STATUTORY INSTRUMENTS

2006 No. 3336

The Water and Sewerage Services (Northern Ireland) Order 2006

PART III

APPOINTMENT AND REGULATION OF UNDERTAKERS

CHAPTER I

APPOINTMENTS

Modification of appointment conditions

Modification by agreement

20.—(1) Subject to the following provisions of this Article, the Authority may modify the conditions of a company's appointment under this Chapter if the company consents to the modifications.

(2) Before making modifications under this Article, the Authority shall give notice—

(a) stating that it proposes to make the modifications and setting out their effect;

(b) stating the reasons why it proposes to make the modifications; and

(c) specifying the period (not being less than 28 days from the date of publication of the notice) within which representations or objections with respect to the proposed modifications may be made,

and shall consider any representations or objections which are duly made and not withdrawn.

(3) A notice under paragraph (2) shall be given—

(a) by publishing the notice in such manner as the Authority considers appropriate for the purpose of bringing the notice to the attention of persons likely to be affected by the making of the modifications; and

(b) by serving a copy of the notice on the company and on the Department.

(4) The Authority shall not under this Article make any modifications which the Department has, within the time specified in the notice under paragraph (2), directed the Authority not to make.

(5) The Department shall not give a direction under paragraph (4) in relation to any modification unless—

(a) the modification is a modification of provision contained in the appointment for the purposes of Article 14(4)(d);

(b) the modification is a modification of a provision of the appointment which relates to the disposal of a company's protected land and is stated in the appointment to be a provision which cannot be modified; or

(c) it appears to the Department that the modification should be made, if at all, under Article 25.

Modification references to Competition Commission

21.—(1) The Authority may make to the Competition Commission a reference which is so framed as to require the Commission to investigate and report on the questions—

(a) whether any matters which—

(i) relate to the carrying out of any function which is a function of any company by virtue of an appointment of that company under this Chapter; and

(ii) are specified in the reference,

operate, or may be expected to operate, against the public interest; and

(b) if so, whether the effects adverse to the public interest which those matters have or may be expected to have could be remedied or prevented by modifications of the conditions of the company's appointment.

(2) The Authority may, at any time, by notice given to the Competition Commission vary a reference under this Article by—

(a) adding to the matters specified in the reference; or

(b) excluding from the reference some or all of the matters so specified;

and on receipt of any such notice the Commission shall give effect to the variation.

(3) The Authority may specify in a reference under this Article, or a variation of such a reference, for the purpose of assisting the Competition Commission in carrying out the investigation on the reference—

(a) any effects adverse to the public interest which, in its opinion, the matters specified in the reference or variation have or may be expected to have; and

(b) any modifications of the conditions of any appointment mentioned in the reference or variation by which, in its opinion, those effects could be remedied or prevented.

(4) As soon as practicable after making a reference under this Article or a variation of such a reference, the Authority shall—

(a) serve a copy of the reference or variation on the company whose appointment is mentioned in the reference or variation; and

(b) publish particulars of the reference or variation in such manner as it considers appropriate for the purpose of bringing the reference or variation to the attention of persons likely to be affected by it.

(5) It shall be the duty of the Authority, for the purpose of assisting the Competition Commission in carrying out an investigation on a reference under this Article or in carrying out functions under Article 26, to give to the Commission—

(a) any information in the Authority's possession which relates to matters falling within the scope of the investigation or the carrying out of those functions, and which is either—

(i) requested by the Commission for that purpose; or

(ii) information which, in the Authority's opinion, it would be appropriate for that purpose to give to the Commission without any such request; and

(b) any other assistance which the Commission may require, and which it is within the Authority's power to give, in relation to any such matters;

and the Commission, for the purpose of carrying out any such investigation or such functions, shall take account of any information given to them for that purpose under this paragraph.

(6) In determining for the purposes of this Article whether any particular matter operates, or may be expected to operate, against the public interest, the Competition Commission shall have regard to the matters as respects which duties are imposed on the Department and the Authority by Part II.

References under Article 21: time limits

22.—(1) Every reference under Article 21 shall specify a period (not longer than 6 months beginning with the date of the reference) within which a report on the reference is to be made.

(2) A report of the Competition Commission on a reference under Article 21 shall not have effect (and no action shall be taken in relation to it under Article 25) unless the report is made before the end of the period specified in the reference or such further period (if any) as may be allowed by the Authority under paragraph (3).

(3) The Authority may, if it has received representations on the subject from the Competition Commission and is satisfied that there are special reasons why the report cannot be made within the period specified in the reference, extend that period by no more than 6 months.

(4) No more than one extension is possible under paragraph (3) in relation to the same reference.

(5) The Authority shall, in the case of an extension made by it under paragraph (3)—

(a) publish that extension in such manner as the Authority considers appropriate for the purpose of bringing it to the attention of persons likely to be affected by it; and

(b) send a copy of what has been published by the Authority under sub-paragraph (a) to the company whose appointment is mentioned in the reference.

References under Article 21: powers of investigation

23.—(1) The following sections of Part 3 of the Enterprise Act shall apply, with the modifications mentioned in paragraphs (2) and (3), for the purposes of references under Article 21 as they apply for the purposes of references under that Part—

(a) section 109 (attendance of witnesses and production of documents etc.);

(b) section 110 (enforcement of powers under section 109: general);

(c) section 111 (penalties);

(d) section 112 (penalties: main procedural requirements);

(e) section 113 (payments and interest by instalments);

(f) section 114 (appeals in relation to penalties);

(g) section 115 (recovery of penalties); and

(h) section 116 (statement of policy).

(2) Section 110 shall, in its application by virtue of paragraph (1), have effect as if—

(a) subsection (2) were omitted; and

(b) in subsection (9) the words from “or section” to “section 65(3))” were omitted.

(3) Section 111(5)(b)(ii) shall, in its application by virtue of paragraph (1), have effect as if—

(a) for the words “published (or, in the case of a report under section 50 or 65, given)” there were substituted “made”;

(b) for the words “published (or given)”, in both places where they appear, there were substituted “made”; and

(c) the words “by this Part” were omitted.

(4) Provisions of Part 3 of the Enterprise Act which have effect for the purposes of sections 109 to 116 of that Act (including, in particular, provisions relating to offences and the making of orders)

shall, for the purposes of the application of those sections by virtue of paragraph (1), have effect in relation to those sections as applied by virtue of that paragraph.

(5) Accordingly, corresponding provisions of this Order shall not have effect in relation to those sections as applied by virtue of that paragraph.

Reports on modification references

24.—(1) In making a report on a reference under Article 21, the Competition Commission—

(a) shall include in the report definite conclusions on the questions comprised in the reference together with such an account of its reasons for those conclusions as, in its opinion, is expedient for facilitating a proper understanding of those questions and of its conclusions;

(b) where it concludes that any of the matters specified in the reference operate, or may be expected to operate, against the public interest, shall specify in the report the effects adverse to the public interest which those matters have or may be expected to have; and

(c) where it concludes that any adverse effects so specified could be remedied or prevented by modifications of the conditions of a company's appointment under this Chapter, shall specify in the report modifications by which those effects could be remedied or prevented.

(2) For the purposes of Article 25, a conclusion contained in a report of the Competition Commission is to be disregarded if the conclusion is not that of at least two-thirds of the members of the group constituted in connection with the reference concerned in pursuance of paragraph 15 of Schedule 7 to the Competition Act 1998 (c. 41).

(3) If a member of a group so constituted disagrees with any conclusions contained in a report made on a reference under Article 21 as the conclusions of the Competition Commission, the report shall, if the member so wishes, include a statement of his disagreement and of his reasons for disagreeing.

(4) For the purposes of the law relating to defamation, absolute privilege attaches to any report made by the Competition Commission on a reference under Article 21.

(5) In making any report on a reference under Article 21 the Competition Commission must have regard to the following considerations before disclosing any information.

(6) The first consideration is the need to exclude from disclosure (so far as practicable) any information whose disclosure the Commission thinks is contrary to the public interest.

(7) The second consideration is the need to exclude from disclosure (so far as practicable)—

(a) commercial information whose disclosure the Commission thinks might significantly harm the legitimate business interests of the undertaking to which it relates; or

(b) information relating to the private affairs of an individual whose disclosure the Commission thinks might significantly harm the individual's interests.

(8) The third consideration is the extent to which the disclosure of the information mentioned in paragraph (7)(a) or (b) is necessary for the purposes of the report.

(9) A report of the Competition Commission on a reference under Article 21 shall be made to the Authority.

(10) Subject to paragraph (11), the Authority—

(a) shall, on receiving such a report, send a copy of it to the company to whose appointment under this Chapter the report relates and to the Department; and

(b) shall, not less than 14 days after that copy is received by the Department, publish another copy of that report in such manner as the Authority considers appropriate for bringing the report to the attention of persons likely to be affected by it.

(11) If it appears to the Department that the publication of any matter in such a report would be against the public interest or the commercial interests of any person, it may, before the end of the period of 14 days mentioned in sub-paragraph (b) of paragraph (10), direct the Authority to exclude that matter from every copy of the report to be published by virtue of that sub-paragraph; and the Authority shall comply with any such direction.

Modifications following report

25.—(1) Where a report of the Competition Commission on a reference under Article 21—

(a) includes conclusions to the effect that any of the matters specified in the reference operate, or may be expected to operate, against the public interest;

(b) specifies effects adverse to the public interest which those matters have or may be expected to have;

(c) includes conclusions to the effect that those effects could be remedied or prevented by modifications of the conditions of a company's appointment under this Chapter; and

(d) specifies modifications by which those effects could be remedied or prevented,

the Authority shall, subject to the following provisions of this Article, make such modifications of the conditions of that appointment as appear to the Authority requisite for the purpose of remedying or preventing the adverse effects specified in the report.

(2) Before making modifications under this Article, the Authority shall have regard to the modifications specified in the report.

(3) Before making modifications under this Article, the Authority shall give notice—

(a) stating that it proposes to make the modifications and setting out their effect;

(b) stating the reasons why it proposes to make the modifications; and

(c) specifying the period (not being less than 28 days from the date of publication of the notice) within which representations or objections with respect to the proposed modifications may be made,

and shall consider any representations or objections which are duly made and not withdrawn.

(4) A notice under paragraph (3) shall be given—

(a) by publishing the notice in such manner as the Authority considers appropriate for the purpose of bringing the matters to which the notice relates to the attention of persons likely to be affected by the making of the modifications; and

(b) by serving a copy of the notice on the company whose appointment it is proposed to modify.

(5) After considering any representations or objections made in response to proposals set out in a notice under paragraph (3), the Authority shall give notice to the Competition Commission—

(a) setting out the modifications it proposes to make to remedy or prevent the adverse effects specified in the report; and

(b) stating the reasons for making the modifications.

(6) The Authority shall include with the notice under paragraph (5) a copy of any representations or objections received in relation to the notice under paragraph (3).

(7) If the period of 4 weeks from the date on which the notice under paragraph (5) is given elapses without a direction under Article 26(1)(a) having been given to it, the Authority shall—

(a) make the modifications set out in the notice; or

(b) if a direction under Article 26(1)(b) has been given, make the modifications which are not specified in the direction.

(8) The Authority shall not under this Article make any modification of any provisions of a company's appointment under this Chapter which—

(a) are contained in that appointment for the purposes of Article 14(4)(d); or

(b) being provisions relating to the disposal of a company's protected land, are stated in the appointment to be provisions which cannot be modified.

Commission's power of veto following report

26.—(1) The Competition Commission may, within the period of 4 weeks after the date on which it is given a notice under Article 25(5), direct the Authority—

(a) not to make the modifications set out in that notice; or

(b) not to make such of the modifications as may be specified in the direction;

and the Authority shall comply with any such direction.

(2) The Department may, within the period of 4 weeks after the date on which the Commission is given a notice under Article 25(5) and on the application of the Commission, direct that the period for giving a direction under paragraph (1) (and, accordingly, the period mentioned in Article 25(7)) shall be extended by 14 days.

(3) The power to give a direction under paragraph (1) may only be exercised in respect of such of the modifications set out in the notice under Article 25(5)(a) as appear to the Commission not to be the modifications which are requisite for the purpose of remedying or preventing all or any of the adverse effects specified in the report as effects which could be remedied or prevented by modifications.

(4) If the Commission gives a direction under paragraph (1), it—

(a) shall give notice setting out the modifications proposed by the Authority, the terms of the direction and the reasons for giving it; and

(b) shall itself make such modifications as appear to it to be requisite for the purpose of remedying or preventing—

(i) if the direction was given under paragraph (1)(a), the adverse effects specified in the report as effects which could be remedied or prevented by modifications;

(ii) if the direction was given under paragraph (1)(b), such of those adverse effects as are not remedied or prevented by the modifications made by the Authority under Article 25(7)(b).

(5) In exercising its power under paragraph (4)(b), the Commission shall have regard to the matters to which the Authority is required to have regard when determining the conditions of a company's appointment.

(6) Before making modifications under paragraph (4)(b) the Commission shall give notice—

(a) stating that it proposes to make the modifications and setting them out;

(b) stating the reason why it proposes to make them;

(c) specifying the period (not being less than 28 days from the date of publication of the notice) within which representations or objections with respect to the proposed modifications may be made,

and shall consider any representations or objections which are duly made and not withdrawn.

(7) A notice under paragraph (4)(a) or (6) shall be given—

(a) by publishing the notice in such manner as the Commission considers appropriate for the purpose of bringing it to the attention of persons likely to be affected by the making of the modifications; and

(b) by serving a copy on the Authority and the company whose conditions of appointment it is proposed should be modified.

(8) The Commission may not make any modification under this Article which the Authority could not make under Article 25.

(9) After making modifications under this Article the Commission shall publish a notice stating that the modifications have been made and setting them out, with the reasons for making them.

Commission's power of veto following report: supplementary

27.—(1) For the purposes of the law relating to defamation, absolute privilege attaches to any notice under paragraph (4)(a), (6) or (9) of Article 26.

(2) In giving any notice under paragraph (4)(a) or (6) of Article 26, or publishing any notice under paragraph (9) of that Article, the Competition Commission must have regard to the following considerations before disclosing any information.

(3) The first consideration is the need to exclude from disclosure (so far as practicable) any information whose disclosure the Commission thinks is contrary to the public interest.

(4) The second consideration is the need to exclude from disclosure (so far as practicable)—

(a) commercial information whose disclosure the Commission thinks might significantly harm the legitimate business interests of the undertaking to which it relates; or

(b) information relating to the private affairs of an individual whose disclosure the Commission thinks might significantly harm the individual's interests.

(5) The third consideration is the extent to which the disclosure of the information mentioned in paragraph (4)(a) or (b) is necessary for the purposes of the notice.

(6) The following sections of Part 3 of the Enterprise Act shall apply, with the modifications mentioned in paragraphs (7) and (8), for the purposes of any investigation by the Commission for the purposes of the exercise of its functions under Article 26, as they apply for the purposes of any investigations on references under that Part—

(a) section 109 (attendance of witnesses and production of documents etc);

(b) section 110 (enforcement of powers under section 109: general);

(c) section 111 (penalties);

(d) section 112 (penalties: main procedural requirements);

(e) section 113 (payments and interest by instalments);

(f) section 114 (appeals in relation to penalties);

(g) section 115 (recovery of penalties); and

(h) section 116 (statement of policy).

(7) Section 110 shall, in its application by virtue of paragraph (6), have effect as if—

(a) subsection (2) were omitted;

(b) in subsection (4), for the words "the publication of the report of the Commission on the reference concerned" there were substituted "the publication by the Commission of a notice under Article 26(9) of the Water and Sewerage Services (Northern Ireland) Order 2006 in connection with the reference concerned or, if no direction has been given by the Commission under Article 26(1) of that Order in connection with the reference concerned and within the period permitted for that purpose, the latest day on which it was possible to give such a direction within the permitted period"; and

(c) in subsection (9) the words from "or section" to "section 65(3))" were omitted.

(8) Section 111(5)(b) shall, in its application by virtue of paragraph (6), have effect as if for sub-paragraph (ii) there were substituted—

"(ii) if earlier, the day on which a notice is published by the Commission under Article 26(9) of the Water and Sewerage Services (Northern Ireland) Order 2006 in connection with the reference concerned or, if no direction is given by the Commission under Article 26(1) of that Order in connection with the reference concerned and within the period permitted for that purpose, the latest day on which such a direction may be given within the permitted period."

(9) Provisions of Part 3 of the Enterprise Act which have effect for the purposes of sections 109 to 116 of that Act (including, in particular, provisions relating to offences and the making of orders) shall, for the purposes of the application of those sections by virtue of paragraph (6), have effect in relation to those sections as applied by virtue of that paragraph.

(10) Accordingly, corresponding provisions of this Order shall not have effect in relation to those sections as applied by virtue of that paragraph.

Modification by order under other statutory provisions

28.—(1) Where the OFT, the Competition Commission or (as the case may be) the Secretary of State makes a relevant order, the order may, subject to paragraph (3), also provide for the modification of the conditions of a company's appointment under this Chapter to such extent as may appear to the OFT, the Commission or (as the case may be) the Secretary of State to be requisite or expedient for the purpose of giving effect to, or taking account of, any provision made by the order.

(2) In paragraph (1) "relevant order" means—

(a) an order under section 75, 83 or 84 of, or paragraph 5, 10 or 11 of Schedule 7 to, the Enterprise Act where—

(i) one or more than one of the enterprises which have, or may have, ceased to be distinct enterprises was carried on by a relevant undertaker; or

(ii) one or more than one of the enterprises which will or may cease to be distinct enterprises is carried on by a relevant undertaker; or

(b) an order under section 160 or 161 of the Enterprise Act where the feature, or combination of features, of the market in the United Kingdom for goods or services which prevents, restricts or distorts competition is—

(i) the structure or an aspect of the structure of a market for the supply of goods or services by a relevant undertaker; or

(ii) the conduct of a relevant undertaker or of customers of a relevant undertaker.

(3) No modification shall be made by virtue of this Article of any provisions of a company's appointment under this Chapter which—

(a) are contained in that appointment for the purposes of Article 14(4)(d); or

(b) being provisions relating to the disposal of a company's protected land, are stated in the appointment to be provisions which cannot be modified.

(4) Expressions used in paragraph (2) and in Part 3 or (as the case may be) Part 4 of the Enterprise Act have the same meanings in that paragraph as in that Part.