

SCHEDULE 2

Article 13

ENFORCEMENT ACTION IN EUROPEAN INTERVENTION NOTICE CASES

Pre-emptive undertakings and orders

1.—(1) Sub-paragraph (2) applies where a European intervention notice is in force.

(2) The Secretary of State may, for the purposes of preventing pre-emptive action, accept from such of the parties concerned as she considers appropriate undertakings to take such action as she considers appropriate.

(3) An undertaking under this paragraph—

- (a) shall come into force when accepted;
- (b) may be varied or superseded by another undertaking; and
- (c) may be released by the Secretary of State.

(4) An undertaking which is in force under this paragraph in relation to a reference or possible reference under article 5 shall cease to be in force if an order under paragraph 2 or an undertaking under paragraph 3 comes into force in relation to that reference.

(5) An undertaking under this paragraph shall, if it has not previously ceased to be in force, cease to be in force when the European intervention notice concerned ceases to be in force.

(6) No undertaking shall be accepted by the Secretary of State under this paragraph before the making of a reference under article 5 unless the undertaking relates to a European relevant merger situation which has been, or may have been, created.

(7) The Secretary of State shall, as soon as reasonably practicable, consider any representations received by her in relation to varying or releasing an undertaking under this paragraph.

(8) In this paragraph and paragraph 2 “pre-emptive action” means action which might prejudice the reference or possible reference concerned under article 5 or impede the taking of any action under this Order which may be justified by the Secretary of State’s decisions on the reference.

2.—(1) Sub-paragraph (2) applies where a European intervention notice is in force.

(2) The Secretary of State may by order, for the purpose of preventing pre-emptive action—

- (a) prohibit or restrict the doing of things which the Secretary of State considers would constitute pre-emptive action;
- (b) impose on any person concerned obligations as to the carrying on of any activities or the safeguarding of any assets;
- (c) provide for the carrying on of any activities or the safeguarding of any assets either by the appointment of a person to conduct or supervise the conduct of any activities (on such terms and with such powers as may be specified or described in the order) or in any other manner;
- (d) do anything which may be done by virtue of paragraph 19 of Schedule 8 to the Act.

(3) An order under this paragraph—

- (a) shall come into force at such time as is determined by or under the order; and
- (b) may be varied or revoked by another order.

(4) An order which is in force under this paragraph in relation to a reference or possible reference under article 5 shall cease to be in force if an undertaking under paragraph 1 or 3 comes into force in relation to that reference.

(5) An order under this paragraph shall, if it has not previously ceased to be in force, cease to be in force when the European intervention notice concerned ceases to be in force.

(6) No order shall be made by the Secretary of State under this paragraph before the making of a reference under article 5 unless the order relates to a European relevant merger situation which has been, or may have been, created.

(7) The Secretary of State shall, as soon as reasonably practicable, consider any representations received by her in relation to varying or revoking an order under this paragraph.

Undertakings in lieu of reference under article 5

3.—(1) Sub-paragraph (2) applies if the Secretary of State has power to make a reference to the Commission under article 5 and otherwise intends to make such a reference.

(2) The Secretary of State may, instead of making such a reference and for the purpose of remedying, mitigating or preventing any of the effects adverse to the public interest which have or may have resulted, or which may be expected to result, from the creation of the European relevant merger situation concerned accept from such of the parties concerned as she considers appropriate undertakings to take such action as she considers appropriate.

(3) In proceeding under sub-paragraph (2), the Secretary of State shall, in particular, accept the decisions of the OFT included in its report under article 4 so far as they relate to the matters mentioned in paragraphs (3)(a) and (4) of that article.

(4) No undertaking shall be accepted by the Secretary of State under this paragraph in connection with a possible reference under article 5 if a public interest consideration mentioned in the European intervention notice concerned has not been finalised and the period of 24 weeks beginning with the giving of that notice has not expired.

(5) The Secretary of State may delay making a decision as to whether to accept any such undertaking (and any related decision as to whether to make a reference under article 5) if she considers that there is a realistic prospect of the public interest consideration being finalised within the period of 24 weeks beginning with the giving of the European intervention notice concerned.

(6) A delay under sub-paragraph (5) shall not extend beyond—

- (a) the time when the public interest consideration is finalised; or
- (b) if earlier, the expiry of the period of 24 weeks mentioned in that sub-paragraph.

(7) An undertaking under this paragraph—

- (a) shall come into force when accepted;
- (b) may be varied or superseded by another undertaking; or
- (c) may be released by the Secretary of State.

(8) An undertaking under this paragraph which is in force in relation to a European relevant merger situation shall cease to be in force if an order comes into force under paragraph 5 or 6 in relation to that undertaking.

(9) The Secretary of State shall, as soon as reasonably practicable, consider any representations received by her in relation to varying or releasing an undertaking under this paragraph.

4.—(1) The Secretary of State shall not make a reference under article 5 in relation to the creation of a European relevant merger situation if—

- (a) the Secretary of State has accepted an undertaking or group of undertakings under paragraph 3; and
- (b) the European relevant merger situation is the situation by reference to which the undertaking or group of undertakings was accepted.

(2) Sub-paragraph (1) does not prevent the making of a reference if material facts about relevant arrangements or transactions, or relevant proposed arrangements or transactions, were not notified (whether in writing or otherwise) to the Secretary of State or the OFT or made public before any undertaking concerned was accepted.

(3) For the purposes of sub-paragraph (2) arrangements or transactions, or proposed arrangements or transactions, are relevant if they are the ones in consequence of which the enterprises concerned ceased or may have ceased, or may cease, to be distinct enterprises.

(4) In sub-paragraph (2) “made public” means so publicised as to be generally known or readily ascertainable.

5.—(1) Sub-paragraph (2) applies where the Secretary of State considers that—

- (a) an undertaking accepted by her under paragraph 3 has not been, is not being or will not be fulfilled; or
- (b) in relation to an undertaking accepted by her under that paragraph, information which was false or misleading in a material respect was given to her or the OFT by the person giving the undertaking before she decided to accept the undertaking.

(2) The Secretary of State may, for any of the purposes mentioned in paragraph 3(2), make an order under this paragraph.

(3) Sub-paragraph (3) of paragraph 3 shall apply for the purposes of sub-paragraph (2) above as it applies for the purposes of sub-paragraph (2) of that paragraph.

(4) An order under this paragraph may contain—

- (a) anything permitted by Schedule 8 to the Act; and
- (b) such supplementary, consequential or incidental provision as the Secretary of State considers appropriate.

(5) An order under this paragraph—

- (a) shall come into force at such time as is determined by or under the order; and
- (b) may contain provision which is different from the provision contained in the undertaking concerned.

(6) No order shall be varied or revoked under this paragraph unless the OFT advises that such a variation or revocation is appropriate by reason of a change of circumstances.

6.—(1) Sub-paragraph (2) applies where—

- (a) the Secretary of State has the power to make an order under paragraph 5 in relation to a particular undertaking and intends to make such an order; or
- (b) the Secretary of State has the power to make an order under paragraph 10 in relation to a particular undertaking and intends to make such an order.

(2) The Secretary of State may, for the purpose of preventing any action which might prejudice the making of that order, make an order under this paragraph.

(3) No order shall be made under sub-paragraph (2) unless the Secretary of State has reasonable grounds for suspecting that it is or may be the case that action which might prejudice the making of the order under paragraph 5 or (as the case may be) 10 is in progress or in contemplation.

(4) An order under sub-paragraph (2) may—

- (a) prohibit or restrict the doing of things which the Secretary of State considers would prejudice the making of the order under paragraph 5 or 10;
- (b) impose on any person concerned obligations as to the carrying on of any activities or the safeguarding of any assets;

- (c) provide for the carrying on of any activities or the safeguarding of any assets either by the appointment of a person to conduct or supervise the conduct of any activities (on such terms and with such powers as may be specified or described in the order) or in any other manner;
 - (d) do anything which may be done by virtue of paragraph 19 of Schedule 8 to the Act.
- (5) An order under this paragraph shall come into force at such time as is determined by or under the order.
- (6) An order under this paragraph shall, if it has not previously ceased to be in force, cease to be in force on—
- (a) the coming into force of an order under paragraph 5 or (as the case may be) 10 in relation to the undertaking concerned; or
 - (b) the making of the decision not to proceed with such an order.
- (7) The Secretary of State shall, as soon as reasonably practicable, consider any representations received by her in relation to varying or revoking an order under this paragraph.

Statutory restrictions following reference under article 5

- 7.—(1) Sub-paragraphs (2) and (3) apply where—
- (a) a reference has been made under article 5 but not finally determined; and
 - (b) no undertakings under paragraph 1 are in force in relation to the European relevant merger situation concerned and no orders under paragraph 2 are in force in relation to that situation.
- (2) No relevant person shall, without the consent of the Secretary of State—
- (a) complete any outstanding matters in connection with any arrangements which have resulted in the enterprises concerned ceasing to be distinct enterprises;
 - (b) make any further arrangements in consequence of that result (other than arrangements which reverse that result); or
 - (c) transfer the ownership or control of any enterprises to which the reference relates.
- (3) No relevant person shall, without the consent of the Secretary of State, assist in any of the activities mentioned in paragraphs (a) to (c) of sub-paragraph (2).
- (4) The prohibitions in sub-paragraphs (2) and (3) do not apply in relation to anything which the person concerned is required to do by virtue of any enactment.
- (5) The consent of the Secretary of State under sub-paragraph (2) or (3)—
- (a) may be general or specific;
 - (b) may be revoked by the Secretary of State; and
 - (c) shall be published in such manner as the Secretary of State considers appropriate for bringing it to the attention of any person entitled to the benefit of it.
- (6) Paragraph (c) of sub-paragraph (5) shall not apply if the Secretary of State considers that publication is not necessary for the purposes mentioned in that paragraph.
- (7) Sub-paragraphs (2) and (3) shall apply to a person's conduct outside the United Kingdom if (and only if) he is—
- (a) a United Kingdom national;
 - (b) a body incorporated under the law of the United Kingdom or of any part of the United Kingdom; or
 - (c) a person carrying on business in the United Kingdom.

- (8) For the purpose of this paragraph a reference under article 5 is finally determined if—
- (a) the time within which the Commission is to prepare a report under article 8 in relation to the reference and give it to the Secretary of State has expired and no such report has been so prepared and given;
 - (b) the Commission decides to cancel the reference under article 11(1);
 - (c) the time within which the Secretary of State is to make and publish a decision under article 12(2) has expired and no such decision has been made and published;
 - (d) the Secretary of State decides under paragraph (2) of article 12 otherwise than as mentioned in paragraph (6) of that article;
 - (e) the Secretary of State decides under paragraph (2) of article 12 as mentioned in paragraph (6) of that article but decides neither to accept an undertaking under paragraph 9 of this Schedule nor to make an order under paragraph 11 of this Schedule; or
 - (f) the Secretary of State decides under paragraph (2) of article 12 as mentioned in paragraph (6) of that article and accepts an undertaking under paragraph 9 of this Schedule or makes an order under paragraph 11 of this Schedule.
- (9) For the purposes of this paragraph the time when a reference under article 5 is finally determined is—
- (a) in a case falling within sub-paragraph (8)(a) or (c), the expiry of the time concerned;
 - (b) in a case falling within sub-paragraph (8)(b) or (d), the making of the decision concerned;
 - (c) in a case falling within sub-paragraph (8)(e), the making of the decision neither to accept an undertaking under paragraph 9 of this Schedule nor to make an order under paragraph 11 of this Schedule; and
 - (d) in a case falling within sub-paragraph (8)(f), the acceptance of the undertaking concerned or (as the case may be) the making of the order concerned.
- (10) In this paragraph “relevant person” means—
- (a) any person who carries on any enterprise to which the reference relates or who has control of any such enterprise;
 - (b) any subsidiary of any person falling within paragraph (a); or
 - (c) any person associated with any person falling within paragraph (a) or any subsidiary of any person so associated.
- 8.—**(1) Sub-paragraph (2) applies where—
- (a) a reference has been made under article 5, and
 - (b) no undertakings under paragraph 1 are in force in relation to the European relevant merger situation concerned and no orders under paragraph 2 are in force in relation to that situation.
- (2) No relevant person shall, without the consent of the Secretary of State, directly or indirectly acquire during the relevant period an interest in shares in a company if any enterprise to which the reference relates is carried on by or under the control of that company.
- (3) The consent of the Secretary of State under sub-paragraph (2)—
- (a) may be general or specific;
 - (b) may be revoked by the Secretary of State; and
 - (c) shall be published in such manner as the Secretary of State considers appropriate for bringing it to the attention of any person entitled to the benefit of it.

(4) Paragraph (c) of sub-paragraph (3) shall not apply if the Secretary of State considers that publication is not necessary for the purpose mentioned in that paragraph.

(5) Sub-paragraph (2) shall apply to a person's conduct outside the United Kingdom if (and only if) he is—

- (a) a United Kingdom national;
- (b) a body incorporated under the law of the United Kingdom or of any part of the United Kingdom; or
- (c) a person carrying on business in the United Kingdom.

(6) In this paragraph—

“company” includes any body corporate;

“relevant period” means the period beginning with the publication of the decision of the Secretary of State to make the reference concerned and ending when the reference is finally determined;

“relevant person” means—

- (a) any person who carries on any enterprise to which the reference relates or who has control of any such enterprise;
- (b) any subsidiary of any person falling within paragraph (a); or
- (c) any person associated with any person falling within paragraph (a) or any subsidiary of any person so associated; and

“share” means share in the capital of a company, and includes stock.

(7) For the purposes of the definition of “relevant period” in sub-paragraph (6), a reference under article 5 is finally determined if—

- (a) the Commission cancels the reference under article 7(1) or article 11(1);
- (b) the time within which the Commission is to prepare a report under article 8 in relation to the reference and give it to the Secretary of State has expired and no such report has been so prepared and given;
- (c) the time within which the Secretary of State is to make and publish a decision under article 12(2) has expired and no such decision has been made and published;
- (d) the Secretary of State decides under paragraph (2) of article 12 otherwise than as mentioned in paragraph (6) of that article;
- (e) the Secretary of State decides under paragraph (2) of article 12 as mentioned in paragraph (6) of that article but decides neither to accept an undertaking under paragraph 9 of this Schedule nor to make an order under paragraph 11 of this Schedule; or
- (f) the Secretary of State decides under paragraph (2) of article 12 as mentioned in paragraph (6) of that article and accepts an undertaking under paragraph 9 of this Schedule or makes an order under paragraph 11 of this Schedule.

(8) For the purposes of the definition of “relevant period” in sub-paragraph (6) above, the time when a reference under article 5 is finally determined is—

- (a) in a case falling within sub-paragraph (7)(a) or (d), the making of the decision concerned;
- (b) in a case falling within sub-paragraph (7)(b) or (c), the expiry of the time concerned;
- (c) in a case falling within sub-paragraph (7)(e), the making of the decision neither to accept an undertaking under paragraph 9 of this Schedule nor to make an order under paragraph 11 of this Schedule; and
- (d) in a case falling within sub-paragraph (7)(f) the acceptance of the undertaking concerned or (as the case may be) the making of the order concerned.

(9) Section 79 of the Act shall apply for the purposes of paragraph 7 and this paragraph in relation to a reference under article 5 as it applies for the purposes of sections 77 and 78 in relation to a reference under section 22 or 33 of the Act.

- (10) In its application by virtue of sub-paragraph (9) section 79 shall have effect as if—
- (a) subsections (1) and (2) were omitted; and
 - (b) for the reference in subsection (4) to the OFT there were substituted a reference to the Secretary of State.

Final undertakings and orders

9.—(1) The Secretary of State may, in accordance with article 12(6) to (8) accept, from such persons as she considers appropriate, undertakings to take action specified or described in the undertakings.

- (2) An undertaking under this paragraph—
- (a) shall come into force when accepted;
 - (b) may be varied or superseded by another undertaking; and
 - (c) may be released by the Secretary of State.

(3) An undertaking which is in force under this paragraph in relation to a reference under article 5 shall cease to be in force if an order under paragraph 6(1)(b) or 10 comes into force in relation to the subject-matter of the undertaking.

(4) No undertaking shall be accepted under this paragraph in relation to a reference under article 5 if an order has been made under—

- (a) paragraph 6(1)(b) or 10 in relation to the subject-matter of the undertaking; or
- (b) paragraph 11 in relation to that reference.

(5) The Secretary of State shall, as soon as reasonably practicable, consider any representations received by her in relation to varying or releasing an undertaking under this paragraph.

10.—(1) Sub-paragraph (2) applies where the Secretary of State considers that—

- (a) an undertaking accepted by her under paragraph 9 has not been, is not being or will not be fulfilled; or
- (b) in relation to an undertaking accepted by her under that paragraph, information which was false or misleading in a material respect was given to her or the OFT by the person giving the undertaking before she decided to accept the undertaking.

(2) The Secretary of State may, for any purpose mentioned in article 12(7), make an order under this paragraph.

(3) Paragraph (8) of article 12 shall apply for the purpose of sub-paragraph (2) above as it applies for the purposes of article 12(7).

- (4) An order under this paragraph may contain—
- (a) anything permitted by Schedule 8 to the Act; and
 - (b) such supplementary, consequential or incidental provision as the Secretary of State considers appropriate.
- (5) An order under this paragraph—
- (a) shall come into force at such time as is determined by or under the order; and
 - (b) may contain provision which is different from the provision contained in the undertaking concerned.

(6) No order shall be varied or revoked under this paragraph unless the OFT advises that such a variation or revocation is appropriate by reason of a change of circumstances.

11.—(1) The Secretary of State may, in accordance with article 12(7), make an order under this paragraph.

(2) An order under this paragraph may contain—

- (a) anything permitted by Schedule 8 to the Act; and
- (b) such supplementary, consequential or incidental provision as the Secretary of State considers appropriate.

(3) An order under this paragraph shall come into force at such time as is determined by or under the order.

(4) No order shall be made under this paragraph in relation to a reference under article 5 if an undertaking has been accepted under paragraph 9 in relation to that reference.

(5) No order shall be varied or revoked under this paragraph unless the OFT advises that such a variation or revocation is appropriate by reason of a change of circumstances.