



# Fair Trading Act 1973

## 1973 CHAPTER 41

### PART V

#### MERGERS

##### Modifications etc. (not altering text)

- C1 Pt. V (ss. 57–77) restricted (E.W.) by [Water Act 1989 \(c. 15, SIF 130\)](#), s. 30(4)
- C2 Pt. V (ss. 57–77) applied (E.W.) by [Water Act 1989 \(c. 15, SIF 130\)](#), ss. 29(9)(b), 30(6)
- C3 Pt. V (ss. 57–77) restricted (E.W.) (01.12.1991) by [Water Industry Act 1991 \(c. 56, SIF 130\)](#), ss. 34(4), 223(2) (with ss. 82(3), 186(1), 188, 222(1), Sch. 14 para. 6).
- C4 Pt. V (ss. 57–77) applied (E.W.) (01.12.1991) by [Water Industry Act 1991 \(c. 56, SIF 130\)](#), ss. 35(2), 223(2) (with ss. 82(3), 186(1), 188, 222(1), Sch. 14 para. 6).

#### *Newspaper merger references*

- 57** **Meaning of “newspaper”, “transfer of newspaper or of newspaper assets” and related expressions.**
- (1) In this Part of this Act—
- (a) “newspaper” means a daily, Sunday or local (other than daily or Sunday) newspaper circulating wholly or mainly in the United Kingdom or in a part of the United Kingdom;
  - [<sup>F1</sup>(b) “newspaper proprietor” includes (in addition to an actual proprietor of a newspaper) any member of a group of persons of which another member is an actual proprietor of a newspaper.
- (1A) In this Part of this Act, any reference to the newspapers of a newspaper proprietor (“NP”) is to—
- (a) all newspapers of which NP is an actual proprietor, and
  - (b) all newspapers of which a member of a group of persons of which NP is a member is an actual proprietor.]

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and any reference to the newspapers of a newspaper proprietor includes all newspapers in relation to which he is a newspaper proprietor and, in the case of a body corporate, all newspapers in relation to which a person having a controlling interest in that body corporate is a newspaper proprietor.

(2) In this Part of this Act “transfer of a newspaper or of newspaper assets” means any of the following transactions, that is to say—

- (a) any transaction (whether involving a transfer or not) by virtue of which a person would become, or would acquire the right to become [<sup>F2</sup>—
  - (i) an actual proprietor of a newspaper, or
  - (ii) a person with a primary or secondary controlling interest in an actual proprietor of a newspaper;]
- (b) any transfer of assets necessary to the continuation of a newspaper as a separate newspaper (including goodwill or the right to use the name of the newspaper);
- (c) any transfer of plant or premises used in the publication of a newspaper, other than a transfer made without a view to a change in the ownership or control of the newspaper or to its ceasing publication;

and “the newspaper concerned in the transfer”, in relation to any transaction falling within paragraph (a), paragraph (b) or paragraph (c) of this subsection, means the newspaper in relation to which (as mentioned in that paragraph) the transaction is or is to be effected.

(3) In this Part of this Act “average circulation per day of publication”, in relation to a newspaper, means its average circulation for the appropriate period, ascertained by dividing the number of copies to which its circulation amounts for that period by the number of days on which the newspaper was published during that period (circulation being calculated on the basis of actual sales in the United Kingdom of the newspaper as published on those days); and for the purposes of this subsection “the appropriate period”—

- (a) in a case in which an application is made for consent under the next following section, means the period of six months ending six weeks before the date of the application, or
- (b) in a case in which a transfer or purported transfer is made without any such application for consent, means the period of six months ending six weeks before the date of the transfer or purported transfer.

(4) For the purposes of this section a person has a [<sup>F3</sup>primary]controlling interest in a body corporate if (but only if) he can, directly or indirectly, determine the manner in which one-quarter of the votes which could be cast at a general meeting of the body corporate are to be cast on matters, and in circumstances, not of such a description as to bring into play any special voting rights or restrictions on voting rights.

[<sup>F4</sup>(5) For the purposes of this section a person (“A”) has a secondary controlling interest in a body corporate (“B”) if, without having a primary controlling interest in B—

- (a) A has a primary controlling interest in a body corporate which has a primary controlling interest in B, or
- (b) A is connected to B by a chain of any number of other bodies corporate, in the first of which A has a primary controlling interest, in the second of which the first has a primary controlling interest, and so on, the last such body corporate having a primary controlling interest in B.

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- (6) For the purposes of this section a group of persons consists of any number of persons of whom the first is—
- (a) a person other than a body corporate, or
  - (b) a body corporate in which no other person has a primary controlling interest, and the others are the bodies corporate in which the first has a primary or secondary controlling interest.
- (7) In determining for the purposes of subsection (6)(b) of this section whether a body corporate (“X”) is one in which another person has a primary controlling interest, there shall be disregarded any body corporate in which X has a primary or secondary controlling interest.]

#### Textual Amendments

- F1** S. 57(1)(b)(1A) substituted (retrospectively) for s. 57(1)(b) by 1994 c. 40, s. 8(2)(6); S.I. 1994/3188, arts. 2, 3(a)
- F2** Subparagraphs (i)(ii) substituted (retrospectively) for words in s. 57(2) by 1994 c. 40, s. 8(3)(6); S.I. 1994/3188, arts. 2, 3(a)
- F3** Word in s. 57(4) inserted (retrospectively) by 1994 c. 40, s. 8(4)(6); S.I. 1994/3188, arts. 2, 3(a)
- F4** S. 57(5)(6)(7) inserted (retrospectively) by 1994 c. 40, s. 8(5)(6); S.I. 1994/3188, arts. 2, 3(a)

## 58 Prohibition of certain newspaper mergers.

- (1) Subject to the following provisions of this section, a transfer of a newspaper or of newspaper assets to a newspaper proprietor whose newspapers have an average circulation per day of publication amounting, together with that of the newspaper concerned in the transfer, to 500,000 or more copies shall be unlawful and void, unless the transfer is made with written consent given (conditionally or unconditionally) by the Secretary of State.
- (2) Except as provided by subsections (3) and (4) of this section and by section 60(3) of this Act, the consent of the Secretary of State under the preceding subsection shall not be given in respect of a transfer until after the Secretary of State has received a report on the matter from the Commission.
- (3) Where the Secretary of State is satisfied that the newspaper concerned in the transfer is not economic as a going concern and as a separate newspaper, then—
- (a) if he is also satisfied that, if the newspaper is to continue as a separate newspaper, the case is one of urgency, he may give his consent to the transfer without requiring a report from the Commission under this section;
  - (b) if he is satisfied that the newspaper is not intended to continue as a separate newspaper, he shall give his consent to the transfer, and shall give it unconditionally, without requiring such a report.
- (4) If the Secretary of State is satisfied that the newspaper concerned in the transfer has an average circulation per day of publication of not more than 25,000 copies, he may give his consent to the transfer without requiring a report from the Commission under this section.
- (5) The Secretary of State may by order made by statutory instrument provide, subject to any transitional provisions contained in the order, that for any number specified in subsection (1) or subsection (4) of this section (whether as originally enacted or as

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previously varied by an order under this subsection) there shall be substituted such other number as is specified in the order.

- (6) In this section “satisfied” means satisfied by such evidence as the Secretary of State may require.

## **59 Newspaper merger reference.**

- (1) Where an application is made to the Secretary of State for his consent to a transfer of a newspaper or of newspaper assets, the Secretary of State, subject to the next following subsection, shall, within one month after receiving the application, refer the matter to the Commission for investigation and report.
- (2) The Secretary of State shall not make a reference to the Commission under the preceding subsection in a case where—
- by virtue of subsection (3) of section 58 of this Act he is required to give his consent unconditionally without requiring a report from the Commission under this section, or
  - by virtue of subsection (3) or subsection (4) of that section he has power to give his consent without requiring such a report from the Commission, and determines to exercise that power,
- or where the application is expressed to depend on the operation of subsection (3) or subsection (4) of that section.
- (3) On a reference made to them under this section (in this Act referred to as a “newspaper merger reference”) the Commission shall report to the Secretary of State whether the transfer in question may be expected to operate against the public interest, taking into account all matters which appear in the circumstances to be relevant and, in particular, the need for accurate presentation of news and free expression of opinion.

## **60 Time-limit for report on newspaper merger reference.**

- (1) A report of the Commission on a newspaper merger reference shall be made before the end of [<sup>F5</sup>such period (not being longer than three months beginning with the date of the reference) as may be specified in the] reference or of such further period (if any) as the Secretary of State may allow for the purpose in accordance with the next following subsection.
- (2) The Secretary of State shall not allow any further period for a report on such a reference except on representations made by the Commission and on being satisfied that there are special reasons why the report cannot be made within the [<sup>F6</sup>period specified in the newspaper merger reference]; and the Secretary of State shall allow only one such further period on any one reference, and no such further period shall be longer than three months.
- (3) If on such a reference the Commission have not made their report before the end of the period specified in [<sup>F7</sup>the newspaper merger reference] or of any further period allowed under subsection (2) of this section, the Secretary of State may, without waiting for the report, give his consent to the transfer to which the reference relates.

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### **Textual Amendments**

**F5** Words substituted by Companies Act 1989 (c. 40, SIF 27), s. 153, Sch. 20 para. 2(1)(a)(2)

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| <b>F6</b> | Words substituted by <a href="#">Companies Act 1989 (c. 40, SIF 27)</a> , s. 153, <a href="#">Sch. 20 para. 2(1)(b)(2)</a> |
| <b>F7</b> | Words substituted by <a href="#">Companies Act 1989 (c. 40, SIF 27)</a> , s. 153, <a href="#">Sch. 20 para. 2(1)(c)(2)</a> |

## **61 Report on newspaper merger reference.**

- (1) In making their report on a newspaper merger reference, the Commission shall include in it definite conclusions on the questions comprised in the reference, together with—
  - (a) such an account of their reasons for those conclusions, and
  - (b) such a survey of the general position with respect to the transfer of a newspaper or of newspaper assets to which the reference relates, and of the developments which have led to that position,as in their opinion are expedient for facilitating a proper understanding of those questions and of their conclusions.
- (2) Where on such a reference the Commission find that the transfer of a newspaper or of newspaper assets in question might operate against the public interest, the Commission shall consider whether any (and, if so, what) conditions might be attached to any consent to the transfer in order to prevent the transfer from so operating, and may, if they think fit, include in their report recommendations as to such conditions.

## **62 Enforcement provisions relating to newspaper mergers.**

- (1) Any person who is knowingly concerned in, or privy to, a purported transfer of a newspaper or of newspaper assets which is unlawful by virtue of section 58 of this Act shall be guilty of an offence.
- (2) Where under that section the consent of the Secretary of State is given to a transfer of a newspaper or of newspaper assets, but is given subject to one or more conditions, any person who is knowingly concerned in, or privy to, a breach of that condition, or of any of those conditions, as the case may be, shall be guilty of an offence.
- (3) A person guilty of an offence under this section shall be liable, on conviction on indictment, to imprisonment for a term not exceeding two years or to a fine or to both.
- (4) No proceedings for an offence under this section shall be instituted—
  - (a) in England or Wales, except by, or with the consent of, the Director of Public Prosecutions, or
  - (b) in Northern Ireland, except by, or with the consent of, the Director of Public Prosecutions for Northern Ireland.

### *Other merger references*

## **63 Mergers references to which ss. 64 to 75 apply.**

- (1) Sections 64 <sup>[F8]</sup>to 75K of this Act shall not have effect in relation to]newspaper merger references; and accordingly in those sections “merger reference” shall be construed—
  - (a) as not including a reference made under section 59 of this Act, but
  - (b) as including any merger reference relating to a transfer of a newspaper or of newspaper assets, if the reference is made under section 64 or section 75 of this Act in a case falling within section 59(2) of this Act.

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- (2) In the following provisions of this Part of this Act “enterprise” means the activities, or part of the activities, of a business.

#### Textual Amendments

**F8** Words substituted by [Companies Act 1989 \(c. 40, SIF 27\)](#), s. 153, **Sch. 20 para. 3**

#### Modifications etc. (not altering text)

**C5** [S. 63\(2\)](#) (definition of "enterprise") applied (E.W.)(01.12.1991) by [Water Industry Act 1991 \(c. 56, SIF 130\)](#), **ss. 35(1), 223(2)** (with [ss. 82\(3\), 186\(1\), 188, 222\(1\)](#), [Sch. 14 para. 6](#)).

### 64 Merger situation qualifying for investigation.

- (1) A merger reference may be made to the Commission by the Secretary of State where it appears to him that it is or may be the fact that two or more enterprises (in this section referred to as “the relevant enterprises”), of which one at least was carried on in the United Kingdom or by or under the control of a body corporate incorporated in the United Kingdom, have, at a time or in circumstances falling within subsection (4) of this section, ceased to be distinct enterprises, and that either—
- (a) as a result, the condition specified in subsection (2) or in subsection (3) of this section prevails, or does so to a greater extent, with respect to the supply of goods or services of any description, or
  - (b) the value of the assets taken over exceeds [<sup>F9</sup>£70 million].
- (2) The condition referred to in subsection (1)(a) of this section, in relation to the supply of goods of any description, is that at least one-quarter of all the goods of that description which are supplied in the United Kingdom, or in a substantial part of the United Kingdom, either—
- (a) are supplied by one and the same person or are supplied to one and the same person, or
  - (b) are supplied by the persons by whom the relevant enterprises (so far as they continue to be carried on) are carried on, or are supplied to those persons.
- (3) The condition referred to in subsection (1)(a) of this section, in relation to the supply of services of any description, is that the supply of services of that description in the United Kingdom, or in a substantial part of the United Kingdom, is, to the extent of at least one-quarter, either—
- (a) supply by one and the same person, or supply for one and the same person, or
  - (b) supply by the persons by whom the relevant enterprises (so far as they continue to be carried on) are carried on, or supply for those persons.
- (4) For the purposes of subsection (1) of this section enterprises shall be taken to have ceased to be distinct enterprises at a time or in circumstances falling within this subsection if either—
- (a) they did so not earlier than six months before the date on which the merger reference relating to them is to be made, or
  - (b) they did so under or in consequence of arrangements or transactions which were entered into without prior notice being given to the Secretary of State or to the Director of material facts about the proposed arrangements or transactions and in circumstances in which those facts had not been made public, and notice of those facts was not given to the Secretary of State or to

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the Director or made public more than six months before the date mentioned in the preceding paragraph.

- (5) In determining whether to make a merger reference to the Commission the Secretary of State shall have regard, with a view to the prevention or removal of uncertainty, to the need for making a determination as soon as is reasonably practicable.
- (6) On making a merger reference, the Secretary of State shall arrange for it to be published in such manner as he thinks most suitable for bringing it to the attention of persons who in his opinion would be affected by it.
- (7) The Secretary of State may by order made by statutory instrument provide, subject to any transitional provisions contained in the order, that for the sum specified in subsection (1)(b) of this section (whether as originally enacted or as previously varied by an order under this subsection) there shall be substituted such other sum (not being less than £5 million) as is specified in the order.
- (8) The fact that two or more enterprises have ceased to be distinct enterprises in the circumstances described in subsection (1) of this section (including in those circumstances the result specified in paragraph (a), or fulfilment of the condition specified in paragraph (b), of that subsection) shall, for the purposes of this Act, be regarded as creating a merger situation qualifying for investigation; and in this Act “merger situation qualifying for investigation” and any reference to the creation of such a situation shall be construed accordingly.
- (9) In this section “made public” means so publicised as to be generally known or readily ascertainable.

#### Textual Amendments

- F9** Words in s. 64(1)(b) substituted (9.2.1994) by S.I. 1994/72, art. 2 (subject to the proviso that this variation shall not have effect in relation to any merger reference which was made to the Monopolies and Mergers Commission before 9.2.1994)

#### Modifications etc. (not altering text)

- C6** S. 64 applied (E.W.) by Water Act 1989 (c. 15, SIF 130), s. 30(5)(b)(ii)  
**C7** Ss. 64-77 modified (E.W.S.) (1.4.1994) by 1993 c. 43, s. 66(3); S.I. 1994/571, art. 5

## 65 Enterprises ceasing to be distinct enterprises.

- (1) For the purposes of this Part of this Act any two enterprises shall be regarded as ceasing to be distinct enterprises if either—
  - (a) they are brought under common ownership or common control (whether or not the business to which either of them formerly belonged continues to be carried on under the same or different ownership or control), or
  - (b) either of the enterprises ceases to be carried on at all and does so in consequence of any arrangements or transaction entered into to prevent competition between the enterprises.
- (2) For the purposes of the preceding subsection enterprises shall (without prejudice to the generality of the words “common control” in that subsection) be regarded as being under common control if they are—
  - (a) enterprises of interconnected bodies corporate, or

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- (b) enterprises carried on by two or more bodies corporate of which one and the same person or group of persons has control, or
  - (c) an enterprise carried on by a body corporate and an enterprise carried on by a person or group of persons having control of that body corporate.
- (3) A person or group of persons able, directly or indirectly, to control or materially to influence the policy of a body corporate, or the policy of any person in carrying on an enterprise, but without having a controlling interest in that body corporate or in that enterprise, may for the purposes of subsections (1) and (2) of this section be treated as having control of it.
- (4) For the purposes of subsection (1)(a) of this section, in so far as it relates to bringing two or more enterprises under common control, a person or group of persons may be treated as bringing an enterprise under his or their control if—
- (a) being already able to control or materially to influence the policy of the person carrying on the enterprise, that person or group of persons acquires a controlling interest in the enterprise or, in the case of an enterprise carried on by a body corporate, acquires a controlling interest in that body corporate, or
  - (b) being already able materially to influence the policy of the person carrying on the enterprise, that person or group of persons becomes able to control that policy.

**Modifications etc. (not altering text)**

- C8** S. 65 applied (with modifications) (11.1.1999) by 1998 c. 41, ss. 3(1)(a), 19(1)(a), Sch. 1 Pt. I paras. 1(4), 2(2) (with s. 73); S.I. 1998/3166, art. 2, Sch.
- C9** Ss. 64-77 modified (E.W.S.) (1.4.1994) by 1993 c. 43, s. 66(3); S.I. 1994/571, art. 5

**66 Time when enterprises cease to be distinct.**

- (1) Where under or in consequence of the same arrangements or transaction, or under or in consequence of successive arrangements or transactions between the same parties or interests, successive events to which this subsection applies occur within a period of two years, then for the purposes of a merger reference those events may, if the Secretary of State <sup>[F10]</sup>or the Commission] thinks fit, be treated as having occurred simultaneously on the date on which the latest of them occurred.
- (2) The preceding subsection applies to any event whereby, under or in consequence of the arrangements or the transaction or transactions in question, any enterprises cease as between themselves to be distinct enterprises.
- (3) For the purposes of subsection (1) of this section any arrangements or transactions may be treated by the Secretary of State <sup>[F10]</sup>or the Commission] as arrangements or transactions between the same interests if it appears to him to be appropriate that they should be so treated, having regard to the persons who are substantially concerned in them.
- (4) Subject to the preceding provisions of this section <sup>[F11]</sup>and to section 66A of this Act], the time at which any two enterprises cease to be distinct enterprises, where they do so under or in consequence of any arrangements or transaction not having immediate effect, or having immediate effect in part only, shall be taken to be the time when the parties to the arrangements or transaction become bound to such extent as will



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result, on effect being given to their obligations, in the enterprises ceasing to be distinct enterprises.

- (5) In accordance with subsection (4) of this section (but without prejudice to the generality of that subsection) for the purpose of determining the time at which any two enterprises cease to be distinct enterprises no account shall be taken of any option or other conditional right until the option is exercised or the condition is satisfied.

#### Textual Amendments

**F10** Words inserted by [Companies Act 1989](#) (c. 40, SIF 27), s. 153, Sch. 20 paras. 4(a), **10**

**F11** Words inserted by [Companies Act 1989](#) (c. 40, SIF 27), s. 153, Sch. 20 paras. 4(b), **10**

#### Modifications etc. (not altering text)

**C10** S. 66 applied (E.W.) by [Water Act 1989](#) (c. 15, SIF 130), s. **29(9)**

**C11** S. 66 applied (E.W.) (01.12.1991) by [Water Industry Act 1991](#) (c. 56, SIF 130), ss. **35(2)**, **223(2)** (with ss. **82(3)**, **186(1)**, **188**, **222(1)**, Sch. 14 para. 6).

**C12** Ss. 64-77 modified (E.W.S.) (1.4.1994) by 1993 c. 43, s. **66(3)**; S.I. 1994/571, art. **5**

### [<sup>F12</sup>66A Obtaining control by stages.

- (1) Where an enterprise is brought under the control of a person or group of persons in the course of two or more transactions (referred to in this section as a “series of transactions”) falling within subsection (2) of this section, those transactions may, if the Secretary of State or, as the case may be, the Commission thinks fit, be treated for the purposes of a merger reference as having occurred simultaneously on the date on which the latest of them occurred.
- (2) The transactions falling within this subsection are—
- (a) any transaction which—
- (i) enables that person or group of persons directly or indirectly to control or materially to influence the policy of any person carrying on the enterprise,
- (ii) enables that person or group of persons to do so to a greater degree, or
- (iii) is a step (whether direct or indirect) towards enabling that person or group of persons to do so, and
- (b) any transaction whereby that person or group of persons acquires a controlling interest in the enterprise or, where the enterprise is carried on by a body corporate, in that body corporate.
- (3) Where a series of transactions includes a transaction falling within subsection (2)(b) of this section, any transaction occurring after the occurrence of that transaction is to be disregarded for the purposes of subsection (1) of this section.
- (4) Where the period within which a series of transactions occurs exceeds two years, the transactions that may be treated as mentioned in subsection (1) of this section are any of those transactions that occur within a period of two years.
- (5) Sections 65(2) to (4) and 77(1) and (4) to (6) of this Act apply for the purposes of this section to determine whether an enterprise is brought under the control of a person or group of persons and whether a transaction falls within subsection (2) of this section as they apply for the purposes of section 65 of this Act to determine whether enterprises are brought under common control.

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- (6) In determining for the purposes of this section the time at which any transaction occurs, no account shall be taken of any option or other conditional right until the option is exercised or the condition is satisfied.]

#### Textual Amendments

**F12** S. 66A inserted by [Companies Act 1989 \(c. 40, SIF 27\)](#), s. **150(1)(2)**

#### Modifications etc. (not altering text)

**C13** By [Water Act 1989 \(c. 15, SIF 130\)](#), s. **29(9) s. 66A** is expressed to be applied (E.W.)

**C14** S. 66A applied (E.W.) (01.12.1991) by [Water Industry Act 1991 \(c. 56, SIF 130\)](#), ss. **35(2), 223(2)** (with ss. **82(3), 186(1), 188, 222(1)**, Sch. 14 para. 6).  
Ss. 64-77 modified (E.W.S.) (1.4.1994) by [1993 c. 43, s. 66\(3\)](#); S.I. 1994/571, art. 5

### 67 Valuation of assets taken over.

- (1) The provisions of this section shall have effect for the purposes of section 64(1)(b) of this Act.
- (2) Subject to subsection (4) of this section, the value of the assets taken over—
- (a) shall be determined by taking the total value of the assets employed in, or appropriated to, the enterprises which cease to be distinct enterprises, except
    - <sup>F13</sup>(i) any enterprise which remains under the same ownership and control, or
    - (ii) if none of the enterprises remains under the same ownership and control, the enterprise having the assets with the highest value, and]
  - (b) shall be so determined by reference to the values at which, on the enterprises ceasing to be distinct enterprises or (if they have not then done so) on the making of the merger reference to the Commission, the assets stand in the books of the relevant business, less any relevant provisions for depreciation, renewals or diminution in value.
- (3) For the purposes of subsection (2) of this section any assets of a body corporate which, on a change in the control of the body corporate or of any enterprise of it, are dealt with in the same way as assets appropriated to any such enterprise shall be treated as appropriated to that enterprise.
- (4) Where in accordance with subsection (1) of section 66 [<sup>F14</sup>or subsection (1) of section 66A] of this Act events to which [<sup>F15</sup>either of those subsections] applies are treated as having occurred simultaneously, subsection (2) of this section shall apply with such adjustments as appear to the Secretary of State or to the Commission to be appropriate.

#### Textual Amendments

**F13** Words substituted by [Companies Act 1989 \(c. 40, SIF 27\)](#), s. 153, Sch. 20 paras. 5(1), **10**

**F14** Words inserted by [Companies Act 1989 \(c. 40, SIF 27\)](#), s. 153, Sch. 20 paras. 5(2), **10**

**F15** Words substituted by [Companies Act 1989 \(c. 40, SIF 27\)](#), s. 153, Sch. 20 paras. 5(2), **10**

#### Modifications etc. (not altering text)

**C15** Ss. 64-77 modified (E.W.S.) (1.4.1994) by [1993 c. 43, s. 66\(3\)](#); S.I. 1994/571, art. 5

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- C16** Section 67(3) applied (E.W.) by Water Act 1989 (c. 15, SIF 130), s. 29(6)(d)–(8)
- C17** S. 67(3)(4) applied (E.W.) (01.12.1991) by Water Industry Act 1991 (c. 56, SIF 130), ss. 33(3)(d), 223(2) (with ss. 82(3), 186(1), 188, 222(1), Sch. 14 para. 6).
- C18** S. 67(4) applied (E.W.) by Water Act 1989 (c. 15, SIF 130), s. 29(6)(d)–(8)

## 68 Supplementary provisions as to merger situations qualifying for investigation.

- (1) In relation to goods or services of any description which are the subject of different forms of supply—
- (a) references in subsection (2) of section 64 of this Act to the supply of goods, or
  - (b) references in subsection (3) of that section to the supply of services,
- shall be construed in whichever of the following ways appears to the Secretary of State or the Commission, as the case may be, to be appropriate in all the circumstances, that is to say, as references to any of those forms of supply taken separately, to all those forms of supply taken together, or to any of those forms of supply taken in groups.
- (2) For the purposes of the preceding subsection the Secretary of State or the Commission may treat goods or services as being the subject of different forms of supply whenever the transactions in question differ as to their nature, their parties, their terms or their surrounding circumstances, and the difference is one which, in the opinion of the Secretary of State or of the Commission, as the case may be, ought for the purposes of that subsection to be treated as a material difference.
- (3) For the purpose of determining whether the proportion of one-quarter mentioned in subsection (2) or subsection (3) of section 64 of this Act is fulfilled with respect to goods or services of any description, the Secretary of State or the Commission, as the case may be, shall apply such criterion (whether it be value or cost or price or quantity or capacity or number of workers employed or some other criterion, of whatever nature) or such combination of criteria as may appear to the Secretary of State or the Commission to be most suitable in all the circumstances.
- (4) The criteria for determining when goods or services can be treated, for the purposes of section 64 of this Act, as goods or services of a separate description shall be such as in any particular case the Secretary of State [<sup>F16</sup>or, as the case may be, the Commission] thinks most suitable in the circumstances of that case.

### Textual Amendments

- F16** Words inserted by Companies Act 1989 (c. 40, SIF 27), s. 153, Sch. 20 paras. 6, 10

### Modifications etc. (not altering text)

- C19** Ss. 64-77 modified (E.W.S.) (1.4.1994) by 1993 c. 43, s. 66(3); S.I. 1994/571, art. 5

## 69 Different kinds of merger references.

- (1) Subject to the following provisions of this Part of this Act, on a merger reference the Commission shall investigate and report on the questions—
- (a) whether a merger situation qualifying for investigation has been created, and
  - (b) if so, whether the creation of that situation operates, or may be expected to operate, against the public interest.

*Status: Point in time view as at 18/08/1994.*

*Changes to legislation: There are currently no known outstanding effects for the Fair Trading Act 1973, Part V. (See end of Document for details)*

- (2) A merger reference may be so framed as to require the Commission, in relation to the question whether a merger situation qualifying for investigation has been created, to exclude from consideration paragraph (a) of subsection (1) of section 64 of this Act, or to exclude from consideration paragraph (b) of that subsection, or to exclude one of those paragraphs if the Commission find the other satisfied.
- (3) In relation to the question whether any such result as is mentioned in section 64(1)(a) of this Act has arisen, a merger reference may be so framed as to require the Commission to confine their investigation to the supply of goods or services in a specified part of the United Kingdom.
- (4) A merger reference may require the Commission, if they find that a merger situation qualifying for investigation has been created, to limit their consideration thereafter to such elements in, or possible consequences of, the creation of that situation as may be specified in the reference, and to consider whether, in respect only of those elements or possible consequences, the situation operates, or may be expected to operate, against the public interest.

**Modifications etc. (not altering text)**

**C20** Ss. 64-77 modified (E.W.S.) (1.4.1994) by 1993 c. 43, s. 66(3); S.I. 1994/571, art. 5

**70 Time-limit for report on merger reference.**

- (1) Every merger reference shall specify a period (not being longer than six months beginning with the date of the reference) within which a report on the reference is to be made; and a report of the Commission on a merger reference shall not have effect, and no action shall be taken in relation to it under this Act, unless the report is made before the end of that period or of such further period (if any) as may be allowed by the Secretary of State in accordance with the next following subsection.
- (2) The Secretary of State shall not allow any further period for a report on a merger reference except on representations made by the Commission and on being satisfied that there are special reasons why the report cannot be made within the period specified in the reference; and the Secretary of State shall allow only one such further period on any one reference, and no such further period shall be longer than three months.

**Modifications etc. (not altering text)**

**C21** S. 70 applied with modifications (E.W.) (01.12.1991) by [Water Industry Act 1991 \(c. 56, SIF 130\)](#), ss. 14(7), 223(2) (with ss. 82(3), 186(1), 188, 222(1), [Sch. 14 para. 6](#)).

S. 70 extended with modifications (1.4.1992) by [S.I. 1992/231 \(N.I. 1\)](#), art. 15(8); [S.R. 1992/117](#), art.3(1)

S. 70 applied (with modifications) (1.2.2001) by [2000 c. 38, s. 12\(9\)\(10\)\(a\)](#) (with s. 106); [S.I. 2001/57](#), art. 3(1), [Sch. 2 Pt. I](#) (subject to transitional provision and saving in [Sch. 2 Pt. II](#))

S. 70 applied (with modifications) (1.10.2001) by [1989 c. 29, s. 56C](#) (as inserted (1.10.2001) by [2000 c. 27, ss. 43, 104\(1\)\(2\)\(6\)](#)); [S.I. 2001/3266, art. 2, Sch.](#) (subject to transitional provisions in [arts. 3-20](#))

S. 70 applied (with modifications) (1.10.2001) by [1986 c. 44, s. 41E\(7\)\(8\)](#) (as inserted (1.10.2001) by [2000 c. 27, ss. 88, 104\(1\)\(2\)\(6\)](#)); [S.I. 2001/3266, art. 2, Sch.](#) (subject to transitional provisions in [arts. 3-20](#))

S. 70 applied (with modifications) (30.11.2000) by [1993 c. 43, Sch. 4A para. 10\(1\)\(2\)\(a\)](#) (as inserted (30.11.2000) by [2000 c. 38, ss. 231\(2\), 275\(4\), Sch. 24](#))

*Status: Point in time view as at 18/08/1994.*

*Changes to legislation: There are currently no known outstanding effects for the Fair Trading Act 1973, Part V. (See end of Document for details)*

- S. 70 applied (with modifications) (26.3.2001) by 2000 c. 26, **s. 20(1)(2)(a)**; S.I. 2000/2957, art. 2(3), **Sch. 3**
- S. 70 extended (4.4.1980) by **Competition Act 1980 (c. 21), s. 11(9)** and extended *ibid.*, ss. 7(6), 33(5)
- S. 70 applied with modifications by **Telecommunications Act 1984 (c. 12, SIF 96), s. 13(9)**
- S. 70 applied with modifications (E.W.S.) by **Airports Act 1986 (c. 31, SIF 9), s. 44(3)**
- S. 70 applied with modifications (E.W.) by **Gas Act 1986 (c. 44, SIF 44:2), ss. 24(7), 48(3)(4)**
- S. 70 applied with modifications (E.W.) by **Water Act 1989 (c. 15, SIF 130), s. 16(7)**
- S. 70 applied with modifications (E.W.S.) by **Electricity Act 1989 (c. 29, SIF 44:1) s. 12(8)**
- S. 70 applied (with modifications) (E.W.S.) (1.4.1994) by 1993 c. 43, **s. 13(8)(9)**; S.I. 1994/571, **art. 5**
- Ss. 64-77 modified (E.W.S.) (1.4.1994) by 1993 c. 43, **s. 66(3)**; S.I. 1994/571, **art. 5**
- S. 70 applied (with modifications) (N.I.) (1.9.1995) by S.I. 1994/426 (N.I. 1), **art. 35(3)**; S.R. 1995/294, art. 2, **Sch.**
- S. 70 applied (with modifications) (N.I.) (10.6.1996) by S.I. 1996/275 (N.I. 2), **art. 15(9)**; S.R. 1996/216, **art. 2**
- S. 70 applied (with modifications) (1.4.1999) by 1984 c. 12, **s. 13(9)(9A)** (as substituted (1.4.1999) by 1998 c. 41, s. 54(3), **Sch. 10 Pt. IV para. 9(2)** (with s. 73); S.I. 1999/505, art. 2, **Sch. 2**)
- S. 70 applied (with modifications) (1.4.1999) by 1986 c. 44, **s. 24(7)(7A)** (as substituted (1.4.1999) by 1998 c. 41, s. 54(3), **Sch. 10 Pt. IV para. 10(2)** (with s. 73); S.I. 1999/505, art. 2, **Sch. 2**)
- S. 70 applied (with modifications) (1.4.1999) by 1989 c. 29, **s. 12(8)(8A)** (as substituted (1.4.1999) by 1998 c. 41, s. 54(3), **Sch. 10 Pt. IV para. 12(2)** (with s. 73); S.I. 1999/505, art. 2, **Sch. 2**)
- S. 70 applied (with modifications) (1.4.1999) by 1991 c. 56, **s. 14(7)(7A)** (as substituted (1.4.1999) by 1998 c. 41, s. 54(3), **Sch. 10 Pt. IV para. 13(3)** (with s. 73); S.I. 1999/505, art. 2, **Sch. 2**)
- S. 70 applied (with modifications) (1.4.1999) by 1993 c. 43, **s. 13(8)(8A)** (as substituted (1.4.1999) by 1998 c. 41, s. 54(3), **Sch. 10 Pt. IV para. 15(2)** (with s. 73); S.I. 1999/505, art. 2, **Sch. 2**)
- S. 70 applied (with modifications) (N.I.) (1.4.1999) by S.I. 1992/231 (N.I. 1), **art. 15(8)(8A)** (as substituted (1.4.1999) by 1998 c. 41, s. 54(3), **Sch. 10 Pt. V para. 17(2)** (with s. 73); S.I. 1999/505, art. 2, **Sch. 2**)
- S. 70 applied (with modifications) (N.I.) (1.4.1999) by S.I. 1996/275 (N.I. 2), **art. 15(9)(9A)** (with **Sch. 7 paras. 2, 3(2)**) (as substituted (1.4.1999) by 1998 c. 41, s. 54(3), **Sch. 10 Pt. V para. 18(2)** (with s. 73); S.I. 1999/505, art. 2, **Sch. 2**)
- S. 70 applied (with modifications) (1.4.1999) by 1980 c. 21, **s. 11(9A)** (as substituted (1.4.1999) by 1998 c. 41, s. 54(3), **Sch. 12 para. 4(3)** (with s. 73); S.I. 1999/505, art. 2, **Sch. 2**)
- S. 70 applied (with modifications) (1.4.1999) by 1986 c. 31, **s. 44(3)(3A)** (as substituted (1.4.1999) by 1998 c. 41, s. 54(3), **Sch. 12 para. 7(2)** (with s. 73); S.I. 1999/505, art. 2, **Sch. 2**)
- S. 70 applied (with modifications) (N.I.) (1.4.1999) by S.I. 1994/426 (N.I. 1), **art. 35(3)(3A)** (as substituted (1.4.1999) by 1998 c. 41, s. 54(3), **Sch. 12 para. 20(2)** (with s. 73); S.I. 1999/505, art. 2, **Sch. 2**)
- S. 70 applied (with modifications) (24.11.1999) by S.I. 1999/3088, **regs. 7, 8**

## 71 Variation of certain merger references.

- (1) Subject to the following provisions of this section, the Secretary of State may at any time vary a merger reference . . . <sup>F17</sup>
- (2) . . . . . <sup>F18</sup>
- (3) Without prejudice to the powers of the Secretary of State under section 70 of this Act, a merger reference shall not be varied so as to specify a period within which a report on the reference is to be made which is different from the period specified in the reference in accordance with that section.

*Status: Point in time view as at 18/08/1994.*

*Changes to legislation: There are currently no known outstanding effects for the Fair Trading Act 1973, Part V. (See end of Document for details)*

#### Textual Amendments

- F17** Words repealed by [Companies Act 1989 \(c. 40, SIF 27\)](#), ss. 153, 212, Sch. 20 paras. 7(a), 10, **Sch. 24**  
**F18** [S.71\(2\)](#) repealed by [Companies Act 1989 \(c. 40, SIF 27\)](#), ss. 153, 212, Sch. 20 paras. 7(b), 10, **Sch. 24**

#### Modifications etc. (not altering text)

- C22** Ss. 64-77 modified (E.W.S.) (1.4.1994) by [1993 c. 43, s. 66\(3\)](#); [S.I. 1994/571, art. 5](#)

## 72 Report of Commission on merger reference.

- (1) In making their report on a merger reference, the Commission shall include in it definite conclusions on the questions comprised in the reference, together with—
- (a) such an account of their reasons for those conclusions, and
  - (b) such a survey of the general position with respect to the subject-matter of the reference, and of the developments which have led to that position,
- as in their opinion are expedient for facilitating a proper understanding of those questions and of their conclusions.
- (2) Where on a merger reference the Commission find that a merger situation qualifying for investigation has been created and that the creation of that situation operates or may be expected to operate against the public interest (or, in a case falling within subsection (4) of section 69 of this Act, find that one or more elements in or consequences of that situation which were specified in the reference in accordance with that subsection so operate or may be expected so to operate) the Commission shall specify in their report the particular effects, adverse to the public interest, which in their opinion the creation of that situation (or, as the case may be, those elements in or consequences of it) have or may be expected to have; and the Commission—
- (a) shall, as part of their investigations, consider what action (if any) should be taken for the purpose of remedying or preventing those adverse effects, and
  - (b) may, if they think fit, include in their report recommendations as to such action.
- (3) In paragraph (a) of subsection (2) of this section the reference to action to be taken for the purpose mentioned in that paragraph is a reference to action to be taken for that purpose either—
- (a) by one or more Ministers (including [<sup>F19</sup>Northern Ireland departments]) or other public authorities, or
  - (b) by one or more persons specified in the report as being persons carrying on, owning or controlling any of the enterprises which, in accordance with the conclusions of the Commission, have ceased to be distinct enterprises.

#### Textual Amendments

- F19** Words substituted by virtue of [Northern Ireland Act 1974 \(c. 28\)](#), **Sch. 1 para. 2(1)(b)(4)**

#### Modifications etc. (not altering text)

- C23** Ss. 64-77 modified (E.W.S.) (1.4.1994) by [1993 c. 43, s. 66\(3\)](#); [S.I. 1994/571, art. 5](#)

*Status: Point in time view as at 18/08/1994.*

*Changes to legislation: There are currently no known outstanding effects for the Fair Trading Act 1973, Part V. (See end of Document for details)*

### 73 Order of Secretary of State on report on merger reference.

- (1) The provisions of this section shall have effect where a report of the Commission on a merger reference has been laid before Parliament in accordance with the provisions of Part VII of this Act, and the conclusions of the Commission set out in the report, as so laid,—
  - (a) include conclusions to the effect that a merger situation qualifying for investigation has been created and that its creation, or particular elements in or consequences of it specified in the report, operate or may be expected to operate against the public interest, and
  - (b) specify particular effects, adverse to the public interest, which in the opinion of the Commission the creation of that situation, or (as the case may be) those elements in or consequences of it, have or may be expected to have.
- (2) In the circumstances mentioned in the preceding subsection the Secretary of State may by order made by statutory instrument exercise such one or more of the powers specified in Parts I and II of Schedule 8 to this Act as he may consider it requisite to exercise for the purpose of remedying or preventing the adverse effects specified in the report as mentioned in the preceding subsection; and those powers may be so exercised to such extent and in such manner as the Secretary of State considers requisite for that purpose.
- (3) In determining whether, or to what extent or in what manner, to exercise any of those powers, the Secretary of State shall take into account any recommendations included in the report of the Commission in pursuance of section 72(2)(b) of this Act and any advice given by the Director under section 88 of this Act.

#### Modifications etc. (not altering text)

- C24** S. 73 modified (1.4.1999) by 1998 c. 41, s. 45(7), **Sch. 7 Pt. II para. 20(2)(a)** (with s. 73); S.I. 1999/505, art. 2, **Sch. 2**
- C25** Ss. 64-77 modified (E.W.S.) (1.4.1994) by 1993 c. 43, s. 66(3); S.I. 1994/571, art. 5
- C26** S.73(2) amended by Copyright, Designs and Patents Act 1988 (c.48, SIF 67A), ss. 144(2), 238(2)

### 74 Interim order in respect of merger reference.

- (1) Where a merger reference has been made to the Commission, . . . <sup>F20</sup>, then, with a view to preventing action to which this subsection applies, the Secretary of State, subject to subsection (3) of this section, may by order made by statutory instrument—
  - (a) prohibit or restrict the doing of things which in his opinion would constitute action to which this subsection applies, or
  - (b) impose on any person concerned obligations as to the carrying on of any activities or the safeguarding of any assets, or
  - (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, or
  - (d) exercise any of the powers which, by virtue of [<sup>F21</sup>paragraph 12 and 12A] of Schedule 8 to this Act, are exercisable by an order under section 73 of this Act.

*Status: Point in time view as at 18/08/1994.*

*Changes to legislation: There are currently no known outstanding effects for the Fair Trading Act 1973, Part V. (See end of Document for details)*

- (2) In relation to a merger reference the preceding subsection applies to any action which might prejudice the reference or impede the taking of any action under this Act which may be warranted by the Commission's report on the reference.
- (3) No order shall be made under this section in respect of a merger reference after whichever of the following events first occurs, that is to say—
  - (a) the time (including any further period) allowed to the Commission for making a report on the reference expires without their having made such a report;
  - (b) the period of forty days beginning with the day on which a report of the Commission on the reference is laid before Parliament expires.
- (4) An order under this section made in respect of a merger reference (if it has not previously ceased to have effect) shall cease to have effect on the occurrence of whichever of those events first occurs, but without prejudice to anything previously done under the order.
- (5) Subsection (4) of this section shall have effect without prejudice—
  - (a) to the operation, in relation to any such order, of section 134(1) of this Act, or
  - (b) to the operation of any order made under section 73 of this Act which exercises the same or similar powers to those exercised by the order under this section.

#### Textual Amendments

**F20** S.74(1) Words repealed by [Companies Act 1989 \(c. 40, SIF 27\)](#), ss. 153, 212, Sch. 20 paras. 8(a), 10, [Sch. 24](#)

**F21** Words substituted by [Companies Act 1989 \(c. 40, SIF 27\)](#), s. 153, Sch. 20 paras. 8(b), **10**

#### Modifications etc. (not altering text)

**C27** Ss. 64-77 modified (E.W.S.) (1.4.1994) by [1993 c. 43, s. 66\(3\)](#); [S.I. 1994/571, art. 5](#)

## 75 Reference in anticipation of merger.

- (1) A merger reference may be made to the Commission by the Secretary of State where it appears to him that it is or may be the fact that arrangements are in progress or in contemplation which, if carried into effect, will result in the creation of a merger situation qualifying for investigation.
- (2) Subject to the following provisions of this section, on a merger reference under this section the Commission shall proceed in relation to the prospective and (if events so require) the actual results of the arrangements proposed or made as, in accordance with the preceding provisions of this Part of this Act, they could proceed if the arrangements in question had actually been made, and the results in question had followed immediately before the date of the reference under this section.
- (3) A merger reference under this section may require the Commission, if they find that a merger situation qualifying for investigation has been created, or will be created if the arrangements in question are carried into effect, to limit their consideration thereafter to such elements in, or possible consequences of, the creation of that situation as may be specified in the reference, and to consider whether, in respect only of those elements or possible consequences, the situation might be expected to operate against the public interest.



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*Status: Point in time view as at 18/08/1994.*

*Changes to legislation: There are currently no known outstanding effects for the Fair Trading Act 1973, Part V. (See end of Document for details)*

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(4) In relation to a merger reference under this section, sections 66, [<sup>F22</sup>66A], 67, 69, 71, 72, 73 and 74 of this Act shall apply subject to the following modifications, that is to say—

- [<sup>F23</sup>(a) section 66 shall apply, where an event by which any enterprises cease as between themselves to be distinct enterprises will occur if the arrangements are carried into effect, as if the event had occurred immediately before the date of the reference;
- (aa) section 66A shall apply, where a transaction falling within subsection (2) of that section will occur if the arrangements are carried into effect, as if the transaction had occurred immediately before the date of the reference;
- (b) in section 67(4) the references to subsection (1) of section 66 and subsection (1) of section 66A shall be construed as references to those subsections as modified in accordance with paragraph (a) or (aa) of this subsection;]
- (c) in section 69, subsection (1) shall be construed as modified by subsection (2) of this section; in subsections (2) and (3) any reference to the question whether a merger situation qualifying for investigation has been created, or whether a result mentioned in section 64(1)(a) of this Act has arisen, shall be construed as including a reference to the question whether such a situation will be created or such a result will arise if the arrangements in question are carried into effect; and subsection (4) of that section shall not apply;
- (d) in section 71, in section 72(2) and in section 74(1), the references to section 69(4) of this Act shall be construed as references to subsection (3) of this section; and
- (e) in section 73(1), the reference to conclusions to the effect that a merger situation qualifying for investigation has been created shall be construed as including a reference to conclusions to the effect that such a situation will be created if the arrangements in question are carried into effect.

[<sup>F24</sup>(4A) Where a merger reference is made under this section, it shall be unlawful, except with the consent of the Secretary of State under subsection (4C) of this section—

- (a) for any person carrying on any enterprise to which the reference relates or having control of any such enterprise or for any subsidiary of his, or
- (b) for any person associated with him or for any subsidiary of such a person, directly or indirectly to acquire, at any time during the period mentioned in subsection (4B) of this section, 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.

(4B) The period referred to in subsection (4A) of this section is the period beginning with the announcement by the Secretary of State of the making of the merger reference concerned and ending—

- (a) where the reference is laid aside at any time, at that time,
- (b) where the time (including any further period) allowed to the Commission for making a report on the reference expires without their having made such a report, on the expiration of that time,
- (c) where a report of the Commission on the reference not including such conclusions as are referred to in section 73(1)(b) of this Act is laid before Parliament, at the end of the day on which the report is so laid,
- (d) where a report of the Commission on the reference including such conclusions is laid before Parliament, at the end of the period of forty days beginning with the day on which the report is so laid,

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and where such a report is laid before each House on different days, it is to be treated for the purposes of this subsection as laid on the earlier day.

- (4C) The consent of the Secretary of State—
- (a) may be either general or special,
  - (b) may be revoked by the Secretary of State, and
  - (c) shall be published in such way as, in the opinion of the Secretary of State, to give any person entitled to the benefit of it an adequate opportunity of getting to know of it, unless in the Secretary of State's opinion publication is not necessary for that purpose.
- (4D) Section 93 of this Act applies to any contravention or apprehended contravention of subsection (4A) of this section as it applies to a contravention or apprehended contravention of an order to which section 90 of this Act applies.
- (4E) Subsections (4F) to (4K) of this section apply for the interpretation of subsection (4A).
- (4F) The circumstances in which a person acquires an interest in shares include those where—
- (a) he enters into a contract to acquire the shares (whether or not for cash),
  - (b) not being the registered holder, he acquires a right to exercise, or to control the exercise of, any right conferred by the holding of the shares, or
  - (c) he acquires a right to call for delivery of the shares to himself or to his order or to acquire an interest in the shares or assumes an obligation to acquire such an interest,
- but does not include those where he acquires an interest in pursuance of an obligation assumed before the announcement by the Secretary of State of the making of the merger reference concerned.
- (4G) The circumstances in which a person acquires a right mentioned in subsection (4F) of this section—
- (a) include those where he acquires a right or assumes an obligation the exercise or fulfilment of which would give him that right, but
  - (b) does not include those where he is appointed as proxy to vote at a specified meeting of a company or of any class of its members or at any adjournment of the meeting or he is appointed by a corporation to act as its representative at any meeting of the company or of any class of its members,
- and references to rights and obligations in this subsection and subsection (4F) of this section include conditional rights and conditional obligations.
- (4H) Any reference to a person carrying on or having control of any enterprise includes a group of persons carrying on or having control of an enterprise and any member of such a group.
- (4J) Sections 65(2) to (4) and 77(1) and (4) to (6) of this Act apply to determine whether any person or group of persons has control of any enterprise and whether persons are associated as they apply for the purposes of section 65 of this Act to determine whether enterprises are brought under common control.
- (4K) "Subsidiary" has the meaning given by section 736 of the Companies Act 1985, but that section and section 736A of that Act also apply to determine whether a company is a subsidiary of an individual or of a group of persons as they apply to determine

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whether it is a subsidiary of a company and references to a subsidiary in subsections (8) and (9) of section 736A as so applied are to be read accordingly.

(4L) In this section—

“company” includes any body corporate, and

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

(4M) Nothing in subsection (4A) of this section makes anything done by a person outside the United Kingdom unlawful unless he is—

- (a) a British citizen, a British Dependent Territories citizen, a British Overseas citizen or a British National (Overseas),
- (b) a body corporate incorporated under the law of the United Kingdom or of a part of the United Kingdom, or
- (c) a person carrying on business in the United Kingdom, either alone or in partnership with one or more other persons.]

(5) If, in the course of their investigations on a merger reference under this section, it appears to the Commission that the proposal to make arrangements such as are mentioned in the reference has been abandoned, the Commission—

- (a) shall, if the Secretary of State consents, lay the reference aside, but
- (b) shall in that case furnish to the Secretary of State such information as he may require as to the results until then of the investigations.

#### Textual Amendments

**F22** “66A” inserted by [Companies Act 1989 \(c. 40, SIF 27\)](#), s. 153, Sch. 20 paras. 9(a), **10**

**F23** S. 75(4)(a)(aa)(b) substituted by [Companies Act 1989 \(c. 40, SIF 27\)](#), s. 153, Sch. 20 paras. 9(b), **10**

**F24** S. 75(4A)–(4M) inserted by [Companies Act 1989 \(c. 40, SIF 27\)](#), s. **149**

#### Modifications etc. (not altering text)

**C28** Ss. 64–77 modified (E.W.S.) (1.4.1994) by [1993 c. 43, s. 66\(3\)](#); S.I. 1994/571, **art. 5**

**C29** S. 75(5) applied (1.4.1999) by [1998 c. 41, s. 45\(7\)](#), **Sch. 7 Pt. II para. 15(7)(b)** (with s. 73): S.I. 1999/505, **art. 2, Sch. 2**

*[<sup>F25</sup> Restriction on power to make merger reference where prior notice has been given*

#### Textual Amendments

**F25** Ss. 75A–75F inserted by [Companies Act 1989 \(c. 40, SIF 27\)](#), s. **146**

### **75A General rule where notice given by acquirer and no reference made within period for considering notice.**

- (1) Notice may be given to the Director by a person authorised by regulations to do so of proposed arrangements which might result in the creation of a merger situation qualifying for investigation.
- (2) The notice must be in the prescribed form and state that the existence of the proposal has been made public.

*Status: Point in time view as at 18/08/1994.*

*Changes to legislation: There are currently no known outstanding effects for the Fair Trading Act 1973, Part V. (See end of Document for details)*

- (3) If the period for considering the notice expires without any reference being made to the Commission with respect to the notified arrangements, no reference may be made under this Part of this Act to the Commission with respect to those arrangements or to the creation or possible creation of any merger situation qualifying for investigation which is created in consequence of carrying those arrangements into effect.
- (4) Subsection (3) of this section is subject to sections 75B(5) and 75C of this Act.
- (5) A notice under subsection (1) of this section is referred to in sections 75B to 75F of this Act as a “merger notice”.

**Modifications etc. (not altering text)**

**C30** Ss. 64-77 modified (E.W.S.) (1.4.1994) by 1993 c. 43, s. 66(3); S.I. 1994/571, art. 5

**75B The role of the Director.**

- (1) The Director shall, when the period for considering any merger notice begins, take such action as he considers appropriate to bring the existence of the proposal, the fact that the merger notice has been given and the date on which the period for considering the notice may expire to the attention of those who in his opinion would be affected if the arrangements were carried into effect.
- (2) The period for considering a merger notice is the period of twenty days, determined in accordance with subsection (9) of this section, beginning with the first day after—
  - (a) the notice has been received by the Director, and
  - (b) any fee payable to the Director in respect of the notice has been paid.
- (3) The Director may, and shall if required to do so by the Secretary of State, by notice to the person who gave the merger notice [<sup>F26</sup>extend the period mentioned in subsection (2) of this section by a further fifteen days].
- (4) The Director may by notice to the person who gave the merger notice request him to provide the Director within such period as may be specified in the notice with such information as may be so specified.
- (5) If the Director gives to the person who gave the merger notice (in this subsection referred to as “the relevant person”) a notice stating that the Secretary of State is seeking undertakings under section 75G of this Act, section 75A(3) of this Act does not prevent a reference being made to the Commission unless—
  - (a) after the Director has given that notice, the relevant person has given a notice to the Director stating that he does not intend to give such undertakings, and
  - (b) the period of ten days beginning with the first day after the notice under paragraph (a) of this subsection was received by the Director has expired.
- (6) A notice by the Director under subsection (3), (4) or (5) of this section must either be given to the person who gave the merger notice before the period for considering the merger notice expires or be sent in a properly addressed and pre-paid letter posted to him at such time that, in the ordinary course of post, it would be delivered to him before that period expires.
- (7) The Director may, at any time before the period for considering any merger notice expires, reject the notice if—

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- (a) he suspects that any information given in respect of the notified arrangements, whether in the merger notice or otherwise, by the person who gave the notice or any connected person is in any material respect false or misleading,
  - (b) he suspects that it is not proposed to carry the notified arrangements into effect, [<sup>F27</sup>or]
  - (c) any prescribed information is not given in the merger notice or any information requested by notice under subsection (4) of this section is not provided within the period specified in the notice.
- [<sup>F27</sup>or,
- (d) it appears to him that the notified arrangements are, or if carried into effect would result in, a concentration with a Community dimension within the meaning of Council Regulation (EEC) No. 4064/89 of 21st December 1989 on the control of concentrations between undertakings.]
- (8) If—
- (a) under subsection [<sup>F26</sup>(3)] of this section the period for considering a merger notice has been extended by a further fifteen days, but
  - (b) the Director has not made any recommendation to the Secretary of State under section 76(b) of this Act as to whether or not it would in the Director's opinion be expedient for the Secretary of State to make a reference to the Commission with respect to the notified arrangements,
- then, during the last five of those fifteen days, the power of the Secretary of State to make a reference to the Commission with respect to the notified arrangements is not affected by the absence of any such recommendation.
- (9) In determining any period for the purposes of subsections (2), (3) and (5) of this section no account shall be taken of—
- (a) Saturday, Sunday, Good Friday and Christmas Day, and
  - (b) any day which is a bank holiday in England and Wales.

#### Textual Amendments

**F26** Words in s. 75B(3)(8)(a) substituted (18.8.1994) by S.I. 1994/1934, reg. 3

**F27** By S.I. 1990/1563, reg. 2 it is provided that for the purpose of determining the effect of giving a merger notice and the steps which may be or are to be taken by any person in connection with such a notice in a case in which the arrangements in question are or would result in a concentration with a Community dimension, section 75B is amended by omitting the word “or” at the end of paragraph (b) of subsection (7) and adding the word “or” and para. (d) at the end of that subsection

#### Modifications etc. (not altering text)

**C31** Ss. 64-77 modified (E.W.S.) (1.4.1994) by 1993 c. 43, s. 66(3), 154(2); S.I. 1994/571, art. 5

### 75C Cases where power to refer unaffected.

- (1) Section 75A(3) of this Act does not prevent any reference being made to the Commission if—
- (a) before the end of the period for considering the merger notice, it is rejected by the Director under section 75B(7) of this Act,
  - (b) before the end of that period, any of the enterprises to which the notified arrangements relate cease to be distinct from each other,

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- (c) any information (whether prescribed information or not) that—
- (i) is, or ought to be, known to the person who gave the merger notice or any connected person, and
  - (ii) is material to the notified arrangements;
- is not disclosed to the Secretary of State or the Director by such time before the end of that period as may be specified in regulations,
- (d) at any time after the merger notice is given but before the enterprises to which the notified arrangements relate cease to be distinct from each other, any of those enterprises ceases to be distinct from any enterprise other than an enterprise to which those arrangements relate,
  - (e) the six months beginning with the end of the period for considering the merger notice expires without the enterprises to which the notified arrangements relate ceasing to be distinct from each other,
  - (f) the merger notice is withdrawn, or
  - (g) any information given in respect of the notified arrangements, whether in the merger notice or otherwise, by the person who gave the notice or any connected person is in any material respect false or misleading.
- (2) Where—
- (a) two or more transactions which have occurred or, if any arrangements are carried into effect, will occur may be treated for the purposes of a merger reference as having occurred simultaneously on a particular date, and
  - (b) subsection (3) of section 75A of this Act does not prevent such a reference with respect to the last of those transactions,
- that subsection does not prevent such a reference with respect to any of those transactions which actually occurred less than six months before—
- (i) that date, or
  - (ii) the actual occurrence of another of those transactions with respect to which such a reference may be made (whether or not by virtue of this subsection).
- (3) In determining for the purposes of subsection (2) of this section the time at which any transaction actually occurred, no account shall be taken of any option or other conditional right until the option is exercised or the condition is satisfied.

**Modifications etc. (not altering text)**

C32 Ss. 64-77 modified (E.W.S.) (1.4.1994) by 1993 c. 43, ss. 66(3); S.I. 1994/571, art. 5

**75D Regulations**

- (1) The Secretary of State may make regulations for the purposes of sections 75A to 75C of this Act.
- (2) The regulations may, in particular—
  - (a) provide for section 75B(2) or (3) or section 75C(1)(e) of this Act to apply as if any reference to a period of days or months were a reference to a period specified in the regulations for the purposes of the provision in question,
  - (b) provide for the manner in which any merger notice is authorised or required to be given, rejected or withdrawn, and the time at which any merger notice is to be treated as received or rejected,

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- (c) provide for the manner in which any information requested by the Director or any other material information is authorised or required to be provided or disclosed, and the time at which such information is to be treated as provided or disclosed,
  - (d) provide for the manner in which any notice under section 75B of this Act is authorised or required to be given,
  - (e) provide for the time at which any notice under section 75B(5)(a) of this Act is to be treated as received,
  - (f) provide for the address which is to be treated for the purposes of section 75B(6) of this Act and of the regulations as a person’s proper address,
  - (g) provide for the time at which any fee is to be treated as paid, and
  - (h) provide that a person is, or is not, to be treated, in such circumstances as may be specified in the regulations, as acting on behalf of a person authorised by regulations to give a merger notice or a person who has given such a notice.
- (3) The regulations may make different provision for different cases.
- (4) Regulations under this section shall be made by statutory instrument.

**Modifications etc. (not altering text)**

**C33** Ss. 64-77 modified (E.W.S.) (1.4.1994) by 1993 c. 43, s. 66(3); S.I. 1994/571, art. 5

**75E Interpretation of sections 75A to 75D.**

In this section and sections 75A to 75D of this Act—

“connected person”, in relation to the person who gave a merger notice, means—

- (a) any person who, for the purposes of section 77 of this Act, is associated with him, or
- (b) any subsidiary of the person who gave the merger notice or of any person so associated with him,

“merger notice” is to be interpreted in accordance with section 75A(5) of this Act,

“notified arrangements” means the arrangements mentioned in the merger notice or arrangements not differing from them in any material respect,

“prescribed” means prescribed by the Director by notice having effect for the time being and published in the London, Edinburgh and Belfast Gazettes,

“regulations” means regulations under section 75D of this Act, and “regulations” means regulations under section 75D of this Act, and

“subsidiary” has the meaning given by section 75(4K) of this Act,

and references to the enterprises to which the notified arrangements relate are references to those enterprises that would have ceased to be distinct from one another if the arrangements mentioned in the merger notice in question had been carried into effect at the time when the notice was given.

**Modifications etc. (not altering text)**

**C34** Ss. 64-77 modified (E.W.S.) (1.4.1994) by 1993 c. 43, ss. 66(3); S.I. 1994/571, art. 5

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## 75F Power to amend sections 75B to 75D.

- (1) The Secretary of State may, for the purpose of determining the effect of giving a merger notice and the steps which may be or are to be taken by any person in connection with such a notice, by regulations made by statutory instrument amend sections 75B to 75D of this Act.
- (2) The regulations may make different provision for different cases and may contain such incidental and supplementary provisions as the Secretary of State thinks fit.
- (3) No regulations shall be made under this section unless a draft of the regulations has been laid before and approved by resolution of each House of Parliament.]

### Modifications etc. (not altering text)

**C35** Ss. 64-77 modified (E.W.S.) (1.4.1994) by [1993 c. 43, s. 66\(3\)](#); [S.I. 1994/571, art. 5](#)

*[<sup>F28</sup> Undertakings as alternative to merger reference]*

### Textual Amendments

**F28** [Ss. 75G–75K](#) inserted by [Companies Act 1989 \(c. 40, SIF 27\), s. 147](#)

## 75G Acceptance of undertakings.

- (1) Where—
  - (a) the Secretary of State has power to make a merger reference to the Commission under section 64 or 75 of this Act,
  - (b) the Director has made a recommendation to the Secretary of State under section 76 of this Act that such a reference should be made, and
  - (c) the Director has (in making that recommendation or subsequently) given advice to the Secretary of State specifying particular effects adverse to the public interest which in his opinion the creation of the merger situation qualifying for investigation may have or might be expected to have,

the Secretary of State may, instead of making a merger reference to the Commission, accept from such of the parties concerned as he considers appropriate undertakings complying with subsections (2) and (3) of this section to take specified action which the Secretary of State considers appropriate to remedy or prevent the effects adverse to the public interest specified in the advice.

the Secretary of State may, instead of making a merger reference to the Commission, accept from such of the parties concerned as he considers appropriate undertakings complying with subsections (2) and (3) of this section to take specified action which the Secretary of State considers appropriate to remedy or prevent the effects adverse to the public interest specified in the advice.
- (2) The undertakings must provide for one or more of the following—
  - (a) the division of a business by the sale of any part of the undertaking or assets or otherwise (for which purpose all the activities carried on by way of business by any one person or by any two or more interconnected bodies corporate may be treated as a single business),
  - (b) the division of a group of interconnected bodies corporate, and



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- (c) the separation, by the sale of any part of the undertaking or assets concerned or other means, of enterprises which are under common control otherwise than by reason of their being enterprises of interconnected bodies corporate.
- (3) The undertakings may also contain provision—
- (a) preventing or restricting the doing of things which might prevent or impede the division or separation,
  - (b) as to the carrying on of any activities or the safeguarding of any assets until the division or separation is effected,
  - (c) for any matters necessary to effect or take account of the division or separation, and
  - (d) for enabling the Secretary of State to ascertain whether the undertakings are being fulfilled.
- (4) If the Secretary of State has accepted one or more undertakings under this section, no reference may be made to the Commission with respect to the creation or possible creation of the merger situation qualifying for investigation by reference to which the undertakings were accepted, except in a case falling within subsection (5) of this section.
- (5) Subsection (4) of this section does not prevent a reference being made to the Commission if material facts about the arrangements or transactions, or proposed arrangements or transactions, in consequence of which the enterprises concerned ceased or may cease to be distinct enterprises were not—
- (a) notified to the Secretary of State or the Director, or
  - (b) made public,
- before the undertakings were accepted.
- (6) In subsection (5) of this section “made public” has the same meaning as in section 64 of this Act.

**Modifications etc. (not altering text)**

**C36** Ss. 64-77 modified (E.W.S.) (1.4.1994) by 1993 c. 43, s. 66(3); S.I. 1994/571, art. 5

**[<sup>F29</sup>75H Publication of undertakings.**

- (1) The Secretary of State shall arrange for—
- (a) any undertaking accepted by him under section 75G of this Act,
  - (b) the advice given by the Director for the purposes of subsection (1)(c) of that section in any case where such an undertaking has been accepted, and
  - (c) any variation or release of such an undertaking, to be published in such manner as he may consider appropriate.
- (2) In giving advice for the purposes of section 75G(1)(c) of this Act the Director shall have regard to the need for excluding, so far as practicable, any matter to which subsection (4) of this section applies.
- (3) The Secretary of State shall exclude from any such advice as published under this section—

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- (a) any matter to which subsection (4) of this section applies and in relation to which he is satisfied that its publication in the advice would not be in the public interest, and
  - (b) any other matter in relation to which he is satisfied that its publication in the advice would be against the public interest.
- (4) This subsection applies to—
- (a) any matter which relates to the private affairs of an individual, where publication of that matter would or might, in the opinion of the Director or the Secretary of State, as the case may be, seriously and prejudicially affect the interests of that individual, and
  - (b) any matter which relates specifically to the affairs of a particular body of persons, whether corporate or unincorporate, where publication of that matter would or might, in the opinion of the Director or the Secretary of State, as the case may be, seriously and prejudicially affect the interests of that body, unless in his opinion the inclusion of that matter relating specifically to that body is necessary for the purposes of the advice.
- (5) For the purposes of the law relating to defamation, absolute privilege shall attach to any advice given by the Director for the purposes of section 75G(1)(c) of this Act.

#### Textual Amendments

**F29** Ss. 75G–75K inserted by [Companies Act 1989 \(c. 40, SIF 27\)](#), **s. 147**

#### Modifications etc. (not altering text)

**C37** Ss. 64–77 modified (E.W.S.) (1.4.1994) by [1993 c. 43, s. 66\(3\)](#); [S.I. 1994/571, art. 5](#)

## 75J Review of undertakings.

Where an undertaking has been accepted by the Secretary of State under section 75G of this Act, it shall be the duty of the Director—

- (a) to keep under review the carrying out of that undertaking, and from time to time consider whether, by reason of any change of circumstances, the undertaking is no longer appropriate and either—
  - (i) one or more of the parties to it can be released from it, or
  - (ii) it needs to be varied or to be superseded by a new undertaking, and
- (b) if it appears to him that the undertaking has not been or is not being fulfilled, that any person can be so released or that the undertaking needs to be varied or superseded, to give such advice to the Secretary of State as he may think proper in the circumstances.]

#### Textual Amendments

**F29** Ss. 75G–75K inserted by [Companies Act 1989 \(c. 40, SIF 27\)](#), **s. 147**

#### Modifications etc. (not altering text)

**C38** Ss. 64–77 modified (E.W.S.) (1.4.1994) by [1993 c. 43, s. 66\(3\)](#); [S.I. 1994/571, art. 5](#)

*Status: Point in time view as at 18/08/1994.*

*Changes to legislation: There are currently no known outstanding effects for the Fair Trading Act 1973, Part V. (See end of Document for details)*

## **75K Order of Secretary of State where undertaking not fulfilled.**

- (1) The provisions of this section shall have effect where it appears to the Secretary of State that an undertaking accepted by him under section 75G of this Act has not been, is not being or will not be fulfilled.
- (2) The Secretary of State may by order made by statutory instrument exercise such one or more of the powers specified in paragraphs 9A and 12 to 12C and Part II of Schedule 8 to this Act as he may consider it requisite to exercise for the purpose of remedying or preventing the adverse effects specified in the advice given by the Director for the purposes of section 75G(1)(c) of this Act; and those powers may be so exercised to such extent and in such manner as the Secretary of State considers requisite for the purpose.
- (3) In determining whether, or to what extent or in what manner, to exercise any of those powers, the Secretary of State shall take into account any advice given by the Director under section 75J(b) of this Act.
- (4) The provision contained in an order under this section may be different from that contained in the undertaking.
- (5) On the making of an order under this section, the undertaking and any other undertaking accepted under section 75G of this Act by reference to the same merger situation qualifying for investigation are released by virtue of this section.

### **Modifications etc. (not altering text)**

**C39** Ss. 64-77 modified (E.W.S.) (1.4.1994) by 1993 c. 43, s. 66(3); S.I. 1994/571, art. 5

## *Supplementary*

## **76 Functions of Director in relation to merger situations.**

It shall be the duty of the Director—

- (a) to take all such steps as are reasonably practicable for keeping himself informed about actual or prospective arrangements or transactions which may constituted or result in the creation of merger situations qualifying for investigation, and
- (b) to make recommendations to the Secretary of State as to any action under this Part of this Act which in the opinion of the Director it would be expedient for the Secretary of State to take in relation to any such arrangements or transactions.

[<sup>F30</sup>(2) In exercising his duty under this section the Director shall take into consideration any representations made to him by persons appearing to him to have a substantial interest in any such arrangements or transactions or by bodies appearing to him to represent substantial numbers of persons who have such an interest.]

### **Textual Amendments**

**F30** S. 76(2) added by Companies Act 1989 (c. 40, SIF 27), s. 153, Sch. 20 para. 11

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*Changes to legislation: There are currently no known outstanding effects for the Fair Trading Act 1973, Part V. (See end of Document for details)*

**Modifications etc. (not altering text)**

**C40** Ss. 64-77 modified (E.W.S.) (1.4.1994) by 1993 c. 43, s. 66(3); S.I. 1994/571, art. 5

**77 Associated persons.**

- (1) For the following purposes, that is to say—
- (a) for the purpose of determining under section 57(1) of this Act whether a person is a newspaper proprietor and, if so, which newspapers are his newspapers;
  - (b) for the purpose of determining under section 65 of this Act whether any two enterprises have been brought under common ownership or common control; and
  - (c) for the purpose of determining what activities are carried on by way of business by any one person, in so far as that question arises in the application, by virtue of an order under section 73 of this Act, of paragraph 14 of Schedule 8 to this Act,
- associated persons, and any bodies corporate which they or any of them control, shall (subject to the next following subsection) be treated as one person.
- (2) The preceding subsection shall not have effect—
- (a) for the purpose mentioned in paragraph (a) of that subsection so as to exclude from section 58 of this Act any case which would otherwise fall within that section, or
  - (b) for the purpose mentioned in paragraph (b) of the preceding subsection so as to exclude from section 65 of this Act any case which would otherwise fall within that section.
- (3) A merger reference other than a newspaper merger reference (whether apart from this section the reference could be made or not) may be so framed as to exclude from consideration, either altogether or for any specified purpose or to any specified extent, any matter which, apart from this section, would not have been taken into account on that reference.
- (4) For the purposes of this section the following persons shall be regarded as associated with one another, that is to say—
- (a) any individual and that individual's husband or wife and any relative, or husband or wife of a relative, of that individual or of that individual's husband or wife;
  - (b) any person in his capacity as trustee of a settlement and the settlor or grantor and any person associated with the settlor or grantor;
  - (c) persons carrying on business in partnership and the husband or wife and relatives of any of them;
  - (d) any two or more persons acting together to secure or exercise control of a body corporate or other association or to secure control of any enterprise or assets.
- (5) The reference in subsection (1) of this section to bodies corporate which associated persons control shall be construed as follows, that is to say—
- (a) in its application for the purpose mentioned in paragraph (a) of that subsection, "control" in that reference means having a controlling interest within the meaning of section 57(4) of this Act, and

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- (b) in its application for any other purpose mentioned in subsection (1) of this section, “control” in that reference shall be construed in accordance with section 65(3) and (4) of this Act.
- (6) In this section “relative” means a brother, sister, uncle, aunt, nephew, niece, lineal ancestor or descendant (the stepchild or illegitimate child or any person, or anyone adopted by a person, whether legally or otherwise, as his child, being taken into account as a relative or to trace a relationship in the same way as that person’s child); and references to a wife or husband shall include a former wife or husband and a reputed wife or husband.

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**Modifications etc. (not altering text)**

**C41** Ss. 64-77 modified (E.W.S.) (1.4.1994) by 1993 c. 43, s. 66(3); S.I. 1994/571, art. 5

**Status:**

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**Changes to legislation:**

There are currently no known outstanding effects for the Fair Trading Act 1973, Part V.