



Companies Act 1989

1989 CHAPTER 40

PART VI

MERGERS AND RELATED MATTERS

146 Restriction on references where prior notice given

After section 75 of the Fair Trading Act 1973 there is inserted—

“Restriction on power to make merger reference where prior notice has been given

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.
- (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”.

Status: This is the original version (as it was originally enacted).

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—
 - (a) extend the period mentioned in subsection (2) of this section by a further ten days, and
 - (b) extend that period as extended under paragraph (a) of this subsection 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—
 - (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, or

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- (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.
- (8) If—
- (a) under subsection (3)(b) 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.

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,
 - (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

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- (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.

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,
 - (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.

75E Interpretation of sections 75A to 75D

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

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“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

“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.

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.”.

147 Undertakings as alternative to merger reference

In Part V of the Fair Trading Act 1973 after the sections inserted by section 146 of this Act there is inserted—

“Undertakings as alternative to merger reference

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

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- (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.

- (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
 - (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.

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—
 - (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.

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

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needs to be varied or superseded, to give such advice to the Secretary of State as he may think proper in the circumstances.

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 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 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.”.

148 Enforcement of undertakings

After section 93 of the Fair Trading Act 1973 there is inserted—

“93A Enforcement of undertakings

- (1) This section applies where a person (in this section referred to as “the responsible person”) has given an undertaking which—
 - (a) has been accepted by the Secretary of State under section 75G of this Act,
 - (b) has been accepted by the appropriate Minister or Ministers under section 88 of this Act after the commencement of this section, or
 - (c) has been accepted by the Director under section 4 or 9 of the Competition Act 1980 after that time.
- (2) Any person may bring civil proceedings in respect of any failure, or apprehended failure, of the responsible person to fulfil the undertaking, as if the obligations imposed by the undertaking on the responsible person had been imposed by an order to which section 90 of this Act applies.”.

149 Temporary restrictions on share dealings

- (1) In section 75 of the Fair Trading Act 1973 (reference in anticipation of merger), after subsection (4) there is inserted—

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- “(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,
- 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

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- (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 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.”.
- (2) This section does not apply in relation to any merger reference made before the passing of this Act.

150 Obtaining control by stages

(1) After section 66 of the Fair Trading Act 1973 there is inserted—

“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.
- (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.”

(2) This section does not apply in relation to any merger reference made before the passing of this Act.

151 False or misleading information

At the end of Part VIII of the Fair Trading Act 1973 there is inserted—

Status: This is the original version (as it was originally enacted).

“93B False or misleading information

- (1) If a person furnishes any information—
 - (a) to the Secretary of State, the Director or the Commission in connection with any of their functions under Parts IV, V, VI or this Part of this Act or under the Competition Act 1980, or
 - (b) to the Commission in connection with the functions of the Commission under the Telecommunications Act 1984 or the Airports Act 1986, and either he knows the information to be false or misleading in a material particular, or he furnishes the information recklessly and it is false or misleading in a material particular, he is guilty of an offence.
- (2) A person who—
 - (a) furnishes any information to another which he knows to be false or misleading in a material particular, or
 - (b) recklessly furnishes any information to another which is false or misleading in a material particular, knowing that the information is to be used for the purpose of furnishing information as mentioned in subsection (1)(a) or (b) of this section, is guilty of an offence.
- (3) A person guilty of an offence under subsection (1) or (2) of this section is liable—
 - (a) on summary conviction, to a fine not exceeding the statutory maximum, and
 - (b) on conviction on indictment, to imprisonment for a term not exceeding two years or to a fine or to both.
- (4) Section 129(1) of this Act does not apply to an offence under this section.”.

152 Fees

- (1) The Secretary of State may by regulations made by statutory instrument require the payment to him or to the Director of such fees as may be prescribed by the regulations in connection with the exercise by the Secretary of State, the Director and the Commission of their functions under Part V of the Fair Trading Act 1973.
- (2) The regulations may provide for fees to be payable—
 - (a) in respect of—
 - (i) an application for the consent of the Secretary of State under section 58(1) of the Fair Trading Act 1973 to the transfer of a newspaper or of newspaper assets, and
 - (ii) a notice under section 75A(1) of that Act, and
 - (b) on the occurrence of any event specified in the regulations.
- (3) The events that may be specified in the regulations by virtue of subsection (2)(b) above include—
 - (a) the making by the Secretary of State of a merger reference to the Commission under section 64 or 75 of the Fair Trading Act 1973,

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- (b) the announcement by the Secretary of State of his decision not to make a merger reference in any case where, at the time the announcement is made, he would under one of those sections have power to make a such a reference.
- (4) The regulations may also contain provision—
- (a) for ascertaining the persons by whom fees are payable,
 - (b) specifying whether any fee is payable to the Secretary of State or to the Director,
 - (c) for the amount of any fee to be calculated by reference to matters which may include—
 - (i) in a case involving functions of the Secretary of State under sections 57 to 61 of the Fair Trading Act 1973, the number of newspapers concerned, the number of separate editions (determined in accordance with the regulations) of each newspaper and the average circulation per day of publication (within the meaning of Part V of that Act) of each newspaper, and
 - (ii) in any other case, the value (determined in accordance with the regulations) of any assets concerned,
 - (d) as to the time when any fee is to be paid, and
 - (e) for the repayment by the Secretary of State or the Director of the whole or part of any fee in specified circumstances.
- (5) The regulations may make different provision for different cases.
- (6) Subsections (2) to (5) above do not prejudice the generality of subsection (1) above.
- (7) In determining the amount of any fees to be prescribed by the regulations, the Secretary of State may take into account all costs incurred by him and by the Director in respect of the exercise by him, by the Commission and by the Director of their respective functions—
- (a) under Part V of the Fair Trading Act 1973, and
 - (b) under Parts I, VII and VIII of that Act in relation to merger references or other matters arising under Part V.
- (8) A statutory instrument containing regulations under this section shall be subject to annulment in pursuance of a resolution of either House of Parliament.
- (9) Fees paid to the Secretary of State or the Director under this section shall be paid into the Consolidated Fund.
- (10) In this section—
- “the Commission”,
 - “the Director”, and
 - “merger reference”,
- have the same meaning as in the Fair Trading Act 1973, and “newspaper” has the same meaning as in Part V of that Act.
- (11) References in this section to Part V of the Fair Trading Act 1973 and to merger references under section 64 or 75 of that Act or under that Part include sections 29 and 30 of the Water Act 1989 and any reference under section 29 of that Act.

Status: This is the original version (as it was originally enacted).

153 Other amendments about mergers and related matters

Schedule 20 to this Act has effect.