

*These notes refer to the Enterprise Act 2002 (c.40)
which received Royal Assent on 7 November 2002*

ENTERPRISE ACT 2002

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Part 3: Mergers

Summary and Background

Chapter 1: Duty to make references

Duty to make references: completed mergers

Section 22: Duty to make references in relation to completed mergers

94. This section provides that the OFT must refer a completed merger to the CC for further investigation if certain circumstances arise. This differs from FTA 1973's arrangements for reference, where the Secretary of State has discretion to refer merger cases. This section will not apply to cases where the European Commission has exclusive jurisdiction to consider the competition aspects of the merger under the ECMR by virtue of the first paragraph of Article 21(2) ECMR.
95. *Subsection (1)* provides that the OFT must make a reference to the CC if it believes there is or may be a 'relevant merger situation' that has or may be expected to result in a substantial lessening of competition. However, *subsection (2)* provides that the OFT can choose not to refer if it thinks either that the market involved is not of sufficient importance to justify a CC investigation, or that any substantial lessening of competition would be outweighed by benefits to customers.
96. The OFT will be required under section 106 to publish advice and information on how these provisions will operate, and how it will apply the substantive tests. The substantial lessening of competition test, and the customer benefits concept are explained in more detail in the notes on sections 35 and 30 respectively.
97. The discretion for the OFT to decide not to refer a merger because the market is of insufficient importance is designed primarily to avoid references being made where the costs involved would be disproportionate to the size of the markets concerned.
98. *Subsection (3)* provides that the OFT is prevented from making a reference in each of the following circumstances:
 - the merger involves a newspaper transfer;
 - the OFT has accepted (or is considering accepting) undertakings in lieu of a reference in relation to the same transaction;
 - the merger was the subject of a 'merger notice' and the deadline for reference has passed;
 - the merger was referred to the CC before it was completed;

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- the merger raises a public interest consideration(s) and either an intervention notice is in force, or the case has been determined;
 - the merger is the subject of a request by the UK under Article 22(3) of the ECMR to the European Commission, and the European Commission is either considering the request, proceeding with a case in pursuance of the request, or has dealt with the matter in response to the request.
99. *Subsection (6)* provides that the definition of UK markets includes both sub-national and supra-national markets.