

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

# ENTERPRISE ACT 2002

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## EXPLANATORY NOTES

### COMMENTARY ON SECTIONS

#### Part 3: Mergers

#### Summary and Background

#### Chapter 1: Duty to make references

#### Duty to make references: completed mergers

#### Section 26: Enterprises ceasing to be distinct enterprises

109. This section defines a merger situation. It is closely modelled on section 65 FTA 1973, with one omission to take account of the existence of CA 1998.
110. The provision in 65(1)(b) of FTA 1973 that referred to ‘arrangements entered into in order to prevent competition between enterprises’ has been omitted. Where such arrangements do not fall within the merger regime under the Enterprise Act 2002, it is considered they will be better suited to investigation under CA 1998.
111. *Subsection (1)* defines ‘two enterprises ceasing to be distinct’ by reference to whether they are brought under common ownership or common control.
112. An ‘enterprise’ is defined in section 129 as the activities, or part of the activities, of a business; and a ‘business’ is defined to include a professional practice and to include any other undertaking that is carried on for gain or reward or that is an undertaking in the course of which goods or services are supplied other than free of charge. The definition includes ‘part of the activities of a business’ as it is sometimes an operating division of a company that is acquired rather than the whole of the company.
113. *Subsections (3) and (4)* (which are modelled on the equivalent FTA 1973 provisions) envisage three levels of control of an enterprise. These are: material influence over policy; control of policy (often called *de facto* control); and a controlling interest in the enterprise (often called *de jure* control). What constitutes material influence or control will be considered on a case-by-case basis by the competition authorities according to the particular circumstances of the case. Under the FTA the authorities have treated the acquisition of the ability to appoint a director or having a 15% shareholding as sufficient to give material influence for these purposes. *De facto* and *de jure* control will arise at higher levels of shareholding, with *de jure* normally requiring more than 50% of the voting rights.
114. Two enterprises cease to be distinct when there is an increase in the level of control - see section 26(3), (4)(a) and (4)(b). It is thus possible for a merger situation to be investigated at any of the three points where there is an increase in the level of control if the different levels of control are acquired at different times.