



# Enterprise Act 2002 (repealed)

## 2002 CHAPTER 40

### PART 3

#### MERGERS

### CHAPTER 2

#### PUBLIC INTEREST CASES

##### **Textual Amendments applied to the whole legislation**

- F1** Act: for the words "solicitor of the Supreme Court of Northern Ireland" wherever they occur there is substituted (prosp.) the words "solicitor of the Court of Judicature of Northern Ireland" by virtue of [Constitutional Reform Act 2005 \(c. 4\), ss. 59, 148\(1\), Sch. 11 para. 5](#) [Editorial Note: this amendment will be carried through into the text of the Act at the same time as any other effects on the Act for the year in which the relevant commencement order (or first such order) is made]

##### *Power to make references*

#### **42 Intervention by Secretary of State in certain public interest cases**

(1) Subsection (2) applies where—

- (a) the Secretary of State has reasonable grounds for suspecting that it is or may be the case that a relevant merger situation has been created or that arrangements are in progress or in contemplation which, if carried into effect, will result in the creation of a relevant merger situation;
- (b) no reference under section 22 or 33 has been made in relation to the relevant merger situation concerned;
- (c) no decision has been made not to make such a reference (other than a decision made by virtue of subsection (2)(b) of section 33 or a decision to accept undertakings under section 73 instead of making such a reference); and

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- (d) no reference is prevented from being made under section 22 or 33 by virtue of—
- (i) section 22(3)(a) or (e) or (as the case may be) 33(3)(a) or (e); or
  - (ii) Community law or anything done under or in accordance with it.
- (2) The Secretary of State may give a notice to the OFT (in this Part “an intervention notice”) if he believes that it is or may be the case that one or more than one public interest consideration is relevant to a consideration of the relevant merger situation concerned.
- (3) For the purposes of this Part a public interest consideration is a consideration which, at the time of the giving of the intervention notice concerned, is specified in section 58 or is not so specified but, in the opinion of the Secretary of State, ought to be so specified.
- (4) No more than one intervention notice shall be given under subsection (2) in relation to the same relevant merger situation.
- (5) For the purposes of deciding whether a relevant merger situation has been created or whether arrangements are in progress or in contemplation which, if carried into effect, will result in the creation of a relevant merger situation, sections 23 to 32 (read together with section 34) shall apply for the purposes of this Chapter as they do for the purposes of Chapter 1 but subject to subsection (6).
- (6) In their application by virtue of subsection (5) sections 23 to 32 shall have effect as if—
- (a) for paragraph (a) of section 23(9) there were substituted—
    - “(a) in relation to the giving of an intervention notice, the time when the notice is given;
    - (aa) in relation to the making of a report by the OFT under section 44, the time of the making of the report;
    - (ab) in the case of a reference which is treated as having been made under section 45(2) or (3) by virtue of section 49(1), such time as the Commission may determine; and”;
  - (b) the references to the OFT in sections 25(1) to (3), (6) and (8) and 31 included references to the Secretary of State;
  - (c) the references to the OFT in section 25(4) and (5) were references to the Secretary of State;
  - (d) the reference in section 25(4) to section 73 were a reference to paragraph 3 of Schedule 7;
  - (e) after section 25(5) there were inserted—
 

“(5A) The Secretary of State may by notice to the persons carrying on the enterprises which have or may have ceased to be distinct enterprises extend the four month period mentioned in section 24(1)(a) or (2) (b) if, by virtue of section 46(5) or paragraph 3(6) of Schedule 7, he decides to delay a decision as to whether to make a reference under section 45.

(5B) An extension under subsection (5A) shall be for the period of the delay.”;
  - (f) in section 25(10)(b) after the word “(4)” there were inserted “, (5A) ”;
  - (g) the reference in section 25(12) to one extension were a reference to one extension by the OFT and one extension by the Secretary of State;

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- (h) the powers to extend time-limits under section 25 as applied by subsection (5) above, and the power to request information under section 31(1) as so applied, were not exercisable by the OFT or the Secretary of State before the giving of an intervention notice but the existing time-limits in relation to possible references under section 22 or 33 were applicable for the purposes of the giving of that notice;
  - (i) the existing time-limits in relation to possible references under section 22 or 33 (except for extensions under section 25(4)) remained applicable on and after the giving of an intervention notice as if any extensions were made under section 25 as applied by subsection (5) above but subject to further alteration by the OFT or the Secretary of State under section 25 as so applied;
  - (j) in subsection (1) of section 31 for the words “section 22” there were substituted “ section 45(2) or (3) ” and, in the application of that subsection to the OFT, for the word “deciding” there were substituted “ enabling the Secretary of State to decide ”;
  - (k) in the case of the giving of intervention notices, the references in sections 23 to 32 to the making of a reference or a reference were, so far as necessary, references to the giving of an intervention notice or an intervention notice; and
  - (l) the references to the OFT in section 32(2)(a) to (c) and (3) were construed in accordance with the above modifications.
- (7) Where the Secretary of State has given an intervention notice mentioning a public interest consideration which, at that time, is not finalised, he shall, as soon as practicable, take such action as is within his power to ensure that it is finalised.
- (8) For the purposes of this Part a public interest consideration is finalised if—
- (a) it is specified in section 58 otherwise than by virtue of an order under subsection (3) of that section; or
  - (b) it is specified in that section by virtue of an order under subsection (3) of that section and the order providing for it to be so specified has been laid before, and approved by, Parliament in accordance with subsection (7) of section 124 and within the period mentioned in that subsection.

#### **43 Intervention notices under section 42**

- (1) An intervention notice shall state—
- (a) the relevant merger situation concerned;
  - (b) the public interest consideration or considerations which are, or may be, relevant to a consideration of the relevant merger situation concerned; and
  - (c) where any public interest consideration concerned is not finalised, the proposed timetable for finalising it.
- (2) Where the Secretary of State believes that it is or may be the case that two or more public interest considerations are relevant to a consideration of the relevant merger situation concerned, he may decide not to mention in the intervention notice such of those considerations as he considers appropriate.
- (3) An intervention notice shall come into force when it is given and shall cease to be in force when the matter to which it relates is finally determined under this Chapter.
- (4) For the purposes of this Part, a matter to which an intervention notice relates is finally determined under this Chapter if—

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- (a) the time within which the OFT is to report to the Secretary of State under section 44 has expired and no such report has been made;
  - (b) the Secretary of State decides to accept an undertaking or group of undertakings under paragraph 3 of Schedule 7 instead of making a reference under section 45;
  - (c) the Secretary of State otherwise decides not to make a reference under that section;
  - (d) the Commission cancels such a reference under section 48(1) or 53(1);
  - (e) the time within which the Commission is to prepare a report under section 50 and give it to the Secretary of State has expired and no such report has been prepared and given to the Secretary of State;
  - (f) the time within which the Secretary of State is to make and publish a decision under section 54(2) has expired and no such decision has been made and published;
  - (g) the Secretary of State decides under section 54(2) to make no finding at all in the matter;
  - (h) the Secretary of State otherwise decides under section 54(2) not to make an adverse public interest finding;
  - (i) the Secretary of State decides under section 54(2) to make an adverse public interest finding but decides neither to accept an undertaking under paragraph 9 of Schedule 7 nor to make an order under paragraph 11 of that Schedule; or
  - (j) the Secretary of State decides under section 54(2) to make an adverse public interest finding and accepts an undertaking under paragraph 9 of Schedule 7 or makes an order under paragraph 11 of that Schedule.
- (5) For the purposes of this Part the time when a matter to which an intervention notice relates is finally determined under this Chapter is—
- (a) in a case falling within subsection (4)(a), (e) or (f), the expiry of the time concerned;
  - (b) in a case falling within subsection (4)(b), the acceptance of the undertaking or group of undertakings concerned;
  - (c) in a case falling within subsection (4)(c), (d), (g) or (h), the making of the decision concerned;
  - (d) in a case falling within subsection (4)(i), the making of the decision neither to accept an undertaking under paragraph 9 of Schedule 7 nor to make an order under paragraph 11 of that Schedule; and
  - (e) in a case falling within subsection (4)(j), the acceptance of the undertaking concerned or (as the case may be) the making of the order concerned.

#### **44 Investigation and report by OFT**

- (1) Subsection (2) applies where the Secretary of State has given an intervention notice in relation to a relevant merger situation.
- (2) The OFT shall, within such period as the Secretary of State may require, give a report to the Secretary of State in relation to the case.
- (3) The report shall contain—
  - (a) advice from the OFT on the considerations relevant to the making of a reference under section 22 or 33 which are also relevant to the Secretary of State's decision as to whether to make a reference under section 45; and

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- (b) a summary of any representations about the case which have been received by the OFT and which relate to any public interest consideration mentioned in the intervention notice concerned and which is or may be relevant to the Secretary of State's decision as to whether to make a reference under section 45.
- (4) The report shall, in particular, include decisions as to whether the OFT believes that it is, or may be, the case that—
- (a) a relevant merger situation has been created or arrangements are in progress or in contemplation which, if carried into effect, will result in the creation of a relevant merger situation;
  - (b) the creation of that situation has resulted, or may be expected to result, in a substantial lessening of competition within any market or markets in the United Kingdom for goods or services;
  - (c) the market or markets concerned would not be of sufficient importance to justify the making of a reference to the Commission under section 22 or 33;
  - (d) in the case of arrangements which are in progress or in contemplation, the arrangements are not sufficiently far advanced, or not sufficiently likely to proceed, to justify the making of such a reference;
  - (e) any relevant customer benefits in relation to the creation of the relevant merger situation concerned outweigh the substantial lessening of competition and any adverse effects of the substantial lessening of competition; or
  - (f) it would be appropriate to deal with the matter (disregarding any public interest considerations mentioned in the intervention notice concerned) by way of undertakings under paragraph 3 of Schedule 7.
- (5) If the OFT believes that it is or may be the case that it would be appropriate to deal with the matter (disregarding any public interest considerations mentioned in the intervention notice concerned) by way of undertakings under paragraph 3 of Schedule 7, the report shall contain descriptions of the undertakings which the OFT believes are, or may be, appropriate.
- (6) The report may, in particular, include advice and recommendations on any public interest consideration mentioned in the intervention notice concerned and which is or may be relevant to the Secretary of State's decision as to whether to make a reference under section 45.
- (7) The OFT shall carry out such investigations as it considers appropriate for the purposes of producing a report under this section.

VALID FROM 29/12/2003

**[<sup>F1</sup>44A Additional investigation and report by OFCOM: media mergers**

- (1) Subsection (2) applies where—
  - (a) the Secretary of State has given an intervention notice in relation to a relevant merger situation; and
  - (b) the intervention notice mentions any media public interest consideration.
- (2) OFCOM shall, within such period as the Secretary of State may require, give a report to the Secretary of State on the effect of the consideration or considerations concerned on the case.

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- (3) The report shall contain—
- (a) advice and recommendations on any media public interest consideration mentioned in the intervention notice concerned and which is or may be relevant to the Secretary of State's decision as to whether to make a reference under section 45; and
  - (b) a summary of any representations about the case which have been received by OFCOM and which relate to any such consideration.
- (4) OFCOM shall carry out such investigations as they consider appropriate for the purposes of producing a report under this section.]

#### Textual Amendments

- F1** S. 44A inserted (29.12.2003) by [Communications Act 2003 \(c. 21\)](#), **ss. 377, 411(2)(3)** (with transitional provisions in [Sch. 18](#)); [S.I. 2003/3142](#), **art. 3(1)**, [Sch. 1](#) (subject to [arts. 3\(3\), 11](#))

#### 45 Power of Secretary of State to refer matter to Commission

- (1) Subsections (2) to (5) apply where the Secretary of State—
- (a) has given an intervention notice in relation to a relevant merger situation; and
  - (b) has received a report of the OFT under section 44 in relation to the matter.
- (2) The Secretary of State may make a reference to the Commission if he believes that it is or may be the case that—
- (a) a relevant merger situation has been created;
  - (b) the creation of that situation has resulted, or may be expected to result, in a substantial lessening of competition within any market or markets in the United Kingdom for goods or services;
  - (c) one or more than one public interest consideration mentioned in the intervention notice is relevant to a consideration of the relevant merger situation concerned; and
  - (d) taking account only of the substantial lessening of competition and the relevant public interest consideration or considerations concerned, the creation of that situation operates or may be expected to operate against the public interest.
- (3) The Secretary of State may make a reference to the Commission if he believes that it is or may be the case that—
- (a) a relevant merger situation has been created;
  - (b) the creation of that situation has not resulted, and may be expected not to result, in a substantial lessening of competition within any market or markets in the United Kingdom for goods or services;
  - (c) one or more than one public interest consideration mentioned in the intervention notice is relevant to a consideration of the relevant merger situation concerned; and
  - (d) taking account only of the relevant public interest consideration or considerations concerned, the creation of that situation operates or may be expected to operate against the public interest.

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- (4) The Secretary of State may make a reference to the Commission if he believes that it is or may be the case that—
- (a) arrangements are in progress or in contemplation which, if carried into effect, will result in the creation of a relevant merger situation;
  - (b) the creation of that situation may be expected to result in a substantial lessening of competition within any market or markets in the United Kingdom for goods or services;
  - (c) one or more than one public interest consideration mentioned in the intervention notice is relevant to a consideration of the relevant merger situation concerned; and
  - (d) taking account only of the substantial lessening of competition and the relevant public interest consideration or considerations concerned, the creation of the relevant merger situation may be expected to operate against the public interest.
- (5) The Secretary of State may make a reference to the Commission if he believes that it is or may be the case that—
- (a) arrangements are in progress or in contemplation which, if carried into effect, will result in the creation of a relevant merger situation;
  - (b) the creation of that situation may be expected not to result in a substantial lessening of competition within any market or markets in the United Kingdom for goods or services;
  - (c) one or more than one public interest consideration mentioned in the intervention notice is relevant to a consideration of the relevant merger situation concerned; and
  - (d) taking account only of the relevant public interest consideration or considerations concerned, the creation of the relevant merger situation may be expected to operate against the public interest.
- (6) For the purposes of this Chapter any anti-competitive outcome shall be treated as being adverse to the public interest unless it is justified by one or more than one public interest consideration which is relevant.
- (7) This section is subject to section 46.

#### **46 References under section 45: supplementary**

- (1) No reference shall be made under section 45 if—
- (a) the making of the reference is prevented by section 69(1), 74(1) or 96(3) or paragraph 4 of Schedule 7; or
  - (b) the European Commission is considering a request made, in relation to the matter concerned, by the United Kingdom (whether alone or with others) under article 22(3) of the European Merger Regulations, is proceeding with the matter in pursuance of such a request or has dealt with the matter in pursuance of such a request.
- (2) The Secretary of State, in deciding whether to make a reference under section 45, shall accept the decisions of the OFT included in its report by virtue of subsection (4) of section 44 and any descriptions of undertakings as mentioned in subsection (5) of that section.

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- (3) Where the decision to make a reference under section 45 is made at any time on or after the end of the period of 24 weeks beginning with the giving of the intervention notice concerned, the Secretary of State shall, in deciding whether to make such a reference, disregard any public interest consideration which is mentioned in the intervention notice but which has not been finalised before the end of that period.
- (4) Subject to subsection (5), where the decision to make a reference under section 45(2) or (4) is made at any time before the end of the period of 24 weeks beginning with the giving of the intervention notice concerned, the Secretary of State shall, in deciding whether to make such a reference, disregard any public interest consideration which is mentioned in the intervention notice but which has not been finalised if its effect would be to prevent, or to help to prevent, an anti-competitive outcome from being adverse to the public interest.
- (5) The Secretary of State may, if he believes that there is a realistic prospect of the public interest consideration mentioned in subsection (4) being finalised within the period of 24 weeks beginning with the giving of the intervention notice concerned, delay deciding whether to make the reference concerned until the public interest consideration is finalised or, if earlier, the period expires.
- (6) A reference under section 45 shall, in particular, specify—
  - (a) the subsection of that section under which it is made;
  - (b) the date on which it is made; and
  - (c) the public interest consideration or considerations mentioned in the intervention notice concerned which the Secretary of State is not under a duty to disregard by virtue of subsection (3) above and which he believes are or may be relevant to a consideration of the relevant merger situation concerned.

VALID FROM 01/05/2004

*<sup>F2</sup>Cases referred by European Commission under the EC Merger Regulation*

**Textual Amendments**

**F2** Ss. 46A-46C and cross-heading inserted (1.5.2004) by [The EC Merger Control \(Consequential Amendments\) Regulations 2004 \(S.I. 2004/1079\)](#), reg. 2, [Sch. para. 2\(15\)](#)

**46A Cases referred by the European Commission where intervention notice is in force**

- (1) Subsection (2) applies if the European Commission has by a decision referred the whole or part of a case to the OFT under Article 4(4) or 9 of the EC Merger Regulation, or is deemed to have taken such a decision, and an intervention notice is in force in relation to that case.
- (2) Before the end of the preliminary assessment period, the Secretary of State shall—
  - (a) decide whether to make a reference to the Commission under section 45; and
  - (b) inform the persons carrying on the enterprises concerned by notice of that decision and of the reasons for it.



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(3) The Secretary of State may, for the purposes of subsection (2), decide not to make a reference on the basis that he is considering whether to seek or accept undertakings under paragraph 3 of Schedule 7 instead of making a reference; but a decision taken on that basis does not prevent the Secretary of State from making a reference under section 45 in the event of no such undertakings being offered or accepted.

(4) In this section—

“the preliminary assessment period” means, subject to section 46B, the period of 45 working days beginning with the day after the day on which the decision of the European Commission to refer the case is taken (or is deemed to have been taken); and

“working day” means any day which is not—

- (a) a Saturday;
- (b) a Sunday; or
- (c) a day which is a European Commission holiday (as published in the Official Journal of the European Communities before the beginning of the year in which it occurs).

#### **46B Extension of preliminary assessment period**

(1) If the OFT has imposed a requirement under section 46C and it considers that the person on whom that requirement was imposed has failed to comply with it, the OFT may, by notice to the persons carrying on the enterprises concerned, extend the preliminary assessment period.

(2) If the Secretary of State has imposed a requirement under section 46C and he considers that the person on whom that requirement was imposed has failed to comply with it, he may, by notice to the persons carrying on the enterprises concerned, extend the preliminary assessment period.

(3) The period of an extension under this section shall—

- (a) begin with the end of the period within which the requirement under section 46C could be complied with; and
- (b) end with—
  - (i) in the case of a notice under subsection (1), the earlier of either compliance with the requirement to the satisfaction of the OFT or cancellation by the OFT of the extension.
  - (ii) in the case of a notice under subsection (2), the earlier of either compliance with the requirement to the satisfaction of the Secretary of State or cancellation by him of the extension.

(4) A notice under this section shall—

- (a) be given within 5 working days of the end of the period mentioned in subsection (3)(a); and
- (b) inform the person to whom it is addressed—
  - (i) in the case of a notice under subsection (1), that the OFT is of the opinion mentioned in that subsection and that it intends to extend the preliminary assessment period.
  - (ii) in the case of a notice under subsection (2), that the Secretary of State is of the opinion mentioned in that subsection and that he intends to extend the preliminary assessment period.

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#### **46C Power to request information in referred cases**

- (1) In a case mentioned in section 46A(1), the OFT may by notice to any of the persons carrying on the enterprises concerned request him to provide the OFT with such information as the OFT may require for the purpose of enabling the Secretary of State to make a decision for the purposes of section 46A(2).
- (2) In such a case, the Secretary of State may by notice to any of the persons carrying on the enterprises concerned request him to provide the Secretary of State with such information as he may require for the purpose of enabling him to make a decision for the purposes of section 46A(2).
- (3) A notice under subsection (1) or (2) shall state—
  - (a) the information required;
  - (b) the period within which the information is to be provided; and
  - (c) the manner (if any) in which the information is required to be provided; and
  - (d) the possible consequences—
    - (i) of not providing the information within the stated period; and
    - (ii) if a manner for its provision is stated in the notice, of not providing it in that manner.]

#### *Reports on references*

#### **47 Questions to be decided on references under section 45**

- (1) The Commission shall, on a reference under section 45(2) or (3), decide whether a relevant merger situation has been created.
- (2) If the Commission decides that such a situation has been created, it shall, on a reference under section 45(2), decide the following additional questions—
  - (a) whether the creation of that situation has resulted, or may be expected to result, in a substantial lessening of competition within any market or markets in the United Kingdom for goods or services; and
  - (b) whether, taking account only of any substantial lessening of competition and the admissible public interest consideration or considerations concerned, the creation of that situation operates or may be expected to operate against the public interest.
- (3) If the Commission decides that a relevant merger situation has been created, it shall, on a reference under section 45(3), decide whether, taking account only of the admissible public interest consideration or considerations concerned, the creation of that situation operates or may be expected to operate against the public interest.
- (4) The Commission shall, on a reference under section 45(4) or (5), decide whether arrangements are in progress or in contemplation which, if carried into effect, will result in the creation of a relevant merger situation.
- (5) If the Commission decides that such arrangements are in progress or in contemplation, it shall, on a reference under section 45(4), decide the following additional questions—

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- (a) whether the creation of that situation may be expected to result in a substantial lessening of competition within any market or markets in the United Kingdom for goods or services; and
  - (b) whether, taking account only of any substantial lessening of competition and the admissible public interest consideration or considerations concerned, the creation of that situation may be expected to operate against the public interest.
- (6) If the Commission decides that arrangements are in progress or in contemplation which, if carried into effect, will result in the creation of a relevant merger situation, it shall, on a reference under section 45(5), decide whether, taking account only of the admissible public interest consideration or considerations concerned, the creation of that situation may be expected to operate against the public interest.
- (7) The Commission shall, if it has decided on a reference under section 45 that the creation of a relevant merger situation operates or may be expected to operate against the public interest, decide the following additional questions—
- (a) whether action should be taken by the Secretary of State under section 55 for the purpose of remedying, mitigating or preventing any of the effects adverse to the public interest which have resulted from, or may be expected to result from, the creation of the relevant merger situation;
  - (b) whether the Commission should recommend the taking of other action by the Secretary of State or action by persons other than itself and the Secretary of State for the purpose of remedying, mitigating or preventing any of the effects adverse to the public interest which have resulted from, or may be expected to result from, the creation of the relevant merger situation; and
  - (c) in either case, if action should be taken, what action should be taken and what is to be remedied, mitigated or prevented.
- (8) Where the Commission has decided by virtue of subsection (2)(a) or (5)(a) that there is or will be a substantial lessening of competition within any market or markets in the United Kingdom for goods or services, it shall also decide separately the following questions (on the assumption that it is proceeding as mentioned in section 56(6))—
- (a) whether action should be taken by it under section 41 for the purpose of remedying, mitigating or preventing the substantial lessening of competition concerned or any adverse effect which has resulted from, or may be expected to result from, the substantial lessening of competition;
  - (b) whether the Commission should recommend the taking of action by other persons for the purpose of remedying, mitigating or preventing the substantial lessening of competition concerned or any adverse effect which has resulted from, or may be expected to result from, the substantial lessening of competition; and
  - (c) in either case, if action should be taken, what action should be taken and what is to be remedied, mitigated or prevented.
- (9) In deciding the questions mentioned in subsections (7) and (8) the Commission shall, in particular, have regard to the need to achieve as comprehensive a solution as is reasonable and practicable to—
- (a) the adverse effects to the public interest; or
  - (b) (as the case may be) the substantial lessening of competition and any adverse effects resulting from it.
- (10) In deciding the questions mentioned in subsections (7) and (8) in a case where it has decided by virtue of subsection (2)(a) or (5)(a) that there is or will be a substantial

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lessening of competition, the Commission may, in particular, have regard to the effect of any action on any relevant customer benefits in relation to the creation of the relevant merger situation concerned.

- (11) In this section “admissible public interest consideration” means any public interest consideration which is specified in the reference under section 45 and which the Commission is not under a duty to disregard.

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

- C1** Ss. 35, 36, 47, 63, 134 and 141 extended (20.6.2003) by 1977 c. 37, s. 50A(6) (as inserted by Enterprise Act 2002 (c. 40), ss. 278, 279, Sch. 25 para. 8(2)); S.I. 2003/1397 {art. 2(1)}, Sch. (with art. 8)

**48 Cases where references or certain questions need not be decided**

- (1) The Commission shall cancel a reference under section 45(4) or (5) if it considers that the proposal to make arrangements of the kind mentioned in that reference has been abandoned.
- (2) In relation to the question whether a relevant merger situation has been created or the question whether a relevant merger situation will be created, a reference under section 45 may be framed so as to require the Commission to exclude from consideration—
- (a) subsection (1) of section 23;
  - (b) subsection (2) of that section; or
  - (c) one of those subsections if the Commission finds that the other is satisfied.
- (3) In relation to the question whether any such result as is mentioned in section 23(2) (b) has arisen or the question whether any such result will arise, a reference under section 45 may be framed so as to require the Commission to confine its investigation to the supply of goods or services in a part of the United Kingdom specified in the reference.

**49 Variation of references under section 45**

- (1) The Commission may, if it considers that doing so is justified by the facts (including events occurring on or after the making of the reference concerned), treat—
- (a) a reference made under subsection (2) or (3) of section 45 as if it had been made under subsection (4) or (as the case may be) (5) of that section; or
  - (b) a reference made under subsection (4) or (5) of section 45 as if it had been made under subsection (2) or (as the case may be) (3) of that section;
- and, in such cases, references in this Part to references under those enactments shall, so far as may be necessary, be construed accordingly.
- (2) Where, by virtue of subsection (1), the Commission treats a reference made under subsection (2) or (3) of section 45 as if it had been made under subsection (4) or (as the case may be) (5) of that section, paragraphs 1, 2, 7 and 8 of Schedule 7 shall, in particular, apply as if the reference had been made under subsection (4) or (as the case may be) (5) of that section instead of under subsection (2) or (3) of that section.

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- (3) Where, by virtue of subsection (1), the Commission treats a reference made under subsection (4) or (5) of section 45 as if it had been made under subsection (2) or (as the case may be) (3) of that section, paragraphs 1, 2, 7 and 8 of Schedule 7 shall, in particular, apply as if the reference had been made under subsection (2) or (as the case may be) (3) of that section instead of under subsection (4) or (5) of that section.
- (4) Subsection (5) applies in relation to any undertaking accepted under paragraph 1 of Schedule 7, or any order made under paragraph 2 of that Schedule, which is in force immediately before the Commission, by virtue of subsection (1), treats a reference as mentioned in subsection (1).
- (5) The undertaking or order shall, so far as applicable, continue in force as if—
  - (a) in the case of an undertaking or order which relates to a reference under subsection (2) or (3) of section 45, accepted or made in relation to a reference made under subsection (4) or (as the case may be) (5) of that section; and
  - (b) in the case of an undertaking or order which relates to a reference made under subsection (4) or (5) of that section, accepted or made in relation to a reference made under subsection (2) or (as the case may be) (3) of that section;and the undertaking or order concerned may be varied, superseded, released or revoked accordingly.
- (6) The Secretary of State may at any time vary a reference under section 45.
- (7) The Secretary of State shall consult the Commission before varying any such reference.
- (8) Subsection (7) shall not apply if the Commission has requested the variation concerned.
- (9) No variation by the Secretary of State under this section shall be capable of altering the public interest consideration or considerations specified in the reference or the period permitted by section 51 within which the report of the Commission under section 50 is to be prepared and given to the Secretary of State.

## **50 Investigations and reports on references under section 45**

- (1) The Commission shall prepare a report on a reference under section 45 and give it to the Secretary of State within the period permitted by section 51.
- (2) The report shall, in particular, contain—
  - (a) the decisions of the Commission on the questions which it is required to answer by virtue of section 47;
  - (b) its reasons for its decisions; and
  - (c) such information as the Commission considers appropriate for facilitating a proper understanding of those questions and of its reasons for its decisions.
- (3) The Commission shall carry out such investigations as it considers appropriate for the purpose of producing a report under this section.

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## **51 Time-limits for investigations and reports by Commission**

- (1) The Commission shall prepare its report under section 50 and give it to the Secretary of State under that section within the period of 24 weeks beginning with the date of the reference concerned.
- (2) Where article 9(6) of the European Merger Regulations applies in relation to the reference under section 45, the Commission shall prepare its report under section 50 and give it to the Secretary of State—
  - (a) within the period of 24 weeks beginning with the date of the reference; or
  - (b) if it is a shorter period, within such period as is necessary to ensure compliance with that article.
- (3) The Commission may extend, by no more than 8 weeks, the period within which a report under section 50 is to be prepared and given to the Secretary of State if it considers that there are special reasons why the report cannot be prepared and given to the Secretary of State within that period.
- (4) The Commission may extend the period within which a report under section 50 is to be prepared and given to the Secretary of State if it considers that a relevant person has failed (whether with or without a reasonable excuse) to comply with any requirement of a notice under section 109.
- (5) In subsection (4) “relevant person” means—
  - (a) any person carrying on any of the enterprises concerned;
  - (b) any person who (whether alone or as a member of a group) owns or has control of any such person; or
  - (c) any officer, employee or agent of any person mentioned in paragraph (a) or (b).
- (6) For the purposes of subsection (5) a person or group of persons able, directly or indirectly, to control or materially to influence the policy of a body of persons corporate or unincorporate, but without having a controlling interest in that body of persons, may be treated as having control of it.
- (7) An extension under subsection (3) or (4) shall come into force when published under section 107.
- (8) An extension under subsection (4) shall continue in force until—
  - (a) the person concerned provides the information or documents to the satisfaction of the Commission or (as the case may be) appears as a witness in accordance with the requirements of the Commission; or
  - (b) the Commission publishes its decision to cancel the extension.
- (9) This section is subject to sections 52 and 53.

## **52 Section 51: supplementary**

- (1) No extension is possible under subsection (3) or (4) of section 51 where the period within which the report is to be prepared and given to the Secretary of State is determined by virtue of subsection (2)(b) of that section.
- (2) Where the period within which the report is to be prepared and given to the Secretary of State is determined by virtue of subsection (2)(a) of section 51, no extension is possible under subsection (3) or (4) of that section which extends that period beyond

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such period as is necessary to ensure compliance with article 9(6) of the European Merger Regulations.

- (3) A period extended under subsection (3) of section 51 may also be extended under subsection (4) of that section and a period extended under subsection (4) of that section may also be extended under subsection (3) of that section.
- (4) No more than one extension is possible under section 51(3).
- (5) Where a period within which a report under section 50 is to be prepared and given to the Secretary of State is extended or further extended under section 51(3) or (4), the period as extended or (as the case may be) further extended shall, subject to subsections (6) and (7), be calculated by taking the period being extended and adding to it the period of the extension (whether or not those periods overlap in time).
- (6) Subsection (7) applies where—
  - (a) the period within which the report under section 50 is to be prepared and given to the Secretary of State is further extended;
  - (b) the further extension and at least one previous extension is made under section 51(4); and
  - (c) the same days or fractions of days are included in or comprise the further extension and are included in or comprise at least one such previous extension.
- (7) In calculating the period of the further extension, any days or fractions of days of the kind mentioned in subsection (6)(c) shall be disregarded.
- (8) The Secretary of State may by order amend section 51 so as to alter any one or more of the following periods—
  - (a) the period of 24 weeks mentioned in subsection (1) of that section or any period for the time being mentioned in that subsection in substitution for that period;
  - (b) the period of 24 weeks mentioned in subsection (2)(a) of that section or any period for the time being mentioned in that subsection in substitution for that period;
  - (c) the period of 8 weeks mentioned in subsection (3) of that section or any period for the time being mentioned in that subsection in substitution for that period.
- (9) No alteration shall be made by virtue of subsection (8) which results in the period for the time being mentioned in subsection (1) or (2)(a) of section 51 exceeding 24 weeks or the period for the time being mentioned in subsection (3) of that section exceeding 8 weeks.
- (10) An order under subsection (8) shall not affect any period of time within which the Commission is under a duty to prepare and give to the Secretary of State its report under section 50 in relation to a reference under section 45 if the Commission is already under that duty in relation to that reference when the order is made.
- (11) Before making an order under subsection (8) the Secretary of State shall consult the Commission and such other persons as he considers appropriate.
- (12) The Secretary of State may make regulations for the purposes of section 51(8).
- (13) The regulations may, in particular—

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- (a) provide for the time at which information or documents are to be treated as provided (including the time at which they are to be treated as provided to the satisfaction of the Commission for the purposes of section 51(8));
- (b) provide for the time at which a person is to be treated as appearing as a witness (including the time at which he is to be treated as appearing as a witness in accordance with the requirements of the Commission for the purposes of section 51(8));
- (c) provide for the persons carrying on the enterprises which have or may have ceased to be, or may cease to be, distinct enterprises to be informed, in circumstances in which section 51(8) applies, of the fact that—
  - (i) the Commission is satisfied as to the provision of the information or documents required by it; or
  - (ii) the person concerned has appeared as a witness in accordance with the requirements of the Commission;
- (d) provide for the persons carrying on the enterprises which have or may have ceased to be, or may cease to be, distinct enterprises to be informed, in circumstances in which section 51(8) applies, of the time at which the Commission is to be treated as satisfied as mentioned in paragraph (c)(i) above or the person concerned is to be treated as having appeared as mentioned in paragraph (c)(ii) above.

### **53 Restrictions on action where public interest considerations not finalised**

- (1) The Commission shall cancel a reference under section 45 if—
  - (a) the intervention notice concerned mentions a public interest consideration which was not finalised on the giving of that notice or public interest considerations which, at that time, were not finalised;
  - (b) no other public interest consideration is mentioned in the notice;
  - (c) at least 24 weeks has elapsed since the giving of the notice; and
  - (d) the public interest consideration mentioned in the notice has not been finalised within that period of 24 weeks or (as the case may be) none of the public interest considerations mentioned in the notice has been finalised within that period of 24 weeks.
- (2) Where a reference to the Commission under section 45 specifies a public interest consideration which has not been finalised before the making of the reference, the Commission shall not give its report to the Secretary of State under section 50 in relation to that reference unless—
  - (a) the period of 24 weeks beginning with the giving of the intervention notice concerned has expired;
  - (b) the public interest consideration concerned has been finalised; or
  - (c) the report must be given to the Secretary of State to ensure compliance with article 9(6) of the European Merger Regulations.
- (3) The Commission shall, in reporting on any of the questions mentioned in section 47(2) (b), (3), (5)(b), (6) and (7), disregard any public interest consideration which has not been finalised before the giving of the report.
- (4) The Commission shall, in reporting on any of the questions mentioned in section 47(2) (b), (3), (5)(b), (6) and (7), disregard any public interest consideration which was not



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finalised on the giving of the intervention notice concerned and has not been finalised within the period of 24 weeks beginning with the giving of the notice concerned.

- (5) Subsections (1) to (4) are without prejudice to the power of the Commission to carry out investigations in relation to any public interest consideration to which it might be able to have regard in its report.

### *Decisions of the Secretary of State*

## **54 Decision of Secretary of State in public interest cases**

- (1) Subsection (2) applies where the Secretary of State has received a report of the Commission under section 50 in relation to a relevant merger situation.
- (2) The Secretary of State shall decide whether to make an adverse public interest finding in relation to the relevant merger situation and whether to make no finding at all in the matter.
- (3) For the purposes of this Part the Secretary of State makes an adverse public interest finding in relation to a relevant merger situation if, in relation to that situation, he decides—
- (a) in connection with a reference to the Commission under subsection (2) of section 45, that it is the case as mentioned in paragraphs (a) to (d) of that subsection or subsection (3) of that section;
  - (b) in connection with a reference to the Commission under subsection (3) of that section, that it is the case as mentioned in paragraphs (a) to (d) of that subsection;
  - (c) in connection with a reference to the Commission under subsection (4) of that section, that it is the case as mentioned in paragraphs (a) to (d) of that subsection or subsection (5) of that section; and
  - (d) in connection with a reference to the Commission under subsection (5) of that section, that it is the case as mentioned in paragraphs (a) to (d) of that subsection.
- (4) The Secretary of State may make no finding at all in the matter only if he decides that there is no public interest consideration which is relevant to a consideration of the relevant merger situation concerned.
- (5) The Secretary of State shall make and publish his decision under subsection (2) within the period of 30 days beginning with the receipt of the report of the Commission under section 50.
- (6) In making a decision under subsections (2) to (4), the Secretary of State shall disregard any public interest consideration not specified in the reference under section 45 and any public interest consideration disregarded by the Commission for the purposes of its report.
- (7) In deciding whether to make an adverse public interest finding under subsection (2), the Secretary of State shall accept—
- (a) in connection with a reference to the Commission under section 45(2) or (4), the decision of the report of the Commission under section 50 as to whether there is an anti-competitive outcome; and
  - (b) in connection with a reference to the Commission under section 45(3) or (5)—

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- (i) the decision of the report of the Commission under section 50 as to whether a relevant merger situation has been created or (as the case may be) arrangements are in progress or in contemplation which, if carried into effect, will result in the creation of a relevant merger situation; and
  - (ii) the decision of the report of the OFT under section 44 as to the absence of a substantial lessening of competition.
- (8) In determining for the purposes of subsection (5) the period of 30 days 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.

## **55 Enforcement action by Secretary of State**

- (1) Subsection (2) applies where the Secretary of State has decided under subsection (2) of section 54 within the period required by subsection (5) of that section to make an adverse public interest finding in relation to a relevant merger situation and has published his decision within the period so required.
- (2) The Secretary of State may take such action under paragraph 9 or 11 of Schedule 7 as he considers to be reasonable and practicable to remedy, mitigate or prevent any of the effects adverse to the public interest which have resulted from, or may be expected to result from, the creation of the relevant merger situation concerned.
- (3) In making a decision under subsection (2) the Secretary of State shall, in particular, have regard to the report of the Commission under section 50.
- (4) In making a decision under subsection (2) in any case of a substantial lessening of competition, the Secretary of State may, in particular, have regard to the effect of any action on any relevant customer benefits in relation to the creation of the relevant merger situation concerned.

*Other*

## **56 Competition cases where intervention on public interest grounds ceases**

- (1) Where the Secretary of State decides not to make a reference under section 45 on the ground that no public interest consideration to which he is able to have regard is relevant to a consideration of the relevant merger situation concerned, he shall by notice require the OFT to deal with the matter otherwise than under this Chapter.
- (2) Where a notice is given to the OFT in the circumstances mentioned in subsection (1), the OFT shall decide whether to make a reference under section 22 or 33; and any time-limits in relation to the Secretary of State's decision whether to make a reference under section 45 (including any remaining powers of extension) shall apply in relation to the decision of the OFT whether to make a reference under section 22 or 33.
- (3) Where the Commission cancels under section 53(1) a reference under section 45 and the report of the OFT under section 44 contains the decision that it is or may be the case that there is an anti-competitive outcome in relation to the relevant merger situation concerned, the Commission shall proceed under this Part as if a reference under section 22 or (as the case may be) 33 had been made to it by the OFT.

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- (4) In proceeding by virtue of subsection (3) to prepare and publish a report under section 38, the Commission shall proceed as if—
- (a) the reference under section 22 or 33 had been made at the same time as the reference under section 45;
  - (b) the timetable for preparing and giving its report under section 50 (including any remaining powers of extension and as extended by an additional period of 20 days) were the timetable for preparing and publishing its report under section 38; and
  - (c) in relation to the question whether a relevant merger situation has been created or the question whether arrangements are in progress or in contemplation which, if carried into effect, will result in the creation of a relevant merger situation, the Commission were confined to the questions on the subject to be investigated by it under section 47.
- (5) In determining the period of 20 days mentioned in subsection (4) 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.
- (6) Where the Secretary of State decides under section 54(2) to make no finding at all in the matter in connection with a reference under section 45(2) or (4), the Commission shall proceed under this Part as if a reference under section 22 or (as the case may be) 33 had been made to it instead of a reference under section 45 and as if its report to the Secretary of State under section 50 had been prepared and published by it under section 38 within the period permitted by section 39.
- (7) In relation to proceedings by virtue of subsection (6), the reference in section 41(3) to decisions of the Commission as included in its report by virtue of section 35(3) or 36(2) shall be construed as a reference to decisions which were included in the report of the Commission by virtue of section 47(8).
- (8) Where the Commission becomes under a duty to proceed as mentioned in subsection (3) or (6), references in this Part to references under sections 22 and 33 shall, so far as may be necessary, be construed accordingly; and, in particular, sections 77 to 81 shall apply as if a reference has been made to the Commission by the OFT under section 22 or (as the case may be) 33.

## **57 Duties of OFT and Commission to inform Secretary of State**

- (1) The OFT shall, in considering whether to make a reference under section 22 or 33, bring to the attention of the Secretary of State any case which it believes raises any consideration specified in section 58 unless it believes that the Secretary of State would consider any such consideration immaterial in the context of the particular case.
- (2) The OFT and the Commission shall bring to the attention of the Secretary of State any representations about exercising his powers under section 58(3) which have been made to the OFT or (as the case may be) the Commission.

## **58 Specified considerations**

- (1) The interests of national security are specified in this section.

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- (2) In subsection (1) “national security” includes public security; and in this subsection “public security” has the same meaning as in article 21(3) of the European Merger Regulations.
- (3) The Secretary of State may by order modify this section for the purpose of specifying in this section a new consideration or removing or amending any consideration which is for the time being specified in this section.
- (4) An order under this section may, in particular—
  - (a) provide for a consideration to be specified in this section for a particular purpose or purposes or for all purposes;
  - (b) apply in relation to cases under consideration by the OFT, the Commission or the Secretary of State before the making of the order as well as cases under consideration on or after the making of the order.

VALID FROM 29/12/2003

#### **[<sup>F3</sup>58A Construction of consideration specified in section 58(2C)**

- (1) For the purposes of section 58 and this section an enterprise is a media enterprise if it consists in or involves broadcasting.
- (2) In the case of a merger situation in which at least one of the enterprises ceasing to be distinct consists in or involves broadcasting, the references in section 58(2C)(a) or this section to media enterprises include references to newspaper enterprises.
- (3) In this Part “newspaper enterprise” means an enterprise consisting in or involving the supply of newspapers.
- (4) Wherever in a merger situation two media enterprises serving the same audience cease to be distinct, the number of such enterprises serving that audience shall be assumed to be more immediately before they cease to be distinct than it is afterwards.
- (5) For the purposes of section 58, where two or more media enterprises—
  - (a) would fall to be treated as under common ownership or common control for the purposes of section 26, or
  - (b) are otherwise in the same ownership or under the same control,
 they shall be treated (subject to subsection (4)) as all under the control of only one person.
- (6) A reference in section 58 or this section to an audience shall be construed in relation to a media enterprise in whichever of the following ways the decision-making authority considers appropriate—
  - (a) as a reference to any one of the audiences served by that enterprise, taking them separately;
  - (b) as a reference to all the audiences served by that enterprise, taking them together;
  - (c) as a reference to a number of those audiences taken together in such group as the decision-making authority considers appropriate; or
  - (d) as a reference to a part of anything that could be taken to be an audience under any of paragraphs (a) to (c) above.

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- (7) The criteria for deciding who can be treated for the purposes of this section as comprised in an audience, or as comprised in an audience served by a particular service—
- (a) shall be such as the decision-making authority considers appropriate in the circumstances of the case; and
  - (b) may allow for persons to be treated as members of an audience if they are only potentially members of it.
- (8) In this section “audience” includes readership.
- (9) The power under subsection (3) of section 58 to modify that section includes power to modify this section.]

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#### **Textual Amendments**

- F3** S. 58A inserted (29.12.2003) by [Communications Act 2003 \(c. 21\)](#), **ss. 375(2)**, 411(2)(3) (with transitional provisions in [Sch. 18](#)); [S.I. 2003/3142](#), **art. 3(1)**, [Sch. 1](#) (subject to arts. 3(3), 11)

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