

EXPLANATORY MEMORANDUM TO THE

The Water Mergers (Determination of Turnover) Regulations 2004

2004 No. 3206

- 1.** This explanatory memorandum has been prepared by the Department of Trade and Industry and is laid before Parliament by Command of Her Majesty.

This memorandum contains information for the Joint Committee on Statutory Instruments.

2. Description

2.1 These regulations set out how the turnover of a water enterprise is to be determined for the purposes of section 33 of the Water Industry Act 1991 (“WIA 1991”) as amended by the Enterprise Act 2002 (“EA 2002”)

3. Matters of special interest to the Joint Committee on Statutory Instruments

3.1 None

4. Legislative background

4.1 Section 32 of the WIA 1991 (as amended by the EA 2002) places a duty on the Office of Fair Trading to refer a merger of water enterprises to the Competition Commission. This duty is qualified by section 33 of the WIA 1991 which provides that the Office of Fair Trading shall not make a reference under section 32 if either the turnover of either the water enterprise which is being taken over or the turnover of any water enterprise which belongs to the person making the take over is below a qualifying threshold of £10 million.

4.2 The provisions of the EA 2002 amending the water merger provisions of the WIA 1991 are now being commenced. These regulations will enable the turnover of a water enterprise to be calculated for the purposes of section 33 of the WIA 1991 (as amended). This is the first use of the power in section 33(4) to (6) of the WIA 1991 (as amended by the EA 2002).

4.3 This statutory instrument is one of three needed to bring the revised WIA 1991 merger regime into force. The others are the Water Mergers (Modification of Enactments) Regulations 2004 and the Enterprise Act 2002 (Merger Fees and Determination of Turnover (Amendment) Order 2004. The Commencement Order is the Enterprise Act 2002 (Commencement No. 7 and Transitional Provisions and Savings) Order 2004.

5. Extent

5.1 This instrument extends to England and Wales.

6. European Convention on Human Rights

Not applicable.

7. Policy background

7.1 The EA 2002 repealed the merger provisions of the Fair Trading Act 1973 and introduced a revised merger regime. As well as moving away from the old “public interest” test to one based on the effects of the merger on competition, the Act made independent competition authorities determinative on all cases save those raising narrowly defined public interest considerations, and replaced the old qualifying threshold for investigation, based on the value of assets acquired, with one based on the UK turnover of the enterprise acquired (which better reflects the economic power of an enterprise).

7.2 Mergers between water enterprises (water and sewerage undertakers) are subject to a special regime, set out in the WIA 1991 which provide for mandatory reference to the Competition Commission if certain thresholds relating to the value of the water assets being taken over and those of the acquirer are exceeded. The purpose of this regime is to preserve the ability of the Director General of Water Services (DGWS) to make use of “comparative” or “yardstick” regulation (i.e. the ability to compare the performance of different water enterprises for the purposes of setting robust price and customer service standards). In the absence of any significant competition in the water sector, such regulation is regarded as a particularly important regulatory tool.

7.3 The EA 2002 included provisions to update the WIA 1991 in line with the changes to the general mergers regime, but it did not change the thrust of the water mergers regime, with its focus on allowing the DGWS to make comparisons between different water enterprises. The main changes are to replace the asset threshold with a turnover threshold for determining whether a merger between water enterprises qualifies for a mandatory reference to the Competition Commission; the transfer of the responsibility for making such references, and for taking a decision on remedies in the event of an adverse finding by the Competition Commission, from the Secretary of State to the Office of Fair Trading and a reduction in the length of time in which to make a reference in the case of a completed merger from six months to four months.

7.4 These regulations enable the turnover to be calculated for the purposes of determining whether a merger falls within section 33 of the WIA 1991 and so will not be referred to the Competition Commission by the Office of Fair Trading under section 32. The Department consulted each of the water and sewerage undertakers, the CB1, WaterVoice, the industry regulator and selected firms of solicitors specialising in competition law.

7.5 None of the comments made in the consultation has resulted in a significant revision of the Regulations. The principal concerns were the meaning of the phrase “material influence”, the need to define which water enterprises belong to the person making the turnover for the purposes of section 33(1)(b) of the WIA 1991 and the desirability of raising the threshold in section 33 above a turnover of £10 million. The

draft Regulations were not amended because Office of Fair Trading has published guidance on the meaning of material influence and the vires of section 33(4) do not extend either to defining water enterprises belonging to a person making a take over for the purposes of section 33(1)(b) or to raising the threshold set by section 33 of the WIA 1991.

7.6 As the turnover threshold of £10 million contained in section 33 of the WIA 1991 (as amended by the EA 2002) is expected to catch the same number of mergers of water enterprises as are caught by the assets threshold test contained in the section prior to amendment the enactment of these Regulations is not politically or legally important.

8. Impact

8.1 A Regulatory Impact Assessment has not been prepared for this instrument, as it has no impact on business, charities or voluntary bodies.

8.2 There is no impact on the public sector.

9. Contact

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