
DRAFT STATUTORY INSTRUMENTS

2003 No.

**The Enterprise Act 2002 (Protection
of Legitimate Interests) Order 2003**

Citation, commencement and interpretation

1.—(1) This Order may be cited as the Enterprise Act 2002 (Protection of Legitimate Interests) Order 2003 and shall come into force on 20th June 2003.

(2) In this Order—

“the Act” means the Enterprise Act 2002;

“a European intervention notice” means a notice given by the Secretary of State to the OFT pursuant to section 67 of the Act;

“public interest consideration” means a consideration which, at the time of the giving of the European intervention notice concerned, is specified in section 58 of the Act, or is not so specified but, in the opinion of the Secretary of State, ought to be so specified.

Determination of a relevant merger situation

2. 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, for the purposes of section 68(2)(a) of the Act and this Order, sections 23 to 32 of the Act (read together with section 34 of the Act and any Order made pursuant to that section) shall apply, but subject to the modifications mentioned in Schedule 1.

European intervention notices under section 67 of the Act

3.—(1) A European 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 in accordance with paragraphs (2) and (3).

(2) A matter to which a European intervention notice relates is finally determined if—

- (a) the time within which the OFT is to report to the Secretary of State under article 4 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 2 instead of making a reference under article 5;
- (c) the Secretary of State otherwise decides not to make a reference under article 5;
- (d) the Commission cancels such a reference under article 7(1) or article 11(1);
- (e) the time within which the Commission is to prepare a report under article 8 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 article 12(2) has expired and no such decision has been made and published;

- (g) the Secretary of State decides under paragraph (2) of article 12 otherwise than as mentioned in paragraph (6) of that article;
 - (h) the Secretary of State decides under paragraph (2) of article 12 as mentioned in paragraph (6) of that article but decides neither to accept an undertaking under paragraph 9 of Schedule 2 nor to make an order under paragraph 11 of that Schedule; or
 - (i) the Secretary of State decides under paragraph (2) of article 12 as mentioned in paragraph (6) of that article and accepts an undertaking under paragraph 9 of Schedule 2 or makes an order under paragraph 11 of that Schedule.
- (3) The time when a matter to which a European intervention notice relates is finally determined is—
- (a) in a case falling within paragraph (2)(a), (e) or (f), the expiry of the time concerned;
 - (b) in a case falling within paragraph (2)(b), the acceptance of the undertaking or group of undertakings concerned;
 - (c) in a case falling within paragraph (2)(c), (d) or (g), the making of the decision concerned;
 - (d) in a case falling within paragraph (2)(h), the making of the decision neither to accept an undertaking under paragraph 9 of Schedule 2 nor to make an order under paragraph 11 of that Schedule; and
 - (e) in a case falling within paragraph (2)(i), the acceptance of the undertakings concerned or (as the case may be) the making of the order concerned.

Initial investigation and report by OFT

4.—(1) Paragraph (2) applies where the Secretary of State has given a European intervention notice in relation to a relevant merger situation under section 67 of the Act.

(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 of the Act which are also relevant to the Secretary of State's decision as to whether to make a reference under article 5; and
- (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 European 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 article 5.

(4) The report shall include a decision as to whether the OFT believes that it is, or may be, the case that a European 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 European relevant merger situation.

(5) The report may, in particular, include advice and recommendations on any public interest consideration mentioned in the European 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 article 5.

(6) The OFT shall carry out such investigations as it considers appropriate for the purpose of producing a report under this article.

Power of Secretary of State to refer the matter

5.—(1) Paragraphs (2) and (3) apply where the Secretary of State—

- (a) has given a European intervention notice in relation to a relevant merger situation; and

- (b) has received a report of the OFT under article 4 in relation to the matter.
- (2) The Secretary of State may make a reference to the Commission if she believes that it is or may be the case that—
 - (a) a European relevant merger situation has been created;
 - (b) one or more than one public interest consideration mentioned in the European intervention notice is relevant to a consideration of the European relevant merger situation concerned; and
 - (c) 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.
- (3) The Secretary of State may make a reference to the Commission if she 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 European relevant merger situation;
 - (b) one or more than one public interest consideration mentioned in the European intervention notice is relevant to a consideration of the European relevant merger situation concerned; and
 - (c) 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.
- (4) No reference shall be made under this article if the making of the reference is prevented by section 69(1) of the Act or paragraph 4 of Schedule 2.
- (5) The Secretary of State, in deciding whether to make a reference under this article, shall accept the decision of the OFT included in its report under article 4 by virtue of paragraph (4) of that article.
- (6) Where the decision to make a reference under article 5 is made at any time on or after the end of the period of 24 weeks beginning with the giving of the European 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 European intervention notice but which has not been finalised before the end of that period.
- (7) The Secretary of State may, if she believes that there is a realistic prospect of the public interest consideration mentioned in paragraph (6) being finalised within the period of 24 weeks beginning with the giving of the European intervention notice concerned, delay deciding whether to make the reference concerned until the public interest consideration is finalised or, if earlier, the period expires.
- (8) A reference under this article shall, in particular, specify—
 - (a) the paragraph of this article under which it is made;
 - (b) the date on which it is made; and
 - (c) the public interest consideration or considerations mentioned in the European intervention notice concerned which the Secretary of State is not under a duty to disregard by virtue of paragraph (6) and which she believes are or may be relevant to a consideration of the relevant merger situation concerned.

Questions to be decided on references under article 5

6.—(1) The Commission shall, on a reference under article 5(2), decide whether a European relevant merger situation has been created.

(2) The Commission shall, on a reference under article 5(3), decide whether arrangements are in progress or in contemplation which, if carried into effect, will result in the creation of a European relevant merger situation.

(3) If the Commission decides that a European 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 European relevant merger situation, it shall, on a reference under article 5, 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, if it has decided on a reference under article 5 that the creation of a European 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 article 12 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 European relevant merger situation concerned;
- (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 European relevant merger situation concerned; and
- (c) in either case, if action should be taken, what action should be taken and what is to be remedied, mitigated or prevented.

(5) In this article “admissible public interest consideration” means any public interest consideration which is specified in the reference under article 5 and which the Commission is not under a duty to disregard.

Cancellation or variation of references under article 5

7.—(1) The Commission shall cancel a reference under article 5(3) if it considers that the proposal to make arrangements of the kind mentioned in the reference has been abandoned.

(2) In relation to the question whether a European relevant merger situation has been created or the question whether a European relevant merger situation will be created, a reference under article 5 may be framed so as to require the Commission to exclude from consideration—

- (a) subsection (1) of section 23 of the Act;
- (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) of the Act has arisen or the question whether any such result will arise, a reference under article 5 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.

(4) 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 reference made under paragraph (2) or (3) of article 5 as if it had been made under paragraph (3) or (as the case may be) (2) of that article; and, in such cases, references in this Order to references under those enactments shall, so far as may be necessary, be construed accordingly.

(5) Where by virtue of paragraph (4), the Commission treats a reference made under paragraph (2) or (3) of article 5 as if it had been made under paragraph (3) or (as the case may be) (2) of that article, paragraphs 1, 2, 7 and 8 of Schedule 2, in particular, apply as if the reference had been made

under paragraph (3) or (as the case may be) (2) of that article instead of under paragraph (2) or (3) of that article.

(6) Paragraph (7) applies in relation to any undertaking accepted under paragraph 1 of Schedule 2, or any order made under paragraph 2 of that Schedule, which is in force immediately before the Commission, by virtue of paragraph (4), treats a reference made under paragraph (2) or (3) of article 5 as if it had been made under paragraph (3) or (as the case may be) (2) of that article.

(7) The undertaking or order shall, so far as applicable, continue in force as if it were—

- (a) in the case of an undertaking or order which relates to a reference under paragraph (2) of article 5, accepted or made in relation to a reference made under paragraph (3) of that article; and
- (b) in the case of an undertaking or order which relates to a reference made under paragraph (3) of that article, accepted or made in relation to a reference made under paragraph (2) of that article;

and the undertaking or order concerned may be varied, superseded, released or revoked accordingly.

(8) The Secretary of State may at any time vary a reference under article 5.

(9) The Secretary of State shall consult the Commission before varying any such reference.

(10) Paragraph (9) shall not apply if the Commission has requested the variation concerned.

(11) No variation by the Secretary of State under this article shall be capable of altering the public interest consideration or considerations specified in the reference or the period permitted by virtue of article 8 within which the report of the Commission under that article is to be prepared and given to the Secretary of State.

Investigations and reports on references under article 5

8.—(1) The Commission shall prepare a report on a reference under article 5 and give it to the Secretary of State within the period permitted by article 9.

(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 article 6;
- (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 article.

Time-limits and investigations and reports by Commission

9.—(1) The Commission shall prepare its report under article 8 and give it to the Secretary of State under that article within the period of 24 weeks beginning with the date of the reference concerned.

(2) The Commission may extend, by no more than 8 weeks, the period within which a report under article 8 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.

(3) The Commission may extend the period within which a report under article 8 is 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 of the Act.

(4) In paragraph (3) “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 sub-paragraph (a) or (b).

(5) For the purposes of paragraph (4) 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.

(6) An extension under paragraph (2) or (3) shall come into force when published in accordance with article 14.

(7) An extension under paragraph (3) 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.

Article 9: supplementary

10.—(1) A period extended under paragraph (2) of article 9 may also be extended under paragraph (3) of that article and a period extended under paragraph (3) of that article may also be extended under paragraph (2) of that article.

(2) No more than one extension is possible under article 9(2).

(3) Where a period within which a report under article 8 is prepared and given to the Secretary of State is extended or further extended under article 9(2) or (3), the period as extended or (as the case may be) further extended, shall, subject to paragraphs (4) and (5), 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).

(4) Paragraph (5) applies where—

(a) the period within which the report under article 8 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 article 9(3); 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.

(5) In calculating the period of the further extension, any days or fractions of days of the kind mentioned in paragraph (4)(c) shall be disregarded.

(6) Any Regulations made pursuant to section 52(12) of the Act shall apply for the purposes of article 9(7).

Restrictions on action where public interest considerations not finalised

11.—(1) The Commission shall cancel a reference under article 5 if—

(a) the European intervention notice concerned mentions a public interest consideration which was not finalised on the giving of that notice or public interest considerations which, at the 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 article 5 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 article 8 in relation to that reference unless—

- (a) the period of 24 weeks beginning with the giving of the European intervention notice has expired; or
- (b) the public interest consideration has been finalised.

(3) The Commission shall, in reporting on any of the questions mentioned in article 6(3) and (4), disregard any public interest consideration which was not finalised on the giving of the European intervention notice and has not been finalised within the period of 24 weeks beginning with the giving of the notice concerned.

(4) Paragraphs (1) to (3) 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.

Decision and enforcement by Secretary of State

12.—(1) Paragraph (2) applies where the Secretary of State has received a report of the Commission under article 8 in relation to a European relevant merger situation.

(2) The Secretary of State shall, in connection with a reference under article 5(2) or (3), decide the questions which the Commission is required to decide by virtue of article 6(1) to (3).

(3) The Secretary of State shall publish her decision under paragraph (2) within a period of 30 days beginning with the receipt of the report of the Commission under article 8.

(4) In making her decisions under paragraph (2), the Secretary of State shall disregard any public interest consideration not specified in the reference under article 5 and any public interest consideration disregarded by the Commission for the purposes of its report.

(5) In making her decisions under paragraph (2), the Secretary of State shall accept the decisions of the report of the Commission under article 8 as to whether a European 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 European relevant merger situation.

(6) Paragraph (7) applies where the Secretary of State has decided under paragraph (2) that—

- (a) a European 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 European relevant merger situation;
- (b) at least one public interest consideration which is mentioned in the European intervention notice concerned is relevant to a consideration of the European relevant merger situation concerned; and
- (c) 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;

and has so decided, and published her decision, within the period required by paragraph (3).

(7) The Secretary of State may take such action under paragraph 9 or 11 of Schedule 2 as she considers 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 European relevant merger situation concerned.

(8) In making a decision under paragraph (7), the Secretary of State shall, in particular, have regard to the report of the Commission under article 8.

(9) In determining for the purpose of paragraph (3) 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.

Enforcement action in European intervention notice cases

13.—(1) Schedule 2 (which provides for enforcement action in European intervention notice cases) shall have effect.

(2) The OFT may advise the Secretary of State in relation to the taking by her of enforcement action under Schedule 2.

Publicity requirements

14.—(1) The Commission shall publish—

- (a) any cancellation made by it under article 7(1) of a reference under article 5;
- (b) any extension by it under article 9 of the period within which a report under article 8 is to be prepared and published;
- (c) any decision made by it under article 9(7)(b) to cancel such an extension; and
- (d) any decision made by it under article 7(4) to treat a reference made under paragraph (2) or (3) of article 5 as if it had been made under paragraph (3) or (as the case may be) (2) of that article.

(2) The Secretary of State shall publish—

- (a) any European intervention notice given by her;
- (b) any report of the OFT under article 4 which has been received by her;
- (c) any reference made by her under article 5 or any decision made by her not to make a reference;
- (d) any variation by her under article 7 of a reference under article 5;
- (e) any report of the Commission under article 8 which has been received by her;
- (f) any decision made by her neither to accept an undertaking under paragraph 9 of Schedule 2 nor to make an order under paragraph 11 of that Schedule;
- (g) any enforcement undertaking accepted by her under paragraph 1 of Schedule 2;
- (h) any variation or release of such an undertaking;
- (i) any decision made by her as mentioned in paragraph 6(6)(b) of Schedule 2; and
- (j) any decision to dispense with the requirements of Schedule 10 of the Act.

(3) Where any person is under a duty by virtue of paragraphs (1) or (2) to publish the result of any action taken by that person or any decision made by that person, the person concerned shall, subject to paragraph (4), also publish that person's reasons for the action concerned or (as the case may be) the decision concerned.

(4) Such reasons need not, if it is not reasonably practicable to do so, be published at the same time as the result of the action concerned or (as the case may be) as the decision concerned.

(5) The Secretary of State shall publish her reasons for any decision made by her under article 12(2).

(6) Such reasons may be published after the publication of the decision concerned if it is not reasonably practicable to publish them at the same time as the publication of the decision.

(7) The Secretary of State shall publish—

- (a) the report of the OFT under article 4 in relation to a matter no later than publication of her decision as to whether to make a reference under article 5 in relation to that matter; and
- (b) the report of the Commission under article 8 in relation to a matter no later than publication of her decision under article 12(2) in relation to that matter.

(8) Where the Secretary of State has decided under article 12(7) to accept an undertaking under paragraph 9 of Schedule 2 or to make an order under paragraph 11 of that Schedule, she shall (after the acceptance of the undertaking or (as the case may be) the making of the order) lay details of her decision and her reasons for it, and the Commission's report under article 8, before each House of Parliament.

Other provisions of the Act applicable to this Order

15. The other provisions of the Act mentioned in Schedule 3 shall apply for the purposes of this Order with the modifications mentioned in that Schedule.

Consequential amendments

16. Schedule 4 (which contains consequential amendments) shall have effect.

2003

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Competition, Consumers and Markets,
Department of Trade and Industry