



Enterprise Act 2002

2002 CHAPTER 40

PART 3

MERGERS

CHAPTER 5

SUPPLEMENTARY

Other

124 Orders and regulations under Part 3

- (1) Any power of the Secretary of State to make an order or regulations under this Part shall be exercisable by statutory instrument.
- (2) Any power of the Secretary of State to make an order or regulations under this Part—
 - (a) may be exercised so as to make different provision for different cases or different purposes; and
 - (b) includes power to make such incidental, supplementary, consequential, transitory, transitional or saving provision as the Secretary of State considers appropriate.
- (3) The power of the Secretary of State under section 34 or 123 (including that power as extended by subsection (2) above) may be exercised by modifying any enactment comprised in or made under this Act, or any other enactment.
- (4) The power of the Secretary of State under section 40(8), 52(8) (including that enactment as applied by section 65(3)), 58(3), 68 or 102 as extended by subsection (2) above may be exercised by modifying any enactment comprised in or made under this Act, or any other enactment.
- (5) An order made by the Secretary of State under section 28 (including that enactment as applied by section 42(5), 59(5) and 67(7)), 40(8), 52(8) (including that enactment as

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applied by section 65(3)), 111(4) or (6), 114(3)(b) or (4)(b) or 121 or Schedule 7 shall be subject to annulment in pursuance of a resolution of either House of Parliament.

- (6) No order shall be made by the Secretary of State under section 34, 68, 102, 123 or 128(6) unless a draft of it has been laid before, and approved by a resolution of, each House of Parliament.
- (7) An order made by the Secretary of State under section 58(3) shall be laid before Parliament after being made and shall cease to have effect unless approved, within the period of 28 days beginning with the day on which it is made, by a resolution of each House of Parliament.
- (8) In calculating the period of 28 days mentioned in subsection (7), no account shall be taken of any time during which Parliament is dissolved or prorogued or during which both Houses are adjourned for more than four days.
- (9) If an order made by the Secretary of State ceases to have effect by virtue of subsection (7), any modification made by it of an enactment is repealed (and the previous enactment revived) but without prejudice to the validity of anything done in connection with that modification before the order ceased to have effect and without prejudice to the making of a new order.
- (10) If, apart from this subsection, an order made by the Secretary of State under section 58(3) would be treated for the purposes of the standing orders of either House of Parliament as a hybrid instrument, it shall proceed in that House as if it were not such an instrument.

125 Offences by bodies corporate

- (1) Where an offence under this Part committed by a body corporate is proved to have been committed with the consent or connivance of, or to be attributable to any neglect on the part of—
 - (a) a director, manager, secretary or other similar officer of the body corporate, or
 - (b) a person purporting to act in such a capacity,
 he as well as the body corporate commits the offence and shall be liable to be proceeded against and punished accordingly.
- (2) Where the affairs of a body corporate are managed by its members, subsection (1) applies in relation to the acts and defaults of a member in connection with his functions of management as if he were a director of the body corporate.
- (3) Where an offence under this Part is committed by a Scottish partnership and is proved to have been committed with the consent or connivance of a partner, or to be attributable to any neglect on the part of a partner, he as well as the partnership commits the offence and shall be liable to be proceeded against and punished accordingly.
- (4) In subsection (3) “partner” includes a person purporting to act as a partner.

126 Service of documents

- (1) Any document required or authorised by virtue of this Part to be served on any person may be served—
 - (a) by delivering it to him or by leaving it at his proper address or by sending it by post to him at that address;

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- (b) if the person is a body corporate other than a limited liability partnership, by serving it in accordance with paragraph (a) on the secretary of the body;
 - (c) if the person is a limited liability partnership, by serving it in accordance with paragraph (a) on a member of the partnership; or
 - (d) if the person is a partnership, by serving it in accordance with paragraph (a) on a partner or a person having the control or management of the partnership business.
- (2) For the purposes of this section and section 7 of the Interpretation Act 1978 (c. 30) (service of documents by post) in its application to this section, the proper address of any person on whom a document is to be served shall be his last known address, except that—
- (a) in the case of service on a body corporate (other than a limited liability partnership) or its secretary, it shall be the address of the registered or principal office of the body;
 - (b) in the case of service on a limited liability partnership or a member of the partnership, it shall be the address of the registered or principal office of the partnership;
 - (c) in the case of service on a partnership or a partner or a person having the control or management of a partnership business, it shall be the address of the principal office of the partnership.
- (3) For the purposes of subsection (2) the principal office of a company constituted under the law of a country or territory outside the United Kingdom or of a partnership carrying on business outside the United Kingdom is its principal office within the United Kingdom.
- (4) Subsection (5) applies if a person to be served under this Part with any document by another has specified to that other an address within the United Kingdom other than his proper address (as determined under subsection (2)) as the one at which he or someone on his behalf will accept documents of the same description as that document.
- (5) In relation to that document, that address shall be treated as his proper address for the purposes of this section and section 7 of the Interpretation Act 1978 in its application to this section, instead of that determined under subsection (2).
- (6) Any notice in writing or other document required or authorised by virtue of this Part to be served on any person may be served on that person by transmitting the text of the notice or other document to him by means of a telecommunication system (within the meaning of the Telecommunications Act 1984 (c. 12)) or by other means but while in electronic form provided the text is received by that person in legible form and is capable of being used for subsequent reference.
- (7) This section does not apply to any document if rules of court make provision about its service.
- (8) In this section references to serving include references to similar expressions (such as giving or sending).

127 Associated persons

- (1) Associated persons, and any bodies corporate which they or any of them control, shall be treated as one person—

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- (a) for the purpose of deciding under section 26 whether any two enterprises have been brought under common ownership or common control; and
 - (b) for the purpose of determining what activities are carried on by way of business by any one person so far as that question arises in connection with paragraph 13(2) of Schedule 8.
- (2) Subsection (1) shall not exclude from section 26 any case which would otherwise fall within that section.
- (3) A reference under section 22, 33, 45 or 62 (whether or not made by virtue of this section) may be framed so as to exclude from consideration, either altogether or for a specified purpose or to a specified extent, any matter which, apart from this section, would not have been taken into account on that reference.
- (4) For the purposes of this section—
- (a) any individual and that individual’s spouse or partner and any relative, or spouse or partner of a relative, of that individual or of that individual’s spouse or partner;
 - (b) any person in his capacity as trustee of a settlement and the settlor or grantor and any person associated with the settlor or grantor;
 - (c) persons carrying on business in partnership and the spouse or partner and relatives of any of them; or
 - (d) two or more persons acting together to secure or exercise control of a body of persons corporate or unincorporate or to secure control of any enterprise or assets,
- shall be regarded as associated with one another.
- (5) The reference in subsection (1) to bodies corporate which associated persons control shall be construed in accordance with section 26(3) and (4).
- (6) In this section “relative” means a brother, sister, uncle, aunt, nephew, niece, lineal ancestor or descendant (the stepchild of any person, or anyone adopted by a person, whether legally or otherwise, as his child being regarded as a relative or taken into account to trace a relationship in the same way as that person’s child); and references to a spouse or partner shall include a former spouse or partner.

128 Supply of services and market for services etc.

- (1) References in this Part to the supply of services shall be construed in accordance with this section; and references in this Part to a market for services and other related expressions shall be construed accordingly.
- (2) The supply of services does not include the provision of services under a contract of service or of apprenticeship whether it is express or implied and (if it is express) whether it is oral or in writing.
- (3) The supply of services includes—
- (a) performing for gain or reward any activity other than the supply of goods;
 - (b) rendering services to order;
 - (c) the provision of services by making them available to potential users.
- (4) The supply of services includes making arrangements for the use of computer software or for granting access to data stored in any form which is not readily accessible.

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- (5) The supply of services includes making arrangements by means of a relevant agreement (within the meaning of section 189(2) of the Broadcasting Act 1990 (c. 42)) for sharing the use of telecommunications apparatus.
- (6) The supply of services includes permitting or making arrangements to permit the use of land in such circumstances as the Secretary of State may by order specify.

129 Other interpretation provisions

- (1) In this Part, unless the context otherwise requires—

“action” includes omission; and references to the taking of action include references to refraining from action;

“agreement” means any agreement or arrangement, in whatever way and whatever form it is made, and whether it is, or is intended to be, legally enforceable or not;

“business” includes a professional practice and includes any other undertaking which is carried on for gain or reward or which is an undertaking in the course of which goods or services are supplied otherwise than free of charge;

“change of circumstances” includes any discovery that information has been supplied which is false or misleading in a material respect;

“Community law” means—

- (a) all the rights, powers, liabilities, obligations and restrictions from time to time created or arising by or under the Community Treaties; and
- (b) all the remedies and procedures from time to time provided for by or under the Community Treaties;

“consumer” means any person who is—

- (a) a person to whom goods are or are sought to be supplied (whether by way of sale or otherwise) in the course of a business carried on by the person supplying or seeking to supply them; or
- (b) a person for whom services are or are sought to be supplied in the course of a business carried on by the person supplying or seeking to supply them;

and who does not receive or seek to receive the goods or services in the course of a business carried on by him;

“customer” includes a customer who is not a consumer;

“enactment” includes an Act of the Scottish Parliament, Northern Ireland legislation and an enactment comprised in subordinate legislation, and includes an enactment whenever passed or made;

“enterprise” means the activities, or part of the activities, of a business;

“the European Merger Regulations” means Council Regulation (EEC) No. 4064/89 of 21st December 1989 on the control of concentrations between undertakings as amended by Council Regulation (EC) No. 1310/97 of 30th June 1997;

“goods” includes buildings and other structures, and also includes ships, aircraft and hovercraft;

“modify” includes amend or repeal;

“notice” means notice in writing;

“price” includes any charge or fee (however described);

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“subordinate legislation” has the same meaning as in the Interpretation Act 1978 (c. 30) and also includes an instrument made under an Act of the Scottish Parliament and an instrument made under Northern Ireland legislation;

“subsidiary” has the meaning given by section 736 of the Companies Act 1985 (c. 6);

“supply”, in relation to the supply of goods, includes supply by way of sale, lease, hire or hire-purchase, and, in relation to buildings or other structures, includes the construction of them by a person for another person; and

“United Kingdom national” means an individual who is—

- (a) a British citizen, a British overseas territories citizen, a British National (Overseas) or a British Overseas citizen;
- (b) a person who under the British Nationality Act 1981 (c. 61) is a British subject; or
- (c) a British protected person within the meaning of that Act.

- (2) For the purposes of this Part any two bodies corporate are interconnected if—
 - (a) one of them is a body corporate of which the other is a subsidiary; or
 - (b) both of them are subsidiaries of one and the same body corporate;
 and in this Part “interconnected bodies corporate” shall be construed accordingly and “group of interconnected bodies corporate” means a group consisting of two or more bodies corporate all of whom are interconnected with each other.
- (3) References in this Part to a person carrying on business include references to a person carrying on business in partnership with one or more other persons.
- (4) Any duty to publish which is imposed on a person by this Part shall, unless the context otherwise requires, be construed as a duty on that person to publish in such manner as he considers appropriate for the purpose of bringing the matter concerned to the attention of those likely to be affected by it.

130 Index of defined expressions

In this Part, the expressions listed in the left-hand column have the meaning given by, or are to be interpreted in accordance with, the provisions listed in the right-hand column.

<i>Expression</i>	<i>Provision of this Act</i>
Action (and the taking of action)	Section 129(1)
Adverse public interest finding	Section 54(3)
Agreement	Section 129(1)
Anti-competitive outcome	Section 35(2)
Business (and carrying on business)	Section 129(1) and (3)
Change of circumstances	Section 129(1)
The Commission	Section 273
Community law	Section 129(1)
Consumer	Section 129(1)

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<i>Expression</i>	<i>Provision of this Act</i>
Customer	Section 129(1)
Date of reference	Section 39(9)
The decision-making authority	Section 22(7)
Enactment	Section 129(1)
Enforcement order	Section 86(6)
Enforcement undertaking	Section 89(2)
Enterprise	Section 129(1)
Enterprises ceasing to be distinct	Section 26(1)
European Merger Regulations	Section 129(1)
Final determination of matter to which intervention notice relates	Section 43(4) and (5)
Final determination of matter to which special intervention notice relates	Section 60(4) and (5)
Final determination of reference under section 22 or 33	Section 79(1) and (2)
Goods	Section 129(1)
Interconnected bodies corporate (and a group of interconnected bodies corporate)	Section 129(2)
Intervention notice	Section 42(2)
Market for goods or services	Section 22(6)
Market in the United Kingdom	Section 22(6)
Merger notice	Section 96(2)
Modify	Section 129(1)
Notice	Section 129(1)
Notified arrangements	Section 96(6)
The OFT	Section 273
Orders under section 81	Section 81(6)
Orders under paragraph 2 of Schedule 7	Paragraph 2(7) of Schedule 7
The period for considering a merger notice	Sections 97 and 98
Price	Section 129(1)
Public interest consideration	Sections 42(3) and 67(9)
Public interest consideration being finalised	Section 42(8)
Publish	Section 129(4)

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<i>Expression</i>	<i>Provision of this Act</i>
References under section 22, 33, 45 or 62	Sections 37(2), 49(1), 56(8) and 64(2)
Relevant customer benefit	Section 30
Relevant merger situation	Section 23 (as read with other enactments)
Reports of the Commission	Section 118(5)
Special intervention notice	Section 59(2)
Special merger situation	Section 59(3)
Subordinate legislation	Section 129(1)
Subsidiary	Section 129(1)
Supply (in relation to the supply of goods)	Section 129(1)
The supply of services (and a market for services etc.)	Section 128
The turnover in the United Kingdom of an enterprise	Section 28(2)
Undertakings under section 80	Section 80(6)
Undertakings under paragraph 1 of Schedule 7	Paragraph 1(7) of Schedule 7
United Kingdom national	Section 129(1)