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DRAFT STATUTORY INSTRUMENTS

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**2006 No.**

**The Water and Sewerage Services  
(Northern Ireland) Order 2006**

**PART III**

**APPOINTMENT AND REGULATION OF UNDERTAKERS**

**CHAPTER I**

**APPOINTMENTS**

*Making of appointments*

**Appointment of relevant undertakers**

**13.—**(1) Subject to the following provisions of this Chapter, a company may be appointed—

- (a) by the Department; or
- (b) with the consent of or in accordance with a general authorisation given by the Department, by the Authority,

to be the water undertaker or sewerage undertaker for any area.

(2) Without prejudice to the obligation of a company holding an appointment under this Chapter to comply with the conditions of its appointment, the appointment of a company to be the water undertaker or sewerage undertaker for any area shall have the effect, while the appointment remains in force—

- (a) of requiring the company to perform any duty imposed by or under any statutory provision on an undertaker of the relevant description (that is to say, a water undertaker or, as the case may be, sewerage undertaker);
- (b) of authorising the company, for the purposes of, or in connection with, the carrying out of any of the functions of an undertaker of the relevant description, to exercise any power conferred by or under any statutory provision on an undertaker of that description;
- (c) of requiring statutory provisions authorising or requiring anything to be done in relation to an undertaker of the relevant description to be construed as authorising or requiring that thing to be done in relation to that company; and
- (d) of requiring other references in any statutory provision to an undertaker of the relevant description, or to the area of that undertaker, to be construed, so far as necessary for the purposes of, or in connection with, the carrying out by that company of the functions of an undertaker of that description, as references to that company or, as the case may be, to that area.

(3) The appointment of a company to be a relevant undertaker shall be by service on the company of an instrument in writing containing the appointment and describing the area for which it is made.

(4) A single instrument may contain the appointment of a company to be the sewerage undertaker for an area and the appointment of the same company to be the water undertaker for the whole or any part of that area or for an area which includes the whole or any part of that area.

(5) A company shall not be appointed to be a water undertaker or a sewerage undertaker unless it is a limited company.

(6) As soon as practicable after making an appointment under this Chapter, the Department shall send a copy of the appointment to the Authority.

### **Continuity of appointments, replacement appointments, etc.**

**14.—**(1) It shall be the duty of the Department to secure that such appointments are made under this Chapter as will ensure that for every area of Northern Ireland there is at all times both—

- (a) a company holding an appointment under this Chapter as water undertaker; and
- (b) whether or not the same company in relation to the whole or any part of that area, a company holding an appointment as sewerage undertaker.

(2) Subject to the following provisions of this Article—

- (a) the Department; and
- (b) with the consent of or in accordance with a general authorisation given by the Department, the Authority,

shall have power, by notice to a company holding an appointment under this Chapter, to terminate the appointment or to vary the area to which it relates.

(3) The appointment of a company to be a water undertaker or sewerage undertaker shall not be terminated or otherwise cease to relate to or to any part of any area except with effect from the coming into force of such appointments and variations replacing that company as a relevant undertaker as secure either—

- (a) that another company becomes the water undertaker or, as the case may be, sewerage undertaker for that area or part or for an area that includes that area or part; or
- (b) that two or more companies each become the water undertaker or, as the case may be, sewerage undertaker for one of a number of different areas that together constitute or include that area or part.

(4) An appointment or variation replacing a company as a relevant undertaker shall not be made in relation to the whole or any part of the area to which that company's appointment as water undertaker or, as the case may be, sewerage undertaker relates except where—

- (a) that company consents to the appointment or variation;
- (b) the appointment or variation relates only to parts of that area none of the premises in which is served by that company;
- (c) the appointment or variation relates only to parts of that area and the conditions mentioned in paragraph (5) are satisfied in relation to each of the premises in those parts which are served by that company; or
- (d) the appointment or variation is made in such circumstances as may be set out for the purposes of this paragraph in the conditions of that company's appointment.

(5) The conditions are that—

- (a) the premises are, or are likely to be, supplied with not less than 100 megalitres of water in any period of 12 months; and
- (b) the person who is the customer in relation to the premises consents in writing to the appointment or variation.

(6) The Department may, after consulting the Authority, make regulations amending paragraph (5)(a) by substituting, for the quantity of water for the time being specified there, such smaller quantity as the Department considers appropriate.

### **Procedure with respect to appointments and variations**

**15.—**(1) An application for an appointment or variation replacing a company as a relevant undertaker shall be made in such manner as may be prescribed.

(2) Within 14 days after making an application under this Article, the applicant shall—

- (a) serve notice of the application on the existing appointee and DOE; and
- (b) publish a copy of the notice in such manner as may be prescribed.

(3) Before making an appointment or variation replacing a company as a relevant undertaker, the Department or the Authority shall give notice—

- (a) stating that it proposes to make the appointment or variation;
- (b) stating the reasons why it proposes to make the appointment or variation; and
- (c) specifying the period (not being less than 28 days from the date of publication of the notice) within which representations or objections with respect to the proposed appointment or variation may be made.

(4) A notice under paragraph (3) shall be given—

- (a) by publishing the notice in such manner as the Department or, as the case may be, the Authority considers appropriate for bringing it to the attention of persons likely to be affected by the making of the proposed appointment or variation; and
- (b) by serving a copy of the notice on the existing appointee and DOE.

(5) As soon as practicable after making an appointment or variation replacing a company as a relevant undertaker, the Department or the Authority shall—

- (a) serve a copy of the appointment or variation on the existing appointee; and
- (b) serve notice of the making of the appointment or variation on DOE.

(6) As soon as practicable after exercising any power to vary the area to which an appointment under this Chapter relates, the Department shall send a copy of the variation to the Authority.

(7) In this Article “the existing appointee”, in relation to an appointment or variation replacing a company as a relevant undertaker, means the company which is replaced in relation to the whole or any part of the area to which the appointment or variation relates or, where there is more than one such company, each of them.

(8) The Department may by regulations impose such additional procedural requirements as it considers appropriate for any case where the conditions mentioned in Article 14(5) are required to be satisfied in relation to an application for an appointment or variation replacing a company as a relevant undertaker.

### **Duties affecting making of appointments and variations**

**16.—**(1) Before making an appointment or variation replacing a company as a relevant undertaker, the Department or the Authority shall consider any representations or objections which have been duly made in pursuance of the notice under Article 15(3) and have not been withdrawn.

(2) Before making an appointment or variation replacing a company as a relevant undertaker, the Department shall consult the Authority.

(3) In determining whether to make an appointment or variation by virtue of Article 14(4)(b) or (c) in relation to any part of an area, the Department or, as the case may be, the Authority shall have

regard, in particular, to any arrangements made or expenditure incurred by the existing appointee for the purpose of enabling premises in that part of that area to be served by that appointee.

(4) It shall be the duty of the Department or, as the case may be, of the Authority—

- (a) in making an appointment or variation replacing a company as a relevant undertaker; and
- (b) where it makes such an appointment or variation, in determining what provision is to be made with respect to the fixing by the new appointee of any water or sewerage charges,

to ensure, so far as may be consistent with its duties under Part II, that the interests of the members and creditors of the existing appointee are not unfairly prejudiced as respects the terms on which the new appointee could accept transfers of property, rights and liabilities from the existing appointee.

(5) In this Article—

“existing appointee”, in relation to an appointment or variation replacing a company as a relevant undertaker in relation to any area or part of an area, means the company which is replaced by that appointment or variation;

“new appointee”, in relation to such an appointment or variation, means the company which by virtue of the appointment or variation becomes a relevant undertaker for the area or part of an area in question;

“water or sewerage charges” means—

- (a) charges in respect of any services provided in the course of the carrying out of the functions of a water undertaker or sewerage undertaker; or
- (b) amounts of any other description which such an undertaker is authorised by or under any statutory provision to require any person to pay.

### **Transitional provision with respect to replacement appointments**

**17.—**(1) Schedule 1 shall have effect for enabling provision to be made with respect to cases in which a company is replaced by another as a relevant undertaker by an appointment or variation under this Chapter.

(2) Paragraphs (3) and (4) apply where, by such an appointment or variation, one company (“the new undertaker”) is to replace another company as a relevant undertaker, but the appointment or variation has not come into force.

(3) Such provisions of this Order as the Department may prescribe shall apply (with any prescribed modifications) in relation to the new undertaker as if the appointment or variation had come into force.

(4) Such of the conditions imposed on the new undertaker under Article 18 as the Authority may specify in a notice given by it to the undertaker shall have effect, in relation to the operation of any provision prescribed under paragraph (3) before the appointment or variation comes into force, as if the appointment or variation had come into force.

### *Conditions of appointment*

### **Power to impose conditions**

**18.—**(1) An appointment under this Chapter may include—

- (a) such conditions as appear to the Department or, as the case may be, the Authority to be requisite or expedient having regard to the duties imposed on it by Part II;
- (b) conditions for the purposes of Article 14(4)(d); and

- (c) conditions requiring the rendering to the Department or, as the case may be, the Authority of a payment on the making of an appointment, or payments while such an appointment is in force, or both, of such amount or amounts as may be determined by or under the conditions.

(2) Conditions may be included by virtue of paragraph (1)(a) in an appointment under this Chapter whether or not they are connected with the supply of water, the provision of sewerage services or the carrying out of the functions under any statutory provision of water undertakers or sewerage undertakers.

(3) Conditions included in an appointment under this Chapter may contain provision for the conditions to cease to have effect or be modified at such times, in such manner and in such circumstances as may be specified in or determined by or under the conditions.

(4) Any provision included by virtue of paragraph (3) in an appointment under this Chapter shall have effect in addition to the provision made by this Chapter with respect to the modification of the conditions of an appointment.

(5) For the purposes of this Order where the same instrument contains an appointment of the same company to be both a water undertaker and a sewerage undertaker (whether or not for the same area), all the conditions included in that instrument by virtue of this Article shall have effect, irrespective of their subject-matter, as conditions of both appointments.

(6) Where an instrument of appointment has been served under paragraph (3) of Article 13 on any company, the coming into force of the appointment for the purposes specified in paragraph (2) of that Article shall not be affected by any contravention of the requirements of this Order with respect to the provision contained by way of conditions of appointment in that instrument.

(7) If the Department considers it appropriate to do so in consequence of any legal proceedings with respect to any such provision as is mentioned in paragraph (6), it may by order direct that such conditions as may be specified in the order are to be treated as included in the appointment in question until there is an opportunity for the provision to which the proceedings relate to be replaced by virtue of any of the other provisions of this Chapter.

(8) Any sums received by the Department or the Authority in consequence of the provisions of any condition of an appointment under this Chapter shall be paid into the Consolidated Fund.

### **Determinations under conditions of appointment**

**19.—**(1) Without prejudice to the generality of sub-paragraph (a) of Article 18(1), conditions included in an appointment by virtue of that sub-paragraph may—

- (a) require the appointed company to comply with any direction given by the Authority as to such matters as are specified in the appointment or are of a description so specified; and
- (b) require the appointed company, except in so far as the Authority consents to the company's doing or not doing them, not to do or to do such things as are specified in the appointment or are of a description so specified.

(2) Without prejudice as aforesaid, such conditions may provide for the reference to and determination by—

- (a) the Department or the Authority; or
- (b) on a reference by the Authority, the Competition Commission,

of such questions arising under the appointment and of such other matters, including (in the case of references to the Commission) disputes as to determinations by the Authority, as are specified in the appointment or are of a description so specified.

(3) Where any question or other matter falls to be determined by the Competition Commission in pursuance of a provision contained in an appointment under this Chapter—

- (a) it shall be the duty of the Authority, on being required to do so by the company holding that appointment, to refer that question or matter to that Commission; and
  - (b) it shall be the duty of that Commission to determine any question or other matter referred by virtue of sub-paragraph (a) in accordance with the principles which apply, by virtue of Part II, in relation to determinations under this Chapter by the Authority.
- (4) For the purposes of paragraph (3), where—
- (a) the question or matter referred to the Competition Commission concerns the review of a price control imposed on the company holding the appointment; and
  - (b) the Commission is to decide to what extent it is reasonable to take into account in its determination costs incurred or borne by the company in connection with the reference,
- the Commission shall also have regard to the extent to which, in its view, its determination is likely to support the company's (rather than the Authority's) claims in relation to the question or matter referred to it.
- (5) Paragraphs (4) and (5) of Article 21, and Articles 26 and 27 apply to references to the Competition Commission under this Article as they apply to references under Article 21.
- (6) A report of the Competition Commission on a reference under this Article—
- (a) shall be made to the Authority; and
  - (b) shall include definite conclusions on the questions or other matters comprised in the reference, together with such an account of its reasons for those conclusions as, in the opinion of the Commission, is expedient for facilitating a proper understanding of those questions or other matters and of its conclusions,
- and paragraphs (10) and (11) of Article 24 apply to such a report as they apply to a report on a reference under Article 21.

### *Modification of appointment conditions*

#### **Modification by agreement**

**20.—**(1) Subject to the following provisions of this Article, the Authority may modify the conditions of a company's appointment under this Chapter if the company consents to the modifications.

- (2) Before making modifications under this Article, the Authority shall give notice—
- (a) stating that it proposes to make the modifications and setting out their effect;
  - (b) stating the reasons why it proposes to make the modifications; and
  - (c) specifying the period (not being less than 28 days from the date of publication of the notice) within which representations or objections with respect to the proposed modifications may be made,
- and shall consider any representations or objections which are duly made and not withdrawn.
- (3) A notice under paragraph (2) shall be given—
- (a) by publishing the notice in such manner as the Authority considers appropriate for the purpose of bringing the notice to the attention of persons likely to be affected by the making of the modifications; and
  - (b) by serving a copy of the notice on the company and on the Department.
- (4) The Authority shall not under this Article make any modifications which the Department has, within the time specified in the notice under paragraph (2), directed the Authority not to make.

(5) The Department shall not give a direction under paragraph (4) in relation to any modification unless—

- (a) the modification is a modification of provision contained in the appointment for the purposes of Article 14(4)(d);
- (b) the modification is a modification of a provision of the appointment which relates to the disposal of a company's protected land and is stated in the appointment to be a provision which cannot be modified; or
- (c) it appears to the Department that the modification should be made, if at all, under Article 25.

### **Modification references to Competition Commission**

**21.—**(1) The Authority may make to the Competition Commission a reference which is so framed as to require the Commission to investigate and report on the questions—

- (a) whether any matters which—
  - (i) relate to the carrying out of any function which is a function of any company by virtue of an appointment of that company under this Chapter; and
  - (ii) are specified in the reference, operate, or may be expected to operate, against the public interest; and
- (b) if so, whether the effects adverse to the public interest which those matters have or may be expected to have could be remedied or prevented by modifications of the conditions of the company's appointment.

(2) The Authority may, at any time, by notice given to the Competition Commission vary a reference under this Article by—

- (a) adding to the matters specified in the reference; or
- (b) excluding from the reference some or all of the matters so specified;

and on receipt of any such notice the Commission shall give effect to the variation.

(3) The Authority may specify in a reference under this Article, or a variation of such a reference, for the purpose of assisting the Competition Commission in carrying out the investigation on the reference—

- (a) any effects adverse to the public interest which, in its opinion, the matters specified in the reference or variation have or may be expected to have; and
- (b) any modifications of the conditions of any appointment mentioned in the reference or variation by which, in its opinion, those effects could be remedied or prevented.

(4) As soon as practicable after making a reference under this Article or a variation of such a reference, the Authority shall—

- (a) serve a copy of the reference or variation on the company whose appointment is mentioned in the reference or variation; and
- (b) publish particulars of the reference or variation in such manner as it considers appropriate for the purpose of bringing the reference or variation to the attention of persons likely to be affected by it.

(5) It shall be the duty of the Authority, for the purpose of assisting the Competition Commission in carrying out an investigation on a reference under this Article or in carrying out functions under Article 26, to give to the Commission—

- (a) any information in the Authority's possession which relates to matters falling within the scope of the investigation or the carrying out of those functions, and which is either—

- (i) requested by the Commission for that purpose; or
- (ii) information which, in the Authority's opinion, it would be appropriate for that purpose to give to the Commission without any such request; and

(b) any other assistance which the Commission may require, and which it is within the Authority's power to give, in relation to any such matters;

and the Commission, for the purpose of carrying out any such investigation or such functions, shall take account of any information given to them for that purpose under this paragraph.

(6) In determining for the purposes of this Article whether any particular matter operates, or may be expected to operate, against the public interest, the Competition Commission shall have regard to the matters as respects which duties are imposed on the Department and the Authority by Part II.

#### **References under Article 21: time limits**

**22.**—(1) Every reference under Article 21 shall specify a period (not longer than 6 months beginning with the date of the reference) within which a report on the reference is to be made.

(2) A report of the Competition Commission on a reference under Article 21 shall not have effect (and no action shall be taken in relation to it under Article 25) unless the report is made before the end of the period specified in the reference or such further period (if any) as may be allowed by the Authority under paragraph (3).

(3) The Authority may, if it has received representations on the subject from the Competition Commission and is satisfied that there are special reasons why the report cannot be made within the period specified in the reference, extend that period by no more than 6 months.

(4) No more than one extension is possible under paragraph (3) in relation to the same reference.

(5) The Authority shall, in the case of an extension made by it under paragraph (3)—

- (a) publish that extension in such manner as the Authority considers appropriate for the purpose of bringing it to the attention of persons likely to be affected by it; and
- (b) send a copy of what has been published by the Authority under sub-paragraph (a) to the company whose appointment is mentioned in the reference.

#### **References under Article 21: powers of investigation**

**23.**—(1) The following sections of Part 3 of the Enterprise Act shall apply, with the modifications mentioned in paragraphs (2) and (3), for the purposes of references under Article 21 as they apply for the purposes of references under that Part—

- (a) section 109 (attendance of witnesses and production of documents etc.);
- (b) section 110 (enforcement of powers under section 109: general);
- (c) section 111 (penalties);
- (d) section 112 (penalties: main procedural requirements);
- (e) section 113 (payments and interest by instalments);
- (f) section 114 (appeals in relation to penalties);
- (g) section 115 (recovery of penalties); and
- (h) section 116 (statement of policy).

(2) Section 110 shall, in its application by virtue of paragraph (1), have effect as if—

- (a) subsection (2) were omitted; and
- (b) in subsection (9) the words from “or section” to “section 65(3)” were omitted.



- (3) Section 111(5)(b)(ii) shall, in its application by virtue of paragraph (1), have effect as if—
- (a) for the words “published (or, in the case of a report under section 50 or 65, given)” there were substituted “made”;
  - (b) for the words “published (or given)”, in both places where they appear, there were substituted “made”; and
  - (c) the words “by this Part” were omitted.

(4) Provisions of Part 3 of the Enterprise Act which have effect for the purposes of sections 109 to 116 of that Act (including, in particular, provisions relating to offences and the making of orders) shall, for the purposes of the application of those sections by virtue of paragraph (1), have effect in relation to those sections as applied by virtue of that paragraph.

(5) Accordingly, corresponding provisions of this Order shall not have effect in relation to those sections as applied by virtue of that paragraph.

### **Reports on modification references**

**24.—**(1) In making a report on a reference under Article 21, the Competition Commission—

- (a) shall include in the report definite conclusions on the questions comprised in the reference together with such an account of its reasons for those conclusions as, in its opinion, is expedient for facilitating a proper understanding of those questions and of its conclusions;
- (b) where it concludes that any of the matters specified in the reference operate, or may be expected to operate, against the public interest, shall specify in the report the effects adverse to the public interest which those matters have or may be expected to have; and
- (c) where it concludes that any adverse effects so specified could be remedied or prevented by modifications of the conditions of a company’s appointment under this Chapter, shall specify in the report modifications by which those effects could be remedied or prevented.

(2) For the purposes of Article 25, a conclusion contained in a report of the Competition Commission is to be disregarded if the conclusion is not that of at least two-thirds of the members of the group constituted in connection with the reference concerned in pursuance of paragraph 15 of Schedule 7 to the Competition Act 1998 (c. 41).

(3) If a member of a group so constituted disagrees with any conclusions contained in a report made on a reference under Article 21 as the conclusions of the Competition Commission, the report shall, if the member so wishes, include a statement of his disagreement and of his reasons for disagreeing.

(4) For the purposes of the law relating to defamation, absolute privilege attaches to any report made by the Competition Commission on a reference under Article 21.

(5) In making any report on a reference under Article 21 the Competition Commission must have regard to the following considerations before disclosing any information.

(6) The first consideration is the need to exclude from disclosure (so far as practicable) any information whose disclosure the Commission thinks is contrary to the public interest.

(7) The second consideration is the need to exclude from disclosure (so far as practicable)—

- (a) commercial information whose disclosure the Commission thinks might significantly harm the legitimate business interests of the undertaking to which it relates; or
- (b) information relating to the private affairs of an individual whose disclosure the Commission thinks might significantly harm the individual’s interests.

(8) The third consideration is the extent to which the disclosure of the information mentioned in paragraph (7)(a) or (b) is necessary for the purposes of the report.

(9) A report of the Competition Commission on a reference under Article 21 shall be made to the Authority.

(10) Subject to paragraph (11), the Authority—

- (a) shall, on receiving such a report, send a copy of it to the company to whose appointment under this Chapter the report relates and to the Department; and
- (b) shall, not less than 14 days after that copy is received by the Department, publish another copy of that report in such manner as the Authority considers appropriate for bringing the report to the attention of persons likely to be affected by it.

(11) If it appears to the Department that the publication of any matter in such a report would be against the public interest or the commercial interests of any person, it may, before the end of the period of 14 days mentioned in sub-paragraph (b) of paragraph (10), direct the Authority to exclude that matter from every copy of the report to be published by virtue of that sub-paragraph; and the Authority shall comply with any such direction.

### **Modifications following report**

**25.—**(1) Where a report of the Competition Commission on a reference under Article 21—

- (a) includes conclusions to the effect that any of the matters specified in the reference operate, or may be expected to operate, against the public interest;
- (b) specifies effects adverse to the public interest which those matters have or may be expected to have;
- (c) includes conclusions to the effect that those effects could be remedied or prevented by modifications of the conditions of a company's appointment under this Chapter; and
- (d) specifies modifications by which those effects could be remedied or prevented,

the Authority shall, subject to the following provisions of this Article, make such modifications of the conditions of that appointment as appear to the Authority requisite for the purpose of remedying or preventing the adverse effects specified in the report.

(2) Before making modifications under this Article, the Authority shall have regard to the modifications specified in the report.

(3) Before making modifications under this Article, the Authority shall give notice—

- (a) stating that it proposes to make the modifications and setting out their effect;
- (b) stating the reasons why it proposes to make the modifications; and
- (c) specifying the period (not being less than 28 days from the date of publication of the notice) within which representations or objections with respect to the proposed modifications may be made,

and shall consider any representations or objections which are duly made and not withdrawn.

(4) A notice under paragraph (3) shall be given—

- (a) by publishing the notice in such manner as the Authority considers appropriate for the purpose of bringing the matters to which the notice relates to the attention of persons likely to be affected by the making of the modifications; and
- (b) by serving a copy of the notice on the company whose appointment it is proposed to modify.

(5) After considering any representations or objections made in response to proposals set out in a notice under paragraph (3), the Authority shall give notice to the Competition Commission—

- (a) setting out the modifications it proposes to make to remedy or prevent the adverse effects specified in the report; and

- (b) stating the reasons for making the modifications.
- (6) The Authority shall include with the notice under paragraph (5) a copy of any representations or objections received in relation to the notice under paragraph (3).
- (7) If the period of 4 weeks from the date on which the notice under paragraph (5) is given elapses without a direction under Article 26(1)(a) having been given to it, the Authority shall—
  - (a) make the modifications set out in the notice; or
  - (b) if a direction under Article 26(1)(b) has been given, make the modifications which are not specified in the direction.
- (8) The Authority shall not under this Article make any modification of any provisions of a company's appointment under this Chapter which—
  - (a) are contained in that appointment for the purposes of Article 14(4)(d); or
  - (b) being provisions relating to the disposal of a company's protected land, are stated in the appointment to be provisions which cannot be modified.

#### **Commission's power of veto following report**

**26.**—(1) The Competition Commission may, within the period of 4 weeks after the date on which it is given a notice under Article 25(5), direct the Authority—

- (a) not to make the modifications set out in that notice; or
  - (b) not to make such of the modifications as may be specified in the direction;
- and the Authority shall comply with any such direction.

(2) The Department may, within the period of 4 weeks after the date on which the Commission is given a notice under Article 25(5) and on the application of the Commission, direct that the period for giving a direction under paragraph (1) (and, accordingly, the period mentioned in Article 25(7)) shall be extended by 14 days.

(3) The power to give a direction under paragraph (1) may only be exercised in respect of such of the modifications set out in the notice under Article 25(5)(a) as appear to the Commission not to be the modifications which are requisite for the purpose of remedying or preventing all or any of the adverse effects specified in the report as effects which could be remedied or prevented by modifications.

(4) If the Commission gives a direction under paragraph (1), it—

- (a) shall give notice setting out the modifications proposed by the Authority, the terms of the direction and the reasons for giving it; and
- (b) shall itself make such modifications as appear to it to be requisite for the purpose of remedying or preventing—
  - (i) if the direction was given under paragraph (1)(a), the adverse effects specified in the report as effects which could be remedied or prevented by modifications;
  - (ii) if the direction was given under paragraph (1)(b), such of those adverse effects as are not remedied or prevented by the modifications made by the Authority under Article 25(7)(b).

(5) In exercising its power under paragraph (4)(b), the Commission shall have regard to the matters to which the Authority is required to have regard when determining the conditions of a company's appointment.

(6) Before making modifications under paragraph (4)(b) the Commission shall give notice—

- (a) stating that it proposes to make the modifications and setting them out;
- (b) stating the reason why it proposes to make them;

- (c) specifying the period (not being less than 28 days from the date of publication of the notice) within which representations or objections with respect to the proposed modifications may be made,

and shall consider any representations or objections which are duly made and not withdrawn.

(7) A notice under paragraph (4)(a) or (6) shall be given—

- (a) by publishing the notice in such manner as the Commission considers appropriate for the purpose of bringing it to the attention of persons likely to be affected by the making of the modifications; and
- (b) by serving a copy on the Authority and the company whose conditions of appointment it is proposed should be modified.

(8) The Commission may not make any modification under this Article which the Authority could not make under Article 25.

(9) After making modifications under this Article the Commission shall publish a notice stating that the modifications have been made and setting them out, with the reasons for making them.

### **Commission's power of veto following report: supplementary**

**27.**—(1) For the purposes of the law relating to defamation, absolute privilege attaches to any notice under paragraph (4)(a), (6) or (9) of Article 26.

(2) In giving any notice under paragraph (4)(a) or (6) of Article 26, or publishing any notice under paragraph (9) of that Article, the Competition Commission must have regard to the following considerations before disclosing any information.

(3) The first consideration is the need to exclude from disclosure (so far as practicable) any information whose disclosure the Commission thinks is contrary to the public interest.

(4) The second consideration is the need to exclude from disclosure (so far as practicable)—

- (a) commercial information whose disclosure the Commission thinks might significantly harm the legitimate business interests of the undertaking to which it relates; or
- (b) information relating to the private affairs of an individual whose disclosure the Commission thinks might significantly harm the individual's interests.

(5) The third consideration is the extent to which the disclosure of the information mentioned in paragraph (4)(a) or (b) is necessary for the purposes of the notice.

(6) The following sections of Part 3 of the Enterprise Act shall apply, with the modifications mentioned in paragraphs (7) and (8), for the purposes of any investigation by the Commission for the purposes of the exercise of its functions under Article 26, as they apply for the purposes of any investigations on references under that Part—

- (a) section 109 (attendance of witnesses and production of documents etc);
- (b) section 110 (enforcement of powers under section 109: general);
- (c) section 111 (penalties);
- (d) section 112 (penalties: main procedural requirements);
- (e) section 113 (payments and interest by instalments);
- (f) section 114 (appeals in relation to penalties);
- (g) section 115 (recovery of penalties); and
- (h) section 116 (statement of policy).

(7) Section 110 shall, in its application by virtue of paragraph (6), have effect as if—

- (a) subsection (2) were omitted;

- (b) in subsection (4), for the words “the publication of the report of the Commission on the reference concerned” there were substituted “the publication by the Commission of a notice under Article 26(9) of the Water and Sewerage Services (Northern Ireland) Order 2006 in connection with the reference concerned or, if no direction has been given by the Commission under Article 26(1) of that Order in connection with the reference concerned and within the period permitted for that purpose, the latest day on which it was possible to give such a direction within the permitted period”; and
  - (c) in subsection (9) the words from “or section” to “section 65(3))” were omitted.
- (8) Section 111(5)(b) shall, in its application by virtue of paragraph (6), have effect as if for subparagraph (ii) there were substituted—
- “(ii) if earlier, the day on which a notice is published by the Commission under Article 26(9) of the Water and Sewerage Services (Northern Ireland) Order 2006 in connection with the reference concerned or, if no direction is given by the Commission under Article 26(1) of that Order in connection with the reference concerned and within the period permitted for that purpose, the latest day on which such a direction may be given within the permitted period.”
- (9) Provisions of Part 3 of the Enterprise Act which have effect for the purposes of sections 109 to 116 of that Act (including, in particular, provisions relating to offences and the making of orders) shall, for the purposes of the application of those sections by virtue of paragraph (6), have effect in relation to those sections as applied by virtue of that paragraph.
- (10) Accordingly, corresponding provisions of this Order shall not have effect in relation to those sections as applied by virtue of that paragraph.

### **Modification by order under other statutory provisions**

**28.**—(1) Where the OFT, the Competition Commission or (as the case may be) the Secretary of State makes a relevant order, the order may, subject to paragraph (3), also provide for the modification of the conditions of a company’s appointment under this Chapter to such extent as may appear to the OFT, the Commission or (as the case may be) the Secretary of State to be requisite or expedient for the purpose of giving effect to, or taking account of, any provision made by the order.

(2) In paragraph (1) “relevant order” means—

- (a) an order under section 75, 83 or 84 of, or paragraph 5, 10 or 11 of Schedule 7 to, the Enterprise Act where—
  - (i) one or more than one of the enterprises which have, or may have, ceased to be distinct enterprises was carried on by a relevant undertaker; or
  - (ii) one or more than one of the enterprises which will or may cease to be distinct enterprises is carried on by a relevant undertaker; or
- (b) an order under section 160 or 161 of the Enterprise Act where the feature, or combination of features, of the market in the United Kingdom for goods or services which prevents, restricts or distorts competition is—
  - (i) the structure or an aspect of the structure of a market for the supply of goods or services by a relevant undertaker; or
  - (ii) the conduct of a relevant undertaker or of customers of a relevant undertaker.

(3) No modification shall be made by virtue of this Article of any provisions of a company’s appointment under this Chapter which—

- (a) are contained in that appointment for the purposes of Article 14(4)(d); or
- (b) being provisions relating to the disposal of a company’s protected land, are stated in the appointment to be provisions which cannot be modified.

(4) Expressions used in paragraph (2) and in Part 3 or (as the case may be) Part 4 of the Enterprise Act have the same meanings in that paragraph as in that Part.

### *Competition*

#### **Functions of the Authority with respect to competition**

**29.**—(1) The functions to which paragraph (2) apply shall be concurrent functions of the Authority and the OFT.

(2) This paragraph applies to the functions of the OFT under Part 4 of the Enterprise Act (other than sections 166 and 171) so far as relating to commercial activities connected with the supply of water or the provision of sewerage services.

(3) The Authority shall be entitled to exercise, concurrently with the OFT, the functions of the OFT under the provisions of Part 1 of the Competition Act 1998 (c. 41) (other than sections 31D(1) to (6), 38(1) to (6) and 51), so far as relating to—

- (a) agreements, decisions or concerted practices of the kind mentioned in section 2(1) of that Act,
- (b) conduct of the kind mentioned in section 18(1) of that Act,
- (c) agreements, decisions or concerted practices of the kind mentioned in Article 81(1) of the treaty establishing the European Community, or
- (d) conduct which amounts to abuse of the kind mentioned in Article 82 of that treaty,

in relation to commercial activities connected with the supply of water or securing the supply of water or the provision or securing the provision of sewerage services.

(4) So far as necessary for the purposes of, or in connection with, the provisions of paragraph (1) and (2), references in Part 4 of the Enterprise Act to the OFT (including references in provisions of that Act applied by that Part) shall be construed as including references to the Authority (except in sections 166 and 171 of that Act and in any other provision of that Act where the context otherwise requires).

(5) So far as necessary for the purposes of, or in connection with, the provisions of paragraph (3), references in Part I of the Competition Act 1998 to the OFT are to be read as including a reference to the Authority (except in sections 31D(1) to (6), 38(1) to (6), 51, 52(6) and (8) and 54 of that Act and in any other provision of that Act where the context otherwise requires).

(6) Before the OFT or the Authority first exercises in relation to any matter functions which are exercisable concurrently by virtue of paragraph (1), it shall consult the other.

(7) Neither the OFT nor the Authority shall exercise in relation to any matter any functions which are exercisable concurrently by virtue of paragraph (1) if functions which are so exercisable have been exercised in relation to that matter by the other.

(8) It shall be the duty of the Authority, for the purpose of assisting the Competition Commission in carrying out an investigation on a reference made to the Commission by the Authority by virtue of paragraph (2), to give to the Commission—

- (a) any information which is in the Authority's possession and which relates to matters falling within the scope of the investigation, and which is either requested by the Commission for that purpose or is information which in the Authority's opinion it would be appropriate for that purpose to give to the Commission without any such request; and
- (b) any other assistance which the Commission may require, and which it is within the Authority's power to give, in relation to any such matters,

and the Commission shall, for the purposes of carrying out any such investigation, take into account any information given to it for that purpose under this paragraph.

(9) If any question arises as to whether paragraph (2) or (3) applies to any particular case, that question shall be referred to and determined by the Secretary of State; and no objection shall be taken to anything done under—

(a) Part 4 of the Enterprise Act; or

(b) Part 1 of the Competition Act 1998 (other than sections 31D(1) to (6), 38(1) to (6) and 51),  
by or in relation to the Authority on the ground that it should have been done by or in relation to the OFT.

(10) Section 117 of the Enterprise Act (offence of supplying false or misleading information) as applied by section 180 of that Act shall have effect so far as relating to functions exercisable by the Authority by virtue of paragraph (1) as if the reference in section 117(1)(a) and (2) to the OFT included a reference to the Authority.