



Enterprise Act 2002

2002 CHAPTER 40

PART 3

MERGERS

CHAPTER 1

DUTY TO MAKE REFERENCES

Duty to make references: anticipated mergers

33 Duty to make references in relation to anticipated mergers

- (1) [^{F1}The CMA shall, subject to subsections (2) and (3), make a reference to its chair for the constitution of a group under Schedule 4 to the Enterprise and Regulatory Reform Act 2013 if the CMA believes that it is or may be the case that—
 - (a) arrangements are in progress or in contemplation which, if carried into effect, will result in the creation of a relevant merger situation; and
 - (b) the creation of that situation may be expected to result in a substantial lessening of competition within any market or markets in the United Kingdom for goods or services.
- (2) The [^{F2}CMA] may decide not to make a reference under this section if it believes that—
 - (a) the market concerned is not, or the markets concerned are not, of sufficient importance to justify the making of a reference ^{F3}...;
 - (b) the arrangements concerned are not sufficiently far advanced, or are not sufficiently likely to proceed, to justify the making of a reference ^{F4}...; or
 - (c) any relevant customer benefits in relation to the creation of the relevant merger situation concerned outweigh the substantial lessening of competition concerned and any adverse effects of the substantial lessening of competition concerned.

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- (3) No reference shall be made under this section if—
- [^{F5}(za) the period within which the CMA is required by section 34ZA to decide whether the duty to make the reference applies has expired without such a decision having been made;]
 - (a) the making of the reference is prevented by section ^{F6} . . . 74(1) ^{F7} ... or paragraph 4 of Schedule 7;
 - (b) the [^{F8}CMA] is considering whether to accept undertakings under section 73 instead of making such a reference;
 - (c) the arrangements concerned are being, or have been, dealt with in connection with a reference made under section 22;
 - (d) a notice under section 42(2) is in force in relation to the matter or the matter to which such a notice relates has been finally determined under Chapter 2 otherwise than in circumstances in which a notice is then given to the [^{F8}CMA] under section 56(1); [^{F9} or]
 - (e) the European Commission is considering a request made, in relation to the matter concerned, by the United Kingdom (whether alone or with others) under article [^{F10}22(1) of the EC Merger Regulation], is proceeding with the matter in pursuance of such a request or has dealt with the matter in pursuance of such a request[^{F11}; or
 - (f) subject to subsection (3A), a reasoned submission requesting referral to the European Commission has been submitted to the European Commission under article 4(5) of the EC Merger Regulation.]
- [^{F12}(3A) Section 33(3)(f) shall cease to apply if the [^{F8}CMA] is informed that a Member State competent to examine the concentration under its national competition law has, within the time permitted by Article 4(5) of the EC Merger Regulation, expressed its disagreement as regards the request to refer the case to the European Commission; and this subsection shall be construed in accordance with that Regulation.]
- (4) A reference under this section shall, in particular, specify—
- (a) the enactment under which it is made; and
 - (b) the date on which it is made.

Textual Amendments

- F1** Words in s. 33(1) substituted (1.4.2014) by Enterprise and Regulatory Reform Act 2013 (c. 24), s. 103(3), **Sch. 5 para. 72(2)** (with s. 28); S.I. 2014/416, art. 2(1)(d) (with Sch.)
- F2** Word in s. 33(2) substituted (1.4.2014) by Enterprise and Regulatory Reform Act 2013 (c. 24), s. 103(3), **Sch. 5 para. 72(3)(a)** (with s. 28); S.I. 2014/416, art. 2(1)(d) (with Sch.)
- F3** Words in s. 33(2)(a) omitted (1.4.2014) by virtue of Enterprise and Regulatory Reform Act 2013 (c. 24), s. 103(3), **Sch. 5 para. 72(3)(b)** (with s. 28); S.I. 2014/416, art. 2(1)(d) (with Sch.)
- F4** Words in s. 33(2)(b) omitted (1.4.2014) by virtue of Enterprise and Regulatory Reform Act 2013 (c. 24), s. 103(3), **Sch. 5 para. 72(3)(c)** (with s. 28); S.I. 2014/416, art. 2(1)(d) (with Sch.)
- F5** S. 33(3)(za) inserted (1.4.2014) by Enterprise and Regulatory Reform Act 2013 (c. 24), s. 103(3), **Sch. 8 para. 3(a)**; S.I. 2014/416, art. 2(1)(d) (with Sch.)
- F6** Words in s. 33(3)(a) repealed (29.12.2003) by Communications Act 2003 (c. 21), ss. 406(7), 411(2)(3), **Sch. 19(1)** (with transitional provisions in Sch. 18 and with Sch. 19 Note 1); S.I. 2003/3142, **art. 3(1)**, Sch. 1 (subject to arts. 3(3), 11)
- F7** Words in s. 33(3)(a) omitted (1.4.2014) by virtue of Enterprise and Regulatory Reform Act 2013 (c. 24), s. 103(3), **Sch. 8 para. 3(b)**; S.I. 2014/416, art. 2(1)(d) (with Sch.)

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- F8** Word in s. 33(3)(3A) substituted (1.4.2014) by Enterprise and Regulatory Reform Act 2013 (c. 24), s. 103(3), **Sch. 5 para. 72(4)** (with s. 28); S.I. 2014/416, art. 2(1)(d) (with Sch.)
- F9** Word in s. 33(3) ceased to have effect (1.5.2004) by virtue of The EC Merger Control (Consequential Amendments) Regulations 2004 (S.I. 2004/1079), reg. 2, **Sch. para. 2(6)(a)**
- F10** Words in s. 33(3)(e) substituted (1.5.2004) by The EC Merger Control (Consequential Amendments) Regulations 2004 (S.I. 2004/1079), reg. 2, **Sch. para. 2(6)(b)**
- F11** S. 33(3)(f) and preceding word inserted (1.5.2004) by The EC Merger Control (Consequential Amendments) Regulations 2004 (S.I. 2004/1079), reg. 2, **Sch. para. 2(7)**
- F12** S. 33(3A) inserted (1.5.2004) by The EC Merger Control (Consequential Amendments) Regulations 2004 (S.I. 2004/1079), reg. 2, **Sch. para. 2(8)**

Modifications etc. (not altering text)

- C1** Pt. 3 modified (1.4.2014) by Enterprise and Regulatory Reform Act 2013 (c. 24), s. 103(3), **Sch. 4 para. 56**; S.I. 2014/416, art. 2(1)(c) (with Sch.)

34 Supplementary provision in relation to anticipated mergers

- (1) The Secretary of State may by order make such provision as he considers appropriate about the operation of sections 27 and 29 in relation to—
- (a) references under this Part which relate to arrangements which are in progress or in contemplation; or
 - (b) notices under section 42(2), 59(2) or 67(2) which relate to such arrangements.
- (2) An order under subsection (1) may, in particular—
- (a) provide for sections 27(5) to (8) and 29 to apply with modifications in relation to such references or notices or in relation to particular descriptions of such references or notices;
 - (b) enable particular descriptions of events, arrangements or transactions which have already occurred—
 - (i) to be taken into account for the purposes of deciding whether to make such references or such references of a particular description or whether to give such notices or such notices of a particular description;
 - (ii) to be dealt with under such references or such references of a particular description or under such notices or such notices of a particular description.

[^{F13}34ZA] Time-limits for decisions about references

- (1) In carrying out its function of deciding whether to make a reference under section 22 or 33, the CMA shall, within the initial period—
- (a) decide whether the duty to make a reference under the section applies (taking account of the power under section 22(2) or (as the case may be) 33(2) and the operation of section 22(3) or (as the case may be) 33(3)); and
 - (b) inform the persons carrying on the enterprises concerned by notice of the decision and of the reasons for it.
- (2) Nothing in this section prevents the CMA from making a reference under section 22 or 33 in the event that—
- (a) it decides that the duty to make a reference does not apply because it is considering whether to accept undertakings under section 73; but

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- (b) no such undertakings are offered or accepted.
- (3) In this section—
- “the initial period” means (subject to any extension under section 34ZB) the period of 40 working days beginning with—
- (a) where the CMA is carrying out its function in consequence of the giving of a merger notice under section 96, the first working day after the day on which the CMA gives notice under section 96(2A) to the person who gave the merger notice, and
- (b) in any other case, the first working day after the day on which the CMA informs the persons carrying on the enterprises concerned by notice that it has sufficient information to enable it to begin an investigation for the purposes of deciding whether to make a reference;
- “working day” means any day which is not—
- (a) a Saturday, a Sunday, Good Friday or Christmas Day, or
- (b) a day which is a bank holiday in England and Wales.
- (4) For the purposes of paragraph (a) in the definition of “initial period” in subsection (3), the CMA is carrying out its function in consequence of the giving of a merger notice under section 96 if it is considering whether to make a reference under section 22 or 33 in relation to—
- (a) arrangements of which notice is given in the merger notice or arrangements which do not differ from them in any material respect, or
- (b) the creation of any relevant merger situation which is, or may be, created in consequence of carrying such arrangements into effect.
- (5) Nothing in this section applies where section 34A(2) or 46A(2) applies (duties where case referred by the European Commission).

Textual Amendments

F13 Ss. 34ZA-34ZC and cross-heading inserted (25.4.2013 for specified purposes, 1.4.2014 in so far as not already in force) by [Enterprise and Regulatory Reform Act 2013 \(c. 24\), s. 103\(1\)\(i\)\(3\), Sch. 8 para. 4; S.I. 2014/416, art. 2\(1\)\(d\) \(with Sch.\)](#)

34ZB Extension of time-limits

- (1) The CMA may extend the initial period mentioned in section 34ZA(1) if it considers that a relevant person has failed (with or without a reasonable excuse) to comply with any requirement of a notice under section 109 in relation to the case in question.
- (2) In subsection (1), “relevant person” means—
- (a) any person carrying on any of the enterprises concerned;
- (b) any person who (whether alone or as a member of a group) owns or has control of any such person; or
- (c) any officer, employee or agent of any person mentioned in paragraph (a) or (b).
- (3) For the purposes of subsection (2), a person or group of persons able, directly or indirectly, to control or materially to influence the policy of a body of persons

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corporate or unincorporate, but without having a controlling interest in that body of persons, may be treated as having control of it.

- (4) Where an intervention notice is in force in relation to the matter concerned, the CMA may extend the initial period by no more than 20 working days.
- (5) The CMA may by notice extend the initial period if the European Commission is considering a request made, in relation to the matter concerned, by the United Kingdom (whether alone or with others) under article 22(1) of the EC Merger Regulation (but is not yet proceeding with the matter in pursuance of such a request).
- (6) An extension under subsection (1) or (4) comes into force when published under section 107.
- (7) An extension under subsection (1) continues in force until—
 - (a) the person concerned provides the information or documents to the satisfaction of the CMA or (as the case may be) appears as a witness in accordance with the requirements of the CMA; or
 - (b) the CMA publishes its decision to cancel the extension.
- (8) An extension under subsection (5) shall be for the period which—
 - (a) begins when notice is given under that subsection, and
 - (b) ends when the CMA gives notice of the completion by the European Commission of its consideration of the request of the United Kingdom.
- (9) In this section, “working day” has the same meaning as in section 34ZA.

Textual Amendments

F13 Ss. 34ZA-34ZC and cross-heading inserted (25.4.2013 for specified purposes, 1.4.2014 in so far as not already in force) by [Enterprise and Regulatory Reform Act 2013 \(c. 24\), s. 103\(1\)\(i\)\(3\)](#), [Sch. 8 para. 4](#); [S.I. 2014/416, art. 2\(1\)\(d\)](#) (with [Sch.](#))

34ZC Sections 34ZA and 34ZB: supplementary

- (1) An extension of the period mentioned in section 34ZA(1) may be made under each of subsections (1), (4) or (5) of section 34ZB.
- (2) No more than one extension is possible under section 34ZB(4).
- (3) Where a period is extended or further extended under section 34ZB(1), (4) or (5), the period as extended or (as the case may be) further extended shall, subject to subsections (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) Subsection (5) applies where—
 - (a) the period mentioned in section 34ZA(1) is further extended;
 - (b) the further extension and at least one previous extension is made under one or more of subsections (1) and (5) of section 34ZB; 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 subsection (4)(c) are to be disregarded.

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- (6) The Secretary of State may by order do either or both of the following—
- (a) amend section 34ZA so as to alter the period of 40 working days mentioned in subsection (3) of that section or any period for the time being mentioned in that subsection in substitution for that period;
 - (b) amend section 34ZB so as to alter the period of 20 working days mentioned in subsection (4) of that section or any period for the time being mentioned in that subsection in substitution for that period.
- (7) But no alteration may be made by virtue of subsection (6) which results in—
- (a) the period for the time being mentioned in section 34ZA(3) exceeding 40 working days; or
 - (b) the period for the time being mentioned in section 34ZB(4) exceeding 20 working days.
- (8) Before making an order under subsection (6), the Secretary of State shall consult the CMA and such other persons as the Secretary of State considers appropriate.
- (9) In this section, “working day” has the same meaning as in section 34ZA.]

Textual Amendments

- F13** Ss. 34ZA-34ZC and cross-heading inserted (25.4.2013 for specified purposes, 1.4.2014 in so far as not already in force) by [Enterprise and Regulatory Reform Act 2013 \(c. 24\), s. 103\(1\)\(i\)\(3\)](#), [Sch. 8 para. 4](#); S.I. 2014/416, art. 2(1)(d) (with Sch.)

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