



# Enterprise Act 2002

## 2002 CHAPTER 40

### PART 3

#### MERGERS

### CHAPTER 3

#### OTHER SPECIAL CASES

##### *Special public interest cases*

#### **59 Intervention by Secretary of State in special public interest cases**

- (1) Subsection (2) applies where the Secretary of State has reasonable grounds for suspecting that it is or may be the case that a special 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 special merger situation.
- (2) The Secretary of State may give a notice to the OFT (in this Part “a special intervention notice”) if he believes that it is or may be the case that one or more than one consideration specified in section 58 is relevant to a consideration of the special merger situation concerned.
- (3) For the purposes of this Part a special merger situation has been created if—
  - (a) no relevant merger situation has been created because of section 23(1)(b) and (2)(b); but
  - (b) a relevant merger situation would have been created if those enactments were disregarded;and the conditions mentioned in subsection (4) are satisfied.
- (4) The conditions mentioned in this subsection are that, immediately before the enterprises concerned ceased to be distinct—

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- (a) at least one of the enterprises concerned was carried on in the United Kingdom or by or under the control of a body corporate incorporated in the United Kingdom; and
  - (b) a person carrying on one or more of the enterprises concerned was a relevant government contractor.
- (5) 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, sections 23 to 32 (read together with section 34) shall apply for the purposes of this Chapter as they do for the purposes of Chapter 1 but subject to subsection (6).
- (6) In their application by virtue of subsection (5) sections 23 to 32 shall have effect as if—
- (a) for paragraph (a) of section 23(9) there were substituted—
    - “(a) in relation to the giving of a special intervention notice, the time when the notice is given;
    - (aa) in relation to the making of a report by the OFT under section 61, the time of the making of the report;
    - (ab) in the case of a reference which is treated as having been made under section 62(2) by virtue of section 64(2), such time as the Commission may determine; and”;
  - (b) the references to the OFT in section 24(2)(a) and (b) included references to the Secretary of State;
  - (c) the references to the OFT in sections 25(1) to (3), (6) and (8) and 31 included references to the Secretary of State;
  - (d) the references to the OFT in section 25(4) and (5) were references to the Secretary of State;
  - (e) the reference in section 25(4) to section 73 were a reference to paragraph 3 of Schedule 7;
  - (f) the reference in section 25(12) to one extension were a reference to one extension by the OFT and one extension by the Secretary of State;
  - (g) the powers to extend time-limits under section 25 as applied by subsection (5) above, and the power to request information under section 31(1) as so applied, were not exercisable by the OFT or the Secretary of State before the giving of a special intervention notice;
  - (h) in subsection (1) of section 31 for the words “section 22” there were substituted “section 62(2)” and, in the application of that subsection to the OFT, for the word “deciding” there were substituted “enabling the Secretary of State to decide”;
  - (i) in the case of the giving of special intervention notices, the references in sections 23 to 32 to the making of a reference or a reference were, so far as necessary, references to the giving of a special intervention notice or a special intervention notice; and
  - (j) the references to the OFT in section 32(2)(a) to (c) and (3) were construed in accordance with the above modifications.
- (7) No more than one special intervention notice shall be given under subsection (2) in relation to the same special merger situation.
- (8) In this section “relevant government contractor” means—
- (a) a government contractor—

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- (i) who has been notified by or on behalf of the Secretary of State of information, documents or other articles relating to defence and of a confidential nature which the government contractor or an employee of his may hold or receive in connection with being such a contractor; and
  - (ii) whose notification has not been revoked by or on behalf of the Secretary of State; or
- (b) a former government contractor who was so notified when he was a government contractor and whose notification has not been revoked by or on behalf of the Secretary of State.
- (9) In this section—
- “defence” has the same meaning as in section 2 of the Official Secrets Act 1989 (c. 6); and
- “government contractor” has the same meaning as in the Act of 1989 and includes any sub-contractor of a government contractor, any sub-contractor of that sub-contractor and any other sub-contractor in a chain of sub-contractors which begins with the sub-contractor of the government contractor.

## **60 Special intervention notices under section 59**

- (1) A special intervention notice shall state—
- (a) the special merger situation concerned; and
  - (b) the consideration specified in section 58 or considerations so specified which are, or may be, relevant to the special merger situation concerned.
- (2) Where the Secretary of State believes that it is or may be the case that two or more considerations specified in section 58 are relevant to a consideration of the special merger situation concerned, he may decide not to mention in the special intervention notice such of those considerations as he considers appropriate.
- (3) A special 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 under this Chapter.
- (4) For the purposes of this Part, a matter to which a special intervention notice relates is finally determined under this Chapter if—
- (a) the time within which the OFT is to report to the Secretary of State under section 61 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 7 instead of making a reference under section 62;
  - (c) the Secretary of State otherwise decides not to make a reference under that section;
  - (d) the Commission cancels such a reference under section 64(1);
  - (e) the time within which the Commission is to prepare a report under section 65 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 section 66(2) has expired and no such decision has been made and published;
  - (g) the Secretary of State decides under subsection (2) of section 66 otherwise than as mentioned in subsection (5) of that section;

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- (h) the Secretary of State decides under subsection (2) of section 66 as mentioned in subsection (5) of that section but decides neither to accept an undertaking under paragraph 9 of Schedule 7 nor to make an order under paragraph 11 of that Schedule; or
  - (i) the Secretary of State decides under subsection (2) of section 66 as mentioned in subsection (5) of that section and accepts an undertaking under paragraph 9 of Schedule 7 or makes an order under paragraph 11 of that Schedule.
- (5) For the purposes of this Part the time when a matter to which a special intervention notice relates is finally determined under this Chapter is—
- (a) in a case falling within subsection (4)(a), (e) or (f), the expiry of the time concerned;
  - (b) in a case falling within subsection (4)(b), the acceptance of the undertaking or group of undertakings concerned;
  - (c) in a case falling within subsection (4)(c), (d) or (g), the making of the decision concerned;
  - (d) in a case falling within subsection (4)(h), the making of the decision neither to accept an undertaking under paragraph 9 of Schedule 7 nor to make an order under paragraph 11 of that Schedule; and
  - (e) in a case falling within subsection (4)(i), the acceptance of the undertaking concerned or (as the case may be) the making of the order concerned.

## **61 Initial investigation and report by OFT**

- (1) Subsection (2) applies where the Secretary of State has given a special intervention notice in relation to a special merger situation.
- (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 which are also relevant to the Secretary of State's decision as to whether to make a reference under section 62; and
  - (b) a summary of any representations about the case which have been received by the OFT and which relate to any consideration mentioned in the special 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 section 62.
- (4) The report shall include a decision as to whether the OFT believes (disregarding section 59(4)(b)) that it is, or may be, the case that a special 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 special merger situation.
- (5) The report may, in particular, include advice and recommendations on any consideration mentioned in the special 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 section 62.
- (6) The OFT shall carry out such investigations as it considers appropriate for the purposes of producing a report under this section.

## **62 Power of Secretary of State to refer the matter**

- (1) Subsection (2) applies where the Secretary of State—
  - (a) has given a special intervention notice in relation to a special merger situation; and
  - (b) has received a report of the OFT under section 61 in relation to the matter.
- (2) The Secretary of State may make a reference to the Commission if he believes that it is or may be the case that—
  - (a) a special merger situation has been created;
  - (b) one or more than one consideration mentioned in the special intervention notice is relevant to a consideration of the special merger situation concerned; and
  - (c) taking account only of the relevant 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 he 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 special merger situation;
  - (b) one or more than one consideration mentioned in the special intervention notice is relevant to a consideration of the special merger situation concerned; and
  - (c) taking account only of the relevant consideration or considerations concerned, the creation of that situation may be expected to operate against the public interest.
- (4) No reference shall be made under this section if the making of the reference is prevented by section 69(1) or paragraph 4 of Schedule 7.
- (5) The Secretary of State, in deciding whether to make a reference under this section, shall accept the decision of the OFT included in its report under section 61 by virtue of subsection (4) of that section.
- (6) A reference under this section shall, in particular, specify—
  - (a) the subsection of this section under which it is made;
  - (b) the date on which it is made; and
  - (c) the consideration or considerations mentioned in the special intervention notice which the Secretary of State believes are, or may be, relevant to a consideration of the special merger situation concerned.

## **63 Questions to be decided on references under section 62**

- (1) The Commission shall, on a reference under section 62(2), decide whether a special merger situation has been created.
- (2) The Commission shall, on a reference under section 62(3), decide whether arrangements are in progress or in contemplation which, if carried into effect, will result in the creation of a special merger situation.
- (3) If the Commission decides that a special merger situation has been created or that arrangements are in progress or in contemplation which, if carried into effect, will

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result in the creation of a special merger situation, it shall, on a reference under section 62, decide whether, taking account only of the consideration or considerations mentioned in the reference, 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 section 62 that the creation of a special 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 section 66 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 special 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 special 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.

#### **64 Cancellation and variation of references under section 62**

- (1) The Commission shall cancel a reference under section 62(3) if it considers that the proposal to make arrangements of the kind mentioned in that reference has been abandoned.
- (2) 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 subsection (2) or (3) of section 62 as if it had been made under subsection (3) or (as the case may be) (2) of that section; and, in such cases, references in this Part to references under those enactments shall, so far as may be necessary, be construed accordingly.
- (3) Where, by virtue of subsection (2), the Commission treats a reference made under subsection (2) or (3) of section 62 as if it had been made under subsection (3) or (as the case may be) (2) of that section, paragraphs 1, 2, 7 and 8 of Schedule 7 shall, in particular, apply as if the reference had been made under subsection (3) or (as the case may be) (2) of that section instead of under subsection (2) or (3) of that section.
- (4) Subsection (5) applies in relation to any undertaking accepted under paragraph 1 of Schedule 7, or any order made under paragraph 2 of that Schedule, which is in force immediately before the Commission, by virtue of subsection (2), treats a reference made under subsection (2) or (3) of section 62 as if it had been made under subsection (3) or (as the case may be) (2) of that section.
- (5) The undertaking or order shall, so far as applicable, continue in force as if—
  - (a) in the case of an undertaking or order which relates to a reference under subsection (2) of section 62, accepted or made in relation to a reference made under subsection (3) of that section; and
  - (b) in the case of an undertaking or order which relates to a reference made under subsection (3) of that section, accepted or made in relation to a reference made under subsection (2) of that section;

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

- (6) The Secretary of State may at any time vary a reference under section 62.
- (7) The Secretary of State shall consult the Commission before varying any such reference.
- (8) Subsection (7) shall not apply if the Commission has requested the variation concerned.
- (9) No variation by the Secretary of State under this section shall be capable of altering the consideration or considerations specified in the reference or the period permitted by virtue of section 65 within which the report of the Commission under that section is to be prepared and given to the Secretary of State.

## **65 Investigations and reports on references under section 62**

- (1) The Commission shall prepare a report on a reference under section 62 and give it to the Secretary of State within the period permitted by virtue of this section.
- (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 section 63;
  - (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) Sections 51 and 52 (but not section 53) shall apply for the purposes of a report under this section as they apply for the purposes of a report under section 50.
- (4) The Commission shall carry out such investigations as it considers appropriate for the purpose of producing a report under this section.

## **66 Decision and enforcement action by Secretary of State**

- (1) Subsection (2) applies where the Secretary of State has received a report of the Commission under section 65 in relation to a special merger situation.
- (2) The Secretary of State shall, in connection with a reference under section 62(2) or (3), decide the questions which the Commission is required to decide by virtue of section 63(1) to (3).
- (3) The Secretary of State shall make and publish his decision under subsection (2) within the period of 30 days beginning with the receipt of the report of the Commission under section 65; and subsection (8) of section 54 shall apply for the purposes of this subsection as it applies for the purposes of subsection (5) of that section.
- (4) In making his decisions under subsection (2), the Secretary of State shall accept the decisions of the report of the Commission under section 65 as to whether a special 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 special merger situation.

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- (5) Subsection (6) applies where the Secretary of State has decided under subsection (2) that—
- (a) a special 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 special merger situation;
  - (b) at least one consideration which is mentioned in the special intervention notice concerned is relevant to a consideration of the special merger situation concerned; and
  - (c) taking account only of the relevant 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 his decision, within the period required by subsection (3).
- (6) The Secretary of State may take such action under paragraph 9 or 11 of Schedule 7 as he considers to be 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 special merger situation concerned.
- (7) In making a decision under subsection (6), the Secretary of State shall, in particular, have regard to the report of the Commission under section 65.