



Enterprise Act 2002

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PART 3

MERGERS

CHAPTER 1

DUTY TO MAKE REFERENCES

Duty to make references: completed mergers

22 Duty to make references in relation to completed mergers

- (1) The OFT shall, subject to subsections (2) and (3), make a reference to the Commission if the OFT believes that it is or may be the case that—
 - (a) a relevant merger situation has been created; and
 - (b) the creation of that situation has resulted, or 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 OFT 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 to the Commission; or
 - (b) 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.
- (3) No reference shall be made under this section if—
 - (a) the making of the reference is prevented by section 69(1), 74(1) or 96(3) or paragraph 4 of Schedule 7;

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- (b) the OFT is considering whether to accept undertakings under section 73 instead of making such a reference;
 - (c) the relevant merger situation concerned is being, or has been, dealt with in connection with a reference made under section 33;
 - (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 OFT under section 56(1); 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 22(3) of the European Merger Regulations, is proceeding with the matter in pursuance of such a request or has dealt with the matter in pursuance of such a request.
- (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.
- (5) The references in this section to the creation of a relevant merger situation shall be construed in accordance with section 23, the reference in subsection (2) of this section to relevant customer benefits shall be construed in accordance with section 30 and the reference in subsection (3) of this section to a matter to which a notice under section 42(2) relates being finally determined under Chapter 2 shall be construed in accordance with section 43(4) and (5).
- (6) In this Part “market in the United Kingdom” includes—
- (a) so far as it operates in the United Kingdom or a part of the United Kingdom, any market which operates there and in another country or territory or in a part of another country or territory; and
 - (b) any market which operates only in a part of the United Kingdom;
- and references to a market for goods or services include references to a market for goods and services.
- (7) In this Part “the decision-making authority” means—
- (a) in the case of a reference or possible reference under this section or section 33, the OFT or (as the case may be) the Commission; and
 - (b) in the case of a notice or possible notice under section 42(2) or 59(2) or a reference or possible reference under section 45 or 62, the OFT, the Commission or (as the case may be) the Secretary of State.

23 Relevant merger situations

- (1) For the purposes of this Part, a relevant merger situation has been created if—
- (a) two or more enterprises have ceased to be distinct enterprises at a time or in circumstances falling within section 24; and
 - (b) the value of the turnover in the United Kingdom of the enterprise being taken over exceeds £70 million.
- (2) For the purposes of this Part, a relevant merger situation has also been created if—
- (a) two or more enterprises have ceased to be distinct enterprises at a time or in circumstances falling within section 24; and

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- (b) as a result, one or both of the conditions mentioned in subsections (3) and (4) below prevails or prevails to a greater extent.
- (3) The condition mentioned in this subsection is that, in relation to the supply of goods of any description, at least one-quarter of all the goods of that description which are supplied in the United Kingdom, or in a substantial part of the United Kingdom—
 - (a) are supplied by one and the same person or are supplied to one and the same person; or
 - (b) are supplied by the persons by whom the enterprises concerned are carried on, or are supplied to those persons.
- (4) The condition mentioned in this subsection is that, in relation to the supply of services of any description, the supply of services of that description in the United Kingdom, or in a substantial part of the United Kingdom, is to the extent of at least one-quarter—
 - (a) supply by one and the same person, or supply for one and the same person; or
 - (b) supply by the persons by whom the enterprises concerned are carried on, or supply for those persons.
- (5) For the purpose of deciding whether the proportion of one-quarter mentioned in subsection (3) or (4) is fulfilled with respect to goods or (as the case may be) services of any description, the decision-making authority shall apply such criterion (whether value, cost, price, quantity, capacity, number of workers employed or some other criterion, of whatever nature), or such combination of criteria, as the decision-making authority considers appropriate.
- (6) References in subsections (3) and (4) to the supply of goods or (as the case may be) services shall, in relation to goods or services of any description which are the subject of different forms of supply, be construed in whichever of the following ways the decision-making authority considers appropriate—
 - (a) as references to any of those forms of supply taken separately;
 - (b) as references to all those forms of supply taken together; or
 - (c) as references to any of those forms of supply taken in groups.
- (7) For the purposes of subsection (6) the decision-making authority may treat goods or services as being the subject of different forms of supply whenever—
 - (a) the transactions concerned differ as to their nature, their parties, their terms or their surrounding circumstances; and
 - (b) the difference is one which, in the opinion of the decision-making authority, ought for the purposes of that subsection to be treated as a material difference.
- (8) The criteria for deciding when goods or services can be treated, for the purposes of this section, as goods or services of a separate description shall be such as in any particular case the decision-making authority considers appropriate in the circumstances of that case.
- (9) For the purposes of this Chapter, the question whether a relevant merger situation has been created shall be determined as at—
 - (a) in the case of a reference which is treated as having been made under section 22 by virtue of section 37(2), such time as the Commission may determine; and
 - (b) in any other case, immediately before the time when the reference has been, or is to be, made.

24 Time-limits and prior notice

- (1) For the purposes of section 23 two or more enterprises have ceased to be distinct enterprises at a time or in circumstances falling within this section if—
 - (a) the two or more enterprises ceased to be distinct enterprises before the day on which the reference relating to them is to be made and did so not more than four months before that day; or
 - (b) notice of material facts about the arrangements or transactions under or in consequence of which the enterprises have ceased to be distinct enterprises has not been given in accordance with subsection (2).
- (2) Notice of material facts is given in accordance with this subsection if—
 - (a) it is given to the OFT prior to the entering into of the arrangements or transactions concerned or the facts are made public prior to the entering into of those arrangements or transactions; or
 - (b) it is given to the OFT, or the facts are made public, more than four months before the day on which the reference is to be made.
- (3) In this section—
 - “made public” means so publicised as to be generally known or readily ascertainable; and
 - “notice” includes notice which is not in writing.

25 Extension of time-limits

- (1) The OFT and the persons carrying on the enterprises which have or may have ceased to be distinct enterprises may agree to extend by no more than 20 days the four month period mentioned in section 24(1)(a) or (2)(b).
- (2) The OFT may by notice to the persons carrying on the enterprises which have or may have ceased to be distinct enterprises extend the four month period mentioned in section 24(1)(a) or (2)(b) if it considers that any of those persons has failed to provide, within the period stated in a notice under section 31 and in the manner authorised or required, information requested of him in that notice.
- (3) An extension under subsection (2) shall be for the period beginning with the end of the period within which the information is to be provided and which is stated in the notice under section 31 and ending with—
 - (a) the provision of the information to the satisfaction of the OFT; or
 - (b) if earlier, the cancellation by the OFT of the extension.
- (4) The OFT may by notice to the persons carrying on the enterprises which have or may have ceased to be distinct enterprises extend the four month period mentioned in section 24(1)(a) or (2)(b) if it is seeking undertakings from any of those persons under section 73.
- (5) An extension under subsection (4) shall be for the period beginning with the receipt of the notice under that subsection and ending with the earliest of the following events—
 - (a) the giving of the undertakings concerned;
 - (b) the expiry of the period of 10 days beginning with the first day after the receipt by the OFT of a notice from the person who has been given a notice under subsection (4) and from whom the undertakings are being sought stating that he does not intend to give the undertakings; or

- (c) the cancellation by the OFT of the extension.
- (6) The OFT may by notice to the persons carrying on the enterprises which have or may have ceased to be distinct enterprises extend the four month period mentioned in section 24(1)(a) or (2)(b) 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(3) of the European Merger Regulations (but is not yet proceeding with the matter in pursuance of such a request).
- (7) An extension under subsection (6) shall be for the period beginning with the receipt of the notice under that subsection and ending with the receipt of a notice under subsection (8).
- (8) The OFT shall, in connection with any notice given by it under subsection (6), by notice inform the persons carrying on the enterprises which have or may have ceased to be distinct enterprises of the completion by the European Commission of its consideration of the request of the United Kingdom.
- (9) Subject to subsections (10) and (11), where the four month period mentioned in section 24(1)(a) or (2)(b) is extended or further extended by virtue of this section in relation to a particular case, any reference to that period in section 24 or the preceding provisions of this section shall have effect in relation to that case as if it were a reference to a period equivalent to the aggregate of the period being extended and the period of the extension (whether or not those periods overlap in time).
- (10) Subsection (11) applies where—
 - (a) the four month period mentioned in section 24(1)(a) or (2)(b) is further extended;
 - (b) the further extension and at least one previous extension is made under one or more of subsections (2), (4) and (6); 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.
- (11) In calculating the period of the further extension, any days or fractions of days of the kind mentioned in subsection (10)(c) shall be disregarded.
- (12) No more than one extension is possible under subsection (1).

26 Enterprises ceasing to be distinct enterprises

- (1) For the purposes of this Part any two enterprises cease to be distinct enterprises if they are brought under common ownership or common control (whether or not the business to which either of them formerly belonged continues to be carried on under the same or different ownership or control).
- (2) Enterprises shall, in particular, be treated as being under common control if they are—
 - (a) enterprises of interconnected bodies corporate;
 - (b) enterprises carried on by two or more bodies corporate of which one and the same person or group of persons has control; or
 - (c) an enterprise carried on by a body corporate and an enterprise carried on by a person or group of persons having control of that body corporate.
- (3) A person or group of persons able, directly or indirectly, to control or materially to influence the policy of a body corporate, or the policy of any person in carrying on

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an enterprise but without having a controlling interest in that body corporate or in that enterprise, may, for the purposes of subsections (1) and (2), be treated as having control of it.

- (4) For the purposes of subsection (1), in so far as it relates to bringing two or more enterprises under common control, a person or group of persons may be treated as bringing an enterprise under his or their control if—
- (a) being already able to control or materially to influence the policy of the person carrying on the enterprise, that person or group of persons acquires a controlling interest in the enterprise or, in the case of an enterprise carried on by a body corporate, acquires a controlling interest in that body corporate; or
 - (b) being already able materially to influence the policy of the person carrying on the enterprise, that person or group of persons becomes able to control that policy.

27 Time when enterprises cease to be distinct

- (1) Subsection (2) applies in relation to any arrangements or transaction—
 - (a) not having immediate effect or having immediate effect only in part; but
 - (b) under or in consequence of which any two enterprises cease to be distinct enterprises.
- (2) The time when the parties to any such arrangements or transaction become bound to such extent as will result, on effect being given to their obligations, in the enterprises ceasing to be distinct enterprises shall be taken to be the time at which the two enterprises cease to be distinct enterprises.
- (3) In accordance with subsections (1) and (2) (but without prejudice to the generality of those subsections) for the purpose of determining the time at which any two enterprises cease to be distinct enterprises no account shall be taken of any option or other conditional right until the option is exercised or the condition is satisfied.
- (4) Subsections (1) to (3) are subject to subsections (5) to (8) and section 29.
- (5) The decision-making authority may, for the purposes of a reference, treat successive events to which this subsection applies as having occurred simultaneously on the date on which the latest of them occurred.
- (6) Subsection (5) applies to successive events—
 - (a) which occur within a period of two years under or in consequence of the same arrangements or transaction, or successive arrangements or transactions between the same parties or interests; and
 - (b) by virtue of each of which, under or in consequence of the arrangements or the transaction or transactions concerned, any enterprises cease as between themselves to be distinct enterprises.
- (7) The decision-making authority may, for the purposes of subsections (5) and (6), treat such arrangements or transactions as the decision-making authority considers appropriate as arrangements or transactions between the same interests.
- (8) In deciding whether it is appropriate to treat arrangements or transactions as arrangements or transactions between the same interests the decision-making authority shall, in particular, have regard to the persons substantially concerned in the arrangements or transactions concerned.

28 Turnover test

- (1) For the purposes of section 23 the value of the turnover in the United Kingdom of the enterprise being taken over shall be determined by taking the total value of the turnover in the United Kingdom of the enterprises which cease to be distinct enterprises and deducting—
 - (a) the turnover in the United Kingdom of any enterprise which continues to be carried on under the same ownership and control; or
 - (b) if no enterprise continues to be carried on under the same ownership and control, the turnover in the United Kingdom which, of all the turnovers concerned, is the turnover of the highest value.
- (2) For the purposes of this Part (other than section 121(4)(c)(ii)) the turnover in the United Kingdom of an enterprise shall be determined in accordance with such provisions as may be specified in an order made by the Secretary of State.
- (3) An order under subsection (2) may, in particular, make provision as to—
 - (a) the amounts which are, or which are not, to be treated as comprising an enterprise's turnover;
 - (b) the date or dates by reference to which an enterprise's turnover is to be determined;
 - (c) the connection with the United Kingdom by virtue of which an enterprise's turnover is turnover in the United Kingdom.
- (4) An order under subsection (2) may, in particular, make provision enabling the decision-making authority to determine matters of a description specified in the order (including any of the matters mentioned in paragraphs (a) to (c) of subsection (3)).
- (5) The OFT shall—
 - (a) keep under review the sum for the time being mentioned in section 23(1)(b); and
 - (b) from time to time advise the Secretary of State as to whether the sum is still appropriate.
- (6) The Secretary of State may by order amend section 23(1)(b) so as to alter the sum for the time being mentioned there.

29 Obtaining control by stages

- (1) Where an enterprise is brought under the control of a person or group of persons in the course of two or more transactions (in this section a “series of transactions”) to which subsection (2) applies, those transactions may, if the decision-making authority considers it appropriate, be treated for the purposes of a reference as having occurred simultaneously on the date on which the latest of them occurred.
- (2) This subsection applies to—
 - (a) any transaction which—
 - (i) enables that person or group of persons directly or indirectly to control or materially to influence the policy of any person carrying on the enterprise;
 - (ii) enables that person or group of persons to do so to a greater degree; or
 - (iii) is a step (whether direct or indirect) towards enabling that person or group of persons to do so; and

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- (b) any transaction by virtue of which that person or group of persons acquires a controlling interest in the enterprise or, where the enterprise is carried on by a body corporate, in that body corporate.
- (3) Where a series of transactions includes a transaction falling within subsection (2)(b), any transaction occurring after the occurrence of that transaction is to be disregarded for the purposes of subsection (1).
- (4) Where the period within which a series of transactions occurs exceeds two years, the transactions that may be treated as mentioned in subsection (1) are any of those transactions that occur within a period of two years.
- (5) Sections 26(2) to (4) and 127(1), (2) and (4) to (6) shall apply for the purposes of this section to determine—
 - (a) whether an enterprise is brought under the control of a person or group of persons; and
 - (b) whether a transaction is one to which subsection (2) applies;
 as they apply for the purposes of section 26 to determine whether enterprises are brought under common control.
- (6) In determining for the purposes of this section the time at which any transaction occurs, no account shall be taken of any option or other conditional right until the option is exercised or the condition is satisfied.

30 Relevant customer benefits

- (1) For the purposes of this Part a benefit is a relevant customer benefit if—
 - (a) it is a benefit to relevant customers in the form of—
 - (i) lower prices, higher quality or greater choice of goods or services in any market in the United Kingdom (whether or not the market or markets in which the substantial lessening of competition concerned has, or may have, occurred or (as the case may be) may occur); or
 - (ii) greater innovation in relation to such goods or services; and
 - (b) the decision-making authority believes—
 - (i) in the case of a reference or possible reference under section 22 or 45(2), as mentioned in subsection (2); and
 - (ii) in the case of a reference or possible reference under section 33 or 45(4), as mentioned in subsection (3).
- (2) The belief, in the case of a reference or possible reference under section 22 or section 45(2), is that—
 - (a) the benefit has accrued as a result of the creation of the relevant merger situation concerned or may be expected to accrue within a reasonable period as a result of the creation of that situation; and
 - (b) the benefit was, or is, unlikely to accrue without the creation of that situation or a similar lessening of competition.
- (3) The belief, in the case of a reference or possible reference under section 33 or 45(4), is that—
 - (a) the benefit may be expected to accrue within a reasonable period as a result of the creation of the relevant merger situation concerned; and

- (b) the benefit is unlikely to accrue without the creation of that situation or a similar lessening of competition.
- (4) In subsection (1) “relevant customers” means—
- (a) customers of any person carrying on an enterprise which, in the creation of the relevant merger situation concerned, has ceased to be, or (as the case may be) will cease to be, a distinct enterprise;
 - (b) customers of such customers; and
 - (c) any other customers in a chain of customers beginning with the customers mentioned in paragraph (a);
- and in this subsection “customers” includes future customers.

31 Information powers in relation to completed mergers

- (1) The OFT may by notice to any of the persons carrying on the enterprises which have or may have ceased to be distinct enterprises request him to provide the OFT with such information as the OFT may require for the purpose of deciding whether to make a reference under section 22.
- (2) The notice shall state—
- (a) the information required;
 - (b) the period within which the information is to be provided; and
 - (c) the possible consequences of not providing the information within the stated period and in the authorised or required manner.

32 Supplementary provision for purposes of sections 25 and 31

- (1) The Secretary of State may make regulations for the purposes of sections 25 and 31.
- (2) The regulations may, in particular—
- (a) provide for the manner in which any information requested by the OFT under section 31 is authorised or required to be provided, and the time at which such information is to be treated as provided (including the time at which it is to be treated as provided to the satisfaction of the OFT for the purposes of section 25(3));
 - (b) provide for the persons carrying on the enterprises which have or may have ceased to be distinct enterprises to be informed, in circumstances in which section 25(3) applies—
 - (i) of the fact that the OFT is satisfied as to the provision of the information requested by it or (as the case may be) of the OFT’s decision to cancel the extension; and
 - (ii) of the time at which the OFT is to be treated as so satisfied or (as the case may be) of the time at which the cancellation is to be treated as having effect;
 - (c) provide for the persons carrying on the enterprises which have or may have ceased to be distinct enterprises to be informed, in circumstances in which section 25(5) applies—
 - (i) of the OFT’s decision to cancel the extension; and
 - (ii) of the time at which the cancellation is to be treated as having effect;
 - (d) provide for the time at which any notice under section 25(4), (5)(b), (6) or (8) is to be treated as received;

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- (e) provide that a person is, or is not, to be treated, in such circumstances as may be specified in the regulations, as acting on behalf of a person carrying on an enterprise which has or may have ceased to be a distinct enterprise.
- (3) A notice under section 25(2)—
- (a) shall be given within 5 days of the end of the period within which the information is to be provided and which is stated in the notice under section 31; and
 - (b) shall inform the person to whom it is addressed of—
 - (i) the OFT’s opinion as mentioned in section 25(2); and
 - (ii) the OFT’s intention to extend the period for considering whether to make a reference.
- (4) In determining for the purposes of section 25(1) or (5)(b) or subsection (3)(a) above any period which is expressed in the enactment concerned as a period of days or number of days no account shall be taken of—
- (a) Saturday, Sunday, Good Friday and Christmas Day; and
 - (b) any day which is a bank holiday in England and Wales.

Duty to make references: anticipated mergers

33 Duty to make references in relation to anticipated mergers

- (1) The OFT shall, subject to subsections (2) and (3), make a reference to the Commission if the OFT 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 OFT 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 to the Commission;
 - (b) the arrangements concerned are not sufficiently far advanced, or are not sufficiently likely to proceed, to justify the making of a reference to the Commission; 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.
- (3) No reference shall be made under this section if—
- (a) the making of the reference is prevented by section 69(1), 74(1) or 96(3) or paragraph 4 of Schedule 7;
 - (b) the OFT 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 OFT under section 56(1); 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 22(3) of the European Merger Regulations, is proceeding with the matter in pursuance of such a request or has dealt with the matter in pursuance of such a request.
- (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.

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.

Determination of references

35 Questions to be decided in relation to completed mergers

- (1) Subject to subsections (6) and (7) and section 127(3), the Commission shall, on a reference under section 22, decide the following questions—
- (a) whether a relevant merger situation has been created; and
 - (b) if so, whether the creation of that situation has resulted, or 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) For the purposes of this Part there is an anti-competitive outcome if—
- (a) a relevant merger situation has been created and the creation of that situation has resulted, or may be expected to result, in a substantial lessening of competition within any market or markets in the United Kingdom for goods or services; or

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- (b) arrangements are in progress or in contemplation which, if carried into effect, will result in the creation of a relevant merger situation and 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.
- (3) The Commission shall, if it has decided on a reference under section 22 that there is an anti-competitive outcome (within the meaning given by subsection (2)(a)), decide the following additional questions—
- (a) whether action should be taken by it under section 41(2) for the purpose of remedying, mitigating or preventing the substantial lessening of competition concerned or any adverse effect which has resulted from, or may be expected to result from, the substantial lessening of competition;
 - (b) whether it should recommend the taking of action by others for the purpose of remedying, mitigating or preventing the substantial lessening of competition concerned or any adverse effect which has resulted from, or may be expected to result from, the substantial lessening of competition; and
 - (c) in either case, if action should be taken, what action should be taken and what is to be remedied, mitigated or prevented.
- (4) In deciding the questions mentioned in subsection (3) the Commission shall, in particular, have regard to the need to achieve as comprehensive a solution as is reasonable and practicable to the substantial lessening of competition and any adverse effects resulting from it.
- (5) In deciding the questions mentioned in subsection (3) the Commission may, in particular, have regard to the effect of any action on any relevant customer benefits in relation to the creation of the relevant merger situation concerned.
- (6) In relation to the question whether a relevant merger situation has been created, a reference under section 22 may be framed so as to require the Commission to exclude from consideration—
- (a) subsection (1) of section 23;
 - (b) subsection (2) of that section; or
 - (c) one of those subsections if the Commission finds that the other is satisfied.
- (7) In relation to the question whether any such result as is mentioned in section 23(2)(b) has arisen, a reference under section 22 may be framed so as to require the Commission to confine its investigation to the supply of goods or services in a part of the United Kingdom specified in the reference.

36 Questions to be decided in relation to anticipated mergers

- (1) Subject to subsections (5) and (6) and section 127(3), the Commission shall, on a reference under section 33, decide the following questions—
- (a) whether arrangements are in progress or in contemplation which, if carried into effect, will result in the creation of a relevant merger situation; and
 - (b) if so, whether 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 Commission shall, if it has decided on a reference under section 33 that there is an anti-competitive outcome (within the meaning given by section 35(2)(b)), decide the following additional questions—

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- (a) whether action should be taken by it under section 41(2) for the purpose of remedying, mitigating or preventing the substantial lessening of competition concerned or any adverse effect which may be expected to result from the substantial lessening of competition;
 - (b) whether it should recommend the taking of action by others for the purpose of remedying, mitigating or preventing the substantial lessening of competition concerned or any adverse effect which may be expected to result from the substantial lessening of competition; and
 - (c) in either case, if action should be taken, what action should be taken and what is to be remedied, mitigated or prevented.
- (3) In deciding the questions mentioned in subsection (2) the Commission shall, in particular, have regard to the need to achieve as comprehensive a solution as is reasonable and practicable to the substantial lessening of competition and any adverse effects resulting from it.
- (4) In deciding the questions mentioned in subsection (2) the Commission may, in particular, have regard to the effect of any action on any relevant customer benefits in relation to the creation of the relevant merger situation concerned.
- (5) In relation to the question whether a relevant merger situation will be created, a reference under section 33 may be framed so as to require the Commission to exclude from consideration—
- (a) subsection (1) of section 23;
 - (b) subsection (2) of that section; or
 - (c) one of those subsections if the Commission finds that the other is satisfied.
- (6) In relation to the question whether any such result as is mentioned in section 23(2)(b) will arise, a reference under section 33 may be framed so as to require the Commission to confine its investigation to the supply of goods or services in a part of the United Kingdom specified in the reference.

37 Cancellation and variation of references under section 22 or 33

- (1) The Commission shall cancel a reference under section 33 if it considers that the proposal to make arrangements of the kind mentioned in the 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 section 22 or 33 as if it had been made under section 33 or (as the case may be) 22; and, in such cases, references in this Part to references under those sections shall, so far as may be necessary, be construed accordingly.
- (3) Where, by virtue of subsection (2), the Commission treats a reference made under section 22 or 33 as if it had been made under section 33 or (as the case may be) 22, sections 77 to 81 shall, in particular, apply as if the reference had been made under section 33 or (as the case may be) 22 instead of under section 22 or 33.
- (4) Subsection (5) applies in relation to any undertaking accepted under section 80, or any order made under section 81, which is in force immediately before the Commission, by virtue of subsection (2), treats a reference made under section 22 or 33 as if it had been made under section 33 or (as the case may be) 22.

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- (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 made under section 22, accepted or made in relation to a reference made under section 33; and
 - (b) in the case of an undertaking or order which relates to a reference made under section 33, accepted or made in relation to a reference made under section 22; and the undertaking or order concerned may be varied, superseded, released or revoked accordingly.
- (6) The OFT may at any time vary a reference under section 22 or 33.
- (7) The OFT 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 OFT under this section shall be capable of altering the period permitted by section 39 within which the report of the Commission under section 38 is to be prepared and published.

38 Investigations and reports on references under section 22 or 33

- (1) The Commission shall prepare and publish a report on a reference under section 22 or 33 within the period permitted by section 39.
- (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 35 or (as the case may be) 36;
 - (b) its reasons for its decisions; and
 - (c) such information as the Commission considers appropriate for facilitating a proper understanding of those questions and of its reasons for its decisions.
- (3) The Commission shall carry out such investigations as it considers appropriate for the purposes of preparing a report under this section.
- (4) The Commission shall, at the same time as a report prepared under this section is published, give it to the OFT.

39 Time-limits for investigations and reports

- (1) The Commission shall prepare and publish its report under section 38 within the period of 24 weeks beginning with the date of the reference concerned.
- (2) Where article 9(6) of the European Merger Regulations applies in relation to the reference under section 22 or 33, the Commission shall prepare and publish its report under section 38—
 - (a) within the period of 24 weeks beginning with the date of the reference; or
 - (b) if it is a shorter period, within such period as is necessary to ensure compliance with that article.
- (3) The Commission may extend, by no more than 8 weeks, the period within which a report under section 38 is to be prepared and published if it considers that there are special reasons why the report cannot be prepared and published within that period.

- (4) The Commission may extend the period within which a report under section 38 is to be prepared and published if it considers that a relevant person has failed (whether with or without a reasonable excuse) to comply with any requirement of a notice under section 109.
- (5) In subsection (4) “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).
- (6) For the purposes of subsection (5) a person or group of persons able, directly or indirectly, to control or materially to influence the policy of a body of persons corporate or unincorporate, but without having a controlling interest in that body of persons, may be treated as having control of it.
- (7) An extension under subsection (3) or (4) shall come into force when published under section 107.
- (8) An extension under subsection (4) shall continue in force until—
 - (a) the person concerned provides the information or documents to the satisfaction of the Commission or (as the case may be) appears as a witness in accordance with the requirements of the Commission; or
 - (b) the Commission publishes its decision to cancel the extension.
- (9) References in this Part to the date of a reference shall be construed as references to the date specified in the reference as the date on which it is made.
- (10) This section is subject to section 40.

40 Section 39: supplementary

- (1) No extension is possible under subsection (3) or (4) of section 39 where the period within which the report is to be prepared and published is determined by virtue of subsection (2)(b) of that section.
- (2) Where the period within which the report is to be prepared and published is determined by virtue of subsection (2)(a) of section 39, no extension is possible under subsection (3) or (4) of that section which extends that period beyond such period as is necessary to ensure compliance with article 9(6) of the European Merger Regulations.
- (3) A period extended under subsection (3) of section 39 may also be extended under subsection (4) of that section and a period extended under subsection (4) of that section may also be extended under subsection (3) of that section.
- (4) No more than one extension is possible under section 39(3).
- (5) Where a period within which a report under section 38 is to be prepared and published is extended or further extended under section 39(3) or (4), the period as extended or (as the case may be) further extended shall, subject to subsections (6) and (7), 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).
- (6) Subsection (7) applies where—

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- (a) the period within which the report under section 38 is to be prepared and published is further extended;
 - (b) the further extension and at least one previous extension is made under section 39(4); 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.
- (7) In calculating the period of the further extension, any days or fractions of days of the kind mentioned in subsection (6)(c) shall be disregarded.
- (8) The Secretary of State may by order amend section 39 so as to alter any one or more of the following periods—
- (a) the period of 24 weeks mentioned in subsection (1) of that section or any period for the time being mentioned in that subsection in substitution for that period;
 - (b) the period of 24 weeks mentioned in subsection (2)(a) of that section or any period for the time being mentioned in that subsection in substitution for that period;
 - (c) the period of 8 weeks mentioned in subsection (3) of that section or any period for the time being mentioned in that subsection in substitution for that period.
- (9) No alteration shall be made by virtue of subsection (8) which results in the period for the time being mentioned in subsection (1) or (2)(a) of section 39 exceeding 24 weeks or the period for the time being mentioned in subsection (3) of that section exceeding 8 weeks.
- (10) An order under subsection (8) shall not affect any period of time within which the Commission is under a duty to prepare and publish its report under section 38 in relation to a reference under section 22 or 33 if the Commission is already under that duty in relation to that reference when the order is made.
- (11) Before making an order under subsection (8) the Secretary of State shall consult the Commission and such other persons as he considers appropriate.
- (12) The Secretary of State may make regulations for the purposes of section 39(8).
- (13) The regulations may, in particular—
- (a) provide for the time at which information or documents are to be treated as provided (including the time at which they are to be treated as provided to the satisfaction of the Commission for the purposes of section 39(8));
 - (b) provide for the time at which a person is to be treated as appearing as a witness (including the time at which he is to be treated as appearing as a witness in accordance with the requirements of the Commission for the purposes of section 39(8));
 - (c) provide for the persons carrying on the enterprises which have or may have ceased to be, or may cease to be, distinct enterprises to be informed, in circumstances in which section 39(8) applies, of the fact that—
 - (i) the Commission is satisfied as to the provision of the information or documents required by it; or
 - (ii) the person concerned has appeared as a witness in accordance with the requirements of the Commission;
 - (d) provide for the persons carrying on the enterprises which have or may have ceased to be, or may cease to be, distinct enterprises to be informed,

in circumstances in which section 39(8) applies, of the time at which the Commission is to be treated as satisfied as mentioned in paragraph (c)(i) above or the person concerned is to be treated as having appeared as mentioned in paragraph (c)(ii) above.

41 Duty to remedy effects of completed or anticipated mergers

- (1) Subsection (2) applies where a report of the Commission has been prepared and published under section 38 within the period permitted by section 39 and contains the decision that there is an anti-competitive outcome.
- (2) The Commission shall take such action under section 82 or 84 as it considers to be reasonable and practicable—
 - (a) to remedy, mitigate or prevent the substantial lessening of competition concerned; and
 - (b) to remedy, mitigate or prevent any adverse effects which have resulted from, or may be expected to result from, the substantial lessening of competition.
- (3) The decision of the Commission under subsection (2) shall be consistent with its decisions as included in its report by virtue of section 35(3) or (as the case may be) 36(2) unless there has been a material change of circumstances since the preparation of the report or the Commission otherwise has a special reason for deciding differently.
- (4) In making a decision under subsection (2), the Commission shall, in particular, have regard to the need to achieve as comprehensive a solution as is reasonable and practicable to the substantial lessening of competition and any adverse effects resulting from it.
- (5) In making a decision under subsection (2), the Commission may, in particular, have regard to the effect of any action on any relevant customer benefits in relation to the creation of the relevant merger situation concerned.

CHAPTER 2

PUBLIC INTEREST CASES

Power to make references

42 Intervention by Secretary of State in certain public interest cases

- (1) Subsection (2) applies where—
 - (a) the Secretary of State has reasonable grounds for suspecting that it is or may be the case that a relevant merger situation has been created or that arrangements are in progress or in contemplation which, if carried into effect, will result in the creation of a relevant merger situation;
 - (b) no reference under section 22 or 33 has been made in relation to the relevant merger situation concerned;
 - (c) no decision has been made not to make such a reference (other than a decision made by virtue of subsection (2)(b) of section 33 or a decision to accept undertakings under section 73 instead of making such a reference); and

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- (d) no reference is prevented from being made under section 22 or 33 by virtue of—
- (i) section 22(3)(a) or (e) or (as the case may be) 33(3)(a) or (e); or
 - (ii) Community law or anything done under or in accordance with it.
- (2) The Secretary of State may give a notice to the OFT (in this Part “an intervention notice”) if he believes that it is or may be the case that one or more than one public interest consideration is relevant to a consideration of the relevant merger situation concerned.
- (3) For the purposes of this Part a public interest consideration is a consideration which, at the time of the giving of the intervention notice concerned, is specified in section 58 or is not so specified but, in the opinion of the Secretary of State, ought to be so specified.
- (4) No more than one intervention notice shall be given under subsection (2) in relation to the same relevant merger situation.
- (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 an intervention notice, the time when the notice is given;
 - (aa) in relation to the making of a report by the OFT under section 44, the time of the making of the report;
 - (ab) in the case of a reference which is treated as having been made under section 45(2) or (3) by virtue of section 49(1), such time as the Commission may determine; and”;
 - (b) the references to the OFT in sections 25(1) to (3), (6) and (8) and 31 included references to the Secretary of State;
 - (c) the references to the OFT in section 25(4) and (5) were references to the Secretary of State;
 - (d) the reference in section 25(4) to section 73 were a reference to paragraph 3 of Schedule 7;
 - (e) after section 25(5) there were inserted—

“(5A) The Secretary of State may by notice to the persons carrying on the enterprises which have or may have ceased to be distinct enterprises extend the four month period mentioned in section 24(1)(a) or (2) (b) if, by virtue of section 46(5) or paragraph 3(6) of Schedule 7, he decides to delay a decision as to whether to make a reference under section 45.

(5B) An extension under subsection (5A) shall be for the period of the delay.”;
 - (f) in section 25(10)(b) after the word “(4)” there were inserted “, (5A)”;
 - (g) 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;

- (h) 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 an intervention notice but the existing time-limits in relation to possible references under section 22 or 33 were applicable for the purposes of the giving of that notice;
 - (i) the existing time-limits in relation to possible references under section 22 or 33 (except for extensions under section 25(4)) remained applicable on and after the giving of an intervention notice as if any extensions were made under section 25 as applied by subsection (5) above but subject to further alteration by the OFT or the Secretary of State under section 25 as so applied;
 - (j) in subsection (1) of section 31 for the words “section 22” there were substituted “section 45(2) or (3)” and, in the application of that subsection to the OFT, for the word “deciding” there were substituted “enabling the Secretary of State to decide”;
 - (k) in the case of the giving of 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 an intervention notice or an intervention notice; and
 - (l) the references to the OFT in section 32(2)(a) to (c) and (3) were construed in accordance with the above modifications.
- (7) Where the Secretary of State has given an intervention notice mentioning a public interest consideration which, at that time, is not finalised, he shall, as soon as practicable, take such action as is within his power to ensure that it is finalised.
- (8) For the purposes of this Part a public interest consideration is finalised if—
- (a) it is specified in section 58 otherwise than by virtue of an order under subsection (3) of that section; or
 - (b) it is specified in that section by virtue of an order under subsection (3) of that section and the order providing for it to be so specified has been laid before, and approved by, Parliament in accordance with subsection (7) of section 124 and within the period mentioned in that subsection.

43 Intervention notices under section 42

- (1) An intervention notice shall state—
- (a) the relevant merger situation concerned;
 - (b) the public interest consideration or considerations which are, or may be, relevant to a consideration of the relevant merger situation concerned; and
 - (c) where any public interest consideration concerned is not finalised, the proposed timetable for finalising it.
- (2) Where the Secretary of State believes that it is or may be the case that two or more public interest considerations are relevant to a consideration of the relevant merger situation concerned, he may decide not to mention in the intervention notice such of those considerations as he considers appropriate.
- (3) An 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 an intervention notice relates is finally determined under this Chapter if—

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- (a) the time within which the OFT is to report to the Secretary of State under section 44 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 45;
 - (c) the Secretary of State otherwise decides not to make a reference under that section;
 - (d) the Commission cancels such a reference under section 48(1) or 53(1);
 - (e) the time within which the Commission is to prepare a report under section 50 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 54(2) has expired and no such decision has been made and published;
 - (g) the Secretary of State decides under section 54(2) to make no finding at all in the matter;
 - (h) the Secretary of State otherwise decides under section 54(2) not to make an adverse public interest finding;
 - (i) the Secretary of State decides under section 54(2) to make an adverse public interest finding 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
 - (j) the Secretary of State decides under section 54(2) to make an adverse public interest finding 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 an 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), (g) or (h), the making of the decision concerned;
 - (d) in a case falling within subsection (4)(i), 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)(j), the acceptance of the undertaking concerned or (as the case may be) the making of the order concerned.

44 Investigation and report by OFT

- (1) Subsection (2) applies where the Secretary of State has given an intervention notice in relation to a relevant 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 45; and

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- (b) a summary of any representations about the case which have been received by the OFT and which relate to any public interest consideration mentioned in the 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 45.
- (4) The report shall, in particular, include decisions as to whether the OFT believes that it is, or may be, the case that—
- (a) a relevant merger situation has been created or arrangements are in progress or in contemplation which, if carried into effect, will result in the creation of a relevant merger situation;
 - (b) the creation of that situation has resulted, or may be expected to result, in a substantial lessening of competition within any market or markets in the United Kingdom for goods or services;
 - (c) the market or markets concerned would not be of sufficient importance to justify the making of a reference to the Commission under section 22 or 33;
 - (d) in the case of arrangements which are in progress or in contemplation, the arrangements are not sufficiently far advanced, or not sufficiently likely to proceed, to justify the making of such a reference;
 - (e) any relevant customer benefits in relation to the creation of the relevant merger situation concerned outweigh the substantial lessening of competition and any adverse effects of the substantial lessening of competition; or
 - (f) it would be appropriate to deal with the matter (disregarding any public interest considerations mentioned in the intervention notice concerned) by way of undertakings under paragraph 3 of Schedule 7.
- (5) If the OFT believes that it is or may be the case that it would be appropriate to deal with the matter (disregarding any public interest considerations mentioned in the intervention notice concerned) by way of undertakings under paragraph 3 of Schedule 7, the report shall contain descriptions of the undertakings which the OFT believes are, or may be, appropriate.
- (6) The report may, in particular, include advice and recommendations on any public interest consideration mentioned in the 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 45.
- (7) The OFT shall carry out such investigations as it considers appropriate for the purposes of producing a report under this section.

45 Power of Secretary of State to refer matter to Commission

- (1) Subsections (2) to (5) apply where the Secretary of State—
- (a) has given an intervention notice in relation to a relevant merger situation; and
 - (b) has received a report of the OFT under section 44 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 relevant merger situation has been created;
 - (b) the creation of that situation has resulted, or may be expected to result, in a substantial lessening of competition within any market or markets in the United Kingdom for goods or services;

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- (c) one or more than one public interest consideration mentioned in the intervention notice is relevant to a consideration of the relevant merger situation concerned; and
 - (d) taking account only of the substantial lessening of competition and the relevant public interest consideration or considerations concerned, the creation of that situation operates or may be expected to operate against the public interest.
- (3) The Secretary of State may make a reference to the Commission if he believes that it is or may be the case that—
 - (a) a relevant merger situation has been created;
 - (b) the creation of that situation has not resulted, and may be expected not to result, in a substantial lessening of competition within any market or markets in the United Kingdom for goods or services;
 - (c) one or more than one public interest consideration mentioned in the intervention notice is relevant to a consideration of the relevant merger situation concerned; and
 - (d) taking account only of the relevant public interest consideration or considerations concerned, the creation of that situation operates or may be expected to operate against the public interest.
- (4) 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 relevant merger situation;
 - (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;
 - (c) one or more than one public interest consideration mentioned in the intervention notice is relevant to a consideration of the relevant merger situation concerned; and
 - (d) taking account only of the substantial lessening of competition and the relevant public interest consideration or considerations concerned, the creation of the relevant merger situation may be expected to operate against the public interest.
- (5) 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 relevant merger situation;
 - (b) the creation of that situation may be expected not to result in a substantial lessening of competition within any market or markets in the United Kingdom for goods or services;
 - (c) one or more than one public interest consideration mentioned in the intervention notice is relevant to a consideration of the relevant merger situation concerned; and
 - (d) taking account only of the relevant public interest consideration or considerations concerned, the creation of the relevant merger situation may be expected to operate against the public interest.

- (6) For the purposes of this Chapter any anti-competitive outcome shall be treated as being adverse to the public interest unless it is justified by one or more than one public interest consideration which is relevant.
- (7) This section is subject to section 46.

46 References under section 45: supplementary

- (1) No reference shall be made under section 45 if—
 - (a) the making of the reference is prevented by section 69(1), 74(1) or 96(3) or paragraph 4 of Schedule 7; or
 - (b) 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(3) of the European Merger Regulations, is proceeding with the matter in pursuance of such a request or has dealt with the matter in pursuance of such a request.
- (2) The Secretary of State, in deciding whether to make a reference under section 45, shall accept the decisions of the OFT included in its report by virtue of subsection (4) of section 44 and any descriptions of undertakings as mentioned in subsection (5) of that section.
- (3) Where the decision to make a reference under section 45 is made at any time on or after the end of the period of 24 weeks beginning with the giving of the intervention notice concerned, the Secretary of State shall, in deciding whether to make such a reference, disregard any public interest consideration which is mentioned in the intervention notice but which has not been finalised before the end of that period.
- (4) Subject to subsection (5), where the decision to make a reference under section 45(2) or (4) is made at any time before the end of the period of 24 weeks beginning with the giving of the intervention notice concerned, the Secretary of State shall, in deciding whether to make such a reference, disregard any public interest consideration which is mentioned in the intervention notice but which has not been finalised if its effect would be to prevent, or to help to prevent, an anti-competitive outcome from being adverse to the public interest.
- (5) The Secretary of State may, if he believes that there is a realistic prospect of the public interest consideration mentioned in subsection (4) being finalised within the period of 24 weeks beginning with the giving of the intervention notice concerned, delay deciding whether to make the reference concerned until the public interest consideration is finalised or, if earlier, the period expires.
- (6) A reference under section 45 shall, in particular, specify—
 - (a) the subsection of that section under which it is made;
 - (b) the date on which it is made; and
 - (c) the public interest consideration or considerations mentioned in the intervention notice concerned which the Secretary of State is not under a duty to disregard by virtue of subsection (3) above and which he believes are or may be relevant to a consideration of the relevant merger situation concerned.

Reports on references

47 Questions to be decided on references under section 45

- (1) The Commission shall, on a reference under section 45(2) or (3), decide whether a relevant merger situation has been created.
- (2) If the Commission decides that such a situation has been created, it shall, on a reference under section 45(2), decide the following additional questions—
 - (a) whether the creation of that situation has resulted, or may be expected to result, in a substantial lessening of competition within any market or markets in the United Kingdom for goods or services; and
 - (b) whether, taking account only of any substantial lessening of competition and the admissible public interest consideration or considerations concerned, the creation of that situation operates or may be expected to operate against the public interest.
- (3) If the Commission decides that a relevant merger situation has been created, it shall, on a reference under section 45(3), decide whether, taking account only of the admissible public interest consideration or considerations concerned, the creation of that situation operates or may be expected to operate against the public interest.
- (4) The Commission shall, on a reference under section 45(4) or (5), decide whether arrangements are in progress or in contemplation which, if carried into effect, will result in the creation of a relevant merger situation.
- (5) If the Commission decides that such arrangements are in progress or in contemplation, it shall, on a reference under section 45(4), decide the following additional questions—
 - (a) whether 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; and
 - (b) whether, taking account only of any substantial lessening of competition and the admissible public interest consideration or considerations concerned, the creation of that situation may be expected to operate against the public interest.
- (6) If the Commission decides that arrangements are in progress or in contemplation which, if carried into effect, will result in the creation of a relevant merger situation, it shall, on a reference under section 45(5), decide whether, taking account only of the admissible public interest consideration or considerations concerned, the creation of that situation may be expected to operate against the public interest.
- (7) The Commission shall, if it has decided on a reference under section 45 that the creation of a relevant merger situation operates or may be expected to operate against the public interest, decide the following additional questions—
 - (a) whether action should be taken by the Secretary of State under section 55 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 relevant merger situation;
 - (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 relevant merger situation; and

- (c) in either case, if action should be taken, what action should be taken and what is to be remedied, mitigated or prevented.
- (8) Where the Commission has decided by virtue of subsection (2)(a) or (5)(a) that there is or will be a substantial lessening of competition within any market or markets in the United Kingdom for goods or services, it shall also decide separately the following questions (on the assumption that it is proceeding as mentioned in section 56(6))—
- (a) whether action should be taken by it under section 41 for the purpose of remedying, mitigating or preventing the substantial lessening of competition concerned or any adverse effect which has resulted from, or may be expected to result from, the substantial lessening of competition;
 - (b) whether the Commission should recommend the taking of action by other persons for the purpose of remedying, mitigating or preventing the substantial lessening of competition concerned or any adverse effect which has resulted from, or may be expected to result from, the substantial lessening of competition; and
 - (c) in either case, if action should be taken, what action should be taken and what is to be remedied, mitigated or prevented.
- (9) In deciding the questions mentioned in subsections (7) and (8) the Commission shall, in particular, have regard to the need to achieve as comprehensive a solution as is reasonable and practicable to—
- (a) the adverse effects to the public interest; or
 - (b) (as the case may be) the substantial lessening of competition and any adverse effects resulting from it.
- (10) In deciding the questions mentioned in subsections (7) and (8) in a case where it has decided by virtue of subsection (2)(a) or (5)(a) that there is or will be a substantial lessening of competition, the Commission may, in particular, have regard to the effect of any action on any relevant customer benefits in relation to the creation of the relevant merger situation concerned.
- (11) In this section “admissible public interest consideration” means any public interest consideration which is specified in the reference under section 45 and which the Commission is not under a duty to disregard.

48 Cases where references or certain questions need not be decided

- (1) The Commission shall cancel a reference under section 45(4) or (5) if it considers that the proposal to make arrangements of the kind mentioned in that reference has been abandoned.
- (2) In relation to the question whether a relevant merger situation has been created or the question whether a relevant merger situation will be created, a reference under section 45 may be framed so as to require the Commission to exclude from consideration—
 - (a) subsection (1) of section 23;
 - (b) subsection (2) of that section; or
 - (c) one of those subsections if the Commission finds that the other is satisfied.
- (3) In relation to the question whether any such result as is mentioned in section 23(2) (b) has arisen or the question whether any such result will arise, a reference under section 45 may be framed so as to require the Commission to confine its investigation

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to the supply of goods or services in a part of the United Kingdom specified in the reference.

49 Variation of references under section 45

- (1) 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) a reference made under subsection (2) or (3) of section 45 as if it had been made under subsection (4) or (as the case may be) (5) of that section; or
 - (b) a reference made under subsection (4) or (5) of section 45 as if it had been made under subsection (2) or (as the case may be) (3) 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.
- (2) Where, by virtue of subsection (1), the Commission treats a reference made under subsection (2) or (3) of section 45 as if it had been made under subsection (4) or (as the case may be) (5) 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 (4) or (as the case may be) (5) of that section instead of under subsection (2) or (3) of that section.
- (3) Where, by virtue of subsection (1), the Commission treats a reference made under subsection (4) or (5) of section 45 as if it had been made under subsection (2) or (as the case may be) (3) 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 (2) or (as the case may be) (3) of that section instead of under subsection (4) or (5) 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 (1), treats a reference as mentioned in subsection (1).
- (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) or (3) of section 45, accepted or made in relation to a reference made under subsection (4) or (as the case may be) (5) of that section; and
 - (b) in the case of an undertaking or order which relates to a reference made under subsection (4) or (5) of that section, accepted or made in relation to a reference made under subsection (2) or (as the case may be) (3) 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 45.
- (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 public interest consideration or considerations specified in the reference or the period permitted by section 51 within which the report of the Commission under section 50 is to be prepared and given to the Secretary of State.

50 Investigations and reports on references under section 45

- (1) The Commission shall prepare a report on a reference under section 45 and give it to the Secretary of State within the period permitted by section 51.
- (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 47;
 - (b) its reasons for its decisions; and
 - (c) such information as the Commission considers appropriate for facilitating a proper understanding of those questions and of its reasons for its decisions.
- (3) The Commission shall carry out such investigations as it considers appropriate for the purpose of producing a report under this section.

51 Time-limits for investigations and reports by Commission

- (1) The Commission shall prepare its report under section 50 and give it to the Secretary of State under that section within the period of 24 weeks beginning with the date of the reference concerned.
- (2) Where article 9(6) of the European Merger Regulations applies in relation to the reference under section 45, the Commission shall prepare its report under section 50 and give it to the Secretary of State—
 - (a) within the period of 24 weeks beginning with the date of the reference; or
 - (b) if it is a shorter period, within such period as is necessary to ensure compliance with that article.
- (3) The Commission may extend, by no more than 8 weeks, the period within which a report under section 50 is to be prepared and given to the Secretary of State if it considers that there are special reasons why the report cannot be prepared and given to the Secretary of State within that period.
- (4) The Commission may extend the period within which a report under section 50 is to be prepared and given to the Secretary of State if it considers that a relevant person has failed (whether with or without a reasonable excuse) to comply with any requirement of a notice under section 109.
- (5) In subsection (4) “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).
- (6) For the purposes of subsection (5) a person or group of persons able, directly or indirectly, to control or materially to influence the policy of a body of persons corporate or unincorporate, but without having a controlling interest in that body of persons, may be treated as having control of it.
- (7) An extension under subsection (3) or (4) shall come into force when published under section 107.
- (8) An extension under subsection (4) shall continue in force until—

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- (a) the person concerned provides the information or documents to the satisfaction of the Commission or (as the case may be) appears as a witness in accordance with the requirements of the Commission; or
- (b) the Commission publishes its decision to cancel the extension.

(9) This section is subject to sections 52 and 53.

52 Section 51: supplementary

- (1) No extension is possible under subsection (3) or (4) of section 51 where the period within which the report is to be prepared and given to the Secretary of State is determined by virtue of subsection (2)(b) of that section.
- (2) Where the period within which the report is to be prepared and given to the Secretary of State is determined by virtue of subsection (2)(a) of section 51, no extension is possible under subsection (3) or (4) of that section which extends that period beyond such period as is necessary to ensure compliance with article 9(6) of the European Merger Regulations.
- (3) A period extended under subsection (3) of section 51 may also be extended under subsection (4) of that section and a period extended under subsection (4) of that section may also be extended under subsection (3) of that section.
- (4) No more than one extension is possible under section 51(3).
- (5) Where a period within which a report under section 50 is to be prepared and given to the Secretary of State is extended or further extended under section 51(3) or (4), the period as extended or (as the case may be) further extended shall, subject to subsections (6) and (7), 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).
- (6) Subsection (7) applies where—
 - (a) the period within which the report under section 50 is to be prepared and given to the Secretary of State is further extended;
 - (b) the further extension and at least one previous extension is made under section 51(4); 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.
- (7) In calculating the period of the further extension, any days or fractions of days of the kind mentioned in subsection (6)(c) shall be disregarded.
- (8) The Secretary of State may by order amend section 51 so as to alter any one or more of the following periods—
 - (a) the period of 24 weeks mentioned in subsection (1) of that section or any period for the time being mentioned in that subsection in substitution for that period;
 - (b) the period of 24 weeks mentioned in subsection (2)(a) of that section or any period for the time being mentioned in that subsection in substitution for that period;
 - (c) the period of 8 weeks mentioned in subsection (3) of that section or any period for the time being mentioned in that subsection in substitution for that period.

- (9) No alteration shall be made by virtue of subsection (8) which results in the period for the time being mentioned in subsection (1) or (2)(a) of section 51 exceeding 24 weeks or the period for the time being mentioned in subsection (3) of that section exceeding 8 weeks.
- (10) An order under subsection (8) shall not affect any period of time within which the Commission is under a duty to prepare and give to the Secretary of State its report under section 50 in relation to a reference under section 45 if the Commission is already under that duty in relation to that reference when the order is made.
- (11) Before making an order under subsection (8) the Secretary of State shall consult the Commission and such other persons as he considers appropriate.
- (12) The Secretary of State may make regulations for the purposes of section 51(8).
- (13) The regulations may, in particular—
 - (a) provide for the time at which information or documents are to be treated as provided (including the time at which they are to be treated as provided to the satisfaction of the Commission for the purposes of section 51(8));
 - (b) provide for the time at which a person is to be treated as appearing as a witness (including the time at which he is to be treated as appearing as a witness in accordance with the requirements of the Commission for the purposes of section 51(8));
 - (c) provide for the persons carrying on the enterprises which have or may have ceased to be, or may cease to be, distinct enterprises to be informed, in circumstances in which section 51(8) applies, of the fact that—
 - (i) the Commission is satisfied as to the provision of the information or documents required by it; or
 - (ii) the person concerned has appeared as a witness in accordance with the requirements of the Commission;
 - (d) provide for the persons carrying on the enterprises which have or may have ceased to be, or may cease to be, distinct enterprises to be informed, in circumstances in which section 51(8) applies, of the time at which the Commission is to be treated as satisfied as mentioned in paragraph (c)(i) above or the person concerned is to be treated as having appeared as mentioned in paragraph (c)(ii) above.

53 Restrictions on action where public interest considerations not finalised

- (1) The Commission shall cancel a reference under section 45 if—
 - (a) the intervention notice concerned mentions a public interest consideration which was not finalised on the giving of that notice or public interest considerations which, at that time, were not finalised;
 - (b) no other public interest consideration is mentioned in the notice;
 - (c) at least 24 weeks has elapsed since the giving of the notice; and
 - (d) the public interest consideration mentioned in the notice has not been finalised within that period of 24 weeks or (as the case may be) none of the public interest considerations mentioned in the notice has been finalised within that period of 24 weeks.
- (2) Where a reference to the Commission under section 45 specifies a public interest consideration which has not been finalised before the making of the reference, the

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Commission shall not give its report to the Secretary of State under section 50 in relation to that reference unless—

- (a) the period of 24 weeks beginning with the giving of the intervention notice concerned has expired;
 - (b) the public interest consideration concerned has been finalised; or
 - (c) the report must be given to the Secretary of State to ensure compliance with article 9(6) of the European Merger Regulations.
- (3) The Commission shall, in reporting on any of the questions mentioned in section 47(2) (b), (3), (5)(b), (6) and (7), disregard any public interest consideration which has not been finalised before the giving of the report.
- (4) The Commission shall, in reporting on any of the questions mentioned in section 47(2) (b), (3), (5)(b), (6) and (7), disregard any public interest consideration which was not finalised on the giving of the intervention notice concerned and has not been finalised within the period of 24 weeks beginning with the giving of the notice concerned.
- (5) Subsections (1) to (4) are without prejudice to the power of the Commission to carry out investigations in relation to any public interest consideration to which it might be able to have regard in its report.

Decisions of the Secretary of State

54 Decision of Secretary of State in public interest cases

- (1) Subsection (2) applies where the Secretary of State has received a report of the Commission under section 50 in relation to a relevant merger situation.
- (2) The Secretary of State shall decide whether to make an adverse public interest finding in relation to the relevant merger situation and whether to make no finding at all in the matter.
- (3) For the purposes of this Part the Secretary of State makes an adverse public interest finding in relation to a relevant merger situation if, in relation to that situation, he decides—
- (a) in connection with a reference to the Commission under subsection (2) of section 45, that it is the case as mentioned in paragraphs (a) to (d) of that subsection or subsection (3) of that section;
 - (b) in connection with a reference to the Commission under subsection (3) of that section, that it is the case as mentioned in paragraphs (a) to (d) of that subsection;
 - (c) in connection with a reference to the Commission under subsection (4) of that section, that it is the case as mentioned in paragraphs (a) to (d) of that subsection or subsection (5) of that section; and
 - (d) in connection with a reference to the Commission under subsection (5) of that section, that it is the case as mentioned in paragraphs (a) to (d) of that subsection.
- (4) The Secretary of State may make no finding at all in the matter only if he decides that there is no public interest consideration which is relevant to a consideration of the relevant merger situation concerned.

- (5) 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 50.
- (6) In making a decision under subsections (2) to (4), the Secretary of State shall disregard any public interest consideration not specified in the reference under section 45 and any public interest consideration disregarded by the Commission for the purposes of its report.
- (7) In deciding whether to make an adverse public interest finding under subsection (2), the Secretary of State shall accept—
 - (a) in connection with a reference to the Commission under section 45(2) or (4), the decision of the report of the Commission under section 50 as to whether there is an anti-competitive outcome; and
 - (b) in connection with a reference to the Commission under section 45(3) or (5)—
 - (i) the decision of the report of the Commission under section 50 as to whether a relevant merger situation has been created or (as the case may be) arrangements are in progress or in contemplation which, if carried into effect, will result in the creation of a relevant merger situation; and
 - (ii) the decision of the report of the OFT under section 44 as to the absence of a substantial lessening of competition.
- (8) In determining for the purposes of subsection (5) the period of 30 days no account shall be taken of—
 - (a) Saturday, Sunday, Good Friday and Christmas Day; and
 - (b) any day which is a bank holiday in England and Wales.

55 Enforcement action by Secretary of State

- (1) Subsection (2) applies where the Secretary of State has decided under subsection (2) of section 54 within the period required by subsection (5) of that section to make an adverse public interest finding in relation to a relevant merger situation and has published his decision within the period so required.
- (2) 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 relevant merger situation concerned.
- (3) In making a decision under subsection (2) the Secretary of State shall, in particular, have regard to the report of the Commission under section 50.
- (4) In making a decision under subsection (2) in any case of a substantial lessening of competition, the Secretary of State may, in particular, have regard to the effect of any action on any relevant customer benefits in relation to the creation of the relevant merger situation concerned.

Other

56 Competition cases where intervention on public interest grounds ceases

- (1) Where the Secretary of State decides not to make a reference under section 45 on the ground that no public interest consideration to which he is able to have regard is relevant to a consideration of the relevant merger situation concerned, he shall by notice require the OFT to deal with the matter otherwise than under this Chapter.
- (2) Where a notice is given to the OFT in the circumstances mentioned in subsection (1), the OFT shall decide whether to make a reference under section 22 or 33; and any time-limits in relation to the Secretary of State's decision whether to make a reference under section 45 (including any remaining powers of extension) shall apply in relation to the decision of the OFT whether to make a reference under section 22 or 33.
- (3) Where the Commission cancels under section 53(1) a reference under section 45 and the report of the OFT under section 44 contains the decision that it is or may be the case that there is an anti-competitive outcome in relation to the relevant merger situation concerned, the Commission shall proceed under this Part as if a reference under section 22 or (as the case may be) 33 had been made to it by the OFT.
- (4) In proceeding by virtue of subsection (3) to prepare and publish a report under section 38, the Commission shall proceed as if—
 - (a) the reference under section 22 or 33 had been made at the same time as the reference under section 45;
 - (b) the timetable for preparing and giving its report under section 50 (including any remaining powers of extension and as extended by an additional period of 20 days) were the timetable for preparing and publishing its report under section 38; and
 - (c) in relation to the question whether a relevant merger situation has been created or the question whether arrangements are in progress or in contemplation which, if carried into effect, will result in the creation of a relevant merger situation, the Commission were confined to the questions on the subject to be investigated by it under section 47.
- (5) In determining the period of 20 days mentioned in subsection (4) no account shall be taken of—
 - (a) Saturday, Sunday, Good Friday and Christmas Day; and
 - (b) any day which is a bank holiday in England and Wales.
- (6) Where the Secretary of State decides under section 54(2) to make no finding at all in the matter in connection with a reference under section 45(2) or (4), the Commission shall proceed under this Part as if a reference under section 22 or (as the case may be) 33 had been made to it instead of a reference under section 45 and as if its report to the Secretary of State under section 50 had been prepared and published by it under section 38 within the period permitted by section 39.
- (7) In relation to proceedings by virtue of subsection (6), the reference in section 41(3) to decisions of the Commission as included in its report by virtue of section 35(3) or 36(2) shall be construed as a reference to decisions which were included in the report of the Commission by virtue of section 47(8).
- (8) Where the Commission becomes under a duty to proceed as mentioned in subsection (3) or (6), references in this Part to references under sections 22 and 33

shall, so far as may be necessary, be construed accordingly; and, in particular, sections 77 to 81 shall apply as if a reference has been made to the Commission by the OFT under section 22 or (as the case may be) 33.

57 Duties of OFT and Commission to inform Secretary of State

- (1) The OFT shall, in considering whether to make a reference under section 22 or 33, bring to the attention of the Secretary of State any case which it believes raises any consideration specified in section 58 unless it believes that the Secretary of State would consider any such consideration immaterial in the context of the particular case.
- (2) The OFT and the Commission shall bring to the attention of the Secretary of State any representations about exercising his powers under section 58(3) which have been made to the OFT or (as the case may be) the Commission.

58 Specified considerations

- (1) The interests of national security are specified in this section.
- (2) In subsection (1) “national security” includes public security; and in this subsection “public security” has the same meaning as in article 21(3) of the European Merger Regulations.
- (3) The Secretary of State may by order modify this section for the purpose of specifying in this section a new consideration or removing or amending any consideration which is for the time being specified in this section.
- (4) An order under this section may, in particular—
 - (a) provide for a consideration to be specified in this section for a particular purpose or purposes or for all purposes;
 - (b) apply in relation to cases under consideration by the OFT, the Commission or the Secretary of State before the making of the order as well as cases under consideration on or after the making of the order.

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.

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- (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—
- (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

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- 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—
- (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;

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- (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;
 - (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.

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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 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

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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.
- (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.

European mergers

67 Intervention to protect legitimate interests

- (1) Subsection (2) applies where—
- (a) the Secretary of State has reasonable grounds for suspecting that it is or may be the case that—
 - (i) a relevant merger situation has been created or that arrangements are in progress or in contemplation which, if carried into effect, will result in the creation of a relevant merger situation; and
 - (ii) a concentration with a Community dimension (within the meaning of the European Merger Regulations), or a part of such a concentration, has thereby arisen or will thereby arise;
 - (b) a reference which would otherwise be possible under section 22 or 33 is prevented from being made under that section in relation to the relevant merger situation concerned by virtue of Community law or anything done under or in accordance with it; and
 - (c) the Secretary of State is considering whether to take appropriate measures to protect legitimate interests as permitted by article 21(3) of the European Merger Regulations.

- (2) The Secretary of State may give a notice to the OFT (in this section “a European intervention notice”) if he believes that it is or may be the case that one or more than one public interest consideration is relevant to a consideration of the relevant merger situation concerned.
- (3) A European intervention notice shall state—
 - (a) the relevant merger situation concerned;
 - (b) the public interest consideration or considerations which are, or may be, relevant to a consideration of the relevant merger situation concerned; and
 - (c) where any public interest consideration concerned is not finalised, the proposed timetable for finalising it.
- (4) Where the Secretary of State believes that it is or may be the case that two or more public interest considerations are relevant to a consideration of the relevant merger situation concerned, he may decide not to mention in the intervention notice such of those considerations as he considers appropriate.
- (5) No more than one European intervention notice shall be given under subsection (2) in relation to the same relevant merger situation.
- (6) Where the Secretary of State has given a European intervention notice mentioning a public interest consideration which, at that time, is not finalised, he shall, as soon as practicable, take such action as is within his power to ensure that it is finalised.
- (7) 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 section as they do for the purposes of Chapter 1 but subject to subsection (8).
- (8) In their application by virtue of subsection (7) sections 23 to 32 shall have effect as if—
 - (a) references in those sections to the decision-making authority were references to the Secretary of State;
 - (b) for paragraphs (a) and (b) of section 23(9) there were substituted “, in relation to the giving of a European intervention notice, the time when the notice is given”;
 - (c) the references to the OFT in section 24(2)(a) and (b) included references to the Secretary of State;
 - (d) sections 25, 31 and 32 were omitted; and
 - (e) the references in sections 23 to 29 to the making of a reference or a reference were, so far as necessary, references to the giving of a European intervention notice or a European intervention notice.
- (9) Section 42(3) shall, in its application to this section and section 68, have effect as if for the words “intervention notice” there were substituted “European intervention notice”.

68 Scheme for protecting legitimate interests

- (1) The Secretary of State may by order provide for the taking of action, where a European intervention notice has been given, to remedy, mitigate or prevent effects adverse to the public interest which have resulted from, or may be expected to result from, the creation of a European relevant merger situation.

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- (2) In subsection (1) “European relevant merger situation” means a relevant merger situation—
- (a) which has been created or will be created if arrangements which are in progress or in contemplation are carried into effect;
 - (b) by virtue of which a concentration with a Community dimension (within the meaning of the European Merger Regulations), or a part of such a concentration, has arisen or will arise; and
 - (c) in relation to which a reference which would otherwise have been possible under section 22 or 33 was prevented from being made under that section by virtue of Community law or anything done under or in accordance with it.
- (3) Provision made under subsection (1) shall include provision ensuring that considerations which are not public interest considerations mentioned in the European intervention notice concerned may not be taken into account in determining whether anything operates, or may be expected to operate, against the public interest.
- (4) Provision made under subsection (1) shall include provision—
- (a) applying with modifications sections 23 to 32 for the purposes of deciding for the purposes of this section 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;
 - (b) requiring the OFT to make a report to the Secretary of State before a reference is made;
 - (c) enabling the Secretary of State to make a reference to the Commission;
 - (d) requiring the Commission to investigate and report to the Secretary of State on such a reference;
 - (e) enabling the taking of interim and final enforcement action.
- (5) An order under this section may include provision (including provision for the creation of offences and penalties, the payment of fees and the delegation of functions) corresponding to any provision made in, or in connection with, this Part in relation to intervention notices or special intervention notices and the cases to which they relate.
- (6) In this section “European intervention notice” has the same meaning as in section 67.

Other

69 Newspaper mergers

- (1) No reference shall, subject to subsection (2), be made under section 22, 33, 45 or 62 in relation to a transfer of a newspaper or of newspaper assets to which section 58(1) of the Fair Trading Act 1973 (c. 41) applies.
- (2) Subsection (1) does not apply in a case falling within section 59(2) of the Act of 1973.
- (3) In this section “transfer of a newspaper or of newspaper assets” has the meaning given by section 57(2) of the Act of 1973.

70 Water mergers

- (1) For sections 32 to 35 of the Water Industry Act 1991 (c. 56) (special provision for water merger references) there shall be substituted—

“32 Duty to refer merger of water or sewerage undertaking

Subject to section 33 below, it shall be the duty of the OFT to make a merger reference to the Competition Commission if the OFT believes that it is or may be the case—

- (a) that arrangements are in progress which, if carried into effect, will result in a merger of any two or more water enterprises; or
- (b) that such a merger has taken place otherwise than as a result of the carrying into effect of arrangements that have been the subject of a reference by virtue of paragraph (a) above.

33 Exclusion of small mergers from duty to make reference

- (1) The OFT shall not make a merger reference under section 32 above in respect of any actual or prospective merger of two or more water enterprises if it appears to the OFT—
 - (a) that the value of the turnover of the water enterprise being taken over does not exceed or, as the case may be, would not exceed £10 million; or
 - (b) that the only water enterprises already belonging to the person making the take over are enterprises each of which has a turnover the value of which does not exceed or, as the case may be, would not exceed £10 million.
- (2) For the purposes of subsection (1)(a) above, the value of the turnover of the water enterprise being taken over shall be determined by taking the total value of the turnover of the water enterprises ceasing to be distinct enterprises and deducting—
 - (a) the turnover of any water enterprise continuing to be carried on under the same ownership and control; or
 - (b) if there is no water enterprise continuing to be carried on under the same ownership and control, the turnover which, of all the turnovers concerned, is the turnover of the highest value.
- (3) For the purposes of subsection (1)(b) above—
 - (a) every water enterprise ceasing to be a distinct enterprise and whose turnover is to be deducted by virtue of subsection (2)(a) or (b) above shall be treated as a water enterprise belonging to the person making the take over; and
 - (b) water enterprises shall be treated as separate enterprises so far as they are carried on by different companies holding appointments under Chapter 1 of this Part.
- (4) For the purposes of this section the turnover of a water enterprise shall be determined in accordance with such provisions as may be specified in regulations made by the Secretary of State.
- (5) Regulations under subsection (4) above may, in particular, make provision as to—
 - (a) the amounts which are, or which are not, to be treated as comprising an enterprise’s turnover; and

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- (b) the date or dates by reference to which an enterprise’s turnover is to be determined.
- (6) Regulations under subsection (4) above may, in particular, make provision enabling the Secretary of State or the OFT to determine matters of a description specified in the regulations (including any of the matters mentioned in paragraphs (a) and (b) of subsection (5) above).
- (7) The Secretary of State may by regulations amend subsection (1) above so as—
 - (a) to alter the sum for the time being mentioned in paragraph (a) of that subsection or otherwise to modify the condition set out in that paragraph; or
 - (b) to alter the sum for the time being mentioned in paragraph (b) of that subsection or otherwise to modify the condition set out in that paragraph.
- (8) Regulations under subsection (7) above—
 - (a) shall not make any modifications in relation to mergers on or before the coming into force of the regulations; and
 - (b) may, in particular, include supplemental, consequential or transitional provision amending or repealing any provision of this section.
- (9) References in this section to enterprises being carried on under the same ownership and control shall be construed in accordance with Part 3 of the 2002 Act.

34 Application of provisions of Enterprise Act 2002

The provisions of Schedule 4ZA to this Act shall have effect with respect to mergers of water enterprises.

35 Construction of merger provisions

- (1) In this Chapter (including Schedule 4ZA)—
 - “enterprise” has the same meaning as in Part 3 of the 2002 Act; and
 - “water enterprise” means an enterprise carried on by a water undertaker.
- (2) References in this Chapter (including Schedule 4ZA), in relation to any two or more enterprises, to the merger of those enterprises are references to those enterprises ceasing, within the meaning of Part 3 of the 2002 Act, to be distinct enterprises; and sections 27 and 29 of that Act and any provision made under section 34 of that Act (time at which enterprises cease to be distinct) shall have effect for the purposes of this Chapter (including Schedule 4ZA) as they have effect for the purposes of that Part.
- (3) Nothing in sections 32 to 34 above (including Schedule 4ZA) shall prejudice any power of the OFT or the Secretary of State, in a case in which, or to any extent to which, the OFT is not required to make a reference under section 32 above, to make a reference under Part 3 of the 2002 Act in respect of any actual or prospective merger of two or more water enterprises.
- (4) Where two or more enterprises have merged or will merge as part of transactions or arrangements which also involve an actual or prospective

merger of two or more water enterprises, Part 3 of the 2002 Act shall apply in relation to the actual or prospective merger of the enterprises concerned excluding the water enterprises; and references in that Part to the creation of a relevant merger situation shall be construed accordingly.

- (5) Subject to subsections (3) and (4), Part 3 of the 2002 Act shall not apply in a case in which the OFT is required to make a reference under section 32 above except as applied by virtue of Schedule 4ZA.”
- (2) Before Schedule 4A to the Act of 1991 there shall be inserted, as Schedule 4ZA, the Schedule set out in Schedule 6 to this Act.

CHAPTER 4

ENFORCEMENT

Powers exercisable before references under section 22 or 33

71 Initial undertakings: completed mergers

- (1) Subsection (2) applies where the OFT is considering whether to make a reference under section 22.
- (2) The OFT may, for the purpose of preventing pre-emptive action, accept from such of the parties concerned as it considers appropriate undertakings to take such action as it considers appropriate.
- (3) No undertaking shall be accepted under subsection (2) unless the OFT has reasonable grounds for suspecting that it is or may be the case that a relevant merger situation has been created.
- (4) An undertaking under this section—
- (a) shall come into force when accepted;
 - (b) may be varied or superseded by another undertaking; and
 - (c) may be released by the OFT.
- (5) An undertaking which—
- (a) is in force under this section in relation to a possible reference or reference under section 22; and
 - (b) has not been adopted under section 80 or paragraph 1 of Schedule 7;
- shall cease to be in force if an order under section 72 or 81 comes into force in relation to that reference or an order under paragraph 2 of that Schedule comes into force in relation to the matter.
- (6) An undertaking under this section shall, if it has not previously ceased to be in force and if it has not been adopted under section 80 or paragraph 1 of Schedule 7, cease to be in force—
- (a) where the OFT has decided to make the reference concerned under section 22, at the end of the period of 7 days beginning with the making of the reference;
 - (b) where the OFT has decided to accept an undertaking under section 73 instead of making that reference, on the acceptance of that undertaking;

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- (c) where an intervention notice is in force, at the end of the period of 7 days beginning with the giving of that notice; and
 - (d) where the OFT has otherwise decided not to make the reference concerned under section 22, on the making of that decision.
- (7) The OFT shall, as soon as reasonably practicable, consider any representations received by it in relation to varying or releasing an undertaking under this section.
- (8) In this section and section 72 “pre-emptive action” means action which might prejudice the reference concerned or impede the taking of any action under this Part which may be justified by the Commission’s decisions on the reference.

72 Initial enforcement orders: completed mergers

- (1) Subsection (2) applies where the OFT is considering whether to make a reference under section 22.
- (2) The OFT may by order, for the purpose of preventing pre-emptive action—
- (a) prohibit or restrict the doing of things which the OFT considers would constitute pre-emptive action;
 - (b) impose on any person concerned obligations as to the carrying on of any activities or the safeguarding of any assets;
 - (c) provide for the carrying on of any activities or the safeguarding of any assets either by the appointment of a person to conduct or supervise the conduct of any activities (on such terms and with such powers as may be specified or described in the order) or in any other manner;
 - (d) do anything which may be done by virtue of paragraph 19 of Schedule 8.
- (3) No order shall be made under subsection (2) unless the OFT has reasonable grounds for suspecting that it is or may be the case that—
- (a) a relevant merger situation has been created; and
 - (b) pre-emptive action is in progress or in contemplation.
- (4) An order under this section—
- (a) shall come into force at such time as is determined by or under the order; and
 - (b) may be varied or revoked by another order.
- (5) An order which—
- (a) is in force under this section in relation to a possible reference or a reference under section 22; and
 - (b) has not been adopted under section 81 or paragraph 2 of Schedule 7;
- shall cease to be in force if an undertaking under section 71 or 80 comes into force in relation to that reference or an undertaking under paragraph 1 of that Schedule comes into force in relation to the matter.
- (6) An order under this section shall, if it has not previously ceased to be in force and if it is not adopted under section 81 or paragraph 2 of Schedule 7, cease to be in force—
- (a) where the OFT has decided to make the reference concerned under section 22, at the end of the period of 7 days beginning with the making of the reference;
 - (b) where the OFT has decided to accept an undertaking under section 73 instead of making that reference, on the acceptance of that undertaking;

- (c) where an intervention notice is in force, at the end of the period of 7 days beginning with the giving of that notice; and
 - (d) where the OFT has otherwise decided not to make the reference concerned under section 22, on the making of that decision.
- (7) The OFT shall, as soon as reasonably practicable, consider any representations received by it in relation to varying or revoking an order under this section.

73 Undertakings in lieu of references under section 22 or 33

- (1) Subsection (2) applies if the OFT considers that it is under a duty to make a reference under section 22 or 33 (disregarding the operation of section 22(3)(b) or (as the case may be) 33(3)(b) but taking account of the power of the OFT under section 22(2) or (as the case may be) 33(2) to decide not to make such a reference).
- (2) The OFT may, instead of making such a reference and for the purpose of remedying, mitigating or preventing the substantial lessening of competition concerned or any adverse effect which has or may have resulted from it or may be expected to result from it, accept from such of the parties concerned as it considers appropriate undertakings to take such action as it considers appropriate.
- (3) In proceeding under subsection (2), the OFT shall, in particular, have regard to the need to achieve as comprehensive a solution as is reasonable and practicable to the substantial lessening of competition and any adverse effects resulting from it.
- (4) In proceeding under subsection (2), the OFT may, in particular, have regard to the effect of any action on any relevant customer benefits in relation to the creation of the relevant merger situation concerned.
- (5) An undertaking under this section—
- (a) shall come into force when accepted;
 - (b) may be varied or superseded by another undertaking; and
 - (c) may be released by the OFT.
- (6) An undertaking under this section which is in force in relation to a relevant merger situation shall cease to be in force if an order comes into force under section 75 or 76 in relation to that undertaking.
- (7) The OFT shall, as soon as reasonably practicable, consider any representations received by it in relation to varying or releasing an undertaking under this section.

74 Effect of undertakings under section 73

- (1) The relevant authority shall not make a reference under section 22, 33 or 45 in relation to the creation of a relevant merger situation if—
- (a) the OFT has accepted an undertaking or group of undertakings under section 73; and
 - (b) the relevant merger situation is the situation by reference to which the undertaking or group of undertakings was accepted.
- (2) Subsection (1) does not prevent the making of a reference if material facts about relevant arrangements or transactions, or relevant proposed arrangements or transactions, were not notified (whether in writing or otherwise) to the OFT or made public before any undertaking concerned was accepted.

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- (3) For the purposes of subsection (2) arrangements or transactions, or proposed arrangements or transactions, are relevant if they are the ones in consequence of which the enterprises concerned ceased or may have ceased, or may cease, to be distinct enterprises.
- (4) In subsection (2) “made public” means so publicised as to be generally known or readily ascertainable.
- (5) In this section “relevant authority” means—
 - (a) in relation to a possible reference under section 22 or 33, the OFT; and
 - (b) in relation to a possible reference under section 45, the Secretary of State.

75 Order-making power where undertakings under section 73 not fulfilled etc.

- (1) Subsection (2) applies where the OFT considers that—
 - (a) an undertaking accepted by it under section 73 has not been, is not being or will not be fulfilled; or
 - (b) in relation to an undertaking accepted by it under that section, information which was false or misleading in a material respect was given to the OFT by the person giving the undertaking before the OFT decided to accept the undertaking.
- (2) The OFT may, for any of the purposes mentioned in section 73(2), make an order under this section.
- (3) Subsections (3) and (4) of section 73 shall apply for the purposes of subsection (2) above as they apply for the purposes of subsection (2) of that section.
- (4) An order under this section may contain—
 - (a) anything permitted by Schedule 8; and
 - (b) such supplementary, consequential or incidental provision as the OFT considers appropriate.
- (5) An order under this section—
 - (a) shall come into force at such time as is determined by or under the order;
 - (b) may contain provision which is different from the provision contained in the undertaking concerned; and
 - (c) may be varied or revoked by another order.
- (6) The OFT shall, as soon as reasonably practicable, consider any representations received by it in relation to varying or revoking an order under this section.

76 Supplementary interim order-making power

- (1) Subsection (2) applies where—
 - (a) the OFT has the power to make an order under section 75 in relation to a particular undertaking and intends to make such an order; or
 - (b) the Commission has the power to make an order under section 83 in relation to a particular undertaking and intends to make such an order.
- (2) The OFT or (as the case may be) the Commission may, for the purpose of preventing any action which might prejudice the making of that order, make an order under this section.

- (3) No order shall be made under subsection (2) unless the OFT or (as the case may be) the Commission has reasonable grounds for suspecting that it is or may be the case that action which might prejudice the making of the order under section 75 or (as the case may be) 83 is in progress or in contemplation.
- (4) An order under subsection (2) may—
- (a) prohibit or restrict the doing of things which the OFT or (as the case may be) the Commission considers would prejudice the making of the order under section 75 or (as the case may be) 83;
 - (b) impose on any person concerned obligations as to the carrying on of any activities or the safeguarding of any assets;
 - (c) provide for the carrying on of any activities or the safeguarding of any assets either by the appointment of a person to conduct or supervise the conduct of any activities (on such terms and with such powers as may be specified or described in the order) or in any other manner;
 - (d) do anything which may be done by virtue of paragraph 19 of Schedule 8.
- (5) An order under this section—
- (a) shall come into force at such time as is determined by or under the order; and
 - (b) may be varied or revoked by another order.
- (6) An order under this section shall, if it has not previously ceased to be in force, cease to be in force on—
- (a) the coming into force of an order under section 75 or (as the case may be) 83 in relation to the undertaking concerned; or
 - (b) the making of the decision not to proceed with such an order.
- (7) The OFT or (as the case may be) the Commission shall, as soon as reasonably practicable, consider any representations received by it in relation to varying or revoking an order under this section.

Interim restrictions and powers

77 Restrictions on certain dealings: completed mergers

- (1) Subsections (2) and (3) apply where—
- (a) a reference has been made under section 22 but not finally determined; and
 - (b) no undertakings under section 71 or 80 are in force in relation to the relevant merger situation concerned and no orders under section 72 or 81 are in force in relation to that situation.
- (2) No relevant person shall, without the consent of the Commission—
- (a) complete any outstanding matters in connection with any arrangements which have resulted in the enterprises concerned ceasing to be distinct enterprises;
 - (b) make any further arrangements in consequence of that result (other than arrangements which reverse that result); or
 - (c) transfer the ownership or control of any enterprises to which the reference relates.
- (3) No relevant person shall, without the consent of the Commission, assist in any of the activities mentioned in paragraphs (a) to (c) of subsection (2).

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- (4) The prohibitions in subsections (2) and (3) do not apply in relation to anything which the person concerned is required to do by virtue of any enactment.
- (5) The consent of the Commission under subsection (2) or (3)—
 - (a) may be general or special;
 - (b) may be revoked by the Commission; and
 - (c) shall be published in such manner as the Commission considers appropriate for the purpose of bringing it to the attention of any person entitled to the benefit of it.
- (6) Paragraph (c) of subsection (5) shall not apply if the Commission considers that publication is not necessary for the purpose mentioned in that paragraph.
- (7) Subsections (2) and (3) shall apply to a person’s conduct outside the United Kingdom if (and only if) he is—
 - (a) a United Kingdom national;
 - (b) a body incorporated under the law of the United Kingdom or of any part of the United Kingdom; or
 - (c) a person carrying on business in the United Kingdom.
- (8) In this section “relevant person” means—
 - (a) any person who carries on any enterprise to which the reference relates or who has control of any such enterprise;
 - (b) any subsidiary of any person falling within paragraph (a); or
 - (c) any person associated with any person falling within paragraph (a) or any subsidiary of any person so associated.

78 Restrictions on certain share dealings: anticipated mergers

- (1) Subsection (2) applies where—
 - (a) a reference has been made under section 33; and
 - (b) no undertakings under section 80 are in force in relation to the relevant merger situation concerned and no orders under section 81 are in force in relation to that situation.
- (2) No relevant person shall, without the consent of the Commission, directly or indirectly acquire during the relevant period an interest in shares in a company if any enterprise to which the reference relates is carried on by or under the control of that company.
- (3) The consent of the Commission under subsection (2)—
 - (a) may be general or special;
 - (b) may be revoked by the Commission; and
 - (c) shall be published in such manner as the Commission considers appropriate for bringing it to the attention of any person entitled to the benefit of it.
- (4) Paragraph (c) of subsection (3) shall not apply if the Commission considers that publication is not necessary for the purpose mentioned in that paragraph.
- (5) Subsection (2) shall apply to a person’s conduct outside the United Kingdom if (and only if) he is—
 - (a) a United Kingdom national;

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- (b) a body incorporated under the law of the United Kingdom or of any part of the United Kingdom; or
 - (c) a person carrying on business in the United Kingdom.
- (6) In this section and section 79—
- “company” includes any body corporate;
 - “relevant period” means the period beginning with the making of the reference concerned and ending when the reference is finally determined;
 - “relevant person” means—
 - (a) any person who carries on any enterprise to which the reference relates or who has control of any such enterprise;
 - (b) any subsidiary of any person falling within paragraph (a); or
 - (c) any person associated with any person falling within paragraph (a) or any subsidiary of any person so associated; and
 - “share” means share in the capital of a company, and includes stock.

79 Sections 77 and 78: further interpretation provisions

- (1) For the purposes of this Part a reference under section 22 or 33 is finally determined if—
- (a) the reference is cancelled under section 37(1);
 - (b) the time within which the Commission is to prepare and publish a report under section 38 in relation to the reference has expired and no such report has been prepared and published;
 - (c) the report of the Commission under section 38 contains the decision that there is not an anti-competitive outcome;
 - (d) the report of the Commission under section 38 contains the decision that there is an anti-competitive outcome and the Commission has decided under section 41(2) neither to accept an undertaking under section 82 nor to make an order under section 84; or
 - (e) the report of the Commission under section 38 contains the decision that there is an anti-competitive outcome and the Commission has decided under section 41(2) to accept an undertaking under section 82 or to make an order under section 84.
- (2) For the purposes of this Part the time when a reference under section 22 or 33 is finally determined is—
- (a) in a case falling within subsection (1)(a), the making of the decision concerned;
 - (b) in a case falling within subsection (1)(b), the expiry of the time concerned;
 - (c) in a case falling within subsection (1)(c), the publication of the report;
 - (d) in a case falling within subsection (1)(d), the making of the decision under section 41(2); and
 - (e) in a case falling within subsection (1)(e), the acceptance of the undertaking concerned or (as the case may be) the making of the order concerned.
- (3) For the purposes of section 78 and subject to subsection (4) below, the circumstances in which a person acquires an interest in shares include those where—
- (a) he enters into a contract to acquire the shares (whether or not for cash);

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- (b) he is not the registered holder but acquires the right to exercise, or to control the exercise of, any right conferred by the holding of the shares; or
 - (c) he—
 - (i) acquires a right to call for delivery of the shares to himself or to his order or to acquire an interest in the shares; or
 - (ii) assumes an obligation to acquire such an interest.
- (4) The circumstances in which a person acquires an interest in shares for the purposes of section 78 do not include those where he acquires an interest in pursuance of an obligation assumed before the publication by the OFT of the reference concerned.
- (5) The circumstances in which a person acquires a right mentioned in subsection (3)—
- (a) include those where he acquires a right, or assumes an obligation, whose exercise or fulfilment would give him that right; but
 - (b) do not include those where he is appointed as proxy to vote at a specified meeting of a company or of any class of its members or at any adjournment of the meeting or he is appointed by a corporation to act as its representative at any meeting of the company or of any class of its members.
- (6) References to rights and obligations in subsections (3) to (5) include conditional rights and conditional obligations.
- (7) References in sections 77 and 78 to a person carrying on or having control of any enterprise includes a group of persons carrying on or having control of an enterprise and any member of such a group.
- (8) Sections 26(2) to (4) and 127(1), (2) and (4) to (6) shall apply for the purposes of sections 77 and 78 to determine whether any person or group of persons has control of any enterprise and whether persons are associated as they apply for the purposes of section 26 to determine whether enterprises are brought under common control.
- (9) Sections 736 and 736A of the Companies Act 1985 (c. 6) shall apply for the purposes of sections 77 and 78 to determine whether a company is a subsidiary of an individual or of a group of persons as they apply to determine whether it is a subsidiary of a company; and references to a subsidiary in subsections (8) and (9) of section 736A as so applied shall be construed accordingly.

80 Interim undertakings

- (1) Subsections (2) and (3) apply where a reference under section 22 or 33 has been made but is not finally determined.
- (2) The Commission may, for the purpose of preventing pre-emptive action, accept from such of the parties concerned as it considers appropriate undertakings to take such action as it considers appropriate.
- (3) The Commission may, for the purpose of preventing pre-emptive action, adopt an undertaking accepted by the OFT under section 71 if the undertaking is still in force when the Commission adopts it.
- (4) An undertaking adopted under subsection (3)—
 - (a) shall continue in force, in accordance with its terms, when adopted;
 - (b) may be varied or superseded by an undertaking under this section; and
 - (c) may be released by the Commission.

- (5) Any other undertaking under this section—
 - (a) shall come into force when accepted;
 - (b) may be varied or superseded by another undertaking; and
 - (c) may be released by the Commission.
- (6) References in this Part to undertakings under this section shall, unless the context otherwise requires, include references to undertakings adopted under this section; and references to the acceptance or giving of undertakings under this section shall be construed accordingly.
- (7) An undertaking which is in force under this section in relation to a reference under section 22 or 33 shall cease to be in force if an order under section 81 comes into force in relation to that reference.
- (8) An undertaking under this section shall, if it has not previously ceased to be in force, cease to be in force when the reference under section 22 or 33 is finally determined.
- (9) The Commission shall, as soon as reasonably practicable, consider any representations received by it in relation to varying or releasing an undertaking under this section.
- (10) In this section and section 81 “pre-emptive action” means action which might prejudice the reference concerned or impede the taking of any action under this Part which may be justified by the Commission’s decisions on the reference.

81 Interim orders

- (1) Subsections (2) and (3) apply where a reference has been made under section 22 or 33 but is not finally determined.
- (2) The Commission may by order, for the purpose of preventing pre-emptive action—
 - (a) prohibit or restrict the doing of things which the Commission considers would constitute pre-emptive action;
 - (b) impose on any person concerned obligations as to the carrying on of any activities or the safeguarding of any assets;
 - (c) provide for the carrying on of any activities or the safeguarding of any assets either by the appointment of a person to conduct or supervise the conduct of any activities (on such terms and with such powers as may be specified or described in the order) or in any other manner;
 - (d) do anything which may be done by virtue of paragraph 19 of Schedule 8.
- (3) The Commission may, for the purpose of preventing pre-emptive action, adopt an order made by the OFT under section 72 if the order is still in force when the Commission adopts it.
- (4) An order adopted under subsection (3)—
 - (a) shall continue in force, in accordance with its terms, when adopted; and
 - (b) may be varied or revoked by an order under this section.
- (5) Any other order under this section—
 - (a) shall come into force at such time as is determined by or under the order; and
 - (b) may be varied or revoked by another order.

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- (6) References in this Part to orders under this section shall, unless the context otherwise requires, include references to orders adopted under this section; and references to the making of orders under this section shall be construed accordingly.
- (7) An order which is in force under this section in relation to a reference under section 22 or 33 shall cease to be in force if an undertaking under section 80 comes into force in relation to that reference.
- (8) An order under this section shall, if it has not previously ceased to be in force, cease to be in force when the reference under section 22 or 33 is finally determined.
- (9) The Commission shall, as soon as reasonably practicable, consider any representations received by it in relation to varying or revoking an order under this section.

Final powers

82 Final undertakings

- (1) The Commission may, in accordance with section 41, accept, from such persons as it considers appropriate, undertakings to take action specified or described in the undertakings.
- (2) An undertaking under this section—
 - (a) shall come into force when accepted;
 - (b) may be varied or superseded by another undertaking; and
 - (c) may be released by the Commission.
- (3) An undertaking which is in force under this section in relation to a reference under section 22 or 33 shall cease to be in force if an order under section 76(1)(b) or 83 comes into force in relation to the subject-matter of the undertaking.
- (4) No undertaking shall be accepted under this section in relation to a reference under section 22 or 33 if an order has been made under—
 - (a) section 76(1)(b) or 83 in relation to the subject-matter of the undertaking; or
 - (b) section 84 in relation to that reference.
- (5) The Commission shall, as soon as reasonably practicable, consider any representations received by it in relation to varying or releasing an undertaking under this section.

83 Order-making power where final undertakings not fulfilled

- (1) Subsection (2) applies where the Commission considers that—
 - (a) an undertaking accepted by it under section 82 has not been, is not being or will not be fulfilled; or
 - (b) in relation to an undertaking accepted by it under that section, information which was false or misleading in a material respect was given to the Commission or the OFT by the person giving the undertaking before the Commission decided to accept the undertaking.
- (2) The Commission may, for any of the purposes mentioned in section 41(2), make an order under this section.

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- (3) Subsections (3) to (5) of section 41 shall apply for the purposes of subsection (2) above as they apply for the purposes of subsection (2) of that section.
- (4) An order under this section may contain—
 - (a) anything permitted by Schedule 8; and
 - (b) such supplementary, consequential or incidental provision as the Commission considers appropriate.
- (5) An order under this section—
 - (a) shall come into force at such time as is determined by or under the order;
 - (b) may contain provision which is different from the provision contained in the undertaking concerned; and
 - (c) may be varied or revoked by another order.
- (6) No order shall be varied or revoked under this section unless the OFT advises that such a variation or revocation is appropriate by reason of a change of circumstances.

84 Final orders

- (1) The Commission may, in accordance with section 41, make an order under this section.
- (2) An order under this section may contain—
 - (a) anything permitted by Schedule 8; and
 - (b) such supplementary, consequential or incidental provision as the Commission considers appropriate.
- (3) An order under this section—
 - (a) shall come into force at such time as is determined by or under the order; and
 - (b) may be varied or revoked by another order.
- (4) No order shall be varied or revoked under this section unless the OFT advises that such a variation or revocation is appropriate by reason of a change of circumstances.
- (5) No order shall be made under this section in relation to a reference under section 22 or 33 if an undertaking has been accepted under section 82 in relation to that reference.

Public interest and special public interest cases

85 Enforcement regime for public interest and special public interest cases

- (1) Schedule 7 (which provides for the enforcement regime in public interest and special public interest cases) shall have effect.
- (2) The OFT may advise the Secretary of State in relation to the taking by him of enforcement action under Schedule 7.

Undertakings and orders: general provisions

86 Enforcement orders: general provisions

- (1) An enforcement order may extend to a person's conduct outside the United Kingdom if (and only if) he is—

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- (a) a United Kingdom national;
 - (b) a body incorporated under the law of the United Kingdom or of any part of the United Kingdom; or
 - (c) a person carrying on business in the United Kingdom.
- (2) Nothing in an enforcement order shall have effect so as to—
- (a) cancel or modify conditions in licences granted—
 - (i) under a patent granted under the Patents Act 1977 (c. 37) or a European patent (UK) (within the meaning of the Act of 1977); or
 - (ii) in respect of a design registered under the Registered Designs Act 1949 (c. 88);
 by the proprietor of the patent or design; or
 - (b) require an entry to be made in the register of patents or the register of designs to the effect that licences under such a patent or such a design are to be available as of right.
- (3) An enforcement order may prohibit the performance of an agreement already in existence when the order is made.
- (4) Schedule 8 (which provides for the contents of certain enforcement orders) shall have effect.
- (5) Part 1 of Schedule 9 (which enables certain enforcement orders to modify licence conditions etc. in regulated markets) shall have effect.
- (6) In this Part “enforcement order” means an order made under section 72, 75, 76, 81, 83 or 84 or under paragraph 2, 5, 6, 10 or 11 of Schedule 7.

87 Delegated power of directions

- (1) An enforcement order may authorise the person making the order to give directions falling within subsection (2) to—
- (a) a person specified in the directions; or
 - (b) the holder for the time being of an office so specified in any body of persons corporate or unincorporate.
- (2) Directions fall within this subsection if they are directions—
- (a) to take such action as may be specified or described in the directions for the purpose of carrying out, or ensuring compliance with, the enforcement order concerned; or
 - (b) to do, or refrain from doing, anything so specified or described which the person might be required by that order to do or refrain from doing.
- (3) An enforcement order may authorise the person making the order to vary or revoke any directions so given.
- (4) The court may by order require any person who has failed to comply with directions given by virtue of this section to comply with them, or otherwise remedy his failure, within such time as may be specified in the order.
- (5) Where the directions related to anything done in the management or administration of a body of persons corporate or unincorporate, the court may by order require the body of persons concerned or any officer of it to comply with the directions, or otherwise

remedy the failure to comply with them, within such time as may be specified in the order.

- (6) An order under subsection (4) or (5) shall be made on the application of the person authorised by virtue of this section to give the directions concerned.
- (7) An order under subsection (4) or (5) may provide for all the costs or expenses of, or incidental to, the application for the order to be met by any person in default or by any officers of a body of persons corporate or unincorporate who are responsible for its default.
- (8) In this section “the court” means—
 - (a) in relation to England and Wales or Northern Ireland, the High Court; and
 - (b) in relation to Scotland, the Court of Session.

88 Contents of certain enforcement orders

- (1) This section applies in relation to any order under section 75, 83 or 84 or under paragraph 5, 10 or 11 of Schedule 7.
- (2) The order or any explanatory material accompanying the order shall state—
 - (a) the actions that the persons or description of persons to whom the order is addressed must do or (as the case may be) refrain from doing;
 - (b) the date on which the order comes into force;
 - (c) the possible consequences of not complying with the order; and
 - (d) the section of this Part under which a review can be sought in relation to the order.

89 Subject-matter of undertakings

- (1) The provision which may be contained in an enforcement undertaking is not limited to the provision which is permitted by Schedule 8.
- (2) In this Part “enforcement undertaking” means an undertaking under section 71, 73, 80 or 82 or under paragraph 1, 3 or 9 of Schedule 7.

90 Procedural requirements for certain undertakings and orders

Schedule 10 (which provides for the procedure for accepting certain enforcement undertakings and making certain enforcement orders and for their termination) shall have effect.

91 Register of undertakings and orders

- (1) The OFT shall compile and maintain a register for the purposes of this Part.
- (2) The register shall be kept in such form as the OFT considers appropriate.
- (3) The OFT shall ensure that the following matters are entered in the register—
 - (a) the provisions of any enforcement undertaking accepted under this Part;
 - (b) the provisions of any enforcement order made under this Part;
 - (c) the details of any variation, release or revocation of such an undertaking or order; and

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- (d) the details of any consent given by the Commission under section 77(2) or (3) or 78(2) or by the Secretary of State under paragraph 7(2) or (3) or 8(2) of Schedule 7.
- (4) The duty in subsection (3) does not extend to anything of which the OFT is unaware.
- (5) The Commission and the Secretary of State shall inform the OFT of any matters which are to be included in the register by virtue of subsection (3) and which relate to enforcement undertakings accepted by them, enforcement orders made by them or consents given by them.
- (6) The OFT shall ensure that the contents of the register are available to the public—
 - (a) during (as a minimum) such hours as may be specified in an order made by the Secretary of State; and
 - (b) subject to such reasonable fees (if any) as the OFT may determine.
- (7) If requested by any person to do so and subject to such reasonable fees (if any) as the OFT may determine, the OFT shall supply the person concerned with a copy (certified to be true) of the register or of an extract from it.

Enforcement functions of OFT

92 Duty of OFT to monitor undertakings and orders

- (1) The OFT shall keep under review—
 - (a) the carrying out of any enforcement undertaking or any enforcement order; and
 - (b) compliance with the prohibitions in sections 77(2) and (3) and 78(2) and in paragraphs 7(2) and (3) and 8(2) of Schedule 7.
- (2) The OFT shall, in particular, from time to time consider—
 - (a) whether an enforcement undertaking or enforcement order has been or is being complied with;
 - (b) whether, by reason of any change of circumstances, an enforcement undertaking is no longer appropriate and—
 - (i) one or more of the parties to it can be released from it; or
 - (ii) it needs to be varied or to be superseded by a new enforcement undertaking; and
 - (c) whether, by reason of any change of circumstances, an enforcement order is no longer appropriate and needs to be varied or revoked.
- (3) The OFT shall give the Commission or (as the case may be) the Secretary of State such advice as it considers appropriate in relation to—
 - (a) any possible variation or release by the Commission or (as the case may be) the Secretary of State of an enforcement undertaking accepted by it or (as the case may be) him;
 - (b) any possible new enforcement undertaking to be accepted by the Commission or (as the case may be) the Secretary of State so as to supersede another enforcement undertaking given to the Commission or (as the case may be) the Secretary of State;

- (c) any possible variation or revocation by the Commission or (as the case may be) the Secretary of State of an enforcement order made by the Commission or (as the case may be) the Secretary of State;
 - (d) any possible enforcement undertaking to be accepted by the Commission or (as the case may be) the Secretary of State instead of an enforcement order or any possible enforcement order to be made by the Commission or (as the case may be) the Secretary of State instead of an enforcement undertaking;
 - (e) the enforcement by virtue of section 94(6) to (8) of any enforcement undertaking or enforcement order; or
 - (f) the enforcement by virtue of section 95(4) and (5) of the prohibitions in sections 77(2) and (3) and 78(2) and in paragraphs 7(2) and (3) and 8(2) of Schedule 7.
- (4) The OFT shall take such action as it considers appropriate in relation to—
- (a) any possible variation or release by it of an enforcement undertaking accepted by it;
 - (b) any possible new enforcement undertaking to be accepted by it so as to supersede another enforcement undertaking given to it;
 - (c) any possible variation or revocation by it of an enforcement order made by it;
 - (d) any possible enforcement undertaking to be accepted by it instead of an enforcement order or any possible enforcement order to be made by it instead of an enforcement undertaking;
 - (e) the enforcement by it by virtue of section 94(6) of any enforcement undertaking or enforcement order; or
 - (f) the enforcement by it by virtue of section 95(4) and (5) of the prohibitions in sections 77(2) and (3) and 78(2) and in paragraphs 7(2) and (3) and 8(2) of Schedule 7.
- (5) The OFT shall keep under review the effectiveness of enforcement undertakings accepted under this Part and enforcement orders made under this Part.
- (6) The OFT shall, whenever requested to do so by the Secretary of State and otherwise from time to time, prepare a report of its findings under subsection (5).
- (7) The OFT shall—
- (a) give any report prepared by it under subsection (6) to the Commission;
 - (b) give a copy of the report to the Secretary of State; and
 - (c) publish the report.

93 Further role of OFT in relation to undertakings and orders

- (1) Subsections (2) and (3) apply where—
- (a) the Commission is considering whether to accept undertakings under section 80 or 82; or
 - (b) the Secretary of State is considering whether to accept undertakings under paragraph 1, 3 or 9 of Schedule 7.
- (2) The Commission or (as the case may be) the Secretary of State (in this section “the relevant authority”) may require the OFT to consult with such persons as the relevant authority considers appropriate with a view to discovering whether they will offer undertakings which the relevant authority would be prepared to accept under section 80 or 82 or (as the case may be) paragraph 1, 3 or 9 of Schedule 7.

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- (3) The relevant authority may require the OFT to report to the relevant authority on the outcome of the OFT's consultations within such period as the relevant authority may require.
- (4) A report under subsection (3) shall, in particular, contain advice from the OFT as to whether any undertakings offered should be accepted by the relevant authority under section 80 or 82 or (as the case may be) paragraph 1, 3 or 9 of Schedule 7.
- (5) The powers conferred on the relevant authority by subsections (1) to (4) are without prejudice to the power of the relevant authority to consult the persons concerned itself.
- (6) If asked by the relevant authority for advice in relation to the taking of enforcement action (whether or not by way of undertaking) in a particular case, the OFT shall give such advice as it considers appropriate.

Other

94 Rights to enforce undertakings and orders

- (1) This section applies to any enforcement undertaking or enforcement order.
- (2) Any person to whom such an undertaking or order relates shall have a duty to comply with it.
- (3) The duty shall be owed to any person who may be affected by a contravention of the undertaking or (as the case may be) order.
- (4) Any breach of the duty which causes such a person to sustain loss or damage shall be actionable by him.
- (5) In any proceedings brought under subsection (4) against a person to whom an enforcement undertaking or an enforcement order relates it shall be a defence for that person to show that he took all reasonable steps and exercised all due diligence to avoid contravening the undertaking or (as the case may be) order.
- (6) Compliance with an enforcement undertaking or an enforcement order shall also be enforceable by civil proceedings brought by the OFT for an injunction or for interdict or for any other appropriate relief or remedy.
- (7) Compliance with an undertaking under section 80 or 82, an order made by the Commission under section 76 or an order under section 81, 83 or 84, shall also be enforceable by civil proceedings brought by the Commission for an injunction or for interdict or for any other appropriate relief or remedy.
- (8) Compliance with an undertaking under paragraph 1, 3 or 9 of Schedule 7, an order made by the Secretary of State under paragraph 2 of that Schedule or an order under paragraph 5, 6, 10 or 11 of that Schedule, shall also be enforceable by civil proceedings brought by the Secretary of State for an injunction or for interdict or for any other appropriate relief or remedy.
- (9) Subsections (6) to (8) shall not prejudice any right that a person may have by virtue of subsection (4) to bring civil proceedings for contravention or apprehended contravention of an enforcement undertaking or an enforcement order.

95 Rights to enforce statutory restrictions

- (1) The obligation to comply with section 77(2) or (3) or 78(2) or paragraph 7(2) or (3) or 8(2) of Schedule 7 shall be a duty owed to any person who may be affected by a contravention of the enactment concerned.
- (2) Any breach of the duty which causes such a person to sustain loss or damage shall be actionable by him.
- (3) In any proceedings brought under subsection (2) against a person who has an obligation to comply with section 77(2) or (3) or 78(2) or paragraph 7(2) or (3) or 8(2) of Schedule 7 it shall be a defence for that person to show that he took all reasonable steps and exercised all due diligence to avoid contravening the enactment concerned.
- (4) Compliance with section 77(2) or (3) or 78(2) shall also be enforceable by civil proceedings brought by the OFT or the Commission for an injunction or for interdict or for any other appropriate relief or remedy.
- (5) Compliance with paragraph 7(2) or (3) or 8(2) of Schedule 7 shall also be enforceable by civil proceedings brought by the OFT or the Secretary of State for an injunction or for interdict or for any other appropriate relief or remedy.
- (6) Subsections (4) and (5) shall not prejudice any right that a person may have by virtue of subsection (2) to bring civil proceedings for contravention or apprehended contravention of section 77(2) or (3) or 78(2) or paragraph 7(2) or (3) or 8(2) of Schedule 7.

CHAPTER 5

SUPPLEMENTARY

Merger notices

96 Merger notices

- (1) A person authorised to do so by regulations under section 101 may give notice to the OFT of proposed arrangements which might result in the creation of a relevant merger situation.
- (2) Any such notice (in this Part a “merger notice”)—
 - (a) shall be in the prescribed form; and
 - (b) shall state that the existence of the proposal has been made public.
- (3) No reference shall be made under section 22, 33 or 45 in relation to—
 - (a) arrangements of which notice is given under subsection (1) above 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;if the period for considering the merger notice has expired without a reference being made under that section in relation to those arrangements.
- (4) Subsection (3) is subject to section 100.

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- (5) In this section and sections 99(5)(c) and 100(1)(c) “prescribed” means prescribed by the OFT by notice having effect for the time being and published in the London, Edinburgh and Belfast Gazettes.
- (6) In this Part “notified arrangements” means arrangements of which notice is given under subsection (1) above or arrangements not differing from them in any material respect.

97 Period for considering merger notices

- (1) The period for considering a merger notice is, subject as follows, the period of 20 days beginning with the first day after—
 - (a) the notice has been received by the OFT; and
 - (b) any fee payable by virtue of section 121 to the OFT in respect of the notice has been paid.
- (2) Where no intervention notice is in force in relation to the matter concerned, the OFT may by notice to the person who gave the merger notice extend by a further 10 days the period for considering the merger notice.
- (3) Where an intervention notice is in force in relation to the matter concerned and there has been no extension under subsection (2), the OFT may by notice to the person who gave the merger notice extend by a further 20 days the period for considering the merger notice.
- (4) Where an intervention notice is in force in relation to the matter concerned and there has been an extension under subsection (2), the OFT may by notice to the person who gave the merger notice extend the period for considering the merger notice by a further number of days which, including any extension already made under subsection (2), does not exceed 20 days.
- (5) The OFT may by notice to the person who gave the merger notice extend the period for considering a merger notice if the OFT considers that the person has failed to provide, within the period stated in a notice under section 99(2) and in the authorised or required manner, information requested of him in that notice.
- (6) An extension under subsection (5) shall be for the period until the person concerned provides the information to the satisfaction of the OFT or, if earlier, the cancellation by the OFT of the extension.
- (7) The OFT may by notice to the person who gave the merger notice extend the period for considering a merger notice if the OFT is seeking undertakings under section 73 or (as the case may be) the Secretary of State is seeking undertakings under paragraph 3 of Schedule 7.
- (8) An extension under subsection (7) shall be for the period beginning with the receipt of the notice under that subsection and ending with the earliest of the following events—
 - (a) the giving of the undertakings concerned;
 - (b) the expiry of the period of 10 days beginning with the first day after the receipt by the OFT of a notice from the person from whom the undertakings are being sought stating that he does not intend to give the undertakings; or
 - (c) the cancellation by the OFT of the extension.

- (9) The Secretary of State may by notice to the person who gave the merger notice extend the period for considering a merger notice if, by virtue of paragraph 3(6) of Schedule 7, he decides to delay a decision as to whether to make a reference under section 45.
- (10) An extension under subsection (9) shall be for the period of the delay.
- (11) The OFT may by notice to the person who gave the merger notice extend the period for considering a merger notice 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(3) of the European Merger Regulations (but is not yet proceeding with the matter in pursuance of such a request).
- (12) An extension under subsection (11) shall be for the period beginning with the receipt of the notice under that subsection and ending with the receipt of a notice under subsection (13).
- (13) The OFT shall, in connection with any notice given by it under subsection (11), by notice inform the person who gave the merger notice of the completion by the European Commission of its consideration of the request of the United Kingdom.

98 Section 97: supplementary

- (1) A notice under section 97(2), (3), (4), (5), (7), (9) or (11) shall be given, before the end of the period for considering the merger notice, to the person who gave the merger notice.
- (2) A notice under section 97(5)—
 - (a) shall also be given within 5 days of the end of the period within which the information is to be provided and which is stated in the notice under section 99(2); and
 - (b) shall also inform the person who gave the merger notice of—
 - (i) the OFT's opinion as mentioned in section 97(5); and
 - (ii) the OFT's intention to extend the period for considering a merger notice.
- (3) In determining for the purposes of section 97(1), (2), (3), (4) or (8)(b) or subsection (2) (a) above any period which is expressed in the enactment concerned as a period of days or number of days no account shall be taken of—
 - (a) Saturday, Sunday, Good Friday and Christmas Day; and
 - (b) any day which is a bank holiday in England and Wales.
- (4) Any reference in this Part (apart from in section 97(1) and section 99(1)) to the period for considering a merger notice shall, if that period is extended by virtue of any one or more of subsections (2), (3), (4) (5), (7), (9) and (11) of section 97 in relation to a particular case, be construed in relation to that case as a reference to that period as so extended; but only one extension is possible under section 97(2), (3) or (4).
- (5) Where the period for considering a merger notice is extended or further extended by virtue of section 97, the period as extended or (as the case may be) further extended shall, subject to subsections (6) and (7), 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).
- (6) Subsection (7) applies where—

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- (a) the period for considering a merger notice is further extended;
 - (b) the further extension and at least one previous extension is made under one or more of subsections (5), (7), (9) and (11) of section 97; 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.
- (7) In calculating the period of the further extension, any days or fractions of days of the kind mentioned in subsection (6)(c) shall be disregarded.

99 Certain functions of OFT and Secretary of State in relation to merger notices

- (1) The OFT shall, so far as practicable and when the period for considering any merger notice begins, take such action as the OFT considers appropriate to bring—
- (a) the existence of the proposal;
 - (b) the fact that the merger notice has been given; and
 - (c) the date on which the period for considering the notice may expire;
- to the attention of those whom the OFT considers would be affected if the arrangements were carried into effect.
- (2) The OFT may by notice to the person who gave the merger notice request him to provide the OFT with such information as the OFT or (as the case may be) the Secretary of State may require for the purpose of carrying out its or (as the case may be) his functions in relation to the merger notice.
- (3) A notice under subsection (2) shall state—
- (a) the information required;
 - (b) the period within which the information is to be provided; and
 - (c) the possible consequences of not providing the information within the stated period and in the authorised or required manner.
- (4) A notice by the OFT under subsection (2) shall be given, before the end of the period for considering the merger notice, to the person who gave the merger notice.
- (5) The OFT may, at any time before the end of the period for considering any merger notice, reject the notice if—
- (a) the OFT suspects that any information given in respect of the notified arrangements (whether in the merger notice or otherwise) by the person who gave the notice or any connected person is in any material respect false or misleading;
 - (b) the OFT suspects that it is not proposed to carry the notified arrangements into effect;
 - (c) any prescribed information is not given in the merger notice or any information requested by notice under subsection (2) is not provided as required; or
 - (d) the OFT considers that the notified arrangements are, or if carried into effect would result in, a concentration with a Community dimension within the meaning of the European Merger Regulations.
- (6) In this section and section 100 “connected person”, in relation to the person who gave a merger notice, means—
- (a) any person who, for the purposes of section 127, is associated with him; or

- (b) any subsidiary of the person who gave the merger notice or of any person so associated with him.

100 Exceptions to protection given by merger notices

- (1) Section 96(3) does not prevent any reference being made to the Commission if—
 - (a) before the end of the period for considering the merger notice, the OFT rejects the notice under section 99(5);
 - (b) before the end of that period, any of the enterprises to which the notified arrangements relate cease to be distinct from each other;
 - (c) any information (whether prescribed information or not) that—
 - (i) is, or ought to be, known to the person who gave the merger notice or any connected person; and
 - (ii) is material to the notified arrangements;is not disclosed to the OFT by such time before the end of that period as may be specified in regulations under section 101;
 - (d) at any time after the merger notice is given but before the enterprises to which the notified arrangements relate cease to be distinct from each other, any of those enterprises ceases to be distinct from any enterprise other than an enterprise to which those arrangements relate;
 - (e) the six months beginning with the end of the period for considering the merger notice expires without the enterprises to which the notified arrangements relate ceasing to be distinct from each other;
 - (f) the merger notice is withdrawn; or
 - (g) any information given in respect of the notified arrangements (whether in the merger notice or otherwise) by the person who gave the notice or any connected person is in any material respect false or misleading.
- (2) Subsection (3) applies where—
 - (a) two or more transactions which have occurred, or, if any arrangements are carried into effect, will occur, may be treated for the purposes of a reference under section 22, 33 or 45 as having occurred simultaneously on a particular date; and
 - (b) section 96(3) does not prevent such a reference in relation to the last of those transactions.
- (3) Section 96(3) does not prevent such a reference in relation to any of those transactions which actually occurred less than six months before—
 - (a) that date; or
 - (b) the actual occurrence of another of those transactions in relation to which such a reference may be made (whether or not by virtue of this subsection).
- (4) In determining for the purposes of subsections (2) and (3) the time at which any transaction actually occurred, no account shall be taken of any option or other conditional right until the option is exercised or the condition is satisfied.
- (5) In this section references to the enterprises to which the notified arrangements relate are references to those enterprises that would have ceased to be distinct from one another if the arrangements mentioned in the merger notice concerned had been carried into effect at the time when the notice was given.

101 Merger notices: regulations

- (1) The Secretary of State may make regulations for the purposes of sections 96 to 100.
- (2) The regulations may, in particular—
 - (a) provide for section 97(1), (2), (3) or (4) or section 100(1)(e) to apply as if any reference to a period of days or months were a reference to a period specified in the regulations for the purposes of the enactment concerned;
 - (b) provide for the manner in which any merger notice is authorised or required to be rejected or withdrawn, and the time at which any merger notice is to be treated as received or rejected;
 - (c) provide for the time at which any notice under section 97(7), (8)(b), (11) or (13) is to be treated as received;
 - (d) provide for the manner in which any information requested by the OFT or any other material information is authorised or required to be provided or disclosed, and the time at which such information is to be treated as provided or disclosed (including the time at which it is to be treated as provided to the satisfaction of the OFT for the purposes of section 97(6));
 - (e) provide for the person who gave the merger notice to be informed, in circumstances in which section 97(6) applies—
 - (i) of the fact that the OFT is satisfied as to the provision of the information requested by the OFT or (as the case may be) of the OFT's decision to cancel the extension; and
 - (ii) of the time at which the OFT is to be treated as so satisfied or (as the case may be) of the time at which the cancellation is to be treated as having effect;
 - (f) provide for the person who gave the merger notice to be informed, in circumstances in which section 97(8) applies—
 - (i) of any decision by the OFT to cancel the extension; and
 - (ii) of the time at which such a cancellation is to be treated as having effect;
 - (g) provide for the time at which any fee is to be treated as paid;
 - (h) provide that a person is, or is not, to be treated, in such circumstances as may be specified in the regulations, as acting on behalf of a person authorised by regulations under this section to give a merger notice or a person who has given such a notice.

102 Power to modify sections 97 to 101

The Secretary of State may, for the purposes of determining the effect of giving a merger notice and the action which may be or is to be taken by any person in connection with such a notice, by order modify sections 97 to 101.

*General duties in relation to references***103 Duty of expedition in relation to references**

- (1) In deciding whether to make a reference under section 22 or 33 the OFT shall have regard, with a view to the prevention or removal of uncertainty, to the need for making a decision as soon as reasonably practicable.

- (2) In deciding whether to make a reference under section 45 or 62 the Secretary of State shall have regard, with a view to the prevention or removal of uncertainty, to the need for making a decision as soon as reasonably practicable.

104 Certain duties of relevant authorities to consult

- (1) Subsection (2) applies where the relevant authority is proposing to make a relevant decision in a way which the relevant authority considers is likely to be adverse to the interests of a relevant party.
- (2) The relevant authority shall, so far as practicable, consult that party about what is proposed before making that decision.
- (3) In consulting the party concerned, the relevant authority shall, so far as practicable, give the reasons of the relevant authority for the proposed decision.
- (4) In considering what is practicable for the purposes of this section the relevant authority shall, in particular, have regard to—
- (a) any restrictions imposed by any timetable for making the decision; and
 - (b) any need to keep what is proposed, or the reasons for it, confidential.
- (5) The duty under this section shall not apply in relation to the making of any decision so far as particular provision is made elsewhere by virtue of this Part for consultation before the making of that decision.
- (6) In this section—
- “the relevant authority” means the OFT, the Commission or the Secretary of State;
 - “relevant decision” means—
 - (a) in the case of the OFT, any decision by the OFT—
 - (i) as to whether to make a reference under section 22 or 33 or accept undertakings under section 73 instead of making such a reference; or
 - (ii) to vary under section 37 such a reference;
 - (b) in the case of the Commission, any decision on the questions mentioned in section 35(1) or (3), 36(1) or (2), 47 or 63; and
 - (c) in the case of the Secretary of State, any decision by the Secretary of State—
 - (i) as to whether to make a reference under section 45 or 62; or
 - (ii) to vary under section 49 or (as the case may be) 64 such a reference; and
 - “relevant party” means any person who appears to the relevant authority to control enterprises which are the subject of the reference or possible reference concerned.

Information and publicity requirements

105 General information duties of OFT and Commission

- (1) Where the OFT decides to investigate a matter so as to enable it to decide whether to make a reference under section 22 or 33, or so as to make a report under section 44 or

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61, it shall, so far as practicable, take such action as it considers appropriate to bring information about the investigation to the attention of those whom it considers might be affected by the creation of the relevant merger situation concerned or (as the case may be) the special merger situation concerned.

- (2) Subsection (1) does not apply in relation to arrangements which might result in the creation of a relevant merger situation if a merger notice has been given in relation to those arrangements under section 96.
- (3) The OFT shall give the Commission—
 - (a) such information in its possession as the Commission may reasonably require to enable the Commission to carry out its functions under this Part; and
 - (b) any other assistance which the Commission may reasonably require for the purpose of assisting it in carrying out its functions under this Part and which it is within the power of the OFT to give.
- (4) The OFT shall give the Commission any information in its possession which has not been requested by the Commission but which, in the opinion of the OFT, would be appropriate to give to the Commission for the purpose of assisting it in carrying out its functions under this Part.
- (5) The OFT and the Commission shall give the Secretary of State—
 - (a) such information in their possession as the Secretary of State may by direction reasonably require to enable him to carry out his functions under this Part; and
 - (b) any other assistance which the Secretary of State may by direction reasonably require for the purpose of assisting him in carrying out his functions under this Part and which it is within the power of the OFT or (as the case may be) the Commission to give.
- (6) The OFT shall give the Secretary of State any information in its possession which has not been requested by the Secretary of State but which, in the opinion of the OFT, would be appropriate to give to the Secretary of State for the purpose of assisting him in carrying out his functions under this Part.
- (7) The Commission shall have regard to any information given to it under subsection (3) or (4); and the Secretary of State shall have regard to any information given to him under subsection (5) or (6).
- (8) Any direction given under subsection (5)—
 - (a) shall be in writing; and
 - (b) may be varied or revoked by a subsequent direction.

106 Advice and information about references under sections 22 and 33

- (1) As soon as reasonably practicable after the passing of this Act, the OFT shall prepare and publish general advice and information about the making of references by it under section 22 or 33.
- (2) The OFT may at any time publish revised, or new, advice or information.
- (3) As soon as reasonably practicable after the passing of this Act, the Commission shall prepare and publish general advice and information about the consideration by it of references under section 22 or 33 and the way in which relevant customer benefits may affect the taking of enforcement action in relation to such references.

- (4) The Commission may at any time publish revised, or new, advice or information.
- (5) Advice and information published under this section shall be prepared with a view to—
 - (a) explaining relevant provisions of this Part to persons who are likely to be affected by them; and
 - (b) indicating how the OFT or (as the case may be) the Commission expects such provisions to operate.
- (6) Advice (or information) published by virtue of subsection (1) or (3) may include advice (or information) about the factors which the OFT or (as the case may be) the Commission may take into account in considering whether, and if so how, to exercise a function conferred by this Part.
- (7) Any advice or information published by the OFT or the Commission under this section shall be published in such manner as the OFT or (as the case may be) the Commission considers appropriate.
- (8) In preparing any advice or information under this section, the OFT shall consult the Commission and such other persons as it considers appropriate.
- (9) In preparing any advice or information under this section, the Commission shall consult the OFT and such other persons as it considers appropriate.

107 Further publicity requirements

- (1) The OFT shall publish—
 - (a) any reference made by it under section 22 or 33 or any decision made by it not to make such a reference (other than a decision made by virtue of subsection (2)(b) of section 33);
 - (b) any variation made by it under section 37 of a reference under section 22 or 33;
 - (c) such information as it considers appropriate about any decision made by it under section 57(1) to bring a case to the attention of the Secretary of State;
 - (d) any enforcement undertaking accepted by it under section 71;
 - (e) any enforcement order made by it under section 72 or 76 or paragraph 2 of Schedule 7;
 - (f) any variation, release or revocation of such an undertaking or order;
 - (g) any decision made by it as mentioned in section 76(6)(b); and
 - (h) any decision made by it to dispense with the requirements of Schedule 10.
- (2) The Commission shall publish—
 - (a) any cancellation by it under section 37(1) of a reference under section 33;
 - (b) any decision made by it under section 37(2) to treat a reference made under section 22 or 33 as if it had been made under section 33 or (as the case may be) 22;
 - (c) any extension by it under section 39 of the period within which a report under section 38 is to be prepared and published;
 - (d) any decision made by it to cancel an extension as mentioned in section 39(8)(b);
 - (e) any decision made by it under section 41(2) neither to accept an undertaking under section 82 nor to make an order under section 84;

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- (f) any decision made by it that there has been a material change of circumstances as mentioned in subsection (3) of section 41 or there is another special reason as mentioned in that subsection of that section;
 - (g) any cancellation by it under section 48(1) or 53(1) of a reference under section 45 or any cancellation by it under section 64(1) of a reference under section 62;
 - (h) any decision made by it under section 49(1) to treat—
 - (i) a reference made under subsection (2) or (3) of section 45 as if it had been made under subsection (4) or (as the case may be) (5) of that section; or
 - (ii) a reference made under subsection (4) or (5) of section 45 as if it had been made under subsection (2) or (as the case may be) (3) of that section;
 - (i) any extension by it under section 51 of the period within which a report under section 50 is to be prepared and published;
 - (j) any decision made by it under section 51(8)(b) to cancel such an extension;
 - (k) any extension by it under section 51 as applied by section 65(3) of the period within which a report under section 65 is to be prepared and published;
 - (l) any decision made by it under section 51(8)(b) as applied by section 65(3) to cancel such an extension;
 - (m) any decision made by it under section 64(2) to 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;
 - (n) any decision made by it as mentioned in section 76(6)(b);
 - (o) any enforcement order made by it under section 76 or 81;
 - (p) any enforcement undertaking accepted by it under section 80;
 - (q) any variation, release or revocation of such an order or undertaking; and
 - (r) any decision made by it to dispense with the requirements of Schedule 10.
- (3) The Secretary of State shall publish—
- (a) any intervention notice or special intervention notice given by him;
 - (b) any report of the OFT under section 44 or 61 which has been received by him;
 - (c) any reference made by him under section 45 or 62 or any decision made by him not to make such a reference;
 - (d) any variation made by him under section 49 of a reference under section 45 or under section 64 of a reference under section 62;
 - (e) any report of the Commission under section 50 or 65 which has been received by him;
 - (f) any decision made by him neither to accept an undertaking under paragraph 9 of Schedule 7 nor to make an order under paragraph 11 of that Schedule;
 - (g) any notice given by him under section 56(1);
 - (h) any enforcement undertaking accepted by him under paragraph 1 of Schedule 7;
 - (i) any variation or release of such an undertaking;
 - (j) any decision made by him as mentioned in paragraph 6(6)(b) of Schedule 7; and
 - (k) any decision made by him to dispense with the requirements of Schedule 10.

- (4) Where any person is under a duty by virtue of subsection (1), (2) or (3) to publish the result of any action taken by that person or any decision made by that person, the person concerned shall, subject to subsections (5) and (6), also publish that person's reasons for the action concerned or (as the case may be) the decision concerned.
- (5) Such reasons need not, if it is not reasonably practicable to do so, be published at the same time as the result of the action concerned or (as the case may be) as the decision concerned.
- (6) Subsections (4) and (5) shall not apply in relation to any information published under subsection (1)(c).
- (7) The Secretary of State shall publish his reasons for—
 - (a) any decision made by him under section 54(2) or 66(2); or
 - (b) any decision to make an order under section 58(3) or vary or revoke such an order.
- (8) Such reasons may be published after—
 - (a) in the case of subsection (7)(a), the publication of the decision concerned; and
 - (b) in the case of subsection (7)(b), the making of the order or of the variation or revocation;if it is not reasonably practicable to publish them at the same time as the publication of the decision or (as the case may be) the making of the order or variation or revocation.
- (9) The Secretary of State shall publish—
 - (a) the report of the OFT under section 44 in relation to a matter no later than publication of his decision as to whether to make a reference under section 45 in relation to that matter; and
 - (b) the report of the Commission under section 50 in relation to a matter no later than publication of his decision under section 54(2) in relation to that matter.
- (10) The Secretary of State shall publish—
 - (a) the report of the OFT under section 61 in relation to a matter no later than publication of his decision as to whether to make a reference under section 62 in relation to that matter; and
 - (b) the report of the Commission under section 65 in relation to a matter no later than publication of his decision under section 66(2) in relation to that matter.
- (11) Where the Secretary of State has decided under section 55(2) or 66(6) to accept an undertaking under paragraph 9 of Schedule 7 or to make an order under paragraph 11 of that Schedule, he shall (after the acceptance of the undertaking or (as the case may be) the making of the order) lay details of his decision and his reasons for it, and the Commission's report under section 50 or (as the case may be) 65, before each House of Parliament.

108 Defamation

For the purposes of the law relating to defamation, absolute privilege attaches to any advice, guidance, notice or direction given, or decision or report made, by the OFT, the Commission or the Secretary of State in the exercise of any of their functions under this Part.

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Investigation powers

109 Attendance of witnesses and production of documents etc.

- (1) The Commission may, for the purpose of any investigation on a reference made to it under this Part, give notice to any person requiring him—
 - (a) to attend at a time and place specified in the notice; and
 - (b) to give evidence to the Commission or a person nominated by the Commission for the purpose.
- (2) The Commission may, for the purpose of any investigation on a reference made to it under this Part, give notice to any person requiring him—
 - (a) to produce any documents which—
 - (i) are specified or described in the notice, or fall within a category of document which is specified or described in the notice; and
 - (ii) are in that person’s custody or under his control; and
 - (b) to produce them at a time and place so specified and to a person so specified.
- (3) The Commission may, for the purpose of any investigation on a reference made to it under this Part, give notice to any person who carries on any business requiring him—
 - (a) to supply to the Commission such estimates, forecasts, returns or other information as may be specified or described in the notice; and
 - (b) to supply it at a time and place, and in a form and manner, so specified and to a person so specified.
- (4) A notice under this section shall include information about the possible consequences of not complying with the notice.
- (5) The Commission or any person nominated by it for the purpose may, for the purpose of any investigation on a reference made to it under this Part, take evidence on oath, and for that purpose may administer oaths.
- (6) The person to whom any document is produced in accordance with a notice under this section may, for the purpose of any investigation on a reference made to the Commission under this Part, copy the document so produced.
- (7) No person shall be required under this section—
 - (a) to give any evidence or produce any documents which he could not be compelled to give or produce in civil proceedings before the court; or
 - (b) to supply any information which he could not be compelled to supply in evidence in such proceedings.
- (8) No person shall be required, in compliance with a notice under this section, to go more than 10 miles from his place of residence unless his necessary travelling expenses are paid or offered to him.
- (9) Any reference in this section to the production of a document includes a reference to the production of a legible and intelligible copy of information recorded otherwise than in legible form.
- (10) In this section “the court” means—
 - (a) in relation to England and Wales or Northern Ireland, the High Court; and
 - (b) in relation to Scotland, the Court of Session.

110 Enforcement of powers under section 109: general

- (1) Where the Commission considers that a person has, without reasonable excuse, failed to comply with any requirement of a notice under section 109, it may impose a penalty in accordance with section 111.
- (2) The Commission may proceed (whether at the same time or at different times) under subsection (1) and section 39(4) or (as the case may be) 51(4) (including that enactment as applied by section 65(3)) in relation to the same failure.
- (3) Where the Commission considers that a person has intentionally obstructed or delayed another person in the exercise of his powers under section 109(6), it may impose a penalty in accordance with section 111.
- (4) No penalty shall be imposed by virtue of subsection (1) or (3) if more than 4 weeks have passed since the publication of the report of the Commission on the reference concerned; but this subsection shall not apply in relation to any variation or substitution of the penalty which is permitted by virtue of this Part.
- (5) A person, subject to subsection (6), commits an offence if he intentionally alters, suppresses or destroys any document which he has been required to produce by a notice under section 109.
- (6) A person does not commit an offence under subsection (5) in relation to any act which constitutes a failure to comply with a notice under section 109 if the Commission has proceeded against that person under subsection (1) above in relation to that failure.
- (7) A person who commits an offence under subsection (5) shall be liable—
 - (a) on summary conviction, to a fine not exceeding the statutory maximum;
 - (b) on conviction on indictment, to imprisonment for a term not exceeding two years or to a fine or to both.
- (8) The Commission shall not proceed against a person under subsection (1) in relation to an act which constitutes an offence under subsection (5) if that person has been found guilty of that offence.
- (9) In deciding whether and, if so, how to proceed under subsection (1) or (3) or section 39(4) or 51(4) (including that enactment as applied by section 65(3)), the Commission shall have regard to the statement of policy which was most recently published under section 116 at the time when the failure concerned or (as the case may be) the obstruction or delay concerned occurred.
- (10) The reference in this section to the production of a document includes a reference to the production of a legible and intelligible copy of information recorded otherwise than in legible form; and the reference to suppressing a document includes a reference to destroying the means of reproducing information recorded otherwise than in legible form.

111 Penalties

- (1) A penalty imposed under section 110(1) or (3) shall be of such amount as the Commission considers appropriate.
- (2) The amount may, in the case of a penalty imposed under section 110(1), be a fixed amount, an amount calculated by reference to a daily rate or a combination of a fixed amount and an amount calculated by reference to a daily rate.

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- (3) The amount shall, in the case of a penalty imposed under section 110(3), be a fixed amount.
- (4) No penalty imposed under section 110(1) shall—
- (a) in the case of a fixed amount, exceed such amount as the Secretary of State may by order specify;
 - (b) in the case of an amount calculated by reference to a daily rate, exceed such amount per day as the Secretary of State may so specify; and
 - (c) in the case of a fixed amount and an amount calculated by reference to a daily rate, exceed such fixed amount and such amount per day as the Secretary of State may so specify.
- (5) In imposing a penalty by reference to a daily rate—
- (a) no account shall be taken of any days before the service of the notice under section 112 on the person concerned; and
 - (b) unless the Commission determines an earlier date (whether before or after the penalty is imposed), the amount payable shall cease to accumulate at the beginning of—
 - (i) the day on which the requirement of the notice concerned under section 109 is satisfied or (as the case may be) the obstruction or delay is removed; or
 - (ii) if earlier, the day on which the report of the Commission on the reference concerned is published (or, in the case of a report under section 50 or 65, given) or, if no such report is published (or given) within the period permitted for that purpose by this Part, the latest day on which the report may be published (or given) within the permitted period.
- (6) No penalty imposed under section 110(3) shall exceed such amount as the Secretary of State may by order specify.
- (7) An order under subsection (4) or (6) shall not specify—
- (a) in the case of a fixed amount, an amount exceeding £30,000;
 - (b) in the case of an amount calculated by reference to a daily rate, an amount per day exceeding £15,000; and
 - (c) in the case of a fixed amount and an amount calculated by reference to a daily rate, a fixed amount exceeding £30,000 and an amount per day exceeding £15,000.
- (8) Before making an order under subsection (4) or (6) the Secretary of State shall consult the Commission and such other persons as he considers appropriate.

112 Penalties: main procedural requirements

- (1) As soon as practicable after imposing a penalty under section 110(1) or (3), the Commission shall give notice of the penalty.
- (2) The notice shall state—
- (a) that the Commission has imposed a penalty on the person concerned;
 - (b) whether the penalty is of a fixed amount, of an amount calculated by reference to a daily rate or of both a fixed amount and an amount calculated by reference to a daily rate;

- (c) the amount or amounts concerned and, in the case of an amount calculated by reference to a daily rate, the day on which the amount first starts to accumulate and the day or days on which it might cease to accumulate;
 - (d) the failure or (as the case may be) the obstruction or delay which the Commission considers gave it the power to impose the penalty;
 - (e) any other facts which the Commission considers justify the imposition of a penalty and the amount or amounts of the penalty;
 - (f) the manner in which, and place at which, the penalty is required to be paid to the Commission;
 - (g) the date or dates, no earlier than the end of the relevant period beginning with the date of service of the notice on the person concerned, by which the penalty or (as the case may be) different portions of it are required to be paid;
 - (h) that the penalty or (as the case may be) different portions of it may be paid earlier than the date or dates by which it or they are required to be paid; and
 - (i) that the person concerned has the right to apply under subsection (3) below or to appeal under section 114 and the main details of those rights.
- (3) The person against whom the penalty was imposed may, within 14 days of the date of service on him of a notice under subsection (1), apply to the Commission for it to specify a different date or (as the case may be) different dates by which the penalty or (as the case may be) different portions of it are to be paid.
- (4) A notice under this section shall be given by—
- (a) serving a copy of the notice on the person on whom the penalty was imposed; and
 - (b) publishing the notice.
- (5) In this section “relevant period” means the period of 28 days mentioned in subsection (3) of section 114 or, if another period is specified by the Secretary of State under that subsection, that period.

113 Payments and interest by instalments

- (1) If the whole or any portion of a penalty is not paid by the date by which it is required to be paid, the unpaid balance from time to time shall carry interest at the rate for the time being specified in section 17 of the Judgments Act 1838 (c. 110).
- (2) Where an application has been made under section 112(3), the penalty shall not be required to be paid until the application has been determined, withdrawn or otherwise dealt with.
- (3) If a portion of a penalty has not been paid by the date required for it, the Commission may, where it considers it appropriate to do so, require so much of the penalty as has not already been paid (and is capable of being paid immediately) to be paid immediately.
- (4) Any sums received by the Commission in or towards the payment of a penalty, or interest on a penalty, shall be paid into the Consolidated Fund.

114 Appeals in relation to penalties

- (1) This section applies if a person on whom a penalty is imposed under section 110(1) or (3) is aggrieved by—
 - (a) the imposition or nature of the penalty;

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- (b) the amount or amounts of the penalty; or
 - (c) the date by which the penalty is required to be paid or (as the case may be) the different dates by which portions of the penalty are required to be paid.
- (2) The person aggrieved may apply to the Competition Appeal Tribunal.
- (3) If a copy of the notice under section 112(1) was served on the person on whom the penalty was imposed, the application to the Competition Appeal Tribunal shall, subject to subsection (4), be made within—
 - (a) the period of 28 days starting with the day on which the copy was served on the person concerned; or
 - (b) such other period as the Secretary of State may by order specify.
- (4) If the application relates to a decision of the Commission on an application by the person on whom the penalty was imposed under section 112(3), the application to the Competition Appeal Tribunal shall be made within—
 - (a) the period of 28 days starting with the day on which the person concerned is notified of the decision; or
 - (b) such other period as the Secretary of State may by order specify.
- (5) On an application under this section, the Competition Appeal Tribunal may—
 - (a) quash the penalty;
 - (b) substitute a penalty of a different nature or of such lesser amount or amounts as the Competition Appeal Tribunal considers appropriate; or
 - (c) in a case falling within subsection (1)(c), substitute for the date or dates imposed by the Commission an alternative date or dates;if it considers it appropriate to do so.
- (6) The Competition Appeal Tribunal shall not substitute a penalty of a different nature under subsection (5)(b) unless it considers that the person on whom the penalty is imposed will, or is likely to, pay less under the substituted penalty than he would have paid under the original penalty.
- (7) Where an application has been made under this section—
 - (a) the penalty shall not be required to be paid until the application has been determined, withdrawn or otherwise dealt with; and
 - (b) the Commission may agree to reduce the amount or amounts of the penalty in settlement of the application.
- (8) Where the Competition Appeal Tribunal substitutes a penalty of a different nature or of a lesser amount or amounts it may require the payment of interest on the substituted penalty at such rate or rates, and from such date or dates, as it considers appropriate.
- (9) Where the Competition Appeal Tribunal specifies as a date by which the penalty, or a portion of the penalty, is to be paid a date before the determination of the application under this section it may require the payment of interest on the penalty, or portion, from that date at such rate as it considers appropriate.
- (10) An appeal lies to the appropriate court—
 - (a) on a point of law arising from a decision of the Tribunal in proceedings under this section; or
 - (b) from a decision of the Tribunal in such proceedings as to the amount or amounts of a penalty.

- (11) An appeal under subsection (10)—
 - (a) may be brought by a party to the proceedings before the Tribunal; and
 - (b) requires the permission of the Tribunal or the appropriate court.
- (12) In this section “the appropriate court” means the Court of Appeal or, in the case of Tribunal proceedings in Scotland, the Court of Session.

115 Recovery of penalties

Where a penalty imposed under section 110(1) or (3), or any portion of such a penalty, has not been paid by the date on which it is required to be paid and—

- (a) no application relating to the penalty has been made under section 114 during the period within which such an application may be made, or
- (b) any such application which has been made has been determined, withdrawn or otherwise dealt with,

the Commission may recover from the person on whom the penalty was imposed any of the penalty and any interest which has not been paid; and in England and Wales and Northern Ireland such penalty and interest may be recovered as a civil debt due to the Commission.

116 Statement of policy

- (1) The Commission shall prepare and publish a statement of policy in relation to the enforcement of notices under section 109.
- (2) The statement shall, in particular, include a statement about the considerations relevant to the determination of the nature and amount of any penalty imposed under section 110(1) or (3).
- (3) The Commission may revise its statement of policy and, where it does so, it shall publish the revised statement.
- (4) The Commission shall consult such persons as it considers appropriate when preparing or revising its statement of policy.

117 False or misleading information

- (1) A person commits an offence if—
 - (a) he supplies any information to the OFT, the Commission or the Secretary of State in connection with any of their functions under this Part;
 - (b) the information is false or misleading in a material respect; and
 - (c) he knows that it is false or misleading in a material respect or is reckless as to whether it is false or misleading in a material respect.
- (2) A person commits an offence if he—
 - (a) supplies any information to another person which he knows to be false or misleading in a material respect; or
 - (b) recklessly supplies any information to another person which is false or misleading in a material respect;

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knowing that the information is to be used for the purpose of supplying information to the OFT, the Commission or the Secretary of State in connection with any of their functions under this Part.

- (3) A person who commits an offence under subsection (1) or (2) shall be liable—
- (a) on summary conviction, to a fine not exceeding the statutory maximum;
 - (b) on conviction on indictment, to imprisonment for a term not exceeding two years or to a fine or to both.

Reports

118 Excisions from reports

- (1) Subsection (2) applies where the Secretary of State is under a duty to publish—
- (a) a report of the OFT under section 44 or 61; or
 - (b) a report of the Commission under section 50 or 65.
- (2) The Secretary of State may exclude a matter from the report concerned if he considers that publication of the matter would be inappropriate.
- (3) In deciding what is inappropriate for the purposes of subsection (2) the Secretary of State shall have regard to the considerations mentioned in section 244.
- (4) The body which has prepared the report shall advise the Secretary of State as to the matters (if any) which it considers should be excluded by him under subsection (2).
- (5) References in sections 38(4) and 107(11) to the giving or laying of a report of the Commission shall be construed as references to the giving or laying of the report as published.

119 Minority reports of Commission

- (1) Subsection (2) applies where, on a reference to the Commission under this Part, a member of a group constituted in connection with the reference in pursuance of paragraph 15 of Schedule 7 to the Competition Act 1998 (c. 41), disagrees with any decisions contained in the report of the Commission under this Part as the decisions of the Commission.
- (2) The report shall, if the member so wishes, include a statement of his disagreement and of his reasons for disagreeing.

Miscellaneous

120 Review of decisions under Part 3

- (1) Any person aggrieved by a decision of the OFT, the Secretary of State or the Commission under this Part in connection with a reference or possible reference in relation to a relevant merger situation or a special merger situation may apply to the Competition Appeal Tribunal for a review of that decision.
- (2) For this purpose “decision”—
- (a) does not include a decision to impose a penalty under section 110(1) or (3); but

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- (b) includes a failure to take a decision permitted or required by this Part in connection with a reference or possible reference.
- (3) Except in so far as a direction to the contrary is given by the Competition Appeal Tribunal, the effect of the decision is not suspended by reason of the making of the application.
- (4) In determining such an application the Competition Appeal Tribunal shall apply the same principles as would be applied by a court on an application for judicial review.
- (5) The Competition Appeal Tribunal may—
 - (a) dismiss the application or quash the whole or part of the decision to which it relates; and
 - (b) where it quashes the whole or part of that decision, refer the matter back to the original decision maker with a direction to reconsider and make a new decision in accordance with the ruling of the Competition Appeal Tribunal.
- (6) An appeal lies on any point of law arising from a decision of the Competition Appeal Tribunal under this section to the appropriate court.
- (7) An appeal under subsection (6) requires the permission of the Tribunal or the appropriate court.
- (8) In this section—
 - “the appropriate court” means the Court of Appeal or, in the case of Tribunal proceedings in Scotland, the Court of Session; and
 - “Tribunal rules” has the meaning given by section 15(1).

121 Fees

- (1) The Secretary of State may by order require the payment to him or the OFT of such fees as may be prescribed by the order in connection with the exercise by the Secretary of State, the OFT and the Commission of their functions under or by virtue of this Part, Part V of the Fair Trading Act 1973 (c. 41) and sections 32 to 34 of, and Schedule 4ZA to, the Water Industry Act 1991 (c. 56).
- (2) An order under this section may, in particular, provide for fees to be payable—
 - (a) in respect of a merger notice;
 - (b) in respect of an application for the consent of the Secretary of State under section 58(1) of the Act of 1973 to the transfer of a newspaper or of newspaper assets; or
 - (c) on the occurrence of any event specified in the order.
- (3) The events that may be specified in an order under this section by virtue of subsection (2)(c) include, in particular—
 - (a) the decision by the OFT in relation to a possible reference under section 22 or 33 that it is or may be the case that a relevant merger situation has been created or (as the case may be) that arrangements are in progress or in contemplation which, if carried into effect, will result in the creation of a relevant merger situation;
 - (b) the decision by the Secretary of State in relation to a possible reference under section 45 that it is or may be the case that a relevant merger situation has been created or (as the case may be) that arrangements are in progress or

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- in contemplation which, if carried into effect, will result in the creation of a relevant merger situation;
- (c) the decision by the Secretary of State in relation to a possible reference under section 62 that—
- (i) it is or may be the case that a special merger situation has been created or (as the case may be) that arrangements are in progress or in contemplation which, if carried into effect, will result in the creation of a special merger situation; and
 - (ii) one or more than one consideration mentioned in the special intervention notice is relevant to a consideration of the special merger situation concerned; and
- (d) the decision by the OFT in relation to a possible reference under section 32 of the Act of 1991 that it is or may be the case that arrangements are in progress which, if carried into effect, will result in a merger of any two or more water enterprises or that such a merger has taken place otherwise than as a result of the carrying into effect of arrangements that have been the subject of a reference by virtue of paragraph (a) of that section.
- (4) An order under this section may, in particular, contain provision—
- (a) for ascertaining the persons by whom fees are payable;
 - (b) specifying whether any fee is payable to the Secretary of State or the OFT;
 - (c) for the amount of any fee to be calculated by reference to matters which may include—
 - (i) in a case involving functions of the Secretary of State under sections 57 to 61 of the Act of 1973, the number of newspapers concerned, the number of separate editions (determined in accordance with the order) of each newspaper and the average circulation per day of publication (within the meaning of Part V of that Act) of each newspaper; and
 - (ii) in any other case, the value of the turnover of the enterprises concerned;
 - (d) as to the time when any fee is to be paid; and
 - (e) for the repayment by the Secretary of State or the OFT of the whole or part of any fee in specified circumstances.
- (5) For the purposes of subsection (4)(c)(ii) the turnover of an enterprise shall be determined in accordance with such provisions as may be specified in an order under this section.
- (6) Provision made by virtue of subsection (5) may, in particular, include provision—
- (a) as to the amounts which are, or which are not, to be treated as comprising an enterprise's turnover;
 - (b) as to the date or dates by reference to which an enterprise's turnover is to be determined;
 - (c) restricting the turnover to be taken into consideration to turnover which has a connection of a particular description with the United Kingdom.
- (7) An order under this section may, in particular, in connection with provisions of the kind mentioned in subsection (5) make provision enabling the Secretary of State or the OFT to determine matters of a description specified in the order (including any of the matters mentioned in paragraphs (a) to (c) of subsection (6)).

- (8) In determining the amount of any fees to be prescribed by an order under this section, the Secretary of State may take into account all costs incurred by him and by the OFT in respect of the exercise by him, the OFT and the Commission of their respective functions under or by virtue of this Part, Part V of the Act of 1973 and sections 32 to 34 of, and Schedule 4ZA to, the Act of 1991.
- (9) Fees paid to the Secretary of State or the OFT under this section shall be paid into the Consolidated Fund.
- (10) In this section “newspaper” has the same meaning as in Part V of the Act of 1973.

122 Primacy of Community law

- (1) Advice and information published by virtue of section 106(1) or (3) shall include such advice and information about the effect of Community law, and anything done under or in accordance with it, on the provisions of this Part as the OFT or (as the case may be) the Commission considers appropriate.
- (2) Advice and information published by the OFT by virtue of section 106(1) shall, in particular, include advice and information about the circumstances in which the duties of the OFT under sections 22 and 33 do not apply as a result of the European Merger Regulations or anything done under or in accordance with them.
- (3) The duty or power to make a reference under section 22 or 45(2) or (3), and the power to give an intervention notice under section 42, shall apply in a case in which the relevant enterprises ceased to be distinct enterprises at a time or in circumstances not falling within section 24 if the condition mentioned in subsection (4) is satisfied.
- (4) The condition mentioned in this subsection is that, because of the European Merger Regulations or anything done under or in accordance with them, the reference, or (as the case may be) the reference under section 22 to which the intervention notice relates, could not have been made earlier than 4 months before the date on which it is to be made.
- (5) Where the duty or power to make a reference under section 22 or 45(2) or (3), or the power to give an intervention notice under section 42, applies as mentioned in subsection (3), references in this Part to the creation of a relevant merger situation shall be construed accordingly.

123 Power to alter share of supply test

- (1) The Secretary of State may by order amend or replace the conditions which determine for the purposes of this Part whether a relevant merger situation has been created.
- (2) The Secretary of State shall not exercise his power under subsection (1)—
 - (a) to amend or replace the conditions mentioned in paragraphs (a) and (b) of subsection (1) of section 23;
 - (b) to amend or replace the condition mentioned in paragraph (a) of subsection (2) of that section.
- (3) In exercising his power under subsection (1) to amend or replace the condition mentioned in paragraph (b) of subsection (2) of section 23 or any condition which for the time being applies instead of it, the Secretary of State shall, in particular, have regard to the desirability of ensuring that any amended or new condition continues

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to operate by reference to the degree of commercial strength which results from the enterprises concerned having ceased to be distinct.

- (4) Before making an order under this section the Secretary of State shall consult the OFT and the Commission.
- (5) An order under this section may provide for the delegation of functions to the decision-making authority.

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 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;
 - (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;

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- (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—
 - (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.
- (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;

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“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);

“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;

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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)
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)

Status: This is the original version (as it was originally enacted).

<i>Expression</i>	<i>Provision of this Act</i>
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)
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

Status: This is the original version (as it was originally enacted).

<i>Expression</i>	<i>Provision of this Act</i>
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)
