



Enterprise Act 2002 (repealed)

2002 CHAPTER 40

PART 3 **U.K.**

MERGERS

CHAPTER 2 **U.K.**

PUBLIC INTEREST CASES

Reports on references

Textual Amendments applied to the whole legislation

- F1** Act: for the words "solicitor of the Supreme Court of Northern Ireland" wherever they occur there is substituted (prosp.) the words "solicitor of the Court of Judicature of Northern Ireland" by virtue of [Constitutional Reform Act 2005 \(c. 4\), ss. 59, 148\(1\), Sch. 11 para. 5](#) [Editorial Note: this amendment will be carried through into the text of the Act at the same time as any other effects on the Act for the year in which the relevant commencement order (or first such order) is made]

47 Questions to be decided on references under section 45 **U.K.**

- (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

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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

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- 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.

Modifications etc. (not altering text)

- C1 Ss. 35, 36, 47, 63, 134 and 141 extended (20.6.2003) by 1977 c. 37, s. 50A(6) (as inserted by Enterprise Act 2002 (c. 40), ss. 278, 279, Sch. 25 para. 8(2)); S.I. 2003/1397 {art. 2(1)}, Sch. (with art. 8)

48 Cases where references or certain questions need not be decided **U.K.**

- (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 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 **U.K.**

- (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—

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- (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 **U.K.**

- (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—

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- (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.

[^{F1}(2A) Where the report relates to a reference under section 45 which has been made after a report of OFCOM under section 44A, the Commission shall give a copy of its report (whether or not published) to OFCOM.]

- (3) The Commission shall carry out such investigations as it considers appropriate for the purpose of producing a report under this section.

Textual Amendments

- F1** S. 50(2A) inserted (29.12.2003) by [Communications Act 2003 \(c. 21\)](#), ss. 389(1), 411(2)(3), [Sch. 16 para. 10](#) (with transitional provisions in [Sch. 18](#)); [S.I. 2003/3142](#), [art. 3\(1\)](#), [Sch. 1](#) (subject to arts. 3(3), 11)

51 Time-limits for investigations and reports by Commission **U.K.**

- (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) [^{F2}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.

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

Textual Amendments

- F2** S. 51(2) ceased to have effect (1.5.2004) by virtue of [The EC Merger Control \(Consequential Amendments\) Regulations 2004 \(S.I. 2004/1079\)](#), reg. 2, [Sch. para. 2\(16\)](#)

52 Section 51: supplementary **U.K.**

- (1) ^{F3}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) ^{F3}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—

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- (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) [^{F3}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) [^{F4}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.

Textual Amendments

- F3** S. 52(1)(2)(8)(b) ceased to have effect (1.5.2004) by virtue of [The EC Merger Control \(Consequential Amendments\) Regulations 2004 \(S.I. 2004/1079\)](#), reg. 2, [Sch. para. 2\(17\)\(a\)](#)
- F4** Words in s. 52(9) ceased to have effect (1.5.2004) by virtue of [The EC Merger Control \(Consequential Amendments\) Regulations 2004 \(S.I. 2004/1079\)](#), reg. 2, [Sch. para. 2\(17\)\(b\)](#)

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53 Restrictions on action where public interest considerations not finalised **U.K.**

- (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 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; [^{F5}or]
 - (b) the public interest consideration concerned has been finalised; [^{F6}or]
 - (c) [^{F7}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.

Textual Amendments

- F5** Word in s. 53(2) inserted (1.5.2004) by [The EC Merger Control \(Consequential Amendments\) Regulations 2004 \(S.I. 2004/1079\)](#), reg. 2, **Sch. para. 2(18)(a)**
- F6** Word in s. 53(2) ceased to have effect (1.5.2004) by virtue of [The EC Merger Control \(Consequential Amendments\) Regulations 2004 \(S.I. 2004/1079\)](#), reg. 2, **Sch. para. 2(18)(b)**
- F7** S. 53(2)(c) ceased to have effect (1.5.2004) by virtue of [The EC Merger Control \(Consequential Amendments\) Regulations 2004 \(S.I. 2004/1079\)](#), reg. 2, **Sch. para. 2(18)(c)**

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