



Companies Act 1989

1989 CHAPTER 40

PART VI

MERGERS AND RELATED MATTERS

147 Undertakings as alternative to merger reference

In Part V of the Fair Trading Act 1973 after the sections inserted by section 146 of this Act there is inserted—

“Undertakings as alternative to merger reference

75G Acceptance of undertakings

(1) Where—

- (a) the Secretary of State has power to make a merger reference to the Commission under section 64 or 75 of this Act,
- (b) the Director has made a recommendation to the Secretary of State under section 76 of this Act that such a reference should be made, and
- (c) the Director has (in making that recommendation or subsequently) given advice to the Secretary of State specifying particular effects adverse to the public interest which in his opinion the creation of the merger situation qualifying for investigation may have or might be expected to have,

the Secretary of State may, instead of making a merger reference to the Commission, accept from such of the parties concerned as he considers appropriate undertakings complying with subsections (2) and (3) of this section to take specified action which the Secretary of State considers appropriate to remedy or prevent the effects adverse to the public interest specified in the advice.

(2) The undertakings must provide for one or more of the following—

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- (a) the division of a business by the sale of any part of the undertaking or assets or otherwise (for which purpose all the activities carried on by way of business by any one person or by any two or more interconnected bodies corporate may be treated as a single business),
 - (b) the division of a group of interconnected bodies corporate, and
 - (c) the separation, by the sale of any part of the undertaking or assets concerned or other means, of enterprises which are under common control otherwise than by reason of their being enterprises of interconnected bodies corporate.
- (3) The undertakings may also contain provision—
- (a) preventing or restricting the doing of things which might prevent or impede the division or separation,
 - (b) as to the carrying on of any activities or the safeguarding of any assets until the division or separation is effected,
 - (c) for any matters necessary to effect or take account of the division or separation, and
 - (d) for enabling the Secretary of State to ascertain whether the undertakings are being fulfilled.
- (4) If the Secretary of State has accepted one or more undertakings under this section, no reference may be made to the Commission with respect to the creation or possible creation of the merger situation qualifying for investigation by reference to which the undertakings were accepted, except in a case falling within subsection (5) of this section.
- (5) Subsection (4) of this section does not prevent a reference being made to the Commission if material facts about the arrangements or transactions, or proposed arrangements or transactions, in consequence of which the enterprises concerned ceased or may cease to be distinct enterprises were not—
- (a) notified to the Secretary of State or the Director, or
 - (b) made public,
- before the undertakings were accepted.
- (6) In subsection (5) of this section “made public” has the same meaning as in section 64 of this Act.

75H Publication of undertakings

- (1) The Secretary of State shall arrange for—
- (a) any undertaking accepted by him under section 75G of this Act,
 - (b) the advice given by the Director for the purposes of subsection (1)(c) of that section in any case where such an undertaking has been accepted, and
 - (c) any variation or release of such an undertaking,
- to be published in such manner as he may consider appropriate.
- (2) In giving advice for the purposes of section 75G(1)(c) of this Act the Director shall have regard to the need for excluding, so far as practicable, any matter to which subsection (4) of this section applies.

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- (3) The Secretary of State shall exclude from any such advice as published under this section—
- (a) any matter to which subsection (4) of this section applies and in relation to which he is satisfied that its publication in the advice would not be in the public interest, and
 - (b) any other matter in relation to which he is satisfied that its publication in the advice would be against the public interest.
- (4) This subsection applies to—
- (a) any matter which relates to the private affairs of an individual, where publication of that matter would or might, in the opinion of the Director or the Secretary of State, as the case may be, seriously and prejudicially affect the interests of that individual, and
 - (b) any matter which relates specifically to the affairs of a particular body of persons, whether corporate or unincorporate, where publication of that matter would or might, in the opinion of the Director or the Secretary of State, as the case may be, seriously and prejudicially affect the interests of that body, unless in his opinion the inclusion of that matter relating specifically to that body is necessary for the purposes of the advice.
- (5) For the purposes of the law relating to defamation, absolute privilege shall attach to any advice given by the Director for the purposes of section 75G(1)(c) of this Act.

75J Review of undertakings

Where an undertaking has been accepted by the Secretary of State under section 75G of this Act, it shall be the duty of the Director—

- (a) to keep under review the carrying out of that undertaking, and from time to time consider whether, by reason of any change of circumstances, the undertaking is no longer appropriate and either—
 - (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 undertaking, and
- (b) if it appears to him that the undertaking has not been or is not being fulfilled, that any person can be so released or that the undertaking needs to be varied or superseded, to give such advice to the Secretary of State as he may think proper in the circumstances.

75K Order of Secretary of State where undertaking not fulfilled

- (1) The provisions of this section shall have effect where it appears to the Secretary of State that an undertaking accepted by him under section 75G of this Act has not been, is not being or will not be fulfilled.
- (2) The Secretary of State may by order made by statutory instrument exercise such one or more of the powers specified in paragraphs 9A and 12 to 12C and Part II of Schedule 8 to this Act as he may consider it requisite to exercise for the purpose of remedying or preventing the adverse effects specified in the advice given by the Director for the purposes of section 75G(1)(c) of this Act; and

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those powers may be so exercised to such extent and in such manner as the Secretary of State considers requisite for that purpose.

- (3) In determining whether, or to what extent or in what manner, to exercise any of those powers, the Secretary of State shall take into account any advice given by the Director under section 75J(b) of this Act.
- (4) The provision contained in an order under this section may be different from that contained in the undertaking.
- (5) On the making of an order under this section, the undertaking and any other undertaking accepted under section 75G of this Act by reference to the same merger situation qualifying for investigation are released by virtue of this section.”.