



# Enterprise Act 2002 (repealed)

## 2002 CHAPTER 40

### PART 3

#### MERGERS

### CHAPTER 1

#### DUTY TO MAKE 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]

##### *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

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- (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 <sup>F1</sup>. . . 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 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); [<sup>F2</sup>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 [<sup>F3</sup>22(1) of the EC Merger Regulation] , is proceeding with the matter in pursuance of such a request or has dealt with the matter in pursuance of such a request[<sup>F4</sup>; or
  - (f) subject to subsection (3A), a reasoned submission requesting referral to the European Commission has been submitted to the European Commission under article 4(5) of the EC Merger Regulation.]
- [<sup>F5</sup>(3A) Subsection (3)(f) shall cease to apply if the OFT is informed that a Member State competent to examine the concentration under its national competition law has, within the time permitted by Article 4(5) of the EC Merger Regulation, expressed its disagreement as regards the request to refer the case to the European Commission; and this subsection shall be construed in accordance with that Regulation.]
- (4) A reference under this section shall, in particular, specify—
- (a) the enactment under which it is made; and
  - (b) the date on which it is made.
- (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

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- (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.

#### Textual Amendments

- F1** Words in s. 22(3)(a) repealed (29.12.2003) by [Communications Act 2003 \(c. 21\)](#), ss. 406(7), 411(2)(3), [Sch. 19\(1\)](#) (with transitional provisions in [Sch. 18](#) and with [Sch. 19 Note 1](#)); S.I. 2003/3142, [art. 3\(1\)](#), [Sch. 1](#) (subject to [arts. 3\(3\)](#), 11)
- F2** Word in s. 22(3) ceased to have effect (1.5.2004) by virtue of [The EC Merger Control \(Consequential Amendments\) Regulations 2004 \(S.I. 2004/1079\)](#), reg. 2, [Sch. para. 2\(2\)\(a\)](#)
- F3** Words in s. 22(3)(e) substituted (1.5.2004) by [The EC Merger Control \(Consequential Amendments\) Regulations 2004 \(S.I. 2004/1079\)](#), reg. 2, [Sch. para. 2\(2\)\(b\)](#)
- F4** S. 22(3)(f) and preceding word inserted (1.5.2004) by [The EC Merger Control \(Consequential Amendments\) Regulations 2004 \(S.I. 2004/1079\)](#), reg. 2, [Sch. para. 2\(3\)](#)
- F5** S. 22(3A) inserted (1.5.2004) by [The EC Merger Control \(Consequential Amendments\) Regulations 2004 \(S.I. 2004/1079\)](#), reg. 2, [Sch. para. 2\(4\)](#)

## 23 Relevant merger situations

- (1) For the purposes of this Part, a relevant merger situation has been created if—
- two or more enterprises have ceased to be distinct enterprises at a time or in circumstances falling within section 24; and
  - 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—
- two or more enterprises have ceased to be distinct enterprises at a time or in circumstances falling within section 24; and
  - 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—
- are supplied by one and the same person or are supplied to one and the same person; or
  - 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—
- supply by one and the same person, or supply for one and the same person; or
  - 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

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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.

**Modifications etc. (not altering text)**

**C1** Ss. 23-32 applied (with modifications) (20.6.2003) by [The Enterprise Act 2002 \(Protection of Legitimate Interests\) Order 2003 \(S.I. 2003/1592\)](#), **art. 2, Sch. 1**

**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

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- (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.

**Modifications etc. (not altering text)**

- C2** Ss. 23-32 applied (with modifications) (20.6.2003) by [The Enterprise Act 2002 \(Protection of Legitimate Interests\) Order 2003 \(S.I. 2003/1592\)](#), [art. 2, Sch. 1](#)

**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 [F<sup>6</sup>22(1) of the EC Merger Regulation](but is not yet proceeding with the matter in pursuance of such a request).

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- (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).

#### Textual Amendments

- F6** Words in s. 25(6) substituted (1.5.2004) by [The EC Merger Control \(Consequential Amendments\) Regulations 2004 \(S.I. 2004/1079\)](#), reg. 2, [Sch. para. 2\(5\)](#)

#### Modifications etc. (not altering text)

- C3** Ss. 23-32 applied (with modifications) (20.6.2003) by [The Enterprise Act 2002 \(Protection of Legitimate Interests\) Order 2003 \(S.I. 2003/1592\)](#), [art. 2](#), [Sch. 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.

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- (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 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.

**Modifications etc. (not altering text)**

- C4 Ss. 23-32 applied (with modifications) (20.6.2003) by [The Enterprise Act 2002 \(Protection of Legitimate Interests\) Order 2003 \(S.I. 2003/1592\)](#), [art. 2, Sch. 1](#)

## 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.



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- (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.

**Modifications etc. (not altering text)**

- C5** Ss. 23-32 applied (with modifications) (20.6.2003) by [The Enterprise Act 2002 \(Protection of Legitimate Interests\) Order 2003 \(S.I. 2003/1592\)](#), [art. 2](#), [Sch. 1](#)
- C6** S. 27 applied (with modifications) (20.6.2003) by [The Enterprise Act 2002 \(Anticipated Mergers\) Order 2003 \(S.I. 2003/1595\)](#), [art. 3](#)

**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.



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**Modifications etc. (not altering text)**

- C7** Ss. 23-32 applied (with modifications) (20.6.2003) by [The Enterprise Act 2002 \(Protection of Legitimate Interests\) Order 2003 \(S.I. 2003/1592\)](#), [art. 2](#), Sch. 1

**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
  - (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.

**Modifications etc. (not altering text)**

- C8** Ss. 23-32 applied (with modifications) (20.6.2003) by [The Enterprise Act 2002 \(Protection of Legitimate Interests\) Order 2003 \(S.I. 2003/1592\)](#), [art. 2](#), Sch. 1
- C9** S. 29 applied (with modifications) (20.6.2003) by [The Enterprise Act 2002 \(Anticipated Mergers\) Order 2003 \(S.I. 2003/1595\)](#), [art. 3](#)

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### 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.

#### Modifications etc. (not altering text)

**C10** Ss. 23-32 applied (with modifications) (20.6.2003) by [The Enterprise Act 2002 \(Protection of Legitimate Interests\) Order 2003 \(S.I. 2003/1592\)](#), [art. 2, Sch. 1](#)

### 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.

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- (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.

**Modifications etc. (not altering text)**

**C11** Ss. 23-32 applied (with modifications) (20.6.2003) by [The Enterprise Act 2002 \(Protection of Legitimate Interests\) Order 2003 \(S.I. 2003/1592\)](#), [art. 2, Sch. 1](#)

**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;
  - (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.

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- (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.

**Modifications etc. (not altering text)**

**C12** Ss. 23-32 applied (with modifications) (20.6.2003) by [The Enterprise Act 2002 \(Protection of Legitimate Interests\) Order 2003 \(S.I. 2003/1592\)](#), [art. 2, Sch. 1](#)

*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 <sup>F7</sup>. . . 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); [<sup>F8</sup>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 [<sup>F9</sup>22(1) of the EC Merger Regulation] , is proceeding with the

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matter in pursuance of such a request or has dealt with the matter in pursuance of such a request.<sup>[F10]</sup>; or

- (f) subject to subsection (3A), a reasoned submission requesting referral to the European Commission has been submitted to the European Commission under article 4(5) of the EC Merger Regulation.]

<sup>[F11]</sup>(3A) Section 33(3)(f) shall cease to apply if the OFT is informed that a Member State competent to examine the concentration under its national competition law has, within the time permitted by Article 4(5) of the EC Merger Regulation, expressed its disagreement as regards the request to refer the case to the European Commission; and this subsection shall be construed in accordance with that Regulation.]

- (4) A reference under this section shall, in particular, specify—
- (a) the enactment under which it is made; and
  - (b) the date on which it is made.

#### Textual Amendments

- F7** Words in s. 33(3)(a) repealed (29.12.2003) by [Communications Act 2003 \(c. 21\)](#), ss. 406(7), 411(2)(3), [Sch. 19\(1\)](#) (with transitional provisions in [Sch. 18](#) and with [Sch. 19 Note 1](#)); S.I. 2003/3142, [art. 3\(1\)](#), [Sch. 1](#) (subject to [arts. 3\(3\)](#), 11)
- F8** Word in s. 33(3) ceased to have effect (1.5.2004) by virtue of [The EC Merger Control \(Consequential Amendments\) Regulations 2004 \(S.I. 2004/1079\)](#), reg. 2, [Sch. para. 2\(6\)\(a\)](#)
- F9** Words in s. 33(3)(e) substituted (1.5.2004) by [The EC Merger Control \(Consequential Amendments\) Regulations 2004 \(S.I. 2004/1079\)](#), reg. 2, [Sch. para. 2\(6\)\(b\)](#)
- F10** S. 33(3)(f) and preceding word inserted (1.5.2004) by [The EC Merger Control \(Consequential Amendments\) Regulations 2004 \(S.I. 2004/1079\)](#), reg. 2, [Sch. para. 2\(7\)](#)
- F11** S. 33(3A) inserted (1.5.2004) by [The EC Merger Control \(Consequential Amendments\) Regulations 2004 \(S.I. 2004/1079\)](#), reg. 2, [Sch. para. 2\(8\)](#)

### 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.

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## *<sup>F12</sup>Cases referred by European Commission under EC Merger Regulation*

### Textual Amendments

**F12** Ss. 34A, 34B and preceding cross-heading inserted (1.5.2004) by [The EC Merger Control \(Consequential Amendments\) Regulations 2004 \(S.I. 2004/1079\)](#), reg. 2, **Sch. para. 2(9)**

### **34A Duty of OFT where case referred by the European Commission**

- (1) Subsection (2) applies if the European Commission has by a decision referred the whole or part of a case to the OFT under Article 4(4) or 9 of the EC Merger Regulation, or is deemed to have taken such a decision, unless an intervention notice is in force in relation to that case.
- (2) Before the end of the preliminary assessment period, the OFT shall—
  - (a) decide whether to make a reference to the Commission under section 22 or 33; and
  - (b) inform the persons carrying on the enterprises concerned by notice of that decision and of the reasons for it.
- (3) The OFT may, for the purposes of subsection (2), decide not to make a reference on the basis that it is considering whether to seek or accept undertakings under section 73 instead of making a reference; but a decision taken on that basis does not prevent the OFT from making a reference under section 22 or 33 in the event of no such undertakings being offered or accepted.
- (4) In this section—
 

“the preliminary assessment period” means, subject to subsection (5), the period of 45 working days beginning with the day after the day on which the decision of the European Commission to refer the case is taken (or is deemed to have been taken); and

“working day” means any day which is not—

  - (a) a Saturday;
  - (b) a Sunday; or
  - (c) a day which is a European Commission holiday (as published in the Official Journal of the European Communities before the beginning of the year in which it occurs).
- (5) If the OFT has imposed a requirement under section 34B and it considers that the person on whom that requirement was imposed has failed to comply with it, the OFT may, by notice to the persons carrying on the enterprises concerned, extend the preliminary assessment period.
- (6) The period of an extension under subsection (5) shall—
  - (a) begin with the end of the period within which the requirement under section 34B could be complied with; and
  - (b) end with the earlier of either compliance with the requirement to the satisfaction of the OFT or cancellation by the OFT of the extension.
- (7) A notice under subsection (6) shall—
  - (a) be given within 5 working days of the end of the period mentioned in paragraph (a) of that subsection; and

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- (b) inform the person to whom it is addressed that the OFT is of the opinion mentioned in subsection (5) and that it intends to extend the preliminary assessment period.

### **34B Power to request information in referred cases**

- (1) In a case mentioned in section 34A(1), the OFT may by notice to any of the persons carrying on the enterprises concerned request him to provide the OFT with such information as the OFT may require for the purpose of making a decision for the purposes of section 34A(2).
- (2) The notice shall state—
  - (a) the information required;
  - (b) the period within which the information is to be provided;
  - (c) the manner (if any) in which the information is required to be provided; and
  - (d) the possible consequences—
    - (i) of not providing the information within the stated period; and
    - (ii) if a manner for its provision is stated in the notice, of not providing it in that manner.]

#### *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
  - (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



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- 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.

**Modifications etc. (not altering text)**

**C13** 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)

**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—
- (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

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- 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.

**Modifications etc. (not altering text)**

- C14** 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)
- C15** S. 36(2)(a)(b) modified (20.6.2003) by [The Enterprise Act 2002 \(Anticipated Mergers\) Order 2003 \(S.I. 2003/1595\)](#), [art. 4](#)

**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,

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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.

- (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) <sup>[F13]</sup>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.]

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- (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.

#### Textual Amendments

- F13** S. 39(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(10)**

#### 40 Section 39: supplementary

- (1) <sup>F14</sup>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) <sup>F14</sup>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.]

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- (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—
  - (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) [<sup>F14</sup>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) [<sup>F15</sup>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));

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- (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.

#### Textual Amendments

- F14** S. 40(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(11)(a)**
- F15** Words in s. 40(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(11)(b)**

## 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.

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