



# Enterprise Act 2002 (repealed)

## 2002 CHAPTER 40

### PART 3

#### MERGERS

### CHAPTER 5

#### SUPPLEMENTARY

#### *Merger notices*

#### **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]

## 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

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(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.
- (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;

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- (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

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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 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.

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- (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

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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.

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