
EXPLANATORY NOTE

(This note is not part of the Order)

Under the European Merger Regulations (ECMR) (Council Regulation (EEC) No. 4064/89 of 21st December 1989 on the control of concentrations between undertakings as amended by Council Regulation (EC) No. 1310/97 of 30th June 1997), if a merger satisfies certain jurisdictional thresholds, that is, it is a concentration with a “Community dimension”, the European Commission (EC) has sole jurisdiction over competition issues and a Member State is precluded from applying its own competition laws (unless a Member State makes a request for the case to be referred back to it for consideration under domestic competition law pursuant to Article 9 of the ECMR and this is agreed to by the EC, or if a Member State invokes Article 296(1)(b) of the EC Treaty(1)).

However, notwithstanding the EC’s sole jurisdiction on competition in such cases, Member States may take appropriate measures to protect legitimate interests so long as they are compatible with the general principles and other provisions of Community law. Public security, plurality of the media and prudential rules are legitimate interests under the ECMR. In addition, other public interests may be invoked which have been communicated to and recognised by the EC pursuant to Article 21(3) of the ECMR.

Section 67 of the Enterprise Act 2002 (EA 2002) provides a mechanism for the Secretary of State to protect legitimate interests where the EC has sole jurisdiction of competition issues. That section enables the Secretary of State to serve a “European intervention notice” if she suspects that a relevant merger situation (as defined in section 23 of the EA 2002) has been, or will be, created; the merger is a concentration with a Community dimension and she is considering whether to take appropriate measures to protect legitimate interests as permitted under the ECMR. She must, however, believe that one or more of the public interest considerations specified (or if not specified, she thinks ought to be specified) in section 58 of the EA 2002 is relevant. Currently, only national security (which includes public security) is specified in section 58 EA 2002, but other public interest considerations may be specified by an Order subject to the affirmative resolution procedure or by other primary legislation. In relation to the recognised water comparator legitimate interest, this interest is protected by the special procedure in the Water Industry Act 1991.

This Order provides for the taking of action by the Secretary of State where a European intervention notice has been given so as to remedy the adverse public interest effects which have resulted from, or may be expected to result from, the creation of a European relevant merger situation—that is where the relevant merger situation is also a concentration with a Community dimension under the ECMR.

The Order follows the procedures set out in the public interest and special public interest schemes of the EA 2002 with appropriate modifications and many of the other provisions of Part 3 of the EA 2002 are applied with modifications where relevant. The Order makes provision for when a European intervention notice comes into force; imposes an obligation on the OFT to produce a report where such a European intervention notice has been given; makes provision for the Secretary of State to refer the matter to the Competition Commission and imposes on them an obligation to report on certain matters within certain time limits. It also enables the Secretary of State to take enforcement action in such European intervention cases and these enforcement provisions mirror to a large extent the public interest and special public interest enforcement regime in Schedule 7 to the EA 2002.

(1) Article 296(1)(b) of the EC Treaty states that “any Member State may take such measures as it considers necessary for the protection of the essential interests of its security which are connected with the production of or trade in arms, munitions and war material; such measures shall not adversely affect the conditions of competition in the common market regarding products which are not intended for specifically military purposes”.

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