

2004 No. 1079

COMPETITION

**The EC Merger Control (Consequential Amendments)
Regulations 2004**

<i>Made</i> - - - -	<i>6th April 2004</i>
<i>Laid before Parliament</i>	<i>8th April 2004</i>
<i>Coming into force</i> - -	<i>1st May 2004</i>

The Secretary of State being designated for the purposes of section 2(2) of the European Communities Act 1972^(a) in relation to measures relating to the control of concentrations between undertakings^(b) in exercise of the powers conferred upon her by the said section 2(2) hereby makes the following Regulations:

Citation and commencement

1. These Regulations may be cited as the EC Merger Control (Consequential Amendments) Regulations 2004 and shall come into force on 1st May 2004.

Consequential amendments

2. The amendments specified in the Schedule to these Regulations shall have effect.

6th April 2004

Gerry Sutcliffe,
Parliamentary under Secretary of State for
Employment Relations, Competition and Consumers,
Department of Trade and Industry

^(a) 1972 c. 68.

^(b) The European Communities (Designation) (No 2) Order 1990 S.I. 1990/1304.

CONSEQUENTIAL AMENDMENTS

Competition Act 1998

1.—(1) The Competition Act 1998(a) is amended as follows.

(2) In Schedule 1 (exclusions: mergers and concentrations), in paragraph 6(3) for the definition of “Merger Regulation” there is substituted—

““Merger Regulation” means Council Regulation (EC) No 139/2004 of 20th January 2004 on the control of concentrations between undertakings.”.

Enterprise Act 2002

2.—(1) The Enterprise Act 2002(b) is amended as follows.

(2) In section 22 (duty to make references in relation to completed mergers), in subsection (3)—

(a) the word “or” before paragraph (e) shall cease to have effect; and

(b) in paragraph (e), for “22(3) of the European Merger Regulations” there is substituted “22(1) of the EC Merger Regulation”.

(3) After section 22(3)(e), there is inserted—

“; 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.”.

(4) After section 22(3), there is inserted—

“(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.”.

(5) In section 25 (extension of time-limits), in subsection (6), for “22(3) of the European Merger Regulations” there is substituted “22(1) of the EC Merger Regulation”.

(6) In section 33 (duty to make references in relation to anticipated mergers), in subsection (3)—

(a) the word “or” before paragraph (e) shall cease to have effect; and

(b) in paragraph (e), for “22(3) of the European Merger Regulations” there is substituted “22(1) of the EC Merger Regulation”.

(7) After section 33(3)(e) there is inserted—

“; 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.”.

(8) After section 33(3) there is inserted—

(a) 1998 c. 41.
(b) 2002 c. 40.

“(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.”.

(9) After section 34 there is inserted—

“Cases referred by European Commission under EC Merger Regulation

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
- (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.”.

(10) In section 39 (time-limits for investigations and reports), subsection (2) shall cease to have effect.

(11) In section 40 (section 39: supplementary)—

- (a) subsections (1), (2) and (8)(b) shall cease to have effect; and
- (b) in subsection (9) the words “or (2)(a)” shall cease to have effect.

(12) In section 46 (references under section 45: supplementary), in subsection (1)—

- (a) the word “or” before paragraph (b) shall cease to have effect; and
- (b) in paragraph (b), for “22(3) of the European Merger Regulations” there is substituted “22(1) of the EC Merger Regulation”.

(13) After section 46(1)(b), there is inserted—

“; or

- (c) subject to subsection (1A), 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.”

(14) After section 46(1) there is inserted—

“(1A) Subsection (1)(c) shall cease to apply if the Secretary of State 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.”.

(15) After section 46 there is inserted—

“Cases referred by European Commission under the EC Merger Regulation

46A Cases referred by the European Commission where intervention notice is in force

(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, and an intervention notice is in force in relation to that case.

(2) Before the end of the preliminary assessment period, the Secretary of State shall—

- (a) decide whether to make a reference to the Commission under section 45; and
- (b) inform the persons carrying on the enterprises concerned by notice of that decision and of the reasons for it.

(3) The Secretary of State may, for the purposes of subsection (2), decide not to make a reference on the basis that he is considering whether to seek or accept undertakings under

paragraph 3 of Schedule 7 instead of making a reference; but a decision taken on that basis does not prevent the Secretary of State from making a reference under section 45 in the event of no such undertakings being offered or accepted.

(4) In this section—

“the preliminary assessment period” means, subject to section 46B, 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).

46B Extension of preliminary assessment period

(1) If the OFT has imposed a requirement under section 46C 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.

(2) If the Secretary of State has imposed a requirement under section 46C and he considers that the person on whom that requirement was imposed has failed to comply with it, he may, by notice to the persons carrying on the enterprises concerned, extend the preliminary assessment period.

(3) The period of an extension under this section shall—

- (a) begin with the end of the period within which the requirement under section 46C could be complied with; and
- (b) end with—
 - (i) in the case of a notice under subsection (1), the earlier of either compliance with the requirement to the satisfaction of the OFT or cancellation by the OFT of the extension.
 - (ii) in the case of a notice under subsection (2), the earlier of either compliance with the requirement to the satisfaction of the Secretary of State or cancellation by him of the extension.

(4) A notice under this section shall—

- (a) be given within 5 working days of the end of the period mentioned in subsection (3)(a); and
- (b) inform the person to whom it is addressed—
 - (i) in the case of a notice under subsection (1), that the OFT is of the opinion mentioned in that subsection and that it intends to extend the preliminary assessment period.
 - (ii) in the case of a notice under subsection (2), that the Secretary of State is of the opinion mentioned in that subsection and that he intends to extend the preliminary assessment period.

46C Power to request information in referred cases

(1) In a case mentioned in section 46A(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 enabling the Secretary of State to make a decision for the purposes of section 46A(2).

(2) In such a case, the Secretary of State may by notice to any of the persons carrying on the enterprises concerned request him to provide the Secretary of State with such information as he may require for the purpose of enabling him to make a decision for the purposes of section 46A(2).

(3) A notice under subsection (1) or (2) shall state—

- (a) the information required;
- (b) the period within which the information is to be provided; and
- (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.”.

(16) In section 51 (time-limits for investigations and reports by Commission), subsection (2) shall cease to have effect.

(17) In section 52 (section 51: supplementary)—

- (a) subsections (1), (2) and (8)(b) shall cease to have effect; and
- (b) in subsection (9) the words “or (2)(a)” shall cease to have effect.

(18) In section 53 (restrictions on action where public interest considerations not finalised), in subsection (2)—

- (a) the word “or” shall be inserted before paragraph (b);
- (b) the word “or” before paragraph (c) shall cease to have effect; and
- (c) paragraph (c) shall cease to have effect.

(19) In section 58 (specified considerations), in subsection (2), for “21(3) of the European Merger Regulations” there is substituted “21(4) of the EC Merger Regulation”.

(20) In section 67 (intervention to protect legitimate interests), in subsection (1)—

- (a) in paragraph (a)(ii), for “European Merger Regulations” there is substituted “EC Merger Regulation”; and
- (b) in paragraph (c), for “21(3) of the European Merger Regulations” there is substituted “21(4) of the EC Merger Regulation”.

(21) In section 68 (scheme for protecting legitimate interests), in subsection (2)(b), for “European Merger Regulations” there is substituted “EC Merger Regulation”.

(22) In section 97 (period for considering merger notices), in subsection (11), for “22(3) of the European Merger Regulations” there is substituted “22(1) of the EC Merger Regulation”.

(23) In section 99 (certain functions of OFT and Secretary of State in relation to merger notices), in subsection (5)(d), for “European Merger Regulations” there is substituted “EC Merger Regulation”.

(24) In section 122 (primacy of Community law), in subsections (2) and (4), for “European Merger Regulations” there is substituted “EC Merger Regulation”.

(25) In section 129 (other interpretation provisions), in subsection (1)—

- (a) the definition of “the European Merger Regulations” shall cease to have effect; and
- (b) after the definition of “customer” there is inserted—

““the EC Merger Regulation” means Council Regulation (EC) No 139/2004 of 20th January 2004 on the control of concentrations between undertakings;”.

(26) In section 130 (index of defined expressions)—

- (a) the expression “European Merger Regulations” in the left-hand column of the table and the corresponding provision in the right-hand column shall cease to have effect; and
- (b) after the expression “The decision making authority” in the left-hand column of the table there is inserted “EC Merger Regulation” and in the corresponding right-hand column there is inserted “Section 129(1)”.

(27) In section 153 (specified considerations: Part 4), in subsection (2), for “21(3)” to the end of that subsection there is substituted “21(4) of Council Regulation (EC) No 139/2004 of 20th January 2004 on the control of concentrations between undertakings.”.

EEC Merger Control (Distinct Market Investigations) Regulations 1990

3.—(1) The EEC Merger Control (Distinct Market Investigations) Regulations 1990(a) are amended as follows.

(2) In paragraph (2) of regulation 1, for “(EEC) No 4064/89” there is substituted “(EC) No 139/2004”.

Transnational Information and Consultation of Employees Regulations 1999

4.—(1) The Transnational Information and Consultation of Employees Regulations 1999(b) are amended as follows.

(2) In paragraph (4) of regulation 3 (controlled and controlling undertaking), for “(EEC) No 4064/89 of 21 December 1989” there is substituted “(EC) No 139/2004 of 20 January 2004”.

Enterprise Act 2002 (Merger Fees and Determination of Turnover) Order 2003

5.—(1) The Enterprise Act 2002 (Merger Fees and Determination of Turnover) Order 2003(c) is amended as follows.

(2) In paragraph (c) of article 10 (repayment of fees) for “22(3) of the EC Merger Regulations” there is substituted “22(1) of the EC Merger Regulation”.

EXPLANATORY NOTE

(This note is not part of the Regulations)

The new EC Merger Regulation - Council Regulation (EC) No 139/2004 of 20th January 2004 on the control of concentrations between undertakings (OJ No L24, 29.01.04, p.1-22) - comes into force on 1st May 2004. It replaces Council Regulation (EEC) No 4064/89 on the control of concentrations between undertakings, as amended by Council Regulation (EC) No 1310/97.

Under the EC Merger Regulation, if a merger satisfies certain jurisdictional thresholds, that is, it is a concentration with a “Community dimension”, it must be notified to the European Commission (EC) before it can proceed and the EC generally has sole jurisdiction over competition issues.

These Regulations make consequential amendments, primarily to the Enterprise Act 2002, which are necessary in light of the new EC Merger Regulation. Member States, both under the repealed and the new EC Merger Regulation, may request that certain cases be referred to them under article 9 of that Regulation for competition assessment, notwithstanding the fact that the EC has sole jurisdiction to examine the case, or request that the EC consider a particular case under article 22 of that Regulation, notwithstanding the fact that the EC does not have jurisdiction to do so because the relevant thresholds have not been satisfied. The new EC Merger Regulation also

(a) S.I. 1990/1715.
 (b) S.I. 1999/3323.
 (c) S.I. 2003/1370.

allows the parties to the merger to request referrals to and from the EC before notification by submitting reasoned submissions. Parties can make an article 4(4) request requesting that a Member State examine the merger and can make an article 4(5) request asking the EC to consider the merger where the merger could be subject to review in three or more Member States. In the latter case, if the request is successful, the merger will be deemed to have a “Community dimension”.

The amendments in paragraphs 2(3) and 2(7) of the Schedule ensure that the OFT is not under a duty to refer a case where parties are in the process of making an article 4(5) request. If the request is not successful, OFT’s duty would then apply again pursuant to the amendments in paragraphs 2(4) and 2(8). The amendments in paragraphs 2(13) and 2(14) of the Schedule make similar amendments in relation to the public interest regime to ensure that the domestic public interest regime cannot be used in such cases, as intervention under this regime would require the OFT to report on competition, unless the merger had been subsequently referred back for consideration under national competition law under article 4(4) and 9 of the EC Merger Regulation. If the Secretary of State wanted to intervene on public interest grounds in cases referred to the EC under article 4(5), she could do so under section 67 of the Enterprise Act 2002.

Where a case is referred back to the United Kingdom under article 4(4) or article 9, the new EC Merger Regulation does not require the publication of any report or the announcement of the findings of the examination of the merger to be effected within 4 months of the EC’s referral as was the case under the repealed Regulation. The amendments in paragraphs 10, 11, 16, 17 and 18 of the Schedule reflect this change. Instead, the new EC Merger Regulation obliges the competent authority of a Member State where a case has been referred back to it to provide the parties with the results of the preliminary competition assessment within 45 working days after the EC’s referral. The amendments in paragraph 2(9) of the Schedule therefore impose a duty on the OFT to decide in such cases whether or not to refer the matter to the Competition Commission, or whether to seek undertakings in lieu of reference, within this time period. The amendments also enable the OFT to suspend the 45 working day time-limit where information has not been provided to it by the undertakings concerned, as provided for in article 9 of the EC Merger Regulation. The amendments in paragraph 2(15) apply to cases where the Secretary of State decides to intervene on public interest grounds in a case referred back under article 4(4) or article 9. In such cases the 45 working day time-limit will apply to her decision whether or not to refer the matter to the Competition Commission, or whether to seek undertakings in lieu of reference. The same provisions for the suspension of time-limits will apply in such cases.

A full regulatory impact assessment has not been produced for this instrument as it amends an existing regime and has no identifiable impact on the costs of business.

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