

EXPLANATORY MEMORANDUM TO
THE WATER MERGERS (MODIFICATION OF ENACTMENTS)
REGULATIONS 2004

2004 No.3202

1. This explanatory memorandum has been prepared by the Department of Trade and Industry and is laid before Parliament by Command of Her Majesty.

2. Description

These Regulations apply Part 3 of the Enterprise Act 2002 (“the EA 2002”)¹ with relevant modifications in relation to water merger references to the Competition Commission (CC) under section 32 of the Water Industry Act 1991 (“the WIA 1991”).

3. Matters of special interest to the Joint Committee on Statutory Instruments

None

4. Legislative background

4.1 The EA 2002 amends the special water merger regime of the WIA 1991 by bringing it into line with the changes made by the EA 2002 to the general merger regime. Section 70 of, and Schedule 6 to, the EA 2002 make those changes by inserting new sections 32 to 35 in the WIA 1991 and a new Schedule 4ZA into that Act. Paragraph 1 of that new Schedule states that Part 3 of the EA 2002 (the merger provisions) shall apply with such prescribed modifications as may be necessary in relation to water mergers and merger references under section 32 of the WIA 1991 as it applies in relation to mergers which are considered under Part 3 of the EA 2002. Paragraph 2 of that new Schedule states that any modifications made pursuant to paragraph 1 shall include modifications to give effect to paragraphs 3 to 6 of the Schedule.

4.2 The Regulations therefore apply Part 3 of the EA 2002 with relevant modifications and give effect to the relevant paragraphs of new Schedule 4ZA.

4.3 This statutory instrument is one of three needed to bring the revised WIA 1991 merger regime into force. The others are The Enterprise Act 2002 (Merger Fees and Determination of Turnover) (Amendment) Order 2004, and The Water Mergers (Determination of Turnover) Regulations 2004. The Commencement order is The Enterprise Act 2002 (Commencement No. 7 and Transitional Provisions and Savings) Order 2004.

5. Extent

This instrument applies to England and Wales.

¹ 2002 c.40

6. European Convention on Human Rights

Gerry Sutcliffe has made the following statement regarding Human Rights:

“In my view the provisions of the Water Mergers (Modification of Enactments) Regulations 2004 are compatible with the Convention rights.”

7. Policy background

7.1 The EA 2002 repealed the merger provisions of the Fair Trading Act 1973 and introduced a revised merger regime. As well as moving away from the old “public interest” test to one based on the effects of the merger on competition, the Act made the independent competition authorities determinative on all merger cases save those raising narrowly defined public interest considerations², and replaced the old qualifying threshold for investigation, based on the value of assets acquired, with one based on the UK turnover of the enterprise acquired (which better reflects the economic power of an enterprise).

7.2 Mergers between water enterprises (water and sewerage undertakers) are subject to a special regime, set out in the WIA 1991, which provide for mandatory reference to the CC if certain thresholds relating to the value of the water assets being taken over and those of the acquirer are exceeded. This purpose of the special water regime is to preserve the ability of the Director General of Water Services (DGWS) to make use of “comparative” or “yardstick” regulation (i.e. the ability to compare the performance of different water companies for the purposes of setting robust price and customer service standards). In the absence of any significant competition in the water sector, such regulation is regarded as a particularly important regulatory tool.

7.3 The EA 2002 included provisions to update the WIA 1991 in line with the changes to the general mergers regime, but it did not change the thrust of the water mergers regime, with its focus on allowing the DGWS to make comparisons between different companies. The main changes are: a switch from an asset threshold to a turnover threshold for determining whether a merger between water enterprises qualifies for a mandatory reference to the CC; the transfer of the responsibility for making such references from the Secretary of State to the OFT; a narrower public interest test based only on preserving the DGWS’s ability to compare different water companies; the transfer of responsibility for final decisions on what remedies should be applied in the event of an adverse finding from the Secretary of State to the CC; and a reduction in the length of time in which to make a reference in the case of a completed merger from six months to four months.

7.4 By virtue of section 35(3) of the WIA 1991, if the OFT is not under a duty to refer the water merger under the provisions of the WIA 1991, a reference of a water merger still may be made under the EA 2002 provisions if relevant. The modifications prescribed in these Regulations would not apply in such cases. By virtue of section 35(4) of the WIA 1991, where there is an actual or prospective merger of two or more enterprises of which the water merger is only a part, the merger of any other

² There are provisions in Part 3 of the Enterprise Act enabling the Secretary of State to intervene in a merger which raises a public interest consideration specified in the EA 2002.

enterprises may still fall for potential parallel scrutiny under Part 3 of the EA 2002 by reference to the considerations set out in that Part, but the modifications prescribed in these Regulations would not apply to the merger being referred under Part 3 of the EA 2002.

7.5 Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings (the EC Merger Regulation) may also apply to water mergers that are the subject of these Regulations and which fall within the exclusive competence of the European Commission by virtue of its provisions. Regulation 21(4) of the EC Merger Regulation recognises that Member States may take appropriate measures to protect legitimate interests other than those taken into consideration by them, and it is considered that securing the ability of the Authority to perform its functions as described above constitutes such a legitimate interest.

8. Impact

8.1 A Regulatory Impact Assessment has not been prepared for this instrument as it has no impact on business, charities or voluntary bodies.

8.2 The impact on the public sector is minimal: there are no identifiable changes to costs to the public or the exchequer brought about by this instrument. The turnover threshold for consideration of mergers under the WIA 1991, as amended, was set so as to catch the same cases as the assets threshold would catch under the regime being replaced. The effect of the changes is that no new burdens are imposed.

9. Contact

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