

**2014 No. 534**

**COMPETITION**

**The Enterprise Act 2002 (Merger Fees and Determination of Turnover) (Amendment) Order 2014**

<i>Made</i>	- - - -	<i>6th March 2014</i>
<i>Laid before Parliament</i>		<i>10th March 2014</i>
<i>Coming into force</i>	- -	<i>1st April 2014</i>

The Secretary of State makes the following Order in exercise of the powers conferred by sections 121 and 124(2) of the Enterprise Act 2002(a).

**Citation and commencement**

1. This Order may be cited as the Enterprise Act 2002 (Merger Fees and Determination of Turnover) (Amendment) Order 2014 and comes into force on 1st April 2014.

**Amendments to the Enterprise Act 2002 (Merger Fees and Determination of Turnover) Order 2003**

2. The Enterprise Act 2002 (Merger Fees and Determination of Turnover) Order 2003(b) is amended as follows.

3. For article 2(d) substitute the following—

“(d) “merger reference” means a reference by the CMA to its chair under section 22 or 33 of the Act(c) or section 32 of the Water Industry Act 1991(d), or a reference by the Secretary of State to the chair of the CMA under section 45 of the Act; and”.

4. In article 3—

- (a) omit paragraph (a);
- (b) in paragraph (b), for “OFT” substitute “CMA”; and
- (c) in paragraph (d)—
  - (i) for “OFT” substitute “CMA”; and
  - (ii) omit “to the Commission”.

5. In article 4—

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- (a) 2002 c. 40; section 121 was amended by paragraph 156 of Schedule 5 to the Enterprise and Regulatory Reform Act 2013 (c. 24).
  - (b) S.I. 2003/1370; relevant amending instruments are S.I. 2004/1079, 2004/3204, 2005/3558.
  - (c) Sections 22 and 33 were amended by, respectively, paragraphs 67 and 72 of Schedule 5 to the Enterprise and Regulatory Reform Act 2013. There are other amendments to sections 22 and 33 which are not relevant.
  - (d) 1991 c. 56; section 32 was substituted by section 70(1) of the Enterprise Act 2002 and amended by paragraph 85 of Schedule 1 to the Enterprise and Regulatory Reform Act 2013 (Competition) (Consequential, Transitional and Saving Provisions) Order 2014.

(a) for paragraph (1) substitute the following—

“(1) Except where the decision in respect of which a fee is payable under article 3(b) or (c) is made in relation to arrangements or proposed arrangements of which the CMA was given notice under section 96(a) of the Act, a fee shall not be payable under article 3(b) or (c) where the creation or possible creation of the relevant merger situation depends or would depend on the operation of section 26(3) or (4)(b) of the Act.”; and

(b) in paragraph (2), for the words from “the OFT decides” to the end substitute “the CMA decides pursuant to section 33(2)(b)(b) of the Act that the arrangements concerned are not sufficiently far advanced, or are not sufficiently likely to proceed, to justify the making of a merger reference.”

**6.** In article 5(1), in the words before sub-paragraph (a), for “article 3(a) to (c)” substitute “article 3(b) or (c)”.

**7.** In article 6—

(a) for paragraphs (1) and (2) substitute the following—

“(1) Where the decision in respect of which a fee is payable under article 3(b) or (c) is made in relation to arrangements or proposed arrangements of which the CMA was given notice under section 96 of the Act and the person who gave the notice still exists at the time when the fee is payable under article 9, the fee is payable by the person who gave the notice.

(2) In any other case, the fee payable under article 3 is payable by the acquirer.”; and

(b) in paragraph (3)(a), for “OFT’s” substitute “CMA’s”.

**8.** For article 7 substitute the following—

“**7.**—(1) In a case in which, by virtue of article 6(1), the obligation to pay the fee under article 3(b) or (c) falls on a person who gave a merger notice under section 96 of the Act, no fee shall be payable if—

(a) that person is the acquirer;

(b) the notified arrangements relate to the enterprise that has been, or will be, taken over by the acquirer; and

(c) the acquirer qualifies as small or medium sized.

(2) In any other case, no fee is payable under article 3 where the acquirer qualifies as small or medium sized.

(3) But paragraphs (1) and (2) do not apply where the acquirer is an individual.

(4) For the purposes of paragraphs (1) and (2) an acquirer qualifies as small or medium sized if—

(a) the acquirer (whether or not it is a company) met, in its most recent financial year before the time when the fee would otherwise become payable, the qualifying conditions to be small specified in section 382(3) to (6) of the Companies Act 2006(c) or the qualifying conditions to be medium-sized specified in section 465(3)(d) to (6) of that Act; and

(b) where the acquirer is a member of a group as defined in section 474 of the Companies Act 2006 (whether or not the acquirer is a company), that group met, in its most recent financial year before the time when the fee would otherwise

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(a) Section 96 of the Enterprise Act 2002 was amended by paragraph 132 of Schedule 5 and paragraph 8 of Schedule 8 to the Enterprise and Regulatory Reform Act 2013.

(b) Section 33(2) of the Enterprise Act 2002 was amended by paragraph 72(3) of Schedule 5 to the Enterprise and Regulatory Reform Act 2013.

(c) 2006 c. 46; section 382(3) was amended by regulation 3(1) of the Companies Act 2006 (Amendment) (Accounts and Reports) Regulations 2008 (S.I. 2008/393).

(d) Section 465(3) was amended by regulation 4(1) of the Companies Act 2006 (Amendment) (Accounts and Reports) Regulations 2008 (S.I. 2008/393).

become payable, the qualifying conditions to be small specified in section 383(4)(a) to (7) of that Act or the qualifying conditions to be medium-sized specified in section 466(4)(b) to (7) of that Act.”

9. In article 8, for “OFT” substitute “CMA”.

10. For article 9 substitute the following—

“9.—(1) In a case falling within article 3(b) or (d), the fee shall be payable when the CMA publishes the merger reference or, as the case may be, publishes its decision that the duty to make such a merger reference does not apply.

(2) In a case falling within article 3(c), the fee shall be payable when the Secretary of State publishes the merger reference, or as the case may be, when the Secretary of State’s decision not to make such a merger reference is published.”

11. Omit article 10.

### **Transitional provision and savings**

12.—(1) The amendments made by this Order do not affect—

(a) any obligation which arose before 1st April 2014 under article 9 of the Enterprise Act 2002 (Merger Fees and Determination of Turnover) Order 2003 to pay a fee, or

(b) any obligation which arose before that date under article 10 of that Order to repay a fee;

and where any such obligation subsisted and had not been discharged immediately before that date the fee in question is payable to or (as the case may be) repayable by the CMA.

(2) Paragraphs (3) to (6) apply where a fee has been paid before, on or after 1st April 2014 pursuant to an obligation under the Enterprise Act 2002 (Merger Fees and Determination of Turnover) Order 2003 which arose before that date in respect of the giving of a merger notice under section 96 of the Enterprise Act 2002.

(3) In paragraphs (4) to (6) “the notified arrangements” means the proposed arrangements in relation to which that merger notice was given.

(4) No fee is payable to the CMA under article 3(b) or (c) of the Enterprise Act 2002 (Merger Fees and Determination of Turnover) Order 2003 where the CMA or (as the case may be) the Secretary of State makes, or decides not to make, a merger reference in relation to the notified arrangements.

(5) No fee is payable to the CMA under article 3(b) or (c) of that Order where—

(a) the CMA or (as the case may be) the Secretary of State makes, or decides not to make, a merger reference in relation to the creation, or possible creation, of a relevant merger situation resulting from the carrying into effect of the notified arrangements; and

(b) that reference, or decision not to make a reference, is made within six months of the date when the obligation to pay the fee in respect of the giving of the merger notice arose.

(6) The CMA must repay the fee paid in respect of the giving of the merger notice where—

(a) the CMA decides not to make a merger reference because it does not believe that it is or may be the case that the notified arrangements would, if carried into effect, result in the creation of a relevant merger situation;

(b) the CMA rejects the merger notice under section 99(5)(d)(c) of the Enterprise Act 2002 (rejection of merger notice where the notified arrangements are or would result in a concentration with a Community dimension); or

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(a) Section 383(4) was amended by regulation 3(2) of the Companies Act 2006 (Amendment) (Accounts and Reports) Regulations 2008 (S.I. 2008/393).

(b) Section 466(4) was amended by regulation 4(2) of the Companies Act 2006 (Amendment) (Accounts and Reports) Regulations 2008 (S.I. 2008/393).

(c) Section 99(5) was amended by paragraph 133(3) of Schedule 5, paragraph 10(3) of Schedule 8 and paragraph 35(3) of Schedule 15 to the Enterprise and Regulatory Reform Act 2013.

- (c) the CMA decides not to make a merger reference because section 22(3)(e)(a) or 33(3)(e)(b) of the Enterprise Act 2002 applies (request to European Commission pursuant to article 22(1) of the EU Merger Regulation).

*Jenny Willott*

Parliamentary Under Secretary of State for Employment Relations and Consumer Affairs  
6th March 2014

Department for Business, Innovation and Skills

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- (a) Section 22(3)(e) was amended by paragraph 2(2)(b) of the Schedule to the EC Merger Control (Consequential Amendments) Regulations 2004 (S.I. 2004/1079). Section 22 was amended by paragraph 67 of Schedule 5 to the Enterprise and Regulatory Reform Act 2013. There are other amendments to section 22 which are not relevant.
- (b) Section 33(3)(e) was amended by paragraph 2(6)(b) of the Schedule to the EC Merger Control (Consequential Amendments) Regulations 2004 (S.I. 2004/1079). Section 33 was amended by paragraph 72 of Schedule 5 to the Enterprise and Regulatory Reform Act 2013. There are other amendments to section 33 which are not relevant.

## EXPLANATORY NOTE

*(This note is not part of the Order)*

This Order amends the Enterprise Act 2002 (Merger Fees and Determination of Turnover) Order 2003 (S.I. 2003/1370) (“the 2003 Order”). The 2003 Order relates to the functions of the Secretary of State, the Office of Fair Trading (“the OFT”) and the Competition Commission under Part 3 of the Enterprise Act 2002 (functions in relation to completed and anticipated mergers) and under sections 32 to 35 of the Water Industry Act 1991 (c. 56) (mergers between water and sewerage undertakers). The 2003 Order contains provisions about the payment to the OFT of fees in connection with the exercise of certain of these merger functions, and this Order amends those provisions.

As a result of provision made by and under the Enterprise and Regulatory Reform Act 2013 (c. 24), the merger functions of the OFT and the Competition Commission have transferred to the Competition and Markets Authority (“the CMA”). Articles 3, 4(b) and (c), 5(b), 7(b), 9 and 10 make amendments to the 2003 Order which are consequential on that transfer.

This Order also amends the 2003 Order to change the time when the fee is payable in cases where a merger notice is given under section 96 of the Enterprise Act 2002, taking account of the fact that amendments made to section 96 by the Enterprise and Regulatory Reform Act 2013 enable merger notices to be given in respect of both anticipated mergers and completed mergers. This change to the 2003 Order is made by articles 4(a) and 10 of this Order, and consequential amendments are made by articles 5(a), 6 to 8 and 11. The fee will be payable (as in cases where no merger notice is given) when the CMA or, as the case may be, the Secretary of State publishes either a merger reference in relation to the notified arrangements or its decision not to make a merger reference. The fee will be payable in respect of a decision by the CMA or (as the case may be) the Secretary of State that it is or may be the case that a relevant merger situation has been created or that arrangements are in progress or in contemplation which, if carried into effect, will result in the creation of a relevant merger situation. The 2003 Order currently provides for the fee to be paid when the merger notice is given and to be repaid if the OFT concludes that the notified arrangements would not, if carried into effect, result in the creation of a relevant merger situation.

New article 6(1) and (2) of the 2003 Order, substituted by article 7 of this Order, also provides that if the person who gave the merger notice under section 96 of the Enterprise Act 2002 has ceased to exist by the time the fee becomes payable, the fee is payable by the “acquirer” (defined in article 6(3) and (4) of the 2003 Order).

In replacing article 7 of the 2003 Order, article 8 of this Order also updates and clarifies the provisions exempting acquirers from paying a merger fee where they qualify as small or medium sized enterprises. New article 7(3) provides explicitly that the exemption does not apply to acquirers who are individuals. New article 7(4) takes the place of existing article 7(3), which sets out the circumstances in which the acquirer will qualify as small or medium sized. Existing article 7(3) refers to provisions of the Companies Act 1985 (c. 6) which have been replaced by provisions of the Companies Act 2006. New article 7(4) refers to the new provisions but makes no change of substance. It refers to “the acquirer” rather than (as existing article 7(3) does) to “the enterprise”.

Article 12 makes transitional provision and savings.

The Schedule to the Enterprise and Regulatory Reform Act 2013 (Commencement No. 6, Transitional Provisions and Savings) Order 2014 (S.I. 2014/416 (C. 17)) contains transitional provisions and savings relating to the transfer to the CMA of the merger control functions of the OFT and the Competition Commission under the Enterprise Act 2002 and in connection with the amendments made by the Enterprise and Regulatory Reform Act 2013 to the law relating to merger notices. Similarly, article 3 of the Enterprise and Regulatory Reform Act 2013 (Competition) (Consequential, Transitional and Saving Provisions) Order 2014 makes transitional provision in connection with the transfer to the CMA of functions relating to water mergers under sections 32 to 35 of the Water Industry Act 1991.

An impact assessment completed for Parts 3 and 4 of the Enterprise and Regulatory Reform Bill, introduced to Parliament on 23rd May 2012, contains an assessment of the effect that the reforms to the competition regime will have on the costs of business and the public and voluntary sectors and is available at the following website:

<https://www.gov.uk/government/publications/strengthening-competition-and-creating-a-single-market-authority>.

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