

**EXPLANATORY MEMORANDUM TO  
THE ENTERPRISE ACT 2002 (MERGER FEES AND DETERMINATION OF  
TURNOVER) (AMENDMENT) ORDER 2014**

**2014 No. 534**

**1.** This explanatory memorandum has been prepared by the Department for Business, Innovation and Skills and is laid before Parliament by Command of Her Majesty.

**2. Purpose of the instrument**

2.1 The Order simplifies the merger fees timetable by requiring the fee to be paid in all cases once the Competition and Markets Authority (“the CMA”) has made a decision following a ‘Phase 1’ investigation. The Order also makes consequential amendments relating to the transfer to the CMA of the competition functions of the Office of Fair Trading (OFT) and the Competition Commission by virtue of the Enterprise and Regulatory Reform Act 2013.

2.2 Other elements of the wider merger fees policy – relating to the circumstances in which certain fees are not payable; the amount of fees; the person by whom fees are payable; and the current limited exemption for acquisitions for SMEs – are not substantially affected. However, the Order updates the current exemption for SMEs and makes consequential changes arising from the change to the time when a fee is paid in cases where a voluntary merger notice has been given under section 96 of the Enterprise Act 2002.

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

3.1 None

**4. Legislative Context**

4.1 The Order amends the Enterprise Act 2002 (Merger Fees and Determination of Turnover) Order 2003 (S.I. 2003/1370). The 2003 Order relates to the functions of the Secretary of State, the OFT and the Competition Commission under Part 3 of the Enterprise Act 2002 in relation to completed and anticipated mergers and under sections 32 to 35 of the Water Industry Act 1991 in relation to mergers of water enterprises; and 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.

4.2 As a result of the Enterprise and Regulatory Reform Act 2013 (c. 24), the merger functions of the OFT and the Competition Commission transfer to the Competition and Markets Authority on 1st April 2014. 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.

4.3 The Schedule to the Enterprise and Regulatory Reform Act 2013 (Commencement No 6, Transitional Provisions and Savings) Order 2014 (SI 2014/416 (C.17)) contains transitional provisions and savings relating to the transfer of the OFT's and Competition Commission's merger functions to the CMA and reform of the law on merger notices (see in particular paragraphs 2, 3 and 6 of that Schedule) which are relevant to this Order. 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 the OFT's and Commission's functions relating to water mergers under sections 32 to 35 of the Water Industry Act 1991.

4.4 The 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. Instead of the fee being payable at the time when the merger notice is given, the fee will be payable (as in other cases) when the CMA (or 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 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.

4.5 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.

4.6 The Order also provides that if the person who gave the merger notice has ceased to exist by the time the fee becomes payable, the fee is payable by the "acquirer"; updates and clarifies the provisions exempting acquirers from paying a merger fee where they qualify as small or medium sized enterprises; and makes clear that the exemption does not apply to acquirers who are individuals.

## **5. Territorial Extent and Application**

5.1 This instrument applies to all of the United Kingdom.

## **6. European Convention on Human Rights**

As the instrument is subject to negative resolution procedure and does not amend primary legislation, no statement is required.

## **7. Policy background**

7.1 The simplification of the fees timetable reflects the removal by the Enterprise and Regulatory Reform Act 2013 of the existing dual route for the voluntary notification of a merger (statutory merger notice and informal notification) and its replacement by a single voluntary merger notice process for all merger cases subject to statutory deadlines.

## **8. Consultation outcome**

8.1 BIS consulted on the proposals for the standard 12-week period as part of its consultation on a number of statutory instruments implementing elements of the new competition regime. Responses were received from around two dozen respondents to this consultation as a whole. The majority of these were law firms. Details of the responses to the consultation, and the Government Response, will be published at:

<https://www.gov.uk/government/consultations/competition-regime-cma-priorities-and-draft-secondary-legislation>

8.2 Respondents to the BIS consultation on the Order welcomed the harmonisation and simplification of the merger fees timetable and arrangements.

## **9. Guidance**

9.1 The CMA published guidance on its mergers jurisdiction and procedure on 10<sup>th</sup> January 2014:

<https://www.gov.uk/government/publications/mergers-guidance-on-the-cmas-jurisdiction-and-procedure>

## **10. Impact**

10.1 The impact assessment completed for Parts 3 and 4 of the Enterprise and Regulatory Reform Bill, introduced to Parliament on 23rd May 2012, contained an assessment of the effect that the reforms to the competition regime will have on the costs of business and the public and voluntary sector. It can be found at the website: <https://www.gov.uk/government/publications/strengthening-competition-and-creating-a-single-market-authority>

## **11. Regulating small business**

11.1 The Order retains the exemption for small and medium-sized enterprises in article 7 of the 2003 Order but updates and clarifies it.

## **12. Monitoring & review**

12.1 Section 56 of the Act, requires the Secretary of State to conduct a review within five years of the operation of certain of the provisions of Part 4 of the Act (which contains amendments to the mergers and market studies and market investigations provisions of the 2002 Act), which could encompass amendments by this Order.

12.2 The impact assessment for the Enterprise and Regulatory Reform Act 2013 competition provisions stated that there would be a review of the competition regime introduced by the Act in April 2018.

## **13. Contact**

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