
EXPLANATORY NOTE

(This note is not part of the Order)

This Order amends the Enterprise Act 2002 (Protection of Legitimate Interests) Order 2003 ([S.I. 2003/1592](#)) (“the 2003 Order”).

The 2003 Order was made under section 68 of the Enterprise Act 2002 (“the Enterprise Act”). Section 67 of the Enterprise Act and the 2003 Order provide a scheme for preventing, mitigating or remedying adverse public interest effects resulting from, or which may result from, the creation of a “European relevant merger situation”. A “European relevant merger situation” is a merger situation engaging competition issues over which the European Union has sole jurisdiction by virtue of Council Regulation ([EC](#)) No. 139/2004 of 20th January 2004 on the control of concentrations between undertakings (OJ No L24, 29.1.04, p. 1) (“the EU Merger Regulation”). Although the European Union has sole jurisdiction in such cases, the EU Merger Regulation permits Member States to take appropriate measures to protect certain legitimate interests.

Section 67 of the Enterprise Act accordingly enables the Secretary of State to serve a “European intervention notice” in prescribed circumstances and this triggers the procedures under the 2003 Order. The 2003 Order follows (with modifications) provisions of Part 3 of the Enterprise Act relating to public interest and special public interest interventions in merger cases (respectively sections 43 to 55 and sections 60 to 66, together with provisions about publication in section 107). These provisions of the Enterprise Act have been amended by the Enterprise and Regulatory Reform Act 2013 which, among other things, abolishes the Office of Fair Trading (“the OFT”) and the Competition Commission and transfers the competition functions of these bodies to the Competition and Markets Authority (“the CMA”) and makes changes to investigatory powers and powers to deal with pre-emptive action. This Order amends the 2003 Order to take account of the amendments to the Enterprise Act.

Articles 3 to 14 of the 2003 Order make provision largely corresponding to that made by sections 43 to 55, 60 to 66 and 107 of the Enterprise Act. Among other things they currently provide for an initial report by the OFT to the Secretary of State, and enable the Secretary of State to make a reference to the Competition Commission and to take enforcement action. Articles 2 to 15 of this Order amend articles 3 to 14 of the 2003 Order to take account of amendments made to the Enterprise Act by the Enterprise and Regulatory Reform Act 2013. Among other things account is taken of the way in which, under amended sections 45 and 62 of the Enterprise Act, references are made by the Secretary of State to the chair of the CMA for the constitution of a CMA panel group under Schedule 4 to the Enterprise and Regulatory Reform Act 2013. The panel group considers the reference, and exercises various other associated powers, on behalf of the CMA. This is reflected in the amendments made to the 2003 Order by articles 6 and 7 of this Order.

Article 2 of and Schedule 1 to the 2003 Order apply (with modifications) provisions of the Enterprise Act concerned with determining whether a “relevant merger situation” has been or will be created. Under section 67 the Secretary of State must, before serving a European intervention notice, have (among other things) reasonable grounds for suspecting that a “relevant merger situation” has been or will be created. Article 16(1) to (6) and (8) to (10) of this Order amends article 2 of and Schedule 1 to the 2003 Order to take account of amendments made by the Enterprise and Regulatory Reform Act 2013 to the applied provisions of the Enterprise Act. Article 16(7) corrects an error in paragraph (i) of Schedule 1 to the 2003 Order.

Article 17 of this Order amends Schedule 2 to the 2003 Order. That Schedule provides for enforcement action which may be taken by the Secretary of State. It is closely modelled on the

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enforcement regime for public interest and special public interest cases in Schedule 7 to the Enterprise Act. Schedule 7 has been amended by the Enterprise and Regulatory Reform Act 2013, and this Order makes amendments to Schedule 2 to the 2003 Order to take account of the changes. In particular, powers to make orders dealing with pre-emptive action are amended and provision for the acceptance of undertakings from the parties to prevent pre-emptive action is revoked.

Article 18 of this Order amends Schedule 3 to the 2003 Order. That Schedule applies various other provisions of the Enterprise Act, with modifications. Many of the relevant provisions of the Enterprise Act have been amended, and some have been replaced or added to, by the Enterprise and Regulatory Reform Act 2013. Article 18 is largely concerned with making amendments to take account of the changes. In particular, it applies newly inserted provisions of the Enterprise Act enabling financial penalties to be imposed for failure to comply with interim measures (section 94A) and adopts amendments made to the Enterprise Act to information-gathering powers (now found in amended section 109).

Article 18(2)(a) revokes a provision applying section 69 of the Enterprise Act, because section 69 was repealed by the Communications Act 2003 (c. 21).

Article 18(16) further modifies section 118 of the Enterprise Act as it applies for the purposes of the 2003 Order, enabling the Secretary of State to exclude matters from reports by OFCOM under article 4A of the 2003 Order when published under article 14(2)(ba) of that Order.

Article 19 makes consequential amendments to Schedule 4 to the 2003 Order, which itself makes consequential modifications to various pieces of legislation.

Articles 20 to 23 make transitional provision and savings relating to the amendments made by this Order. Transitional provision and savings are also made, in relation to amendments made by the Enterprise and Regulatory Reform Act 2013 to provisions of the Enterprise Act applied by the 2003 Order, by the Enterprise and Regulatory Reform Act 2013 (Commencement No. 6, Transitional Provisions and Savings) Order 2014 (S.I. 2014/416 (C.17)).