

2003 No. 1370

COMPETITION

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

Made - - - - - *23rd May 2003*

Laid before Parliament *27th May 2003*

Coming into force - - *20th June 2003*

The Secretary of State in exercise of the powers conferred on her by sections 28, 121 and 124(2) of the Enterprise Act 2002(a), hereby makes the following Order:

PART 1

GENERAL

Citation and commencement

1. This Order may be cited as the Enterprise Act 2002 (Merger Fees and Determination of Turnover) Order 2003 and shall come into force on 20th June 2003.

Interpretation

2. In this Order—

- (a) “the Act” means the Enterprise Act 2002;
- (b) “applicable turnover” means the turnover of an enterprise in the preceding business year, or in a case to which article 11(4) applies, in the period referred to in that article, determined in accordance with the Schedule to this Order; and where a business year or a period under article 11(4) does not equal 12 months the applicable turnover shall be the amount which bears the same proportion to the applicable turnover during that business year as 12 months does to that period;
- (c) “business year” means a period of more than six months in respect of which an enterprise or, if applicable, the business of which it forms part, prepares or is required to prepare accounts; and
- (d) “merger reference” means a reference by the OFT to the Commission under section 22 or 33 of the Act or a reference by the Secretary of State to the Commission under section 45 of the Act.

(a) 2002 c. 40.

PART 2

MERGER FEES

Matters in respect of which fees are payable

3. A fee of the amount specified in Article 5 shall be payable in respect of—
- (a) the giving of a merger notice under section 96 of the Act;
 - (b) subject to article 4(1) and (2), the decision by the OFT in relation to a possible reference under section 22 or 33 of the Act that it is or may be the case that a relevant merger situation has been created or (as the case may be) that arrangements are in progress or in contemplation which, if carried into effect, will result in the creation of a relevant merger situation;
 - (c) subject to article 4(1), the decision by the Secretary of State in relation to a possible reference under section 45 of the Act that it is or may be the case that a relevant merger situation has been created or (as the case may be) that arrangements are in progress or in contemplation which, if carried into effect, will result in the creation of a relevant merger situation.

Circumstances in which certain fees are not payable

- 4.—(1) A fee shall not be payable under article 3(b) or (c)—
- (a) where a fee has been paid under article 3(a) in respect of a merger notice given in relation to proposed arrangements and either—
 - (i) the merger reference or, as the case may be, the OFT's or Secretary of State's decision not to make a merger reference is made in relation to those arrangements; or
 - (ii) if the fee under article 3(a) became due within the previous six months, the result of carrying those arrangements into effect is the creation or possible creation of a relevant merger situation which is the subject of the merger reference or, as the case may be, the OFT's or the Secretary of State's decision not to make a merger reference;
 - (b) 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.
- (2) A fee shall not be payable under article 3(b) in relation to arrangements that are in progress or in contemplation which, if carried into effect, will result in the creation of a relevant merger situation, where the OFT decides that the arrangements concerned are not sufficiently far advanced, or are not sufficiently likely to proceed, to justify the making of a reference to the Commission pursuant to section 33(2)(b) of the Act.

Amount of fees

- 5.—(1) The amount of the fee payable under article 3 shall be—
- (a) where the value of the turnover in the United Kingdom of the enterprise which has been taken over or (as the case may be) which it is proposed or contemplated should be taken over, does not exceed £20 million, £5,000;
 - (b) where the value of such turnover exceeds £20 million but does not exceed £70 million, £10,000;
 - (c) where the value of such turnover exceeds £70 million, £15,000.
- (2) For the purposes of this article the value of the turnover in the United Kingdom of the enterprise which has been taken over or (as the case may be) which it is proposed or contemplated should be taken over, shall be determined by taking the total value of the turnover in the United Kingdom of the enterprises which cease to be distinct enterprises and deducting—
- (a) the turnover in the United Kingdom of any enterprise which continues to be carried on under the same ownership and control; or

- (b) if no enterprise continues to be carried on under the same ownership and control, the turnover in the United Kingdom which, of all the turnovers concerned, is the turnover of the highest value.

(3) For the purposes of this article the turnover in the United Kingdom of an enterprise shall be determined in accordance with article 11(2) to (4).

Person by whom fees are payable

6.—(1) In a case falling within article 3(a), the fee shall be payable by the person who gives the merger notice.

(2) Subject to article 7, in a case falling within article 3(b) or (c), the fee shall be payable by the acquirer.

(3) For the purposes of this article and article 7 “the acquirer” means the person, or group of persons, who has or have acquired or will, if those arrangements are carried into effect, acquire either—

- (a) a controlling interest in one of the enterprises which was or is involved in the creation or possible creation of a relevant merger situation which is the subject of the merger reference or, as the case may be, the OFT’s or the Secretary of State’s decision not to make such a merger reference, and in which he or they did not previously have such an interest; or
- (b) in the case of such an enterprise carried on by a body corporate in which he or they did not previously have a controlling interest, a controlling interest in that body corporate.

(4) In a case where paragraph (3) applies to more than one person, whether by virtue of them being treated as associated persons, as defined in section 127 of the Act, or otherwise, the persons to whom it applies shall be jointly and severally liable for the fee in that case.

(5) Where a fee is payable under article 3(b) or (c) but the acquirer is not—

- (a) a United Kingdom national; or
- (b) a body corporate incorporated under the law of the United Kingdom or of a part of the United Kingdom; or
- (c) a person carrying on business in the United Kingdom, either alone or in partnership with one or more persons,

he shall not be liable to pay the fee unless the creation or possible creation of a relevant merger situation which is the subject of the merger reference or, as the case may be, the OFT’s or the Secretary of State’s decision not to make such a merger reference, results wholly or partially from anything done by him within the United Kingdom.

Exemption for acquisitions by small and medium sized enterprises

7.—(1) In a case falling within article 3(a) no fee shall be payable by the person who gives the merger notice where—

- (a) that person is the acquirer;
- (b) the notified arrangements relate to the enterprise that will be taken over by the acquirer; and
- (c) the acquirer qualifies as small or medium sized.

(2) In a case falling within article 3(b) or (c) no fee shall be payable by the acquirer where the acquirer qualifies as small or medium sized.

(3) For the purpose of paragraphs (1) and (2) an enterprise qualifies as small or medium sized if, immediately before the time at which the fee would otherwise become payable—

- (a) it satisfies the requirements to be small or medium sized set out in subsections (3) to (6) of section 247 of the Companies Act 1985(a) (“the 1985 Act”) in its most recent financial year, whether or not the enterprise is a company; and

(a) 1985 c. 6.

- (b) where it is a member of a group as defined in section 262 of the 1985 Act (whether or not the enterprise is a company), that group qualifies as small or medium sized within the meaning of subsection (3) to (5) of section 249 of the 1985 Act in its most recent financial year.

Person to whom fees are payable

- 8. In a case falling within article 3 the fee shall be payable to the OFT.

Time when fees are payable

9.—(1) In a case falling within article 3(a), the fee shall be payable at the time when the merger notice is given.

(2) In a case falling within article 3(b), the fee shall be payable when the OFT publishes the merger reference or, as the case may be, publishes its decision not to make such a merger reference.

(3) In a case falling with article 3(c), the fee shall be payable when the Secretary of State publishes the merger reference or, as the case may be, publishes her decision not to make such a merger reference.

Repayment of fees

- 10. In a case falling within article 3(a)—
 - (a) the OFT shall repay the whole of the fee where the notified arrangements would not, if they were carried into effect, result in the creation of a relevant merger situation;
 - (b) the OFT shall repay the whole of the fee where it rejects the merger notice under section 99(5)(d) of the Act (rejection of merger notice where the notified arrangements are or would result in a concentration with a Community dimension);
 - (c) the OFT may repay the whole of the fee in any case to which section 22(3)(e) or section 33(3)(e) of the Act applies (request to European Commission pursuant to article 22(3) of the European Merger Regulations).

PART 3

DETERMINATION OF TURNOVER

Determination of turnover in the United Kingdom of an enterprise

11.—(1) This article shall apply for the purposes referred to in section 28(2) of the Act and article 5.

(2) The turnover in the United Kingdom of an enterprise shall be, subject to paragraph (3), the applicable turnover for the business year preceding—

- (a) where the question whether a relevant merger situation has been created is being determined, the date when the enterprises concerned ceased to be distinct enterprises or such earlier date as the decision-making authority considers appropriate;
- (b) where the question whether it is or may be the case that arrangements are in progress or in contemplation which, if carried into effect, will result in the creation of a relevant merger situation is being determined, the date when the decision in relation to a possible reference has been or is to be made, or such earlier date as the decision-making authority considers appropriate.

(3) Where an acquisition or divestment or other transaction or event has occurred since the end of the preceding business year which the decision-making authority considers may have a significant impact on the turnover of the enterprise, that acquisition or divestment or other transaction or event may be taken into account if the decision-making authority considers it appropriate to do so.

(4) Where in the application of this article there is any period in respect of which there is no preceding business year then the applicable turnover shall be the turnover for that period.

23rd May 2003

Brian Wilson,
Minister of State for Energy and Construction,
Department of Trade and Industry

APPLICABLE TURNOVER

Interpretation**1.** In this Schedule:

“aid” means aid within the meaning of Article 87 of the EC Treaty;

“branch” means a place of business in the United Kingdom which forms a legally dependent part of a credit institution or financial institution and which conducts directly all or some of the operations inherent in the business of the undertaking and any number of branches set up in the United Kingdom shall for the purposes of this Order be regarded as a single branch;

“credit institution” means a credit institution for the purposes of Article 1 of Directive 2000/12/EC of the European Parliament and of the Council of 20 March 2000 relating to the taking up and pursuit of the business of credit institutions(a);

“financial institution” means a financial institution for the purposes of Article 1 of Directive 2000/12/EC of the European Parliament and of the Council of 20 March 2000 relating to the taking up and pursuit of the business of credit institutions;

“insurance undertaking” means an insurance undertaking carrying on the business of direct insurance of a class set out in the Annex to Council Directive (EEC) 73/239 the First Council Directive on the co-ordination of laws, regulations and administrative provisions relating to the taking-up and pursuit of the business of direct insurance other than life assurance(b) or in Article 2 of Directive 2002/83/EC of the European Parliament and of the Council of 5th November 2002 concerning life assurance(c); and

terms used in this Schedule in respect of the determination of the applicable turnover of credit institutions, financial institutions and insurance undertakings shall (except where the contrary intention appears) have the same meaning as in the relevant Directive.

2. Save in paragraphs 4 to 9, the provisions of this Schedule shall be interpreted in accordance with accounting principles and practices that are generally accepted in the United Kingdom.

General

3. The applicable turnover of an enterprise, other than an enterprise which is a credit institution, financial institution or insurance undertaking shall be limited to the amounts derived from the sale of products and the provision of services falling within the ordinary activities of the enterprise to businesses or consumers in the United Kingdom after deduction of sales rebates, value added tax and other taxes directly related to turnover.

4. Subject to paragraphs 8 and 9, where an enterprise consists of two or more enterprises which are under common ownership or control the applicable turnover shall be calculated by adding together the respective applicable turnover of each of the enterprises under common ownership or control.

5. For the purposes of paragraphs 4 and 7 to 9, enterprises shall in particular be treated as being under common control if they are—

- (a) enterprises of interconnected bodies corporate;
- (b) enterprises carried on by two or more bodies corporate of which one and the same person or group of persons has control; or
- (c) an enterprise carried on by a body corporate and an enterprise carried on by a person or group of persons having control of that body corporate.

6. A person or group of persons able, directly or indirectly, to control or materially influence the policy of a body corporate, or the policy of any person in carrying on an enterprise but without having a controlling interest in that body corporate or in that enterprise, may, for the purposes of paragraph 4, be treated by the decision-making authority as having control of it.

7. Section 127 of the Act shall apply to the determination of whether enterprises are under common control for the purposes of paragraphs 5 and 6 as it applies, for the purposes specified in section 127, to section 26 of the Act.

8. Subject to paragraph 9, applicable turnover shall not include amounts derived from the sale of products or the provision of services between enterprises under common ownership or control.

(a) OJ No. L126, 26.05.00, p. 1.

(b) OJ No. L228, 16.8.73, p. 3.

(c) OJ No. L345, 19.12.02, p. 1.

9. Where, as a result of the merger situation, one or more enterprises ceases or will cease to be under common ownership or control with the enterprise being taken over, the decision-making authority may treat amounts derived from the sale of products or the provision of services between the enterprise being taken over and any enterprises ceasing to be under common ownership or control with that enterprise as applicable turnover and if such sale of products or provision of services has not resulted in any turnover or the decision-making authority considers that the turnover attributed to them does not reflect open market value, the decision-making authority may attribute such value to them as it considers appropriate and include them in the calculation of applicable turnover.

10. Where an enterprise has applicable turnover part of which is attributable to a credit institution, financial institution or insurance undertaking, that part or those parts of the applicable turnover shall be calculated in accordance with paragraphs 3, 11 and 12.

Credit institutions and financial institutions

11. The applicable turnover of an enterprise which is a credit institution or financial institution shall be limited to the sum of the following income as defined in Council Directive (EEC) 86/635(a) received by the branch or division of that institution established in the United Kingdom after deduction of value added tax and other taxes directly related to those items:

- (a) interest income and similar income;
- (b) income from securities:
 - income from shares and other variable yield securities;
 - income from participating interests;
 - income from shares in affiliated undertakings;
- (c) commissions receivable;
- (d) net profit on financial operations;
- (e) other operating income.

Insurance undertakings

12. The applicable turnover of an enterprise which is an insurance undertaking shall be limited to the value of gross premiums received from residents of the United Kingdom which shall comprise all amounts received and receivable in respect of insurance contracts issued by or on behalf of the undertaking, including outgoing reinsurance premiums, and after deduction of taxes and parafiscal contributions or levies charged by reference to the amounts of individual premiums or the total volume of premiums.

Aid granted to businesses

13. Any aid granted by a public body to a business which relates to one of the ordinary activities of the business shall be included in the calculation of turnover if the business is itself the recipient of the aid and if the aid is directly linked to the sale of products or the provision of services by the business and is therefore reflected in the price.

(a) OJ No. L372, 31.12.86, p. 1.

EXPLANATORY NOTE

(This note is not part of the Order)

Part 2 of this Order provides for fees to be payable in connection with the exercise by the Secretary of State, the OFT and the Competition Commission of their functions relating to completed and anticipated mergers under Part 3 of the Enterprise Act 2002 (“the Act”).

Article 3 provides that fees are payable in the following cases: in respect of a pre-notification of a merger under section 96 of the Act; in respect of a decision by the OFT regarding the creation or possible creation of a relevant merger situation under section 22 or 33 of the Act and in respect of a decision by the Secretary of State regarding the creation or possible creation of a relevant merger situation under section 45 of the Act.

Article 4 specifies certain cases in which fees are not payable, for example, where a fee has already been paid when pre-notifying the merger. Article 5 specifies the amount of fee payable, which is linked to the UK turnover of the enterprise being taken over which is determined in accordance with Part 3 of this Order. Provision is also made as to the persons by whom the fee is payable (Article 6). There is an exemption for acquisitions made by small and medium sized enterprises in Article 7. Provision is made as to the persons to whom fees are payable (Article 8), and the time when fees are payable (Article 9).

Provision is also made for the refund of fees payable in respect of merger pre-notifications where, for example, the notice is rejected because the notified arrangements are, or would result in, a concentration with a Community dimension (within the meaning of Council Regulation (EEC) No. 4064/89 as amended by Council Regulation (EC) No. 1310/97), or where the notified arrangements would not, if carried into effect, result in a relevant merger situation (Article 10).

Part 3 of this Order specifies how the UK turnover of an enterprise is to be determined for the purposes of establishing the fee payable and section 28(2) of the Act in order to establish whether a relevant merger situation under section 23 of the Act has been created.

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