EXPLANATORY MEMORANDUM TO

THE ENTERPRISE ACT 2002 (MERGER FEES AND DETERMINATION OF TURNOVER) (AMENDMENT) ORDER 2004

2004 No.3204

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

The Order amends the Enterprise Act 2002 (Merger Fees and Determination of Turnover) Order 2003 ("the Merger Fees Order")[1].

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

None

4. Legislative background

4.1 Section 121 of the Enterprise Act 2002[2] ("the EA 2002") enables the Secretary of State to charge fees in connection with the exercise by the Secretary of State, the Office of Fair Trading (OFT), the Office of Communications and the Competition Commission (CC) of their merger functions under Part 3 of the EA 2002 and sections 32 to 34 of, and Schedule 4ZA to, the Water Industry Act 1991 ("WIA 1991").

4.2 The Merger Fees Order was made pursuant to section 121 of the EA 2002. That Order states that fees are payable to the OFT in respect of a pre-notification of a merger to the OFT under section 96 of the EA 2002; a decision by the OFT regarding the creation or possible creation of a relevant merger situation under section 22 or 33 of the EA 2002 or a decision by the Secretary of State regarding the creation or possible creation of a relevant merger situation under section 45 of the EA 2002.

4.3 The Merger Fees Order did not make provision for the payment of fees in connection with merger functions under the WIA 1991. This is because the EA 2002 made amendments to sections 32 to 35 of the WIA 1991 – one of the main amendments being the transfer of responsibility for making water merger references under the WIA 1991 from the Secretary of State to the OFT – which did not come into force at the same time as the other merger provisions of the EA 2002. The Secretary of State therefore continued to have a duty to refer qualifying water mergers under the WIA 1991. Fees were payable in respect of this function by virtue of the Merger (Fees) Regulations 1990[3].

[1] S.I. 2003/1370 (as amended by S.I. 2004/1079).
[2] 2002 c.40.
[3] S.I. 1990/1660 (as amended by S.I. 2001/1199).

4.4 The provisions of the EA 2002 amending the water merger provisions of the WIA 1991 are now being commenced. As the responsibility for referring qualifying water mergers under the WIA 1991 will now be transferred to the OFT, this Order amends the Merger Fees Order so that provision is made for the payment of fees where the OFT makes a merger reference to the CC under section 32 of the WIA 1991.

4.5 The Merger (Fees) Regulations 1990 will fall when the repeal of the enabling power in section 152 of the Companies Act 1989 is commenced, which will be on the same date as the commencement of this statutory instrument.

4.6 This statutory instrument is one of three needed to bring the revised WIA 1991 merger regime into force. The others are The Water Mergers (Determination of Turnover) Regulations 2004 and The Water Mergers (Modification of Enactments) 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 all of the United Kingdom, as the enabling power applies to all of the United Kingdom. It is likely to only have effect in relation to water mergers in England and Wales, as the WIA 1991 only applies to England and Wales and the amount of the fee payable in water merger cases is calculated by reference to the turnover in England and Wales of the water enterprise being taken over.

6. European Convention on Human Rights

Not applicable.

7. Policy background

7.1 Merger fees were first introduced in 1990 in the form of the Merger (Fees) Regulations 1990, which were made under section 152 of the Companies Act 1989. Prior to that, there was no statutory basis for charging merger fees. The EA 2002 repealed the vires in section 152 of the Companies Act (although this repeal was not commenced, as the Merger (Fees) Regulations were still necessary for water mergers under the WIA 1991). Section 121 of the EA 2002 created a new statutory basis enabling fees to be charged by reference to the value of the turnover of the enterprises concerned.

7.2 The fees in the Merger (Fees) Regulations are calculated by reference to the value of the assets of the target company. The Merger Fees Order calculates fees by reference to the value of the UK turnover of the target company – but the levels of fees charged are the same under both instruments. The acquirer pays the

fee but there are exemptions for small and medium sized enterprises. The Department is currently carrying out a consultation on the merits of increasing merger fees, which have not been increased since 1990.

7.3 The fee payable for water mergers referred under the WIA 1991 is calculated by reference to the turnover in England and Wales of the enterprise being taken over. Turnover for these purposes is determined in accordance with Regulations made pursuant to section 33(4) of the WIA 1991 and not in accordance with the turnover provisions in Part 3 of the Merger Fees Order.

7.4 As this Order does not increase the fees payable in water merger cases, the level of public interest is likely to be low. The change is not politically or legally important.

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 There is no impact on the public sector.

9. Contact

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