STATUTORY INSTRUMENTS

2024 No. 1236

COMPETITION

The Enterprise Act 2002 (Mergers and Market Investigations) (Determination of Control and Turnover for Penalties) Regulations 2024

Made - - - -	*25th November 2024*
Laid before Parliament	*29th November 2024*
Coming into force - -	*1st January 2025*

The Secretary of State makes these Regulations in exercise of the powers conferred by sections 94AB(9) to (11), 111(9) to (11), 167B(9) to (11) and 174D(11) to (13) of the Enterprise Act 2002(**a**).

Citation, commencement, extent and interpretation

1.—(1) These Regulations may be cited as the Enterprise Act 2002 (Mergers and Market Investigations) (Determination of Control and Turnover for Penalties) Regulations 2024 and come into force on 1st January 2025.

(2) These Regulations extend to England and Wales, Scotland and Northern Ireland.

(3) In these Regulations—

(a) "the Act" means the Enterprise Act 2002;

(b) "provisional penalty notice" means a provisional penalty notice issued pursuant to section 112(A1) of the Act(**b**) where the appropriate authority issuing it is minded to impose a penalty under section 94AA, 110, 167A or 174A of the Act(**c**);

(c) "relevant authority" means the appropriate authority issuing a provisional penalty notice.

(**a**) 2002 c. 40. Section 94AB is substituted by paragraph 11 of Schedule 11 to the Digital Markets, Competition and Consumers Act 2024 (c. 13) ("the 2024 Act") on a date to be appointed. Section 111(9) to (11) is inserted by paragraph 17 of Schedule 10 to the 2024 Act on a date to be appointed. Section 167B is inserted by paragraph 18 of Schedule 11 to the 2024 Act on a date to be appointed. Section 174D was inserted by paragraph 1 of Schedule 11 to the Enterprise and Regulatory Reform Act 2013 (c. 24), and sub-sections (11) to (13) are inserted by paragraph 29 of Schedule 10 to the 2024 Act on a date to be appointed. The regulation-making powers inserted by the 2024 Act were commenced, for limited purposes, by section 339(2)(c) of the 2024 Act on 24th May 2024.

(**b**) Section 112(A1) is inserted by paragraph 18 of Schedule 10 to the 2024 Act. Section 112(A1) requires the relevant authority to issue a provisional penalty notice before a penalty can be imposed under section 94AA, 110, 167A or 174A of the Act (per section 94AA(6), 112(A1), 167B(6) and 174A(10) respectively).

(**c**) Section 94AA is substituted by paragraph 11 of Schedule 11 to the 2024 Act. Section 110 was amended by paragraph 144 of Schedule 5 to the Enterprise and Regulatory Reform Act 2013 and is further amended by paragraph 15 of Schedule 10 to the 2024 Act. Section 167A is inserted by paragraph 18 of Schedule 11 to the 2024 Act and amended by paragraph 8 of Schedule 9 to that Act. Section 174A was inserted by paragraph 1 of Schedule 11 to the Enterprise and Regulatory Reform Act 2013 and is further amended by paragraph 27 of Schedule 10 to the 2024 Act.

Control of an enterprise

2.—(1) This regulation applies for the purposes of determining when an enterprise(**a**) is to be treated as controlled by a person for the purposes of the following sections of the Act—

(a) section 94AB(3) and (4) (amount of penalties under section 94AA: enforcement of undertakings and orders);

(b) section 111(4) and (4A) (amount of penalties under section 110: enforcement of powers under section 109)(**b**);

(c) section 167B(3) and (4) (amount of penalties under section 167A: enforcement of undertakings and orders: imposition of penalties);

(d) section 174D(4) and (4A) (amount of penalties under section 174A: enforcement of powers under section 174: attendance of witnesses and production of documents etc.)(**c**).

(2) An enterprise is to be treated as controlled by a person ("P") where—

(a) the enterprise is carried on by P otherwise than in partnership or as a member of an unincorporated association or body,

(b) the enterprise is carried on by a body corporate in which P has a controlling interest,

(c) the enterprise is carried on by a body corporate, and P is able directly or indirectly to control, or materially influence, the policy of that body corporate without having a controlling interest in that body corporate,

(d) the enterprise is carried on by a partnership or by an unincorporated association or body, and P (whether or not P is a member of that partnership, association or body) is able directly or indirectly to control, or materially influence, the policy of that partnership, association or body in carrying on the enterprise, or

(e) the enterprise is carried on by an individual, and P is able directly or indirectly to control, or materially influence, the policy of that individual in carrying on the enterprise.

(3) For the purposes of paragraph (2)(b), P has a controlling interest in a body corporate if P—

(a) is a parent undertaking of that body corporate within the meaning of section 1162 of the Companies Act 2006 (parent and subsidiary undertakings)(**d**), or

(b) would be a parent undertaking of that body corporate within the meaning of that section if P were an undertaking within the meaning of section 1161 of that Act (meaning of "undertaking" and related expressions),

and the reference in paragraph (2)(c) to P not having a controlling interest is to be construed accordingly.

(4) For the purposes of paragraph (3), subsections (2)(c) and (4)(a) of section 1162 of the Companies Act 2006 are to be disregarded.

(5) For the purposes of paragraph (2)(c), (d) and (e) the relevant authority may determine whether any person is able to control directly or indirectly, or materially influence, the policy of a body corporate, or the policy of a partnership, an unincorporated association or body, or an individual (as the case may be) in carrying on an enterprise.

(6) References in this regulation to a body corporate include a body incorporated outside the United Kingdom; and references to a partnership or an unincorporated association or body include a partnership or unincorporated association or body formed or established, or having any members incorporated, formed or established, outside the United Kingdom.

(**a**) Section 129(1) of the Enterprise Act 2002 defines "enterprise" for the purposes of Part 3; section 183(1) of that Act applies the same definition of "enterprise" for the purposes of Part 4.
(**b**) Section 111(4) is amended, and sub-section (4A) is inserted, by paragraph 17 of Schedule 10 to the 2024 Act.
(**c**) Section 174D(4) is amended, and sub-section (4A) is inserted, by paragraph 29 of Schedule 10 to the 2024 Act.
(**d**) 2006 c. 46.

Determination of turnover and daily turnover

3.—(1) This regulation applies for the purposes of determining the turnover and daily turnover of an enterprise for the purposes of the following sections of the Act—

(a) section 94AB(4) (amount of penalties under section 94AA: enforcement of undertakings and orders);

(b) section 111(4A) (amount of penalties under section 110: enforcement of powers under section 109);

(c) section 167B(4) (amount of penalties under section 167A: enforcement of undertakings and orders: imposition of penalties);

(d) section 174D(4A) (amount of penalties under section 174A: enforcement of powers under section 174: attendance of witnesses and production of documents etc.).

(2) Subject to paragraphs (3) to (6), the turnover of an enterprise is its turnover in—

(a) the last accounting period to end before the relevant date (its "relevant accounting period"), or

(b) if the enterprise has no accounting period that ends before the relevant date, the period beginning with the day on which the enterprise began to be carried on and ending with the last day of the month preceding the month in which the relevant date falls.

(3) If the relevant authority estimates on the relevant date that the turnover of the enterprise in the accounting period immediately preceding its relevant accounting period (the "preceding accounting period") was higher than the turnover of the enterprise in its relevant accounting period, the turnover is its turnover in the preceding accounting period.

(4) If the figures necessary to calculate turnover of the enterprise in its relevant accounting period are not available to the relevant authority on the relevant date, the turnover is (subject to paragraph (5)) its turnover in—

(a) the preceding accounting period, or

(b) if the enterprise has no preceding accounting period, the period beginning with the day on which the enterprise began to be carried on and ending with the day immediately preceding the date on which its relevant accounting period began.

(5) If the figures necessary to calculate the turnover of the enterprise under paragraph (4)(a) or (b) are not available to the relevant authority on the relevant date, the turnover of the enterprise is its turnover in the period beginning with the day after the last day of its relevant accounting period and ending with the last day of the month preceding the month in which the relevant date falls.

(6) Where the period by reference to which turnover is calculated does not equal 12 months, the turnover of the enterprise is the turnover in that period divided by the number of days in that period and multiplied by 365 or, if the period includes 29th February, 366.

(7) The daily turnover of the enterprise is the turnover divided by 365 or, if the period by reference to which turnover is calculated includes 29th February, 366.

(8) For the purposes of this regulation—

(a) an "accounting period" of an enterprise is a period of more than six months in respect of which accounts are prepared or required to be prepared in relation to the enterprise;

(b) the "relevant date" means the date on which the provisional penalty notice is issued;

(c) the provisions of the Schedule apply in the determination of turnover.

Justin Madders
Parliamentary Under Secretary of State
Department for Business and Trade

25th November 2024

SCHEDULE

Regulation 3

Turnover of an enterprise

Interpretation

1.—(1) In this Schedule—

"credit institution" means a credit institution as defined in section 417 of the Financial Services and Markets Act 2000 (definitions)(**a**);

"financial institution" means a financial institution as defined in Article 4(1)(26) of Regulation (EU) No. 575/2013 of the European Parliament and of the Council of 26 June 2013 on prudential requirements for credit institutions and investment firms and amending Regulation (EU) No. 648/2012 (definitions)(**b**), or any undertaking located outside the United Kingdom which does not fall within that definition but which carries on equivalent activities;

"insurance undertaking" means—

(a) an insurance undertaking as defined in section 417 of the Financial Services and Markets Act 2000,

(b) a reinsurance undertaking as defined in section 417 of the Financial Services and Markets Act 2000,

(c) an overseas insurance undertaking, or

(d) an overseas reinsurance undertaking;

"overseas insurance undertaking" means an undertaking—

(a) with a head office located in a country or territory other than the United Kingdom, and

(b) which effects or carries out contracts of insurance as principal;

"overseas reinsurance undertaking" means an undertaking—

(a) with a head office located in a country or territory other than the United Kingdom, and

(b) which effects or carries out contracts of insurance that are limited to reinsurance contracts as principal.

(2) The provisions of this Schedule are to be interpreted in accordance with generally accepted accounting principles and practices.

Turnover of an enterprise

2.—(1) The turnover of an enterprise is the sum of all amounts derived directly or indirectly from the sale of goods and provision of services (both in and outside the United Kingdom) falling within the activities of the enterprise, after the deduction of sales rebates, value added tax and other taxes directly related to turnover.

(**a**) 2000 c. 8. The definition of "credit institution" was inserted into section 417 by S.I. 2019/632.
(**b**) EUR 575/2013 was amended by paragraph 2 of Schedule 1 to the Financial Services Act 2021 (c. 22) and S.I. 2019/1232.

(2) Paragraphs 5 and 6 also apply to determine the turnover of an enterprise.

(3) But where all or any of the activities constituting an enterprise are the activities of a credit institution, a financial institution or an insurance undertaking, paragraph 3 or (as the case may be) paragraph 4 applies instead of this paragraph to determine the turnover of the enterprise in respect of those activities.

Turnover in respect of activities of a credit institution or financial institution

3.—(1) The turnover of an enterprise in respect of activities of a credit institution or financial institution is the sum of the following income items received by the institution, after the deduction of value added tax and other taxes directly related to those items—

(a) interest income and similar income;

(b) the following income from securities—

(i) income from shares and other variable yield securities;

(ii) income from participating interests;

(iii) income from shares in affiliated undertakings;

(c) commissions receivable;

(d) net profit on financial operations;

(e) other operating income.

(2) Expressions used in sub-paragraph (1) have the meanings given by Council Directive (EEC) 86/635 of 8 December 1986 on the annual accounts and consolidated accounts of banks and other financial institutions(**a**).

(3) Paragraphs 5 and 6 also apply to determine the turnover of an enterprise in respect of activities of a credit institution or financial institution.

Turnover in respect of activities of an insurance undertaking

4.—(1) The turnover of an enterprise in respect of activities of an insurance undertaking is the total value of gross premiums received, comprising 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.

(2) Paragraphs 5 and 6 also apply to determine the turnover of an enterprise in respect of activities of an insurance undertaking.

Subsidies

5.—(1) The turnover of an enterprise includes any subsidy given in respect of the enterprise, determined in accordance with this paragraph.

(2) For the purposes of sub-paragraph (1), "subsidy" means financial assistance which—

(a) is given, directly or indirectly, from public resources by a public authority,

(b) confers an economic advantage on one or more businesses whose activities or part of whose activities constitute the enterprise, and

(**a**) OJ No. L372, 31.12.86, p.1, amended by Directives 2001/65/EC (OJ No. L 283, 27.10.01, p. 28), 2003/51/EC (OJ No. L178, 17.7. 03, p. 16), and 2006/46/EC (OJ No. L224, 16.8.06, p. 1).

(c) is specific such that it benefits one or more businesses whose activities or part of whose activities constitute the enterprise over one or more other businesses with respect to the production and sale of goods and the provision of services.

(3) For the purposes of sub-paragraph (2), the means by which financial assistance may be given include—

(a) a direct transfer of funds (such as grants or loans);

(b) a contingent transfer of funds (such as guarantees);

(c) the forgoing of revenue that is otherwise due;

(d) the sale of goods;

(e) the provision of services;

(f) the purchase of goods and services.

(4) For the purposes of sub-paragraph (2)(a), "public authority" means a person who exercises functions of a public nature.

(5) Financial assistance given by a person who is not a public authority is to be treated for the purposes of sub-paragraph (2)(a) as financial assistance given from public resources by a public authority if the involvement of a public authority in the decision to give financial assistance is such that the decision is, in substance, the decision of the public authority.

(6) For the purposes of sub-paragraph (5), the factors which may be taken into account when considering the involvement of a public authority in the decision of a person to give financial assistance include, in particular, factors relating to—

(a) the control exercised over that person by that public authority, or

(b) the relationship between that person and that public authority.

(7) For the purposes of this paragraph, financial assistance is to be treated as given to a business if the business has an enforceable right to the financial assistance.

Further provisions about determining turnover

6.—(1) Where the person to whom a provisional penalty notice is issued owns or controls more than one enterprise, the turnover of those enterprises does not include amounts derived from the sale of goods and provision of services between them.

(2) Where in the accounts or other information used by the relevant authority to calculate the turnover of an enterprise any figure is expressed in a currency other than sterling, the relevant authority may determine the equivalent in sterling, applying whatever rate or rates of exchange the authority considers appropriate and rounding the resulting figure up or down as it considers appropriate.

(3) Where an acquisition, divestment or other transaction or event has occurred since the end of the period by reference to which the turnover of the enterprise is determined in accordance with regulation 3 which the relevant authority considers may have a significant impact on the turnover of the enterprise, the relevant authority may take account of that acquisition, divestment or transaction or event if it considers it appropriate to do so and accordingly increase or (as the case may be) reduce by such amount as it considers appropriate the amount which would otherwise constitute the turnover of the enterprise.

EXPLANATORY NOTE

(This note is not part of the Regulations)

These Regulations make provision for the purposes of sections 94AB(3) and (4), 111(4) and (4A), 167B(3) and (4) and 174D(4) and (4A) of the Enterprise Act 2002 (c. 40) ("the Enterprise Act") for determining when an enterprise is to be treated as controlled by a person and for determining the turnover of an enterprise.

The Digital Markets, Competition and Consumers Act 2024 (c. 13) amends Part 3 (mergers) and Part 4 (market studies and market investigations) of the Enterprise Act in respect of enforcement, including the calculation of penalties, as follows—

- section 94AB of the Enterprise Act sets out the maximum penalties that may be imposed under section 94AA of that Act;
- section 111 of the Enterprise Act sets out the maximum penalties that may be imposed under section 110 of that Act;
- section 167B of the Enterprise Act sets out the maximum penalties that may be imposed under section 167A of that Act;
- section 174D of the Enterprise Act sets out the maximum penalties that may be imposed under section 174A of that Act.

The maximum penalties are calculated by reference to the turnover and daily turnover of the enterprises owned or controlled by the person on whom the penalty is imposed.

Regulation 2 makes provision for determining when an enterprise is to be treated as controlled by a person.

Regulation 3 and the Schedule make provision for determining the turnover and daily turnover of an enterprise.

The impact assessments completed for the Digital Markets, Competition and Consumers Bill, introduced to Parliament on 25th April 2023, contain an assessment of the effect that the reforms to the competition regime will have on the costs of business, the voluntary sector and the public sector. They are available at: https://bills.parliament.uk/bills/3453/publications. Printed copies can be obtained from the Department for Business and Trade, Old Admiralty Building, Admiralty Place, London SW1A 2DY.

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