EXPLANATORY MEMORANDUM TO

THE WATER MERGERS (MODIFICATION OF ENACTMENTS) (AMENDMENT) REGULATIONS 2024

2024 No. 1234

1. Introduction

1.1 This explanatory memorandum has been prepared by the Department for Business and Trade and is laid before Parliament by Command of His Majesty.

2. Declaration

2.1 Justin Madders MP, Minister for Employment Rights, Competition and Markets at the Department for Business and Trade confirms that this Explanatory Memorandum meets the required standard.

2.2 Alex Williams, Deputy Director for Competition Policy, at the Department for Business and Trade confirms that this Explanatory Memorandum meets the required standard.

3. Contact

3.1 Rebecca Marighella at the Department for Business and Trade can be contacted at rebecca.marighella@businessandtrade.gov.uk with any queries regarding the instrument.

Part One: Explanation, and context, of the Instrument

4. Overview of the Instrument

What does the legislation do?

4.1 This instrument amends the Water Mergers (Modification of Enactments) Regulations 2004 (S.I. 2004/3202) (the "2004 Regulations") to take account of amendments made by the Digital Markets, Competition and Consumers Act 2024 ("the DMCCA") to Part 3 of the Enterprise Act 2002 (which contains the main statutory scheme for the regulation of mergers).

4.2 The Water Industry Act 1991 applies Part 3 of the Enterprise Act 2002 to mergers between water enterprises in England and Wales, subject to any necessary modifications. Those modifications are set out in the 2004 Regulations.

4.3 This instrument amends the 2004 Regulations to ensure that the amendments made by the DMCCA are applied correctly, or in one case do not apply, to mergers between water enterprises.

Where does the legislation extend to, and apply?

4.4 The extent of this instrument (that is, the jurisdiction(s) which the instrument forms part of the law of) is England and Wales.

4.5 The territorial application of this instrument (that is, where the instrument produces a practical effect) is England and Wales.

5. Policy Context

What is being done and why?

5.1 Mergers between water enterprises (water and sewerage undertakers)[1] are subject to a special merger control regime under the Water Industry Act 1991 (the "1991 Act"). The 1991 Act applies the standard merger regime set out in Part 3 of the Enterprise Act 2002 for the purposes of the water mergers regime, subject to any necessary modifications, which are currently set out in the 2004 Regulations.

5.2 Part 2 of the DMCCA, which enacts various competition policy reforms, makes amendments to the merger regime in Part 3 of the Enterprise Act 2002, giving effect to policy proposals previously consulted on in the 2021 Reforming Competition and Consumer Policy consultation[2]. The reforms include amendments to:

- enable the CMA to fast-track a merger to a Phase 2 investigation if the parties to the merger so request (section 128 of, and Schedule 5 to, the DMCCA);
- create new or enhanced powers for the CMA to impose turnover based civil penalties for breaches of investigative measures (e.g. obstructing an investigation, destroying evidence) and for breaches of remedies imposed or accepted by the CMA in relation to mergers (section 143 of, and Schedules 10 and 11 to, the DMCCA);
- make provision regarding the service of documents and extra-territorial application of notices under Part 3 of the Enterprise Act 2002 (section 144 of, and Schedule 13 to, the DMCCA);
- enable the CMA and parties involved in a merger to mutually agree to extend the statutory timetable for Phase 2 investigations where this is likely to support timely resolution of merger investigations and to create added flexibility to the process (section 131 of the DMCCA);
- change the definition of "working day" for the purposes of Part 3 of the Enterprise Act so that a bank holiday in any part of the United Kingdom is not a working day (section 146 of the DMCCA); and
- replace an obligation on the CMA in section 96(5) of the Enterprise Act 2002 to publish the latest form of the merger notice in the London, Edinburgh and Belfast Gazettes with an obligation to instead publish it online, for example on the CMA website (section 133 of the DMCCA)[3].

5.3 For the purposes of the water merger regime, this instrument amends the modifications made by the 2004 Regulations to provisions in Part 3 of the Enterprise Act 2002 so that almost all of these changes also apply appropriately to investigations of water mergers (see paragraph 5.7 for the exception).

5.4 In contrast to the position for the general merger regime which assesses the effect of a merger on competition, the intention of the special water merger regime is to ensure that a merger between two or more water or sewerage enterprises in England and Wales will not prejudice the Water Services Regulation Authority's (Ofwat) ability to make comparisons for the purpose of carrying out its statutory functions (such as setting price controls on regulated water enterprises and other regulatory functions).

[1] A water enterprise is an enterprise carried on by a company appointed under section 6 of the Water Industry Act 1991 to be a water and/or sewerage undertaker.
[2] The policy context for competition reforms in Part 2 of DMCCA is set out in paragraphs 10, 11, 15, 16 of the to the DMCCA: https://publications.parliament.uk/pa/bills/cbill/58-03/0294/en/220294en.pdf.
[3] The merger notice is used by businesses to notify the CMA of potentially relevant merger situations.

5.5 In line with the position set out in the 1991 Act, the procedural aspects of the main merger control regime in Part 3 of the Enterprise Act 2002 should, however, generally apply to the water merger regime (subject to any necessary or expedient modifications) to ensure there is a consistent approach where appropriate. By ensuring that almost all the amendments made by the DMCCA to Part 3 of the Enterprise Act 2002 apply to water mergers this instrument is adopting that approach.

5.6 The rationale for the changes made by the DMCCA to the general merger regime is set out in the 2021 Reforming Competition and Consumer Policy response to consultation[4] and the Explanatory Notes to the DMCCA. The same reasons apply to their adoption in the case of water mergers.

5.7 There is one exception to the overall approach, however, which relates to the fast-track process introduced by the DMCCA. Following consultation with Ofwat, the position agreed with the Department for Environment, Food and Rural Affairs before passage of the DMCCA was that the fast-track process would not apply in water merger cases. This is because Ofwat has a statutory role at the Phase 1 stage of a water merger investigation. Ofwat's role comes before the CMA forms a view on whether to refer a water merger for a Phase 2 investigation, in that the CMA must request and Ofwat must give its opinion on the impact of the merger on its ability to make comparisons between water enterprises before the reference decision is made. Fast tracking a merger to Phase 2 could prejudice that statutory role. As a result, no amendments were made by the DMCCA to the 1991 Act to permit a statutory expedited Phase 1 investigation in relation to a water merger. This instrument therefore ensures that provisions in Part 3 of the Enterprise Act 2002 relating to the fast-track procedure inserted by the DMCCA are omitted in the application of Part 3 to water mergers.

What was the previous policy, how is this different?

5.8 The previous policy, as outlined in Schedule 4ZA to the 1991 Act and the 2004 Regulations, applied the general merger regime from Part 3 of the Enterprise Act 2002 to water mergers, with necessary modifications to accommodate the specific needs of the water sector. The DMCCA introduced several amendments to the general merger regime, which are outlined in 5.2. This instrument is being introduced to reflect the amendments made by the DMCCA to Part 3 of the Enterprise Act 2002, to ensure new or amended provisions relevant to the water merger regime apply as appropriate and to ensure that in terms of their procedural elements the general merger regime and the special regime for water mergers remain largely aligned.

6. Legislative and Legal Context

How has the law changed?

6.1 Part 3 of the Enterprise Act 2002 contains the main statutory scheme for the regulation of mergers. Sections 32 to 35 of, and Schedule 4ZA to, the 1991 Act set out a special regime for mergers between water enterprises. Paragraph 1 of Schedule 4ZA provides that Part 3 of the Enterprise Act 2002 shall apply, with such prescribed modifications as the Secretary of State may consider necessary or expedient, in relation to water mergers and merger references under section 32 of the 1991 Act as it applies in relation to mergers which are considered under Part 3 of the Enterprise Act 2002.

[4] BEIS, 2022. https://www.gov.uk/government/consultations/reforming-competition-and-consumer-policy/outcome/reforming-competition-and-consumer-policy-government-response.

6.2 This instrument amends the modifications made by the 2004 Regulations to take account of the amendments made by the DMCCA. Regulations 3 and 5 to 9 of this instrument make amendments relating to the new fast-track process. This includes adding new sections 34ZD to 34ZF (fast track reference requests) inserted by paragraph 7 of Schedule 5 to the DMCCA to the list of sections of Part 3 omitted by the 2004 Regulations. Regulation 4 reflects the repeal by the DMCCA of section 32 of the Enterprise Act 2002. This is in connection with changes to the definition of "working day" which, following the amendments in s. 146 of the DMCCA, will now be defined in section 129(1) of the Enterprise Act for the purposes of the whole of Part 3. Regulation 10 ensures that the new provision in Part 3 of the Enterprise Act 2002 relating to the service of documents and territorial extent of information notices under that Part (section 144 of, and Schedule 13 to, the DMCCA) and the new civil penalties powers (section 143 of, and Schedules 10 and 11 to, the DMCCA) apply appropriately to water mergers.

6.3 Not all the amendments made by Part 2 of the DMCCA to Part 3 of the Enterprise Act 2002 require the 2004 Regulations to be amended. The amendments to Part 3 in relation to mutually agreed extensions of the Phase 2 timetable (see section 131 of the DMCCA) will apply to water mergers without requiring any modification. Other amendments to Part 3 of the Enterprise Act 2002, such as changes to the thresholds which determine whether the CMA has jurisdiction to review a merger under the general merger regime (see Schedule 4 to the DMCCA), will not apply to water mergers because the relevant sections in Part 3 are already omitted by the 2004 Regulations (see regulation 3 of the 2004 Regulations).

6.4 Regulation 11 includes a transitional provision in relation to the insertion of new regulation 30ZB into the 2004 Regulations. Further transitional provision in relation to amendments to Part 3 of the Enterprise Act 2002 made by the DMCCA is included in the Digital Markets, Competition and Consumers Act 2024 (Commencement No.1 and Savings and Transitional Provisions) Regulations 2024 (S.I. 2024/1226 (C. 78)). Those Regulations include transitional provision in relation to amendments to Part 3 that apply to water mergers by virtue of Schedule 4ZA to the 1991 Act without requiring any modification under the 2004 Regulations. That transitional provision includes further savings in relation to civil penalties and transitional provision for other amendments, such as those relating to the definition of "working day", the service of documents and mutually agreed extensions to the Phase 2 timetable.

6.5 Another instrument was made earlier this year making amendments to the 2004 Regulations consequential on the DMCCA. The Digital Markets, Competition and Consumers Act 2024 (Water Mergers) (Consequential Amendments) Regulations 2024 (S.I. 2024/840) updated the modifications made by the 2004 Regulations as a result of amendments made by Schedule 6 to the DMCCA (which makes some minor amendments to Part 3 of the Enterprise Act 2002 in relation to mergers involving energy network enterprises). Schedule 6 to the DMCCA came into force on 24th July 2024.

Why was this approach taken to change the law?

6.6 Legislating is the only possible approach to making the proposed changes, as amendments introduced by the DMCCA to Part 3 of the Enterprise Act 2002 require amendments to be made to the 2004 Regulations to ensure Part 3 applies appropriately to water mergers. There are no plans to re-make the 2004 Regulations at this time.

7. Consultation

Summary of consultation outcome and methodology

A consultation for this instrument was not undertaken. This is because the instrument makes amendments that reflect amendments made to Part 3 of the Enterprise Act 2002 by the DMCCA and are intended to ensure that the water mergers regime continues to operate appropriately.

8. Applicable Guidance

8.1 The CMA has already published guidance relating to the special water mergers regime[5]. This guidance states that it should be read alongside other detailed guidance that the CMA has published or adopted in relation to merger control provisions of the Enterprise Act 2002. That more detailed general guidance is being updated by the CMA to reflect the changes made by the DMCCA.

Part Two: Impact and the Better Regulation Framework

9. Impact Assessment

9.1 A full Impact Assessment has not been prepared for this instrument because the amendments being made by the instrument relate to provisions introduced by the Digital Markets, Competition and Consumer Act 2024. The aggregate impacts of amendments would likely be minor due to the nature of the changes and only a few businesses being affected by them. Any impacts of these changes are already accounted for in the previous impact assessment for the Act.

Impact on businesses, charities and voluntary bodies

9.2 The impact on businesses, charities, and voluntary bodies is minimal, as the instrument ensures that the water mergers framework reflects appropriate DMCCA amendments and continues to operate as intended.

9.3 The legislation affects businesses involved in mergers of water and sewerage undertakings in England and Wales. This may include small or microbusinesses above the relevant jurisdictional thresholds.

9.4 There is no, or no significant, impact on the public sector because any associated resource costs are expected to be insignificant. This instrument is not expected to deliver a change to net benefit for the public sector.

10. Monitoring and review

What is the approach to monitoring and reviewing this legislation?

10.1 The are no plans for monitoring or reviewing this instrument. The review provision already in the 2004 Regulations will require the regime for water mergers, as set out in those Regulations, to be reviewed as a whole.

10.2 No statutory review provision is required under the Small Business, Enterprise and Employment Act 2015 because this instrument is making amendments to secondary legislation which already includes a statutory review provision (in regulation 37 of the 2004 Regulations).

[5] CMA, 2015. https://www.gov.uk/government/publications/water-and-sewerage-mergers-cma49#:~:text=This%20guidance%20provides%20advice%20and,by%20the%20Water%20Act%202014.

Part Three: Statements and Matters of Particular Interest to Parliament

11. Matters of special interest to Parliament

11.1 None.

12. European Convention on Human Rights

12.1 These Regulations are subject to the negative resolution procedure but as they modify primary legislation the Minister for Employment Rights, Competition and Markets has made the following statement regarding Human Rights:

"In my view the provisions of the Water Mergers (Modification of Enactments) (Amendment) Regulations 2024 are compatible with the Convention rights."

13. The Relevant European Union Acts

13.1 This instrument is not made under the European Union (Withdrawal) Act 2018 or the European Union (Future Relationship) Act 2020 or the Retained EU Law (Revocation and Reform) Act 2023 ("relevant European Union Acts"). Although the instrument amends the Water Mergers (Modification of Enactments) Regulations 2004 which are assimilated law, the amendments relate to the changes made by the DMCCA to Part 3 of the Enterprise Act 2002. They do not relate to the withdrawal of the United Kingdom from the European Union.