

2015 No. 1936

COMPETITION

WATER INDUSTRY, ENGLAND AND WALES

**The Water Mergers (Miscellaneous Amendments) Regulations
2015**

<i>Made</i> - - - -	<i>24th November 2015</i>
<i>Laid before Parliament</i>	<i>26th November 2015</i>
<i>Coming into force</i> - -	<i>18th December 2015</i>

The Secretary of State makes these Regulations in exercise of the powers conferred by—

- (a) section 219(1)(a) of, and paragraph 1 of Schedule 4ZA to, the Water Industry Act 1991(b); and
- (b) sections 121(1), (2)(c) and (3)(d) and 124(2) of the Enterprise Act 2002(c).

PART 1

Introduction

Citation and commencement

1. These Regulations may be cited as the Water Mergers (Miscellaneous Amendments) Regulations 2015 and come into force on 18th December 2015.

Amendment of subordinate legislation

2.—(1) The Water Mergers (Modification of Enactments) Regulations 2004(d) are amended in accordance with Part 2.

(2) The Enterprise Act 2002 (Merger Fees and Determination of Turnover) Order 2003(e) is amended in accordance with Part 3.

(a) See the definition of “prescribed” in section 219(1).
(b) 1991 c.56. Schedule 4ZA was inserted by Schedule 6 to the Enterprise Act 2002 (c.40).
(c) 2002 c. 40. Section 121 was amended by paragraph 156 of Schedule 5 to the Enterprise and Regulatory Reform Act 2013 (c.24); there are other amendments but none are relevant.
(d) S.I. 2004/3202, amended by S.I. 2014/549; there are other amending instruments but none is relevant.
(e) S.I. 2003/1370; relevant amending instruments are S.I. 2004/1079, 2004/3204, 2005/3558 and 2014/534.

PART 2

Amendments to the Water Mergers (Modification of Enactments) Regulations 2004

Regulation 3

3. In paragraph (1) of regulation 3 (omitted provisions)—

- (a) omit sub-paragraph (ba);
- (b) in sub-paragraph (e), for “sections 73 to 75 (undertakings in lieu of references, etc);” substitute “section 73 (undertakings in lieu of references under section 22 or 33)(a);”;
- (c) in sub-paragraph (f), at the end insert “and”; and
- (d) omit sub-paragraph (fa).

Regulation 4

4. In regulation 4 (sections 22 to 24: references in relation to completed mergers), in the text of section 22 of the 2002 Act as it has effect as substituted by that regulation, after subsection (2) insert—

“(3) No reference shall be made under section 32(b) of the 1991 Act if the period within which the CMA is required by section 34ZA of the 2002 Act to decide whether the duty to make a reference applies has expired without such a decision having been made.”.

Regulation 5

5. In regulation 5 (section 25: extension of time-limits)—

- (a) in paragraph (a), for “in subsections (1), (2) and (9)” substitute “in subsections (1), (2), (4), (9) and (10)”;
- (b) after paragraph (a), insert—

“(aa) in subsection (4), for “section 73” there were substituted “section 33D of the 1991 Act”;”;
- (c) in paragraph (b), for “subsections (4) to (8), (10) and (11)” substitute “subsections (6) to (8)”;
- (d) for paragraph (c) substitute—

“(d) in subsection (10)(b), for “subsections (2), (4) and (6)” there were substituted “subsections (2) and (4)”.”.

Regulation 9

6. In regulation 9 (section 33: duty to make references in relation to anticipated mergers), in the text of section 33 of the 2002 Act as it has effect as substituted by that regulation—

- (a) the existing text becomes subsection (1); and
- (b) after that subsection insert—

“(2) No reference shall be made under section 32(a) of the 1991 Act if the period within which the CMA is required by section 34ZA of the 2002 Act to decide whether the duty to make a reference applies has expired without such a decision having been made.”.

New regulations 10ZA, 10ZB and 10ZC

7. After regulation 10, insert—

(a) Section 73 was amended by paragraph 113 of Schedule 5 to the Enterprise and Regulatory Reform Act 2013.

“Section 34ZA: Time-limits for decisions about references

10ZA. Section 34ZA (time-limits for decisions about references)(a) has effect as if—

- (a) in subsection (1)—
 - (i) in the words before paragraph (a), for “section 22 or 33” there were substituted “section 32(a) or (b) of the 1991 Act”; and
 - (ii) in paragraph (a), for “(taking account of the power under section 22(2) or (as the case may be) 33(2) and the operation of section 22(3) or (as the case may be) 33(3))” there were substituted “(taking account of the operation of sections 33(1) and 33A(4) of the 1991 Act and the power under section 33A(1) or (as the case may be) (2) of the 1991 Act)”;
- (b) in subsection (2)—
 - (i) in the words before paragraph (a), for “section 22 or 33” there were substituted “section 32(a) or (b) of the 1991 Act”; and
 - (ii) in paragraph (a), for “section 73” there were substituted “section 33D of the 1991 Act”;
- (c) in subsection (3), in the definition of “the initial period”—
 - (i) paragraph (a) were omitted; and
 - (ii) in paragraph (b), “in any other case,” were omitted and the remaining text ceased to be paragraph (b); and
- (d) subsections (4) and (5) were omitted.

Section 34ZB: Extension of time-limits

10ZB. Section 34ZB (extension of time-limits)(b) has effect as if subsections (5) and (8) were omitted.

Section 34ZC: Sections 34ZA and 34ZB: supplementary

10ZC. Section 34ZC (sections 34ZA and 34ZB: supplementary)(c) has effect as if the references to subsection (5) of section 34ZB were omitted.”.

Regulation 17

8. In regulation 17 (section 72: initial enforcement orders: completed or anticipated mergers)—

- (a) for paragraph (a)(i) substitute—
 - “(i) in paragraph (a), for “section 22 or 33” there were substituted “section 32(a) or (b) of the 1991 Act”; and”;
- (b) in paragraph (d)—
 - (i) for sub-paragraph (i) substitute—
 - “(i) in paragraph (a), for “section 22 or 33” there were substituted “section 32(a) or (b) of the 1991 Act”; and”;
 - (ii) at the end of sub-paragraph (i), omit “and”;
 - (iii) after sub-paragraph (i), insert—
 - “(ia) in paragraph (b), for “section 73” there were substituted “section 33D of the 1991 Act”; and”;
- (iv) for sub-paragraph (ii) substitute—

(a) Section 34ZA was inserted by paragraph 4 of Schedule 8 to the Enterprise and Regulatory Reform Act 2013.
(b) Section 34ZB was inserted by paragraph 4 of Schedule 8 to the Enterprise and Regulatory Reform Act 2013.
(c) Section 34ZC was inserted by paragraph 4 of Schedule 8 to the Enterprise and Regulatory Reform Act 2013.

“(ii) in paragraph (d), for “section 22 or 33” there were substituted “section 32(a) or (b) of the 1991 Act””.

New regulations 17A, 17B and 17C

9. After regulation 17, insert—

“Section 73A: Time-limits for consideration of undertakings

17A. Section 73A (time-limits for consideration of undertakings)(a) has effect as if—

- (a) in subsection (1)—
 - (i) in the words before paragraph (a), for “section 73(2)” there were substituted “section 33D(1) of the 1991 Act”; and
 - (ii) paragraph (b) and the “or” preceding it were omitted; and
- (b) in subsection (2), for “section 73(2)” there were substituted “section 33D(1) of the 1991 Act”.

Section 74: Effect of undertakings under section 73

17B. Section 74 (effect of undertakings under section 73)(b) has effect as if—

- (a) in the heading, for “section 73” there were substituted “section 33D of the 1991 Act”;
- (b) in subsection (1)—
 - (i) in the words before paragraph (a), for “relevant authority shall not make a reference under section 22, 33 or 45” there were substituted “CMA shall not make a reference under section 32(a) or (b) of the 1991 Act”; and
 - (ii) in paragraph (a), for “section 73” there were substituted “section 33D of the 1991 Act”; and
- (c) subsection (5) were omitted.

Section 75: Order making power where undertakings under section 73 not fulfilled etc

17C. Section 75 (order making power where undertakings under section 73 not fulfilled etc)(c) has effect as if—

- (a) in the heading, for “section 73” there were substituted “section 33D of the 1991 Act”;
- (b) in subsection (1)(a), for “section 73” there were substituted “section 33D of the 1991 Act”;
- (c) in subsection (2), for “section 73(2)” there were substituted “section 33D(2) of the 1991 Act”; and
- (d) for subsection (3) there were substituted—

“(3) Subsections (4) and (5) of section 33D of the 1991 Act shall apply for the purposes of subsection (2) above as they apply for the purposes of subsection (1) of that section.””.

New regulation 24A

10. After regulation 24, insert—

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- (a) Section 73A was inserted by paragraph 7 of Schedule 8 to the Enterprise and Regulatory Reform Act 2013.
 - (b) Section 74 was amended by paragraph 114 of Schedule 5 to the Enterprise and Regulatory Reform Act 2013.
 - (c) Section 75 was amended by paragraph 115 of Schedule 5 to the Enterprise and Regulatory Reform Act 2013.

“Section 89: Subject-matter of undertakings

24A. Section 89 (subject-matter of undertakings)(a) has effect as if for subsection (2) there were substituted—

“(2) In this Part “enforcement undertaking” means an undertaking under section 33D of the 1991 Act or an undertaking under section 80 or 82.”.

New regulation 25A

11. Before regulation 26, insert—

“Section 103: Duty of expedition in relation to references

25A. Section 103 (duty of expedition in relation to references) has effect as if in subsection (1), after “making and determining references under this Part” there were inserted “or under sections 32 to 35 of the 1991 Act”.

Regulation 26

12. In regulation 26 (section 104: certain duties of relevant authorities to consult), for paragraph (a) substitute—

“(a) in sub-paragraph (i) of paragraph (a), for “section 22 or 33 or accept undertakings under section 73” there were substituted “section 32(a) or (b) of the 1991 Act or accept undertakings under section 33D of that Act”; and”.

Regulation 27

13. In regulation 27 (section 105: general information duties of the CMA), for paragraph (a) substitute—

“(a) for “section 22 or 33” there were substituted “section 32(a) or (b) of the 1991 Act”; and”.

Regulation 28

14. For regulation 28 (section 106: advice and information about references under sections 22 and 33) substitute—

“Section 106: Advice and information about references under sections 22 and 33

28. Section 106 (advice and information about references under sections 22 and 33) has effect as if—

- (a) in the heading, for “sections 22 and 33” there were substituted “section 32 of the 1991 Act”;
- (b) in subsection (1), for “section 22 or 33” there were substituted “section 32(a) or (b) of the 1991 Act”; and
- (c) in subsection (6), after “a function conferred by this Part” there were inserted “or by sections 32 to 35 of the 1991 Act”.

Regulation 29

15. In regulation 29 (section 107: further publicity requirements)—

(a) for paragraph (a)(ii) substitute—

(a) Section 89 was amended by paragraph 32 of Schedule 15 to the Enterprise and Regulatory Reform Act 2013.

- “(ii) in paragraph (aa), for “subsection (2)(b) of section 33” there were substituted “section 33A(1)(a) of the 1991 Act”;
- (iii) in paragraph (ab), “paragraph (b) of” were omitted;
- (iv) paragraphs (ae) to (ah) were omitted;
- (v) paragraph (c) were omitted;
- (vi) in paragraph (eb), for “section 73” there were substituted “section 33D of the 1991 Act;” and
- (vii) paragraph (i) were omitted.”; and
- (b) in paragraph (b)—
 - (i) at the end of sub-paragraph (i), omit “and”;
 - (ii) after sub-paragraph (ii), insert—
 - “;and
 - (iii) paragraphs (g) to (m) were omitted;
 - (c) in subsection (3), paragraphs (b) to (j) were omitted; and
 - (d) subsections (6) to (11) were omitted.”.

New regulation 29A

16. After regulation 29, insert—

“Section 108: Defamation

29A. Section 108 (defamation) has effect as if after “under this Part” there were inserted “or sections 32 to 35 of the 1991 Act”.”.

Regulation 30A

17. In regulation 30A (section 110A: restriction on powers to impose penalties under section 110), omit paragraph (b) (and the remaining text ceases to be paragraph (a)).

New regulation 30B

18. After regulation 30A, insert—

“Section 110B: Section 110A: supplementary provision

30B. Section 110B (section 110A: supplementary provision)(a) has effect as if—

- (a) in subsection (1)—
 - (i) in the words before paragraph (a), for “section 22 or 33”, there were substituted “section 32(a) or (b) of the 1991 Act”;
 - (ii) in paragraphs (b) and (c), for “section 73”, there were substituted “section 33D of the 1991 Act”; and
 - (iii) paragraph (e) were omitted;
- (b) in subsection (2)—
 - (i) in the words before paragraph (a), for “section 22 or 33”, there were substituted “section 32(a) or (b) of the 1991 Act”; and
 - (ii) paragraph (e) were omitted; and
- (c) subsections (3) to (6) were omitted.”.

(a) Section 110B was inserted by section 29(11) of the Enterprise and Regulatory Reform Act 2013.

New regulation 31A

19. After regulation 31, insert—

“Section 119: Minority reports of CMA

31A. Section 119 (minority reports of CMA) has effect as if, in subsection (1), for “this Part” there were substituted “section 32 of the 1991 Act”.

Regulation 32

20. In regulation 32 (section 120: review of decisions under Part 3)—

(a) before paragraph (a), insert—

“(za) in the heading, after “Part 3” there were inserted “or sections 32 to 35 of the 1991 Act””.

(b) in paragraph (a), in the text of subsection (1) of section 120 of the 2002 Act as it has effect as substituted by that regulation, for “section 32 of the 1991 Act”, substitute “sections 32 to 35 of the 1991 Act”; and

(c) in paragraph (b), for “or section 32 of the 1991 Act”, substitute “or sections 32 to 35 of the 1991 Act”.

New regulation 36

21. After regulation 35, insert—

“Schedule 10: procedural requirements for certain enforcement undertakings and orders

36. Schedule 10 (procedural requirements for certain enforcement undertakings and orders) has effect as if, in paragraphs 1(a) and 6(a), for “section 73 or 82 or paragraph 3 or 9 of Schedule 7” there were substituted “section 33D of the 1991 Act or section 82 of, or paragraph 3 or 9 of Schedule 7 to, this Act”.

New regulation 37

22. After regulation 36, insert—

“Review

37.—(1) The Secretary of State must—

(a) carry out reviews of these Regulations; and

(b) for each review, publish a report setting out the conclusions of the review.

(2) The reports must, in particular—

(a) set out the objectives intended to be achieved by these Regulations;

(b) assess the extent to which those objective are achieved; and

(c) assess whether those objectives remain appropriate, and if so, the extent to which they could be achieved with a system that imposes less regulation.

(3) The first report must be published by 17th December 2020.

(4) Subsequent reports must be published at intervals not exceeding five years.”.

PART 3

Amendments to the Enterprise Act 2002 (Merger Fees and Determination of Turnover) Order 2003

Article 3

23. For paragraph (d) of article 3 (matters in respect of which fees are payable) substitute—

“(d) subject to article 4(3) and (4), the decision by the CMA in relation to a possible merger reference under section 32(a) or (b) of the Water Industry Act 1991 that it is or may be the case—

- (i) that arrangements are in progress which, if carried into effect, will result in a merger of any two or more water enterprises; or
- (ii) that such a merger has taken place otherwise than as a result of the carrying into effect of arrangements that have been the subject of a reference by virtue of sub-paragraph (i) above.”.

Article 4

24. After paragraph (2) of article 4, insert—

“(3) A fee shall not be payable under article 3(d)—

- (a) where the merger or prospective merger of two or more water enterprises depends or would depend on the operation of section 26(3) or (4)(b) of the Act; or
- (b) in relation to arrangements of a kind specified in paragraph (4), where the CMA decides pursuant to section 33A(1)(a) of the Water Industry Act 1991(a) that they are not sufficiently far advanced, or are not sufficiently likely to proceed, to justify the making of a merger reference.

(4) The arrangements are those in progress or in contemplation which, if carried into effect, will result in a merger of any two or more water enterprises.”.

PART 4

Saving provision

Saving provision

25. Part 3 of these Regulations does not affect any obligation to pay a fee which arose under article 9 of the Enterprise Act 2002 (Merger Fees and Determination of Turnover) Order 2003 before 18th December 2015.

24th November 2015

Rory Stewart
Parliamentary Under Secretary of State
Department for Environment, Food and Rural Affairs

(a) Section 33A(1)(a) was inserted by section 14(1) of the Water Act 2014 (c.21).

EXPLANATORY NOTE

(This note is not part of the Regulations)

Part 2 of these Regulations amends the Water Mergers (Modification of Enactments) Regulations 2004 (S.I. 2004/3202) (“the WMR 2004”). Part 3 amends the Enterprise Act 2002 (Merger Fees and Determination of Turnover) Order 2003 (S.I. 2003/1370) (“the Merger Fees Order”).

Part 3 of the Enterprise Act 2002 (c.40) contains the main statutory scheme for the regulation of mergers. Sections 32 to 35 of, and Schedule 4ZA to, the Water Industry Act 1991 (c. 56) (“the 1991 Act”) apply that scheme to mergers between water or sewerage undertakers in England and Wales (“water mergers”), subject to modifications set out in the WMR 2004.

Section 14 of the Water Act 2014 (c. 21) amended the 1991 Act to allow the Competition and Markets Authority (“the CMA”) to decide not to refer certain water mergers to the CMA Mergers Panel in certain circumstances and to accept undertakings in lieu of making such a reference.

These Regulations amend the modifications made by the WMR 2004 accordingly, including by imposing time-limits in relation to references and undertakings.

The Merger Fees Order provides for a fee to be payable in respect of merger references made by the CMA under section 32 of the 1991 Act. These Regulations amend the Merger Fees Order so that a fee will also be payable if the CMA, when considering whether to make a merger reference in relation to an actual or prospective water merger, needs to ask the Water Services Regulation Authority for its opinion on the impact of the water merger on its ability to regulate, and how that weighs up against potential customer benefits of the merger. These Regulations also amend the Merger Fees Order so that a fee will be payable if the CMA is considering whether to accept an undertaking under section 33D of the 1991 Act instead of making a merger reference.

A full regulatory impact assessment has not been produced for this instrument as it has no impact on the costs of business. The Explanatory Memorandum is available at www.legislation.gov.uk.

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