
STATUTORY INSTRUMENTS

2018 No. 578

COMPETITION

The Enterprise Act 2002 (Share of Supply Test) (Amendment) Order 2018

Made - - - - 14th May 2018

Coming into force in accordance with article 1(2)

The Secretary of State makes this Order in exercise of the powers conferred by sections 123(1) and 124(2) and (3) of the Enterprise Act 2002⁽¹⁾.

In accordance with section 124(6) of that Act, a draft of this instrument was laid before Parliament and approved by a resolution of each House of Parliament.

In accordance with section 123(3) of that Act, in exercising the power under section 123(1) to amend or replace the condition mentioned in section 23(2)(b) of that Act, the Secretary of State had regard, in particular, to the desirability of ensuring that any amended or new condition continues to operate by reference to the degree of commercial strength which results from the enterprises concerned having ceased to be distinct.

Before making this Order the Secretary of State consulted the Competition and Markets Authority in accordance with section 123(4) of that Act⁽²⁾.

Citation and commencement

1.—(1) This Order may be cited as the Enterprise Act 2002 (Share of Supply Test) (Amendment) Order 2018.

(2) This Order comes into force 28 days after the day on which it is made.

Amendment of the Enterprise Act 2002

2. The Enterprise Act 2002 is amended in accordance with articles 3 to 5 of this Order.

Relevant merger situations

3.—(1) Section 23⁽³⁾ (relevant merger situations) is amended as follows.

(1) 2002 c. 40; section 124(3) was amended by paragraph 24(1) and (2) of Schedule 16 to the Communications Act 2003 c. 21.
(2) Section 123(4) was amended by paragraphs 59 and 158 of Part 2 of Schedule 5 to the Enterprise and Regulatory Reform Act 2013 c. 24.
(3) Section 23(9) was amended by paragraphs 59 and 68 of Part 2 of Schedule 5 to the Enterprise and Regulatory Reform Act 2013 c. 24.

- (2) For subsection (2)(b) substitute—
- “(b) the share of supply test is met.”.
- (3) After subsection (2) insert—
- “(2A) The share of supply test is met if—
- (a) as a result of the enterprises ceasing to be distinct enterprises, one or both of the conditions mentioned in subsections (3) and (4) below prevails or prevails to a greater extent; or
 - (b) in the course of the enterprises ceasing to be distinct a person or group of persons has brought a relevant enterprise under the ownership or control of the person or group and one or both of the conditions mentioned in subsections (4A) and (4B) below was satisfied in relation to the relevant enterprise before it ceased to be a distinct enterprise.”.
- (4) After subsection (4) insert—
- “(4A) The condition mentioned in this subsection is that, in relation to the supply of goods of any description—
- (a) at least one-quarter of all goods of that description which were supplied in the United Kingdom, or in a substantial part of the United Kingdom, were supplied by or to the person or persons by whom the enterprise was carried on, and
 - (b) that supply was made in connection with activities of the enterprise by virtue of which it was a relevant enterprise.
- (4B) The condition mentioned in this subsection is that, in relation to the supply of services of any description—
- (a) the supply of services of that description in the United Kingdom, or in a substantial part of the United Kingdom, was to the extent of at least one-quarter of all the services of that description, supply by or for the person or persons by whom the enterprise is carried on, and
 - (b) that supply was made in connection with activities of the enterprise by virtue of which it was a relevant enterprise.”.
- (5) In subsection (5), for “or (4)” substitute “, (4), (4A) or (4B)”.
- (6) In subsection (6), for “and (4)” substitute “, (4), (4A) and (4B)”.
- (7) After subsection (9) insert—
- “(10) Subsections (2) to (4) of section 26 apply for the purposes of this section as they apply for the purposes of that section.”.

Relevant enterprises

4. After section 23 insert—

“Relevant enterprises

23A.—(1) In section 23 “relevant enterprise” means an enterprise the activities of which consist in or include—

- (a) developing or producing restricted goods;
 - (b) holding information (including but not limited to information comprised in software and documents such as blueprints, manuals, diagrams and designs) that
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- (i) is capable of use in connection with the development or production of restricted goods; and
- (ii) is responsible for achieving or exceeding the performance levels, characteristics or functions of the restricted goods that are specified in the relevant export control legislation;
- (c) owning, creating or supplying intellectual property relating to the functional capability of—
 - (i) computer processing units;
 - (ii) the instruction set architecture for such units;
 - (iii) computer code that provides low level control for such units;
- (d) designing, maintaining or providing support for the secure provisioning or management of—
 - (i) roots of trust of computer processing units;
 - (ii) computer code that provides low level control for such units;
- (e) research into—
 - (i) quantum computing or simulation;
 - (ii) quantum imaging, sensing, timing or navigation;
 - (iii) quantum communications; or
 - (iv) quantum resistant cryptography;
- (f) developing or producing anything designed for use in—
 - (i) quantum computing or simulation;
 - (ii) quantum imaging, sensing, timing or navigation;
 - (iii) quantum communications; or
 - (iv) quantum resistant cryptography;
- (g) supplying services employing—
 - (i) quantum computing or simulation;
 - (ii) quantum imaging, sensing, timing or navigation;
 - (iii) quantum communications; or
 - (iv) quantum resistant cryptography.

(2) In this section—

“intellectual property” means—

- (a) any patent, trade mark, registered design, copyright or design right,
- (b) any right under the law of a country or territory outside the United Kingdom corresponding to, or similar to, a right within paragraph (a), or
- (c) any information or technique not protected by a right within paragraph (a) or (b) but having industrial, commercial or other economic value;

“quantum communications”—

- (a) means the transmission of information, utilising the properties of quantum mechanics, in particular superposition or entanglement, and
- (b) includes the establishment of cryptographic keys and the generation of true random numbers using a quantum physical process;

“quantum computing or simulation” means the study, simulation or realisation of systems that utilise certain properties of quantum mechanics, in particular superposition or entanglement, to process information, run algorithms or perform operations on data;

“quantum imaging” means utilising certain properties of quantum mechanics, in particular superposition or entanglement, to create images of objects with a resolution or other imaging criteria that is beyond what is possible in non-quantum optics;

“quantum navigation” means utilising certain properties of quantum mechanics, including measurements of suspensions of atoms or ions, to establish the location or movement of objects with a resolution or sensitivity that is beyond what is possible in non-quantum devices or systems;

“quantum resistant cryptography” means methods of securing information or data being transmitted or stored, including by non-quantum means, with a view to resisting attack by a quantum computer;

“quantum sensing” means utilising certain properties of quantum mechanics, including measurements of suspensions of atoms or ions, to determine a property or rate of change in the property of an object, or the effect of an object on a measurable quantity, with a resolution or sensitivity that is beyond what is possible in non-quantum devices or systems;

“quantum timing” means utilising certain properties of quantum mechanics, including measurements of suspensions of atoms or ions, to provide a timing signal with a resolution or sensitivity that is beyond what is possible in non-quantum devices or systems;

“relevant export control legislation” means—

- (a) Schedules 2 and 3 to the Export Control Order 2008⁽⁴⁾;
- (b) the Schedule to the Export of Radioactive Sources (Control) Order 2006⁽⁵⁾;
- (c) Annex I to Council Regulation (EC) No. 428/2009⁽⁶⁾;

“restricted goods” means goods, software or information the export or transfer of which is controlled by virtue of their being specified in the relevant export control legislation but excluding any goods, software or information which are controlled only to the extent that they are prohibited from being exported or transferred to one country only;

“roots of trust”—

- (a) means hardware, firmware, or software components that are inherently trusted to perform critical security functions, and
- (b) includes cryptographic key material bound to a device that can identify the device or verify a digital signature to authenticate a remote entity.”.

Consequential amendments

5.—(1) In section 35(7)(7) for the words from “any such result” to “arisen” substitute “, for the purposes of section 23(2)(b), the share of supply test is met”.

(4) S.I. 2008/3231; Schedule 2 was substituted by S.I. 2017/85 and subsequently amended by S.I. 2017/697 and Schedule 3 was substituted by S.I. 2010/2007 and subsequently amended by S.I. 2012/1910, S.I. 2014/1069, S.I. 2015/940 and S.I. 2017/85.

(5) S.I. 2006/1846.

(6) OJ No L 134, 29.5.2009, p. 1, as last amended by Commission Delegated Regulation (EU) 2017/2268 (OJ No L 334, 15.12.2017, p. 1).

(7) Section 35(7) was amended by paragraphs 59 and 75 of Part 2 of Schedule 5 to the Enterprise and Regulatory Reform Act 2013 c. 24.

(2) In section 36(6)(8) for the words from “any such result” to “arise” substitute “, for the purposes of section 23(2)(b), the share of supply test will be met”.

(3) In section 48(3)(9) for the words from “any such result as is mentioned in section 23(2)(b)” to “will arise” substitute “, for the purposes of section 23(2)(b), the share of supply test is or will be met”.

Transitional provision

6. The amendments made by articles 3 to 5 apply only in relation to cases where enterprises cease to be distinct after the commencement of this Order.

Richard Harrington
Parliamentary Under Secretary of State
Department for Business, Energy and Industrial
Strategy

14th May 2018

(8) Section 36(6) was amended by paragraphs 59 and 76 of Part 2 of Schedule 5 to the Enterprise and Regulatory Reform Act 2013 c. 24.
(9) Section 48(3) was amended by paragraphs 59 and 90 of Part 2 of Schedule 5 to the Enterprise and Regulatory Reform Act 2013 c. 24.

EXPLANATORY NOTE

(This note is not part of the Order)

This Order amends section 23 of the Enterprise Act 2002 (c. 40) (the Act) which sets out the criteria for a merger to be a “relevant merger situation”, thereby qualifying it for investigation by the Competition and Markets Authority. The Secretary of State has the power under section 42 of the Act to intervene in a “relevant merger situation” on the grounds of specified public interest considerations, where appropriate.

A “relevant merger situation” is created if: two or more enterprises have ceased to be distinct at a time or in circumstances set out in section 24 of the Act, and at least one of the following thresholds is met:

- (a) the value of the turnover in the UK of the enterprise being taken over exceeds £70m (the “turnover test”); or
- (b) the merger would result in the creation or enhancement of at least a 25% share of supply of goods or services in the UK, or in a substantial part of the UK (the “share of supply” test).

Article 3 of the Order amends the share of supply test so that, in cases where the enterprise being taken over is a “relevant enterprise” that test is additionally met, if the relevant enterprise has a 25% share of supply of goods or services in the UK before the merger. The relevant goods or services for this purpose are those by virtue of which it qualifies as a “relevant enterprise”.

Article 4 inserts a new section 23A into the Act which defines a “relevant enterprise”. The definition covers enterprises which are involved in specified activities in connection with the following: military or dual-use goods which are subject to export control, computer processing units and quantum technology.

Article 5 makes minor consequential amendments. Article 6 makes transitional provision to the effect that the amendments made by the Order apply only in cases where enterprises cease to be distinct after the Order comes into force.

A separate Order made under section 28(6) of the Act and coming into force immediately after this Order amends the turnover test in section 23(1)(b) of the Act so that, in cases where the enterprise being taken over is a “relevant enterprise”, the test is met if that enterprise has turnover in the UK of over £1m instead of £70 million.

A full impact assessment of the effect that this Order and the Order amending the turnover test will have on the costs to business and the public sector is available from the Department for Business, Energy and Industrial Strategy, 1 Victoria Street, London SW1H 0ET and is also published with an Explanatory Memorandum alongside this instrument on the UK Legislation website www.legislation.gov.uk.