

Subsidiary Legislation made under ss.81, 183 & 288.

Competition (Merger Fees and Determination of Turnover) Order 2021

LN.2021/037

		<i>Commencement</i>	1.1.2021
Amending enactments	Relevant current provisions		Commencement date
LN. 2023/237	Art. 6(1)(a)-(c)		1.8.2023
2025/208	Art. 6(1)(a)-(c)		1.8.2025

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In exercise of the powers conferred on him by sections 81, 183 and 288 of the Competition Act 2020, and all other enabling powers, the Minister has made the following Order-

Title.

1. This Order may be cited as the Competition (Merger Fees and Determination of Turnover) Order 2021.

Commencement.

2. This Order comes into operation on the day of publication.

Interpretation.

3.(1) In this Order-

“the Act” means the Competition Act 2020;

“applicable turnover” means the turnover of an enterprise in the preceding business year, or in a case to which article 11(4) applies, in the period referred to in that article, determined in accordance with the Schedule to this Order; and where a business year or a period under article 11(4) does not equal 12 months the applicable turnover shall be the amount which bears the same proportion to the applicable turnover during that business year as 12 months does to that period;

“business year” means a period of more than six months in respect of which an enterprise or, if applicable, the business of which it forms part, prepares or is required to prepare accounts;

“merger reference” means a reference by the GCMA to its chair under section 74 or 85 of the Act or a reference by the Minister to the chair of the GCMA under section 103 of the Act.

Matters in respect of which fees are payable.

4. A fee of the amount specified in article 6 shall be payable in respect of-

- (a) subject to article 5(1) and (2), the decision by the GCMA in relation to a possible reference under section 74 or 85 of the Act that it is or may be the case that a relevant merger situation has been created or (as the case may be) that arrangements are in progress or in contemplation which, if carried into effect, will result in the creation of a relevant merger situation;

- (b) subject to article 5(1), the decision by the Minister in relation to a possible reference under section 103 of the Act that it is or may be the case that a relevant merger situation has been created or (as the case may be) that arrangements are in progress or in contemplation which, if carried into effect, will result in the creation of a relevant merger situation.

Circumstances in which certain fees are not payable.

5.(1) Except where the decision in respect of which a fee is payable under article 4(b) is made in relation to arrangements or proposed arrangements of which the GCMA was given notice under section 157(5) of the Act, a fee shall not be payable under article 4(b) where the creation or possible creation of the relevant merger situation depends or would depend on the operation of section 79(3) or (4)(b) of the Act.

(2) A fee shall not be payable under article 4(b) in relation to arrangements that are in progress or in contemplation which, if carried into effect, will result in the creation of a relevant merger situation, where the GCMA decides pursuant to section 85(2)(b) of the Act that the arrangements concerned are not sufficiently far advanced, or are not sufficiently likely to proceed, to justify the making of a merger reference.

Amount of fees.

6.(1) The amount of the fee payable under article 4 is-

- (a) where the value of the turnover in Gibraltar of the enterprise which has been taken over or (as the case may be) which it is proposed or contemplated should be taken over, does not exceed £10 million, £5,470;
- (b) where the value of such turnover exceeds £10 million but does not exceed £25 million, £10,938;
- (c) where the value of such turnover exceeds £25 million, £16,408.

(2) For the purposes of this article the value of the turnover in Gibraltar of the enterprise which has been taken over or (as the case may be) which it is proposed or contemplated should be taken over, shall be determined by taking the total value of the turnover in Gibraltar of the enterprises which cease to be distinct enterprises and deducting-

- (a) the turnover in Gibraltar of any enterprise which continues to be carried on under the same ownership and control; or

- (b) if no enterprise continues to be carried on under the same ownership and control, the turnover in Gibraltar which, of all the turnovers concerned, is the turnover of the highest value.

(3) For the purposes of this article the turnover in Gibraltar of an enterprise shall be determined in accordance with article 11(2) to (4).

Person by whom fees are payable.

7.(1) Where the decision in respect of which a fee is payable under article 4 is made in relation to arrangements or proposed arrangements of which the GCMA was given notice under section 157 of the Act and the person who gave the notice still exists at the time when the fee is payable under article 10, the fee is payable by the person who gave the notice.

(2) In any other case, the fee payable under article 4 is payable by the acquirer.

(3) For the purposes of this article and article 8 “the acquirer” means the person, or group of persons, who has or have acquired or will, if those arrangements are carried into effect, acquire either-

- (a) a controlling interest in one of the enterprises which was or is involved in the creation or possible creation of a relevant merger situation which is the subject of the merger reference or, as the case may be, the GCMA’s or the Minister’s decision not to make such a merger reference, and in which he or they did not previously have such an interest; or
- (b) in the case of such an enterprise carried on by a body corporate in which he or they did not previously have a controlling interest, a controlling interest in that body corporate.

(4) In a case where paragraph (3) applies to more than one person, whether by virtue of them being treated as associated persons, as defined in section 187 of the Act, or otherwise, the persons to whom it applies shall be jointly and severally liable for the fee in that case.

(5) Where a fee is payable under article 4(b) or (c) but the acquirer is not-

- (a) a resident of Gibraltar; or
- (b) a body corporate incorporated under the law of Gibraltar; or
- (c) a person carrying on business in Gibraltar,

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he shall not be liable to pay the fee unless the creation or possible creation of a relevant merger situation which is the subject of the merger reference or, as the case may be, the GCMA's or the Minister's decision not to make such a merger reference, results wholly or partially from anything done by him within Gibraltar.

Exemption for acquisitions by small and medium sized enterprises.

8.(1) In a case in which, by virtue of article 7(1), the obligation to pay the fee under article 4 falls on a person who gave a merger notice under section 157 of the Act, no fee shall be payable if-

- (a) that person is the acquirer;
- (b) the notified arrangements relate to the enterprise that has been, or will be, taken over by the acquirer; and
- (c) the acquirer qualifies as small or medium sized.

(2) In any other case, no fee is payable under article 4 where the acquirer qualifies as small or medium sized.

(3) But paragraphs (1) and (2) do not apply where the acquirer is an individual.

(4) For the purposes of paragraphs (1) and (2) an acquirer qualifies as small or medium sized if-

- (a) the acquirer (whether or not it is a company) met, in its most recent financial year before the time when the fee would otherwise become payable, the qualifying conditions to be small or medium-sized as specified in Schedule 9 of the Companies Act 2014; and
- (b) where the acquirer is a member of a group as defined in section 280 of the Companies Act 2006 (whether or not the acquirer is a company), that group met, in its most recent financial year before the time when the fee would otherwise become payable, the qualifying conditions to be small or medium-sized as specified in section 293 of that Act.

Person to whom fees are payable.

9. In a case falling within article 4 the fee shall be payable to the GCMA.

Time when fees are payable.

10.(1) In a case falling within article 4(a), the fee shall be payable when the GCMA publishes the merger reference or, as the case may be, publishes its decision that the duty to make such a merger reference does not apply.

(2) In a case falling within article 4(b), the fee shall be payable when the Minister publishes the merger reference, or as the case may be, when the Minister's decision not to make such a merger reference is published.

Determination of turnover in Gibraltar of an enterprise.

11. (1) This article shall apply for the purposes referred to in section 81(2) of the Act and article 6.

(2) The turnover in Gibraltar of an enterprise shall be, subject to paragraph (3), the applicable turnover for the business year preceding-

- (a) where the question whether a relevant merger situation has been created is being determined, the date when the enterprises concerned ceased to be distinct enterprises or such earlier date as the decision-making authority considers appropriate;
- (b) where the question whether it is or may be the case that arrangements are in progress or in contemplation which, if carried into effect, will result in the creation of a relevant merger situation is being determined, the date when the decision in relation to a possible reference has been or is to be made, or such earlier date as the decision-making authority considers appropriate.

(3) Where an acquisition or divestment or other transaction or event has occurred since the end of the preceding business year which the decision-making authority considers may have a significant impact on the turnover of the enterprise, that acquisition or divestment or other transaction or event may be taken into account if the decision-making authority considers it appropriate to do so.

(4) Where in the application of this article there is any period in respect of which there is no preceding business year then the applicable turnover shall be the turnover for that period.

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Article 3

Interpretation.

1. In this Schedule-

“branch” means a place of business in Gibraltar which forms a legally dependent part of a credit institution or financial institution and which conducts directly all or some of the operations inherent in the business of the undertaking and any number of branches set up in Gibraltar shall for the purposes of this Order be regarded as a single branch;

“credit institution” means a credit institution for the purposes of Article 1 of Directive 2000/12/EC of the European Parliament and of the Council of 20 March 2000 relating to the taking up and pursuit of the business of credit institutions;

“financial institution” means a financial institution for the purposes of Article 1 of Directive 2000/12/EC of the European Parliament and of the Council of 20 March 2000 relating to the taking up and pursuit of the business of credit institutions;

“insurance undertaking” means an insurance undertaking carrying on the business of direct insurance of a class set out in the Annex to Council Directive (EEC) 73/239 the First Council Directive on the co-ordination of laws, regulations and administrative provisions relating to the taking-up and pursuit of the business of direct insurance other than life assurance or in Article 2 of Directive 2002/83/EC of the European Parliament and of the Council of 5th November 2002 concerning life assurance; and

terms used in this Schedule in respect of the determination of the applicable turnover of credit institutions, financial institutions and insurance undertakings shall (except where the contrary intention appears) have the same meaning as in the relevant Directive.

2. Save in paragraphs 4 to 9, the provisions of this Schedule shall be interpreted in accordance with accounting principles and practices that are generally accepted in Gibraltar.

General.

3. The applicable turnover of an enterprise, other than an enterprise which is a credit institution, financial institution or insurance undertaking shall be limited to the amounts derived from the sale of products and the provision of services falling within the ordinary

activities of the enterprise to businesses or consumers in Gibraltar after deduction of sales rebates and (where applicable) other taxes directly related to turnover.

4. Subject to paragraphs 8 and 9, where an enterprise consists of two or more enterprises which are under common ownership or control the applicable turnover shall be calculated by adding together the respective applicable turnover of each of the enterprises under common ownership or control.

5. For the purposes of paragraphs 4 and 7 to 9, enterprises shall in particular be treated as being under common control if they are-

- (a) enterprises of interconnected bodies corporate;
- (b) enterprises carried on by two or more bodies corporate of which one and the same person or group of persons has control; or
- (c) an enterprise carried on by a body corporate and an enterprise carried on by a person or group of persons having control of that body corporate.

6. A person or group of persons able, directly or indirectly, to control or materially influence the policy of a body corporate, or the policy of any person in carrying on an enterprise but without having a controlling interest in that body corporate or in that enterprise, may, for the purposes of paragraph 4, be treated by the decision-making authority as having control of it.

7. Section 187 of the Act shall apply to the determination of whether enterprises are under common control for the purposes of paragraphs 5 and 6 as it applies, for the purposes specified in section 187, to section 79 of the Act.

8. Subject to paragraph 9, applicable turnover shall not include amounts derived from the sale of products or the provision of services between enterprises under common ownership or control.

9. Where, as a result of the merger situation, one or more enterprises ceases or will cease to be under common ownership or control with the enterprise being taken over, the decision-making authority may treat amounts derived from the sale of products or the provision of services between the enterprise being taken over and any enterprises ceasing to be under common ownership or control with that enterprise as applicable turnover and if such sale of products or provision of services has not resulted in any turnover or the decision-making authority considers that the turnover attributed to them does not reflect open market value, the decision-making authority may attribute such value to them as it considers appropriate and include them in the calculation of applicable turnover.

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10. Where an enterprise has applicable turnover part of which is attributable to a credit institution, financial institution or insurance undertaking, that part or those parts of the applicable turnover shall be calculated in accordance with paragraphs 3, 11 and 12.

Credit institutions and financial institutions.

11. The applicable turnover of an enterprise which is a credit institution or financial institution shall be limited to the sum of the following income as defined in Council Directive (EEC) 86/635 received by the branch or division of that institution established in Gibraltar after deduction of other taxes directly related to those items-

- (a) interest income and similar income;
- (b) 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.

Insurance undertakings.

12. The applicable turnover of an enterprise which is an insurance undertaking shall be limited to the value of gross premiums received from residents of Gibraltar which shall comprise 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.