

Enterprise Act 2002

The Facts

The Enterprise Act 2002 came into force on 20 June 2003. And it will affect businesses of all sizes. The Enterprise Act (the Act) makes a number of significant reforms to competition and consumer law enforcement in the UK. These are designed to empower consumers and to give competition authorities such as the Office of Fair Trading (the OFT) a stronger role in ensuring that markets work well.

The Act builds on the progress made by the Competition Act 1998, which will remain in force with some minor amendments, and largely replaces the Fair Trading Act 1973.

The Act has wide ranging implications for both businesses and consumers. Steve Lisseter, the OFT's Enterprise Act Co-ordinator, explains: 'The Act recognises that competition and consumer law enforcement is a specialist activity which is best carried out by strong, proactive and independent authorities. By giving bodies such as the OFT improved enforcement and investigatory powers – and imposing criminal penalties on individuals who engage in anti-competitive behaviour – it underlines the need for businesses to safeguard the interests of their consumers. If companies and their advisors are not yet ready for the new Act, now is the time to do something about it'.

The changing role of the OFT

Under the Act the OFT became a corporate body with a chairman and a minimum of four non-executive directors. The OFT is funded by the government and its 620 staff are civil servants.

What the OFT does

The OFT's goal is to make markets work well for consumers. To do this they enforce competition laws and consumer protection laws and they investigate the operation of markets. In addition, the OFT publish advice and information for businesses on the application of the

competition and consumer laws, and advice and information for consumers to raise their awareness of the benefits of competition and how they can buy wisely. The OFT also advise ministers and public bodies about matters relating to competition and consumer law, including possible changes to existing or proposed legislation.

Criminalisation of cartels

The Act makes it a criminal offence for individuals to dishonestly engage in certain cartel activities, namely price-fixing, limiting supply or production, market-sharing or bid-rigging. This new offence applies to agreements between undertakings at the same level of the supply chain (so-called horizontal agreements) and carries a maximum penalty of five years' imprisonment and/or an unlimited fine.

Disqualification of directors

The OFT and certain sector regulators may apply for a court order disqualifying the directors of companies which have breached national or European competition law. These Competition Disqualification Orders (CDO's) prevent individuals from acting as a company director or taking on certain other management roles for up to 15 years. An order may be granted if the court decides an individual contributed to the breach or failed to take steps to prevent it.

Alternatively, the OFT may accept a Competition Disqualification Undertaking (CDU) from the individual concerned. This has the same effect as a CDO, but takes the form of a binding commitment to the OFT. In such cases, the OFT will set the period of disqualification and the individual's name will not appear on the Public Register of Disqualified Directors.

Enforcement of Consumer Law

Part 8 of the Act improves consumer protection by giving the OFT, trading standards departments and certain other enforcement bodies wider scope to obtain court orders against traders who are in breach of consumer legislation. This new enforcement framework replaces the Stop Now Orders (EC Directive) Regulations, which were introduced in June 2001, and Part III of the Fair Trading Act and will ensure faster enforcement action.

Enforcement orders can be obtained against two types of infringement:

- breaches of UK laws relating to EC Directives, such as those on consumer credit, package holidays and unfair terms in consumer contracts. These are called 'community infringements'.
- breaches of other UK legislation specified by the Secretary of State. These are called 'domestic infringements'.

Consumer Codes of Practice

Under the Act, trade associations or other recognised industry bodies can apply for OFT approval for a consumer code of practice.

To gain OFT approval – signified by an official symbol – the code must meet a set of published criteria and the industry body or 'code sponsor' must provide evidence that it is working for the benefit of consumers. Approval can be withdrawn if the code subsequently fails any of these tests.

Super-complaints

The Act enshrines in law the 'super-complaints' procedure through which designated consumer bodies can raise concerns about specific markets with the OFT for a fast-track response.

Super-complaints should normally include reasonable evidence that market structures or practices are significantly harming the interests of consumers. The OFT will announce within 90 days whether or not the complaint is to be taken further, for example to a full market study or enforcement action.

Mergers

The majority of merger decisions will be taken by the OFT and the Competition Commission (CC) as specialist, independent competition authorities. Ministers will become involved only where there are defined public interest considerations. At present national security is the only defined public interest consideration, but there is scope in the Act for additional public interest considerations to be

added. Mergers will be assessed against a competition test, rather than the wider public interest test formerly applied.

A merger will be investigated by the OFT if the target company has a UK turnover of £70 million ('the turnover test') or if the merging parties will together supply at least 25 per cent of goods and services in the UK or a substantial part of it ('the share of supply test'). The OFT has a duty to refer to the CC a merger which may be expected to result in a 'substantial lessening of competition', but can accept undertakings in lieu of a reference. There are certain exceptions to this duty, which are described in the Mergers guidance listed, page three.

Competition Appeal Tribunal

The Act replaces the Appeal Tribunals of the Competition Commission (known as CCAT) with a new, independent body, the Competition Appeal Tribunal (CAT). The CAT will be entirely separate from the CC and have a wider range of functions. It will be able to hear appeals against decisions taken under the Competition Act and review OFT, CC and DTI decisions on merger or market investigation decisions. It will also be able to hear claims for damages where an infringement of competition law has been established, including representative claims made by designated bodies on behalf of named consumers.

Market studies

Under the Act, the OFT will study markets where it has reason to believe they are not working well for consumers. These studies may lead to a number of outcomes, including:

- publication of a report with recommendations
- enforcement action under the Competition Act or consumer legislation
- a market investigation reference to the CC
- consumer information and education initiatives
- a clean bill of health for the market

Market investigation references can be made to the CC, without ministerial involvement, if the OFT has reasonable grounds to suspect that competition is being prevented, restricted or distorted.

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