

How will the Enterprise Act 2002 change the Competition Act 1998 regime?

A photograph of a person's hands and forearms, gesturing as if in conversation. The hands are positioned in the lower half of the frame, with fingers spread and palms facing each other. The background is a solid, bright yellow. The person is wearing a dark-colored long-sleeved shirt and a watch on their left wrist.

Enterprise
Act
2002

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Introduction

This booklet provides a summary of the main ways in which the provisions of the Enterprise Act 2002 (the Enterprise Act) will impact on the existing Competition Act 1998 (the Competition Act) regime. Where, as a result of the Enterprise Act, significant changes are required to the existing Competition Act guidelines published by the Office of Fair Trading (the OFT) this booklet indicates these changes.

The Competition Act regime is likely to be subject to further change as a result of the EC Modernisation package introduced by Regulation EC 1/03 (OJ L1 4.1.2003 p.1). The DTI published a consultation paper on 1 April 2003 (Consultation No: CCP 008/03) setting out proposed changes to the Competition Act regime resulting from the EC Modernisation package. The OFT will revise the existing Competition Act guidelines, in association with the Regulators, to include any changes resulting from EC Modernisation and will publish the revised guidelines for consultation later in 2003. At the same time the Competition Act guidelines will be amended to include the changes to the Competition Act resulting from the Enterprise Act as set out in this booklet.

The revised Competition Act guidelines, taking into account the Enterprise Act changes outlined in this booklet, will be published before the changes resulting from Regulation EC 1/03 come into force on 1 May 2004.

References to the OFT in this booklet are to be interpreted as applying to the regulators with concurrent competition powers, unless the text indicates otherwise. These are the Director General of Telecommunications, the Gas and Electricity Markets Authority, the Director General of Water Services, the Northern Ireland Authority for Energy Regulation, the Rail Regulator, and the Civil Aviation Authority (the Regulators).

What will not change

The provisions of the Enterprise Act are largely complementary to those of the Competition Act, which remains in force. As a result, the substantive Chapter I and Chapter II prohibitions remain in place and the general Competition Act procedures for investigation and enforcement continue to apply.

There are no significant changes to the scope of the existing Competition Act exemptions and exclusions. In particular, whilst the Fair Trading Act 1973 merger control provisions will be replaced by the Enterprise Act, the exclusions in the Competition Act for mergers and for restrictions which are ancillary to mergers both remain in place. However, the exclusion for designated professional rules is being repealed, (see below) since it has not been relied on in practice.

Under the Enterprise Act there will be no change to the penalties applied to undertakings for infringing the Chapter I or Chapter II prohibitions. The DTI is consulting on what maximum penalties should be applied following EC Modernisation.

However, although the Competition Act regime remains in place, there are important changes to the OFT's structure as well as its procedures and activities.

The Office of Fair Trading

From 1 April 2003, the OFT consists of a board composed of a chairman and six other members (five non-executive). Previously the OFT existed on a non-statutory basis as the administrative support for the Director General of Fair Trading. Under the Enterprise Act the position of Director General is abolished and his current functions are transferred to the OFT.

The Enterprise Act introduces a criminal offence for individuals who dishonestly engage in certain types of cartel agreements.

As a consequence of this change all references to the Director General of Fair Trading or the Director General contained in the Competition Act guidelines should be read as referring to the OFT. These references continue, where appropriate, to refer to the Regulators.

The Chapter I prohibition and the criminalisation of cartels

As noted above, the substantive penalties applied to undertakings for a breach of the Competition Act continue to apply. Alongside the Competition Act regime, which applies to undertakings, the Enterprise Act introduces a criminal offence for individuals who dishonestly engage in certain types of cartel agreements.

The cartel agreements specified in sections 188-189 of the Enterprise Act do not cover all agreements which would be caught by the Chapter I prohibition, only the specified offences of price fixing, market-sharing, bid-rigging and limiting the production or the supply of goods or services. The Enterprise Act allows the OFT to issue notices (known as no-action letters) giving individuals immunity from prosecution in England, Wales and Northern Ireland. In Scotland cooperation by an individual will be taken into account when deciding whether or not to prosecute. The OFT will have additional powers for investigating the cartel offence. While the OFT will have reserve prosecution powers, the Serious Fraud Office, in practice, will prosecute the offence in England and Wales and Northern Ireland and the Lord Advocate will prosecute in Scotland. The power to investigate the criminal cartel offence and the additional powers of investigation given to the OFT are not exercisable by the Regulators.

Further details of the criminal offence are given in the *Overview of the Enterprise Act (OFT508)* (the Overview), the consultation draft guidance: *Powers for Investigating Criminal Cartels (OFT505)*, which provides details of the OFT's powers of investigation in connection with the cartel offence, as well as the guidance: *The cartel offence: no-action letters for individuals (OFT513)*, which contains information about the conditions and procedure for issuing no-action letters.

Disqualification of directors

The Enterprise Act gives the OFT the power to apply to the courts for a Competition Disqualification Order (CDO) where there has been a breach of competition law. The court must grant a CDO to disqualify a person where the person is a director of an undertaking which commits a breach of any of the prohibitions set out in Chapter I or Chapter II or Articles 81 or 82 of the EC Treaty and where the court considers that as a result of his or her conduct the person concerned is unfit to be a director. The maximum period of disqualification under a CDO is 15 years. The OFT may also, instead of applying for a CDO, accept Competition Disqualification Undertakings which have the same binding effect as a CDO but are given voluntarily by the person concerned rather than imposed by the court.

Further details of the disqualification regime, including the factors which will determine whether the OFT applies for a CDO, or accepts an undertaking and the procedures which will apply are set out in the OFT guidance: *Competition Disqualification Orders (OFT510)*.

The Enterprise Act establishes the Competition Appeal Tribunal (CAT) as a specialist independent body for appeals on matters relating to competition law.

Competition Act powers of investigation

The Enterprise Act gives the OFT the power, when it obtains a warrant in connection with a Competition Act investigation, to take authorised, non-OFT, staff on company visits. The OFT expects to use this power to take specialists such as IT experts, for example, to use their expertise in collecting and assessing evidence stored in computers on site.

Guidance on the use of this power will be added to the Competition Act guideline *Powers of Investigation* (OFT404) in due course.

Appeals and litigation

The Enterprise Act establishes the Competition Appeal Tribunal (CAT) as a specialist independent body for appeals on matters relating to competition law. This replaces the Competition Commission Appeal Tribunals (CCAT) that were established as part of the Competition Commission by the Competition Act.

The CAT takes over the CCAT's existing functions under the Competition Act (details of these functions are set out in the Competition Act guideline *The Major Provisions* (OFT400)). The CAT also takes on the following new functions under the Enterprise Act, which impact on the Competition Act regime:

- hearing damages claims where an infringement of the Chapter I or Chapter II prohibitions or Articles 81 and 82 of the EC Treaty has been established by the OFT, and
- hearing representative claims for damages, brought by specified consumer bodies on behalf of named individuals for established breaches of competition law.

Further details of these changes are set out in the Overview.

The Enterprise Act also makes further provision in the case of damages claims to the CAT or any other court by persons who have suffered loss or damage as a result of a breach of the Chapter I or Chapter II prohibitions or Articles 81 and 82 of the EC Treaty. In such cases the court is bound by decisions of the OFT or the European Commission finding that there has been a breach of those provisions, provided that the time for appealing the decision in question has elapsed. Claimants may also rely on a decision of the CAT establishing a breach of one of the prohibitions that results from an appeal of an earlier decision by the OFT.

References to the Competition Commission Appeal Tribunals (or to the CCAT) in the guidelines should be read as references to the CAT (see in particular the Competition Act guideline *The Major Provisions* paragraphs 14.1 to 14.6, and in the Competition Act guideline on *Enforcement* (OFT407) paragraphs 4.47 to 4.50).

Third party appeals

Previously third parties could only appeal a decision of the Director General of Fair Trading, other than a decision concerning the imposition of any penalty or the withdrawing or varying of a decision following a third party appeal, after first applying to the Director General requesting the Director General to withdraw or vary the decision. The third party's right of appeal to the CCAT was then against the Director General's refusal to do so. Under the Enterprise Act this procedure is abolished and any third parties with sufficient interest in the decision will have a right of appeal directly to the CAT.

As a result of this change, paragraphs 14.7 and 14.8 in the Competition Act guideline *The Major Provisions* on third party appeals should be ignored.

The Enterprise Act replaces the Director General's monopoly reference powers with a new power for the OFT to make market investigation references.

Repeal of the exclusion for professional rules

The Enterprise Act repeals Schedule 4 of the Competition Act which excluded designated professional rules from the Chapter I prohibition. No rules have ever been designated under this exclusion, and repeal of the Schedule means that these rules will continue to be subject to the Chapter I prohibition in the same way as all other agreements and decisions of associations.

As a result of the repeal, references to the exclusion in paragraph 5.1 of the Competition Act guideline *The Major Provisions*, in paragraph 5.1 of the Competition Act guideline *The Chapter I Prohibition* (OFT401) and in paragraphs 6.1 to 6.8 of Competition Act guideline *Trade Associations, Professions and Self-Regulating Bodies* (OFT408) should be ignored.

Market investigation references

The Enterprise Act replaces the Director General's monopoly reference powers with a new power for the OFT to make market investigation references to the Competition Commission. There are technical changes to the reference test and to the associated investigatory powers. Further information on the market investigation reference provisions is given in the OFT guidance on *Market investigation references* (OFT511).

The OFT will, as a matter of policy, consider whether a matter which needs investigation involves an infringement of the Chapter I or Chapter II prohibitions, before it considers whether to initiate a market study or make a reference to the Competition Commission under the Enterprise Act's market investigation provisions.

As a consequence of this change, references in the Competition Act Guidelines to the Fair Trading Act monopoly provisions should instead refer to these market investigation powers (in paragraph 6.2 of the Competition Act guideline *Vertical Agreements and Restraints* (OFT419)). The details of the Fair Trading Act monopoly provisions contained in paragraphs 13.1 to 13.5 of the Competition Act guideline *Major Provisions* and paragraphs 4.7 to 4.9 of the Competition Act guideline *Concurrent Application to Regulated Industries* (OFT405) should be ignored.

Super-complaints

The Enterprise Act introduces the opportunity for consumer bodies, designated by the Secretary of State, to make super-complaints to the OFT and to the Regulators when they believe that features of a market are significantly harming the interests of consumers. There is a wide range of possible outcomes, including the scope for an investigation under the Competition Act when there are reasonable grounds to suspect that one of the prohibitions has been breached.

For further information about super-complaints see the consultation draft guidance *Super-complaints: guidance for designated consumer bodies* (OFT504) and the final guidance to be published in the Summer of 2003.

Handling of information

The Enterprise Act repeals the Competition Act provisions relating to the disclosure of information and replaces them with more detailed provisions for the handling and disclosure of information received by the OFT and other public bodies. The fundamental principles of protecting confidential information

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are not changed by the Enterprise Act, but there will be new gateways for information disclosure by UK authorities to overseas authorities for enforcement purposes.

Subject to a number of conditions, information obtained during Competition Act investigations may be disclosed to overseas authorities provided that it is not disclosed further by the overseas authority without the OFT's consent. The overseas authority may not use the information disclosed for any purpose other than that for which it was sought.

Disclosure by OFT staff in breach of the rules for information handling remains a criminal offence.

The consultation guidance: *The overseas disclosure of information* (OFT507) deals with disclosure to overseas authorities in more detail.

When will these provisions come into force?

The Enterprise Act will commence in stages. The first stage, which includes measures which provide for the commencement of the OFT Board, the establishment of the CAT and the repeal of Schedule 4 of the Competition Act, came into force on 1 April 2003. The remaining substantive competition provisions will come into force on 20 June 2003.

This document is not a substitute for the Competition Act 1998, the Enterprise Act 2002, or for regulations and orders made under those Acts. Nor should it be regarded as a substitute for statutory guidance issued in relation to those Acts. Parties to an agreement or conduct should seek their own legal advice before coming to a final view on any particular competition issue themselves.

Documents referred to in this booklet

The following are the Competition Act guidelines and the Enterprise Act guidance and consultation documents referred to in this booklet:

Competition Act guidelines

Major Provisions

OFT400, published March 1999

Chapter I Prohibition

OFT401, published March 1999

Powers of Investigation

OFT404, published in March 1999

Concurrent Application to Regulated Industries

OFT405, published March 1999

Enforcement

OFT407, published March 1999

Trade Associations, Professions and Self-Regulating Bodies

OFT408, published March 1999

Vertical Agreements and Restraints

OFT419, published in March 2000

Enterprise Act guidance documents and consultation papers

Super-complaints: guidance for designated consumer bodies

OFT504, consultation paper issued August 2002

Powers for investigating criminal cartels

OFT505, consultation paper issued April 2003

Controls on overseas information disclosure

OFT507, consultation paper issued April 2003

Competition Disqualification Orders

OFT510, published May 2003

Market investigation references

OFT511, published March 2003

The cartel offence: no-action letters for individuals

OFT513, published April 2003

Where can I get further information?

The OFT is publishing a series of guidance booklets and consultation papers on various aspects of the Enterprise Act. A useful starting point is the Overview. Copies of the guidance and consultation papers can be ordered or downloaded from the OFT's website <http://www.ofg.gov.uk/enterpriseact/htm>, where you can also sign up to the Enterprise Act email alert service to keep up-to-date with any new developments.

Or you can request them by

Phone 0870 60 60 321
Fax 0870 60 70 321
Email oft@eclogistics.co.uk
Post EC Logistics, Swallowfield Way,
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To discuss any matter directly relating to the Enterprise Act please contact the OFT's Enterprise Act Enquiry Line by phone on 020 7211 8181 or by email enterpriseact.enquiries@oft.gsi.gov.uk.

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London EC4Y 8JX

This information is available in other formats and languages on request. Please ring 0870 60 60 321 to order.

This leaflet is only a simple guide and should not be relied on as a complete statement of the law. To understand your rights and obligations fully, study the relevant law or consult a solicitor.

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