

Practical information

Everything you need to know about the Enterprise Act

Enterprise
Act
2002



The Enterprise Act makes significant changes to competition law, to the enforcement of consumer regulations, to insolvency law and to the structure, procedures and activities of the Office of Fair Trading (the 'OFT').

This leaflet briefly gives you an outline of the competition and consumer aspects and the changes to the OFT. The OFT has published an overview of the competition and consumer provisions and will be publishing specific guidance on the most important areas during 2003. These guidance booklets are free and can be ordered or downloaded from <http://www.offt.gov.uk/enterpriseact.htm>.

Timing

The changes to the structure of the OFT will take place on 1 April 2003. The rest of the competition and consumer provisions will come into force during the Summer of 2003. When announced, the exact timings will be published on the DTI website at <http://www.dti.gov.uk/ccp>. You could also join our free email update service at www.offt.gov.uk/enterpriseact.htm and we will let you know as soon as we can.

About the Office of Fair Trading

Before 1 April 2003, the OFT existed as administrative support for the Director General of Fair Trading. Under the Enterprise Act (the 'EA') the OFT becomes a corporate body with a chairman and a minimum of four non-executive directors. The first chairman of the OFT will be John Vickers, who is currently Director General of Fair Trading. The OFT is funded by the government and its 620 staff are civil servants.

Further information about the OFT, can be found at: <http://www.offt.gov.uk>

What the OFT does

The OFT's goal is to make markets work well for consumers. To do this we enforce competition laws and consumer protection laws and we investigate the operation of markets. This requires us to gather and review market, company and industry information.

In addition, we 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. We also advise ministers and public bodies about matters relating to competition and consumer law, including possible changes to existing or proposed legislation.

The Competition and Consumer Aspects of the Enterprise Act

The following is a brief explanation of the main provisions of the consumer and competition aspects of the EA and their effect.

Consumer codes of practice

Under section 8 of the EA

'the OFT may ...make arrangements for approving consumer codes and may, in accordance with the arrangements, give its approval to or withdraw its approval from any consumer code.'

The purpose of consumer codes is to safeguard or promote the interests of consumers.

In February 2003 we launched a new scheme for the approval of business codes which will benefit consumers. The scheme has two stages:

Stage one – a code sponsor (such as a trade association) promises that its code (which its membership needs to comply with) meets the OFT's core criteria.

Stage two – the sponsor must demonstrate to the OFT that the code is working well on a day-to-day basis and delivering on its stage one promises. Consumer disputes, for example, must be properly resolved.

It makes changes to the Competition Act 1998 (CA98) and strengthens the OFT's powers under the CA98.

Codes that pass this second stage can use and display the OFT 'approved code' logo and may be included in any official 'codes' promotions carried out by the OFT to increase consumer confidence.

The first approved codes are likely to be announced in the autumn of 2003 and a codes web site will be available towards the end of this year.

Changes to the Competition Act 1998

As mentioned earlier, the EA directly affects competition and consumer law. In particular it makes changes to the Competition Act 1998 (CA98) and strengthens the OFT's powers under the CA98.

The CA98 introduced two prohibitions into UK competition law:

- Chapter I prohibits agreements between two or more undertakings which have the object or effect of preventing, restricting or distorting competition to an appreciable extent and which may affect trade within the UK.
- Chapter II prohibits the abuse of a dominant market position by an undertaking if it may affect trade within the UK.

The word 'undertaking' in the CA98, broadly means a company or another organisation which buys or sells goods or services and includes companies, firms, businesses, partnerships, sole traders, trade associations and non profit-making organisations.

The OFT, together with those industry regulators (such as OFTEL and OFGEM) who have equivalent powers, can, where they have reasonable grounds to suspect that an organisation or business has breached a Chapter I or II prohibition, require them to supply information. They can also obtain search warrants, visit premises and take away copies of papers and electronic documents.

Where an undertaking is found to have breached the CA98 they may be fined. For example, the OFT recently fined one company £4.95m for agreements to fix prices – a breach of Chapter I.

The EA makes minor changes to the CA98 itself. These strengthen the OFT's investigatory powers under the CA98 and alter the damages and appeals process (see later). The OFT may also apply for disqualification of company directors (see later) when there has been found to be a breach of the CA98.

Criminalisation of cartels

A cartel is an agreement between two or more organisations or businesses not to compete with each other. The agreement is usually verbal and is already prohibited under Chapter I of the CA98 (organisations or businesses which infringe the CA98 may be fined). The EA introduces a new criminal offence for individuals dishonestly participating in the most serious types of cartel agreements: price fixing, bid-rigging; market-sharing; and agreements to limit production or supply. The OFT will have an extended range of powers to investigate a suspected cartel. The Serious Fraud Office, or the Lord Advocate in Scotland, will prosecute offenders and, if convicted, they may be imprisoned for up to five years or fined an unlimited amount of money.

Organisations or businesses and individuals can apply for leniency with respect to cartel offences. In return for full disclosure and co-operation, at an early stage in the OFT investigation, a company may have any fine reduced, and there may be immunity from prosecution for individuals.

During 2003 the OFT will be publishing guidance on the circumstances in which leniency will be given to individuals.

Disqualification of directors

The EA introduces new powers for the OFT and sector regulators to apply to the court for a Competition Disqualification Order ('CDO') against a director whose company has breached the Chapter I or Chapter II prohibitions of CA98 or the corresponding provisions in EC competition law (Articles 81 and 82 of the EC Treaty). A CDO will disqualify someone from being a director of a company for a maximum period of 15 years.

The OFT will only apply for a disqualification order if it considers that the director's behaviour contributed to the breach, either through direct involvement, or because the director failed to take the kind of action that would be expected of a person in their position. The court will decide whether a director is unfit. The OFT can accept binding commitments from individuals, for instance to cease to act as a company director, instead of going to court.

The OFT will be publishing guidance on CDOs, which will indicate some of the circumstances in which it may apply for a CDO.

Damages claims under the CA98

The EA extends the scope for damages claims. Third parties who suffer as a result of an agreement or behaviour, in breach of Chapter I or Chapter II, can apply to the Competition Appeal Tribunal (CAT) (see later) for compensation. However, this can only be done if the breach occurred after the EA provisions come into force in summer 2003.

The EA also introduces the ability of designated consumer bodies to launch damages claims on behalf of named individual consumers.

Mergers

Before the Enterprise Act 2002, the Secretary of State for Trade and Industry made all decisions on whether to clear mergers or refer them to the Competition Commission for further investigation, after taking advice from the OFT. Under the Enterprise Act, the OFT will now decide whether to clear a merger or to refer it the Competition Commission for further investigation. The Secretary of State for Trade and Industry will only be able to intervene and take the decision where a merger raises a matter of national security or involves a newspaper. The Competition Commission will have the final say in the small number of cases which are referred to it for further investigation.

In order to qualify for scrutiny under the EA, a merger must involve a change of control over an enterprise. It must also meet certain criteria: either the UK turnover of the enterprise being acquired must be above £70 million, or the combined firm must supply 25 per cent or more of a particular good or service within a substantial part of the UK.

If the OFT has a reasonable belief that a qualifying merger appears to substantially lessen competition in a market in the UK, it has a duty to refer the merger to the Competition Commission for investigation. It can accept binding commitments from those involved instead of referring the merger. There are other particular circumstances in which the OFT may decide not to refer. These will be described in the OFT's guidance on the substantive assessment of mergers which is due to be published by the Summer of 2003.

Markets may be chosen for study if the OFT is concerned about the behaviour of organisations or business, consumers, the effects of government regulation, or a combination of these.

Super-complaints

Under the EA, the Department for Trade and Industry (DTI) can designate certain bodies which represent consumers to make super-complaints. Super-complaints can be made to the OFT, or to an industry regulator that has been named in secondary legislation, by a designated consumer body when it thinks that a feature, or combination of features, of a market are significantly harming the interests of consumers. The OFT or regulator must then publish a response within 90 calendar days, stating what it will do about the complaint and giving the reasons behind its decision.

The OFT will publish a guidance document on the super-complaints regime, including its views on how a designated consumer body should present a complaint.

OFT market studies

As at present, the OFT will study markets that are not working well for consumers.

These studies may follow on from super-complaints, they may be initiated by the OFT from other complaints or as a consequence of its other activities. Markets may be chosen for study if the OFT is concerned about the behaviour of organisations or business, consumers, the effects of government regulation, or a combination of these. Studies will be announced publicly and will usually last 9-12 months. The OFT will normally publish its findings, with reasons and it may use its other investigatory or enforcement powers, where appropriate, to take matters forward.

Further information We have set up an email up

Market investigation references to the Competition Commission

The Act gives the OFT and certain regulators the ability to refer markets to the Competition Commission (CC) for a public investigation. This power replaces their ability to make monopoly references under the Fair Trading Act 1973.

The OFT may refer a market if it has reasonable grounds to suspect that a feature (or combination of features) of a market prevents, restricts or distorts competition. A feature may be:

- the structure of the market concerned (e.g. government regulations, or simply the market being highly concentrated), or
- the behaviour of persons supplying or purchasing goods which affect the operation of the market, or
- the behaviour of customers of the above.

The OFT does not expect to make references based on single company behaviour, unless there are other features in the market concerned. Single company behaviour will normally be considered under the CA98.

Before making a market investigation reference to the CC, the OFT will consult the main firms that would be affected, sharing its reasoning as far as is practicable and giving them an opportunity to respond.

The OFT has published guidance on the circumstances in which it will make these references.

Enforcement of consumer protection laws

The OFT, Trading Standards Departments (TSDs) and other bodies responsible for consumer law enforcement today have the power to seek court

The EA extends the range of consumer law under which swift enforcement action can be taken ,which means that the OFT and TSDs can act more quickly against rogue traders.

orders under the Stop Now Regulations and under the Fair Trading Act. Under the EA this will be done through a single enforcement regime. Action can be taken when there is evidence of a breach of certain consumer protection laws. Before taking court action, the OFT, TSD or other enforcement body will always invite the trader concerned to respond to the allegations against them, and they will be able to give binding commitments instead of going to court.

The EA extends the range of consumer law under which swift enforcement action can be taken ,which means that the OFT and TSDs can act more quickly against rogue traders.

Appeals

The EA revises the appeal system and transfers CA98 appeals from the Competition Commission Appeals Tribunal to the Competition Appeal Tribunal (CAT). The CAT is able to hear appeals against OFT and CC decisions in merger cases and market investigation reference cases (but not OFT market studies). These appeals will be handled on a judicial review basis, and will consider whether the decision was made lawfully and fairly.

Third parties who have suffered because someone has breached the CA98, or the corresponding provisions of EC law (Articles 81 and 82), and where this has been recognised by an OFT or European Commission decision, may make a claim for damages before the CAT. In addition, designated consumer bodies may make claims before the CAT on behalf of named consumers.

OFT publications

The OFT has published a 32 page overview guide to the EA (OFT508) which gives a much more detailed coverage than this introductory leaflet. Throughout 2003 the OFT will be publishing guidance on specific topics as follows:

- Competition Disqualification Orders
- Consumer Reforms
- Market investigation references
- Cartel Offence: no-action letters for individuals
- Super-complaints: guidance for designated consumer bodies
- Mergers: substantive analysis

New guidance may be published and the existing guidance revised from time to time. For an up-to-date list of guidance booklets available: check www.offt.gov.uk/enterpriseact.htm email enterpriseact.enquiries@oft.gsi.gov.uk or phone Enterprise Act enquiries on **0207 211 8181**

All guidance booklets can be ordered or downloaded from the OFT's website <http://www.offt.gov.uk/enterpriseact.htm>. 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,
Hayes, Middlesex UB3 1DQ

We also have an Enterprise Act enquiry line to handle questions on the Act itself. Telephone 020 7211 8181.

Email: enterpriseact.enquiries@oft.gsi.gov.uk

[/enterpriseact.htm](http://www.offt.gov.uk/enterpriseact.htm) where you can register.

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.

Published by the Office of Fair Trading Printed in the UK on paper comprising 75 per cent post-consumer waste and 25 per cent ECF pulp

PUB no. 129-6 Edition 03/03 – 03/03 – 20,000

Product code OFT530

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Enterprise
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2002