

Enterprise Act 2002: Roadmap to the Competition provisions

The Act is divided into eleven parts and has 281 clauses and 26 Schedules.

Part 1:	The Office of Fair Trading - the OFT	- establishes the OFT - sets out its general functions - provides for making super-complaints to the OFT
Part 2:	The Competition Appeal Tribunal – the CAT The Competition Service - the CS	- establishes the CAT - transfer of functions and independence from CC - provides rules on proceedings before the CAT - CAT review of decisions of OFT, sector regulators, CC - third party claims for damages before the CAT - consumer claims - establishes the Competition Service
Part 3:	Merger Regime	- provides for a new merger regime - new merger notification turnover threshold - new substantive test - substantial lessening of competition
Part 4:	Market Investigations	- provides for new market investigations - old monopoly regime discontinued - new roles for OFT and CC - regulated sectors - CC power to change licence terms
Part 5:	The Competition Commission – the CC	- amends the CC's constitution and rules of procedure - publication of annual report to the SoS
Part 6:	Cartels	- the creation of a cartel offence - criminal prosecution - provides the OFT with increased investigatory powers

Part 7:	Miscellaneous	➤ directors' disqualification for breach of competition rules ➤ super-complaints in regulated sectors ➤ EC modernisation
Part 8:	Consumer Legislation	
Part 9:	Disclosure of Information	➤ provides for rules to govern the disclosure of certain competition information held by a public authority
Part 10:	Insolvency Law	
Part 11:	Supplementary Provisions	➤ interpretation and commencement

Date enacted: Royal Assent 7 November 2002.

Date in force: Competition provisions of the Act:

- (i) institutional changes: Tuesday, 1 April 2003 (for accounting and administrative reasons);
- (ii) substantive changes: Friday, 20 June 2003.

Secondary legislation

At 30 April 2003 the DTI's website confirmed the following draft secondary legislation (subject to Parliamentary approval) and guidance required to implement the competition provisions of the Act

Competition Appeal Tribunal Rules

Monetary Penalties for failures to provide information

Merger Fees

Determination of Turnover

European Merger Intervention Notice

Anticipated Mergers (Section 34)

Use of Land as a Service

Merger Notices

Director's Disqualification Procedures

Register Hours

Consumer secondary legislation and guidance

The following is required to implement the Act's consumer provisions (where those consumer provisions have competition relevance)

Supercomplaints:

- Final criteria and guidance
- Concurrent regulators

Consumer Claims:

- Criteria and guidance for bodies seeking designation to bring representative claims for consumers (competition law infringements)

Part 9 (Information):

'Specified information' and the statutory functions for which it may be disclosed

Guidance and procedure

The OFT, the CC and the DTI have put out to consultation various papers on substantive and procedural issues. The following table shows both papers still out to consultation and those where, consultation having closed, formal guidance has now been issued.

List of Consultation Papers of OFT, CC and DTI

OFT consultation papers:

- Competition disqualification orders (consultation closed 26 September 2002)
- Market investigation references (Guidance published 12 March 2003)
- Consumer reforms (consultation closed 15 November 2002)
- The cartel offence: no-action letters for individuals (Guidance published April 2003)
- Super-complaints: guidance for designated consumer bodies (consultation closed 31 October 2002)
- Mergers: the Mergers Panel (consultation closed 29 November 2002)
- Mergers: substantive assessment (consultation closed 12 January 2003)
- Powers for investigating criminal cartels (consultation open to 1 July 2003)
- Controls on overseas information disclosure (consultation open to 10 July 2003)

CC consultation papers:

- The Commission's Rules of Procedure
- Merger References: Competition Commission - guidelines (the merger guidelines)
- Market Investigation References: Competition Commission - guidelines (the market guidelines)
- General Advice and Information
- Statement of Policy on Penalties

Consultation on all the above papers closed on 10 December 2002. In March 2003, the CC published on its website a final text of its Rules and of the four guidance documents.

- Chairman's guidance to groups on the application of the CC's Rules – not yet published

DTI consultation papers:

- Maximum monetary penalties available to the CC for parties' failure to provide information (consultation closed 16 December 2002)
- CAT Rules of Procedure (consultation closed 16 December 2002)
- Draft Orders to be made under Part 8 - Enforcement of Consumer legislation (Consultation closed on 7 March 2003)
- Criteria for specifying bodies to bring claims for damages on behalf of consumers (Consultation closed on 7 March 2003)
- Criteria for designating bodies to make super-complaints (Consultation closed on 7 March 2003)
- Draft Order to be made under Part 9 (Information) (Consultation closed on 14 March 2003)
- Technical Statutory Instruments on:
 - updated merger fees
 - modified approach to the determination of turnover
 - the use of land as a service
 - the arrangements for handling European merger cases with a UK public interest dimension
 - the operation of the Act to mergers that occur in stages.

Consultation on all of the above papers closed on 28 February 2003.

30 April 2003

COMMENTARY

How will the Enterprise Act reform UK competition law? The following is a note-form commentary.

The Office of Fair Trading

■ establishes the OFT:

- a Non-Ministerial Government Department
- a body corporate producing before each financial year an annual plan (subject to consultation and laid before Parliament) and an annual report at the end of each financial year to the Secretary of State
- abolishes the office of the Director General of Fair Trading (DGFT) and transfers the DGFT's functions, property, rights and liabilities to the OFT
- board consisting of a Chairman and at least four other members appointed by the SoS; the tenure of members (including the Chairman) may not exceed 5 years. The new OFT will come into being on 1 April 2003, with John Vickers (the present DGFT) as the first Chairman. For the first two years, Mr Vickers will be both Chairman and Chief Executive. In 2005, two separate people will hold the roles of Chairman and Chief Executive.

■ sets out its general functions:

- acquisition of information, provision of information to the public and Ministers, and promotion of good consumer practice (for instance, approving Codes of Conduct)
- in addition to enforcing the CA'98, the OFT monitors markets and actively **investigates markets that are not working well for consumers**. The OFT's Markets and Policy Initiatives Division (MPI) carries out these investigations in areas where there are concerns that a particular market is not working well for consumers and where competition or consumer regulation enforcement action (including a reference to the CC) does not appear, immediately, to be the appropriate response. The outcome of such an investigation may be: (i) enforcement action by the OFT

under competition or consumer legislation; (ii) a market investigation reference to the CC; (iii) proposals for changes to law, regulation or self-regulation; or (iv) giving the market a clean bill of health.

▼ **OFT provides for arrangements for making super-complaints to the**

- by the SoS designated consumer bodies
- where market features may be harming consumers to a significant extent
- OFT must publish a response within 90 days from the date it receives the complaint
- outcome: reference to CC, or OFT report

The Competition Appeal Tribunal (the CAT)

▼ **establishes the CAT**

- takes over functions of appeal tribunals of CC
- independent of the CC

▼ **provides for rules on proceedings before the CAT**

- the tribunal for each proceeding must consist of a chairman and two members
- third party with a sufficient interest may appeal CA'98 decisions directly to the CAT – the need for a preliminary application to the OFT is abolished.
- claims for damages may be brought before the CAT where a breach of competition law has already been established (without prejudice to claims in the courts)
- designated consumer bodies may bring claims on behalf of consumers: "class actions"

- any aggrieved person with a sufficient interest can apply directly to the CAT for review of a decision taken by the OFT, CC, SoS or sectoral regulators in connection with the new mergers or market investigation regimes. The CAT is not entitled to vary or substitute the decision but can require the relevant body to reconsider the decision on grounds of procedural unfairness, illegality or unreasonableness.
- a person aggrieved by a CC decision imposing a penalty for failure to provide evidence may also appeal to the CAT. The CAT may quash or change the penalty or alter the deadline for payment.
- OFT/CAT decisions regarding findings of competition law infringements are (except where subject to appeal) to bind courts for subsequent claims for damages

▼ **establishes the Competition Service**

- a new body providing impartial and professional support services to the CAT
- staff formerly employed by the CC
- the Board consists of the President of CAT, the Registrar of the CAT, one or more appointed members (appointed by the SoS after consulting the President) and the Chairman (the first one appointed by the SoS).

The Merger Regime

What of the existing regime remains?

- The existing two-stage approach to merger control. The OFT will carry out the first stage investigation to decide whether a reference to the CC is required. The CC will carry out the second stage, in-depth investigation where necessary.
- The UK's system of pre-notification of mergers remains voluntary.
- The systems for obtaining confidential guidance and informal advice from the OFT remain in place.

What does the new Merger Regime introduce?

- **Final decisions on most mergers will be taken by the OFT and the CC** rather than the Secretary of State
- The Secretary of State will decide mergers that raise **defined public interest considerations** (eg national security)
- **Mergers will be considered against a new test** of whether they are expected to result in **a substantial lessening of competition** rather than the current public interest test
- The OFT has (subject to the discretion below) **a duty to make a reference** where it believes that a relevant merger situation may result in a substantial lessening of competition
- The **authorities have discretion** to clear a merger where, notwithstanding an expected substantial lessening of competition, they expect the merger to result in defined types of customer benefit (such as lower prices, greater choice or greater innovation) or if the market is of insufficient importance to justify a reference
- A **right of appeal to the CAT** exists for any person aggrieved by a **decision of the OFT to refer or not to refer a merger**. Similarly, a right of appeal exists against a decision of the SoS or the CC in connection with a reference or possible reference of a merger and against a failure to take a decision.
- A person aggrieved by a **CC decision imposing a penalty** for failure to provide information requested by the CC may also **appeal to the CAT**. The CAT may quash or change the penalty or alter the deadline for payment.
- The current worldwide assets-based criteria for determining whether a merger is subject to merger control will be replaced with a **UK-based turnover test (£70 million)**. This threshold was changed during the last stages of the legislative process from £45 million to £70 million. Thus, a 'relevant merger situation' is created if at least one of two thresholds is met. They are:
 - the value of the turnover in the UK of the enterprise being taken over (i.e. the target company) is over £70 million; or
 - the merger would result in the new merged entity having at least a 25% share of supply of particular goods or services

(or a combination of both) in the UK, or in a substantial part of the UK.

- **Statutory maximum timetables** for the investigation:
 - the OFT can investigate normally up to 4 months from when the transaction becomes unconditional or is made public.
 - merging parties may send the OFT a Merger Notice in which case investigations must normally be completed within 20 working days subject to specific extensions.
 - cases referred to the CC must normally be investigated and a decision on remedies made within 24 weeks from the date of reference.
- **Special cases:** mergers between (i) defence-related companies will be scrutinised against public interest considerations only; (ii) newspapers will remain governed by the FTA'73 rules, and (iii) water companies are subject to rules more closely aligned than previously with the general regime, whilst preserving the DGWS's ability to make use of 'comparative' regulation (ie to compare the performance of different water companies).

Market Investigations

The purpose of market investigations is to inquire into a market where competition is being harmed by one or more features of the market, but there has been no obvious breach of the prohibitions on anti-competitive agreements or abuse of a dominant position under CA'98 or EC Treaty. Such market features would include the structure of a market, the conduct of firms operating within it (whether or not such conduct is intentional), or the conduct of such firms' customers. A market may be referred in the case of uncoordinated parallel behaviour by firms operating in the market, or possibly where firms hold a collective dominant position.

The existing FTA'73 monopoly enquiries regime – both for scale and complex monopolies - will be repealed and replaced by the market investigation references. As under the existing regime, the OFT and other sectoral regulators will be able to refer a market to the CC for a competition investigation. In addition, a Minister may refer a market for investigation to the CC, where he is dissatisfied with the OFT's decision not to refer, or where he is not satisfied the OFT would refer within a reasonable time period.

The main points of the new regime:

- **A market investigation reference** is one of the possible outcomes following an investigation by the OFT's Markets and Policy Initiatives Division into a market that is not working well for consumers (one way in which the OFT carries out its general functions).
- **The OFT has discretion.** In order to be able to refer a market for investigation, the OFT must have **reasonable grounds for suspecting that one or more features of a market** in the UK prevent, restrict or distort competition in connection with the supply or acquisition of goods or services in the UK or a part of the UK. Where it has such grounds, the OFT has a **discretion whether to refer** a market to the CC for investigation.
- **Competition-based test.** The tests applied by the authorities when making a reference and by the CC when analysing markets will be focused on identifying adverse effects on competition.
- **CC is under a duty.** Where the CC identifies competition problems, it is under a duty to take remedial steps. (Under the FTA'73, any remedial action was at the discretion of the SoS.) The CC has powers to accept remedial undertakings and make remedial orders (similar to SoS under FTA '73). Note: except for cases where public interest intervention by SoS.
- **Customer benefits.** In considering the implications of its duty to remedy, the CC is to take account of 'customer benefits' (eg lower prices, better quality, greater choice).
- **Changing licence terms.** In regulated sectors, the CC will be able to remedy adverse effects by changing the licence terms of companies operating in the market, taking account of the statutory duties of the relevant sectoral regulator.
- **Public interest issues** will be restricted to cases in respect of which the SoS issues an intervention notice (currently only in relation to national security).
- **Administrative timetable.** The CC will be responsible for setting its own administrative timetable in consultation with parties to the investigation, subject to a **two-year statutory long-stop**.
- **Procedural rules for CC proceedings** will be published.

- **Fines for failure to produce information.** The CC will be able to impose financial penalties for failure, without reasonable excuse, to produce specified information.

The Competition Commission

- **provides for Chairman to make rules of procedure for CC investigations**
- **amends the CC's constitution and powers**
- **the CC to prepare an annual report for the SoS for each financial year.** The SoS to lay the report before Parliament and arrange for it to be published.

The Cartel Offence

Scope of the cartel offence

- Applies to individuals who dishonestly engage in certain hard-core cartel agreements (i.e. to fix prices, share markets or customers, limit production or rig bids)
- Applies only to horizontal agreements – vertical agreements are outside the scope of the offence
- Agreements implemented or intended to be implemented in the UK
- Agreements reached overseas may only be prosecuted if subsequent action is taken in the UK to further the agreement (eg telephone call or email)

Procedure

- The OFT is to investigate (with increased powers) under a Serious Fraud Office (SFO) case controller.
- Leniency policy: The OFT may issue 'no-action letters' to protect informants from prosecution.

Prosecution and penalty

- The SFO will be lead prosecutor; the OFT also is to be a named prosecutor. Third parties can bring a prosecution with the OFT's consent.
- The offence will be triable in the Magistrates' Courts or Crown Courts.
- Maximum penalty: 5 years. Fines available in addition or as an alternative.
- The cartel offence will be grounds for extradition (Note: not retrospective).
- The offence exists alongside the CA'98 regime imposing civil sanctions.

Increased powers of investigation

- To be used when OFT has reasonable grounds for suspecting "the cartel offence"
- Request for information or production of documents
- Power to enter premises under a warrant
- Power to bring non-OFT "experts" (eg IT experts)
- Seizure of material where it is not reasonably practicable to determine on the premises whether the material is seizeable or not (subject to safeguards, eg requirement to give written notice and legal professional privilege to be respected).
- **New surveillance powers:** Chairman of OFT may issue authorisation for the purpose of preventing or detecting serious crime (eg authorisation to record a cartel meeting in a hotel room)
- Powers to interfere with private property (i.e. to gain access to premises to undertake intrusive surveillance).
- Persons who hinder investigations may be committing criminal offence

Miscellaneous

Deals with a number of miscellaneous competition provisions, including:

► Competition Disqualification Orders:

- The OFT and sector regulators are granted the power to petition the **courts to grant orders disqualifying directors** who engage in serious competition breaches (for up to 15 years).
- Two conditions must be satisfied: (i) the person must be a director of a company that has committed a breach of competition law; and (ii) the court considers that the person's conduct makes him unfit to manage or control a company. In addition, a person whom the OFT or regulator considers unfit may consent to a period of disqualification without the need for court involvement by giving a disqualification undertaking to the OFT or regulator.
- The OFT considers that all directors of all companies may reasonably be expected to know that companies must comply with competition law.
- The **OFT might seek to have the entire board disqualified**, in circumstances where a board of directors has resolved that the company should engage in the activity that constituted the breach of competition law.

► OFT officers can be accompanied by experts (eg IT experts) on CA'98 dawn raids.

► The SoS may by Statutory Instrument allow **"super-complaints"** to be made to sector regulators as well as to the OFT.

► The SoS has the power to modify provisions that may be contained in certain enforcement orders.

► The Secretary of State is empowered to deal with the reform of EC law (eg regarding "modernisation" of the EC competition regime.)

Disclosure of Information

■ provides rules to govern the disclosure of certain competition information held by a public authority

- general restriction on disclosure
- “competition information” is effectively information obtained by a public authority in connection with an investigation carried out for the purposes of competition legislation
- applies to all such information currently held or obtained before or after the passing of the Act
- the circumstances in which it is permissible to disclose the information in the UK and overseas
- permitted disclosure on following grounds: consent of provider/subject, Community obligations, to facilitate exercise of statutory functions or for purposes of criminal proceedings
- overseas disclosure permitted on following grounds: for criminal investigations/proceedings or for civil proceedings relating to enforcement of competition legislation. Overseas disclosure is not permitted for certain types of information (eg information obtained under merger investigations or in relation to market investigation references).
- matters to be taken into account before disclosure: public interest, whether significant harm to the interests of a business or individual
- overseas disclosure subject to additional considerations: seriousness of the matter, whether appropriate protection for storage and disclosure of personal data, whether appropriate protection against self-incrimination in criminal proceedings and whether any arrangements in place for the provision of mutual assistance between the UK and that country in relation to the disclosure
- penalties for breach of disclosure rules: imprisonment of up to 2 years and/or fine.

List of Schedules

- Schedule 1 – The Office of Fair Trading
- Schedule 2 – The Competition Appeal Tribunal
- Schedule 3 – The Competition Service
- Schedule 4 – Tribunal: procedure
- Schedule 5 – Proceedings under Part 1 of the Competition Act 1998
- Schedule 6 – Schedule to be inserted in the Water Industry Act 1991
- Schedule 7 – Enforcement regime for public interest and special public interest cases
- Schedule 8 – Provision that may be contained in certain enforcement orders
- Schedule 9 – Certain amendments of sectoral enactments
- Schedule 10 – Procedural requirements for certain enforcement undertakings and orders
- Schedule 11 – The Competition Commission
- Schedule 12 – Competition Commission: certain procedural rules
- Schedule 13 – Listed Directives
- Schedule 14 – Specified functions
- Schedule 15 – Enactments conferring functions
- Schedule 16 – Schedule B1 to Insolvency Act 1986
- Schedule 17 – Administration: minor and consequential amendments
- Schedule 18 – Schedule 2A to Insolvency Act 1986
- Schedule 19 – Duration of bankruptcy restrictions order and undertaking
- Schedule 20 – Schedule 4A to Insolvency Act 1986
- Schedule 21 – Effect of bankruptcy restrictions order and undertaking
- Schedule 22 – Individual voluntary arrangement
- Schedule 23 – Individual insolvency: minor and consequential amendments
- Schedule 24 – Transitional and transitory provisions and savings
- Schedule 25 – Minor and consequential amendments
- Schedule 26 – Repeals and revocations

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