Overview of the Enterprise Act

The competition and consumer provisions
The Enterprise Act 2002 (the Act) received Royal Assent in November 2002.

The first edition of this booklet was published at the time of Royal Assent. This second edition includes references to subsequent Office of Fair Trading publications. The provisions described in this booklet came into force on 1 April and 20 June 2003.

The Act has made a number of significant reforms to competition law and consumer law enforcement in the UK. The new provisions work alongside the Competition Act 1998 and various pieces of consumer legislation, largely replacing the Fair Trading Act 1973.

The Act has established the Office of Fair Trading (the OFT) as a corporate body, replacing the former statutory office of the Director General of Fair Trading. The OFT will apply and enforce the new competition and consumer measures alongside the Competition Commission, the sectoral regulators, the Competition Appeal Tribunal, Trading Standards Departments and others.

Office of Fair Trading
Fleetbank House
2-6 Salisbury Square
London EC4Y 8JX
Telephone 020 7211 8000
Enterprise Act enquiries 020 7211 8181 or
email enterpriseact.enquiries@oft.gsi.gov.uk
Web www.oft.gov.uk
## Contents

<table>
<thead>
<tr>
<th>Chapter</th>
<th>Title</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>What this guideline is about</td>
<td>2</td>
</tr>
<tr>
<td>2</td>
<td>Purpose and structure of the Act</td>
<td>4</td>
</tr>
<tr>
<td>3</td>
<td>The Office of Fair Trading and its general functions</td>
<td>6</td>
</tr>
<tr>
<td>4</td>
<td>Mergers</td>
<td>9</td>
</tr>
<tr>
<td>5</td>
<td>Market investigation references</td>
<td>14</td>
</tr>
<tr>
<td>6</td>
<td>Criminalisation of cartels</td>
<td>17</td>
</tr>
<tr>
<td>7</td>
<td>Disqualification of directors</td>
<td>20</td>
</tr>
<tr>
<td>8</td>
<td>Super-complaints</td>
<td>22</td>
</tr>
<tr>
<td>9</td>
<td>Enforcement of consumer law</td>
<td>23</td>
</tr>
<tr>
<td>10</td>
<td>Handling of information</td>
<td>26</td>
</tr>
<tr>
<td>11</td>
<td>Appeals</td>
<td>29</td>
</tr>
<tr>
<td>12</td>
<td>Changes to the Competition Act 1998</td>
<td>32</td>
</tr>
<tr>
<td>13</td>
<td>Glossary of abbreviations used in this guideline</td>
<td>33</td>
</tr>
</tbody>
</table>
1.1 This guideline provides an overview of the main provisions of the Enterprise Act 2002 (the Act) which relate to competition law and the enforcement of consumer legislation, with particular regard to the role of the Office of Fair Trading (the OFT). The Act also contains provisions relating to insolvency, which will not be covered in this document or in any other OFT publication.

1.2 The Act has replaced or amended legislation relating to the structure and functions of the OFT, merger control, investigation of markets, enforcement of consumer legislation, appeals on points of competition law, Competition Commission (CC) procedures and handling of certain information by public authorities. The Act also introduces new provisions relating to criminalisation of cartels, disqualification of directors for breaches of competition law and super-complaints.

1.3 The competition and consumer provisions came into force either on 1 April or 20 June 2003, as described in this guideline. Further details of the commencement provisions and a number of relevant consultation documents published by the Secretary of State (SoS), have been published on the DTI website at http://www.dti.gov.uk/ccp

1.4 Prior to commencement of the Act, existing legislation, in particular the Fair Trading Act 1973 (FTA73), remained in force. The Act contains transitional provisions so that businesses, consumers and their advisors can be certain as to which legislation and procedures would apply to events such as mergers and market investigations that have taken place around the time the Act came into force. This guideline only covers the new law.

1.5 The provisions of the Act are largely complementary to those of the Competition Act 1998 (CA98), which remains in force with some minor amendments. Guidance on CA98 is available on the OFT’s website (http://www.oft.gov.uk). Hard copies can also be ordered through the website or by calling 0870 60 60 321.

1.6 This guideline does not purport to be a full or binding statement of law. It is intended to be an introductory text and guide to other sources of relevant information. This guideline does not constitute
guidance or advice or information that the OFT has a duty to publish under any section of the Act. Anyone in doubt about how they may be affected by the Act should seek legal advice.

1.7 The OFT and others have published documents which provide more details on specific areas and we have included references to these where appropriate. The current list of Enterprise Act guidance booklets, including some consultation drafts, appears at the back of this guideline. The guidance booklets will be revised and re-issued from time to time and new ones may be published. An up-to-date list of our publications is always available on our web site at http://www.oft.gov.uk/News/Publications/Leaflet+Ordering.htm
2 Purpose and structure of the Act

Purpose

2.1 The Act implements pledges made in the Government’s 2001 election manifesto to give more independence to the competition authorities, to reform bankruptcy laws and to tackle trading practices that harm consumers.

2.2 The Government paper *Productivity in the UK: Enterprise and the Productivity Challenge*, published in June 2001, set out the Government’s intention to focus on enterprise and productivity as the cornerstone of its economic reforms. The specific measures in the Act were foreshadowed in three further White Papers:

- *Productivity and Enterprise: A World Class Competition Regime* (Cm 5233) published in July 2001
- *Productivity and Enterprise: Insolvency – A Second Chance* (Cm 5234) also published in July 2001, and

2.3 At the time of writing, these documents can all be found on the DTI website (http://www.dti.gov.uk) and are also available from HMSO.

Structure

2.4 The Act is divided into eleven parts:

- **Part 1** establishes the OFT as a corporate body and sets out its general functions, and provides for arrangements for making super-complaints. Formerly, the OFT existed only as administrative support for the statutory office of the Director General of Fair Trading, and not as a legal entity in its own right.

- **Part 2** established the Competition Appeal Tribunal (CAT) and made provisions for proceedings to be brought before it. The CAT is a new independent body which has taken on the functions of the Competition Commission Appeals Tribunal as well as some new functions.
• **Part 3** makes provision for a new merger control regime, with various responsibilities attributable to the OFT, the CC and, in exceptional cases, the Secretary of State (SoS).

• **Part 4** makes provision for market investigation references to be made by the OFT, or in exceptional cases by Ministers, to the CC and describes how the CC should decide, and report on such cases.

• **Part 5** deals with the CC and outlines its rules of procedure. No further details will be given in this guideline. Further information can be found on the CC’s website at http://www.competition-commission.org.uk

• **Part 6** creates a new criminal offence for individuals engaged in cartels, and provides the OFT with certain investigatory powers.

• **Part 7** deals with a number of miscellaneous competition provisions, including a new power for the court to disqualify company directors who engage in serious breaches of competition law and some minor amendments to CA98.

• **Part 8** outlines new procedures for enforcing certain consumer legislation and related matters.

• **Part 9** provides new rules to govern the disclosure of certain types of information by public authorities.

• **Part 10** changes insolvency law, and will not be considered further in this guidance. Information relating to the insolvency provisions of the Act may be found at http://www.insolvency.gov.uk/reform.htm

• **Part 11** contains supplementary provisions, such as how the Act will be brought into force and in which UK territories the Act applies. These are largely technical matters which are beyond the scope of this guideline.
3 The Office of Fair Trading and its general functions

The new OFT

3.1 The Act established the OFT on a statutory basis as a corporate body on 1 April 2003. Under the old law (FTA73) the OFT did not exist as a legal entity, but was merely the administrative support for the Director General of Fair Trading. Under the new law, the statutory position of Director General of Fair Trading has been abolished and his functions transferred to the OFT.

3.2 The OFT consists of a Chairman and Chief Executive, currently John Vickers and no fewer than four other members, appointed by the SoS. Together, these form the OFT board. At the time of writing there were six board members (Penny Boys, Allan Asher, Lord Blackwell, Christine Farnish, Richard Whish, Rosalind Wright). The OFT will then appoint other staff as required to carry out its functions. Existing staff have transferred to the new OFT to provide continuity. The Act provides for a Chief Executive to be appointed from 1 April 2005.

3.3 The OFT board regulates its own proceedings, including quorum. The OFT must consult with the SoS on its procedures for dealing with conflicts of interest, which have been published (see below). The tenure of OFT members (including the Chairman) will be determined by the SoS, although terms of office may not exceed five years. The Chairman and members of the OFT are not limited to a single term of office.

3.4 The OFT board will be largely concerned with strategic decisions and will not usually be involved in individual cases. For further information on the OFT board and its procedures please see http://www.oft.gov.uk/About/OFT+Board/default.htm

The OFT’s annual plan and annual report

3.5 Before the commencement of each financial year, the OFT is now required to publish an annual plan containing a statement of its main objectives and priorities for the year. This plan will be subject to consultation and laid before Parliament. The first draft annual plan was published on 3 April 2003 and the final version is due to be published by 30 June 2003.
Following the end of each financial year, the OFT will give the SoS a report on its activities and performance throughout the year. The report (the ‘Annual Report’) will describe recent decisions and investigations and relevant developments. It must also include an assessment of the OFT’s performance and practices and the extent to which the OFT has met its main priorities and objectives.

**General functions of the OFT**

The general functions of the OFT include the following:

- obtaining, compiling and keeping under review information about matters relating to the carrying on of its functions. This function is to be carried out with a view to (among other things) ensuring that the OFT has sufficient information to take informed decisions and to carry out its other functions effectively

- making the public aware of the ways in which competition may benefit consumers and the economy and giving information or advice in respect of its functions in this regard. This includes publishing educational materials and carrying out educational activities

- providing information and advice to ministers and public bodies on matters relating to any of its functions, and

- promoting good consumer practice, including encouraging the use of consumer codes of practice and approving such codes. Further information on consumer codes is given in chapter 9 of this guideline.
Market studies

3.8 One way in which the OFT will carry out its general functions is by studying markets which are not working well for consumers. The Markets and Policy Initiatives Division (MPI) will carry out these studies. They are distinct from market investigation references to the CC as described in chapter 5 of this guideline.

3.9 MPI’s market studies may have a number of different outcomes including:

- OFT enforcement action under the CA98
- OFT enforcement action under Part 8 of the Act (see section 9)
- a market investigation reference to the CC
- proposals for changes to laws, regulations and self-regulation
- publishing better information for consumers, or
- giving the market in question a clean bill of health.

3.10 The OFT will generally publish a report to explain the outcome of its studies and will always publish reasons if it makes a market investigation reference to the CC.
4 Mergers

4.1 The Act amends the existing framework for control of UK mergers and acquisitions, by replacing the vast majority of the mergers provisions of the FTA73. The two most significant changes are:

• decisions on merger control will, in general, not be taken by the SoS. Most decisions will be taken by the OFT and the CC as specialist, independent competition authorities

and

• except in the special cases outlined in paragraphs 4.8 to 4.11 below, mergers will be assessed against a pure competition test, rather than the wider public interest test which formerly applied. Generally, mergers will be prohibited, or remedies required, if they would result in a substantial lessening of competition in a UK market.

Jurisdictional tests

4.2 The OFT may investigate mergers which meet either the 'turnover test' or the 'share of supply test'. The turnover test is met if the target company has a UK turnover exceeding £70 million. The share of supply test is met if the merging parties will together supply at least 25 per cent of goods or services of a particular description, either in the UK as a whole or in a substantial part of it. This test is only met if the share of supply increases as a result of the merger. If a merger meets the tests for assessment by the European Commission, the OFT will not investigate and cannot refer the merger.¹

4.3 The OFT can look at outright acquisitions of businesses and at acquisitions which confer a lesser degree of control over the conduct of a business, starting from the level at which the purchaser gains 'material influence' over the target business.
Duty to refer

4.4 The OFT must consider whether there is a significant prospect that the merger may be expected to lessen competition substantially. If the OFT believes that this test is or may be met, then it must either refer the merger to the CC or, if appropriate, seek undertakings in lieu of a reference from the merging parties to remedy the expected adverse effects of the merger. The general duty to refer is subject to three exceptions, where the OFT has discretion not to refer if the merger is insufficiently advanced to warrant reference: if the market is of insufficient importance to justify a reference; or if there are obvious benefits to customers that outweigh the adverse effect on competition.

4.5 Prior to a decision whether to refer a completed merger to the CC, the OFT can require initial undertakings or make initial orders to prevent integration of the parties. Such orders or undertakings may last for so long as the merger is under investigation.

CC’s investigation and remedies

4.6 If the merger is referred to the CC, it will conduct a full investigation to determine whether the merger has caused, or may be expected to cause, a substantial lessening of competition. If so, the CC will either prohibit the merger or impose remedies, in the form of undertakings from the parties or orders. The CC will take into account any customer benefits resulting from the merger in setting remedies. The OFT may be asked to help negotiate undertakings.

4.7 The OFT will also have a role in monitoring whether parties comply with undertakings and orders following a merger. It will be responsible for maintaining a public register of all undertakings given and orders made, which will be available on the OFT website.
Special cases

4.8 Mergers involving defence related companies, newspapers or water companies may be subject to different procedures and analysis. Further information on the rules governing these special cases is given in our more detailed guidance on mergers (see below). Companies which operate in these sectors should be aware that the jurisdictional tests for such mergers are also different so that mergers of smaller businesses that do not meet the £70 m turnover test or share of supply test may still be subject to merger scrutiny.

4.9 If a merger raises defined public interest issues, the SoS may issue an intervention notice and will then take decisions, in place of the OFT and CC. In that context, the SoS will review public interest considerations alongside the advice on jurisdiction and competition issues provided by the OFT and/or CC. At present, national security is the only defined public interest consideration for which intervention is permitted, but there is scope in the Act for additional public interest considerations to be added.

4.10 The Act preserves the FTA73 special regime for newspaper mergers. If the criteria for application of that regime are met, the prior consent of the SoS must be obtained before the merger takes place. The Communications Bill which is presently being considered by Parliament, proposes to revise the control of newspaper mergers in order to align the procedures with those under the Act. As with cases raising national security issues, it is proposed that the SoS will be able to intervene and take decisions on the merger, with advice on jurisdiction and competition issues being provided by the OFT and/or CC. In these circumstances the SoS will have scope to consider issues of plurality or diversity and the Bill provides for OFCOM, the new communications regulator, to advise on these matters.
4.11 The provisions of the Act relating to water mergers will come into force at a date which has yet to be announced. Until that time mergers of water and sewerage companies will be subject to a mandatory reference by the SoS. Under the Act provisions, if two water enterprises merge, the OFT will be required to refer the merger to the CC unless the turnover of one (or both) of the water enterprises is less than £10 million. The CC will consider whether the merger will adversely affect the ability of the Director General of Water Services to regulate effectively, by reducing the number of companies whose performances can be compared.

Timetable

4.12 The statutory timetable for the OFT’s investigation is normally up to four months after the transaction becomes unconditional, or is made public. In practice, the OFT will aim to complete its investigation within shorter administrative timetables.

4.13 For proposed mergers, the merging parties may elect to send the OFT a ‘merger notice’, in which case the OFT will usually have to complete its investigations within 30 working days, subject to possible extension in certain cases. If the parties tell the OFT about a merger before it takes place, the OFT does not have to make a reference until the arrangements are sufficiently advanced.

4.14 If the merger is referred to the CC, the CC normally has a maximum of 24 weeks from the date of reference in which to complete its investigation and – if it finds an adverse effect on competition – make its decision on remedies. Negotiating and finalising the detailed terms of the remedies with the parties will usually take place following the publication of the CC’s report.
**Appeals**

4.15 The Act introduces a new right to apply for review of decisions on mergers taken by the OFT, CC or SoS. The parties to the merger, or other persons who are sufficiently affected by the decision, may apply to the CAT for a review. For these reviews, the CAT cannot substitute its own decision on the merits of the case, but can review the reasonableness, lawfulness and fairness of the decision and if necessary require it to be reconsidered by the OFT, CC or SoS.

**Further information**

4.16 Further details of the new merger control regime are given in the OFT publications *Mergers – substantive assessment guidance*, OFT516, and *Mergers – procedural guidance*, OFT526, both published in May 2003.
5 Market investigation references

5.1 Part 4 of the Act makes provision for a system of market investigations by the CC. The purpose of these investigations is to inquire into markets where it appears that the structure of the market or the conduct of suppliers or customers is harming competition.

5.2 These market investigation references replace the existing FTA73 monopoly enquiries, and the Act has repealed the parts of the FTA73 relating to those enquiries.

Making a reference

5.3 The OFT may make market investigation references to the CC. The following sectoral regulators may also make market investigation references in relation to their designated sectors:

- The Director General of Telecommunications
- The Gas and Electricity Markets Authority
- The Director General of Water Services
- The Director General of Electricity Supply for Northern Ireland
- The Rail Regulator
- The Director General of Gas for Northern Ireland; and
- The Civil Aviation Authority.

The provisions described in the remainder of this chapter apply to references made by sectoral regulators as they apply to references made by the OFT.

5.4 When making a reference, the OFT must have reasonable grounds for suspecting that one or more features of a market prevents, restricts or distorts competition in relation to the supply or acquisition of goods or services in the UK (or a part of the UK).

5.5 There is a reserve power for Ministers to refer markets to the CC in certain circumstances where the Minister is not satisfied with a decision of the OFT not to make a reference. A reference may also be made where Ministers are not satisfied that the OFT will reach a decision on a reference within a reasonable time.
5.6 The OFT may accept undertakings in lieu of a reference from such persons as it considers appropriate, in order to remedy any adverse effects on competition (or the harmful effects on customers that result) which would otherwise form the subject of a reference.

5.7 If the OFT makes a reference, or accepts undertakings, it must publish its reasons for doing so.

CC's investigation and remedies

5.8 The CC will carry out a detailed investigation to determine whether any feature in the referred market (or markets) prevents, restricts or distorts competition in relation to the supply of goods or services in the UK (or a part of the UK). If such an adverse effect on competition is identified, the CC must decide what action to take to remedy the adverse effect and/or any detrimental effect on customers which results, taking into account any relevant customer benefits. Remedies may take the form of undertakings or orders.

5.9 The maximum period for the CC’s investigation is two years.

Public interest cases

5.10 The SoS may intervene in cases involving specified public interest considerations (currently only national security) by giving an intervention notice. Intervention notices may be served on the CC within four months of a reference being made to it, or on the OFT if it is considering accepting undertakings in lieu of a reference.

5.11 Where an intervention notice has been served, the CC will decide whether there has been an adverse effect on competition in the market and what remedies would be appropriate, and will report to the SoS. If the SoS decides that a public interest consideration is relevant to the proposed remedies, the SoS will take action, taking into account that consideration. If the SoS decides that no public interest consideration is relevant, the matter will revert to the CC to take action.
Appeals

5.12 The Act introduces a new right to apply for review of decisions taken by the OFT, CC or SoS in connection with market investigation references. As under the mergers regime, persons who are sufficiently affected by the decision may apply to the CAT for a review of the decision. For these reviews, the CAT cannot substitute its own decision on the merits of the case, but can review the lawfulness and fairness of the decision and if necessary require it to be reconsidered by the OFT, CC or SoS.

Further information

5.13 Further details of the factors which the OFT will consider when deciding whether to make a reference, and the procedures which apply are given in Market investigation references, OFT511, published in March 2003. OFT expects to publish further guidance on procedures in market studies, super-complaints and in connection with market investigation references in the summer of 2003.
6 Criminalisation of cartels

6.1 The Act introduces a criminal offence for individuals who dishonestly engage in cartel agreements. The new cartel offence operates alongside the existing regime that imposes civil sanctions on undertakings\(^2\) that breach the CA98 prohibition on anti-competitive agreements. Further information on the CA98 prohibition can be found in the OFT guideline The Chapter I Prohibition, OFT401, published in March 1999.

6.2 The offence provides a deterrent to individuals against engaging in cartel activity, in addition to the deterrent provided by the threat of fines for the undertakings involved.

The offence

6.3 An individual is liable to criminal prosecution if he or she dishonestly agrees with one or more other persons that undertakings will engage in one or more of the prohibited cartel activities. These are:

- price-fixing
- limitation of supply or production
- market-sharing, and
- bid-rigging.

6.4 The offence is committed only if the individual acts dishonestly, a concept which is well understood in criminal law. The offence will be committed irrespective of whether the agreement reached is actually implemented by the undertakings and irrespective of whether the individuals have the authority to act on behalf of the undertaking at the time of the agreement.

6.5 The offence only applies to agreements between undertakings at the same level in the supply chain, known as horizontal agreements. Vertical agreements will not fall within the scope of the offence.

6.6 If the agreement is made outside the UK, proceedings may only be brought where some step has been taken to implement the agreement in the UK.
Penalty and prosecution

6.7 The cartel offence is triable either in a magistrates' court (summary trial) or before a jury (trial on indictment). Before the magistrates, a convicted offender may receive a six month term of imprisonment and/or a fine up to the statutory maximum. On conviction on indictment, an offender may receive a maximum of five years' imprisonment and/or an unlimited fine.

6.8 In England, Wales and Northern Ireland, prosecutions will generally be undertaken by the Serious Fraud Office (SFO), although the OFT also has the power to prosecute. Private prosecutions may be brought only with the consent of the OFT. In Scotland, prosecutions will be brought by the Lord Advocate.

No-action letters

6.9 The OFT has the power to issue written notices confirming that a particular individual will not be prosecuted for the offence if certain conditions are met3. These 'no-action letters' will be given to individuals who have participated in a cartel but satisfy the conditions for a no-action letter, including giving details of the cartel activity to the OFT and cooperating throughout the investigation.

6.10 Further information about the conditions and procedure for issuing of no-action letters is available in The cartel offence: Guidance on the issue of no-action letters for individuals, OFT513, published in April 2003.
The OFT’s powers of investigation

6.11 In order to investigate the cartel offence, the Act provides the OFT with a number of new powers, including the following:

• power to compel persons to answer questions or otherwise provide information or documents relevant to the investigation. This power can apply to persons under investigation, or other persons who the OFT has reason to believe have relevant information. Persons may refuse to disclose to investigators information that is covered by legal professional privilege

• power to enter premises under warrant and to take possession of relevant documents, including print-outs of documents stored in electronic form. Explanations of documents or their whereabouts may also be required


6.12 Persons who hinder investigations may themselves be committing a criminal offence:

• unreasonable failure to comply with requirements to answer questions or provide information or documents may lead to penalties of up to six months’ imprisonment and/or a fine

• making false or misleading statements may result in up to two years’ imprisonment and/or a fine

• destroying, concealing or falsifying documents relevant to an investigation may lead to up to five years imprisonment and/or a fine.

6.13 Further details of the OFT’s powers of investigation in connection with the cartel offence are available in *Powers for investigating criminal cartels*, OFT505, consultation draft published April 2003.
7 Disqualification of directors

7.1 The Act amends the Company Directors Disqualification Act 1986 (CDDA86) to provide the OFT with power to apply to the court for orders disqualifying directors of companies which have committed a breach of competition law. These orders are called Competition Disqualification Orders (CDOs).

7.2 The following sectoral regulators may also apply for CDOs in relation to their designated sectors:

- The Director General of Telecommunications
- The Gas and Electricity Markets Authority
- The Director General of Water Services
- The Director General of Electricity Supply for Northern Ireland
- The Rail Regulator
- The Director General of Gas for Northern Ireland, and
- The Civil Aviation Authority.

The procedures described in the remainder of this chapter apply to applications by sectoral regulators as they apply to applications by the OFT.

7.3 The court must make a CDO against a person if it is satisfied that:

(a) an undertaking which is a company of which that person is a director commits a breach of competition law, and

(b) the court considers that person’s conduct as a director makes him or her unfit to be concerned in the management of a company. Conduct may include omissions.
For these purposes, a 'breach of competition law' means an infringement of any of the following:

- the Chapter I prohibition of CA98
- Article 81 of the EC Treaty
  (both relating to anti-competitive agreements)
- the Chapter II prohibition of CA98
- Article 82 of the EC Treaty
  (both relating to abuse of a dominant position)

Applications for CDOs must be made to the High Court or, in Scotland, the Court of Session. Before making an application for a CDO against a person, the OFT will give notice to that person and give him or her an opportunity to make representations.

When deciding whether the director’s conduct makes him or her unfit to be concerned in the management of a company, the court must consider whether the director contributed to the breach, failed to take steps to prevent it or ought to have known that the conduct breached competition law. The court may also have regard to his or her conduct as a director of a company in connection with any other breach of competition law.

The maximum period of disqualification under a CDO is 15 years. During the period in which a person is subject to a CDO, it is a criminal offence for that person to be a director of a company or take on certain other roles relating to company management.

The OFT may, instead of applying for a CDO, accept a Competition Disqualification Undertaking (CDU) from a person. A CDU has the same effect as a CDO, but is a binding commitment given to the OFT by the person in question, rather than being ordered by the court.

Further details of the factors which will determine whether the OFT applies for a CDO, or accepts a CDU, and the procedures which apply are given in the guidance *Competition Disqualification Orders*, OFT510, published in May 2003.
8 Super-complaints

8.1 The Act makes express provision for designated consumer bodies to make 'super-complaints', where there are market features that may be harming consumers to a significant extent.

8.2 Super-complaints must relate to one or more features of a market as a whole. This will not normally be the specific behaviour of individual businesses. Relevant market features that could give rise to a complaint include the market structure or the general conduct of firms operating in the market.

8.3 The bodies eligible to make super-complaints will be designated by the SoS. The SoS may designate any body that represents the interests of consumers of any description and which meets other criteria which have been published by the SoS. Please see http://www.dti.gov.uk/enterpriseact/pdfs/superguide.pdf Applications by consumer bodies will be open to public scrutiny and comment before decisions are taken on designation.

8.4 The OFT has up to 91 days to respond to a super-complaint. The response will state whether the OFT has decided to take action, and if so, what action it proposes to take. The Act does not limit the types of action which the OFT may take, so any of its other powers can be used. Outcomes may include an investigation into the market by the OFT, enforcement action under CA98, recommending changes to legislation, or referring the market to the CC for further investigation. The OFT will publish its response, giving reasons for the action it proposes to take.

8.5 Super-complaints may also be made to sectoral regulators in relation to particular markets. They will have a duty to consider super-complaints from 20 June 2003 when the super-complaints provisions commence.

Further information

8.6 Further information on super-complaints, including advice on the preparation of a reasoned case and the procedures which apply, is given in the guideline Super-complaints: guidance for designated consumer bodies, OFT504, consultation draft published in August 2002.
9 Enforcement of consumer law

9.1 The Act has made provision for the enforcement of certain consumer legislation by means of court orders, called Enforcement Orders, against businesses breaching that legislation. The new enforcement procedure is based on the Stop Now Orders Regulations (SNORs) and replaces those Regulations and Part III of the FTA73.

9.2 Enforcement action can be taken against ‘Community infringements’ or ‘domestic infringements’. Community infringements are breaches of UK laws giving effect to a number of specific EC Directives (e.g. certain laws on consumer credit, package holidays and unfair terms in consumer contracts) where the breach harms the collective interests of consumers. Domestic infringements are breaches of UK laws or contracts of a type specified by the SoS, which are committed in the course of a business and harm the collective interests of consumers in the UK. The list of specified legislation has been published at http://www.dti.gov.uk/enterpriseact/pdfs/sidomesin.pdf

Enforcers

9.3 The OFT and trading standards departments have powers to enforce in respect of all types of infringement. The SoS may also designate sectoral regulators and consumer protection bodies as enforcers in respect of all or a limited range of infringements. Various provisions give the OFT a coordinating role to ensure that action is taken by the most appropriate body in each case.

Procedure

9.4 Before applying for an Enforcement Order, the OFT must consult with the business infringing consumer protection legislation, with a view to getting the infringement stopped without the need to go to court. The OFT may decide to accept undertakings from the business that it will stop the infringing conduct. After a two week consultation period, if the business will not give undertakings, the OFT can apply for an Enforcement Order to the High Court or County Court (or Court of Session or Sheriff in Scotland).
9.5 The court can order the business to stop, and not repeat, the infringing conduct. The order also prevents a person infringing in the same way through any other business or from acting as a company officer (for example, a director) and allowing the company to carry out the infringing conduct. Alternatively, the court can accept undertakings that the infringement will cease. If the person has breached undertakings which he or she gave to the OFT, the court will take account of that breach.

9.6 In urgent cases, interim orders can be made, in which case the prior consultation period is shortened to one week. An interim application lasts until the court has heard an application for a full enforcement order.

9.7 If a person breaches the court order or undertakings given to the court by repeating the infringement, he or she is in contempt of court and can be fined and/or imprisoned for up to two years.

9.8 In order to exercise these functions effectively, the OFT has the power to require information from any person by means of a written notice. If the person fails to comply with the notice, an application can be made to the court for an order.

9.9 Further details on the enforcement of consumer legislation, including the principles that the OFT will apply in deciding when to take action, can be found in the guidance Enforcement of consumer protection legislation, OFT512, published in March 2003.

Promoting consumer codes of practice

9.10 The Act highlights one of the key functions of the OFT as promoting good practice in activities that may affect consumer interests. One of the ways in which the OFT may do this is by giving its approval to (or withdrawing approval from) consumer codes of practice.

9.11 A code of practice is eligible for approval by the OFT if it is intended to regulate the conduct of businesses that supply goods or services to consumers, with a view to safeguarding or promoting the interests of consumers.

4 Unless action is needed so urgently that notice cannot be given, in which case, if another enforcer is making the application, the OFT must authorise it to be made without notice.
9.12 A body that administers a voluntary consumer code and can influence and raise standards within its sector, such as a trade association, may apply for approval of its code. Such a body is known as a 'code sponsor'.

9.13 The Act requires the OFT to set criteria for approving codes, and permits it to use an official symbol to signify which codes have OFT approval.

9.14 The OFT has arranged a two stage procedure for its approval regime. In the first stage, the OFT will encourage code sponsors to develop codes that meet the published core criteria. In the second stage, code sponsors will need to provide evidence that the code lives up to the initial promises made and works to the benefit of consumers. The OFT will approve and promote the code once it is satisfied that this requirement has been met.

9.15 Further information on consumer codes of practice is available in Core criteria for consumer codes of practice – guidance for those drawing up codes of practice, OFT352, published in May 2002; and The OFT's Consumer codes of practice regime, OFT631, published in February 2003.
10 Handling of information

10.1 The Act sets out new requirements for safeguarding certain information and lays down the requirements that have to be met before public authorities, including the OFT, may disclose such information. The provisions apply to information which has been gathered for the purposes of the OFT’s general functions, competition functions or consumer functions under the Act and under other specified competition and consumer protection legislation. The provisions apply whether the information obtained relates to the affairs of individuals or undertakings.

10.2 There is a general restriction on the disclosure of information during the lifetime of the individual or during the existence of the undertaking unless that disclosure is within one of the permitted gateways or the information had previously been made public.

Permitted disclosures

10.3 A public authority which holds such information may disclose it only in the following circumstances:

- the disclosure is made with the consent of the individual or undertaking to which the information relates and, if different, the provider of the information (if the provider’s identity is known to the authority)
- the disclosure is required in order to fulfil an EC obligation
- the disclosure is made to facilitate the exercise of the disclosing authority’s statutory functions. If information disclosed for this purpose is not made available to the public, there are restrictions on the recipient making further disclosure
- the disclosure is made to another public authority to facilitate the exercise of the recipient’s statutory functions. Information disclosed in this way (that is not made available to the public) may not be used for any purposes other than that for which it was disclosed, and there are restrictions on further disclosure by the authority receiving the information
• the disclosure is made in connection with the investigation of a criminal offence or bringing of criminal proceedings. The disclosing authority must be satisfied that disclosure is proportionate in the circumstances. The recipient may only use the information for the specific purpose of the disclosure

• disclosure is made to overseas authorities in accordance with the rules set out below.

10.4 Before disclosing any information in one of these permitted gateways, the disclosing authority must consider the following:

• whether disclosure would be contrary to the public interest

• whether disclosure would cause significant harm to the interests of a business (for commercial information) or individual (for information relating to private affairs). If the disclosure could harm business or individual interests, the authority is required to consider the extent to which disclosure of that information is necessary.

Disclosures to overseas authorities

10.5 New rules are also established for the disclosure of information to overseas authorities. Disclosure is permitted in order to facilitate the investigation and bringing of criminal proceedings generally or civil proceedings that relate to certain specified competition or consumer legislation. However, there are exclusions and overseas disclosure is not permitted for certain types of information, including that obtained under merger investigations or in relation to market investigation references.

10.6 Information may only be disclosed to an overseas authority on condition that:

• it is not further disclosed without the agreement of the authority disclosing the information, and

• the overseas authority does not use it for any purpose other than that for which it was disclosed.
Furthermore, the SoS has the power to prevent a disclosure to an overseas authority - where the SoS believes it would be more appropriate for any investigation or proceedings to be carried out in the UK or another country.

10.7 In addition to the considerations described in paragraph 10.4 above, there are additional factors which must be considered before making any disclosure to an overseas authority, including:

- whether the matter is sufficiently serious to justify making the disclosure
- whether the law of the overseas country/territory provides appropriate protection for the storage and disclosure of personal data, and
- whether the law of that country/territory provides appropriate protection against self-incrimination in criminal proceedings.

Disclosure offences

10.8 It is an offence to disclose information in circumstances where such disclosure is not permitted under these rules, where it contravenes a direction not to do so from the SoS or where the information is disclosed for a purpose not permitted under the Act. Penalties include imprisonment up to two years (on indictment) or three months (on summary conviction) and/or a fine.

Further information

10.9 Further information on the disclosure of information can be found in the consultation paper, The overseas disclosure of information, OFT507, published in April 2003.
11 Appeals

The Competition Appeal Tribunal

11.1 The Act establishes the Competition Appeal Tribunal (CAT), which has replaced the appeal tribunals of the CC (known as CCAT). The CAT is entirely independent of the CC.

11.2 The CAT has taken on the CCAT’s function of hearing appeals of certain decisions taken by the OFT or sectoral regulators under CA98, with the power, among other things, to confirm, set aside or vary the decision, or remit the matter to the OFT (or regulator).

11.3 The CAT’s new functions under the Act are:

- hearing claims for damages where an infringement of competition law has been established (under Chapters I or II of CA98 or UK decisions under Articles 81 or 82 EC Treaty)

- hearing representative claims for damages, brought by specified bodies on behalf of groups of named individual consumers, in respect of established breaches of those competition laws, and

- reviewing decisions on mergers or market investigation references, taken by the OFT, CC, SoS or sectoral regulators as described in paragraphs 4.15 and 5.12 above.

11.4 The CAT will have ordinary members, a panel of chairmen and a President. The Lord Chancellor will appoint the President and chairmen. The SoS appoints the ordinary members. The tribunal for each proceedings must consist of a chairman (who may be the President) and two other members.

11.5 The SoS has made Tribunal Rules for CAT proceedings, including matters such as time limits for bringing proceedings, ability to reject proceedings, conduct of hearings, interim orders and fees for bringing proceedings.

11.6 The CAT is funded and supported in its administration through a new body called the Competition Service.
CA98 decisions – appeals by third parties

11.7 The Act also amends the procedure for appeals by third parties of certain decisions taken under the CA98. The procedure for appeals by persons whose agreement or conduct was the subject of a decision is unchanged. The types of decision capable of appeal also remain unchanged.

11.8 Previously, any third party wishing to appeal a decision under Chapter I or Chapter II of CA98 was required under the old procedure to first write to the Director General of Fair Trading asking him to withdraw or vary his decision. There was then a right of appeal to the CCAT against a decision of the Director General not to withdraw or vary the original decision.

11.9 The Act amends CA98 such that any person may appeal the listed types of CA98 decision directly to the CAT, provided that the CAT considers he or she has a sufficient interest in that decision. The need for a preliminary application to the OFT is abolished for any decision made on or after 20 June 2003.

Damages claims and representative claims

11.10 The Act enables claims for damages to be brought before the CAT where a breach of competition law has already been established. Damages claims may be available to persons who have suffered loss or damage as a result of certain types of competition law infringement. This is in addition to the existing right to bring damages claims in the courts.

11.11 Claims may be made where either the OFT or European Commission has decided that there has been a breach of:

- the Chapter I CA98 or Article 81 EC Treaty prohibitions on anti-competitive agreements, or
- the Chapter II CA98 or Article 82 EC Treaty prohibitions on abuse of a dominant position.
11.12 Claims may also be made where the CAT has itself established a breach of one of these prohibitions as a result of an appeal of an earlier decision of the OFT. No claim may be brought for so long as the decision in question may be still subject to appeal.

11.13 These claims may be brought directly by the person who has suffered loss because of the infringement. Also, bodies specified by SoS will be permitted to bring representative actions on behalf of consumers. The consumers on behalf of whom the action is brought must be individuals, and must not be receiving the goods or services in question in the course of his/her business. Damages will be awarded directly to the represented consumers.

Applications for review

11.14 Almost all decisions taken by the OFT, CC, SoS or sectoral regulators in connection with the new mergers\(^6\) or market investigation\(^7\) regimes will be subject to the possibility of judicial review by the CAT. For these reviews, the CAT is not entitled to vary the decision or substitute its own decision but can quash the decision on grounds of procedural unfairness, illegality or unreasonableness. In such circumstances, the relevant body may be asked to think again and make a fresh decision.

11.15 Applications for review can be brought by any person aggrieved by the decision (or failure to take a decision), although the CAT will be able to reject proceedings if the applicant does not have a sufficient interest in the decision.

Appeals of penalty decisions

11.16 As part of the mergers and market investigation references, the CC will have the power to impose penalties for failure to provide evidence (either as a witness or in the form of documents). Penalties imposed by the CC can be appealed to the CAT. For these appeals, the CAT may quash the penalty or substitute a different amount or different dates for payment.

---

\(^6\) See paragraph 4.15
\(^7\) See paragraph 5.12
12 Changes to the Competition Act 1998

12.1 In addition to the key changes outlined above, the Act makes some small but significant changes to the CA98, with effect from 1 April 2003.

Repeal of exclusion for professional rules

12.2 The Act repealed Schedule 4 to the CA98. This schedule had excluded designated professional rules from the Chapter I prohibition on anti-competitive agreements. These rules now have to comply with Chapter I of the CA98 in the same way as all other agreements and decisions of associations.

Power to enter premises

12.3 Since 1 April 2003, where the OFT obtains a warrant to enter premises in connection with a CA98 investigation, the warrant may authorise specified persons to accompany the OFT officer named in the warrant. This provision enables the OFT to make use of specialists with expertise that is not available within the OFT, for example experts in information technology. Such persons will assist on searches where necessary to ensure that the terms of the warrant are fully exploited and all information relevant to an investigation is obtained efficiently.

12.4 The Act contains an equivalent power for specified persons to be authorised to accompany the OFT officer named in search warrants obtained in connection with investigation of the new cartel offence.

Appeals of CA98 decisions

12.5 Paragraphs 11.7 to 11.9 above describe the changes the Act will make to the procedure for third parties who appeal decisions under CA98.

Further information

12.6 OFT has published a leaflet *How will the Enterprise Act 2002 change the Competition Act 1998 regime?* OFT441 which explains how the CA98 has changed as a result of the Enterprise Act. In particular the leaflet indicates consequential changes to the CA98 guidelines, which will be re-issued later in 2003.
13 Glossary of abbreviations used in this guideline

<table>
<thead>
<tr>
<th>Abbreviation</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>CA98</td>
<td>Competition Act 1998</td>
</tr>
<tr>
<td>CAT</td>
<td>Competition Appeal Tribunal</td>
</tr>
<tr>
<td>CC</td>
<td>Competition Commission</td>
</tr>
<tr>
<td>CCAT</td>
<td>Appeals Tribunal of the Competition Commission, which ceases to exist under the Enterprise Act</td>
</tr>
<tr>
<td>CDO</td>
<td>Competition Disqualification Order</td>
</tr>
<tr>
<td>CDU</td>
<td>Competition Disqualification Undertaking</td>
</tr>
<tr>
<td>DTI</td>
<td>Department of Trade and Industry</td>
</tr>
<tr>
<td>EC Treaty</td>
<td>Treaty of Rome, establishing the European Community, as consolidated by the Treaty of Amsterdam</td>
</tr>
<tr>
<td>FTA73</td>
<td>Fair Trading Act 1973</td>
</tr>
<tr>
<td>MPI</td>
<td>Markets and Policy Initiatives Division of the OFT</td>
</tr>
<tr>
<td>OFT</td>
<td>Office of Fair Trading</td>
</tr>
<tr>
<td>SoS</td>
<td>Secretary of State for Trade and Industry</td>
</tr>
<tr>
<td>SNORs</td>
<td>Stop Now Orders (EC Directive) Regulations 2001</td>
</tr>
</tbody>
</table>
Overview – the competition and consumer provisions
Enterprise Act publications

The OFT has issued a series of guidance booklets on various aspects of the Act, as listed below. They can all be downloaded from the OFT’s website http://www.oft.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

New guidance may be published and the existing guidance revised from time to time. For an up-to-date list of guidance booklets:

check www.oft.gov.uk/enterpriseact.htm
email enterpriseact.enquiries@oft.gsi.gov.uk
or telephone Enterprise Act enquiries on 020 7211 8181.

OFT Enterprise Act publications available as at June 2003:

**Competition disqualification orders**
OFT510 - guidance published May 2003

**Market investigation references**
OFT511 - guidance published March 2003

**Enforcement of consumer protection legislation**
OFT512 - guidance published March 2003

**The cartel offence - no-action letters for individuals**
OFT513 - guidance published April 2003

**Super-complaints - guidance for designated consumer bodies**
OFT504 - consultation paper issued August 2002

**Mergers - substantive assessment**
OFT516 - guidance published May 2003

**Mergers – procedural guidance**
OFT526 - guidance published May 2003

**Powers for investigating criminal cartels**
OFT505 - consultation paper issued April 2003

**The overseas disclosure of information**
OFT507 - consultation paper issued April 2003

**Practical Information**
OFT530 – leaflet summarising the competition and consumer provisions of the Enterprise Act.

**How will the Enterprise Act 2002 change the Competition Act 1998 regime?**
OFT441 - leaflet summarising changes published May 2003