



# The Enterprise Act 2002

Guide to the competition reforms



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## Introduction

The last few years have been dramatic ones in the area of UK competition law. Radical changes to the UK competition regime since March 2000 have forced almost every company to rethink its competition compliance policies, strategies on risk management and day-to-day ways of conducting business. The aim of this guide is to provide you with an outline of the most recent changes to the UK competition regime introduced by the Enterprise Act 2002 (the Act).

In March 2000, the Competition Act 1998 (Competition Act) introduced tougher laws prohibiting anticompetitive agreements and practices in the UK. It abolished much of the old law and established prohibitions modelled on articles 81 and 82 of the Treaty establishing the European Community (EC Treaty).

On 20 June 2003, the Act will introduce further significant changes by adding strong deterrents for individuals involved in competition law breaches, modernising the monopoly and merger rules, and restructuring and increasing the powers of the competition authorities.

On 1 May 2004, in response to EC modernisation<sup>1</sup>, the UK competition regime will be altered again. In particular, the Office of Fair Trading (OFT) and the sectoral regulators will be given the power to enforce the EC competition rules and the Competition Act will be amended to align it with the new European system.

The Act can, therefore, be seen as the second part in a trilogy of UK competition reforms. It builds on the foundations for modernisation laid by the Competition Act. The key changes that it introduces are:

- a new criminal offence for individuals who dishonestly engage in cartel agreements;
- new powers of investigation to assist the OFT when investigating the cartel offence;
- the power to disqualify directors of companies that have breached the competition rules;
- provisions to encourage individuals to bring private damages actions;
- a new 'super-complaints' procedure, allowing designated consumer bodies to trigger inquiries into certain markets;
- modernising and reforming the Fair Trading Act 1973 (FTA) monopoly and merger regimes; and

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<sup>1</sup> See *Radical reform of EU competition law enforcement*, Freshfields Bruckhaus Deringer, December 2002.

- restructuring the competition authorities, in particular by transferring the functions and powers of the Director General of Fair Trading (DGFT) to a new statutory body corporate, the OFT, and by creating a new Competition Appeal Tribunal (CAT), which takes over the functions of the Competition Commission Appeal Tribunal (CCAT) and acquires new functions.

The Act, which follows the recommendations in the White Paper, *A World Class Competition Regime*, received Royal Assent on 7 November 2002. Implementation of its measures is subject to commencement orders. On 1 April 2003, a limited number of provisions were brought into force, in particular those formally creating the new OFT and the CAT. *The substantive competition provisions come into force on 20 June 2003.*

This guide is accurate as at 31 May 2003. It does not deal with the changes to the insolvency laws brought into effect by the Act, nor with the consumer protection provisions. We have prepared a separate guide dealing with the insolvency provisions which can be provided on request.

## **Criminalisation of cartels**

### **The cartel offence**

#### **Deterring breaches of the competition rules**

The Act makes two significant changes that are designed to provide a strong deterrent to breaches of the competition rules. The first is Part 6 of the Act, which creates a new 'cartel offence' for individuals who dishonestly engage in cartel activity. It is a criminal offence which will run in parallel with the existing civil regime established by the Competition Act. The second is an amendment to the Company Directors Disqualification Act 1986 (CDDA), which confers power on the OFT (and specified sectoral regulators) to seek competition disqualification orders (CDOs) against directors of companies that commit breaches of the competition rules (discussed in the section entitled 'Power to disqualify directors of companies that have breached the competition rules' on page 15).

#### **What is the new cartel offence?**

The Act introduces a new cartel offence (section 188 of the Act) for which there are criminal sanctions. It can be committed by *individuals*, but not a company, who have acted *dishonestly* in respect of 'hard core' cartel behaviour, including *horizontal* arrangements to fix prices, share markets, limit production or supply, or rig bids.

An individual can be convicted without there having been any infringement finding under the civil regime (articles 81 or 82 of the EC Treaty or Chapters I and II of the Competition Act). This is because the definition of the cartel offence does not refer to these provisions. However, as discussed in more detail below, it is possible for an investigation of a cartel offence and a breach of article 81 of the EC Treaty or Chapter I of the Competition Act to proceed in parallel.

#### **What type of conduct is covered by the cartel offence?**

Section 188 of the Act exposes any individual, including managers and employees, to criminal sanctions if he or she dishonestly agrees with one or more persons to make or implement, or to cause to be made or implemented, arrangements relating to at least two undertakings which:

- directly or indirectly fix a price in the UK of a product or service;
- limit or prevent supply or production in the UK of a product or service;
- divide the supply in the UK of a product or service;
- divide customers for the supply in the UK of a product or service; or

- rig bids.

The cartel offence applies only to horizontal arrangements, being arrangements between undertakings at the same level of the supply or production chain. The criminal offence will be committed whether or not the agreement is actually implemented. However, an agreement made outside of the UK will lead to an infringement only if implemented in the UK, as discussed below.

**What is meant by 'dishonesty'?**

Individuals commit the offence only if they are 'dishonest'. There are two principal elements to the test in English law as to whether the accused has acted dishonestly. An individual is dishonest if:

- according to the standards of reasonable and honest people, the individual's behaviour was dishonest (the objective test); and
- the individual knew that he was acting dishonestly according to those standards (the subjective test).

Mere negligence of an individual is not enough. However, the explanatory notes to the Act indicate that bid-rigging is a prohibited activity under section 188 where, for all practical purposes, the carrying out of the activity will, in itself, indicate a dishonest intention.

Although a director, or shadow director, who behaves negligently but not dishonestly will not be criminally liable, he or she may still be disqualified from acting as a director (see the section below entitled 'Power to disqualify directors of companies that have breached the competition rules' on page 15).

**What are the penalties for the cartel offence?**

An individual found guilty of the cartel offence is liable on conviction on indictment to imprisonment for a term of up to five years and/or to an unlimited fine, and on summary conviction to imprisonment for a term of up to six months and/or to a fine not exceeding the statutory maximum (£5,000). It is also possible for a court by or before which an individual is convicted to make a CDO against an individual who is also a director.

**What if the agreement is made outside the UK?**

No proceedings may be brought in respect of the cartel offence where the agreement is made outside the UK, unless it has been implemented in whole or in part in the UK. The Act does not define the word 'implemented'. There is, therefore, some uncertainty as to the extent of the necessary nexus between the agreement and its effects in the UK. It is possible that it could include any agreement having an effect on prices or competition in the UK. Certainly there

will be no automatic safe haven for individuals who reach agreements abroad and do not enter the UK.

The cartel offence will be extraditable. In other words, subject to reciprocal arrangements with foreign states, those committing the offence, or conspiring or attempting to do so, may be extradited to or from the UK. Extradition will not be applied retrospectively (ie to acts prior to 20 June 2003) and is possible only to and from countries that have criminal penalties for the same activity.

### **Investigating the offence**

#### **Who will investigate?**

Responsibility for instituting proceedings for the cartel offence is conferred by the Act on the OFT and the Serious Fraud Office (SFO). A third party can only institute proceedings with the consent of the OFT. The OFT may act alone or in conjunction with the SFO in investigating an offence although prosecutions will generally be undertaken by the SFO. In Scotland, prosecutions will be instigated by the Lord Advocate.

#### **How will the authorities go about investigating and proving the commission of the cartel offence?**

The Act confers enhanced powers of investigation on the OFT. Where the OFT has 'reasonable grounds for suspecting' an offence has been committed, it may:

- require an individual to answer questions or provide information or produce documents;
- enter premises under warrant; and
- acquire information by covert surveillance and action in respect of property.

#### **What will be sufficient to trigger a cartel investigation?**

The OFT may commence an investigation in circumstances where it considers that there are 'reasonable grounds for suspecting' that a criminal offence has been committed. The test for determining whether there are 'reasonable grounds' for suspicion is objective and will depend on the information available to the OFT.

The OFT's draft guidance on its powers for investigating criminal cartels gives examples of sources of information that may give rise to reasonable grounds for suspicion that the cartel offence has been committed, including statements provided by employees, ex-employees or disaffected members of a cartel, or correspondence received on an application for leniency made by an undertaking or an individual. The OFT may obtain information about individuals, undertakings, agreements and markets at any time through informal enquiries, although it cannot compel an individual or undertaking

to respond to an informal enquiry for which there is no statutory power.

**How can the OFT exercise its power to require information and documents?**

The OFT must exercise its power to require an individual under investigation, or any other individual, to answer questions or provide information and to produce specified documents relevant to the investigation by serving a written notice. There is no limit to the number of notices that the OFT can serve on an individual.

The notice must set out:

- the subject matter and the purpose of the investigation;
- the nature of the offences which may be committed by failing to cooperate with an investigation; and
- the time and place at which information or documents must be produced, or an individual is required to attend an interview to answer questions on any matter relevant to the investigation.

In setting an appropriate time limit for complying with the notice, the OFT will consider the amount and complexity of the information required.

**How can the OFT exercise its power to enter premises under a warrant?**

The OFT may enter and search premises and take possession of relevant documents, or take necessary steps for preserving them or preventing interference, with a warrant issued by the High Court (or a sheriff in Scotland), where there are 'reasonable grounds for believing' that there are documents on the premises which the OFT has the power to require to be produced.

Reasonable and proportionate force may be used, if necessary, to enter premises if the named OFT officer is satisfied that the premises are those specified in the warrant. If the occupier is informed, he or she, or one of his or her representatives, must be given a reasonable opportunity to be present when the warrant is executed. OFT officers also have the power to remove material where it is not reasonably practicable to determine on the premises the extent to which it may be seized, if at all. If it appears that legally privileged material has been seized, the OFT has a duty to return this material. The OFT has indicated in its draft guidance that it will do so as soon as practicable.

**Can you insist on your legal adviser being present?**

OFT officers executing a warrant obtained under the Act in respect of a suspected criminal offence are not obliged to wait for an individual's or undertaking's legal advisers to arrive before

commencing the search. However, the OFT has indicated in its draft guidance that OFT officers may be prepared to wait a reasonable amount of time for an undertaking's or an individual's legal adviser to arrive if it is the OFT's intention to remove material from the premises (although the rest of the search will proceed without delay).

Individuals suspected of having committed the cartel offence will be reminded of their entitlement to legal advice before being interviewed under caution. An individual being interviewed under the powers of investigation in the Act will also be entitled to seek legal advice. OFT officers will not generally conduct interviews under caution during a search warrant, although such an interview may be conducted if an individual voluntarily decides to provide information to OFT officers. In this case, the individual will be advised of his or her entitlement to legal advice.

**What other investigatory powers will the OFT have?**

The Act gives the OFT new powers of surveillance for the sole purpose of investigating the cartel offence. The Act amends the Regulation of Investigatory Powers Act 2000 (RIPA) and the Police Act 1997 to grant the OFT the power of intrusive surveillance and the related power of property interference.

Intrusive surveillance is covert surveillance carried out on anything taking place on any residential premises and in any private vehicle and involves using a surveillance device to either hear or see what is happening. Property interference allows for the covert installation of such devices in property which would otherwise involve some element of trespass.

The personal authority of the Chairman of the OFT and the prior approval of the Office of Surveillance Commissioners are required before use of the surveillance powers, except in cases of urgency, where the Chairman of the OFT can authorise the surveillance.

The OFT has applied to the Home Office to be added to a list of authorities which can authorise the use of other methods of surveillance in accordance with the RIPA, such as directed surveillance (monitoring the movements of people), covert human intelligence sources (use of informants) and access to communication data (postal and telephone records).

The enhanced powers are modelled broadly on those which were available already to the SFO under section 2 of the Criminal Justice Act 1987. The draft OFT guidance indicates that the OFT will exercise its powers under the Act to investigate in close co-operation with the SFO. The OFT intends to publish codes of practice on its

procedures for exercising the various methods of surveillance in its investigations.

**Are there limitations on the use of the powers of investigation?**

Some safeguards are in place to protect the rights of individuals and undertakings. The OFT does not have the power under the Act to obtain, whether by written notice or during the execution of a search warrant, documents which are privileged. An individual may not be required under the powers of investigation under the Act to disclose any information or produce any document if the information or document is protected by a banking obligation of confidence, unless the individual to whom the obligation of confidence is owed consents to the disclosure or the OFT has authorised the disclosure as being necessary for the investigation.

There is also protection against self-incrimination. Statements made by an individual in response to a requirement imposed by the OFT using its powers of investigation under the Act may only be used as evidence in criminal proceedings against an individual where that individual:

- knowingly or recklessly has made a false or misleading statement in response to that requirement and is then prosecuted for an offence of knowingly or recklessly making a false or misleading statement; or
- is being prosecuted for an unrelated offence and makes a statement which is inconsistent with the original statement. In this regard, the original statement made can only be used where evidence relating to it has been adduced, or a question relating to it has been asked, by or on behalf of that individual in proceedings arising out of the prosecution.

A statement made by an individual in response to a requirement imposed by the OFT using its compulsory powers of investigation under the Competition Act, may be used as evidence in a cartel offence prosecution against the individual who made the statement only if, in giving evidence during that prosecution, he or she makes a statement inconsistent with it and if evidence relating to it is adduced, or a question relating to it is asked, by him or her or on his or her behalf.

**What are the penalties for not complying with an investigation?**

Failing to comply with a requirement imposed by the OFT during a criminal investigation, providing false or misleading information, falsifying, concealing or disposing of documents relevant to the investigation, and obstructing an individual exercising powers under a warrant are all offences carrying penalties of imprisonment and/or fines for breach.

An individual found guilty of such an offence is liable on conviction on indictment to imprisonment for a term of between two and five years and/or to an unlimited fine, and on summary conviction, to imprisonment for a term of up to six months and/or to a fine not exceeding the statutory maximum (£5,000). Some offences are considered as serious as the cartel offence itself, such as the destruction, falsification or concealment of documents.

**When is disclosure of information to overseas authorities permitted?**

The Act introduces a new system regulating the disclosure of information obtained under competition and consumer protection legislation to overseas public authorities (OPAs). It replaces current controls on disclosure set out in the FTA, the Consumer Credit Act 1974 and the Competition Act.

In disclosing information to OPAs, the OFT must in broad terms ensure that confidentiality of commercial and personal information is preserved and that the scope of the disclosure of information, where permitted, is no wider than is necessary for effective enforcement action.

**When may information be disclosed to OPAs?**

The Act allows disclosure of information to OPAs where, but only where, the disclosure will facilitate the exercise by the OPA of any function it has relating to:

- carrying out investigations in connection with the enforcement of any relevant legislation by means of civil proceedings;
- bringing civil proceedings for the enforcement of such legislation or the conduct of such proceedings;
- the investigation of crime;
- bringing criminal proceedings or the conduct of such proceedings; and
- deciding whether to start or bring to an end such investigations or proceedings.

The Secretary of State may prohibit disclosure if it is more appropriate that an investigation or proceedings be conducted in the UK or a third country.

There are further limitations on disclosure to OPAs, in particular, where:

- the matter is not sufficiently serious to justify the disclosure of information (disclosure of information for the purposes of bringing civil and criminal proceedings on matters relating to competition law or other criminal proceedings covered by mutual assistance

agreements to which the UK is a party will normally be ‘sufficiently serious’);

- the law of the country or territory covered by the OPA does not provide appropriate protection against self-incrimination in criminal proceedings (appropriate protection being available, for example, in the US and all signatories to the European Convention for the Protection of Human Rights and Fundamental Freedoms);
- the law of the country or territory covered by the OPA does not incorporate appropriate data protection provisions (such provisions already existing in the US and all the countries in the European Economic Area, including the UK, that have implemented the Data Protection Directive); and
- there are no mutual assistance arrangements in place as between the UK and the relevant country (although this factor is not necessarily determinative).

In deciding whether to make disclosure, the following factors also need to be taken into account:

- the need to exclude (so far as practicable) information, the disclosure of which is thought to be contrary to the public interest;
- the need to exclude (so far as practicable) disclosure of commercial information or information relating to the private affairs of an individual which is thought to significantly harm the legitimate business interests of an undertaking or the interests of an individual; and
- whether disclosure is necessary for the purpose for which it is permitted.

Information obtained under the OFT’s market or merger investigation powers (see the section entitled ‘Merger and market investigations’ on page 23) may not be disclosed to OPAs.

**Can information provided under leniency applications be disclosed to OPAs?**

Information provided by an undertaking under a leniency application may be disclosed to an OPA only if that undertaking benefited from a similar leniency arrangement with the OPA concerned.

Information provided voluntarily by an individual under an immunity application (see below) may be disclosed to an OPA for the purpose of a criminal cartel offence prosecution only if that individual is granted immunity from prosecution by the OPA.

### **Immunity from prosecution**

#### **Is immunity from prosecution available in return for co-operation with the authorities?**

Under the Act, the OFT has power to grant a 'no-action' letter to an individual for the purpose of an investigation or prosecution of the cartel offence. Where granted, no proceedings for the cartel offence may be brought against that individual in England and Wales or Northern Ireland, except in circumstances specified by the notice.

No such guarantee of immunity can be given in respect of prosecutions brought in Scotland. The decision to prosecute rests with the Lord Advocate, who will take into account a report from the OFT.

The no-action letter is aimed at protecting individuals who, while not having taken steps to coerce another undertaking to take part in the cartel, have nonetheless participated in the activities of the cartel and would, but for the possibility of a no-action letter, face criminal prosecution.

Guidance has been published outlining how the OFT intends to decide whether to grant a no-action letter to an individual. The preconditions for the grant of a no-action letter (which will not guarantee the issue of a no-action letter) are that an individual must:

- admit participation in the cartel offence;
- provide the OFT with all the information, documents and other evidence available to him or her regarding the existence and activities of the cartel;
- maintain continuous and complete co-operation throughout the investigation until the conclusion of any criminal proceedings arising as a result of the investigation;
- not have taken steps to coerce another undertaking to take part in the cartel; and
- refrain from further participation in the cartel from the time of its disclosure to the OFT (except as may be directed by the investigating authority).

#### **What is the procedure for obtaining a no-action letter?**

If an individual believes that a no-action letter may be required (or an early determination is needed as to whether they are liable to be prosecuted in Scotland), an approach can be made to the Director of Cartel Investigations at the OFT. The approach may be made:

- directly by the individual;
- by a lawyer representing the individual; or

- on behalf of named employees, directors, ex-employees or ex-directors, by an undertaking, or by a lawyer representing such undertaking, seeking leniency from the OFT in accordance with the DGFT's *Guidance as to the Appropriate Amount of a Penalty* (the OFT's Leniency Notice) or in conjunction with an application for leniency from the European Commission in accordance with the Commission Notice on Immunity from Fines or Reduction of Fines in Cartel Cases (the Commission Notice on Immunity).

An approach by a lawyer representing an individual may initially be made on an anonymous basis. When an approach is made, the Director of Cartel Investigations will give an initial indication as to whether the OFT may be prepared to issue a no-action letter. Where an undertaking has been granted 100 per cent leniency in accordance with the Commission Notice on Immunity or the OFT's Leniency Notice, the OFT will normally be prepared to issue no-action letters to those named individuals on whose behalf an approach is made.

Where the OFT is prepared to issue a no-action letter, the information provided by the individual in interviews will not be used against that individual in criminal proceedings, unless the individual has knowingly or recklessly provided information that is false or misleading in a material particular (where a no-action letter is not provided) or where a no-action letter is issued and then revoked.

**Can a no-action letter be revoked?**

A no-action letter may be revoked if the recipient ceases to fulfil the preconditions set out above, has knowingly or recklessly provided information that is false or misleading in a material particular, or has withheld information, documents or other evidence in his or her possession or under his or her control.

**Does a no-action letter protect an individual from disqualification as a director?**

The OFT does not intend to seek a CDO against individuals who benefit from no-action letters or who are directors of companies that benefit from leniency from either the OFT, in accordance with the OFT's Leniency Notice, or the European Commission, in accordance with the Commission Notice on Immunity (see the section entitled 'Power to disqualify directors of companies that have breached the competition rules' on page 15).

**Should multiple leniency applications be co-ordinated?**

Different leniency and immunity regimes for companies and individuals in the UK, combined with the existence of similar regimes in other jurisdictions, may give rise to a need to co-ordinate

applications on a number of fronts. For example, criminal and civil leniency programmes exist in the US, and civil leniency is available from the European Commission. Care may be needed in approaching all simultaneously if appropriate protection is required for all relevant individuals and undertakings.

**How will the civil and criminal regimes interact in cartel investigations?**

Although it will not automatically be the case that a 'hard core' cartel infringement committed by an undertaking will result in a finding that an individual has committed the cartel offence, in practice, where a decision is made to investigate the undertaking for a cartel infringement, criminal and civil investigations may proceed simultaneously.

There are distinctions between the 'hard core' infringements under article 81 of EC Treaty and Chapter I of the Competition Act, on the one hand, and the cartel offence, on the other. Their respective consequences may also be different. Thus:

- the cartel offence can only be committed by individuals, whereas article 81 and the Chapter I prohibition apply only to undertakings;
- the cartel offence applies only to horizontal arrangements to fix prices, share markets, limit production or supply, or rig bids – article 81 and Chapter I prohibit a broader spectrum of behaviour;
- article 81 and the Chapter I prohibition may be infringed without any requirement of dishonest behaviour;
- breach of article 81 or the Chapter I prohibition may expose an undertaking to penalties and civil damages actions by third parties and will render any offending agreements void and unenforceable; and
- the cartel offence requires an agreement between individuals.

Despite these differences, it is likely that where a cartel offence has been committed there will also have been a breach of article 81 of the EC Treaty and/or Chapter I of the Competition Act.

The OFT has indicated in its draft guidance on powers for investigating criminal cartels that, in making its enquiries as to whether it can use its formal investigating powers under the Act or the Competition Act, it will bear in mind the possibility that a criminal offence may have been committed. The OFT officers will also act in accordance with the Police and Criminal Evidence Act 1984, the Criminal Procedures and Investigations Act 1996 and all relevant codes of practice (or equivalent Scottish law or practice). In cases where a European Commission cartel investigation involves a potential criminal cartel offence in the UK under the Act, the OFT

and the European Commission will co-operate to co-ordinate the progress of their investigations.

## **Power to disqualify directors of companies that have breached the competition rules**

### **How does the Act provide for the disqualification of directors?**

Directors of companies that are involved in breaches of the competition rules may be disqualified as directors for up to 15 years.

An application for a CDO may be made by the OFT or a specified regulator defined in the CDDA as being the Director General of Telecommunications, the Gas and Electricity Markets Authority, the Director General of Water Services, the Rail Regulator and the Civil Aviation Authority.

Under the CDDA, the court *must* make a CDO against an individual if:

- the company of which he or she is a director commits a breach of competition law (Chapter I or II of the Competition Act or articles 81 or 82 of the EC Treaty); and
- the court considers that his or her conduct as a director makes him or her unfit to be concerned in the management of a company.

A CDO can only be made against a director, or a shadow director, of a company.

Prior notice must be given by the OFT, or relevant specified regulator, to a director that an application may be made against him or her and the director must have an opportunity to make representations.

### **When will an individual be considered unfit to be concerned in the management of a company?**

A court, when deciding whether an individual is unfit, *must* have regard to whether:

- the director's conduct contributed to the breach of competition law;
- the director had reasonable grounds to suspect the conduct of the company constituted a breach but took no steps to prevent it; or
- the director did not know but ought to have known that the conduct of the company constituted a breach.

There is no need to have actual knowledge of any particular infringement of the competition rules: negligence or wilful disregard may be enough. In addition to the three factors above, the court may also have regard to an individual's conduct as a director of a company in connection with any other breach of competition law.

### **When will the OFT or a specified regulator apply for a CDO?**

The OFT has published guidance on applications for CDOs. In deciding whether to apply for a CDO, the OFT will follow a five-step process. It will consider:

- whether an undertaking which is a company of which the person is a director has committed a breach of competition law (proven in decisions or judgments by the OFT or a specified regulator, the European Commission, the CAT or European Court);
- whether a financial penalty has been imposed for the breach;
- whether the company has benefited from leniency;
- the extent of the director's responsibility for the breach of competition law, either through action or omission; and
- any aggravating or mitigating circumstances.

The OFT's guidance states that the OFT is *likely* to make an application in particularly serious cases where a director has had an active role in causing his or her company to carry out or agree to carry out the activity constituting the breach, such as planning, devising, approving, ordering, pressuring, encouraging, advocating or attending meetings about the activity causing the breach.

The OFT is *quite likely* to make an application where there is no evidence of direct involvement by the director, but the OFT or the specified regulator considers that there is evidence that a director knew or had reasonable grounds to suspect, or authorised expenditure of funds knowing or having reasonable grounds to suspect, that it would be used for an activity related to a breach.

The OFT *does not rule out* applying for a CDO where there is no evidence that the director was actually aware of the activity constituting the breach, but ought to have known. The guidance specifically states that the OFT and the specified regulators expect that every director of a company ought to know that price-fixing, market sharing and bid-rigging agreements are likely to breach competition law.

The OFT will not apply for a CDO against any current director of a company whose company has benefited from leniency in respect of the activities to which the grant of leniency relates or any individual beneficiary of a no-action letter.

### **How does the CDDA affect the conduct of directors?**

Given that the particular role played by a director in the management of a company may have an influence on the OFT's willingness to apply for a CDO, care needs to be taken in relation to conduct generally and at meetings of directors.

Thus, for example, the mere absence of a director from the board meeting at which a resolution is passed, and which instituted a breach of competition law, would not necessarily mean that the OFT would not apply for a CDO against that director. The director may not have attended the relevant board meeting or may have left before discussion of the relevant resolution so that he or she would not have to vote on the resolution. There may well now be a positive obligation on a director to take active steps to seek to prevent other directors from resolving that the company should commit a breach. As a practical matter, concerned directors should ensure that their vigorous dissent is recorded in any relevant meeting minutes: abstention may not be sufficient to avoid an application by the OFT for a CDO.

**Can the OFT seek alternative sanctions to the CDO?**

The OFT may accept a competition disqualification undertaking (CDU) from a director instead of applying for, or proceeding with an application for, a CDO. The CDU must specify that the director will not be a director of a company, act as a receiver of a company's property, be concerned or take part in the promotion, formation or management of a company, or act as an insolvency practitioner. The maximum period which may be specified in a CDU is 15 years.

**How will the OFT be able to find out if an individual is involved in a breach of the competition rules?**

The Act confers powers of investigation on the OFT and specified regulators for the purpose of determining whether to apply to the court for a CDO. The powers are the same as those available for investigating suspected infringements of the Competition Act.

**What happens if an individual breaches a CDO?**

Breach of a CDO is a criminal offence, carrying a penalty of up to two years' imprisonment and/or a fine. The director may also be liable for relevant debts of any company for which he or she is acting as a director.

## **Civil actions: encouraging private enforcement of the competition rules**

### **What rights are there to bring private actions for breach of the competition rules?**

A breach of the Chapter I and II prohibitions of the Competition Act is actionable in tort (or in Scotland, in delict) as a breach of statutory duty, in much the same way as an infringement of articles 81 and 82 of the EC Treaty. Few such private damages actions have been brought to trial in the UK, although a number are currently pending.

One of the aims of the government, reflected in the provisions of the Act, is to facilitate and encourage private damages actions. This will have the dual effect of providing a further deterrent for companies against breaching the competition rules and will enable individuals who suffer loss resulting from breaches to obtain damages more easily. Neither the OFT, nor the European Commission can presently award compensation to those injured by a breach.

### **How does the Act facilitate private claims?**

The Act introduces two new provisions into the Competition Act (sections 47A and 47B) which enable damages claims to be brought in the CAT for breaches of the Chapter I and II prohibitions and infringements of articles 81 and 82 of the EC Treaty. Third parties will be able to recover losses before the CAT, either individually or through a specified body.

A damages claim before the CAT is conditional on the prior finding of an infringement of any of these provisions by the OFT, by the CAT itself (on appeal from the OFT) or by the European Commission. Where an appeal is lodged, ordinarily the claim cannot be made until the outcome of the appeal has been determined.

The entitlement to bring damages claims before the CAT subsists alongside, but does not affect, the ability to bring damages claims in the national courts. However, any claim before the CAT must be brought within a two-year period from the date of the decision establishing an infringement. Where this date has passed, a claimant may still be able to proceed in a national court (if the usual six-year limitation period has not expired).

### **Where can a claim be brought?**

A claim for damages can now be brought before the CAT or a national court. The scope of a damages claim made before the CAT is to be the same as that made before a court. The claimant must, in each forum, prove causation and loss in order to establish a claim for damages.

It is clear that the damages which may be awarded by the CAT include all monetary awards which can be awarded by a court in respect of the relevant infringement. It remains to be seen whether a claim could include an account of profits unlawfully made by the infringing undertaking or a restitutionary remedy.

The outcome of the case should be the same regardless of the choice of forum. However, proceedings before the CAT will benefit from its expertise in the area of competition law. Different procedural rules from those of a national court will apply in the CAT, which may also influence a party's choice of forum. In particular, the proceedings may well be disposed of more speedily and hearings are less formal than in the courts.

One additional option potentially available to consumers suffering loss arising from a cartel may be to proceed in the US. In the recent *Empagran SA and others v Hoffman-La Roche Ltd and others* (No 01-7115(DC Cir) January 17, 2003) decision, the Circuit Court of Appeals in Washington DC ruled that companies involved in an international vitamins cartel could be sued in the US by foreign plaintiffs, even though the plaintiffs bought their vitamins outside the US. The majority of the court held that where the cartel had resulted in the requisite anticompetitive effect on US commerce, non-US residents could sue non-US companies in the US. If the ruling is confirmed on appeal, companies who engage in anticompetitive behaviour have to take into account potential liability in the US for the effects of their conduct worldwide. It would also mean that foreign plaintiffs could bring actions against international cartels in the US where legal rules allow class actions, treble damages and contingency fees.

#### **What is a representative claim?**

Under the Act, consumer organisations will be able to bring claims on behalf of groups of consumers (consisting of at least two named individuals) before the CAT. A consumer organisation, once appointed as a 'specified body', can bring representative claims for damages on behalf of wider groups of consumers. The claims may be brought in respect of economic loss suffered as a result of anticompetitive behaviour.

The scope of such claims is limited to those brought on behalf of named individual consumers, on evidence that each has suffered a specific loss resulting from the competition law breach. For this reason, representative claims should not be regarded as directly analogous to class actions of the nature seen in the US, which allow proceedings to be brought on behalf of a certified class of plaintiffs who do not need to be individually named in the proceedings and who are not required to demonstrate that they have individually

suffered loss at the 'liability' stage of the proceedings as a result of the breach of the law.

**Which consumer organisations can bring claims?**

A consumer body must, if it is to be considered for designation as a 'specified body' which can bring representative claims on behalf of consumers:

- be constituted, managed and controlled in such a way as to act independently, impartially and with complete integrity;
- be able to demonstrate that it represents and/or protects the interests of consumers; and
- have the capability to take forward a claim on behalf of consumers.

The fact that a body has a trading arm will not disqualify it from being able to bring representative claims, provided that the trading arm does not control the body and that any profits of the trading arm are used only to further the stated objectives.

## **Super-complaints**

### **What are super-complaints?**

The Act introduces a super-complaint procedure into the competition law regime which may lead to an OFT market investigation. A super-complaint may be made where a designated consumer body considers that one or more features of a market for goods or services (such as market structure or the conduct of firms operating in the market) is, or appears to be, significantly harming the interests of consumers. The market may be regional, national or supra-national (where the UK forms part of that market). The aim of the procedure is to encourage groups who represent consumers to make relevant complaints on their collective behalf, where individual consumers may not have access to the kind of information necessary to make a judgement about wider market issues.

### **What is the time-frame within which the OFT must respond to a super-complaint?**

The OFT is obliged to respond to a super-complaint within 90 days of receiving the complaint, setting out whether it has proposed to take action and, if so, what action it proposes to take.

### **What are the consequences of a super-complaint?**

The super-complaint could result in the OFT launching a market study into the issue (and eventually making recommendations, such as that the government should change laws or regulations), referring the matter for possible enforcement action by the OFT's competition or consumer regulation divisions, making a market investigation reference, referring or transferring a complaint to a regulator, dismissing the complaint, or finding the complaint to be unfounded.

### **Who can bring a super-complaint?**

The Act allows the Secretary of State for Trade and Industry to designate certain bodies to bring super-complaints, but only where they appear to represent the interests of consumers. A 'consumer' in this context means an end-user of goods or services. Two recent examples of such bodies representing consumer interests are Postwatch (which has asked the OFT to look at problems experienced in the mail consolidation market by businesses) and the National Association of Citizens Advice Bureau (which has asked the OFT to look at problems that consumers experience with doorstep sales in relation to a wide variety of goods and services).

The OFT has issued draft guidance on the criteria for the appointment of such bodies in accordance with the Act. The key

criteria which a body must meet before it can be appointed as a representative body to bring a super-complaint are that it:

- is constituted, managed and controlled in such a way that it acts independently, impartially and with complete integrity;
- can demonstrate considerable experience and competence in representing the interests of consumers of any description;
- has the capability to put together reasoned super-complaints on a range of issues; and
- is ready and willing to co-operate with the OFT and any other authority or body responsible for responding to super-complaints.

The draft guidance also specifies that the fact that a body has a trading arm will not disqualify it from being designated, provided that the trading arm does not control the body, any profits of the trading arm are used only to further the objectives of the body and the body has established procedures to deal with potential conflicts of interest.

**Is the designation of a super-complaint body reviewable?**

Presently, the draft guidance states only that the Secretary of State will, from time to time, review the designation of each organisation as a designated consumer body and that this will occur after the second year of the organisation's designation and then at intervals.

If the Secretary of State finds that the designated consumer body no longer meets the criteria or is abusing the super-complaints process, then the designation will be withdrawn.

## **Merger and market investigations**

### **Why have the monopoly and merger regimes been reformed?**

The Competition Act deliberately retained the monopoly and merger provisions, which provide a pragmatic means for investigating markets. The reason for reforming the rules now is to modernise the existing regimes. Although the extensive and complex new provisions repeal and replace the old ones, they are, in spirit, very similar to their predecessors. The key reasons for the changes are:

- to depoliticise the regimes by taking the Secretary of State out of the decision-making process where possible;
- to ensure that the competition authorities act against competition-based tests and not the public interest test set out in the FTA; and
- to introduce a new right of review of decisions taken in these cases.

### **The merger regime**

#### **How will the new merger regime work?**

The OFT has a duty to refer a merger (anticipated or completed) to the Competition Commission where it believes that there is, or may be, a relevant merger situation that has resulted, or may be expected to result, in a substantial lessening of competition. A discretion not to refer exists in certain circumstances: for example, if the market involved is of insufficient importance, if suitable undertakings are accepted from the parties, or if customer benefits outweigh the adverse effects.

On a reference, the Competition Commission must decide whether a relevant merger situation has been created (or whether arrangements will result in the creation of a relevant merger situation) and, if so, whether or not the situation results, or may be expected to result, in a substantial lessening of competition within any market(s) in the UK for goods or services.

If the Competition Commission decides, by a two-thirds majority, that there is an anticompetitive outcome, it must go on to determine whether it should itself take action or recommend that others take action to remedy, mitigate or prevent the adverse effects. In making the decision on remedial action, the Competition Commission may have regard to the effect of any such action on any relevant customer benefits arising from the merger. The types of order that the Competition Commission may make are similar to those that can currently be made by the Secretary of State under the FTA, but have been updated.

Different rules apply and the Secretary of State retains a role in public interest, special public interest and newspaper merger cases. Different rules also apply to water mergers. Changes have been made to the water regime to bring it more into line with the general regime.

The CAT will have the power to review decisions taken in relation to a relevant merger situation. In determining such a reference, the CAT is to apply the same principles as would be applied by a court on an application for judicial review.

**How significant is it that the OFT and the Competition Commission now have the central role in merger cases?**

In general merger cases, the Act makes it clear that the OFT determines whether a merger should be referred to the Competition Commission and the Competition Commission decides what steps should be taken to remedy, mitigate or prevent an anticompetitive outcome.

By contrast, the role of politics in the FTA merger regime was apparent and significant. Although the DGFT has always advised the Secretary of State as to which mergers should be subject to investigation by the Competition Commission, the Secretary of State has had the final decision and, in the past, has not always acted in accordance with the advice of the DGFT. Further, although the Competition Commission has determined which mergers raise public interest issues and has proposed remedies, it has been the Secretary of State who has decided what, if any, remedies should be imposed to remedy detriments identified. On occasions, the Secretary of State has cleared a merger despite a clear finding of the Competition Commission that the merger should be blocked.

The new regime takes a significant step forward by removing the Secretary of State from the process in most cases. This should ensure that decisions taken are apolitical, taken by those best qualified to act, and are more predictable.

**What role does the Act confer on the Secretary of State in merger cases?**

The Act provides that the Secretary of State can act only:

- in defined public interest cases – currently only national security, although new grounds may be added in the future;
- special public interest cases – mergers involving certain government contractors; and
- newspaper mergers.

**What about the new appraisal test? What does 'substantial lessening of competition' mean and how does this differ from the old public interest test?**

According to the authorities, not very much is going to change because, in practice, they already apply the substantial lessening of competition test in most cases. Legally, however, the current public interest test requires, in a merger appraisal, 'all matters which appear... to be relevant' to be taken into account, including competition issues, the interests of consumers and the desirability of maintaining and promoting the balanced distribution of industry and employment in the UK. This is obviously very broad and has led to wider public interests being taken into account in merger reports in the past, albeit rarely (see, for example, BSKyB/Manchester United). The fact that the substantial lessening of competition test is purely a competition test may, therefore, change the way in which mergers are scrutinised in the future.

Both the OFT and the Competition Commission have issued guidance as to how they will apply the substantial lessening of competition test. These guidance papers will obviously be of critical importance to understanding the test before any decisions are adopted under the new regime. Essentially, the authorities are looking for mergers that will reduce competition on a market and make it profitable to increase prices, leading to reduced product choice, output, quality and innovation.

**The substantial lessening of competition test is not the same as that set out in the EC Merger Regulation – why have the UK rules not been brought into line with EC rules?**

Although the Competition Act significantly harmonises UK and EC law on anticompetitive agreements and practices, the UK authorities decided against adopting the merger test used by the European Commission, which reviews mergers, or concentrations, against the 'dominance' test set out in the EC Merger Regulation. Rather, it decided to adopt the test used in legislation controlling mergers in a number of other major jurisdictions, including the US, Canada, Australia and New Zealand. The main reason for this decision is that the substantial lessening of competition test is considered to be more flexible, giving broader power to control mergers, especially those occurring in oligopolistic or concentrated markets.

The European Commission has, in fact, proposed changes to the wording of the EC Merger Regulation to deal with this recognised weakness. However, it has not decided to adopt the substantial lessening of competition test<sup>2</sup>.

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<sup>2</sup> See *EU merger control reform proposals*, Freshfields Bruckhaus Deringer, December 2002.

**Does the system of voluntary notification still apply?**

The Act retains the voluntary notification system. There is no requirement to notify a relevant merger situation to the OFT, although voluntary, statutory and non-statutory, prenotification is still possible. Where a statutory prenotification is made, the OFT will generally have a period of 20 days to consider the merger (which may be extended by up to 10 additional days).

**Are there any other significant changes to the merger regime?**

The changes highlighted above are only the 'headline' changes. However, there are many other changes in the 109 sections that deal with mergers which cannot be dealt with in this guide, which simply provides an overview.

A few additional important changes to note are:

- in the determination of whether a merger is a 'relevant' merger (which should be referred), the current assets test is replaced with a turnover test;
- the Competition Commission is obliged to report within a new statutory maximum period of 24 weeks from the date of reference (which may be extended by eight weeks in exceptional circumstances); and
- in order to aid it in meeting its new deadline, the Competition Commission has the power to impose monetary penalties (fixed and/or daily) on individuals for non-compliance with orders for the production of documents or information. When minded to impose a fine, the Competition Commission will have regard to its published statement of policy on penalties (see below). There is a right to appeal to the CAT against the imposition or the amount of any penalty imposed (and a further appeal on an issue of law or the amount of a penalty to the appropriate court).

**The market investigation regime****How will the new market investigation regime work in practice?**

Both the OFT and Competition Commission have issued guidance explaining their approach in market investigation cases. The new market investigation regime broadly works as follows, although special rules apply in defined public interest cases.

The OFT or the sectoral regulators can refer features of a market to the Competition Commission for investigation. There is a discretion to make a reference where there are reasonable grounds for suspecting that any feature(s) of a market in the UK for relevant goods or services prevents, restricts or distorts competition in connection with the supply or acquisition of any goods or services in

the UK or a part of the UK. There is a reserve ministerial power to make market investigation references in certain circumstances.

The Competition Commission carries out an in depth investigation into the market and determines whether there is an adverse effect on competition (ie whether any feature(s) of a market in the UK for relevant goods or services prevents, restricts or distorts competition in connection with the supply or acquisition of any goods or services in the UK or a part of the UK).

The authorities thus act against a competition-based test and not the public interest test set out in the FTA.

Where the Competition Commission identifies competition problems, it must consider whether to take steps or recommend the taking of steps by others to mitigate, remedy or prevent those problems. It can accept undertakings or make an order to remedy the problems identified. In deciding on an appropriate remedy, the Competition Commission may take account of customer benefits. The Competition Commission guidelines set out its approach to remedies.

The CAT will have power to review decisions taken in market investigation cases.

**What is the purpose of market investigations?**

The purpose of these provisions is essentially the same as the monopoly provisions of the FTA. However, the title 'market investigation' catches the essence of what is done more than the term 'monopoly investigation', which is more pejorative.

The objective of the new provisions is to enquire into markets where it appears that competition has been prevented, restricted or distorted by any 'feature' of a market in the UK for goods or services, but where there has been no obvious breach of the Competition Act prohibitions. 'Features' which could prevent, restrict or distort competition include the structure of the market, the conduct of individuals supplying or acquiring goods or services on the market or the conduct of such individuals' customers or suppliers. The authorities are, therefore, looking for features of markets that hamper the process of competition and rivalry between firms. The powers are especially useful for the investigation of oligopolistic markets, where there is little competition between the players on the market (for example, where there is evidence of parallel behaviour by firms on a market, such as high pricing and profits or prevalent vertical agreements, but there is no clear breach of the EC Treaty or UK Competition Act prohibitions).

**What is the role of the Secretary of State under the new regime?**

The Act abolishes the central role of the Secretary of State and confers responsibility for the operation of the rules on the OFT and the Competition Commission in most cases. However, some political interference is still possible.

Ministers have a reserved power to make references to the Commission where:

- they have reasonable grounds for suspecting that a feature or combination of features of a market are preventing, restricting or distorting competition; and
- they are dissatisfied with the OFT's decision not to make a reference; or
- the OFT is not likely to reach a decision on whether to make a reference within a reasonable period of time.

The Secretary of State can claim an interest in defined public interest cases, which currently covers only national security.

**Are there any other significant changes?**

The 53 sections of the Act that deal with market investigations introduce numerous changes to the old regime, so a careful read of the provisions is vital.

Two further important changes to note are that:

- a statutory upper limit of two years is imposed for the preparation and publication by the Competition Commission of its report following a market investigation reference; and
- penalties can be imposed on those that do not comply with requests for information.

**Enhanced powers of investigation**

**What powers of investigation does the Competition Commission have?**

The Act gives the Competition Commission broad powers to obtain information, evidence and documents for the purpose of merger and market investigation references (section 109 of the Act). These powers include a power to require an individual to attend or give evidence to the Competition Commission, produce documents which are in his or her custody or control or supply estimates, forecasts, returns or other information.

The purpose of the Competition Commission's investigation and information gathering powers under the Act is to ensure that the Competition Commission is able to carry out its functions by deciding the questions set out in the Act in the most informed manner possible and within the strict deadlines set out in the Act.

The Competition Commission's aim is to avoid delay and unnecessary costs and ensure high-quality, informed decisions.

**How are these powers different from the previous powers of investigation under the FTA?**

The powers of investigation under the Act are broadly similar to the provisions and the investigatory powers that the Competition Commission had under section 85 of the FTA (which has been repealed). However, the key change is that the Competition Commission's power to initiate contempt proceedings against an individual who, without reasonable excuse, fails to comply with a request for information, evidence or documents has been replaced with a power directly to impose monetary penalties.

**When can the Competition Commission impose a monetary penalty?**

There are two circumstances in which the Competition Commission may impose a monetary penalty, being when the Competition Commission considers that an individual:

- without reasonable excuse, has failed to comply with any requirement of a notice under section 109 of the Act (in which case it may impose a fixed penalty or a daily rate penalty); or
- has intentionally obstructed or delayed another individual's efforts to copy a document that he has a right to copy (in which case it may only impose a fixed penalty).

In deciding whether there is any reasonable excuse, the Competition Commission will take account of all the relevant circumstances, including information as to the extent to which the contravention arose from circumstances outside the control of the individual who has failed to comply.

**What is the maximum penalty which can be imposed for failure to comply with a request?**

The amount which can be imposed in the case of a fixed penalty cannot exceed £30,000 and, in the case of an amount calculated by reference to a daily rate, cannot exceed £15,000. If a combined fixed and a daily rate applies, then the penalty cannot exceed £30,000 for the fixed amount and £15,000 for the daily rate amount.

**Are there any aggravating or mitigating circumstances?**

The Competition Commission, in determining the appropriate amount, will consider the following factors as aggravating:

- repeat contravention;
- continuing contravention;
- involvement of senior management;

- absence of evidence or mechanisms to prevent contravention or failure; or
- any attempt to conceal a contravention from the Competition Commission.

On the other hand, the Competition Commission will consider as mitigating factors:

- adequate steps taken to secure compliance; or
- previous conduct of the individual concerned.

**When will the Competition Commission impose a penalty?**

The Competition Commission has stated in its policy statement that it is more likely to impose a penalty where:

- the contravention or failure affected the efficient carrying out of the Competition Commission's functions;
- the contravention adversely affected other people in relation to the Competition Commission carrying out its functions;
- the penalty is likely to create a disincentive for future compliance and deter future breaches;
- the failure was wilful or negligent; and
- the individual sought to obtain a benefit from the contravention.

**What rights are there to appeal a decision to impose a penalty?**

There is a right of appeal to the CAT against the imposition or the amount of a penalty imposed by the Competition Commission. There is a further right of appeal on a point of law or as to the amount of a penalty to the appropriate court.

## **The new regulatory bodies**

A consistent theme of the Act is to establish and bolster the powers of independent regulatory bodies. The role of the Secretary of State, who used to play a significant part in monopoly and merger cases, has been correspondingly diminished.

With effect from 1 April 2003, the Act changed the structure of the competition authorities in the UK.

### **OFT**

The role of the DGFT was abolished and a new statutory body corporate, the OFT, was created. All the functions, property, rights and powers of the DGFT were transferred to the OFT.

### **Competition Commission**

The Act amended the constitution and powers of the Competition Commission, created by the Competition Act. The changes reflect the transfer of the Competition Commission's appeals function to a new body, the CAT. However, the Competition Commission retains its reporting function in merger and market investigation cases.

### **CAT**

The Act established the CAT, which has taken over the functions of the CCAT and taken on some additional functions. In particular, the CAT can hear damages claims (brought both by individuals and representative bodies on behalf of consumers) in cases where an infringement of competition law has been established, and is able to review decisions adopted by the authorities under the merger and market investigation regimes. A new body corporate, the Competition Service, funds and provides support services, including the provision of staff, accommodation, equipment and other services to the CAT.

## **Practical information and the future**

### **How can I best gain an understanding of the Act and its key provisions?**

This guide only provides an outline and brief explanation of the key changes introduced by the Act. The Act is long but the provisions are important and an understanding of the rules, powers of investigation and consequences of breach is critical. The OFT, the Competition Commission and the DTI have all published guidance papers, some of which are still in draft, which explain how the provisions of the Act will work in practice. A list of the guidance papers and draft guidance papers published as at 31 May 2003 is set out at the end of this guide. The DTI has also published explanatory notes to the Act, which are helpful.

### **What will happen to the Competition Act and the FTA when the Act comes into force?**

When the UK competition rules were revised in March 2000 by the Competition Act, the laws on restrictive agreements and anticompetitive practices were brought into line with EC law by introducing prohibitions modelled on articles 81 and 82 of the EC Treaty. However, the monopoly and merger regimes in the FTA were not significantly amended.

The Act leaves the core Competition Act prohibitions in place, but introduces a number of amendments. In contrast, the impact of the Act on the FTA is much more significant. Both the monopoly and general merger control provisions set out in the FTA have been repealed and replaced with new regimes for market investigations and mergers. However, the special arrangements for the control of newspaper mergers set out in the FTA have not been altered by the Act. These latter provisions will, however, be amended if and when the Communications Bill is adopted later this year.

### **What substantive competition rules will apply in the UK after the introduction of the Act?**

The following bullets outline the key competition legislation which will apply in the UK after the introduction of the Act:

- the Competition Act, which prohibits restrictive agreements and practices and abuses of a dominant position which affect trade within the UK;
- the Act, which:
  - contains a new cartel offence, applicable to individuals who dishonestly engage in cartel agreements, and the power to disqualify directors of companies that have breached the competition rules;

- allows for the investigation of particular markets where it appears that competition is being prevented, restricted or distorted but where there is no obvious breach of the Competition Act prohibitions;
- contains a new, modernised regime for the control of mergers with a UK nexus that are not subject to European Community merger rules; and
- articles 81 and 82 of the EC Treaty, which prohibit restrictive agreements and practices and abuses of a dominant position affecting trade between member states. These provisions are directly effective and can be relied upon by or against private individuals in private claims for damages, injunctions or other remedies. An undertaking can also be investigated by the European Commission and fined where it is found to be in breach of the rules. From 1 May 2004, the OFT and the sectoral regulators will be able to enforce these provisions.

**How can I ensure that I, and my company, comply with the Act?**

A competition compliance programme is an important means of eliminating or reducing the risk of engaging in anticompetitive practices. A UK-specific compliance programme is essential to promoting an understanding of the law in the UK and a culture of compliance within a company. Not only do serious consequences flow from competition law breaches for companies, but individuals can now also be held responsible for certain breaches of competition law in the UK.

**Does the Act introduce any other significant changes that I need to be aware of?**

The Act makes other significant changes that do not fit within any of the sections above. For example:

- the OFT's powers of entry under the Competition Act have been amended to allow people who are not employees of the OFT (eg IT experts) to accompany and assist OFT officers on raids;
- third parties may now bring appeals against Competition Act decisions of the OFT directly before the CAT without first having to require the OFT to withdraw or vary its decisions;
- the exclusion of designated professional rules from the Chapter I prohibition on anticompetitive agreements has been repealed; and
- power is conferred on the Secretary of State to make modifications to the Competition Act where necessary to keep UK competition law in line with the EC regime (see below).

We note again that the Act also makes significant changes to the insolvency laws and consumer protection provisions. We have

prepared a separate guide dealing with the insolvency provisions, which can be provided on request.

**Are there any further changes planned – the third part in the trilogy of reform?**

The EU is radically changing the way that articles 81 and 82 are enforced. From 1 May 2004, Regulation 1/2003 will abolish the system of notification and authorisation set up by Regulation 17/62 and confer responsibility for the enforcement of articles 81 and 82 on a network of competition authorities (the European Commission, national competition authorities (NCAs) and the national courts).

These changes have two main implications for the UK:

- The UK competition authorities, including the OFT and the sectoral regulators, will be designated to enforce the EC competition rules from 1 May 2004. The government is consulting on matters such as the procedures to be followed by the NCAs and the penalties applicable for infringements of articles 81 and 82.
- The changes will also have implications for the Competition Act, a key objective of which is to harmonise UK law on restrictive agreements and practices with EC law. It has adopted prohibitions modelled on articles 81 and 82, a notification and exemption system based on that set out in Regulation 17/62, and provided for its provisions to be interpreted, in so far as is possible, in accordance with Community law. Changes to the EC regime could create differences between the UK and EC regimes. In order to address this, the government is consulting on measures to align the operation of the two legal frameworks in the UK. This is likely to result in the abolition of the notification system set out in the Competition Act, and an aligning of the powers of investigation, penalties and remedies with the EC regime. This means that, from 1 May 2004, it may not be possible to notify agreements, or practices, to the OFT for a decision as to whether or not they infringe the Chapter I prohibition. Undertakings will have to take responsibility for forming their own view as to the lawfulness of an agreement or practice. The government will also consult as to how the current Competition Act exclusions and exemptions should be treated and, in particular, on whether the domestic exclusion of vertical agreements from the Chapter I prohibition should be repealed.

## **The Enterprise Act 2002 – guidance as at 31 May, 2003**

### **Competition Commission guidance**

- *CC1 Competition Commission: Rules of Procedure*, March 2003
- *CC2 Merger References: Competition Commission Guidelines*, March 2003
- *CC3 Market Investigation References: Competition Commission Guidelines*, March 2003
- *CC4 Competition Commission: General Advice and Information*, March 2003
- *CC5 Competition Commission: Statement of Policy on Penalties*, March 2003
- *CC6 Competition Commission: Chairman’s Guidance to Groups*, May 2003 (still under consultation)

### **OFT guidance**

- *OFT 511: Market Investigation References*, March 2003
- *OFT 508: Overview of the Enterprise Act*, November 2002
- *OFT 513: The Cartel Offence: Guidance on the Issue of No-action Letters for Individuals*, April 2003
- *OFT 510: Competition Disqualification Orders*, May 2003
- *OFT 516: Mergers: Substantive Assessment Guidance*, May 2003
- *OFT 526: Mergers: Procedural Guidance*, May 2003
- *Consultation Paper: Super-complaints: Guidance for Designated Consumer Bodies*, August 2002
- *Consultation Paper: The Overseas Disclosure of Information*, April 2003
- *Consultation Paper: Powers for Investigating Criminal Cartels*, April 2003

### **DTI consultations**

- *Competition Commission’s Investigatory Powers*, September 2002
- *CAT Rules*, September 2002
- *Enterprise Act 2002: Consultation on Draft Order to be Made Under Part 9 (Information)*, December 2002
- *Enterprise Act 2002: Consultation Paper on Draft Criteria for Designating Bodies to Make Super-complaints*, December 2002
- *Enterprise Act 2002: Consultation Paper on Specifying Bodies to Bring Claims for Damages on Behalf of Consumers*, December 2002

### **Consultation on modernisation**

*UK Competition Law: Modernisation: A consultation on the Government's proposals for giving effect to Regulation 1/2003 EC and for realignment of the Competition Act 1998, April 2003*

### **Secondary legislation**

The following draft secondary legislation is required to implement the Act's competition provisions. This legislation is due to come into force on 20 June 2003.

- The Enterprise Act 2002 (Protection of Legitimate Interests) Order 2003
- The Enterprise Act 2002 (Anticipated Mergers) Order 2003
- The Enterprise Act 2002 (Merger Prenotification) Regulations 2003
- Insolvent Companies (Disqualification of Unfit Directors) Proceedings (Amendment) Rules 2003
- The OFT Registers of Undertakings and Orders (Available Hours) Order 2003

The following finalised secondary legislation is due to come into force on 20 June 2003.

- Competition Appeal Tribunal Rules
- The Competition Commission (Penalties) Order 2003
- The Enterprise Act 2002 (Merger Fees and Determination of Turnover) Order 2003

The following finalised secondary legislation has already come into force.

- The Enterprise Act 2002 (Commencement No 1) Order 2003
- The Enterprise Act 2002 (Commencement No 2, Transitional and Transitory Provisions) Order 2003
- The Enterprise Act 2002 (Consequential and Transitory Provisions) Orders 2003

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<p>BARCELONA Mestre Nicolau 19-7 08021 Barcelona T +34 93 363 7400 F +34 93 419 7799</p>	<p>DÜSSELDORF Freiligrathstrasse 1 40479 Düsseldorf T +49 211 49 79 0 F +49 211 49 79 10 3  Mailing address: Postfach 10 17 43 40008 Düsseldorf</p>	<p>MADRID Fortuny 6 28010 Madrid T +34 91 319 1024 F +34 91 308 4636</p>	<p>SINGAPORE Freshfields Drew &amp; Napier 20 Raffles Place #18-00 Ocean Towers Singapore 048620 T +65 6535 6211 F +65 6533 5007/8007/9007</p>
<p>BEIJING 3201 Beijing Silver Tower 2 Dong San Huan Bei Lu Chaoyang District Beijing 100027 T +8610 6410 6338 F +8610 6410 6337</p>	<p>FRANKFURT AM MAIN Taunusanlage 11 60329 Frankfurt am Main T +49 69 27 30 80 F +49 69 23 26 64</p>	<p>MILAN Via dei Giardini 7 20121 Milan T +39 02 625 301 F +39 02 625 30800</p>	<p>TOKYO Freshfields Law Office Freshfields Foreign Law Office Ark Mori Building 18th floor 1-12-32 Akasaka Minato-ku Tokyo 107-6018 T +81 3 3584 8500 F +81 3 3584 8501</p>
<p>BERLIN Potsdamer Platz 1 10785 Berlin T +49 30 20 28 36 F +49 30 20 28 37 66</p>	<p>HAMBURG Alsterarkaden 27 20354 Hamburg T +49 40 36 90 60 F +49 40 36 90 61 55  Mailing address: Postfach 30 52 70 20316 Hamburg</p>	<p>MOSCOW Kadashevskaya nab 14/2 119017 Moscow T +7 501 (or +7 095) 785 3000 F +7 501 (or +7 095) 785 3001</p>	<p>VIENNA Seilergasse 16 1010 Vienna T +43 1 515 15 0 F +43 1 512 63 94</p>
<p>BRATISLAVA Laurinská 12 81101 Bratislava T +421 2 5413 1121 F +421 2 5413 1123</p>	<p>HANOI #05-01 International Centre 17 Ngo Quyen Street Hanoi T +84 4 8247 422 F +84 4 8268 300</p>	<p>MUNICH Prannerstrasse 10 80333 Munich T +49 89 20 70 20 F +49 89 20 70 21 00</p>	<p>WASHINGTON Freshfields Bruckhaus Deringer LLP 701 Pennsylvania Avenue, NW Suite 600 Washington, DC 20004-2692 T +1 202 777 4500 F +1 202 777 4555</p>
<p>BRUSSELS Bastion Tower Place du Champ de Mars/Marsveldplein 5 1050 Brussels T +32 2 504 7000 F +32 2 504 7200</p>	<p>HO CHI MINH CITY #1108 Saigon Tower 29 Le Duan Boulevard District 1 Ho Chi Minh City T +84 8 8226 680 F +84 8 8226 690</p>	<p>NEW YORK Freshfields Bruckhaus Deringer LLP 520 Madison Avenue 34th floor New York, NY 10022 T +1 212 277 4000 F +1 212 277 4001</p>	<p>LS578143 – dtp5841</p>
		<p>PARIS 69 boulevard Haussmann 75008 Paris T +33 1 44 56 44 56 F +33 1 44 56 44 00</p>	