These notes refer to the Enterprise Act 2002 (c.40)
which received Royal Assent on 7 November 2002

ENTERPRISE ACT 2002

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Part 7: Miscellaneous Competition Provisions

Powers of entry under 1998 Act

Section 203: Powers of entry

435. This section amends sections 28, 62 and 63 CA 1998 to allow people who are not employees of the OFT to accompany and assist OFT officers on raids conducted under the auspices of a warrant. It is anticipated that such people will have expertise that is not available within the OFT but is required to fully exploit the terms of the warrant (e.g. IT experts).

Directors disqualification

Section 204: Disqualification

436. A person who is subject to a disqualification order made under the Company Directors Disqualification Act 1986 ('CDDA 1986') may not:

- be a director of a company;
- act as a receiver of a company's property; or
- in any way, whether directly or indirectly, be concerned or take part in the promotion, formation or management of a company;

without the leave of the court; or

- act as an insolvency practitioner;

for the period specified in the order. It is a criminal offence to contravene a disqualification order. Civil liabilities may also be incurred in respect of such contravention.

437. This section inserts five new sections into CDDA 1986 to enable the courts to protect the public by disqualifying a person in consequence of his or her involvement in an infringement of competition law.

438. New section 9A provides that the court must make a disqualification order against a person for a period of up to 15 years if two conditions have been satisfied. The first condition is that the person is a director of a company that has committed a breach of competition law. This is defined as an infringement of either the prohibitions in CA 1998 or the EC Treaty relating to agreements preventing, restricting, or distorting competition or abuse of a dominant position. The second condition is that the court considers the person's conduct was such as to make him unfit to be concerned in the management or control of a company. Applications for a disqualification order may be made by either the OFT or a specified regulator.

439. New section 9B provides that a person whom the OFT or regulator considers unfit may consent to a period of disqualification without the need for court involvement by giving a disqualification undertaking to the OFT or regulator. The maximum period of disqualification is 15 years.

440. New section 9C provides the OFT and regulators with powers of investigation to enable them to decide whether to make a disqualification application. These powers are the same as those that are available for an investigation into a suspected infringement of CA 1998. It also provides that, before it can make a disqualification application, the OFT or regulator must give prior notice to the person likely to be affected by the application, and give him or her the opportunity to make representations.

Miscellaneous

Section 205: Super-complaints to regulators other than OFT

441. This section empowers the Secretary of State to impose super-complaint duties on any of the sectoral regulators able concurrently to exercise powers under CA 1998, in connection with super-complaints made to them relating to their sectors (see also section 11). The Secretary of State will be able to amend the list of regulators specified where necessary thereafter.

Section 206: Power to modify Schedule 8

442. This section allows the Secretary of State to amend or add to the list of remedies that can be used in final orders. This new provision is intended to allow the list to evolve over time in response to market developments.

Section 207: Repeal of Schedule 4 to the 1998 Act

443. *Subsection (1)* removes section 3(1)(d) of and Schedule 4 to CA 1998. These provisions create a special regime dis-applying the Chapter I prohibition to the professional rules of those bodies listed in Part II of Schedule 4 and that have applied for designation of their rules under the Act.

Section 208: Repeal of Part 6 of Fair Trading Act 1973

444. This section repeals sections 78 to 80 FTA 1973, which made provision for Ministers to make general references and restrictive labour practice references to the CC.

Section 209: Reform of Community competition law

445. Since the reforms made by CA 1998, a major part of the regulation of competition in the UK is modelled on the EC competition rules. Thus the prohibitions in Articles 81 and 82 of the Treaty correspond to the 'Chapter I' and 'Chapter II' prohibitions in CA 1998, and many of the powers of the OFT under that Act correspond to the powers of the European Commission contained in the EC implementing legislation made under Article 83 of the Treaty.

446. The European Commission has made a proposal for a Council Regulation under Article 83 that would substantially revise the way EC competition law is enforced (the 'Modernisation' regulation). This proposal is currently under discussion in the EU Council.

447. If adopted by the Council, the Modernisation regulation would give national competition authorities and courts a much greater role in the enforcement of Articles 81 and 82, and would also transform the way in which the exception provided by Article 81(3) is applied. Under the current system (the 'notification system'), agreements may be notified to the Commission in order to obtain an individual exemption granted under Article 81(3), and agreements or conduct may be notified in order to obtain a

decision that the agreement or conduct does not infringe Article 81(1) or Article 82. Under the new system, such procedures would be abolished. Instead, Article 81 in its entirety would be applied directly by national courts and authorities (as well as by the Commission), and businesses would no longer be able to apply to the Commission to obtain such exemptions or decisions.

448. Although some provisions of the regulation would be directly applicable in UK law, others would require further implementation to be given effect. Measures that are required in order to give effect to the EC provisions (e.g. by setting out the powers of the OFT in applying Articles 81 and 82) can be made under the powers given by the European Communities Act 1972.

449. If, however, it is judged desirable to keep UK competition law in step with the EC system, as so reformed, it will be necessary to make appropriate changes to the UK system, and in particular to CA 1998. The powers provided by this section are designed to enable the appropriate amendments to be made. Thus the Secretary of State will have the power to eliminate or reduce any differences that would result from Modernisation, or from any subsequent further changes to EC competition law following a regulation or a directive made under Article 83 of the Treaty.

450. The following are examples of how the power may be used:

- to ensure that the Chapter I prohibition does not apply to an agreement that satisfies the conditions in section 9 CA 1998 (the criteria for individual and block exemptions), without any need for a decision by the OFT to that effect;
- to remove the process whereby parties to an agreement, or authors of conduct, may notify the agreement or conduct to the OFT for guidance or a decision as to whether it is caught by the relevant prohibition;
- to specify the decisions that the OFT may take following an investigation. At present the powers to take decisions in relation, in particular, to the inapplicability of the Chapter I or Chapter II prohibitions are set out in detail in provisions that relate to applications under the notification system; it may therefore be necessary to set them out in similar detail, but in the context of the new system.

451. *Subsection (1)* sets out the basic power to modify CA 1998. The modifications that can be made are those considered appropriate in order to eliminate or reduce such differences between UK competition law (as contained in CA 1998) and EC competition law as may result from the making of a relevant Community instrument. The power may also be used to avert the creation of such differences, by ensuring that the appropriate changes to UK competition law move in synchrony with the changes to the EC system.

452. *Subsection (2)* defines expressions used in *subsection (1)*, in particular those which provide the basis of the comparison that must be made in exercising the power under that subsection. Thus the differences that may be dealt with under *subsection (1)* are those between the ‘domestic provisions’ of the CA 1998, on the one hand, and EC competition law, on the other. For those purposes, EC competition law will include not only, for example, the directly applicable provisions of a Council regulation, but also any provisions of UK law that implement or give effect to the EC competition rules. Conversely, ‘domestic provisions’ of the CA 1998 will exclude any measures implementing or giving effect to the EC rules. When an instrument is made under Article 83 of the Treaty and implemented in UK law (for instance using the powers given by section 2(2) of the European Communities Act 1972), it is clear that a difference may then arise, in particular, between domestic provisions of the CA 1998 previously modelled on the EC competition rules, and those rules as amended in consequence of the new Community instrument. In those circumstances, the power in *subsection (1)* may be used in order to reduce or eliminate such differences.

453. *Subsection (3)* provides a separate power to repeal or modify any provision of an Act (other than the 1998 Act) which excludes any matter from the prohibitions in the 1998 Act. Examples of such statutes are paragraph 9 of Schedule 14 to the Companies Act 1989 (agreements relating to bodies which are recognised regulatory or supervisory bodies under that Act) and sections 164, 311 and 312 of the Financial Services and Markets Act 2000 (various agreements and conduct within the scope of that Act).

454. *Subsections (4) to (8)* make further provision as to the relevant powers, including provision permitting the powers to be used to sub-delegate the power to make subordinate legislation and provision removing the restriction in the European Communities Act 1972 in relation to regulations implementing a Community instrument to which this section applies. The affirmative resolution procedure applies to any use of the powers given by this section.