

*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 1: the Office of Fair Trading

Establishment etc. of Office of Fair Trading

Sections 1 and 2 & Schedule 1: The Office of Fair Trading & The Director General of Fair Trading

18. **Section 1** establishes a new corporate authority to be known as the OFT. Section 2 abolishes the office of DGFT and transfers the DGFT's functions, property, rights and liabilities to the OFT. The office of DGFT was established by FTA 1973. The DGFT has a wide range of functions in respect of consumer protection and competition matters.
19. The OFT is to be a body corporate and is to consist of a Chairman and at least four other members. It is intended that the majority of members of the OFT to be non-executive appointments. As a Non-Ministerial Government Department, the OFT will be a Crown body and its staff will be civil servants.
20. The organisation currently known as the OFT is not a statutory body, but simply the administrative support that has grown up around the DGFT to support him or her in the exercise of his or her statutory functions. The OFT name has also traditionally been used when publicising and explaining the work of the DGFT. References in the Act to the OFT are purely to the new corporate authority.
21. In managing its affairs, the OFT is, under section 1, obliged to have regard to any relevant guidance on the governance of public bodies and to such generally accepted principles of good corporate governance as it is reasonable to regard as applicable to it. For example, the OFT would have to have regard to relevant principles in the Combined Code produced by the Hampel Committee on Corporate Governance in 1998.
22. **Schedule 1** sets out in more detail the OFT's internal structure. The Chairman is to be appointed by the Secretary of State. The other members are to be appointed by the Secretary of State in consultation with the Chairman. Members may be removed from office by the Secretary of State only on the grounds of incapacity or misbehaviour.
23. The Secretary of State shall also, after consulting the Chairman, appoint a person to act as Chief Executive of the OFT. The Chief Executive may also be a member of the OFT. During the first two years after this provision comes into force, the Secretary of State may appoint a single person to hold both the post of Chairman and the post of Chief Executive. This is to provide some continuity for the OFT as the new arrangements settle down, and to allow the Government to honour its commitment to John Vickers. Mr Vickers will retire as Chairman and Chief Executive in 2005. The Schedule also gives the OFT the power to do anything that it thinks will facilitate or assist with the performance of its functions, and sets out its powers of delegation.

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24. **Schedule 1** also requires the OFT to publish a summary of its rules and procedures for dealing with conflicts of interest. It must consult the Secretary of State on these rules and procedures.

Section 3: Annual plan

25. This section provides that the OFT will, before each financial year, publish an annual plan setting out its main objectives and priorities for the year ahead, and lay the plan before Parliament. It also obliges the OFT to consult on its proposals for the annual plan at least two months before publishing the final document, and to lay any consultation proposals before Parliament.

Section 4: Annual and other reports

26. This section provides that, after the end of each financial year, the OFT will publish an annual report on its activities and performance, and lay the report before Parliament.
27. *Subsection (2)* stipulates that each annual report will include a general survey of developments in respect of matters falling within the scope of the OFT's functions; an assessment of progress against the year's annual plan (see section 3); a summary of the OFT's significant decisions, investigations and activities; a break-down of how the OFT has allocated its resources; and an assessment of its enforcement activities. This is the minimum that must be included in the report; it is open to the OFT to include more information if it wishes.
28. *Subsection (4)* allows the OFT to prepare other reports on issues that fall within its functions, and to publish them.

Schedule 24: Transitional and transitory provisions and savings

29. This schedule contains various transitional provisions relating to the creation of the OFT, the abolition of the offices of the DGFT, and the repeal of Schedule 4 to the Competition Act 1998.

General functions of OFT

Section 5: Acquisition of information etc.

30. This section gives the OFT the function of obtaining and reviewing information relating to any of its functions, both in respect of competition and consumer matters. This information-gathering role, which may involve research, is with a view to the OFT having the information it needs to make decisions and carry out its functions.

Section 6: Provision of information etc. to the public

31. The OFT is given the function of promoting to the public the benefits that competition has for consumers and the economy. The OFT may also provide the public with information or advice on matters relating to its functions.
32. In relation to these roles, the OFT may publish educational literature or take part in educational activities (such as seminars or lectures). It may also provide support to others producing educational literature or carrying out educational activities.
33. In publishing information under sections 3, 4 and 6, OFT must have regard to the considerations set out in section 244. These are considering the need to exclude from disclosure: (i) any information whose disclosure OFT thinks is contrary to the public interest; (ii) commercial information whose disclosure OFT thinks might significantly harm the legitimate business interests of the undertaking to which it relates; and (iii) information relating to the private affairs of an individual whose disclosure OFT thinks might significantly harm the individual's interests. Under section 244, OFT must also

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consider the extent to which the disclosure of information mentioned under (ii) or (iii) above is necessary for the purpose of fulfilling its functions under sections 3, 4 and 6.

Section 7: Provision of information and advice to Ministers etc.

34. The OFT can, of its own volition, make proposals or give other information and advice to Government Ministers or public authorities on matters relating to its functions. Such advice may address the impact of future as well as existing legislation.
35. In addition to the OFT acting of its own volition, Government Ministers may also request proposals, information or advice from the OFT on matters relating to its functions.

Section 8: Promoting good consumer practice

36. This section enables the OFT to set up and undertake an enhanced role in respect of consumer codes of practice produced by a variety of bodies.
37. *Subsection (1)* sets out the OFT's general function to promote good practice in the carrying out of activities that may affect the economic interests of consumers in the UK.
38. *Subsection (2)* provides that the function includes making arrangements to approve consumer codes (as defined in subsection (6)) and both to give and withdraw approval.
39. It is expected that the OFT will use the power in this section to run a two-stage scheme under which bodies will submit their codes for approval. First, it is intended that bodies will develop consumer codes based on core criteria set by OFT. This first stage does not involve approval. OFT will confirm in writing where a code appears to meet the core criteria and is likely to be of practical benefit to consumers and good traders. At the second stage, sponsors will need to provide evidence of delivery of the initial promises in the code and the OFT will approve and promote the code once it is satisfied that this has been demonstrated. An approved code of practice will contain a redress mechanism and a complaints procedure. It might also include sector-specific criteria.
40. *Subsection (3)* provides that the arrangements made by OFT for approving consumer codes must set out the criteria it will use to decide whether approval should be granted or removed.
41. *Subsection (4)(a)* provides that the arrangements under subsection (2) may set out in detail the type of codes that may be the subject of an application for approval.
42. *Subsection (4)(b)* allows the OFT to set out arrangements for the use of a logo to signify OFT approval of a consumer code.
43. *Subsection (5)* requires OFT to publish the arrangements to approve consumer codes in any way it considers appropriate.
44. *Subsection (6)* defines a consumer code of practice as any document that is intended to regulate the conduct of a person supplying goods or services to consumers and the purpose of which is to safeguard or promote the interests of consumers. This definition does not include codes of practice that only give non-binding guidance.

Miscellaneous

Section 9: Repeal of certain powers of direction

45. This section repeals section 12 FTA 1973 and section 13 Competition Act 1980.

Section 10: Part 2 of the 1973 Act

46. Part II of FTA 1973 was created to allow the Secretary of State, on the advice of the DGFT and a then newly-created Consumer Protection Advisory Committee, to make

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orders to prevent or modify unfair (but not illegal) trade practices that harmed the economic interests of consumers. Only three orders have been made under Part II (of which two are still in force) and the Consumer Protection Advisory Committee, upon whose report the order-making power is dependent, has not existed in practice since 1983.

47. This section repeals most of Part II. It retains the two orders made under Part II that are still in force, and the enforcement provisions for those orders. It includes a power to repeal the remaining provisions of Part II once the two remaining orders have been revoked, and the enforcement provisions are therefore no longer required:
- *subsection (1)* repeals sections 3, 13–22 and Schedule 2 of FTA 1973;
 - section 3 and Schedule 2 of FTA 1973 provide for the creation of the Consumer Protection Advisory Committee and set out the terms by which members of the Committee will be appointed and retained. They also set out the Committee’s procedures for voting and arrangements for deputising for the Chairman. The Committee lost its quorum in 1982 and the last appointments expired in 1983;
 - sections 13-16 FTA 1973 set out the role and duties of the Consumer Protection Advisory Committee. They set out the circumstances in which the Secretary of State, any other Minister, or the DGFT can ask the Committee to consider whether a specified consumer trade practice adversely affects the economic interests of consumers in the UK, and the requirements for the Committee to report on its findings;
 - sections 17-21 FTA 1973 set out the circumstances in which the DGFT can, in a reference to the Advisory Committee, recommend that the Secretary of State makes an order to prevent a practice that is harming the economic interests of consumers from continuing. They also set out the requirements for the Committee to report on its findings;
 - section 22 FTA 1973 gives the Secretary of State the power to make such an order following a recommendation by the Committee. Two orders made as a result of this provision remain in force today. These are the Consumer Transactions (Restrictions on Statements) Order 1976 (1976/1813 as amended by SI 1978/127) and the Business Advertisements (Disclosure) Order 1977 (1977/1918). No orders have been made under section 22 since then;
 - The Consumer Transactions (Restrictions on Statements) Order 1976 makes it a criminal offence: (i) to use notices to attempt to restrict consumers’ statutory rights, and (ii) to issue guarantees that do not mention that a consumer’s statutory rights are not affected by the guarantee;
 - The Business Advertisements (Disclosure) Order 1977 requires that anyone seeking to sell goods in the course of a business must ensure that any advertisements published make it reasonably clear that the goods are to be sold in the course of a business. An example of this in practice is where classified advertisements for car sales include a (T) where they are trade rather than private sales.
48. *Subsection (2)* provides that these two orders shall remain in force, notwithstanding the repeal of section 22 under which they were made. They will continue to be enforced under the provisions set out at sections 23-33 FTA 1973. The subsection also preserves the effect of section 22 so far as relating to any revocation of the orders. Accordingly, any revocation order will be subject to the affirmative resolution procedure.
49. *Subsection (3)* provides that, if and when those orders are revoked, the Secretary of State may repeal, by order, any remaining provisions of Part II of FTA 1973, and subsection (2) above, which will no longer be needed.

50. Subsection (3) allows for other consequential amendments or modifications that are necessary as a result of these repeals. *Subsection (4)* allows for transitional or savings provisions to be made in connection with these. It also sets out that any orders under Subsection (3) will be made by negative resolution in either House of Parliament.

Section 11: Super-complaints to the OFT

51. This section gives certain designated consumer bodies the right to make a 'super-complaint' where they consider that there is any market feature or combination of features, such as the structure of a market or the conduct of those operating within it, that may be harming consumers to a significant extent. The market in question may be regional, national or supranational (where the UK forms part of that market). The aim of this procedure is to encourage groups who represent consumers to make relevant complaints on their collective behalf, and the OFT will be obliged to respond to a super-complaint within a specified time.
52. *Subsections (2) and (3)* set out the timeframe in which the OFT must respond. Within 90 days, the OFT will be required to make a considered response to a super-complaint, setting out what action, if any, it proposes to take under its competition or consumer powers. Eventual outcomes could, for example, include a formal reference to the CC or the publication by the OFT of a report recommending changes to regulation or self-regulation. The OFT must also explain the reasons behind its decision.
53. *Subsection (4)* allows the Secretary of State to alter the 90 day period for an OFT response should this period of time, through experience, prove to be either too lax or too limiting.
54. *Subsection (6)* provides for the route by which super-complainants will be named and describes who may qualify for super-complainant status: namely, those bodies who appear to represent the interests of consumers and meet the additional criteria for designation that the Secretary of State is required to publish.
55. *Subsection (7)* obliges the OFT to issue guidance on the presentation of a reasoned case. The OFT will of course require some evidence from the super-complainant in support of the super-complaint and super-complainants will expect to provide some supporting evidence. What constitutes a reasoned case will vary from case to case, but the OFT guidance will help super-complainants to submit a reasoned case. The OFT may also issue other relevant guidance, for example on the publicising of super-complaints or on super-complaints concerning the regulated sectors.
56. *Subsection (9)* cross-refers to the relevant definitions in Part 4 of the Act.