



Enterprise Act 2002

2002 CHAPTER 40

PART 7

MISCELLANEOUS COMPETITION PROVISIONS

Powers of entry under 1998 Act

203 Powers of entry

- (1) The 1998 Act is amended as follows.
- (2) In section 28 (power to enter premises under a warrant), after subsection (3) there is inserted—

“(3A) A warrant under this section may authorise persons specified in the warrant to accompany the named officer who is executing it.”
- (3) In section 62 (power to enter premises: Commission investigations), after subsection (5) there is inserted—

“(5A) A warrant under this section may authorise persons specified in the warrant to accompany the named officer who is executing it.”
- (4) In section 63 (power to enter premises: Director’s special investigations), after subsection (5) there is inserted—

“(5A) A warrant under this section may authorise persons specified in the warrant to accompany the named authorised officer who is executing it.”

Directors disqualification

204 Disqualification

- (1) The Company Directors Disqualification Act [1986 \(c. 46\)](#) is amended as follows.

Status: This is the original version (as it was originally enacted).

- (2) The following sections are inserted after section 9 (matters for determining unfitness in certain cases)—

“Disqualification for competition infringements

9A Competition disqualification order

- (1) The court must make a disqualification order against a person if the following two conditions are satisfied in relation to him.
- (2) The first condition is that an undertaking which is a company of which he is a director commits a breach of competition law.
- (3) The second condition is that the court considers that his conduct as a director makes him unfit to be concerned in the management of a company.
- (4) An undertaking commits a breach of competition law if it engages in conduct which infringes any of the following—
 - (a) the Chapter 1 prohibition (within the meaning of the Competition Act 1998) (prohibition on agreements, etc. preventing, restricting or distorting competition);
 - (b) the Chapter 2 prohibition (within the meaning of that Act) (prohibition on abuse of a dominant position);
 - (c) Article 81 of the Treaty establishing the European Community (prohibition on agreements, etc. preventing, restricting or distorting competition);
 - (d) Article 82 of that Treaty (prohibition on abuse of a dominant position).
- (5) For the purpose of deciding under subsection (3) whether a person is unfit to be concerned in the management of a company the court—
 - (a) must have regard to whether subsection (6) applies to him;
 - (b) may have regard to his conduct as a director of a company in connection with any other breach of competition law;
 - (c) must not have regard to the matters mentioned in Schedule 1.
- (6) This subsection applies to a person if as a director of the company—
 - (a) his conduct contributed to the breach of competition law mentioned in subsection (2);
 - (b) his conduct did not contribute to the breach but he had reasonable grounds to suspect that the conduct of the undertaking constituted the breach and he took no steps to prevent it;
 - (c) he did not know but ought to have known that the conduct of the undertaking constituted the breach.
- (7) For the purposes of subsection (6)(a) it is immaterial whether the person knew that the conduct of the undertaking constituted the breach.
- (8) For the purposes of subsection (4)(a) or (c) references to the conduct of an undertaking are references to its conduct taken with the conduct of one or more other undertakings.

- (9) The maximum period of disqualification under this section is 15 years.
- (10) An application under this section for a disqualification order may be made by the OFT or by a specified regulator.
- (11) Section 60 of the Competition Act 1998 (c. 41) (consistent treatment of questions arising under United Kingdom and Community law) applies in relation to any question arising by virtue of subsection (4)(a) or (b) above as it applies in relation to any question arising under Part 1 of that Act.

9B Competition undertakings

- (1) This section applies if—
 - (a) the OFT or a specified regulator thinks that in relation to any person an undertaking which is a company of which he is a director has committed or is committing a breach of competition law,
 - (b) the OFT or the specified regulator thinks that the conduct of the person as a director makes him unfit to be concerned in the management of a company, and
 - (c) the person offers to give the OFT or the specified regulator (as the case may be) a disqualification undertaking.
- (2) The OFT or the specified regulator (as the case may be) may accept a disqualification undertaking from the person instead of applying for or proceeding with an application for a disqualification order.
- (3) A disqualification undertaking is an undertaking by a person that for the period specified in the undertaking he will not—
 - (a) be a director of a company;
 - (b) act as receiver of a company's property;
 - (c) in any way, whether directly or indirectly, be concerned or take part in the promotion, formation or management of a company;
 - (d) act as an insolvency practitioner.
- (4) But a disqualification undertaking may provide that a prohibition falling within subsection (3)(a) to (c) does not apply if the person obtains the leave of the court.
- (5) The maximum period which may be specified in a disqualification undertaking is 15 years.
- (6) If a disqualification undertaking is accepted from a person who is already subject to a disqualification undertaking under this Act or to a disqualification order the periods specified in those undertakings or the undertaking and the order (as the case may be) run concurrently.
- (7) Subsections (4) to (8) of section 9A apply for the purposes of this section as they apply for the purposes of that section but in the application of subsection (5) of that section the reference to the court must be construed as a reference to the OFT or a specified regulator (as the case may be).

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9C Competition investigations

- (1) If the OFT or a specified regulator has reasonable grounds for suspecting that a breach of competition law has occurred it or he (as the case may be) may carry out an investigation for the purpose of deciding whether to make an application under section 9A for a disqualification order.
- (2) For the purposes of such an investigation sections 26 to 30 of the Competition Act 1998 (c. 41) apply to the OFT and the specified regulators as they apply to the OFT for the purposes of an investigation under section 25 of that Act.
- (3) Subsection (4) applies if as a result of an investigation under this section the OFT or a specified regulator proposes to apply under section 9A for a disqualification order.
- (4) Before making the application the OFT or regulator (as the case may be) must—
 - (a) give notice to the person likely to be affected by the application, and
 - (b) give that person an opportunity to make representations.

9D Co-ordination

- (1) The Secretary of State may make regulations for the purpose of co-ordinating the performance of functions under sections 9A to 9C (relevant functions) which are exercisable concurrently by two or more persons.
- (2) Section 54(5) to (7) of the Competition Act 1998 (c. 41) applies to regulations made under this section as it applies to regulations made under that section and for that purpose in that section—
 - (a) references to Part 1 functions must be read as references to relevant functions;
 - (b) references to a regulator must be read as references to a specified regulator;
 - (c) a competent person also includes any of the specified regulators.
- (3) The power to make regulations under this section must be exercised by statutory instrument subject to annulment in pursuance of a resolution of either House of Parliament.
- (4) Such a statutory instrument may—
 - (a) contain such incidental, supplemental, consequential and transitional provision as the Secretary of State thinks appropriate;
 - (b) make different provision for different cases.

9E Interpretation

- (1) This section applies for the purposes of sections 9A to 9D.
- (2) Each of the following is a specified regulator for the purposes of a breach of competition law in relation to a matter in respect of which he or it has a function—
 - (a) the Director General of Telecommunications;

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- (b) the Gas and Electricity Markets Authority;
 - (c) the Director General of Water Services;
 - (d) the Rail Regulator;
 - (e) the Civil Aviation Authority.
- (3) The court is the High Court or (in Scotland) the Court of Session.
- (4) Conduct includes omission.
- (5) Director includes shadow director.”
- (3) In section 1(1) (general provision about disqualification orders) for “section 6” substitute “sections 6 and 9A”.
- (4) In section 8A (variation etc of disqualification undertaking) after subsection (2) there is inserted the following subsection—
 - “(2A) Subsection (2) does not apply to an application in the case of an undertaking given under section 9B, and in such a case on the hearing of the application whichever of the OFT or a specified regulator (within the meaning of section 9E) accepted the undertaking—
 - (a) must appear and call the attention of the court to any matters which appear to it or him (as the case may be) to be relevant;
 - (b) may give evidence or call witnesses.”
- (5) In section 8A for subsection (3) there is substituted—
 - “(3) In this section “the court”—
 - (a) in the case of an undertaking given under section 9B means the High Court or (in Scotland) the Court of Session;
 - (b) in any other case has the same meaning as in section 7(2) or 8 (as the case may be).”
- (6) In section 16(3) for “the Secretary of State or the official receiver or the liquidator” substitute “a person falling within subsection (4)”.
- (7) In section 16 after subsection (3) there is inserted the following subsection—
 - “(4) The following fall within this subsection—
 - (a) the Secretary of State;
 - (b) the official receiver;
 - (c) the OFT;
 - (d) the liquidator;
 - (e) a specified regulator (within the meaning of section 9E).”
- (8) In section 17 (applications for leave under an order or undertaking) after subsection (3) there is inserted the following subsection—
 - “(3A) Where a person is subject to a disqualification undertaking accepted at any time under section 9B any application for leave for the purposes of section 9B(4) must be made to the High Court or (in Scotland) the Court of Session.”
- (9) In section 17(4) for “or 1A(1)(a)” substitute “1A(1)(a) or 9B(4)”.
- (10) In section 17 after subsection (5) there are inserted the following subsections—

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- “(6) Subsection (5) does not apply to an application for leave for the purposes of section 1(1)(a) if the application for the disqualification order was made under section 9A.
- (7) In such a case and in the case of an application for leave for the purposes of section 9B(4) on the hearing of the application whichever of the OFT or a specified regulator (within the meaning of section 9E) applied for the order or accepted the undertaking (as the case may be)—
- (a) must appear and draw the attention of the court to any matters which appear to it or him (as the case may be) to be relevant;
 - (b) may give evidence or call witnesses.”
- (11) In section 18 (register of disqualification orders and undertakings) for subsection (2A) substitute—
- “(2A) The Secretary of State must include in the register such particulars as he considers appropriate of—
- (a) disqualification undertakings accepted by him under section 7 or 8;
 - (b) disqualification undertakings accepted by the OFT or a specified regulator under section 9B;
 - (c) cases in which leave has been granted as mentioned in subsection (1)
 - (d).”

Miscellaneous

205 Super-complaints to regulators other than OFT

- (1) The Secretary of State may by order provide that section 11 is to apply to complaints made to a specified regulator in relation to a market of a specified description as it applies to complaints made to the OFT, with such modifications as may be specified.
- (2) An order under this section—
 - (a) shall be made by statutory instrument, and
 - (b) shall be subject to annulment in pursuance of a resolution of either House of Parliament.
- (3) In this section—

“regulator” has the meaning given in section 54(1) of the 1998 Act; and

“specified” means specified in the order.

206 Power to modify Schedule 8

- (1) The Secretary of State may by order made by statutory instrument modify Schedule 8.
- (2) An order under this section may make—
 - (a) different provision for different cases or different purposes;
 - (b) such incidental, supplementary, consequential, transitory, transitional or saving provision as the Secretary of State considers appropriate.
- (3) An order under this section may, in particular, modify that Schedule in its application by virtue of Part 3 of this Act, in its application by virtue of Part 4 of this Act, in its application by virtue of any other enactment (whether by virtue of Part 4 of this

Act as applied by that enactment or otherwise) or in its application by virtue of every enactment that applies it.

- (4) An order under this section as extended by subsection (2) may modify any enactment comprised in or made under this Act, or any other enactment.
- (5) No order shall be made under this section unless a draft of it has been laid before, and approved by a resolution of, each House of Parliament.
- (6) No modification of Schedule 8 in its application by virtue of Part 3 of this Act shall be made by an order under this section if the modification relates to a relevant merger situation or (as the case may be) a special merger situation which has been created before the coming into force of the order.
- (7) No modification shall be made by an order under this section of Schedule 8 in its application in relation to references made under section 22, 33, 45 or 62 before the coming into force of the order.
- (8) No modification shall be made by an order under this section of Schedule 8 in its application in relation to references made under section 131 or 132 before the coming into force of the order (including references made under section 131 as applied by another enactment).
- (9) Before making an order under this section, the Secretary of State shall consult the OFT and the Commission.
- (10) Expressions used in this section which are also used in Part 3 of this Act have the same meaning in this section as in that Part.

207 Repeal of Schedule 4 to the 1998 Act

Section 3(1)(d) of and Schedule 4 to the 1998 Act (which provide for the exclusion from the Chapter 1 prohibition in cases involving designated professional rules) shall cease to have effect.

208 Repeal of Part 6 of Fair Trading Act 1973

Sections 78 to 80 of the 1973 Act (references to Commission other than monopoly and merger references) shall cease to have effect.

209 Reform of Community competition law

- (1) The Secretary of State may by regulations make such modifications of the 1998 Act as he considers appropriate for the purpose of eliminating or reducing any differences between—
 - (a) the domestic provisions of the 1998 Act, and
 - (b) European Community competition law,which result (or would otherwise result) from a relevant Community instrument made after the passing of this Act.
- (2) In subsection (1)—

“the domestic provisions of the 1998 Act” means the provisions of the 1998 Act so far as they do not implement or give effect to a relevant Community instrument;

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“European Community competition law” includes any Act or subordinate legislation so far as it implements or gives effect to a relevant Community instrument;

“relevant Community instrument” means a regulation or directive under Article 83 of the Treaty establishing the European Community.

- (3) The Secretary of State may by regulations repeal or otherwise modify any provision of an Act (other than the 1998 Act) which excludes any matter from the Chapter I prohibition or the Chapter II prohibition (within the meaning of Part 1 of the 1998 Act).
- (4) The power under subsection (3) may not be exercised—
 - (a) before the power under subsection (1) has been exercised; or
 - (b) so as to extend the scope of any exclusion that is not being removed by the regulations.
- (5) Regulations under this section may—
 - (a) confer power to make subordinate legislation;
 - (b) make such consequential, supplementary, incidental, transitory, transitional or saving provision as the Secretary of State considers appropriate (including provision modifying any Act or subordinate legislation); and
 - (c) make different provision for different cases or circumstances.
- (6) The power to make regulations under this section is exercisable by statutory instrument.
- (7) No regulations may be made under this section unless a draft of them has been laid before and approved by a resolution of each House of Parliament.
- (8) Paragraph 1(1)(c) of Schedule 2 to the European Communities Act 1972 (c. 68) (restriction on powers to legislate) shall not apply to regulations which implement or give effect to a relevant Community instrument made after the passing of this Act.