

# ENTERPRISE ACT 2002

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## EXPLANATORY NOTES

### COMMENTARY ON SECTIONS

#### **Part 8: Enforcement of Certain Consumer Legislation**

##### **Enforcement procedure**

##### *Section 214: Consultation*

514. This section applies if an enforcer thinks that an infringement has occurred, is occurring, or, in the case of a Community infringement, is likely to occur. Except where the OFT thinks that an application for an enforcement order should be made without delay, enforcers must first consult the OFT (if it is not the enforcer) and the person against whom the enforcement order may be made and give the latter the opportunity to stop the infringement occurring, continuing or being repeated, as the case may be, without the need for court action (*subsections (1) to (3)*). It may be, for example, that the trader was not aware that his conduct constituted an infringement or that he is able to show that it was an isolated occurrence. The enforcer may then decide it is not necessary to make an application. It may also be that the trader decides to offer an undertaking to the enforcer under section 219.
515. After the end of 14 days beginning on the day after the request for consultation is received, the enforcer may make an application for an enforcement order under section 215 (subsection (4)(a)). This period is reduced to 7 days where the enforcer intends to make an application for an interim enforcement order (subsection (4)(b)) (see below). The Secretary of State may by order make rules as to consultation (*subsection (5)*). The Department plans to use this to provide for addresses for service of the request for consultation and to specify a deemed date of receipt of a request for consultation, for example two days after posting first class.
516. The purpose of enforcers being required to consult the OFT is to enable the OFT to perform a co-ordinating role in relation to proceedings under this Part. This will enable the OFT to facilitate the sharing of information between enforcers to promote consistent enforcement throughout the country and to make directions under section 216 to avoid the risk of traders facing multiple actions in relation to the same infringement. It is not envisaged that the OFT should become directly involved in the consultations with the trader except where it is the enforcer or has been asked to do so by the trader.

##### *Section 215: Applications*

517. This section is concerned with the person against whom an application for an enforcement order may be made, the types of infringement in respect of which particular enforcers are to have the power to make applications to the courts, and the courts that are to hear such proceedings.
518. An application for an enforcement order (including an interim enforcement order) must name the person the enforcer thinks has engaged or is engaging in conduct that

constitutes an infringement, or who is likely to engage in conduct that would constitute a Community infringement (*subsection (1)*).

519. A general enforcer (that is, the OFT, a trading standards department or the Department of Enterprise, Trade and Investment in Northern Ireland) may make an application for an enforcement order in respect of all infringements to which this Part applies (*subsection (2)*).
520. A designated enforcer may make an application for an enforcement order only in respect of those infringements for which it is designated (*subsection (3)*).
521. A Community enforcer may make an application for an enforcement order only in respect of a Community infringement (*subsection (4)*).
522. An application for an enforcement order may be made to the High Court or a county court if the person against whom the order is sought carries on business or has a place of business in England and Wales or Northern Ireland; or to the Court of Session or the sheriff if the person carries on business or has a place of business in Scotland (*subsection (5)*).
523. The court may examine whether the purpose of a Community enforcer justifies it taking action in the particular case (*subsection (6)*). Where the court thinks that the purpose of the Community enforcer does not justify it taking action, it may refuse the application solely on that ground (*subsection (7)*). The purpose of a Community enforcer in this context is the purpose of the body for the purpose of the Injunctions Directive. The Department believes that the Injunctions Directive only gives Community enforcers the right to make applications for enforcement orders in respect of those interests protected by the enforcer in its home State. The purpose of a Community enforcer would therefore, in particular, include the infringements in respect of which it has the power to act in its home State (*subsection (8)*).
524. An enforcer that is not the OFT must notify the OFT of the outcome of an application made under this section (*subsection (9)*). This would include the terms of any undertaking given to, or order made by, the court. This is to assist the OFT in its co-ordination role.

### ***Section 216: Applications: directions by OFT***

525. This section provides that, if the OFT believes that an enforcer or enforcers other than itself intends to apply for an enforcement order in respect of a particular infringement, it may direct which enforcer may bring such proceedings, or that only it may do so (*subsections (1) and (2)*). Where the OFT directs that only it may make such application, that does not prevent it from seeking a voluntary undertaking from the trader or from taking other steps to bring the infringement to an end (*subsection (3)*). The OFT may vary or withdraw any direction made under this section (*subsection (4)*).
526. The effect is that if the OFT becomes aware that an enforcer (other than a Community enforcer) is intending to make an application, but there are regulatory or self-regulatory mechanisms that the enforcer has not attempted to use, the OFT could make a direction to the effect that only it can make a court application. This will be the case even if the OFT had no prior knowledge, and therefore no intention to apply itself, before it became aware of the alleged infringement or the other enforcer's intention. This will ensure that existing regulatory and self-regulatory mechanisms, such as that operated by the Independent Television Commission (ITC) in relation to broadcast advertising and sponsorship, are not by-passed.
527. The section will also allow the OFT to prevent businesses being faced with multiple applications in respect of the same infringement. The OFT can decide which enforcer is best placed to proceed with the application. It may be, if, for example, a majority of the trader's customers are in another EEA State, that the OFT could direct that

if an application is to be made, then it should be a Community enforcer that brings proceedings and not others, but this is not likely to happen very often.

528. The OFT may take such steps as it thinks appropriate for bringing a direction given under this section to the attention of other enforcers who may be affected by it. This will minimise the risk that others will seek to enter into informal negotiations with the trader over the same infringement (*subsection (5)*).
529. This section does not prevent an application for an enforcement order being made by a Community enforcer (*subsection (6)*). This is because the only constraint permitted by the Injunctions Directive on such bodies is the requirement to give the OFT two weeks' notice of their intention to make an application to the courts (see section 214).

### **Section 217: Enforcement orders**

530. Where the court is satisfied that the person against whom proceedings have been brought has engaged in conduct that constitutes an infringement or, in the case of a Community infringement, is likely to do so, the court may make an enforcement order against that person (*subsections (1) to (3)*). The Department considers that it is a requirement of the Injunctions Directive for the courts to be able to make orders to stop threatened Community infringements. This could be the case if an enforcer becomes aware that a misleading advertisement is about to be published in a newspaper or periodical.
531. In considering whether to make an enforcement order, the court must have regard to whether the defendant has failed to comply with any voluntary undertaking given under section 219 relating to any conduct that constitutes an infringement (*subsection (4)*). Failure to comply with an undertaking would be pertinent to the question of whether an enforcement order should be made (rather than another undertaking accepted). The order must indicate the nature of the conduct that the person has engaged in, or in the case of a Community infringement which is likely to engage in, that constitutes an infringement and must require the person against whom it is made:
- not to continue or repeat the conduct; or
  - not to engage in conduct of the nature indicated by the court if it has found that a Community infringement is likely to be committed; and
  - not to engage in conduct of the nature indicated by the court in the course of the business concerned or another business carried out by him in future; and
  - not to consent to, or connive in, the carrying out of such conduct by a body corporate with which he has a special relationship as defined in section 222(3),
- as provided by *subsections (5)-(7)*. The last element means that the defendant must not consent to, or connive in, the carrying out of such conduct by a body corporate of which he is a director or which he controls. This will prevent a sole trader from evading the scope of an enforcement order by acquiring a company with a nominal share capital to operate his business and continue the infringement.
532. In addition, the court may order the defendant (but not the enforcer) at his expense to publish its order (in full or in part) and/or a corrective statement in such form and manner as deemed adequate with a view to eliminating or reducing the continuing effects of the infringement (*subsection (8)*). The availability of this remedy is a requirement of the Injunctions Directive. An obvious example for its use would be in respect of an advertisement that has been found to be misleading. It would be in the discretion of the courts when to exercise this power and how the information should best be published to bring it to the attention of consumers. However, whether or not the court exercises this power, enforcers would be free to publish the terms of court orders and undertakings given to the court (see below).

533. As an alternative to making an enforcement order, the court may accept an undertaking from the defendant. The undertaking may take the same form as the order, or may be to take such steps as the court considers will prevent him doing anything the order would have prohibited him from doing (*subsection (9)*). In these circumstances, the court may also accept a further undertaking from the defendant to publish at his expense the terms of the undertaking (in full or in part) or a corrective statement (*subsection (10)*).
534. Where the court accepts an undertaking from the defendant in respect of conduct that constitutes an infringement, it cannot make an enforcement order in respect of that finding (*subsection (11)*) except where further proceedings are brought under section 220.
535. An injunction (or interdict in Scotland) generally has effect only in the jurisdiction (England and Wales, or Scotland or Northern Ireland) in which it was granted. The effect of *subsection (12)* is that an enforcement order made under this Part will apply throughout the UK. It will therefore be capable of stopping a person who is the subject of an order in one jurisdiction of the UK from harming the collective interests of consumers in the other two jurisdictions.
536. This Part makes no special provisions for appeals. The normal rules will apply.

### ***Section 218: Interim enforcement order***

537. This section provides that, where certain conditions are satisfied, the courts may make an interim enforcement order pending the determination of an application for an enforcement order.
538. Where it is alleged that a person is engaged in conduct that constitutes an infringement, or is likely to engage in conduct that constitutes a Community infringement, and it appears to the court that:
- an application for an enforcement order in respect of the alleged conduct would be likely to be successful; and
  - it is expedient that the conduct is prohibited or prevented immediately,
- the court may make an interim enforcement order. An interim order may be made without notice being given to the person named in the application if it appears to the court that it is appropriate to do so (*subsection (1)*). But *subsection (7)* requires that where an application for an interim enforcement order is made without notice being given to the person named in the application it must explain why no notice has been given.
539. An application for an interim enforcement order without notice may be necessary, for example, if an enforcer becomes aware that a misleading advertisement is about to be published in a national newspaper or if a trader sets up in temporary premises to sell goods of unsatisfactory quality or to mislead consumers as to the goods they are purchasing (so-called 'one day sales').
540. An interim enforcement order must indicate the nature of the alleged conduct and must require the person against whom it is made:
- not to continue or repeat the conduct; or
  - not to engage in conduct of the nature indicated by the court if it has found that a Community infringement is likely to be committed; and
  - not to engage in conduct of the nature indicated by the court in the course of the business concerned or another business carried out by him in future; and
  - not to consent to, or connive in, the carrying out of such conduct by a body corporate with which he has a special relationship as defined in section 222(3),

as provided by *subsections (2) to (4)*.

541. An interim enforcement order may be applied for before an application for an enforcement order is made and at any time until an application for an enforcement order is determined (*subsection (5)*). However, an enforcer other than the OFT must not make an application for an interim enforcement order without complying with the prior consultation requirements in section 214. A consultation period of 7 days is required under that section unless the OFT agrees that an application should be made without delay. The Department would expect enforcers to obtain OFT's agreement to an application being made without delay in cases of great urgency and whenever an application is made without notice.
542. An application for an interim enforcement order must refer to all matters which are known to the applicant and which are material to the question of whether or not the application should be granted (*subsection (6)*). This will enable the courts to consider all the relevant information known to the applicant when an application for an interim enforcement order is made without notice being given to the person named in the application, or where an application with notice is not defended.
543. The court may vary or discharge an interim enforcement order on the application of either the enforcer who applied for the order or the person against whom it is made (*subsection (8)*). An interim enforcement order ceases to have effect on the determination of the application for an enforcement order (*subsection (9)*).
544. As an alternative to making an interim enforcement order, the court may accept an undertaking from the defendant. The undertaking may take the same form as the interim order, or may be to take such steps as the court considers will prevent him doing anything the order would have prohibited him from doing (*subsection (10)*).
545. As with enforcement orders, an interim enforcement order made in one part of the UK will apply throughout the UK (*subsection (11)*).

### ***Section 219: Undertakings***

546. This section provides that where an enforcer has the power to make an application to the court for an enforcement order, it (the enforcer) may accept an undertaking from a person who it believes has engaged, or is engaging, in conduct that constitutes an infringement or, in the case of a Community infringement, is likely to do so (*subsections (1) to (3)*). The undertaking must require that person:
- not to continue or repeat the conduct in question; or
  - not to engage in such conduct which is believed to constitute a Community infringement if it has not yet occurred; and
  - not to engage in conduct of that kind in the course of the business concerned or another business carried out by him in future; and
  - not to consent to, or connive in, the carrying out of conduct of that kind by a body corporate with which he has a special relationship as defined in section 222(3).
- as provided by *subsections (4) and (5)*. An enforcer may decide that such an undertaking will avoid the need for it to apply for an enforcement order. An enforcer must notify the OFT of the terms of any undertaking given to it under this section and the identity of the person giving it (*subsection (6)*). This is to enable the OFT to fulfil its co-ordination role.
547. If a person gives an undertaking to an enforcer under this section, the court must take this, as well as whether he has failed to comply with it, into account in considering whether to make an enforcement order on any subsequent application.

**Section 220: Further proceedings**

548. This section applies where an enforcer believes that an enforcement order (including an interim enforcement order) or an undertaking given to the court has been breached. In any such case, either the enforcer who made the application for the order or the OFT will be able to make a further application to the court to enforce the order (*subsections (1) and (2)*).
549. This further application might lead the court to find that its order or undertakings given to it have been breached and therefore that the defendant is in contempt of court. If the court finds that a breach has been committed, it can impose a fine and/or, if the defendant is an individual, a term of imprisonment not exceeding two years.
550. However, where a further application is made to the court in respect of a failure to comply with an undertaking given to the court, the enforcer may instead make an application for an enforcement order or for an interim enforcement order (*subsection (3)*). Similarly, the court may make an enforcement order or an interim enforcement order instead of finding that the defendant is in contempt (*subsection (4)*). An application to enforce an undertaking given to the court must be made to the court that accepted the undertaking (*subsection (5)(b)*).
551. An enforcer (other than the OFT) must notify the OFT if it makes an application to the court in respect of a failure to comply with an enforcement order, an interim enforcement order, or an undertaking given to the court. It must also notify the OFT of any order made by the court on the application (*subsection (6)*). Where an enforcer makes an application for an enforcement order or an interim enforcement order in further proceedings the consultation requirements in section 214 and the OFT's powers of direction in section 216 do not apply: the purpose of notifying the OFT is to keep it informed of proceedings against particular traders to assist its co-ordination function.

**Section 221: Community infringements: proceedings**

552. This section has two purposes. First, it provides general enforcers and designated enforcers that are public bodies with any necessary additional powers to their existing statutory powers to enable them to bring proceedings under the legislation implementing the Injunctions Directive in any EEA State to stop Community infringements that originate there but that harm the collective interests of consumers in the UK (*subsections (1) and (2)*). Whether private designated enforcers will have these powers will depend upon their own constitutions.
553. Second, it enables general enforcers and designated enforcers (both public and private) to co-operate with any Community enforcer for the purpose of bringing proceedings in other EEA States and to cooperate with such an enforcer in the exercise of its functions (including accepting undertakings under section 219) under the provisions of this Part (*subsections (3) and (4)*). There is no need for the section to refer explicitly to an enforcer being able to apply jointly with or on behalf of another enforcer because there is no restriction on the enforcer's ability to apply in these circumstances. Whether a body is entitled to bring proceedings and in respect of which infringements is determined by section 213 and any designation order made under it.

**Section 222: Bodies corporate: accessories**

554. This section provides that if a body corporate engages in conduct that constitutes a domestic or Community infringement with the consent or connivance of a person (an accessory) who has a special relationship with that body corporate, the consent or connivance is also conduct that constitutes the infringement (*subsections (1) and (2)*). The effect is that an application can be made under section 215 for an enforcement order against an accessory who consents to, or connives at, the conduct of the body corporate.

555. The court will have the power to make an order against, or to accept an undertaking from, an accessory whether or not it has made an order or accepted an undertaking from the body corporate (*subsections (5) and (6)*). Similarly, an enforcer may accept an undertaking from an accessory regardless of whether it accepts an undertaking from the body corporate (*subsection (7)*).
556. The provisions of this Part apply to infringements consisting of consent or connivance as they apply to other infringements with the exception that the terms of orders and undertakings are modified slightly by *subsections (8) and (9)* of this section.
557. Where an order is made as referred to in *subsection (5)* or an undertaking is accepted as referred to in *subsections (6) or (7)*, it must require the accessory:
- not to continue to consent to, or connive at, the body corporate's conduct or repeat the consent or connivance;
  - not to engage in conduct of the kind committed by the body corporate in the course of any business that may be carried out by him (i.e. as sole trader or in partnership); and
  - not to consent to, or connive at, conduct of that kind by any other body corporate with which he has a special relationship, as defined in section 222(3).
558. An accessory may be either a controller of a company or a director, manager, secretary or other similar officer (or a person purporting to act in such a capacity). A 'controller' means someone who instructs the directors of a company as to how to act or someone who, together with any associates, controls one third or more of the voting power in the company (*subsections (3) and (4)*). 'Associate' is defined in *subsections (10) to (13)* and principally covers husbands and wives, and cohabitees (including ones of the same sex who live together in a settled relationship), relatives and business partners, and companies who share a 'controller'.

### ***Section 223: Bodies corporate: orders***

559. Where an enforcement order (including an interim enforcement order) is made against a company, conduct by a company owned by that company or by a sister company would not be a breach of the order. This section will give the court wide power to deal with this situation.
560. This section will empower the court, when making an enforcement order or interim enforcement order under sections 217 or 218, respectively, to direct that the order will be binding upon all other members of a group of interconnected bodies corporate of which it is a member (*subsection (2)*). 'Interconnected bodies corporate' and 'group of interconnected bodies corporate' are defined by reference to the definition of 'subsidiary' in section 736 of the Companies Act 1985 (*subsections (3) to (5)*).
561. Further, if a body corporate subject to an enforcement order (including an interim enforcement order) becomes a member of a group of interconnected bodies corporate subsequently, or the group is enlarged, the enforcer will be able to apply to the court for a direction that the order be binding on the new members or member.