

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

# ENTERPRISE ACT 2002

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## EXPLANATORY NOTES

### COMMENTARY ON SECTIONS

#### **Part 2: the Competition Appeal Tribunal**

#### **The Competition Appeal Tribunal**

##### *Section 12: The Competition Appeal Tribunal*

57. This section creates the CAT. The CAT will take over the functions formerly performed by the appeal tribunals of the CC. Sections 17, 18, 19, 114, 120 and 179 of the Act give the CAT additional functions.

##### *Schedule 2: The Competition Appeal Tribunal*

58. This Schedule sets out the terms of appointment to the CAT for the President, chairmen and ordinary members. The Lord Chancellor appoints the President and chairmen. The Secretary of State appoints ordinary members.

##### *Section 13: The Competition Service*

59. This section establishes a new body called the Competition Service that will provide support services to the CAT. The Service will employ staff formerly employed by the Commission, and take on some of its assets and liabilities. Previously both the CC's inquiry panels and appeals tribunals were supported by the staff of the CC. This arrangement is no longer considered appropriate because the CAT will now hear appeals against decisions made by the CC.

##### *Schedule 3: The Competition Service*

60. This Schedule establishes the Competition Service. The Service will consist of the President of the CAT, the Registrar of the CAT and one or more members appointed by the Secretary of State, and will have its own staff. Part 2 of the Schedule sets out the arrangements for transferring property, rights and liabilities from the CC to the Service.

##### *Section 14: Constitution of Tribunal for particular proceedings and its decisions*

61. This section sets out the arrangements for proceedings before the CAT.

##### *Section 15: Tribunal rules*

62. This section gives the Secretary of State the power to make the rules of the CAT.

##### *Schedule 4: Tribunal: procedure*

63. **Part 1** of this Schedule contains provisions concerning Tribunal decisions, and provides procedures for their enforcement. Paragraph 1 of this Schedule provides the procedure

relating to decisions taken by the CAT. It contains similar provisions to those currently in paragraph 4 of Schedule 8 to CA 1998 (repealed by paragraph 8(5) of Schedule 5).

64. [Paragraphs 2-8](#) provide a procedure for the enforcement of certain decisions of the Tribunal that is distinct from the procedure for the enforcement of decisions of the OFT. At present, directions given by the CAT are enforced in the same way as OFT directions: thus the OFT must apply to the court under section 34 CA 1998 for an order requiring compliance with the CAT's direction. The new provisions provide a more direct means of enforcement, both of directions given by the CAT and awards of damages and costs.
65. The new procedures permit most decisions of the CAT to be enforceable by registration at the High Court in England and Wales, and by corresponding procedures in Scotland and Northern Ireland. By virtue of those procedures, the decision becomes enforceable in the same way as a judgment of the High Court (or, in Scotland, the Court of Session). However, penalties imposed by a decision of the CAT will continue to be enforced as a civil debt due to the OFT, under section 37 CA 1998.
66. [Part 2](#) of Schedule 4 (paragraphs 2-25) sets out some of the areas that the Rules of the CAT may cover, and is based on the current Part II of Schedule 8 to the CA 98 (repealed by paragraph 8(5) of Schedule 5). New provisions have been added to take into account the CAT's new roles, including appeals on judicial review grounds (for cases under Part 3 and Part 4) and damages claims in competition cases. The CAT rules do not have to cover all of the areas mentioned, and can also cover issues that are not specified.
67. [Part 2](#) includes provisions for rules to be made in relation to the rejection of proceedings by the CAT in various circumstances (subject to the parties being given the opportunity to be heard). These are, in cases other than damages claims, where the person bringing the proceedings does not have sufficient interest or shows no valid grounds; in the case of damages claims, where the CAT considers that there are no reasonable grounds for the claim or that a person bringing a representative claim is not entitled to do so; and in certain circumstances where the person bringing the proceedings has previously brought vexatious proceedings or made vexatious applications.

### ***Section 16: Transfers of certain proceedings to Tribunal***

68. [Section 16](#) provides the Lord Chancellor with a power to make regulations allowing the courts - at their discretion - to transfer to the CAT matters arising in civil proceedings that require a determination of an infringement issue. An infringement issue is defined as any question relating to whether or not there has been an infringement of the prohibitions in Chapter I or Chapter II of CA 98 or the equivalent prohibitions in Articles 81 or 82 of the EC Treaty. [Subsection \(3\)](#) provides that rules of court may be made in connection with such a transfer. Any such rules would be made in line with the arrangements for drawing up rules of court in the different legal jurisdictions in the UK. ("Rules of court" has the meaning given by the schedule to the Interpretation Act 1978). Paragraph 25 of Schedule 4 specifies that Tribunal rules may make corresponding provision in connection with the transfer of proceedings from a court.
69. [Subsections \(4\) and \(5\)](#) allow the courts to transfer to the CAT so much of any proceedings as relate to a damages claim to which the new section 47A of the CA 98 apply (see below).

## **Proceedings under Part 1 of 1998 Act**

### ***Section 17: Third party appeals***

70. This section replaces the existing section 47 CA 1998 by a new version that removes the current requirement for a third party first to request the OFT to withdraw or vary its decision before having a right of appeal to the CAT. For those purposes, a 'third party' is a person who is not a party to the agreement (or the author of the conduct) in respect of which the OFT has made its decision.

71. [Section 47\(1\)](#) specifies which decisions by the OFT may be appealed by a third party. The decisions covered are the same as in the existing version of section 47(1).
72. [Section 47\(2\)](#) specifies that a third party appeal may only be made by a person with sufficient interest or who represents persons with sufficient interest. This preserves the existing position, but responsibility for determining whether the party has sufficient interest will lie with the CAT and not the OFT as at present.
73. [Section 47\(3\)](#) preserves the existing position under the current section 47(7).

### ***Section 18: Monetary Claims***

74. *Subsection (1)* inserts a new section 47A in CA 1998 that will enable claims for damages, or other monetary awards, to be brought in the CAT (the CAT will also exercise the appeals jurisdiction currently exercised by the appeal tribunals of the CC, and the new review jurisdiction under Parts 3 and 4 of the Act). However, it will be possible to bring such claims in the CAT only where it has been established (by either the OFT or the European Commission) that an infringement of competition law has occurred. The right to bring such a claim will be without prejudice to the existing right to bring similar claims in the courts.
75. The new section 47A(1) and (3) enable the CAT to hear any claims for damages or other sums of money arising from a specified infringement of competition law, which could be made in civil proceedings before a court.
76. The new section 47A(6) specifies the infringements of competition law in respect of which a claim may be made to the CAT. These are: breaches of the prohibitions in Chapter I and Chapter II of CA 1998, and breaches of the prohibitions in Article 81 and Article 82 of the EC Treaty. Those prohibitions concern agreements, decisions and concerted practices that have the object or effect of preventing, restricting or distorting competition (Chapter I and Article 81), and conduct that amounts to the abuse of a dominant position (Chapter II and Article 82). Also included are existing decisions taken under the corresponding provisions of the European Coal and Steel Treaty, which expires on 23 July 2002.
77. The new section 47A(3) disapplies any limitation periods which would otherwise be applicable to such claims. The limitation periods for claims brought before the Tribunal will be specified in the CAT Rules.
78. The new section 47A(5), (6) and (8) further limit the claims that may be heard by the CAT. A claim may be brought only if it arises out of an infringement that has already been established by a decision of the OFT, of the CAT itself on appeal from the OFT, or the European Commission. Except with the permission of the CAT, decisions are excluded that may still be subject to appeal (for instance an appeal to the CAT itself in the case of decisions of the OFT, to the Court of Appeal in the case of CAT decisions on such an appeal, or an application to the European Court of Justice in the case of decisions of the European Commission).
79. The new section 47A(9) makes it clear that, in determining the claim, the CAT is bound by the relevant decision establishing the infringement.
80. *Subsection (2)* provides that proceedings may be brought under the new section 47A in respect of claims arising before, as well as after, the commencement of that section. This will be subject to the limitation periods specified in the CAT Rules.

### ***Section 19: Claims on behalf of consumers***

81. This section inserts a new section 47B in CA 1998 that enables proceedings comprising claims for damages under section 47A to be brought in a representative capacity by a specified body on behalf of a group of named individual consumers.

82. The new section 47B(1), (3) and (4) enable such claims to be made on behalf of any group of two or more consumers, provided that each consumer has given his or her consent, and the claims relate to the same infringement. 47B(3) also permits, under the same conditions, existing claims to be taken over by such a specified body. Such proceedings may only be made by a body that is specified by the Secretary of State under section 47B(9), and on behalf of persons who are claiming as consumers within the meaning given by sections 47B(2), (7) and (8). In particular, the infringement that is relied upon must affect goods or services that were received (or sought to be received) by the claimant otherwise than in the course of his or her business.
83. The new section 47B(6) provides that all sums awarded under this section must be awarded directly to the represented consumers, who will then be able to enforce the award in accordance with paragraphs 2 to 5 of Schedule 4. It also allows the CAT to order that the sum awarded be paid to the representative body who will then be able to enforce the award on behalf of the individuals in accordance with paragraphs 4(c) or 5(c) of Schedule 4. Such an order may only be made with the consent of both the individuals concerned and the representative body.
84. The new section 47B(7) and (8) sets out the conditions that must apply before an individual can be said to be a 'consumer' for the purposes of a consumer claim under this section. The infringement must have affected goods or services that the individual has received (or sought to receive) otherwise than in the course of business (although this will not exclude those received for the purposes of a future business). Conversely, the goods or services must have been supplied (or, had they been obtainable, would have been supplied) by a person acting in the course of business. A typical example will be where a consumer has bought goods for his or her own use, whose price has been inflated by a price-fixing agreement either among the suppliers themselves, or the manufacturers, or possibly among the manufacturers' own suppliers.
85. The new section 47B(9) gives the Secretary of State the power to specify by order, and in accordance with published criteria, the bodies that are permitted to bring a representative claim. Such orders will be subject to negative Parliamentary procedure as specified in section 71 of the CA 1998.
86. The new section 47B(10) provides that a body wishing to be specified for the purposes of this section must make an application in a form approved by the Secretary of State.

## **Other amendments of the 1998 Act**

### ***Section 20: Findings of infringements***

87. *Subsection (1)* inserts a new section 58A in CA 1998. The new section provides that certain decisions of the OFT or the CAT regarding an infringement of competition law are to bind the courts for the purpose of a subsequent claim for damages.
88. The new section 58A(1) specifies the infringements that are covered. These are: breaches of the prohibitions in Chapter I and Chapter II of CA 1998, and breaches of the prohibitions in Article 81 and Article 82 of the EC Treaty.
89. *Subsection (2)* clarifies that the new section 58A does not apply in relation to infringement decisions made before the commencement of the section. Decisions made before commencement will therefore not be binding on the courts when the courts are considering monetary claims.

### ***Section 21 & Schedule 5: Proceedings under Part 1 of the 1998 Act***

90. *Schedule 5* makes a number of consequential amendments to CA 1998. It amends Schedule 7 to CA 1998 to remove references to the appeal tribunal. It also amends Schedule 8 to CA 1998 and section 49 CA 1998.