

ENTERPRISE ACT 2002

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Part 8: Enforcement of Certain Consumer Legislation

Introduction

455. This Part of the Act is intended to strengthen consumer protection by giving enforcement bodies wider powers to obtain court orders (similar to injunctions) against businesses which do not comply with their legal obligations to consumers. It will replace Part III of FTA 1973 and the Stop Now Orders (EC Directive) Regulations 2001 ('the SNORs').
456. Part III of FTA 1973 was intended to provide a means of dealing with traders who, ignoring the constraints imposed by civil or criminal law, operate their business in a way that is detrimental to the interests of consumers. Under FTA 1973 the DGFT can apply for an order that the trader refrain from continuing a course of conduct that is unlawful and detrimental to consumers.
457. Three principal defects have been identified with the Part III enforcement regime.
458. First, most traders whose behaviour raises concerns for the purposes of Part III operate at local level. Consumer protection legislation is largely enforced by weights and measures authorities (trading standards departments), but under Part III of FTA 1973 they have to refer cases suitable for action to the DGFT.
459. Second, the DGFT can only apply for a court order if, after using his best endeavours, he has been unable to obtain a satisfactory written assurance from the trader in question that he will refrain from continuing that course of conduct or a similar one, or that such an assurance has been broken. This has given traders scope for delay by entering into lengthy discussion about the terms of the assurance.
460. Third, the OFT has reported that the courts, in considering applications for Part III orders, require evidence of a large number of instances of unlawful conduct before they will find that a person has 'persisted in a course of conduct'.
461. The 1999 Consumer White Paper '*Modern Markets: Confident Consumers*' included a commitment to legislate to rectify the principal weaknesses in the Part III enforcement regime.
462. Partial reform of Part III has already taken place through the SNORs, which implement Directive [98/27/EC](#) of the European Parliament and of the Council of 19 May 1998 on injunctions for the protection of consumers' interests (known as the 'Injunctions Directive'). The purpose of the Injunctions Directive is similar to that of Part III: it permits consumer protection bodies ('qualified entities') designated by the Member States to apply to the courts or competent administrative authorities for orders to require traders to cease conduct that constitutes a breach of any of the consumer protection directives listed in the annex to the Injunctions Directive and that harm the collective interests of consumers. Qualified entities can bring proceedings in their own Member

State and in another Member State if an infringement there has effects on consumers in the qualified entity's home State.

463. The Injunctions Directive was added to the European Economic Area Agreement by Decision No 121/1999 of the EEA Joint Committee, which came into force on 1 July 2000.
464. The effect of the SNORs was to replace the grounds for an order under Part III with that required by the Injunctions Directive and to correct other perceived defects with the Part III process, in so far as Part III applies to the UK legislation implementing the specified consumer protection directives. The SNORs:
- extended enforcement jurisdiction to trading standards departments and other designated bodies;
 - limited the time during which voluntary compliance must be sought to two weeks; and
 - replaced the 'persisted in a course of conduct' test with a requirement that the enforcement authority demonstrate that the trader has engaged, or is likely to engage, in conduct that constitutes an infringement of one of the specified directives as transposed in the UK, where the infringement harms the collective interests of consumers.
465. The result has been the creation of two separate enforcement regimes aimed at rectifying similar conduct by similar offenders. The SNORs, which were made under section 2(2) of the European Communities Act 1972, could not have dealt with the perceived defects in Part III in respect of unlawful conduct detrimental to consumers outside the scope of the Injunctions Directive.
466. When brought into force, this Part of the Act will create a single, unified enforcement regime across the consumer field. The remedies to be available to enforcing bodies and the procedures to obtain them are based on those presently provided for in the SNORs. However, this Part will also enable a court order to be made to secure enforcement of domestic law requirements not covered by the SNORs but currently available under Part III of FTA 1973 only to the DGFT ('domestic infringements').
467. If requested to do so by the DGFT, the statutory regulators for the gas, electricity, water, rail, and telecommunications industries have the power to make applications under Part III within the fields they regulate. All of these statutory regulators are qualified to bring proceedings under the SNORs, and it is proposed to designate them as enforcers under this Part.

Section 210: Consumers

468. This section defines the class of consumers who are to benefit from the protection provided for in this Part. A distinction is made between a 'consumer' for the purposes of a 'domestic infringement' and a 'consumer' for the purposes of an infringement of the legislation to which the Injunctions Directive applies (a 'Community infringement').
469. A 'consumer' in relation to a domestic infringement is an individual who receives, or seeks to receive, goods or services other than in the course of his business, or with a view to setting up a business, from a person who supplies them in the course of business (*subsections (2) to (4)*). The definition of a consumer for the purposes of domestic infringements therefore excludes partnerships and corporate bodies.
470. The purpose of including prospective business people within the above definition of 'consumer' is to ensure that an enforcement order is available in respect of domestic infringements that harm the collective interests of individuals who participate in, for example, 'homeworking schemes' or who contract with so-called 'vanity publishers' or who purchase goods and services for the purpose of direct selling type schemes. As

soon as an individual begins trading he will cease to be within the definition in respect of purchases for the purpose of his business, so business customers in general are not covered.

- 471. For the purpose of domestic infringements, it does not matter if the supplier has a place of business in the UK or not (*subsection (5)*). This means businesses will not be able to avoid the provisions of this Part by locating offshore.
- 472. The concept of “business” is relevant to the definition of a “consumer” for the purposes of a domestic infringement in two ways. The supply, actual or attempted, of goods or services must be “in the course of a business carried on” by the supplier, but the recipient must not receive them “in the course of a business carried on by him” at the time of receipt.
- 473. *Subsection (8)* defines a ‘business’ for the purpose of the definition of the supplier of goods and services and of a consumer in respect of domestic infringements. Any undertaking carried on ‘for gain or reward’ and any which charges for the supply of goods or services are businesses within the definition. This follows the existing definition in FTA 1973.
- 474. For the purposes of Community infringements, ‘consumers’ must include all persons who are consumers for the purposes of the individual directives listed in the annex to the Injunctions Directive; otherwise the Injunctions Directive would not be properly implemented. *Subsection (6)* accordingly provides that the meaning of ‘consumer’ in relation to a Community infringement is to be determined by the Injunctions Directive and the relevant listed directives.
- 475. There is no reference in the Injunctions Directive to infringements having been committed by a person in the course of business, or any similar limitation. Although the directives listed in the annex to the Injunctions Directive mainly require Member States to impose obligations on persons carrying on business in the general sense, the identification and definition of those persons vary considerably. For this reason there is no express requirement in this section that persons only engage in conduct constituting a Community infringement if they do so in the course of business.
- 476. [Schedule 13](#) lists the individual directives, or parts of individual directives, to which the Injunctions Directive applies (*subsection (7)*). *Subsection (9)* provides the Secretary of State with an order-making power to modify [Schedule 13](#) by adding or removing directives to reflect further amendments to the Injunctions Directive.

Sections 211 and 212: Domestic infringements & Community infringements

- 477. These sections set out the types of detrimental conduct in respect of which an enforcement order under this Part can be made.
- 478. Because the intention is that this Part should replace the SNORs while continuing to fully implement the requirements of the Injunctions Directive, the starting point for the scope of this new enforcement regime is the infringements to which the Injunctions Directive applies. The Injunctions Directive applies to any act contrary to the directives listed in the annex thereto as transposed into the internal legal order of an EEA State that harms the collective interests of consumers (Article 1.2). It also applies to breaches of national provisions that go beyond the minimum level of the listed directives as permitted by those directives (see below).
- 479. The listed directives (or parts of them) contain a wide range of consumer protection measures, including those on unfair contract terms, misleading advertising, doorstep and distance selling, electronic commerce, and the sale of consumer goods, as well as directives dealing with particular sectors such as package travel, consumer credit, timeshare and medicines advertising.

480. The Injunctions Directive does not affect the rules as to the applicable law in cross-border cases (see Article 2.2). It would not, for this reason, be sufficient for this Part to apply only to UK law transposing the listed directives because the Injunctions Directive would not then be properly implemented. This Part must be capable of providing for the situation where a UK court decides that the law of another EEA State should apply. This could happen where a trader's unlawful conduct in the UK harms consumers in another EEA State. In most cases, the laws of the EEA States will be the same for the purpose of these cases, because they will all give effect to the listed directives. In most cases, it is only where an EEA State's legislation provides greater protection for consumers as allowed for under the 'minimum clause' contained in most of the listed directives that there may be a significant difference in the outcome, depending upon which State's law the court decides to apply.

Section 212: Community Infringements

481. *Subsections (1) and (2)* of section 212 provide a definition of a Community infringement that is in accordance with Article 1(2) of the Injunctions Directive. The definition refers to 'acts or omissions' that contravene provisions of listed directives as transposed by an EEA State. The concept of an omission is implicit in the Injunctions Directive because for some of the individual directives a contravention will arise (and in some cases will only arise) because of an omission. Schedule 13 lists the individual directives, or parts of individual directives, to which the Injunctions Directive, and therefore the definition of a Community infringement, applies (section 212(4)).
482. *Section 212(3)* provides the Secretary of State with an order-making power to specify, for the purpose of the definition of a Community infringement, the UK laws that give effect to the listed directives or that provide 'additional permitted protections'.
483. 'Additional permitted protections' are provisions that have been adopted or retained by an EEA State pursuant to the so-called 'minimum clause' contained in most of the directives (section 212(2)). These clauses enable EEA States to adopt or retain provisions that provide greater protection for consumers, on matters within the scope of the directive concerned, provided the protection does not breach the rules in the EU Treaty on, for example, the free movement of goods. A simple example would be where a directive provides for a cooling-off period, say seven days, during which a consumer may cancel the contract without penalty but an EEA State's law provides a longer period, say ten days. In contrast, a measure that provides a type of protection that is outside the scope of a listed directive is not an 'additional permitted protection' because it cannot be said to rely on the minimum clause in the directive: the provision would not be within the scope of the directive and the infringement would not therefore fall within the Injunctions Directive. For example, the Consumer Credit Act 1974, which implements the Consumer Credit Directive, also regulates consumer hire agreements which are not dealt with in the directive at all. Breaches of the provisions on consumer hire will not therefore be Community infringements. But it is sometimes difficult to distinguish between national measures that rely on a minimum clause in a directive and measures that are not within the scope of a directive.
484. The power in section 212(3) will be used to specify the legislation that gives effect in UK law to the listed directives. This will be helpful to enforcers and the courts in dealing with cases.
485. For a Community infringement to have occurred it is not sufficient that there has been an act or omission contrary to one of the listed directives (including additional permitted protections in the EEA State concerned). The act must also 'harm the collective interests of consumers'. The Injunctions Directive does not define the 'collective interests of consumers'. But the term (already used in the SNORs) is used in the Act in defining Community infringements so as to be sure that the UK continues to fully implement the requirements of the Injunctions Directive. For consistency, the same test has been applied for domestic infringements.

486. For both Community and domestic infringements, the Department does not consider that harming the collective interests of consumers means that a large number of consumers must already have been harmed. The Department believes it simply means that a continuation or repetition of an act or omission specified as a Community or domestic infringement could harm the collective interests of consumers, since the interests of future customers of the trader are actually or will potentially be affected. For example, if a trader has not complied with the requirement to inform consumers of their rights to cancel under the Consumer Protection (Distance Selling) Regulations 2000 when they purchase by mail order, the Department would expect the court to find it would be harmful to the collective interests of consumers for the trader to repeat the omission.
487. Similarly, the Department considers that the “harm to the collective interests of consumers” test would be satisfied where an unlawful practice is employed in relation only to goods or services purchased by a very small minority of the community (eg expensive luxury goods) and the general mass of consumers are therefore unaffected.
488. The Department considers that the phrase ‘collective interests of consumers’ in the Injunctions Directive (and in the Act) is intended to produce the consequence that the procedure is not available to provide redress for individual consumers who may have been harmed by an infringement.

Section 211: Domestic Infringements

489. In addition to Community infringements this Part also applies to domestic infringements as defined in section 211. The definition of a domestic infringement consists of three elements: an act or omission must be done by a person in the course of business; it must fall within section 211(2); and it must harm the collective interests of consumers in the UK. The ‘harm test’ is the same as that for Community infringements described above.
490. *Subsection (2)*, which provides the second element of the definition, gives the Secretary of State the power to specify by order the acts and omissions consisting of breaches of legislation or common law, as set out in section 211(2)(a)-(g), for the purposes of the definition of a domestic infringement. The legislation to which this provision applies includes Northern Ireland legislation.
491. *Section 211(2)(a)* enables the order to specify acts or omissions which consist of a contravention of an enactment that imposes a duty, prohibition or restriction enforceable by criminal proceedings. It is immaterial whether the duty, prohibition or restriction is imposed in relation to consumers or not, so that, for example, breaches of legislation that serve equally to protect businesses as well as consumers will qualify (section 211(4)(a)). It is not necessary for a person to have been convicted of any offence in respect of the act or omission (section 211(4)(d)).
492. *Section 211(2)(b)* and (c) enables an order to specify things done, or omitted to be done, in breach of contract or in breach of a non-contractual duty (for example, a statutory duty or a duty under the common law of negligence). It is immaterial whether civil proceedings in respect of the breach of contract or breach of duty have been brought or not (section 211(4)(c)). It is also to be immaterial whether or not that breach is waived by the consumer (section 211(4)(e)). For example, the consumer may decide to keep goods despite the fact that they were not supplied in the condition required by the contract. Another example would be where a consumer agrees to waive a breach of a contractual term such as a clause in a car hire agreement that the vehicle will have air conditioning.
493. *Subsection (2)(a)-(c)* reflects the existing scope of Part III of the FTA 1973. Section 211(2)(d) enables the order to specify as within the definition of a domestic infringement acts or omissions for which legislation provides a remedy or sanction enforceable in civil proceedings, although no duty is expressly placed on a person not to engage in such conduct. It is immaterial whether or not any remedy or sanction

is provided for the benefit of consumers or not (section 211(4)(b)). For example, in relation to section 211(2)(d), a provision may require that a person must be compensated if another person does, or omits to do, something required by the provision. Also, under the Control of Misleading Advertisements Regulations 1988 a person concerned with the publication of a misleading advertisement may be subject to proceedings for an injunction brought by the DGFT; but there is no express duty on a person not to publish misleading advertisements. It is intended to list the Control of Misleading Advertisements Regulations 1998 in both the Community infringements regime and the domestic infringements regime for the reasons explained below.

494. [Section 211\(2\)\(e\)](#) enables the order to specify as within the definition of a domestic infringement things done or omitted to be done where an enactment creates a sanction of unenforceability. An example is the Consumer Credit Act 1974. A large number of 'requirements' of the Consumer Credit Act 1974 have as their sanction the unenforceability (against the debtor or hirer) of the consumer credit agreement or of the security of the agreement, or of rights under them. An example is requirements in relation to the form, content and signature of agreements in sections 60 and 61, and the duty to supply copies of the agreement and notice of the right to cancel in sections 62 to 64. In these cases, the court can allow the agreement to be enforced except in cases set out in sections 127(3) and (4) (e.g. unsigned agreements or where notice of the right to cancel is not given as required).
495. To the extent that requirements in the Consumer Credit Act 1974 transpose the Consumer Credit Directive ([87/102/EEC](#)), they would be covered by the definition of Community infringements in section 212. But the scope of the Consumer Credit Act 1974 goes beyond the giving of effect to the Consumer Credit Directive and 'additional permitted protections' within the meaning of section 212, although it is difficult to draw a clear dividing line. For this reason, it is intended to list the Consumer Credit Act 1974 in both the Community infringements regime and the domestic infringements regime.
496. [Section 211\(2\)\(f\)](#) enables an order to specify as within the definition of a domestic infringement any act or omission by which a person supplying goods or services purports or attempts to exercise any right relating to the supply when legislation restricts or excludes him from doing so in such circumstances. *Subsection (2)(f)* covers, for example, the creditor who seeks to enforce a term of a regulated credit agreement when he has failed to comply with a statutory pre-condition for enforcement, such as the requirement to give the debtor or hirer seven days' notice of his intention to do so under section 76 of the Consumer Credit Act 1974. It would also cover cases where a creditor recovers possession of protected hire-purchase goods without a court order, as required by section 90 of the Consumer Credit Act 1974 and the business which claims money or the return of goods under a contract which is unenforceable.
497. A person who demands or accepts payments of sums when legislation relieves the payee of liability for them would also be purporting to exercise a right within subsection (2) (f). An example is section 93 of the Consumer Credit Act 1974, which provides that a debtor under a consumer credit agreement is not liable to pay increased interest when he is in default.
498. [Section 211\(2\)\(g\)](#) enables an order to specify as within the definition of a domestic infringement an act or omission by which a person supplying or seeking to supply goods or services purports or attempts to avoid liability relating to the supply in circumstances where such avoidance is restricted or prevented under an enactment. An example of an enactment which prevents the exclusion of liability is section 2(1) of the Unfair Contract Terms Act 1977. This section provides that contract terms or notices purporting to exclude or restrict liability for death or personal injury resulting from negligence are void and of no effect under all circumstances.
499. [Section 211\(3\)](#) makes clear that, when specifying acts or omissions within the legislation or common law provisions covered in an order under section 211(2), the

Secretary of State may exclude a subcategory of the act or omission concerned from the scope of the order.

500. The Department intends to make orders defining UK law for the purpose of the definition of a Community infringement, and listing the UK legislation and civil law obligations to which the definition of a domestic infringement will apply, before this Part of the Act comes into force. As with the Injunctions Directive and the way the Office of Fair Trading has used its existing powers under Part III of FTA 1973, the intention is that the list for domestic infringements should initially be limited to breaches of legislation whose main focus is to protect the economic interests of consumers, together with breaches of contract for the supply of goods or services and of the duty of care in negligence.
501. As a general rule it would not be the Department's intention to include UK law implementing the directives listed in the annex to the Injunctions Directive in the domestic infringements regime. This is because breach of these will in any case be a Community infringement. However, there will be some cases where this will be necessary, for example, where the Department wants to be sure of covering more than what could be said to transpose listed directives in reliance on the minimum clause. For example, as mentioned above, it is not possible to draw a clear distinction between some of the provisions of the Consumer Credit Act 1974 that implement the consumer credit directive and others that are outside the scope of the directive. It is therefore the Department's intention to list the Consumer Credit Act 1974 in both the Community infringements regime and the domestic infringements regime.
502. A useful weapon against homeworking or outworking scams has been the Control of Misleading Advertising Regulations 1988, which implement the Misleading Advertising Directive (84/450/EEC). Although prospective business people are protected by this directive, they may not necessarily be 'consumers' for the purpose of the definition of a Community infringement. The Department therefore also intends to include the Control of Misleading Advertisements Regulations 1988 under the domestic infringements regime as well as the Community infringements regime.

Section 213: Enforcers

503. This section deals with those bodies who are to have enforcement powers under this Part.
504. Three categories of enforcement bodies are defined: 'general enforcers', 'designated enforcers' and 'Community enforcers'.
505. 'General enforcers' are the OFT, every weights and measures authority in Great Britain (trading standards departments) and the Department of Enterprise, Trade and Investment in Northern Ireland (*subsection (1)*).
506. The Secretary of State is given an order-making power to confer enforcement powers upon other UK public bodies and private consumers organisations that have as one of their purposes the protection of the collective interests of consumers (*subsection (2)*). These enforcers are termed 'designated enforcers'. An order under this section may designate a body for the purposes of domestic and/or Community infringements, and for different types of infringement within each of those categories (*subsections (6) and (7)*).
507. The Secretary of State may only confer enforcement powers on a public body if it is independent (*subsection (3)*) and on a private consumer organisation if it fulfils such criteria as the Secretary of State specifies by order (*subsection (4)*). The designation of a body by virtue of subsection (3) will be conclusive evidence that the body is a public body for the purposes of this Part. This will be relevant, for example, in relation to whether the enforcer is to have the statutory power to obtain documents and information under section 225 (*subsection (8)*).

508. Regulation 4 of the SNORs contains the existing power to designate private consumer organisations (in the SNORs called ‘other UK qualified entities’) and sets out criteria according to which they may be designated. It is anticipated the Secretary of State will set similar criteria for designating private consumer organisations for the purposes of this Part. It is open to her to decide to set different criteria in respect of Community and domestic infringements, but at present we do not anticipate this will be the case. The power to designate includes power to revoke the designation from any body which ceases to meet the criteria.
509. It is intended that the first order made under this section will be to designate the public enforcement authorities (in the SNORs called ‘public UK qualified entities’), other than those who are general enforcers under this Part, at present listed in Schedule 3 to the SNORs for Community infringements. These are the statutory regulators for the gas, electricity, water, telecommunications and rail industries, the Information Commissioner and the Civil Aviation Authority. It may also designate any private consumer organisations which have been designated under the SNORs as ‘other UK qualified entities’ for Community infringements by the time this Part of the Act comes into force.
510. Community enforcers are entities from other EEA States that are listed in the Official Journal of the European Communities under Article 4.3 of the Injunctions Directive (*subsection (5)*). It is a requirement of the Injunctions Directive that the courts or administrative authorities of an EEA State must accept inclusion in this list as proof of the legal capacity of the entities to apply for injunctions in all EEA States to stop Community infringements.
511. In the same way, UK enforcers which are designated for the purposes of Community infringements can apply for injunctions in other Member States to protect UK consumers. At the request of a designated enforcer who has been designated for the purposes of one or more Community infringements, the Secretary of State must notify the European Commission that it should be added to the list of bodies published in the Official Journal of the European Communities as being qualified to bring proceedings in all Member States.
512. The Department considers that the Injunctions Directive only gives enforcement bodies the power to apply for injunctions in other EEA States in respect of those Community infringements for which it is designated in its home State. The notification to the Commission must include the types of Community infringement in respect of which the body is designated, in addition to the name and a general description of the purpose of the body, which are required under Article 4(2) of the Injunctions Directive (*subsection (10)*). It is up to the Commission how it deals with the publication, but the current Official Journal entry (OJ No. C30, 2002, Item 2) for Denmark includes a reference to the individual directives for which each of the Consumer Ombudsman and Danish Medicines Control Agency are qualified to bring actions.
513. The Secretary of State is required to notify the Commission if a designated enforcer ceases to be designated for the purpose of Community infringements or if its designation in relation to such infringements is varied. The Secretary of State must also inform the Commission of any change in the name or purpose of a designated enforcer (*subsection (11)*).

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.

Information

Sections 224 and 225: OFT & Other enforcers

562. These sections provide the OFT, other general enforcers and designated enforcers who are public bodies, with a statutory power to require information (including documents) by means of a notice served on any person.
563. These enforcers will be able to request this information for the purpose of enabling them to consider whether to exercise their functions under this Part (section 224(2)(a) and section 225(3)(a)). This may be the case, for example, where it is not possible on the basis of *ad hoc* complaints from consumers to determine whether the cause of complaint is the result of an accidental mistake or part of a deliberate pattern of unlawful conduct (e.g. mail order companies sending out goods different from those that were ordered).
564. These enforcers will also be able to request information for the purpose of monitoring compliance with enforcement orders (including interim enforcement orders) and undertakings, to enable them to decide whether to bring further proceedings under section 220 to enforce a court order or an undertaking given to the court or, in the case of undertakings given to an enforcer, to make an application for an enforcement order (including an interim enforcement order) under section 215. A general enforcer other than the OFT or a designated enforcer that is a public body can only use this power to enable it to exercise any functions it has under this Part (such an enforcer may be designated only in respect of certain kinds of infringement) or to monitor compliance with an enforcement order or undertaking made in proceedings it has brought or with an undertaking given voluntarily to it. No such restriction applies in relation to the OFT, in part because the OFT will have the power to bring a further application to enforce a court order or undertaking given to the court in proceedings brought by any enforcer (section 224(2)(d) and section 225(3)(b)).
565. Neither designated enforcers that are private bodies nor Community enforcers will have a statutory power to request information themselves. The OFT will therefore have power to request information on behalf of these enforcers to enable them to consider whether to exercise their functions under this Part (section 224(b) and (c)).

Sections 226 and 227: Notices: procedure and enforcement

566. Section 226 sets out the procedure for notices under sections 224 and 225. They are required to be in writing. In accordance with the ordinary meaning of “writing”, notices may in principle be given in electronic communications.
567. *Section 227* sets out the remedies that are available where a notice is not complied with.
568. If a person fails to furnish the information requested within the time specified, an application may be made by the enforcer that served the notice to the court for an order requiring the default in compliance to be made good. The court for this purpose is a court which may make an enforcement order, that is, the High Court or a county court or their Scottish equivalents.
569. Where the court is satisfied that the person has failed to comply with a notice and that the information is reasonably required for the purposes set out in sections 224 and 225, it may make an order requiring the person to do anything it is necessary to do to comply with the notice. Where the court makes such an order, it may order costs against the person in default or, if the person is a corporate body, against any of its officers responsible for the default.

Miscellaneous

Section 228: Evidence

570. *Subsection (1)* provides that convictions in any related criminal proceedings in the UK may be used as evidence in proceedings under this Part.
571. *Subsection (2)* enables findings in civil proceedings to be admitted in evidence under this Part of acts or omissions which constitute Community infringements or certain kinds of domestic infringements, except where the findings have been overturned on appeal (*subsection (3)*).
572. This will allow judgements in the criminal courts and findings in the civil courts to be admitted in evidence for the purpose of proving a breach of the relevant legislation or common law obligations. But it will still be necessary to prove that the conduct harms the collective interests of consumers.

Section 229: Advice and information

573. The OFT is required (as soon as is reasonably practicable) to prepare and publish advice and information explaining the provisions of this Part and indicating how it expects them to operate in practice. The advice and information may include advice and information about the factors the OFT may take into account in considering how to exercise its functions under this Part, such as adherence to the principles of best practice in enforcement as set out in the Enforcement Concordat or any document which replaces it. This will promote consistent enforcement across the country. In preparing any advice and information, the OFT must consult such persons as it considers representative of those affected. This advice and information may be published in such form and in such manner as the OFT considers appropriate. The OFT may at any time publish revised or new advice and information to reflect experience gained in the operation of this Part.

Section 230: Notice to OFT of intended prosecution

574. This section will apply if a local weights and measures authority (ie trading standards department) in England and Wales intends to start proceedings for an offence under an enactment or subordinate legislation which the Secretary of State has specified for the purposes of this section (*subsection (1)*).
575. The authority must give the OFT notice of its intention to start proceedings, together with a summary of the facts on which the charges are to be founded (*subsection (2)*).

The authority must not start proceedings until the earlier of the end of 14 days from giving the notice or the day the OFT notifies the authority that it has received the notice and the summary of the facts (*subsection (3)*). The authority must also notify the OFT of the outcome of the proceedings (*subsection (4)*).

576. This section reflects the existing requirements about notices of intended prosecution in section 130 of the FTA 1973 which relates to offences under the Trade Descriptions Act 1968, Part III of the Consumer Protection Act 1987, the Property Misdescriptions Act 1991 and the Timeshare Act 1992. The Department's intention is to list in the order under section 230 all the legislation providing for criminal offences which will be included in the legislation specified in orders made under sections 211 and 212 in relation to domestic and Community infringements. The purpose is to reinforce the OFT's co-ordination role in respect of the legislation to which this Part applies. For example, the OFT could inform one authority that another is prosecuting or that an enforcement order has been granted. This may lead the authority to decide it is not necessary to prosecute. Proceedings will not however be invalid simply by virtue of the fact that the prosecuting authority has not given the OFT the required notice of intended prosecution.
577. This section does not apply in relation to Scotland, where all criminal prosecutions are brought by the Procurator Fiscal, or to Northern Ireland where public law enforcement of consumer protection legislation rests with the Department of Enterprise, Trade and Investment.

Section 231: Notice of convictions and judgments to OFT

578. This section will give the courts in the UK the power to notify the OFT of convictions and judgments that might not otherwise be brought to its attention, for the purpose of the OFT considering whether to exercise its functions under this Part or under the Estate Agents Act 1979 ('EAA'). It is immaterial that proceedings have been finally been disposed of by the courts. Under the EAA, the DGFT has the power to issue a warning notice or a banning order preventing a person from acting as an estate agent. This section will replace section 131 of the FTA 1973.

Interpretation

Section 232: Goods and services

579. *Subsections (2) and (3)* provide a definition of 'goods' and the 'supply of services' for purposes of this Part, including in relation to the meaning of a 'consumer' in relation to a domestic infringement. These definitions are identical in substance to those contained in section 137(2) of the FTA 1973.
580. *Subsections (4) and (5)* make provision as to the circumstances in which the supply of goods or services wholly or partly outside the UK are to be regarded as being supplied to a consumer in the UK, so that the provisions on domestic infringements will apply to those transactions. This is when goods or services are supplied in accordance with the arrangements falling within subsection (5), but those arrangements may be made by any means, including electronic means, for example, internet transactions and transactions made by other forms of electronic communications. There is no presumption that a consumer should normally be resident in the UK. The effect is that an application can be made for an enforcement order under section 215 against an e-trader based in the UK whose unlawful conduct which constitutes a domestic infringement is directed at consumers anywhere in the world. *Subsections (4) and (5)* update an equivalent provision in section 138(3) of the FTA 1973 which does not reflect today's world of e-commerce.

Section 233: Person Supplying Goods

581. This section repeats in substance section 138(4) and 138(5) of the FTA 1973. It provides that in relation to the supply of goods under a hire-purchase agreement, credit sale agreement or conditional sale agreement, the person conducting the antecedent negotiations, as well as the owner or seller, shall be treated as a person supplying or seeking to supply the goods. The effect is that in these types of agreements the dealer will be treated as the supplier as well as the finance company which is technically the supplier under the contract with the consumer.

Section 234: Supply of services

582. This section follows the definition of ‘supply of services’ in section 137(3) of the FTA 1973, with two modifications. The first modification is the inclusion of new *subsection (4)*, which provides that the supply of services includes making arrangements for a person to receive computer software or data such as information, music or photographs. This is intended to cover electronic supply. Such persons are not receiving anything in physical form and so might not otherwise be receiving ‘goods’. This provision ensures that such consumers will be considered to be receiving a service.
583. The second change is the omission from the definition of ‘supply of services’ of provisions corresponding to sections 137(3)(c), (d), (e) and (g) of FTA 1973, which relate to the making of arrangements to permit the use of land in certain specified circumstances. The Secretary of State is however given a power by order to extend the definition of the supply of services involving arrangements permitting the use of land as in section 137(3A) of the FTA 1973. It is intended that this order-making power will be used to reinstate those provisions relating to the use of land in section 137(3) that are relevant to this Part before this Part of the Act comes into force.

Crown

Section 236: Crown

584. The directives listed in the annex to the Injunctions Directive are binding on the Crown in so far as it carries on activities that bring it within the class of persons who can commit Community infringements. No distinction is made between domestic and Community infringements: the whole Part binds the Crown.