EXPLANATORY MEMORANDUM TO

THE SECTION 16 ENTERPRISE ACT 2002 REGULATIONS 2015
2015 No.1643

1. This explanatory memorandum has been prepared by the Department for Business, Innovation and Skills (BIS) and the Ministry of Justice (MoJ) and is laid before Parliament by Command of Her Majesty.

2. Purpose of the instrument

2.1 These Regulations enable the courts throughout the United Kingdom (the High Court in England and Wales, the Court of Session or the Sheriff court in Scotland or the High Court or county court in Northern Ireland) to transfer cases which raise specific competition issues directly to the Competition Appeal Tribunal (CAT) rather than having to dismiss the case and for the claimant then to bring proceedings before the CAT.

3. Matters of special interest to the Joint Committee

3.1 None.

4. Legislative Context

4.1 These Regulations are being made further to the Consumer Rights Act 2015[1] to help make the CAT the main destination for competition cases and make it easier for businesses, especially small and medium sized enterprises (SMEs), to challenge anti-competitive behaviour as the CAT is quicker and cheaper than the general courts.

4.2 Section 16(1) of the Enterprise Act 2002 gives the Lord Chancellor, the power, by regulations, to provide for the transfer of cases which raise infringement issues (as defined in section 16(6) of that Act) directly to the CAT to enable the CAT to determine those aspects of the proceedings. This will now include standalone cases (where there has been no finding of a breach of competition law by a regulator), as well as follow-on claims (where there has already been a finding of a breach of competition law by a regulator). This could for example allow for the transfer to the CAT of a case involving a claim for damages where a business has suffered as a result of price fixing, which has meant that they have paid more for goods or services than they should have.

5. Territorial Extent and Application

5.1 This instrument applies to England, Wales, Scotland and Northern Ireland.

6. European Convention on Human Rights

[1] http://www.legislation.gov.uk/ukpga/2015/15/contents/enacted/data.htm

6.1 As the instrument is subject to negative resolution procedure and does not amend primary legislation, no statement is required

7. Policy background

7.1 In 2007, the Office of Fair Trading concluded that private actions are the least effective aspect of the UK's competition regime [2]. Businesses have also informed us that the current regime is too costly and slow, with it being especially difficult for SMES and consumers to be able to obtain redress.

7.2 In January 2013, the Government published its response to the consultation on Private Actions in Competition Law[3], which included proposed reforms to establish the CAT as a major venue for competition actions in the UK, to make it easier for businesses, especially SMEs, to challenge anti-competitive behaviour that is harming them.

7.3 On 21 January 2014 the Consumer Rights Bill was introduced into Parliament and gained Royal Assent on 26 March 2015. The Consumer Rights Act 2015 sets out in one place, consumers' rights and what they are entitled to if something goes wrong. This covers goods, services and, for the first time, digital content. The reforms will also build on and enhance the success of the current consumer and competition law enforcement regimes.

7.4 Through powers in the Enterprise Act 2002, Government is therefore making it possible for courts to transfer cases which raise a number of issues, including competition issues, to the CAT so that the CAT can consider the competition issues. This will enable the CAT to fulfil its potential and allow those who have been harmed by a breach in competition law, to access redress more easily.

7.5 Currently, all stand-alone claims (claims where there has been no finding of a breach of competition law by a regulator) arising in England and Wales or Northern Ireland pleading a breach of European Union (EU) or UK competition law must be issued in or transferred to the High Court, with similar cases in Scotland heard in the Court of Session. Only follow-on claims (claims where there has already been a finding of a breach of competition law by a regulator) may be issued in the CAT. This is because at present, i.e. before the reforms introduced by the Consumer Rights Act 2015 (see Schedule 8), section 47A of the Competition Act 1998 requires that civil actions brought before the CAT have to follow on from a prior decision of a competition regulator. Between 2005 and 2008 there were a total of 41 judgments in competition litigation cases in the UK, of which only 9 (22%) were before the CAT.

7.6 The CAT is a specialist tribunal with cross-disciplinary expertise in law, economics, business and accountancy whose function is to hear and decide cases involving competition or economic regulatory issues. Stakeholders have therefore advanced the

[2] http://webarchive.nationalarchives.gov.uk/20130701181937/http://oft.gov.uk/shared_oft/reports/comp_policy/oft916resp.pdf

[3] https://www.gov.uk/government/consultations/private-actions-in-competition-law-a-consultation-on-options-for-reformhttps://www.gov.uk/government/publications/consumer-rights-bill.

opinion that, as a result of the limitation on the CAT to hear only follow-on cases and appeals against decisions of a competition regulator, the CAT has unfulfilled potential. Senior members of the legal profession have also cited numerous cases which, despite being primarily follow-on, could not be heard in the CAT because the claimant wished to introduce one or more aspects of evidence or damages that did not rely on a prior infringement decision. As part of the reforms under the Consumer Rights Act 2015, the Government is allowing the CAT to hear stand-alone cases. The implementation of Section 16(1) would complete the set of reforms.

7.7 Through the making of regulations under section 16(1) of the Enterprise Act 2002, the courts should be able to transfer cases which involve any of the following areas of competition law:

(a) the Chapter I prohibition of the Competition Act 1998;
(b) the Chapter II prohibition of the Competition Act 1998;
(c) Article 101 of the Treaty; and
(d) Article 102 of the Treaty.

7.8 As part of the wider reforms being introduced through the Consumer Rights Act 2015 (expected to come into force on 01 October 2015 via revised CAT rules of procedure), the CAT will be able to fast track certain cases. In particular these are likely to be cases that involve small and micro sized businesses and the overall aim of fast track is to resolve simpler cases more quickly and at a lower cost. The making of regulations under section 16(1) will help ensure the courts can transfer cases, so that they may benefit from this regime.

7.9 Separate rules of court in England and Wales Practice Direction 30 of the Civil Procedure Rules – https://www.justice.gov.uk/courts/procedure-rules/civil/rules/part30/pd_part30 (The amendments to the practice directions will go live on the commencement date 1 October 2015) and Scotland and reliance on section 16(4) of the Enterprise Act 2002 in Northern Ireland - http://www.legislation.gov.uk/ukpga/2002/40/section/16 already provide for cases under section 47A of the Competition Act 1998 to be transferred to the CAT. Practice Direction 30 is being amended to reflect the changes introduced by these Regulations. Changes may also be made to Scottish court rules in due course.

8. Consultation outcome

8.1 Details of the consultation process for the private actions reforms are given in paragraph 12. No formal consultation has taken place on the consequential amendments included in this Order.

9. Guidance

9.1 Guidance has been produced for the Consumer Rights Act 2015.[4]

9.2 The accompanying Practice Direction 30 can be viewed at: http://www.justice.gov.uk/courts/procedure-rules/civil/. The amendments to the practice directions will go live on the commencement date 1 October 2015.

However, no guidance is being issued on these Regulations.

10. Impact

10.1 Private Actions reforms are judged to be zero-net-cost as the costs fall on businesses that are not compliant with existing competition law. These changes will make it easier for businesses and consumers to gain compensation for harm caused by infringements of competition law by enabling courts to transfer cases which raise competition issues directly to the CAT.

10.2 An Impact Assessment has not been prepared for this instrument. However, an Impact Assessment was produced for the consultation on Private Actions, published in January 2013.[5]

10.3 The CAT is expected to see a small increase in its workload as it will be possible for courts to transfer cases which raise competition issues directly to it. The CAT is however very supportive of this reform, as it will help to make it the main destination for competition cases.

11. Regulating small business

11.1 These Regulations apply to small businesses to the extent that it will enable them to access redress more easily. Where a small business has either suffered from, or been accused of, a breach of competition law, this Order will enable them to resolve the dispute more easily as cases before the CAT are dealt with more speedily and cheaply than in the ordinary courts.

12. Monitoring & review

12.1 During the passage of the Consumer Rights Act 2015, the Government agreed to a review of Schedule 8 to the Consumer Rights Act 2015 (Private Actions in Competition Law) after five years to ensure it is operating efficiently and providing consumers and businesses with access to redress from those who have breached competition law and caused them harm.

13. Contact

[4] http://www.businesscompanion.info/

[5] https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/31529/12-743-private-actions-in-competition-law-impact-assessment.pdf.

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