

Agreements and concerted practices

Understanding competition law

Competition
law 2004

Since 1 May 2004 not only the European Commission, but also the Office of Fair Trading (OFT) has the power to apply and enforce Articles 81 and 82 of the EC Treaty in the United Kingdom. The OFT also has the power to apply and enforce the Competition Act 1998. In relation to the regulated sectors the same provisions are applied and enforced, concurrently with the OFT, by the regulators for communications matters, gas, electricity, water and sewerage, railway and air traffic services (under section 54 and schedule 10 of the Competition Act 1998) (the Regulators). Throughout the guidelines, references to the OFT should be taken to include the Regulators in relation to their respective industries, unless otherwise specified.

The following are the Regulators:

- the Office of Communications (OFCOM)
- the Gas and Electricity Markets Authority (OFGEM)
- the Northern Ireland Authority for Energy Regulation (OFREG NI)
- the Director General of Water Services (OFWAT)
- the Office of Rail Regulation (ORR), and
- the Civil Aviation Authority (CAA).

Section 52 of the Competition Act 1998 obliges the OFT to prepare and publish general advice and information about the application and enforcement by the OFT of Articles 81 and 82 of the EC Treaty and the Chapter I and Chapter II prohibitions contained in the Competition Act 1998. This guideline is intended to explain these provisions to those who are likely to be affected by them and to indicate how the OFT expects them to operate. Further information on how the OFT has applied and enforced competition law in particular cases may be found in the OFT's decisions, as available on its website from time to time.

This guideline is not a substitute for the EC Treaty nor for regulations made under it. Neither is it a substitute for European Commission notices and guidelines. Furthermore, this guideline is not a substitute for the Competition Act 1998 or the Enterprise Act 2002 and the regulations and orders made under those Acts. It should be read in conjunction with these legal instruments, Community case law and United Kingdom case law. Anyone in doubt about how they may be affected by the EC Treaty, the Competition Act 1998 or the Enterprise Act 2002 should seek legal advice.

In addition to its obligations under Community law, when dealing with questions in relation to competition within the United Kingdom arising under Part I of the Competition Act 1998, the OFT will act in accordance with section 60 of that Act.

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1 Introduction

¹ The Treaty establishing the European Community.

² References in this guideline to **agreement(s)** should, unless otherwise stated or the context demands it, be taken to include decisions by associations of undertakings and concerted practices.

³ Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (OJ L1, 4.1.03, p1).

⁴ The conditions in Article 81(3) or section 9(1) of the Act.

- 1.1** Article 81 of the EC Treaty¹ and the Chapter I prohibition contained in the Competition Act 1998 (the Act) both prohibit, in certain circumstances, agreements² which prevent, restrict or distort competition. Regulation 1/2003 (the Modernisation Regulation)³, which took effect on 1 May 2004, substantially changed the framework for the enforcement of EC competition law.
- 1.2** This guideline sets out some of the circumstances in which the Office of Fair Trading (OFT) considers that agreements will or may be regarded as anti-competitive. It explains how the OFT will operate its powers under the Modernisation Regulation and under the Act when assessing agreements between undertakings. It is intended that this guideline should be of assistance not only to those undertakings which are parties to an agreement, but also to their customers and other businesses.
- 1.3** The provisions prohibiting agreements preventing, restricting or distorting competition are contained in Article 81(1) of the EC Treaty (Article 81(1)) and section 2(1) of the Act (the Chapter I prohibition). The terms used in relation to these provisions and the concepts relevant to their application are considered in Part 2 of this guideline.
- 1.4** Types of anti-competitive agreements to which Article 81 and/or the Chapter I prohibition may apply are considered in Part 3.
- 1.5** Part 4 of this guideline deals with the relationship between EC and national competition law. It considers the issue of consistency between Community and national competition law, and the approach the OFT will take to agreements which may fall within both Article 81 and the Chapter I prohibition.
- 1.6** Agreements which fall within Article 81 and/or the Chapter I prohibition but which satisfy certain specified conditions⁴ are not prohibited, no prior decision to that effect being required. The conditions which need to be satisfied are set out in Part 5. Part 5 also discusses EC and domestic block exemptions and United Kingdom parallel exemptions.

- 1.7** Certain categories of agreement are excluded from the scope of Article 81 and/or the Chapter I prohibition. These categories of agreements are discussed in Part 6.
- 1.8** Breach of Article 81 or the Chapter I prohibition means that the agreement is void and each party is liable to a financial penalty of up to 10 per cent of its worldwide turnover. In addition, third parties who consider they have suffered loss as a result of any unlawful agreement may bring an action for damages in the Competition Appeal Tribunal (the CAT) or the courts. These consequences of infringement are considered in Part 7.
- 1.9** In certain circumstances where a case raises novel or unresolved questions about the application of Article 81 and/or the Chapter I prohibition and where the OFT considers there is an interest in issuing clarification for the benefit of a wider audience the OFT may publish written guidance in the form of an Opinion. The OFT also offers confidential informal advice. Further details can be found in Part 8.

2 Anti-competitive agreements: the provisions

Scope of the provisions

2.1 There are two substantive provisions which may be applied by the OFT to anti-competitive agreements: Article 81 and the Chapter I prohibition. The key difference between the two is their geographic scope. Both these provisions apply to agreements between undertakings which have as their object or effect the prevention, restriction or distortion of competition:

- within the common market and which may affect trade between Member States in the case of Article 81, and
- within the United Kingdom and which may affect trade within the United Kingdom in the case of the Chapter I prohibition.

2.2 Article 81(1) and section 2(2) of the Act provide an identical list of agreements to which the provisions apply, namely those which:

- ‘(a) directly or indirectly fix purchase or selling prices or any other trading conditions
- (b) limit or control production, markets, technical development or investment
- (c) share markets or sources of supply
- (d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage
- (e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.’

2.3 This is a non-exhaustive, illustrative list and does not set a limit on the investigation and enforcement activities of the OFT under Article 81 or the Chapter I prohibition. Discussion of the OFT’s approach to these types of agreement, and other potentially anti-competitive agreements can be found in Part 3 of this guideline. It should be

noted, however, that any agreement that has an appreciable adverse effect on competition is likely to fall within Article 81(1) and/or the Chapter I prohibition irrespective of whether or not it is of a type described in the illustrative list in Article 81(1) and section 2(2) of the Act (or is considered in Part 3 of this guideline). Such an agreement may nevertheless be enforceable without prior approval if it meets the conditions set out in Article 81(3) and/or section 9(1) of the Act. This is considered in Part 5.

Terms used in the provisions

- 2.4** The terms used in Article 81 and the Chapter I prohibition and the concepts relevant to their application are dealt with in this section. These are terms and concepts used throughout this guideline.

Undertakings

- 2.5** The term undertaking is not defined in the EC Treaty or the Act but its meaning has been set out in Community law. It covers any natural or legal person engaged in economic activity, regardless of its legal status and the way in which it is financed⁵. It includes companies, firms, businesses, partnerships, individuals operating as sole traders, agricultural co-operatives, associations of undertakings (e.g. trade associations), non profit-making organisations and (in some circumstances) public entities that offer goods or services on a given market. The key consideration in assessing whether an entity is an undertaking for the application of Article 81 and/or the Chapter I prohibition is whether it is engaged in economic activity. An entity may engage in economic activity in relation to some of its functions but not others.

⁵ See Case C-41/90 *Höfner and Elser v Macrotron* [1991] ECR I-1979, [1993] 4 CMLR 306 and Case T-319/99 *Fenin v Commission*, [2003] ECR IT-357.

- 2.6** Article 81 and the Chapter I prohibition do not apply to agreements where there is only one undertaking: that is, between entities which form a single economic unit. In particular, an agreement between a parent and its subsidiary company, or between two companies which are under the control of a third, will not be agreements between undertakings if the subsidiary has no real freedom to determine its course of action on the market and, although having a separate legal personality, enjoys no economic independence⁶. Whether or not the

⁶ See Case 22/71 *Beguelin Import v GL Import Export* [1971] ECR 949, [1972] CMLR 81.

entities form a single economic unit will depend on the facts of each case.

Agreement

- 2.7** Agreement has a wide meaning and covers agreements whether legally enforceable or not, written or oral; it includes so-called gentlemen's agreements. There does not have to be a physical meeting of the parties for an agreement to be reached: an exchange of letters or telephone calls may suffice.
- 2.8** The fact that a party may have played only a limited part in the setting up of the agreement, or may not be fully committed to its implementation, or may have participated only under pressure from other parties does not mean that it is not party to the agreement (although these facts may be taken into account in deciding the level of any financial penalty: for further details see the *OFT's guidance as to the appropriate amount of a penalty* (OFT423)).

Decisions by associations of undertakings

- 2.9** Article 81 and the Chapter I prohibition also cover decisions by associations of undertakings. Trade associations are the most common form of associations of undertakings, but the provisions are not limited to any particular type of association. A decision by a trade association may include, for example, the constitution or rules of an association of undertakings or its recommendations or other activities⁷. In the day to day conduct of the business of an association, resolutions of the management committee or of the full membership in general meeting, binding decisions of the management or executive committee of the association, or rulings of its chief executive may all be 'decisions' of the association. The key consideration is whether the object or effect of the decision, whatever form it takes, is to influence the conduct or coordinate the activity of the members. A trade association's co-ordination of its members' conduct in accordance with its constitution may also be a decision even if its recommendations are not binding on its members, and may not have been fully complied with. It will be a question of

⁷ See *Re National Sulphuric Acid Association Ltd* OJ L260, 3.10.80, p24, [1980] 3 CMLR 429.

fact in each case whether an association of undertakings is itself a party to an agreement.

- 2.10** The competition law guideline *Trade associations, professions and self-regulating bodies* (OFT408) deals with the application and enforcement of Article 81 and the Chapter I prohibition in respect of both trade associations and the rules of self-regulating bodies.

Concerted practices

- 2.11** Article 81 and the Chapter I prohibition apply to concerted practices as well as to agreements. The boundary between the two concepts is imprecise. The key difference is that a concerted practice may exist where there is informal co-operation without any formal agreement or decision.
- 2.12** In considering if a concerted practice exists, the OFT will follow relevant Community precedents established under Article 81. The OFT will need to establish that the parties, even if they did not enter into an agreement, knowingly substituted cooperation between them for the risks of competition.
- 2.13** The following are examples of factors which the OFT may consider in establishing if a concerted practice exists:
- whether the parties knowingly entered into practical co-operation
 - whether behaviour in the market is influenced as a result of direct or indirect contact between undertakings
 - whether parallel behaviour is a result of contact between undertakings leading to conditions of competition which do not correspond to normal conditions of the market
 - the structure of the relevant market and the nature of the product involved
 - the number of undertakings in the market and, where there are only a few undertakings, whether they have similar cost structures and outputs.

The prevention, restriction or distortion of competition

2.14 Article 81 and/or the Chapter I prohibition apply where the object or effect of the agreement is to prevent, restrict or distort competition within the common market (in the case of Article 81) or within the United Kingdom (in the case of the Chapter I prohibition). Any agreement between undertakings might be said to restrict the freedom of action of the parties. That does not, however, necessarily mean that the agreement is prohibited. The OFT does not adopt such a narrow approach. The OFT will assess an agreement in its economic context.

The appreciable effect on competition test

2.15 An agreement will fall within Article 81 and/or the Chapter I prohibition only if it has as its object or effect an appreciable prevention, restriction or distortion of competition within:

- the common market in the case of Article 81, or
- the United Kingdom in the case of the Chapter I prohibition.

2.16 The European Commission's *Notice on Agreements of Minor Importance*⁸ (the *Notice on Agreements of Minor Importance*) sets out, using market share thresholds, what is **not** an appreciable restriction of competition under Article 81. The European Commission considers that agreements between undertakings which affect trade between Member States do not appreciably restrict competition within the meaning of Article 81 if:

- the aggregate market share of the parties to the agreement does not exceed 10 per cent on any of the relevant markets affected by the agreement where the agreement is made between competing undertakings (i.e. undertakings which are actual or potential competitors on any of the markets concerned), or
- the market share of each of the parties to the agreement does not exceed 15 per cent on any of the relevant markets affected by the agreement where the agreement is made between non-competing undertakings, (i.e. undertakings which are neither actual nor potential competitors on any of the markets concerned).

⁸ OJ C368, 22.12.01, p13.

In both cases, these thresholds are reduced to five per cent where competition on the relevant market is restricted by the cumulative foreclosure effect of parallel networks of agreements⁹ having similar effects on the market.

⁹ Network effects are explained in Part 5 of the competition law guideline *Assessment of market power* (OFT415).

2.17 The above approach does **not** apply to an agreement containing any of the restrictions set out in paragraph 11 of the *Notice on Agreements of Minor Importance*. These include:

- in the case of an agreement between competing undertakings a provision which:
 - directly or indirectly fixes prices, shares markets or limits production, or
- in the case of an agreement between non-competing undertakings a provision which:
 - limits a buyer's ability to determine its resale price¹⁰, or
 - restricts a buyer operating at a retail level from selling to any end user in response to an unsolicited order (passive selling), or
 - restricts active or passive selling by the authorised distributors to end-users or other authorised distributors in a selective distribution network, or
 - restricts, by agreement between a supplier of components and a buyer who incorporates those components in its products, the supplier's ability to sell the components as spare parts to end-users or independent repairers not entrusted by the buyer with the repair or servicing of its products.

¹⁰ Except that a supplier may impose a maximum resale price or recommend a resale price, provided that pressure from the parties to the agreement does not result in that becoming a fixed or minimum price.

For the full list of restrictions please see paragraph 11 of the Notice. Agreements containing any of the restrictions set out in paragraph 11 of the *Notice on Agreements of Minor Importance* are regarded as being capable of having an appreciable effect even where the market shares fall below the thresholds explained in paragraph 2.16.

2.18 In determining whether an agreement has an appreciable effect on competition for the purposes of Article 81 and/or the Chapter I prohibition, the OFT will have regard to the European Commission's

approach as set out in the *Notice on Agreements of Minor Importance*.

2.19 As a matter of practice the OFT is likely to consider that an agreement will not fall within either Article 81 or the Chapter I prohibition when it is covered by the *Notice on Agreements of Minor Importance*. Where the OFT considers that undertakings have in good faith relied on the terms of the *Notice on Agreements of Minor Importance*, the OFT will not impose financial penalties for an infringement of Article 81 and/or the Chapter I prohibition. A review of the types of agreements which would generally fall within Article 81 and/or the Chapter I prohibition are covered in Part 3 of this guideline.

2.20 The mere fact that the parties' market shares exceed the thresholds set out in paragraph 2.16, does **not** mean that the effect of an agreement on competition **is** appreciable. Other factors will be considered in determining whether the agreement has an appreciable effect¹¹. Relevant factors may include for example, the content of the agreement and the structure of the market or markets affected by the agreement, such as entry conditions or the characteristics of buyers and the structure of the buyers' side of the market (see the competition law guideline *Assessment of market power* (OFT415)).

2.21 When applying the market share thresholds discussed above, the relevant market share will be the combined market share not only of the parties to the agreement but also of other undertakings belonging to the same group of undertakings as the parties to the agreement. These will include, in the case of each party to the agreement: (i) undertakings over which it exercises control; and (ii) undertakings which exercise control over it as well as any other undertakings which are controlled by those undertakings. Further details on defining the relevant market are given in the competition law guideline *Market definition* (OFT403).

Applicable law and territorial scope

2.22 In determining whether Article 81 and/or the Chapter I prohibition apply, the OFT will take into account the difference in the territorial scope of the two provisions.

¹¹ See the Commission *Guidelines on the application of Article 81(3) of the Treaty*, OJ C 101, 27.04.2004, p97.

Article 81

2.23 Article 81 only applies to agreements which may affect trade between Member States, i.e. it will only apply where there may be an appreciable effect on interstate trade. The case law of the European courts has interpreted this phrase broadly. Given the breadth of this interpretation, it is likely that in many cases agreements will fall within both Article 81 and the Chapter I prohibition. The European Commission has issued guidelines on the criteria it will apply to assess whether or not an agreement has an effect on trade between Member States in its Notice entitled *Guidelines on the Effect on Trade Concept contained in Articles 81 and 82 of the Treaty*¹². The OFT will have regard to this Notice when considering whether agreements are likely to affect trade between Member States appreciably.

¹² OJ C101, 27.04.2004, p81.

The Chapter I prohibition

2.24 The Chapter I prohibition only applies to agreements that may affect trade within the United Kingdom.

2.25 In practice it is very unlikely that an agreement which appreciably restricts competition within the United Kingdom does not also affect trade within the United Kingdom. So, in applying the Chapter I prohibition the OFT's focus will be on the effect that an agreement has on competition, discussed in paragraph 2.20 above.

2.26 The Chapter I prohibition applies only if an agreement is, or is intended to be, implemented in the United Kingdom.

2.27 The United Kingdom means Great Britain (England, Wales and Scotland and the subsidiary islands, excluding the Isle of Man and the Channel Islands) and Northern Ireland. For the purposes of the Chapter I prohibition, the United Kingdom includes any part of the United Kingdom where an agreement operates or is intended to operate.

Administrative priorities

2.28 It is the OFT's practice to consider, on a case by case basis, whether an agreement falls within its administrative priorities so as to merit investigation.

3 Examples of anti-competitive agreements

3.1 This Part contains a discussion of various types of agreement which might appreciably restrict competition and fall within Article 81 and/or the Chapter I prohibition. The principles discussed are general and apply to agreements considered under both provisions.

3.2 Although an agreement may appreciably restrict competition within the meaning of Article 81 and/or the Chapter I prohibition, it will not be prohibited (and will still be valid and enforceable) where it satisfies the conditions in Article 81(3) and/or section 9(1) of the Act respectively. Further details on these conditions can be found in Part 5 and in the European Commission's Notice entitled *Guidelines on the Application of Article 81(3) of the Treaty*¹³.

¹³ OJ C101, 27.04.2004, p97.

Examples of agreements which might appreciably restrict competition

3.3 The types of agreements discussed in this part are agreements which have the object or effect of:

- directly or indirectly fixing prices
- fixing trading conditions
- sharing markets
- limiting or controlling production or investment
- collusive tendering (bid-rigging)
- joint purchasing or selling
- sharing information
- exchanging price information
- exchanging non-price information
- restricting advertising
- setting technical or design standards.

There is also a short discussion of other types of agreements which may be anti-competitive. The examples provided in this part are not exhaustive.

Directly or indirectly fixing prices

- 3.4** An agreement whose object is directly or indirectly to fix prices, or the resale prices of any product or service, almost invariably infringes Article 81 and/or the Chapter I prohibition. The OFT considers that such price-fixing agreements, by their very nature, restrict competition to an appreciable extent.
- 3.5** There are many ways in which prices can be fixed. Price fixing may involve fixing either the price itself or the components of a price, setting a minimum price below which prices are not to be reduced, establishing the amount or percentage by which prices are to be increased, or establishing a range outside which prices are not to move.
- 3.6** Price fixing may also take the form of an agreement to restrict price competition. This will include, for example, an agreement to adhere to published price lists or not to quote a price without consulting potential competitors, or not to charge less than any other price in the market. An agreement may restrict price competition even if it does not entirely eliminate it. Competition may, for example, remain in the ability to grant discounts or special deals on a published list price or ruling price. Recommendations of a trade association in relation to price are dealt with in the competition law guideline *Trade associations, professions and self-regulating bodies* (OFT408).
- 3.7** An agreement may also have the object of fixing prices while only indirectly affecting the price to be charged. It may cover the discounts or allowances to be granted, transport charges, payments for additional services, credit terms or the terms of guarantees, for example. The agreement may relate to the charges or allowances quoted themselves, to the ranges within which they fall, or to the formulae by which ancillary terms are to be calculated.

- 3.8** Price fixing issues are not limited to agreements between competing undertakings. They can also arise between undertakings operating at different levels in the supply chain, where an agreement directly or indirectly (whether on its own or in combination with other factors under the control of the parties) has the object of restricting a buyer's ability to determine its resale price¹⁴.

Agreements to fix trading conditions

- 3.9** Undertakings may agree to regulate the terms and conditions on which goods or services are to be supplied, in addition to prices. Use of standard terms and conditions are dealt with in the competition law guideline *Trade associations, professions and self-regulating bodies* (OFT408).

Agreements to share markets

- 3.10** Undertakings may agree to share markets, whether by territory, type or size of customer, or in some other way. This may be as well as or instead of agreeing on the prices to be charged, especially where the product is reasonably standardised. Where the object of the agreement is to share markets in this way, it will almost invariably infringe Article 81 and/or the Chapter I prohibition. The OFT considers that such market-sharing agreements, by their very nature, restrict competition to an appreciable extent.

- 3.11** There can be agreements, however, which have the effect (rather than the object) of sharing the market to some degree as a consequence of the main object of the agreement. Parties may agree, for example, each to specialise in the manufacture of certain products in a range, or of certain components of a product, in order to be able to produce in longer runs and therefore more efficiently. Such an agreement may fall within Article 81 and/or the Chapter I prohibition where there is, or is likely to be, an appreciable effect on competition. In assessing research and development (R&D) agreements¹⁵ and joint production or specialisation agreements¹⁶, the OFT has regard to the European Commission's *Guidelines on the applicability of Article 81 of the EC Treaty to horizontal cooperation agreements*¹⁷ (*Guidelines on Horizontal Cooperation Agreements*). R&D agreements may have the

¹⁴ Except that a supplier may impose a maximum resale price or recommend a resale price, provided that pressure from the parties to the agreement does not result in that becoming a fixed or minimum price. For further detail, see the competition law guideline *Vertical agreements* (OFT419).

¹⁵ An R&D agreement may range in scope from outsourcing certain research and development activities, to the joint improvement of existing products or to a co-operation concerning the research, development and marketing of completely new products.

¹⁶ A joint production agreement is an agreement between parties to produce certain products jointly, whereas a specialisation agreement is an agreement whereby the parties agree (unilaterally or reciprocally) to cease production of a product and to purchase it from the other party.

¹⁷ OJ C3, 6.1.01, p2.

¹⁸ Commission Regulation (EC) No 2659/2000 on the application of Article 81(3) of the Treaty to categories of research and development agreements.

¹⁹ Commission Regulation (EC) No 2658/2000 on the application of Article 81(3) of the Treaty to categories of specialisation agreements.

benefit of the European Commission block exemption for categories of research and development agreements¹⁸. Similarly, joint production or specialisation agreements may have the benefit of the European Commission block exemption for categories of specialisation agreements¹⁹.

Agreements to limit or control production or investment

3.12 An agreement whose object is to limit or control production will almost invariably infringe Article 81 and/or the Chapter I prohibition. Such an agreement may be the way in which prices are fixed, or it may relate to production levels or quotas, or it may be intended to deal with structural overcapacity. In some cases, it will be linked to other agreements which may affect competition.

3.13 Competitive pressures may be reduced if undertakings in an industry agree to limit investment or at least to coordinate future investment plans. The OFT considers that any agreement whose object is to limit or control investment will, by its very nature, restrict competition to an appreciable extent.

Collusive tendering ('bid-rigging')

3.14 Tendering procedures are designed to provide competition in areas where it might otherwise be absent. An essential feature of the system is that prospective suppliers prepare and submit tenders or bids independently. Any tender submitted as a result of collusion between prospective suppliers will almost invariably infringe Article 81 and/or the Chapter I prohibition. The OFT considers that bid-rigging agreements, by their very nature, restrict competition to an appreciable extent.

Joint purchasing/selling

3.15 An agreement between purchasers to fix (directly or indirectly) the price that they are prepared to pay, or to purchase only through agreed arrangements, limits competition between them. An example of one type of agreement which might be made between purchasers is an agreement as to those with whom they will deal. Such an

arrangement may fall within Article 81 and/or the Chapter I prohibition if it has an appreciable effect on competition. In assessing joint purchasing/selling agreements, the OFT has regard to the European Commission's *Guidelines on Horizontal Cooperation Agreements*.

- 3.16** The same issues potentially arise in agreements between sellers, in particular where sellers agree to boycott certain customers. This type of agreement may have an appreciable effect on competition. In assessing agreements involving co-operation between competitors in the selling, distribution or promotion of their products, the OFT has regard to the European Commission's *Guidelines on Horizontal Cooperation Agreements*²⁰.

²⁰ Such agreements are termed **commercialisation agreements** in the European Commission's *Guidelines on Horizontal Cooperation Agreements*.

Information sharing

- 3.17** As a general principle, the more informed customers are, the more effective competition is likely to be and so making information publicly available to customers does not usually harm competition.
- 3.18** In the normal course of business, undertakings exchange information on a variety of matters legitimately and with no risk to the competitive process. Indeed, competition may be enhanced by the sharing of information, for example, on new technologies or market opportunities. There are therefore circumstances where there is no objection to the exchange of information, even between competitors, and whether or not under the aegis of a trade association (see the competition law guideline *Trade associations, professions and self-regulating bodies* (OFT408)).
- 3.19** The exchange of information may however have an adverse effect on competition where it serves to reduce or remove uncertainties inherent in the process of competition. The fact that the information could have been obtained from other sources is not necessarily relevant. Whether or not exchange of information has an appreciable effect on competition will depend on the circumstances of each individual case: the market characteristics, the type of information and the way in which it is exchanged. As a general principle, the OFT will consider that there is more likely to be an appreciable effect on competition the smaller the number of undertakings operating in the

²¹ Case T-141/94 *Thyssen Stahl AG v Commission* [1999] ECR II-347, upheld on appeal in Case C-194/99 P, judgement of 2 October 2003.

market, the more frequent the exchange and the more sensitive, detailed and confidential the nature of the information which is exchanged. There is also more likely to be an appreciable effect on competition where the exchange of information is limited to certain participating undertakings to the exclusion of their competitors and consumers²¹.

Exchange of price information

3.20 The exchange of information on prices may lead to price co-ordination and therefore diminish competition which would otherwise be present between the undertakings. This will be the case whether the information exchanged relates directly to the prices charged or to the elements of a pricing policy, for example discounts, costs, terms of trade and rates and dates of change.

3.21 The more recent or current the information exchanged, the more likely it is that exchange will have an appreciable effect on competition. Therefore, the circulation of purely historical information or the collation of price trends is unlikely to have an appreciable effect on competition, for example, where the exchange forms part of a scheme of inter-business comparison which is intended to spread best industrial practice. Exchange of information that is aggregated, and which cannot be disaggregated is also unlikely to have an appreciable effect on competition.

Exchange of non-price information

3.22 The exchange of information on matters other than price may have an appreciable effect on competition depending on the type of information exchanged and the structure of the market to which it relates. The exchange of aggregated statistical data, market research, and general industry studies for example are unlikely to have an appreciable effect on competition, since exchange of such information is unlikely to reduce individual undertakings' commercial and competitive independence.

3.23 In general, the exchange of information on output and sales should not affect competition provided that it is aggregated or, if it enables

participants to identify individual undertakings' competitive behaviour, provided that it is sufficiently historic. In such circumstances, it is unlikely that an agreement to exchange such information would influence the participants' competitive market behaviour. There may however be an appreciable effect on competition if the information exchanged is current or recent or concerns future plans, and if it can be ascribed to particular undertakings, whether because it is broken down in this way or because it can be disaggregated.

Advertising

- 3.24** Restrictions on advertising, whether relating to the amount, nature or form of advertising, have the potential to restrict competition. Whether the effect is appreciable depends on the purpose and nature of the restriction, and on the market in which it is to apply. Decisions aimed at curbing misleading advertising, or at ensuring that advertising is legal, truthful and decent are unlikely to have an appreciable adverse effect on competition (see the competition law guideline *Trade associations, professions and self-regulating bodies* (OFT408)).

Standardisation agreements

- 3.25** An agreement on technical or design standards may lead to an improvement in production by reducing costs or raising quality, or it may promote technical or economic progress by reducing waste and consumers' search costs. Some such agreements will, however, be likely to infringe Article 81 and/or the Chapter I prohibition if they are, in effect, a means of limiting competition from other sources, for example by raising entry barriers. Standardisation agreements which prevent the parties from developing alternative standards or products that do not comply with the agreed standard may also infringe Article 81 and/or the Chapter I prohibition. In assessing standardisation agreements, the OFT has regard to the European Commission's *Guidelines on Horizontal Cooperation Agreements*.

Other anti-competitive agreements

- 3.26** Competition in a market can be restricted in less direct ways than by fixing prices or sharing markets or the other examples set out above – for example, a scheme under which a customer obtains better terms the more business it places with the parties to the scheme could be regarded as anti-competitive. Each case will need to be considered in its own circumstances.
- 3.27** Other agreements where the parties agree to cooperate may fall within Article 81 and/or the Chapter I prohibition if they have an appreciable effect on competition. However, not all these, or other, agreements having appreciable effect on competition will necessarily be prohibited. As mentioned at paragraph 3.2, certain agreements which have an appreciable effect on competition within the meaning of Article 81 and/or the Chapter I prohibition will not be prohibited (and will still be valid and enforceable) where they satisfy the conditions in Article 81(3) and/or in section 9(1) of the Act respectively.

4 Relationship between EC and national competition law

Article 3 of the Modernisation Regulation

4.1 Article 3 of the Modernisation Regulation governs the relationship between Article 81 and national competition law. Article 3(1) provides that where national competition authorities or courts apply national competition law to agreements which may affect trade between Member States within the meaning of Article 81(1), they must also apply Article 81 to those agreements. Article 3(2) provides that national competition law cannot prohibit agreements which may affect trade between Member States:

- that do not restrict competition within the meaning of Article 81(1)
- that fulfil the conditions of Article 81(3), or
- that are covered by an EC block exemption regulation.

4.2 In all cases where the OFT examines an agreement between undertakings under the Chapter I prohibition it also considers whether Article 81 is applicable. The OFT's determination of whether Article 81 is applicable will consist of assessing whether the agreement may have an effect on trade between Member States. Where it is clear that the effect on trade between Member States test is met (see paragraph 2.23 above), the OFT will usually apply both Article 81 and the Chapter I prohibition. Equally, however, it is open to the OFT to apply Article 81 alone in such cases.

4.3 Under the OFT's Rules²², the OFT may, at any time prior to making an infringement decision, elect to apply to a case one or both of Article 81 and the Chapter I prohibition. This means that a case started under the Chapter I prohibition can be continued under Article 81 alone or (as is more likely) under both the Chapter I prohibition and Article 81 if it is subsequently concluded that there may be an effect on trade between Member States. Similarly a case started under the Chapter I prohibition and Article 81 can be continued under the Chapter I prohibition alone if it is subsequently concluded that there is no effect on trade between Member States.

²² The Competition Act 1998 (Office of Fair Trading's Rules) Order 2004 (SI 2004/2752), rule 10.

- 4.4** In cases where an undertaking has committed an infringement of both an EC prohibition (i.e. Article 81 or Article 82) and the equivalent UK prohibition (i.e. the Chapter I or the Chapter II prohibition respectively), the undertaking will not be penalised again for the same anti-competitive effects. For further details see the OFT's *Guidance as to the appropriate amount of a penalty* (OFT423).
- 4.5** As noted in paragraph 2.23 above, the OFT will have regard to the guidance set out in the European Commission's Notice entitled *Guidelines on the Effect on Trade Concept contained in Articles 81 and 82 of the Treaty*²³ when considering whether a particular agreement may have an effect on trade between Member States to determine whether Article 81 applies.

²³ OJ C101, 27.04.2004, p81.

Primacy of Community law

- 4.6** In applying Article 81 the OFT is bound by the fundamental principle of the primacy of Community law and must follow the case law of the European Court in interpreting Community legislation. As a consequence, and in addition to the Article 3 obligations set out in paragraph 4.1 above, an agreement prohibited by Article 81 cannot be permitted under national law. The OFT cannot therefore permit an agreement which has been prohibited under Article 81.
- 4.7** The Modernisation Regulation also makes further provision to ensure consistency in the application of Article 81. Article 16(2) of the Modernisation Regulation provides that where the European Commission has taken a decision on an agreement, the OFT and other NCAs cannot take a decision under Article 81 in respect of the same agreement which would run counter to the decision adopted by the European Commission. Further detail on the Modernisation Regulation can be found in the competition law guideline *Modernisation* (OFT442).

Consistency and cases brought under the Chapter I prohibition

- 4.8** In addition to its obligations under Community law, under section 60 of the Act the OFT is under an obligation to deal with questions arising under Part I of the Act in relation to competition within the UK in such a way as to ensure consistency with the treatment of corresponding questions arising in Community law in so far as this is possible, having regard to any relevant differences between any of the provisions concerned.

5 The legal exception regime

- 5.1** The Modernisation Regulation introduces a legal exception regime. This means that an agreement that falls within Article 81(1) but which satisfies the conditions set out in Article 81(3) shall not be prohibited, no prior decision to that effect being required. Such an agreement is valid and enforceable from the moment that the conditions in Article 81(3) are satisfied and for as long as that remains the case. The Modernisation Regulation provides that the burden of proving that the conditions are satisfied rests on the undertaking(s) claiming the benefit of Article 81(3).
- 5.2** The Act has been amended to mirror this approach so that an agreement that falls within the Chapter I prohibition but which satisfies the conditions set out in section 9(1) of the Act is not prohibited, no prior decision to that effect being required. Such an agreement is valid and enforceable from the moment the conditions in section 9(1) are satisfied and for as long as that remains the case. The Act provides that the burden of proving that the conditions are satisfied rests on the undertaking(s) claiming the benefit of section 9(1) of the Act.

The conditions in Article 81(3) and section 9(1)

- 5.3** Article 81(3) and section 9(1) set out four conditions which must all be met for an agreement to have the benefit of either provision. Article 81(3) provides that Article 81(1) is inapplicable in respect of any agreement:
- ‘which contributes to improving the production or distribution of goods or promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:
- (a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;
 - (b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.’

- 5.4** The wording of section 9(1) is similar to that of Article 81(3) except that in the first condition in section 9(1) the phrase 'of goods' is not included. The omission of these words is intended to make clear (consistent with the practice of the European Commission in relation to Article 81(3)) that improvements in production or distribution in relation to services may also satisfy the first condition in section 9(1). The European Commission's practice has been either to apply Article 81(3) to services by analogy, or to invoke the promotion of technical and economic progress provision in Article 81(3) in relation to services agreements.
- 5.5** The European Commission has issued a Notice entitled *Guidelines on the Application of Article 81(3) of the Treaty*²⁴ to assist companies and their advisers in determining whether an agreement satisfies the conditions in Article 81(3). The OFT will have regard to this Notice in considering the application of Article 81(3) and section 9(1) of the Act.

²⁴ OJ C101. 27.04.2004, p97.

²⁵ The European Commission may only issue an EC block exemption regulation where it has been empowered to do so by an EC Council Regulation. For instance Council Regulation (EEC) 19/65 (JO, 06.03.1965, p533, Spec. ed. (1965 - 1966) p35)) (as amended, most recently, by Council Regulation (EC)1215/1999 and the Modernisation Regulation) allows the European Commission to adopt EC block exemption regulations in respect of vertical agreements and industrial property rights.

²⁶ EC block exemption regulations in force include: Commission Regulation (EC) No 2658/2000 on the application of Article 81(3) of the Treaty to categories of specialisation agreements (OJ, L304, 5.12.2000, p3); Commission Regulation (EC) No 2659/2000 on the application of Article 81(3) of the Treaty to categories of research and development agreements (OJ L304, 5.12.2000, p7); Commission Regulation (EC) No 2790/1999 on the application of Article 81(3) of the

Block exemptions

Article 81

- 5.6** The European Commission may adopt block exemption regulations so that particular categories of agreement which it considers satisfy the conditions in Article 81(3) are not prohibited under Article 81²⁵. Where an agreement is covered by an EC block exemption regulation²⁶ the parties to the restrictive agreement are relieved of the burden of showing that their agreement satisfies the conditions in Article 81(3). They only have to prove that the restrictive agreement is block exempted.

Withdrawal of block exemptions

- 5.7** The European Commission may withdraw the benefit of any EC block exemption regulation if it finds that in a particular case the agreement in question has effects that are incompatible with Article 81(3)²⁷.
- 5.8** The OFT may also, under Article 29(2) of the Modernisation Regulation, withdraw the benefit of any EC block exemption regulation from any agreements if the following conditions are met:

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Treaty to categories of vertical agreements and concerted practices (OJ L336, 29.12.1999, p21); Commission Regulation (EC) No 1400/2002 on the application of Article 81(3) to categories of vertical agreement and concerted practices in the motor vehicle sector (OJ L203, 1.8.2002, p30); and Commission Regulation (EC) No 772/2004 of 27 April 2004 on the application of Article 81(3) of the Treaty to categories of technology transfer agreements, OJ L123, 27.04.2004, p11.

²⁷ Article 29(1) of the Modernisation Regulation.

²⁸ Article 29(2) of the Modernisation Regulation.

²⁹ The Competition Act 1998 (Office of Fair Trading's Rules) Order 2004 (SI 2004/2751), rule 13.

- the agreements in question have effects that are incompatible with Article 81(3) in the territory of the United Kingdom, or a part of the United Kingdom, and
- the relevant territory has all the characteristics of a distinct geographic market²⁸.

In the case of withdrawal of an EC block exemption regulation by the OFT, it will be for the OFT to demonstrate that the agreement infringes Article 81(1) and that it does not satisfy the conditions of Article 81(3) in the United Kingdom (or part of the United Kingdom) that is a distinct geographic market. The United Kingdom courts have no power to withdraw the benefit of an EC block exemption regulation.

5.9 In practice, the OFT is likely to exercise this power only rarely. An example of when the OFT might exercise its power to withdraw a block exemption is given in the competition law guideline *Vertical agreements* (OFT 419).

5.10 Where the OFT proposes to exercise its powers to withdraw the benefit of a block exemption from an agreement it must, following the procedures specified in the OFT's Rules²⁹, give written notice to the parties to that agreement and give them an opportunity to make representations. It may also consult the public. If the OFT has decided to withdraw the benefit of a block exemption, it will notify the parties to that agreement of its decision and will publish the decision on a public register on the OFT's website.

Consequences of withdrawal

5.11 Where the OFT decides to withdraw the benefit of a block exemption from a particular agreement it at the same time establishes that the agreement infringes Article 81. Such an infringement finding can have effect only from the date of the withdrawal. The agreement will be void only from the date of withdrawal and any financial penalties imposed in respect of that agreement can relate only to the period after the withdrawal of the block exemption.

- 5.12** Withdrawal of the block exemption in a particular case will result in any parallel exemption also ceasing to have effect, by virtue of section 10(4)(b) of the Act.

The Chapter I prohibition

- 5.13** Under the Act the Secretary of State may, acting on the OFT's recommendation, make domestic block exemptions that specify particular categories of agreement which the OFT considers are likely to be exempt from the Chapter I prohibition as a result of section 9(1). An agreement which falls within a category specified in the block exemption will not be prohibited under the Chapter I prohibition³⁰. Any such block exemption may impose conditions or obligations subject to which the block exemption will have effect³¹.
- 5.14** Breach of a condition imposed by the block exemption cancels the block exemption in respect of an agreement. The failure to comply with an obligation imposed by the block exemption enables the OFT to cancel the block exemption in respect of an agreement. Furthermore if the OFT thinks that an agreement is not exempt from the Chapter I prohibition as a result of section 9(1) of the Act, the OFT may cancel the block exemption in respect of that agreement.

Parallel exemption under the Act

- 5.15** An agreement is exempt from the Chapter I prohibition if it is covered by a finding of inapplicability by the European Commission³² or an EC block exemption regulation, or would be covered by an EC block exemption regulation if the agreement had an effect on trade between Member States. These types of agreement are not prohibited under the Chapter I prohibition, no prior decision to that effect being required.
- 5.16** Where an agreement has no effect on trade between Member States but it would be covered by an EC block exemption regulation if the agreement had an effect on trade between Member States and therefore benefits from a parallel exemption, the OFT may nevertheless impose conditions on the parallel exemption or cancel the exemption following procedures specified in the OFT's Rules³³ if

³⁰ A domestic block exemption does not exempt agreements affecting trade between Member States for the purposes of Article 81. An agreement falling within a domestic block exemption which affects trade between Member States and falls within Article 81, will be invalid and unenforceable if it does not benefit also from an EC block exemption or does not otherwise satisfy the conditions in Article 81(3) .

³¹ The only United Kingdom block exemption that has been adopted to date is the Competition Act 1998 (Public Transport Ticketing Schemes Block Exemption) Order 2001 (SI 2001/319).

³² Under Article 10 of the Modernisation Regulation, the European Commission can find that Article 81 is inapplicable to an agreement either because the conditions of Article 81(1) are not fulfilled or because the conditions of Article 81(3) are satisfied.

³³ The Competition Act 1998 (Office of Fair Trading's Rules) Order 2004 (SI 2004/2751), rule 12.

the agreement has effects in the United Kingdom, or a part of it, which are incompatible with the conditions in section 9(1).

Individual exemptions

- 5.17** Each individual exemption granted by the OFT prior to 1 May 2004 has been time limited. All such individual exemptions are valid until their expiry, although the OFT retains the power to cancel such exemptions. After expiry, individual exemptions will not be renewed.
- 5.18** An individual exemption decision made by the European Commission prior to 1 May 2004 is binding on the OFT until the expiry date of the individual exemption. In such cases the OFT will not apply Article 81 or the Chapter I prohibition for the duration of the individual exemption. The OFT will consider comfort letters issued by the European Commission, but these are not binding on the OFT.

6 Exclusions

Article 81

6.1 Although the concept of an exclusion is not specifically recognised in relation to Article 81, under Community competition law certain categories of agreement are, in effect, excluded from the application of Article 81. These include:

- an agreement which would result in a concentration with a Community dimension and thereby be subject to the EC Merger Regulation³⁴
- an agreement made by an undertaking entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly, in so far as the application of Article 81 would obstruct the performance, in law or in fact, of the particular tasks assigned to the undertaking
- certain agreements which relate to production of, or trade in, the agricultural products listed in Annex I of the EC Treaty. Derogations in respect of these agreements are contained in Council Regulation (EEC) No 26/62 which provides that Article 81(1) does not apply where agreements:
 - form an integral part of a national market organisation in agricultural products, or
 - are necessary for the attainment of the objectives of the common agricultural policy.

This is not an exhaustive list.

³⁴ Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings (OJ L24, 29.01.2004, p1).

The Chapter I prohibition

6.2 Schedules 1-3 of the Act specifically exclude from the Chapter I prohibition certain categories of agreement:

- an agreement to the extent to which it would result in a merger or joint venture within the merger provisions of the Enterprise Act 2002 (see the Enterprise Act publication *Mergers: substantive assessment guidance* (OFT506) for further detail)

- an agreement which would result in a concentration with a Community dimension and thereby be subject to the EC Merger Regulation
- an agreement which is subject to competition scrutiny under the Financial Services and Markets Act 2000, the Broadcasting Act 1990 or the Communications Act 2003
- an agreement which is required in order to comply with, and to the extent that it is, a planning obligation
- (until 1 May 2005) an agreement to the extent that it is a land agreement, as defined in the Competition (Land and Vertical Agreements) Exclusion Order 2000 (see the competition law guideline *Land agreements* (OFT420) for further detail)
- (from 1 May 2005) an agreement to the extent that it is a land agreement, as defined in the Competition Act 1998 (Land Agreements Exclusion and Revocation) Order 2004 (see the competition law guideline *Land agreements* (OFT 420) for further detail)
- (until 1 May 2005) an agreement to the extent that it is a vertical agreement, as defined in the Competition Act 1998 (Land and Vertical Agreements) Exclusion Order 2000, and does not have the object or effect of fixing resale prices (see the competition law guideline *Vertical agreements* (OFT419) for further detail)
- (until 1 May 2007) an agreement which is the subject of a direction under section 21(2) of the Restrictive Trade Practices Act 1976³⁵
- an agreement for the constitution of a European Economic Area regulated market, to the extent that it relates to the rules made or guidance issued by that market
- an agreement made by an undertaking entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly, insofar as the prohibition would obstruct the performance of the particular tasks assigned to the undertaking (see the competition law guideline *Services of general economic interest* (OFT421))

³⁵ Paragraph 2 of Schedule 3 to the Act. This exclusion is repealed with effect from 1 May 2007.

- an agreement to the extent to which it is made to comply with a legal requirement
- an agreement which is necessary to avoid conflict with international obligations and which is also the subject of an order by the Secretary of State
- an agreement which is necessary for compelling reasons of public policy and which is also the subject of an order by the Secretary of State
- an agreement where it relates to production of, or trade in, 'agricultural products' as defined in the EC Treaty and in Council Regulation (EEC) No 26/62, or to farmers' co-operatives.

The Secretary of State has the power to add, amend or remove exclusions in certain circumstances.

6.3 A domestic exclusion does not exclude agreements or conduct from applicable EC law: any agreements or conduct affecting trade between Member States that are excluded under the Act remain subject to Article 81. Accordingly, should conduct or agreements affecting trade between Member States infringe Article 81, all the usual consequences will follow, irrespective of any domestic exclusion.

7 Consequences of infringement

Voidness

7.1 Any agreement which falls within Article 81(1) or the Chapter I prohibition and does not satisfy the conditions set out in Article 81(3) or section 9(1) of the Act, respectively, is void and unenforceable³⁶.

Financial penalties

7.2 Section 36 of the Act provides that the OFT may impose a financial penalty on an undertaking which has intentionally or negligently committed an infringement of Article 81 and/or the Chapter I prohibition. The amount of the penalty imposed may be up to 10 per cent of the worldwide turnover of the undertaking. See *OFT's Guidance as to the appropriate amount of a penalty* (OFT423) for further details. Further information on penalties and other consequences of an infringement may be found in the competition law guideline *Enforcement* (OFT407).

7.3 In order to avoid the prohibition regime being unduly burdensome on small businesses, the Act provides limited immunity from financial penalties for 'small agreements' in relation to infringements of the Chapter I prohibition³⁷. This immunity does not apply to infringements of Article 81 or to price-fixing agreements. The term 'small agreements' relates to agreements between undertakings whose combined annual turnover does not exceed £20 million³⁸. The immunity applies only to financial penalties: an anti-competitive agreement by such undertakings is still an infringement of the Chapter I prohibition, and consequently the OFT may take other enforcement action. The immunity does not prevent third parties from claiming damages for the loss caused by such an agreement.

7.4 Undertakings will benefit from immunity from financial penalties under the Act if the OFT is satisfied that they acted on the reasonable assumption that on the facts they qualified for the limited immunity for 'small agreements' in relation to infringements of the Chapter I prohibition.

³⁶ Article 81(2) and section 2(4) of the Act.

³⁷ Section 39 of the Act.

³⁸ Full details of how turnover is to be calculated can be found in the Competition Act 1998 (Small Agreements and Conduct of Minor Significance) Regulations 2000 (SI 2000/262).

7.5 The OFT may still investigate small agreements and can decide to withdraw the immunity from financial penalties if, having investigated the agreement, it considers that the agreement is likely to infringe the Chapter I prohibition. Withdrawal of the immunity in this way cannot have effect before the date of this decision.

Third party action

7.6 Third parties adversely affected by an agreement which they believe is prohibited by Article 81 and/or the Chapter I prohibition may take action in the courts to stop the behaviour and/or to seek damages.

7.7 Where a decision of the OFT or the CAT (on appeal from a decision of the OFT) has already found an infringement of Article 81 and/or the Chapter I prohibition, third parties who consider they have suffered loss as a result may bring an action for damages, against the undertaking or undertakings concerned, in the CAT or the courts. The CAT and the courts will be bound, in such proceedings, by the relevant infringement decision, provided that the decision is no longer capable of being overturned on appeal³⁹.

³⁹ Sections 47A(9) and 58A(2) of the Act.

8 Opinions and informal advice

- 8.1** Undertakings will generally be well placed to analyse the effect of their own conduct under Article 81 and under the Chapter I prohibition in the light of relevant Community case law and Community instruments including EC block exemption regulations and European Commission notices. Further, United Kingdom case law and OFT competition law guidelines, such as this one, are available to assist undertakings in considering the application of the law under the Act.
- 8.2** However, in specific cases that raise novel or unresolved questions of law, it may be possible to obtain guidance from the European Commission or from the OFT.

The European Commission's approach

- 8.3** The European Commission has published a Notice setting out its intention to issue Guidance Letters in certain circumstances, most particularly where a case gives rise to genuine uncertainty because it presents novel or unresolved questions for the application of the law. Further information about the European Commission's approach can be found in its *Notice on informal guidance relating to novel questions concerning Articles 81 and 82 of the EC Treaty that arise in individual cases (guidance letters)*⁴⁰.

The OFT's approach

- 8.4** Where a case raises novel or unresolved questions about the application of Article 81 and/or the Chapter I prohibition in the United Kingdom, and where the OFT considers there is an interest in issuing clarification for the benefit of a wider audience, it may publish written guidance in the form of an Opinion.
- 8.5** An Opinion published by the OFT cannot prejudge the assessment of the same question by the European Commission, the European Court or the CAT. An Opinion from the OFT does not bind any NCA or court having the power to apply Article 81 and/or the Chapter I prohibition. An Opinion also cannot bind the subsequent assessment of the same issues by the OFT, although the OFT will have regard to its Opinion

⁴⁰ OJ C101, 27.04.2004, p78.

when carrying out the assessment. See the competition law guideline *Modernisation* (OFT423) for further details on Opinions.

Informal advice

- 8.6** The OFT also offers confidential informal advice to undertakings on the application of Article 81 and/or the Chapter I prohibition through contact with OFT officials on an ad hoc basis. Views given by way of informal advice are not binding. Requests for informal advice should be made in the first place by calling the OFT enquiries line at 08457 22 44 99, or emailing enquiries@oft.gsi.gov.uk

Competition law guidelines

The OFT is issuing a series of competition law guidelines. New guidance may be published and the existing guidance revised from time to time. For an up-to-date list of guidance booklets check the OFT website at www.offt.gov.uk

All guidance booklets can be ordered or downloaded from the OFT website at www.offt.gov.uk Or you can request them by:

phone 0800 389 3158

fax 0870 60 70 321

email oft@eclogistics.co.uk

post EC Logistics, PO Box 366, Hayes UB3 1XB

