

# Powers of investigation

Understanding competition law

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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

**1.1** The Competition Act 1998 (the Act) provides the Office of Fair Trading (the OFT) with various powers to investigate suspected anti-competitive behaviour. This guideline describes these powers of investigation.

**1.2** First, Part I of the Act provides the OFT with powers to investigate on its own behalf suspected infringements of both Article 81 and Article 82 of the EC Treaty<sup>1</sup> ('Article 81' and 'Article 82' respectively) and the Chapter I and Chapter II prohibitions contained within Part I of the Act ('the Chapter I prohibition' and 'the Chapter II prohibition' respectively). These powers enable the OFT to:

- require the production of specified documents or specified information<sup>2</sup>
- enter business premises without a warrant<sup>3</sup>, and
- enter and search business and/or domestic premises with a warrant.<sup>4</sup>

**1.3** Parts 3 to 5 of this guideline describe when each of these powers can be used, the extent of each power and the procedures that must be followed. The limitations on the use of these powers are described in Part 6 of this guideline and the offences committed by a person who fails to comply when these powers are exercised are described in Part 7. The OFT's power to require information when determining whether to withdraw the benefit of an exclusion is described in Part 8.

**1.4** Second, Part 2 of the Act makes provision for the OFT to assist, or act on behalf of, the European Commission in connection with European Commission investigations relating to Article 81 and Article 82. The scope of these powers is described in Part 9.

**1.5** Third, Part 2A of the Act provides that the OFT can carry out an inspection in the United Kingdom, at the request of a national competition authority (NCA) of another Member State on behalf of that NCA, for the purpose of assisting it in deciding whether there has been an infringement of Article 81 or Article 82. When the OFT conducts such investigations it will use similar powers to those it has

<sup>1</sup> The Treaty establishing the European Community.

<sup>2</sup> Section 26.

<sup>3</sup> Section 27.

<sup>4</sup> Sections 28 and 28A.

available to investigate suspected infringements of Article 81 and Article 82 on its own behalf. The OFT's role in such investigations is described in Part 10 of this guideline.

- 1.6** The Regulators have concurrent powers to investigate suspected infringements of Article 81 and Article 82 and the Chapter I prohibition and Chapter II prohibition under Part I of the Act. The Regulators do not have investigative powers under Part 2 or Part 2A of the Act and therefore do not have any powers to investigate suspected infringements of Article 81 or Article 82 in connection with an investigation by the European Commission or on behalf of NCAs of other Member States. However, where appropriate, Regulators may participate in investigations conducted by the OFT under Part 2 or Part 2A of the Act.

## 2 Trigger for the use of the powers of investigation

**2.1** Section 25 of the Act provides that the OFT, when acting on its own behalf, may carry out an investigation if there are reasonable grounds for suspecting:

- that an agreement<sup>5</sup> falls within Article 81 and/or the Chapter I prohibition, and/or
- that there has been an infringement of Article 82 and/or the Chapter II prohibition.

The formal powers of investigation can only be used where this requirement is met. Thus the OFT is not obliged to determine whether the conditions in Article 81(3) of the EC Treaty (in the case of an agreement which is suspected to fall within Article 81) or section 9(1) of the Act (in the case of an agreement which is suspected to fall within the Chapter I prohibition) may be satisfied before it may conduct an investigation.<sup>6</sup>

**2.2** Whether there are reasonable grounds for suspicion will depend upon the OFT's assessment of the information available. Examples of information that may be a source of reasonable grounds for suspicion include information provided by disaffected members of a cartel, statements from employees or ex-employees, or a complaint.

**2.3** However, in the case of an agreement which is suspected to fall within the Chapter I prohibition, if the OFT considers that the agreement has the benefit of a parallel exemption or a domestic block exemption, then it cannot investigate unless it has reasonable grounds for suspecting that the circumstances are such that it could exercise its power to cancel the exemption. Similarly, in the case of an agreement which is suspected to fall within Article 81, if the OFT considers that the agreement has the benefit of a Commission block exemption regulation, then it cannot investigate unless it has reasonable grounds for suspecting that the conditions for the withdrawal of the benefit of the regulation in question may be satisfied.<sup>7</sup>

<sup>5</sup> References in this guideline to **agreements** should, unless otherwise stated or the context demands it, be taken to include decisions by associations of undertakings and concerted practices.

<sup>6</sup> Further details of the conditions in Article 81(3) of the EC Treaty and section 9(1) of the Act are set out in the competition law guideline *Agreements and concerted practices* (OFT401).

<sup>7</sup> For a discussion of EC and domestic block exemptions and parallel exemptions under the Act and the circumstances in which they may be cancelled or withdrawn (as the case may be), see the competition law guideline *Agreements and concerted practices* (OFT401).

**2.4** Parts 3 to 5 of this guideline describe the OFT's formal powers of investigation. It should be noted that the OFT may also obtain information about undertakings<sup>8</sup>, agreements, practices and markets through informal enquiries. Such enquiries, which may be made at a meeting, in written correspondence or in a telephone conversation, may be made in addition to, or instead of, using the formal powers of investigation set out in the Act. The OFT cannot compel an undertaking to respond to an informal enquiry which is not backed by statutory powers. Undertakings are encouraged to cooperate.

<sup>8</sup> 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 financed. It includes companies, partnerships, firms, businesses, individuals operating as sole traders, agricultural cooperatives, 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.

# 3 Production of specified documents and information

## When the power can be used

- 3.1** Where the OFT has reasonable grounds for suspecting that an agreement falls within one or both of Article 81 and the Chapter I prohibition, and/or that one or both of Article 82 and the Chapter II prohibition have been infringed, it may require, under section 26 of the Act, a person to produce specified documents or to provide specified information. This is the power of investigation that the OFT uses most frequently. The section 26 power is exercised by written notice, the contents of which are described in paragraph 3.8 below.
- 3.2** It is not necessary for the section 26 power to be used before carrying out an inspection (described in Parts 4 and 5 below). For example, it may be used for the first time either during or after an inspection to clarify facts that have emerged.
- 3.3** A person may receive a notice requiring the production of documents or information on more than one occasion during the course of an investigation. For example, the OFT may require a person to produce further information after considering the material produced in response to an earlier notice under section 26.

## The scope of the power

- 3.4** The OFT can require any person to produce documents or information that it considers relate to any matter relevant to the investigation. The OFT is not limited to approaching the undertakings suspected of infringement. For example, the notice may be addressed to third parties such as complainants, suppliers, customers and competitors.
- 3.5** The OFT can also:
- take copies or extracts from any document produced

- require the person required to produce the document (or any past or present officer or employee of that person) to provide an explanation of the document if it is produced
- require the person required to produce the document to state, to the best of their knowledge or belief, where the document can be found, if the document is not produced.

**3.6** The term 'document' includes 'information recorded in any form'<sup>9</sup>. This definition includes records, such as invoices or sales figures, held on computer. 'Specified' means documents or information that are specified or described in a written notice or that fall within a category which is so specified or described. A category of documents may include, for example, invoices, agreements and minutes of meetings.

<sup>9</sup> Section 59 of the Act.

**3.7** The OFT can use the power to require the production of specified information to require the compilation and production of information that is not already in recorded form. For example, a person may be asked to provide market share information or to provide a description of a particular market using their knowledge and experience or the knowledge and experience of their staff.

## The procedure

**3.8** The power to require the production of documents or information using section 26 of the Act is exercised by serving a written notice. The written notice will usually be sent by post or by fax. The written notice must:

- state the subject matter and purpose of the investigation
- specify or describe the documents or information, or categories of documents or information, required, and
- set out the nature of the offences that may be committed if a person fails to comply when the powers of investigation are exercised (described in Part 7 of this guideline).

**3.9** The notice may also state the time and place at which a document or information must be produced and the manner and form in which it is to be produced. For example, a person may be required to produce

the documents or information at a specified address on a designated date at a particular time. If a document is produced, the OFT may require that an explanation of the document is provided. A person required by the OFT to provide an explanation of a document may be accompanied by a legal adviser.

- 3.10** In specifying documents or information in a written notice, the OFT will not seek more documents or information than it believes are necessary for the investigation as at the date of the notice.
- 3.11** When setting the appropriate time limit for the production of documents or information, the OFT will consider the amount and the complexity of the information required, the resources available to the individual or undertaking and the urgency of the case.
- 3.12** The notice may be addressed to individuals or undertakings. Where a notice is addressed to an undertaking, the appropriate person to respond is the person who is authorised by the undertaking to respond on behalf of the undertaking. Where a notice is addressed to an individual, that individual must respond, and it is not acceptable for another person to respond on their behalf. This does not prevent an individual from obtaining legal representation in relation to a notice.

## 4 Power to enter business premises without a warrant

**4.1** If the OFT has reasonable grounds for suspecting that an agreement falls within one or both of Article 81 and the Chapter I prohibition, and/or that one or both of Article 82 and the Chapter II prohibition have been infringed, it may conduct an investigation and has the power to enter premises to carry out inspections, either with or without a warrant. These powers enable the OFT to enter premises and to gain access to documents relevant to an investigation.

**4.2** The power to carry out inspections without a warrant is described in this Part of the guideline. This power is limited to business premises, which are defined in the Act as meaning any premises (or part of any premises) not used as a dwelling<sup>10</sup>. The power to carry out inspections of both business and domestic premises when a warrant has been obtained is described in Part 5 of this guideline.

<sup>10</sup> Section 27(6).

### When the power can be used

**4.3** Any officer of the OFT who is authorised in writing by the OFT to enter premises (an authorised officer) may enter business premises in connection with an investigation if they have given the occupier of the premises at least two working days' written notice of the intended entry. The occupier of the premises need not be suspected of an infringement. For example, the premises of a supplier or customer may be entered using this power.

**4.4** An authorised officer may enter business premises in connection with an investigation without a warrant and without notice if:

- the OFT has a reasonable suspicion that the premises are, or have been, occupied by a party to an agreement which it is investigating or an undertaking whose conduct it is investigating, or
- the authorised officer has been unable to give notice to the occupier, despite taking all reasonably practicable steps to give notice.

### The scope of the power

**4.5** An authorised officer entering business premises without a warrant may require:

- any person on the premises to produce any document that the authorised officer considers relates to any matter relevant to the investigation. For example, an employee may be asked to produce minutes of any meetings with competitors, the diaries of specified directors, sales data or invoices. The authorised officer can take copies of, or extracts from, any document produced
- any person on the premises to provide an explanation of any document produced. For example, an employee may be requested to provide an explanation of the entries or codes on an invoice or spreadsheet
- any person to state, to the best of their knowledge and belief, where any document that the authorised officer considers relates to any matter relevant to the investigation can be found
- any information, which is stored in any electronic form and is accessible from the premises, and which the officer considers relates to any matter relevant to the investigation, to be produced in a form in which it can be read and can be taken away.

He may also take any other steps necessary in order to preserve the documents or prevent interference with them. This includes requiring that the premises (or any part of the premises, including offices, files and cupboards) be sealed for such time as is reasonably necessary to enable the inspection to be completed. This time period will not be for longer than 72 hours, except where an undertaking consents to a longer time or where access to documents is unduly delayed, such as by the unavailability of a person who can provide access.

**4.6** An authorised officer may take with him any equipment that he deems necessary when entering any premises under this power. For example, the authorised officer may take portable computer equipment and tape recording equipment.

## The procedure

- 4.7** If the authorised officer is carrying out an inspection of business premises without a warrant after giving at least two working days' written notice, the written notice must state:
- the subject matter and purpose of the investigation, and
  - the nature of the offences that may be committed if a person fails to comply when the powers of investigation are exercised (described in Part 7 below).
- 4.8** If the authorised officer is entering the premises without a warrant and without written notice, he may enter only on production of evidence of his authorisation by the OFT and a document indicating:
- the subject matter and purpose of the investigation, and
  - the nature of the offences that may be committed if a person fails to comply when the powers of investigation are exercised (described in Part 7 below).
- 4.9** The authorised officer will normally arrive at the premises during office hours. On entering the premises, the authorised officer will produce evidence of his identity. He will also hand over a separate document which sets out the powers of the authorised officer and states that the occupier may request that a legal adviser is present. Where possible, the person in charge at the premises should designate an appropriate person to be a point of contact for the authorised officer during the inspection. It is the OFT's practice that at the end of the inspection, the authorised officer will provide where practicable a list of documents and extracts from documents of which copies have been taken.

## Access to legal advice

- 4.10** An undertaking being inspected will be able to contact its legal advisers during the course of an inspection. The authorised officer will grant a request to wait a reasonable time for legal advisers to arrive at the premises before the inspection continues, if he considers that it is appropriate to do so in the circumstances.

**4.11** The exercise of the right to consult a legal adviser must not unduly delay or impede the inspection. Any delay must be kept to a strict minimum. The main concern is that any delay might provide an opportunity for evidence to be tampered with or for other parties to a suspected infringement to be warned about the inspection, for example, by telephone or email. To reduce this concern, the authorised officer may attach such conditions as he considers appropriate when agreeing a reasonable time to wait. The conditions could include, for example, the sealing of cabinets, keeping business records in the same state and place as when the authorised officer arrived, suspending external e-mail and allowing the authorised officer to enter and remain in occupation of selected offices. If an undertaking has an in-house legal adviser on the premises, or if the undertaking has been given notice of the inspection, the authorised officer will not wait for an external legal adviser to arrive.

## 5 Power to enter and search any premises with a warrant

**5.1** An application can be made to a judge of the High Court (or the Court of Session in Scotland) for a warrant<sup>11</sup> for a named officer of the OFT (named officer) and other authorised officers<sup>12</sup> to enter and search both business and domestic premises (the latter may not be entered without a warrant).

<sup>11</sup> See Civil Procedure Rules, *Practice Direction - Application for a warrant under the Competition Act 1998* (May 2004).

<sup>12</sup> A named officer is also an authorised officer.

### When the power can be used

**5.2** In relation to business premises, the Act identifies three circumstances in which a judge of the High Court or Court of Session may issue a warrant to authorise a named officer and any other authorised officers to enter and search business premises specified in the warrant. The judge must be satisfied that there are reasonable grounds for suspecting that there are documents on the premises to be searched:

- which the OFT has required to be produced, either by written notice (section 26 of the Act) or in the course of an inspection without a warrant (section 27 of the Act), and which have not been produced
- which the OFT has the power to require to be produced by written notice (section 26 of the Act), but which, if required to be produced, would be concealed, removed, tampered with or destroyed, or
- which an authorised officer could have required to be produced in an inspection without a warrant (section 27 of the Act). In these circumstances the judge must also be satisfied that an authorised officer has attempted but has been unable to enter the business premises without a warrant.

**5.3** The second ground for obtaining a warrant identified above (that documents would be concealed or removed etc. if required to be produced) is the only means by which the OFT is able to carry out an

inspection of business premises with a warrant without using one of the other investigatory powers first.

**5.4** Domestic premises are defined in the Act as premises (or any part of premises) used as a dwelling, and also used in connection with the affairs of an undertaking or association of undertakings, or where documents relating to the affairs of an undertaking or association of undertakings are kept.<sup>13</sup> In relation to domestic premises, the Act identifies two circumstances in which a judge of the High Court or Court of Session may issue a warrant to authorise a named officer and any other authorised officers to enter and search domestic premises specified in the warrant. The judge must be satisfied that there are reasonable grounds for suspecting that on any domestic premises to be searched there are documents:

- which the OFT has required to be produced by written notice (section 26 of the Act) and which have not been produced, or
- which the OFT has the power to require to be produced by written notice under section 26 of the Act; and if the documents were required to be produced, they would not be produced but would be concealed, removed, tampered with or destroyed.

### The scope of the power

**5.5** The warrant will authorise a named officer, and any other authorised officers to:

- Enter the premises specified in the warrant using such force as reasonably necessary. Authorised officers entering the premises will be entitled to use force only if they are prevented from entering the premises and may use only such force as is reasonably necessary for the purpose of gaining entry. Authorised officers cannot use force against any person.
- Search the premises and take copies of any documents or extracts from documents appearing to be of the kind in respect of which the warrant was granted (identified in paragraph 5.9 below). Authorised officers can search offices, desks and filing cabinets etc. to find such documents. It is the OFT's practice that, at the end of the inspection, the authorised officer will, where practicable,

<sup>13</sup> Section 28A(9).

provide a list of documents and extracts from documents of which copies have been taken.

- Take possession of any documents appearing to be of the kind in respect of which the warrant was granted if such action appears to be necessary for preserving the documents or preventing interference with them, or if it is not reasonably practicable to take copies of the documents on the premises. Unless it is impracticable in all the circumstances, no item will be removed from the premises until the authorised officers have prepared a list of the items to be removed from the premises, a copy of the list has been supplied to the occupier (or the occupier's representative) and a reasonable opportunity has been allowed to check that the list contains all items concerned and only those items. Original documents that are taken will be returned within three months.
- Take any other steps which appear necessary in order to preserve the documents or prevent interference with them. This includes requiring that the premises (or any part of the premises, including offices, files and cupboards) be sealed for such time as is reasonably necessary to enable the inspection to be completed. This time period will not be for longer than 72 hours, except where an undertaking consents to a longer time or where access to documents is unduly delayed, such as by the unavailability of a person who can provide access.
- Require any person to provide an explanation of any document appearing to be of the kind in respect of which the warrant was granted or to state to the best of their knowledge and belief where such document may be found.
- Require any information, which is stored in any electronic form and is accessible from the premises, and which the officer considers relates to any matter relevant to the investigation, to be produced in a form in which it can be read and can be taken away.

**5.6** In respect of business premises, the officers' powers to take copies of, and take possession of, documents will include the powers to:

- Take copies, or take possession, of any document in order to determine later whether (or the extent to which) the document is

<sup>14</sup> Section 50(1) Criminal Justice and Police Act 2001.

<sup>15</sup> Section 50(2) Criminal Justice and Police Act 2001.

of a kind in respect of which the warrant was granted, where in all the circumstances it is not reasonably practicable to determine this on the premises.<sup>14</sup>

- Take copies, or take possession of, any document comprised in something else where in all the circumstances it is not reasonably practicable on the premises to separate the document which is of a kind in respect of which the warrant was granted from a document or information which is not, but in which it is comprised.<sup>15</sup>

**5.7** Authorised officers entering premises under a warrant may take with them such equipment as they deem necessary. This will include equipment that can be used to enter the premises using reasonable force (for example, equipment that can be used to break locks) as well as equipment that can be used to facilitate the search (for example, computer equipment).

**5.8** The warrant may also authorise other persons to accompany the authorised officers on the inspection, such as computer technicians or industry experts who may carry out specific tasks under supervision of authorised officers.

**5.9** The category of documents that authorised officers can take copies of etc. (as set out in paragraph 5.5 above) depends on the ground under which the warrant was obtained:

- Where the warrant was granted because a person failed to produce documents, the authorised officers can take copies etc. of any documents which were required to be produced and were not produced under section 26 or 27 of the Act.
- Where the warrant was granted because there were reasonable grounds for suspecting that documents would have been tampered with etc., the authorised officers can take copies etc. of any such documents. In addition, if the judge is satisfied that it is reasonable to suspect that there are also other documents relating to the investigation on the premises, the warrant will authorise the authorised officers to take copies etc. of any such document.

- Where the warrant was granted because an authorised officer was unable to enter business premises, the authorised officers can take copies etc. of any document which could have been required to be produced under section 27 of the Act had they been able to enter the premises.

## The procedure

**5.10** The powers set out in paragraphs 5.5 to 5.9 may only be exercised on production of the warrant.

**5.11** The warrant must indicate:

- the subject matter and purpose of the investigation, and
- the nature of the offences that may be committed if a person fails to comply when the powers of investigation are exercised (described in Part 7 below).

The warrant continues in force for one month from the date of issue.

**5.12** The authorised officers will normally arrive at the premises during office hours. On entering the premises, the named officer will produce evidence of their identity. The named officer will also hand over a document which sets out the powers of the authorised officers and states that the occupier may request that a legal adviser be present. Where possible, the person in charge at the premises should designate an appropriate person to be a point of contact for the authorised officers during the inspection.

**5.13** If there is no one at the premises, the named officer must take reasonable steps to inform the occupier of the premises of the intended entry. If the occupier is informed, the occupier or their legal or other representative must be given a reasonable opportunity to be present when the warrant is executed. If the named officer has been unable to inform the occupier of the intended entry, he is under a

duty to leave a copy of the warrant in a prominent place on the premises. On leaving premises that are unoccupied the named officer must leave them secured as effectively as he found them.

### **Access to legal advice**

**5.14** See paragraphs 4.10 to 4.11 above.

# 6 Limitations on the use of the powers of investigation under Part I of the Act

## Privileged communications

**6.1** The power to require the production of documents under Part I of the Act, either on written notice or during an inspection, does not extend to privileged communications. A privileged communication is defined by section 30 of the Act to mean a communication:

- between a professional legal adviser and his or her client, or
- made in connection with, or in contemplation of, legal proceedings and for the purposes of those proceedings

which would be protected from disclosure in proceedings in the High Court on grounds of legal professional privilege or in the Court of Session on grounds of confidentiality of communications.

**6.2** When the OFT is investigating suspected infringements of Article 81 or Article 82 in the UK on its own initiative (or at the request of another NCA or on behalf of the European Commission - see paragraphs 10.5 and 9.9, respectively), UK rules on legal professional privilege ('privilege') will apply. This means that the communications of in-house lawyers, in addition to lawyers in private practice, can benefit from privilege. This is a different rule to that applied by the European Commission, which does not allow the communications of in-house lawyers to benefit from privilege.<sup>16</sup>

<sup>16</sup> Case 155/79 *AM & S Europe v Commission* [1982] ECR 1575, [1982] CMLR 264.

**6.3** Whilst UK privilege rules would apply to cases being investigated in the UK by the OFT on its own behalf, the OFT could be sent the communications of in-house lawyers, or lawyers qualified outside the EU, by an NCA from another Member State where the communication of such lawyers are not privileged. Under those circumstances, the OFT may use the documentation received from the other NCA in its investigation.

- 6.4** The European Commission's privilege rules (which do not extend to in-house counsel) will continue to apply to investigations that it conducts on its own behalf (see further paragraphs 9.7 to 9.9 below).

### Self-incrimination

- 6.5** Privilege against self-incrimination is an aspect of the right to a fair trial guaranteed by Article 6 of the European Convention on Human Rights<sup>17</sup>. A privilege against self-incrimination has also been recognised in EC jurisprudence in relation to investigation of suspected breaches of Article 81 and Article 82<sup>18</sup>. In the context of investigations under the Act, the privilege recognised in EC jurisprudence is consistent with the requirements of the European Convention on Human Rights<sup>19</sup>.

- 6.6** The OFT may compel an undertaking to provide specified documents or specified information but cannot compel the provision of answers which might involve an admission on its part of the existence of a competition law infringement, which it is incumbent upon the OFT to prove. The OFT may, however, request documents or information relating to facts: for example, whether a particular employee attended a particular meeting.

- 6.7** A statement made by a person in response to a requirement imposed by the OFT when investigating suspected competition law infringements may not generally be used in evidence against that person on a prosecution for the cartel offence under the Enterprise Act 2002 (the Enterprise Act)<sup>20</sup>.

### Disclosure of information

- 6.8** Part 9 of the Enterprise Act imposes limits on the disclosure of information relating to the affairs of any individual or to any particular business of an undertaking, that is obtained in connection with the exercise of any function of the OFT under the Act (including the OFT's powers of investigation under the Act).

<sup>17</sup> This is given effect in the United Kingdom by the Human Rights Act 1998.

<sup>18</sup> See paragraphs 77-78 of the judgment in Case T-112/98 *Mannesmannröhren-Werke AG v Commission* [2001] ECR II-729.

<sup>19</sup> See *Office of Fair Trading v X* [2003] EWHC 1042 (Comm), [2003] 2 All ER (Comm) 183.

<sup>20</sup> Section 30A. The same general principle applies also to requirements imposed by the OFT when investigating under Part 2 or Part 2A of the Act: see sections 65B and 65K.

**6.9** The Enterprise Act requires that such information is not to be disclosed during the lifetime of the individual in question or while the undertaking continues in existence unless disclosure is specifically permitted under Part 9 or is made pursuant to a power or duty to disclose information which exists apart from Part 9.

**6.10** Part 9 of the Enterprise Act provides a number of categories of permitted disclosure<sup>21</sup>. For example, the OFT is permitted to disclose information for the purpose of facilitating any of its functions (including its functions under the Act and the Enterprise Act)<sup>22</sup>. Disclosure is also allowed with the consent either of the individual to whose affairs the information relates or, where the information relates to the business of an undertaking, the consent of the person carrying on the business. In either case, where the information was obtained by the OFT from a different person (who had the information lawfully and whose identity is known to the OFT), then the consent of that person will also be required<sup>23</sup>.

<sup>21</sup> Sections 239 to 243 Enterprise Act.

<sup>22</sup> Section 241(1) Enterprise Act.

<sup>23</sup> Section 239 Enterprise Act.

**6.11** Before making a permitted disclosure (for example, where such information is included in material to be published), the OFT must have regard to three considerations:

- the need to exclude, so far as is practicable, information the disclosure of which would in its opinion be contrary to the public interest<sup>24</sup>
- the need to exclude, so far as is practicable, commercial information disclosure of which it thinks might significantly harm the legitimate business interests of the undertaking to which it relates, or information relating to the private affairs of an individual disclosure of which it thinks might significantly harm the individual's interests<sup>25</sup>, and
- the extent to which the disclosure of commercial information is necessary for the purposes for which it is to be disclosed<sup>26</sup>.

<sup>24</sup> Section 244(2) Enterprise Act.

<sup>25</sup> Section 244(3) Enterprise Act.

<sup>26</sup> Section 244(4) Enterprise Act.

The OFT may have to edit documents it proposes to disclose to remove information: for example, by blanking out parts of documents or by aggregating figures.

<sup>27</sup> The Competition Act 1998 (Office of Fair Trading's Rules) Order 2004 (SI 2004/2751), Rule 6(1).

**6.12** Where, under the OFT's Rules, the OFT proposes to disclose any information identified by the person supplying it as being confidential information, the OFT will inform the person supplying the information of its proposed action, and give that person a reasonable opportunity to make representations to the OFT<sup>27</sup>.

<sup>28</sup> Article 12 of 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). See the competition law guideline *Modernisation* (OFT442) for further details.

**6.13** For disclosure of information to the Commission and NCAs, the OFT has a power to disclose, apart from Part 9 of the Enterprise Act, provided by the Modernisation Regulation<sup>28</sup>. This allows disclosure to the Commission and NCAs for the purpose of applying Articles 81 and 82. Where information relates to the affairs of any individual or to any business of an undertaking, the OFT will have regard to the three considerations outlined at paragraph 6.11 above before making such disclosure to the Commission or an NCA. However, such disclosure is not made under the OFT's Rules, and accordingly the procedure outlined in paragraph 6.12 above does not apply. Part 9 of the Enterprise Act also specifically permits disclosure of information where disclosure is required for the purpose of a Community obligation<sup>29</sup>.

<sup>29</sup> Section 240 Enterprise Act. Such an obligation may arise from Article 11 or Article 18(6) of the Modernisation Regulation.

# 7 Offences relating to the powers of investigation under Part I of the Act

**7.1** The Act sets out a number of criminal offences which may be committed where a person fails to co-operate when the powers of investigation set out in Part I of the Act are exercised. It is an offence for a person to:

- fail to comply with a requirement imposed under the powers of investigation in the Act (subject to certain defences, see below)
- intentionally obstruct an authorised officer carrying out an inspection either with or without a warrant
- intentionally or recklessly destroy or otherwise dispose of or falsify or conceal a document that they have been required to produce or cause or permit its destruction, disposal, falsification or concealment, or
- provide information that is false or misleading in a material particular if they know, or are reckless as to whether, it is false or misleading, either to the OFT or to another person such as an employee or legal adviser, knowing that it will be used for the purpose of providing information to the OFT.

**7.2** A person who fails to comply with a requirement to produce a document has a defence if they can prove that the document was not in their possession or control and that it was not reasonably practicable to comply with this requirement. It is a defence for a person who fails to comply with a requirement to provide information or an explanation of a document or to state where a document is to be found if they can prove that they had a reasonable excuse for failing to comply with the requirement.

**7.3** Failing to comply with a requirement imposed under section 26 or section 27 of the Act is not an offence if the OFT has failed to act in accordance with the provision in question.

- 7.4** The officer as well as the body corporate is guilty of any of the offences described above if the offence that is committed by a body corporate is proved to have been committed with the consent or connivance of an officer or to be attributable to their neglect. An 'officer' is defined to mean a director, manager, secretary or other similar officer of the company or a person purporting to act in any such capacity. Where the affairs of the body corporate are managed by its members, a member is also guilty of an offence if the offence of the body corporate is proved to have been committed with the consent or connivance of the member or to be attributable to their neglect as if they were a director. In Scotland, a partner or person purporting to be a partner, as well as the partnership, may be guilty of the offence.
- 7.5** Offences will be tried either summarily in the Magistrates' Court or Sheriff Court or, in the case of more serious offences, on indictment in the Crown Court or the High Court of the Justiciary. The Code for Crown Prosecutors will be followed in determining the appropriate court in which to commence proceedings.
- 7.6** A person convicted of intentionally obstructing an authorised officer carrying out an inspection without a warrant will be liable to a fine. The consequences of intentionally obstructing an authorised officer exercising their powers under a warrant are more serious. Conviction on indictment may lead to a fine, to imprisonment for up to two years, or both.
- 7.7** The sanctions that may be imposed by the courts on a person found guilty of each offence described in paragraph 7.1 are set out in the table following. The sanctions that are available for each offence differ according to whether the person is found guilty on summary conviction or on indictment.

<b>Offence</b>	<b>Sanction on summary conviction</b>	<b>Sanction on conviction on indictment</b>
Fail to comply with a requirement imposed under the powers of investigation	Fine of up to the statutory maximum (currently £5000)	Unlimited fine
Intentionally obstruct an authorised officer carrying out an inspection without a warrant	Fine of up to the statutory maximum	Unlimited fine
Intentionally obstruct an authorised officer carrying out an inspection with a warrant	Fine of up to the statutory maximum	Unlimited fine and/or up to two years' imprisonment
Intentionally or recklessly destroy, dispose of, falsify or conceal a document the production of which has been required or cause or permit its destruction etc.	Fine of up to the statutory maximum	Unlimited fine and/or up to two years' imprisonment
Knowingly or recklessly provide information that is false or misleading in a material particular	Fine of up to the statutory maximum	Unlimited fine and/or up to two years' imprisonment

## 8 Powers of investigation in relation to exclusions

<sup>30</sup> Section 3 and Schedules 1-4. The Act does not provide for exclusions from Article 81 or Article 82.

<sup>31</sup> Schedule 1.

<sup>32</sup> Schedule 3. However, the exclusion is repealed with effect from 1 May 2007: see the competition law guideline *Modernisation* (OFT442).

<sup>33</sup> Schedule 3.

<sup>34</sup> The exclusion for vertical agreements is repealed with effect from 1 May 2005: see the competition law guideline *Vertical agreements* (OFT419). See the competition law guideline *Land agreements* (OFT420) for further detail in relation to land agreements.

<sup>35</sup> Ten working days starting with the date notice is given. See Rule 14(3).

**8.1** The Act specifically excludes certain categories of agreements and/or conduct from the Chapter I prohibition or the Chapter II prohibition<sup>30</sup> (see competition law guidelines *Agreements and concerted practices* (OFT401) and *Abuse of a dominant position* (OFT402)). In relation to some of these categories, the OFT is able to withdraw the application of the exclusion in certain circumstances. Those categories are:

- certain agreements falling within the mergers exclusion<sup>31</sup>
- agreements which are the subject of a direction under section 21(2) of the Restrictive Trade Practices Act 1976<sup>32</sup>
- agreements which relate to production of or trade in 'agricultural products' as defined in the EC Treaty and in Council Regulation (EEC) No 26/62, or to certain farmers' cooperatives<sup>33</sup>, and
- certain vertical agreements and land agreements which fall within the relevant order made pursuant to section 50 of the Act<sup>34</sup>.

**8.2** The OFT may issue a direction to withdraw the application of an exclusion from a particular agreement falling within one of the above categories if it considers that the agreement would fall within the Chapter I prohibition and that it would be unlikely to satisfy the conditions in section 9(1) of the Act.

**8.3** If the OFT is considering withdrawing an exclusion, it may require any party to the agreement in question to give it such information in connection with the agreement as it requires. This must be done by sending a written notice. If the party in question fails to provide the information required within the time period specified in the OFT's Rules<sup>35</sup> without reasonable excuse, the OFT may give a direction withdrawing the exclusion.

- 8.4** Section 194A of the Broadcasting Act 1990 allows the OFT and OFCOM (but not the other Regulators) to exercise the powers of investigation in the Act in respect of certain agreements relating to television news provision. A special procedure must, however, be observed before the powers can be exercised.
- 8.5** Section 160 of the Financial Services and Markets Act 2000 allows the OFT (but not the Regulators) to exercise powers to request information in respect of its competition scrutiny of the regulating provisions and practices of the Financial Services Authority. Section 305 of the Financial Services and Markets Act 2000 allows the OFT (but not the Regulators) to exercise powers to request information in respect of its competition scrutiny of recognised investment exchanges and clearing houses.

## 9 Power to assist the European Commission in its investigations

**9.1** The European Commission has formal powers enabling it to undertake investigations relating to Article 81 and Article 82. Part 2 of the Act and the Modernisation Regulation together provide the OFT with powers to assist the European Commission. The OFT may actively participate in European Commission investigations relating to Article 81 or Article 82 in three ways:

- the OFT may be required to **assist** the European Commission when European Commission officials carry out an inspection of business premises in the United Kingdom
- the European Commission may request that the OFT carry out an inspection of business premises **on its behalf**, and/or
- the OFT may be required to **assist** the European Commission when European Commission officials carry out an inspection of non-business premises in the United Kingdom.

**9.2** These powers are not available to the Regulators; however, they may participate in inspections carried out by the OFT on behalf of the European Commission if the industry being investigated falls within their area of expertise.

**9.3** When **assisting** the European Commission with an inspection of business premises, the officers of the OFT have the same powers as an official authorised by the European Commission<sup>36</sup>. The OFT may obtain a warrant where a European Commission inspection is being, or is likely to be, obstructed. The warrant will authorise officers of the OFT and European Commission officials to enter the premises in question and to search for books and records and the sealing of the premises or part of the premises for the period and to the extent necessary for the inspection.

<sup>36</sup> Article 20(5) of the Modernisation Regulation.

**9.4** When the OFT is carrying out an inspection of business premises **on behalf of** the European Commission, the officers of the OFT will have been given an authorisation under the Act which has the effect of providing them with the powers of an official authorised by the European Commission<sup>37</sup>. This means that the officers will possess further powers that are not available when the OFT investigates suspected infringements of Article 81 or Article 82 on its own behalf. Primarily, the officers will not only be able to ask employees of the undertaking under inspection for explanations of documents but also of **facts** relating to the subject matter and purpose of the inspection<sup>38</sup>. The authorisation will identify the officers, the subject matter and purpose of the investigation and draw attention to the penalties which an undertaking may incur in connection with the inspection under the relevant provision of Community law<sup>39</sup>. The OFT may obtain a warrant where an inspection of business premises which it is carrying out on behalf of the European Commission is being, or is likely to be, obstructed<sup>40</sup>. The warrant will authorise officers of the OFT, and any accompanying European Commission officials, to enter the premises in question and to search for books and records that the OFT officers have the power to examine, using such force as is reasonably necessary for those purposes. The warrant will also authorise taking copies of the books and records and the sealing of the premises or part of the premises for the period and to the extent necessary for the inspection.

<sup>37</sup> Section 62B(1).

<sup>38</sup> Article 20(2)(e) of the Modernisation Regulation.

<sup>39</sup> Article 23(1)(c) (fines) and Article 24(1)(e) (periodic penalty payments) of the Modernisation Regulation.

<sup>40</sup> Section 63.

**9.5** When **assisting** the European Commission with an inspection of non-business premises, the OFT must obtain a warrant **before** any inspection can be carried out. The warrant will authorise officers of the OFT and officials of the European Commission to enter the non-business premises. It may also authorise them to search for books and records that the officials have power to examine, and to take copies of the books and records, and may authorise the use by them of such force as is reasonably necessary for the purposes of effecting entry and searching. When assisting the European Commission in this way, the officers of the OFT, in addition to being able to do anything which the warrant authorises them to do, have the same powers as an official authorised by the European Commission<sup>41</sup>.

<sup>41</sup> Article 21(4) of the Modernisation Regulation.

**9.6** Any warrant obtained by the OFT in connection with an investigation by the European Commission must indicate the subject matter and purpose of the investigation and the nature of the offence for obstruction described in paragraph 9.10. The warrant may also authorise other persons to accompany the authorised officers on the inspection, such as computer technicians or industry experts who may carry out specific tasks under supervision of authorised officers.

**9.7** The range of documents that can benefit from legal professional privilege in inspections conducted **to assist** the European Commission is narrower than when the OFT is investigating suspected infringements of Article 81 or Article 82 on its own behalf or on behalf of another NCA. The European Court has recognised that correspondence between a client and an external legal adviser, entitled to practise in one of the Member States, is subject to legal professional privilege where: (i) the correspondence follows the initiation of proceedings by the European Commission and concerns the defence of the client; or (ii) the correspondence existed before the initiation of proceedings but is closely linked with the subject-matter of the proceedings. Correspondence between a client and an external legal adviser who is not entitled to practise in one of the Member States or between a client and an in-house legal adviser (unless the in-house legal adviser is simply reporting the legal advice of an external legal adviser) is not recognised by the European Court as being protected by legal professional privilege<sup>42</sup>.

**9.8** Where an inspection is being conducted **to assist** the European Commission, legal professional privilege can be claimed only for documents that fall within the category of correspondence that the European Court has recognised as being subject to legal professional privilege. In order to claim legal professional privilege for certain documents during an inspection the occupier must make a case to the European Commission demonstrating why the documents are covered by legal professional privilege.

<sup>42</sup> Case 155/79 *AM & S Europe v Commission* [1982] ECR 1575, 1982 [CMLR] 264.

**9.9** Where an inspection is being conducted by the OFT **on behalf of** the European Commission (under sections 62B and/or 63 of the Act), the United Kingdom rules on legal professional privilege will apply<sup>43</sup> .

<sup>43</sup> Section 65A of the Act.

**9.10** A person will be guilty of an offence if they intentionally obstruct any person in the exercise of their powers under a warrant issued in relation to a European Commission investigation relating to Article 81 or 82. The sanction is a fine of up to the statutory maximum on summary conviction or an unlimited fine and/or a maximum of two years' imprisonment on conviction on indictment.

# 10 Power to assist National Competition Authorities of EC Member States

**10.1** The Modernisation Regulation enables the NCAs to investigate suspected infringements of Article 81 and Article 82 on behalf of each other.

<sup>44</sup> Section 65D.

**10.2** Under Part 2A of the Act, the OFT may carry out an inspection or other fact-finding measure in the United Kingdom on behalf of an NCA of another Member State in order to assist it in establishing whether there has been an infringement of Article 81 or 82<sup>44</sup>.

<sup>45</sup> Section 65E.

<sup>46</sup> Section 65F.

<sup>47</sup> Sections 65G and 65H.

**10.3** Part 2A provides the OFT with similar powers of investigation to those it uses to investigate suspected infringements of Article 81 and 82 under Part I of the Act. This means that where there are reasonable grounds for suspecting that an agreement falls within Article 81 or that the prohibition in Article 82 has been infringed, the OFT will have the power to:

- require the production of specified documents and information (see Part 3 above)<sup>45</sup>
- enter business premises without a warrant (see Part 4 above)<sup>46</sup>, and
- enter and search business or domestic premises with a warrant (see Part 5 above)<sup>47</sup>.

**10.4** These powers of investigation are not available to the Regulators; however, they may participate in inspections under warrant carried out by the OFT on behalf of other NCAs where the industry being investigated falls within their area of expertise. The warrant may authorise officers of a relevant Regulator to accompany authorised officers on the inspection, and they may carry out specific tasks under the supervision of authorised officers.

**10.5** These powers of investigation are subject to the same restrictions concerning legal professional privilege and self-incrimination that are described in Part 6, in relation to investigations under Part I of the

Act. Individuals who fail to comply when these powers of investigation are exercised risk committing the same offences and face the same possible sanctions as described in Part 7.

**10.6** Although NCAs of other Member States do not have any formal powers of investigation within the United Kingdom, officers of other NCAs may be authorised to accompany the authorised officers of the OFT on an inspection where the OFT uses its power to enter premises under a warrant. Such officers may carry out specific tasks under the supervision of the authorised officers of the OFT <sup>48</sup>.

<sup>48</sup> Sections 65G(4) and 65H(4).







## **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.of.gov.uk](http://www.of.gov.uk)

All guidance booklets can be ordered or downloaded from the OFT website at [www.of.gov.uk](http://www.of.gov.uk) Or you can request them by:

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