

# Land Agreements

**The application of competition law following the  
revocation of the Land Agreements Exclusion Order**

March 2011

OFT1280a

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# 1 INTRODUCTION

## Purpose of this guideline

- 1.1 This guideline is aimed at businesses that are party to land agreements and their legal advisors. For the purposes of this guideline, land agreements are defined as agreements which create, alter, transfer or terminate an interest in land. Land agreements therefore include transfers of freehold interests, leases and assignments of leasehold interests. They also include agreements relating to easements, licences and, in Scotland, interests under a lease and other heritable rights in or over land, such as heritable securities.
- 1.2 Article 101 of the Treaty on the Functioning of the European Union (the TFEU) and the Chapter I prohibition contained in the Competition Act 1998 (the Act) both prohibit, in certain circumstances, agreements which prevent, restrict or distort competition. The UK law prohibiting anti-competitive agreements is referred to either as 'the Chapter I prohibition' or 'the prohibition' in this guideline.
- 1.3 Prior to 6 April 2011, many land agreements have been excluded<sup>1</sup> from the prohibition of anti-competitive agreements contained in Chapter I of the Act. From 6 April 2011 onwards, the Chapter I prohibition applies to land agreements that have been entered into prior to and continue to exist after 6 April 2011 and also to land agreements that are entered into on or after that date.<sup>2,3</sup>

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<sup>1</sup> By virtue of the Competition Act 1998 (Land Agreements Exclusion and Revocation) Order 2004 (SI 2004/1260) and, prior to that, the Competition Act 1998 (Land and Vertical Agreements Exclusion) Order 2000 (SI 2000/310).

<sup>2</sup> By virtue of the Competition Act 1998 (Land Agreements Exclusion Revocation) Order 2010 (SI 2010/1709). Planning obligations continue to benefit from exclusion from the Chapter I prohibition by virtue of paragraph 1, Schedule 3 of the Act.

1.4 This guideline aims to assist firms in understanding how the general principles of competition law apply to land agreements in the UK. In particular, it focuses on restrictions in land agreements which restrict the way in which land may be used, or how a right over land may be exercised (referred to in this guideline as 'restrictions').<sup>4</sup>

### **When will a land agreement infringe competition law?**

1.5 There are many legitimate reasons why a person or business may impose or agree to restrictions which affect or limit the way in which land may be used or how a right over land may be exercised in a land agreement. Such restrictions do not necessarily infringe competition law and the OFT expects that only a minority of restrictions will do so.

1.6 In some cases, land will be an important 'input' to a related market where goods or services are being provided. Land agreements have the potential to restrict competition in such related markets. An agreement will not fall within the scope of the Chapter I prohibition unless its impact on competition in a related market is 'appreciable'.

1.7 Two main categories of restrictions in land agreements are more likely to restrict competition.

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<sup>3</sup> From 6 April 2011, this guideline replaces the OFT's previous guideline on *Land Agreements* (OFT420), which explained the application of the Competition Act 1998 (Land Agreements Exclusion and Revocation) Order 2004.

<sup>4</sup> The scope of this guideline is limited to explaining the application of competition law to the types of agreement that were previously excluded from the Chapter I prohibition. Given its specific purpose, the guideline focuses on the law of anti-competitive agreements. A succinct reference to the prohibitions on the abuse of a dominant position is made in chapter 6 of this guideline. The guideline does not cover merger control. Certain land agreements in connection with grocery retailing activities are subject to additional control under the Groceries Market Investigation (Controlled Land) Order 2010 (the Groceries Controlled Land Order). The provisions of the Groceries Controlled Land Order apply separately from general competition law. Land restrictions in the grocery sector which are not caught by the provisions of this Order may however be prohibited under general competition law.

- 1.8 First, if the parties to a land agreement are competitors in a relevant market and a restriction regarding the use of land is aimed at sharing or carving-up markets between those parties, the agreement is very likely to constitute a serious infringement of the Chapter I prohibition.
- 1.9 Second, other types of restriction may fall within the Chapter I prohibition if they have the effect of restricting competition by raising barriers to entry (or expansion) in a particular market where a party to the agreement is carrying out an economic activity and a restriction makes access to that market by other competitors more difficult.<sup>5</sup> These types of restriction are unlikely to appreciably restrict competition unless one or more of the parties to the agreement possess 'market power' in a related market. Market power is the ability to maintain prices above competitive levels or to maintain output in terms of product quantities, product quality, and variety or innovation below competitive levels for a not insignificant period of time.<sup>6</sup>
- 1.10 Market power is unlikely to arise where there is sufficient competition from existing competitors in the related market, or other suitable land is available for use in the related market by other competitors. Chapter 4 provides further detail on how to assess such factors.
- 1.11 Agreements which appreciably restrict competition may nevertheless be exempt from the Chapter I prohibition, if certain criteria are satisfied (as explained further in chapter 5 of this guideline).

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<sup>5</sup> This may be the case, for example, in relation to the following types of restrictions: (i) arrangements where a landlord agrees not to allow access to a site or sites owned by the landlord to competitors of the lessee; (ii) lease provisions which restrict the commercial activity that a lessee is permitted to undertake on leased premises; and (iii) restrictive covenants in the context of a sale of land where a restriction is imposed on the future use of that land.

<sup>6</sup> The degree of market power that is normally required for a finding of an infringement of the Chapter I prohibition/Article 101 TFEU is less than the degree of market power required for a finding of dominance under Chapter II of the Act/Article 102 TFEU. See chapters 4 and 6.

1.12 The compatibility of a land agreement with the prohibition needs to be assessed taking into account present and also possible future circumstances. An agreement which does not infringe the Chapter I prohibition at the time when it is entered into may, subsequently and as a result of change in its economic context, infringe the Chapter I prohibition.

### **What happens if an agreement infringes competition law?**

1.13 Parties to a prohibited agreement (that is, an agreement which falls within the scope of the prohibition and does not benefit from exemption), or a party abusing a dominant position may face enforcement action by the OFT, a sectoral regulator,<sup>7</sup> or, where there may be an effect on trade between Member States, the European Commission. These authorities have the power to investigate suspected infringements, to impose financial penalties of up to 10 per cent of a firm's worldwide turnover and to give directions to take steps to bring an infringement to an end.<sup>8</sup>

1.14 A restriction which infringes the Chapter I prohibition is void and unenforceable. The effect of this on the remainder of an agreement is a matter for the law which governs the particular agreement. In some cases a court may consider it possible to 'sever' the provisions of an agreement which infringe the Chapter I prohibition and in such cases, the other terms of the agreement would remain valid and enforceable.<sup>9</sup>

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<sup>7</sup> The following sectoral regulators have concurrent powers to enforce competition law in the UK: the Office of Communications; the Gas and Electricity Markets Authority; the Water Services Regulation Authority; the Office of Rail Regulation; the Civil Aviation Authority; and the Northern Ireland Authority for Utility Regulation.

<sup>8</sup> See the OFT guideline *Enforcement* (OFT407).

<sup>9</sup> This has been stated, amongst others, by the High Court in *Inntrepreneur Estates Ltd v Mason*, [1994] 68 P&CR 53, [1993] 2 CMLR 293, QB, and by the Court of Appeal in *Inntrepreneur Estates (GL) Ltd v Boyes*, [1995] ECC 16, [1993] 2 EGLR 112, CA.

- 1.15 Parties to a prohibited agreement may also be susceptible to private action before the UK courts for damages or injunctive relief for breaches of competition law, by any person who has suffered loss as a result of an infringement.

### **Structure of the remainder of this guideline**

- 1.16 Chapter 2 explains the main elements of the law prohibiting agreements and certain other arrangements which prevent, restrict or distort competition.
- 1.17 Chapter 3 summarises the OFT's approach to defining markets.<sup>10</sup> Defining the relevant market is an important step in assessing agreements or conduct under the competition rules.
- 1.18 Chapter 4 sets out the types of restrictions that are more likely to restrict competition and the main factors relevant to assessing whether a land agreement prevents, restricts or distorts competition to an appreciable extent. Chapter 4 also notes certain other restrictions of competition which could potentially arise in the context of land agreements, but which are outside the scope of this guideline.
- 1.19 Chapter 5 explains the circumstances in which land agreements that appreciably restrict competition may nevertheless be exempt from the Chapter I prohibition.
- 1.20 Chapter 6 summarises the circumstances in which a firm which has a dominant market position may infringe competition law by abusing this position, in way that excludes its competitors from the relevant market, or exploits its customers.
- 1.21 Chapter 7 sets out the consequences of infringing competition law in further detail.

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<sup>10</sup> Market definition is a tool used in all areas of competition law. Given the scope of this guideline, market definition is explained primarily in relation to the application of the Chapter I prohibition to land agreements.



- 1.22 Chapter 8 explains the circumstances in which the OFT would be unlikely to take further action in cases involving land agreements. This chapter sets out that the OFT is generally unlikely to take further action in respect of a land agreement where none of the parties to the agreement has a market share exceeding 30 per cent on the relevant market.<sup>11</sup>
- 1.23 Chapter 9 sets out some worked examples of how land agreements may be assessed in relation to the Chapter I prohibition.<sup>12</sup>
- 1.24 Annexe A contains a flow-chart showing how businesses and their legal advisers can use the guideline to assess land agreements in practice. Annexe B is a glossary of terms referred to in this guideline.

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<sup>11</sup> This should not be regarded as a statement of how the Chapter I prohibition will apply to land agreements. Paragraphs 8.3 to 8.9 below apply to agreements which transfer an interest in land and relate to obligations or restrictions regarding the use of land. These paragraphs do not apply to other types of agreement which are outside the scope of this guideline, as explained in chapter 4).

<sup>12</sup> This guideline cannot cover every possible scenario and other types of restrictions should be assessed in accordance with the legal framework explained in this guideline. Businesses should consider seeking legal advice on any specific agreements which they believe may raise competition law concerns.

## 2 ANTI-COMPETITIVE AGREEMENTS: THE PROVISIONS

### Scope of the provisions

- 2.1 Both UK and EU competition law prohibit agreements and certain other arrangements which have as their object or effect the prevention, restriction or distortion of competition.<sup>13</sup> These prohibitions are set out, respectively, in Chapter I of the Act and Article 101 of the TFEU.<sup>14</sup>
- 2.2 Article 101 of the TFEU applies to agreements which have the potential to appreciably affect trade between EU Member States.<sup>15</sup> In most cases, individual land agreements will not have an effect on trade between EU Member States, and therefore, in practice, Articles 101 (and 102) TFEU are less likely to apply. However, for most practical purposes it is not necessary to distinguish between the EU and UK rules. For the remainder of this guideline, references to the Chapter I prohibition should also be understood to include the prohibition in Article 101 TFEU.<sup>16</sup>

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<sup>13</sup> Restrictions of competition by object are those that by their very nature have the potential to restrict competition. Once it has been established that an agreement has as its object the restriction of competition, there is no need to take account of its actual effect in order to conclude that the prohibition has been infringed. See, for example, the judgment of the European Court of Justice in Joined cases C-501/06 P, C-513/06 P, C-515/06 P and C-519/06 P *GlaxoSmithKline* [2009] ECR I-9291, [2010] 4 CMLR 2.

<sup>14</sup> See the OFT guideline *Agreements and concerted practices* (OFT401).

<sup>15</sup> This criterion is explained in the Commission *Guidelines on the effect of trade concept contained in Articles 81 and 82 [now 101 and 102] of the Treaty* (OJ C101, 27.4.2004, p. 81). In exceptional cases, land agreements may appreciably affect trade between Member States. This may be for example the case where a competitor from another Member State is foreclosed as a result of a restriction contained in a land agreement or land agreements.

<sup>16</sup> UK competition law mirrors the substantive provisions of EU competition law. Under section 60 of the Act the courts and UK competition authorities are required to interpret UK competition law consistently with the equivalent EU provisions and have regard to relevant decisions of the European Commission.

- 2.3 The exclusion previously in place for land agreements did not apply to the equivalent prohibition in Article 101 TFEU, or the prohibitions on the abuse of a dominant position in Chapter II of the Act and Article 102 TFEU.
- 2.4 Any agreement which falls within the scope of the Chapter I prohibition or Article 101 TFEU will be void and unenforceable<sup>17</sup> unless it benefits from exemption.<sup>18</sup> When considering whether a land agreement is prohibited, it is therefore necessary to assess:
- whether the agreement prevents, restricts or distorts competition and, if it does
  - whether it benefits from exemption.
- 2.5 In order to qualify for exemption four cumulative criteria must be satisfied. These are set out in chapter 5. In this guideline the term 'exemption' includes both the exemption regime of section 9 of the Act and the equivalent provisions in Article 101(3) TFEU.<sup>19</sup>

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<sup>17</sup> In some cases a court may consider it possible to sever certain provisions which infringe the Chapter I prohibition in a land agreement, and let other terms of the agreement be valid and enforceable (as set out further in chapter 7).

<sup>18</sup> Agreements benefiting from an exclusion from competition law are outside the scope of the prohibition. Planning obligations benefit from exclusion from the Chapter I prohibition by virtue of paragraph 1, Schedule 3 of the Act.

<sup>19</sup> Certain categories of agreement benefit automatically from exemption by virtue of a block exemption. The only UK block exemption currently in force is the Public Transport Ticketing Schemes Block Exemption (SI 2001 No 319, as amended). EU block exemptions also apply under UK law by virtue of the parallel exemption regime under section 10 of the Act. There is no block exemption that relates specifically to land agreements.

## Terms used in the provisions

### Undertakings

- 2.6 Competition law applies to agreements between, and conduct by, 'undertakings'. An undertaking means any natural or legal person carrying out commercial or economic activities relating to goods or services, irrespective of that person's legal status or the way that it is financed. This includes companies, firms, businesses, partnerships, individuals operating as sole traders, agricultural co-operatives, associations of undertakings (for example trade associations), non profit-making organisations and (in some circumstances) public bodies that offer goods or services on a given market.
- 2.7 In this guideline the words 'firm', 'business' and 'company' should be understood to include all forms of undertaking.
- 2.8 The key consideration in assessing whether an entity is an undertaking for the purposes of the application of the Chapter I prohibition is whether it is engaged in economic activity. An entity may engage in an economic activity in relation to some of its functions but not others. For example, a public body such as a local authority may act as an undertaking if it leases land for commercial uses and acts as a landlord in that context, but would not be acting as an undertaking when carrying out activities that are connected with the exercise of the powers of a public authority (for example, granting planning permission).
- 2.9 The prohibition does not apply to individuals who are not acting as a business. Therefore agreements regarding the use of residential property, or transfers of leasehold or freehold interests in residential property, agreed with a private individual or between such individuals,<sup>20</sup> will not be caught by the prohibition.

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<sup>20</sup> If only one party to a lease agreement is acting as an undertaking and the other is not, the agreement would not be caught by the Chapter I prohibition.

## Agreement

- 2.10 For the purposes of competition law, an 'agreement' does not need to be a formal written agreement. The prohibition extends also to informal arrangements, concerted practices and decisions of associations of undertakings.<sup>21</sup>

## The prevention, restriction or distortion of competition

### The appreciable effect on competition test

- 2.11 An agreement will not fall within the scope of competition law unless its impact on competition is 'appreciable'. It should be noted that when assessing the impact on competition of an agreement, it is always necessary to consider the specific facts of the case. 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 appreciably restricts competition.
- 2.12 When determining whether the impact of an agreement is appreciable the OFT will have regard to the approach set out in the European Commission's *Notice on Agreements of Minor Importance*.<sup>22</sup>

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<sup>21</sup> For the purposes of the Chapter I prohibition, the OFT considers that the parties to an agreement will generally be the contracting parties executing the creation, alteration, transfer or termination of the interest in land. The position may be more complex where a restrictive covenant affecting freehold land 'runs with the land' (that is to say, it may be enforceable by not only the original contracting parties, but also between the successors in title of the land both burdened by and benefiting from the restriction). The OFT will consider on a case-by-case basis whether there is an 'agreement' between the successors in title of land with the benefit or burden of a restrictive covenant. It may be relevant to take into account, for example, whether a party is aware of a restriction and whether a party has sought or is seeking to enforce a restriction.

<sup>22</sup> OJ C368, 22.12.2001, p. 13. See also the OFT guideline *Agreements and concerted practices* (OFT401), paragraph 2.14 ff.

- 2.13 This means that unless the agreement contains a restriction of competition listed as hardcore in the Commission's Notice (such as an agreement to fix prices or allocate customers), the OFT considers that agreements between firms do not appreciably restrict competition 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 between competing undertakings (often called 'horizontal agreements'), 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 (that is, firms which are neither actual nor potential competitors on any of the markets concerned, which usually means firms operating at different levels of the supply chain).<sup>23</sup>
- 2.14 In both cases, the thresholds are reduced to five per cent where competition on the relevant market is restricted by the cumulative foreclosure effect of parallel networks of agreements having similar effects on the markets.<sup>24</sup>
- 2.15 The OFT does not consider that the impact of an agreement on competition is appreciable below these market share thresholds.
- 2.16 The mere fact that the parties' market shares exceed the thresholds set out in paragraph 2.13 above, does **not** mean that the effect of an agreement on competition is appreciable. Other factors will be

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<sup>23</sup> 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.

<sup>24</sup> The cumulative effect of parallel networks of agreements is explained in paragraph 8 of the European Commission's *Notice on Agreements of Minor Importance*.

considered in determining whether the agreement may have an appreciable effect on competition. Key factors that are relevant to this assessment are set out in chapter 4 and must be considered on a case by case basis.

- 2.17 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 the Chapter I prohibition.<sup>25</sup>

### **Present and future circumstances**

- 2.18 Finally, the compatibility of a land agreement with the prohibition needs to be assessed taking into account present and also possible future circumstances. An agreement which does not infringe the Chapter I prohibition at the time when it is entered into may, subsequently and as a result of change in its economic context, infringe the prohibition and become void and unenforceable.<sup>26</sup> Assessing the possibility of an agreement infringing competition law in the future is important when an agreement can make it more difficult for other businesses to compete effectively in a market – for example, the assessment may be affected by the entry and exit of competitors on that market or the availability of suitable sites for use in that market.

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<sup>25</sup> See OFT guideline *Agreements and concerted practices* (OFT401), paragraph 2.19.

<sup>26</sup> Similarly, an agreement which infringes the prohibition at the time when it is entered into may cease to be void and become enforceable at a later stage because of a change in circumstances. This is sometimes referred to as 'transient voidness' of an agreement. See the judgment of the Court of Appeal in *Passmore v Morland plc*, [1999] 1 CMLR 1129, CA. Paragraph 8.6 explains how the OFT may consider recent changes in parties' market shares as part of its overall assessment of whether further action by the OFT would be warranted in particular cases relating to land agreements.

### 3 MARKET DEFINITION

#### The purpose of market definition

- 3.1 Market definition is important in assessing agreements or conduct under the competition rules. For example, the Chapter I prohibition applies to agreements which have as their object or effect an appreciable prevention, restriction or distortion of competition. The appreciability test usually requires definition of a relevant market and demonstration that the agreement would have an appreciable effect on competition within that market.<sup>27</sup>
- 3.2 This chapter summarises the principles of market definition and how they apply in the context of land agreements. A fuller explanation of market definition is set out in the OFT guideline *Market Definition* (OFT403).<sup>28</sup>
- 3.3 Assessing the impact of a land agreement will generally involve the consideration of two relevant markets.
- 3.4 The first relevant market is the downstream or **related market**. This is the market involving the economic activity where the land affected by the agreement is used. For example, when considering a covenant in a lease that prevents the tenant from opening a coffee shop on leased

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<sup>27</sup> An exception is where an agreement has as its object the prevention, restriction or distortion of competition. In these cases, market definition is not necessarily a pre-requisite for a finding of infringement but the relevant market would need to be defined for the purpose of determining the relevant turnover of an undertaking, which is taken into account when determining the appropriate amount of any penalty (see the *OFT's Guidance as to the appropriate amount of a penalty* (OFT 423)).

<sup>28</sup> More specific guidance on how market definition is assessed for retail markets, in the context of the UK merger control regime, is set out in the OFT and CC joint *Merger Assessment Guidelines* (OFT1254/CC2 (Revised)) and a joint 'Commentary on retail mergers' by the Competition Commission and OFT published in March 2011. Such guidance is also illustrative for cases considered under the Act.



premises, it will be necessary to consider the impact of that covenant on the market in which a coffee shop would compete. This will depend on both the product and geographic scope of the market.

- 3.5 The product scope of the related market will be defined by the economic activity for which the land is being used. The relevant product market comprises all the products<sup>29</sup> or services that customers consider substitutable. Using the coffee shop example referred to in paragraph 3.4 above, the product scope is defined by looking at all other types of shops that compete with and constrain coffee shops. These could include coffee shops and also other similar premises selling food and beverages such as sandwich bars and cafes, depending on the degree of competitive constraint that they provide on coffee shops.
- 3.6 The geographic scope of the related market will be defined by the relevant geographic area over which the product in question competes. The geographic scope of the relevant market may be global, international, national, regional or local. Continuing the above example, suppose that the product scope had been defined as the relevant market for coffee shops and competing premises also selling beverages, such as cafes. In this case the geographic market would be defined by looking at the geographic area over which the coffee shop competes with other coffee shops or similar premises selling beverages.
- 3.7 The second relevant market is the upstream **market for land** that is suitable for use in the related market. This second market can be important when assessing the impact of a restriction over a particular piece of land, because the land is an input into the related market.
- 3.8 Determining what land is suitable (and over what geographic area) will depend on the product and geographic scope of the related market. The scope of the market for land is defined as all land that is suitable for use in the related market where the land is being used. In the example of the

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<sup>29</sup> The term 'product' is used for convenience and should be interpreted throughout this guideline to include goods and services.

coffee shop, the product scope for the land will include all the land that is suitable for use by a coffee shop and similar premises selling beverages, within the relevant geographic scope of that market.

- 3.9 A restriction on the use of land is more likely to impact on competition where the related market has a narrow geographic scope. In some retail markets, for example, the ability of customers to switch between retailers will be limited to a local level. In other markets, the related market may have a wider geographic scope and it is less likely that a restriction on the use of a particular piece of land will impact on competition in that market.
- 3.10 Market definition is not an end in itself but a key step in identifying the competitive constraints acting on a supplier of a given product or service. Market definition is usually the first step in the assessment of market power, which is explained further in chapter 4 of this guideline.

### **How to define markets**

- 3.11 In identifying the product scope of the relevant market, particular regard is paid to demand-side factors (the behaviour of customers and its effects). However, it may also be relevant to consider supply-side factors (the capabilities and reactions of suppliers in the short term) and other market characteristics.
- 3.12 The relevant product market is identified primarily by considering the response of customers of the 'focal product' to an increase in the price of the product (demand-side substitution). In order to establish which products are substitutable and therefore form part of the relevant market, a conceptual framework known as the 'hypothetical monopolist test' is usually employed.
- 3.13 Applying this framework begins by determining the narrowest product in question, called the focal product. A set of substitutable products will satisfy the hypothetical monopolist test if a hypothetical firm that was the only present and future seller of the products in the candidate market would find it profitable to raise prices for these products.

- 3.14 A set of substitute products will fail the hypothetical monopolist test (that is to say, it will be too narrow to comprise the relevant market), if customers would respond to a small but significant and non-transitory increase in price (a SSNIP) by switching to products outside the set to such an extent that the price increase by the hypothetical monopolist would not be profitable. If customers switch to substitutable products, those alternative products will form part of the same market. This process is repeated on the wider group of products until a point is reached where a SSNIP would be profitable.
- 3.15 When applying the hypothetical monopolist test, the OFT will normally use a SSNIP of five per cent, although it may sometimes be appropriate to use a higher or lower number. In most cases, a hypothetical monopolist test would be conducted relative to prevailing prices. In cases where it is thought that prevailing prices might be the outcome of anti-competitive behaviour, the OFT may consider conducting the test using prices that are lower than prevailing prices as a starting point.
- 3.16 The OFT will consider a range of evidence when evaluating whether a SSNIP by the hypothetical monopolist would be profitable. Relevant evidence may include closeness of substitution, product characteristics, relative price levels, information on prices and sales volumes across time or areas, responses from customers or third parties, relevant documents and profit margins. This list is not definitive and information gathered on these factors may be supplemented by other information and by calculations which can help the OFT judge how likely it is that a SSNIP would be profitable.<sup>30</sup>
- 3.17 The boundaries of the relevant product market are generally determined by reference to demand-side substitution alone. However, there are circumstances where the OFT may consider the response of suppliers to changes in prices – known as supply side substitution. Supply-side substitution can be thought of as a special case of entry – entry that occurs quickly (for example less than one year), effectively (for example

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<sup>30</sup> Further detail is set out in the OFT guideline *Market Definition* (OFT403).

on a scale large enough to affect prices), and without the need for substantial sunk investments. Supply-side substitution addresses the questions of whether, to what extent, and how quickly, undertakings would start supplying a market in response to a hypothetical monopolist attempting to sustain supra-competitive prices.<sup>31</sup>

- 3.18 The same demand techniques are used to determine the geographic scope of a market. Correspondingly where available, similar information to that used to identify demand-side substitution between products can be used to assess the geographic boundaries of the relevant market. Useful evidence may include: product characteristics such as perishability; differences in pricing, advertising or sales by area; customer switching data; and responses from customers or third parties.<sup>32</sup>
- 3.19 In several previous merger cases in a retail context, the OFT has used a catchment area as a pragmatic approximation to geographic market definition. This has been done for example in some retail mergers involving physical (or 'bricks and mortar') stores. From the customer's perspective, most retail markets are inherently local if they require a visit to a physical store or outlet.
- 3.20 A catchment area can be usefully defined as the area from which a store derives a large percentage of its business. Catchment areas have sometimes been determined by relying on proxies or rules of thumb. Notably, the OFT has in the past considered the area from within which about 80 per cent of a stores' customers (or sales) are drawn as a useful

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<sup>31</sup> More detail on supply side substitution is given in the OFT Guideline *Market Definition* (OFT403).

<sup>32</sup> More details on evidence are provided in the OFT Guideline *Market Definition* (OFT403).

starting point when considering catchment areas.<sup>33</sup> This is without prejudice to other rules being used in appropriate circumstances.

- 3.21 To delineate catchment areas, it is common to use a measure around the store which is being considered. The measure could be a distance or a drive time from the store.<sup>34</sup>
- 3.22 In the absence of sufficient information enabling the geographical market to be defined on the basis of catchment areas, or where these would not be a realistic representation of market definition of using the hypothetical monopolist test, other proxies may be relevant to determine the geographic market. For example, postal areas and Local Authority

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<sup>33</sup> See, for example, *Travis Perkins plc/BSS Group plc* (OFT ME/4609/10, October 2010), *Completed acquisition by Lodge Brothers Funerals Ltd of two funeral homes in the London borough of Hillingdon* (OFT ME/4245/09, December 2009), *Home Retail Group plc / Focus (DIY) Ltd* (OFT ME/3427/07, April 2007) and *Nationwide Building Society/Derbyshire Building Society* (OFT ME/3872/08, November 2008).

<sup>34</sup> For example, a 15-minute drive-time catchment area would encompass the area from which customers could reach a store by driving for 15 minutes or less. By way of illustration, drive times have been used by the OFT and the Competition Commission to define catchment areas in the following sectors: (i) cinemas – a 20-minute drive-time catchment area was used in *Terra Firma Investments (GP) 2 Ltd/United Cinemas International (UK) Limited and Cinema International Corporation (UK) Limited* (OFT ME/1322/04, January 2005) and *Vue Entertainment Holdings (UK) Ltd/A3 Cinema Ltd* (CC, February 2006); (ii) supermarkets – a 10- or 15-minute drive-time catchment area for supermarkets of 1400 square metres and over and a five- or 10-minute drive-time catchment area for supermarkets of under 1400 square metres were used in *Safeway PLC Safeway plc and Asda Group Limited (owned by Wal-Mart Stores Inc); Wm Morrison Supermarkets PLC; J Sainsbury plc; and Tesco plc: A report on the mergers in contemplation* (CC, August 2003); (iii) sports equipment stores – a 15-minute drive-time catchment areas was used in *Sports Direct/JJB Sports* (CC, March 2010). In relation to other businesses, such as licensed betting offices, a distance measure has been used to define the catchment area - a 400m and 880m distances from the betting office were used in *William Hill plc/Stanley plc* (OFT ME/1716/05, August 2005).

Licensing Areas have been used as a proxy for geographic markets by the OFT in the past.<sup>35</sup>

- 3.23 As noted above, in some retail markets, the ability of customers to switch between retailers will be limited to a local level. In other commercial and industrial markets, the related market may have a wider geographic scope, for example, where the scope is regional or national.<sup>36</sup>

## Other considerations

- 3.24 In some cases suppliers may be able to offer different customers different terms (for example, when suppliers are able to discriminate between customers by charging different prices for the same product depending on how much they are willing to pay). In these cases it is also necessary to consider whether the relevant market should be divided into different customer groups.<sup>37</sup>
- 3.25 In certain circumstances, it may be argued that a market is not 'local' if suppliers in that market (for example national retail chains) have a national pricing policy. However, the existence of national pricing policies is not in itself sufficient to conclude that a certain store competes in a national market. In such situations, it is relevant to consider whether other key aspects of the retail offer (such as product range, store aspect and layout, amount of pre- and post- sales service,

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<sup>35</sup> The OFT has used these proxies in past merger cases in the absence of a detailed study into local market conditions, but it has also noted that they may not accurately capture the geographic scope of competitive constraints on individual businesses.

<sup>36</sup> An illustrative example of a 'regional' market is the OFT's merger decision in *Aggregate Industries Limited/Atlantic Aggregates Limited and Stone Haul Limited* (OFT ME/3978/08, March 2009), where the OFT examined the market for 'secondary' aggregates on the basis of 30-mile radii, whilst having regard to a 40-50 mile radius in relation to certain locations. See also OFT Decision No. CA98/01/2008 *Abuse of a dominance position by Cardiff Bus*. Other markets may be wider in scope (for example, national markets).

<sup>37</sup> In other cases there may also be temporal characteristics of demand, which may lead to defining temporal or seasonal markets.

targeted customer discounts or competitor price matching) are decided on the basis of local factors or are adaptable to those. Where there is evidence that companies compete locally in any of those factors, it is possible that the relevant geographic market is mostly local.<sup>38</sup>

- 3.26 Finally competition is not always symmetric. For example, a small grocery store may not impose a competitive constraint on a large supermarket in a given area, but at the same time that supermarket may constrain the pricing of the smaller store, as well as other supermarkets and other smaller stores over a wider area.

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<sup>38</sup> For example, merger analysis in the cinema sector has shown that firms that operate on a national basis may nevertheless set ticket prices and other aspects of their retail offer according to local competition (see, for example, *Vue Entertainment Holdings (UK) Ltd/A3 Cinema Ltd* (CC, February 2006)).

## **4 ASSESSING WHETHER A LAND AGREEMENT APPRECIABLY RESTRICTS COMPETITION**

- 4.1 This chapter sets out the main factors relevant to assessing whether a land agreement prevents, restricts or distorts competition, and whether it does so to an appreciable extent. This guideline is designed to provide a framework to assist parties in assessing land agreements for compatibility with the Chapter I prohibition.
- 4.2 Restrictions in land agreements regarding the way in which land may be used, or how a right over land may be exercised, do not necessarily infringe competition law. Parties that own or have an interest in land are generally free to determine how that land should be used or whether the land is suitable for use for a particular purpose. The OFT expects that only a minority of land agreements will be caught by the Chapter I prohibition.
- 4.3 The nature of the restriction, the relationship between the parties to the agreement and the factual context of the restriction are particularly important in assessing whether a restriction will have negative effects on competition. This chapter sets out types of restriction that are more likely to appreciably restrict competition and types of restriction that generally are unlikely to do so.
- 4.4 When assessing whether a restriction may restrict competition, it is necessary to compare the actual or future situation on the relevant market with the land agreement and the restrictions that it contains in place, with the situation that would prevail in the absence of the agreement (the 'counterfactual'). A restriction will fall within the scope of the prohibition only if it has a negative impact on actual or potential competition when compared with the counterfactual.<sup>39</sup>

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<sup>39</sup> For example, it may be relevant to consider whether a particular agreement is necessary for an undertaking to enter a new market successfully. In such cases, it is necessary to appraise how likely it is that a party would be able to enter the relevant market in the absence of the agreement. It must be clear that such an agreement would be objectively necessary for



4.5 Chapter 9 of this guideline provides worked examples which illustrate the general framework set out in this chapter.

## **Key factors relevant to the assessment of whether an agreement appreciably restricts competition**

### **Type of restriction and relationship between the parties to the agreement**

4.6 Where the parties to a land agreement are competitors and the object of a restriction regarding the use of land is for the parties to share markets by territory, type or size of customer, the agreement will almost invariably infringe the Chapter I prohibition. The OFT considers that such market-sharing agreements have as their object the restriction of competition and, by their very nature, restrict competition to an appreciable extent.

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undertakings to enter the market in a similar setting. See paragraph 18 of the European Commission's *Guidelines on the application of Article 81(3)* [now 101(3)], (OJ C101, 27.4.2004, p.97) and Case T-328/03 *O2 (Germany) v Commission* [2006] 5 CMLR 258. In the *O2* case, the European Court stated that the examination of competition in the absence of an agreement may be particularly necessary in markets undergoing liberalisation or emerging markets, where effective competition may be problematic owing to the presence of a dominant operator, the concentrated nature of the market structure or the existence of significant barriers to entry. See also Case 56/65 *Société Technique Minière v. Maschinenbau ULM GmbH*, [1966] ECR 235, [1966] CMLR 357, Case 258/78 *Nungesser (LC) KG and Kurt Eisele v Commission* [1982] ECR 2015, [1983] 1 CMLR 278, Case *Métropole Télévision SA v Commission* OJ C354, 23.11.1996, p.18, ECJ, Case T-65/98 *Van den Bergh Foods vs. Commission* [1998] ECR II-2641, [1998] 5 CMLR 475, [2003] ECR II-4653, [2004] 4 CMLR 14, CFI). On the other hand, considerations regarding the indispensability of a restriction to the profitability of a project or business on a particular market, in light of the competitive situation on that market, should be assessed under the exemption framework. If the assessment involves weighing up the pro-competitive benefits of an agreement against its restrictive impact, this balancing should be carried out within the exemption framework. The application of the exemption criteria to land agreements is explained in chapter 6 of this guideline.

- 4.7 Other types of restrictions may have the effect of restricting competition, if they foreclose<sup>40</sup> (a substantial part of) a related market to the competitors of a party to the agreement, by raising barriers to entry or expansion, or dampen competition in that market.
- 4.8 The examples of restrictions described in paragraphs 4.9 to 4.14 below may appreciably restrict competition if one or more of the parties to the agreement has or obtains some degree of market power on a related market and the agreement contributes to the creation, maintenance or strengthening of that market power. Paragraphs 4.15 to 4.25 below describe the key factors in assessing whether parties to such an agreement possess market power.

### Exclusivity arrangements

- 4.9 Where a land-owner leases land to a party and agrees not to allow a competitor of that party to operate on the land or other land that is owned by the land-owner, this may protect the lessee from competition and has the potential to foreclose competitors of the lessee in a related market.
- 4.10 For example, a landlord of a shopping centre might guarantee one tenant the exclusive right to operate a certain type of shop in that centre. By definition, such an agreement would protect that tenant from competition from other relevant competitors within that shopping centre and this has the potential to restrict competition on the related market.

### Leasehold use restrictions

- 4.11 In many leases, a landlord will specify permitted uses for the land that is leased (often referred to as 'permitted user' clauses) or conversely, uses that are not permitted (often referred to 'restricted user' clauses). In most cases, permitted user and restricted user clauses are unlikely to

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<sup>40</sup> A market is foreclosed either completely or partially when undertakings face barriers to entering that market, or barriers to expansion once in that market.

restrict competition. However, where a land-owner is also active in a related market and seeks to limit the availability of its land to its downstream competitors by restricting the use of its land for a particular purpose, this has the potential to restrict competition.

- 4.12 For example, a land-owner who operates a number of convenience stores in a particular area may limit how a lessee of a particular site may use the property, by stipulating that the lessee may not use the site as a convenience store, or conversely by stipulating that it must be used for a particular purpose other than as a convenience store. This has the potential to restrict competition in the related market for convenience stores.

### Freehold restrictive covenants

- 4.13 A restrictive covenant regarding the transfer of a freehold interest in land may restrict the use of a party's land in some way for the benefit of another party's land. In most cases, such restrictions will not restrict competition. However, where a land-owner stipulates how a property should be used in order to limit the availability of land to its competitors in a related market, this has the potential to restrict competition on the related market.
- 4.14 An example would be where the vendor of a property, who owns a betting shop or betting shops in a particular area, seeks to control how the property is used after it is sold by specifying that it cannot be used as a betting shop. A further example would be a restriction accepted by the purchaser of a property not to sell the property to a competitor of the vendor.

### Market power on the related market

- 4.15 Market power arises where an undertaking does not face effective competitive pressure.<sup>41</sup>

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<sup>41</sup> See footnote 6 above.

4.16 In the context of land agreements, the stronger a party's competitors are on the related market and the greater their number, the less risk there is that parties to the agreement will possess market power in that market and that the types of restrictions outlined in paragraphs 4.9 to 4.14 above will foreclose access to the related market or dampen competition on this market. Further, an undertaking may not possess market power on the related market where there is a strong threat of potential competition (for example where there is other suitable land available for use in the related market).<sup>42</sup> These points are considered further below.

### Existing competitors

4.17 Market shares and measures of concentration, assessed on the relevant market, may inform the degree of market power a party possesses on a related market. The market shares of competing firms in the relevant market, both in absolute terms and relative to each other, can give an indication of the potential extent of a firm's market power. Market shares may be calculated in a number of ways, including on the basis of turnover, sales, or the number of competitors in a particular area. A straightforward count of the number of firms in a market is a basic measure of concentration or market shares. When assessing local retail markets, a count of the number of independent fascias in a local area also conveys information about concentration or market share.<sup>43</sup>

4.18 Where the parties to an agreement have high market shares,<sup>44</sup> this is usually a good indicator of market power but this may not always be the

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<sup>42</sup> The OFT guideline *Assessment of Market Power* (OFT 415) explains in further detail how the OFT will assess whether undertakings possess market power.

<sup>43</sup> Whilst counting firms or fascias in a particular area may provide a good first proxy for market shares, counting firms or fascias does not take into account differences in shares of sales and the size distribution of firms. This may not be suitable when there are large differences in the sizes of firms or their sales. For the purposes of the assessment of independent fascias stores under common ownership should be treated as a single fascia (even if branded differently).

<sup>44</sup> 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

case. For example, an undertaking may not have market power on the related market where entry barriers are low and there is a strong threat of potential competition.

### Barriers to entry or expansion on the related market and availability of suitable land

- 4.19 The existence of barriers to entry or expansion – in particular, the availability of suitable land for use in the related market is also relevant to the assessment of market power on the related market.<sup>45</sup>
- 4.20 As outlined in chapter 3, the scope of the available land relevant to this assessment is defined by reference to the economic activity in the related market, including the geographic scope of that market.
- 4.21 Barriers to entry or expansion in a related market may be significant where a single land owner owns all (or substantially all) of the available land suitable for use in that market. Even if the suitable land is owned by many parties, it might not be available to the market if most of it is tied up in long term lease contracts.
- 4.22 It is also necessary to consider whether sites suitable for use in the related market have unique or special qualities. For example, a restriction which prevents land from being used for a superstore is more likely to have an impact on competition than a restriction which prevents an individual high street unit from being used as a particular type of retail business. This is because there are likely to be fewer sites suitable for a superstore development, and more sites suitable for a high street store (that are not subject to such a restriction).

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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.

<sup>45</sup> The OFT will consider not only the scale of any barriers to entry and/or expansion that may impact on the likelihood of entry or expansion on a related market, but also whether firms have the ability and incentive to enter that market (or the intent to do so).

- 4.23 Furthermore, barriers to entry or expansion may be more significant where the number of other sites suitable for use in the related market is limited as a result of planning restrictions.
- 4.24 Similarly, there may be circumstances where the ability to compete in a market requires access to land in a particular location, such as land in the proximity of a port or transport network. A restriction preventing potential competitors from using land in such a location is more likely to appreciably restrict competition.
- 4.25 Where effective entry which prevents or erodes market power in the related market is likely to occur within one to two years (for example as a result of land being sold, developed or converted from other uses), entry barriers can in general be regarded as low.<sup>46</sup>

### **Other considerations**

- 4.26 It is not only the position of the parties to the agreement on the related market, or the availability of other suitable land in the affected market which is important, but also the extent of the relevant restriction. The longer the duration of the restriction the more significant the impact on competition is likely to be.

### **Cumulative impact of multiple agreements**

- 4.27 Where an agreement forms part of a series or group of similar agreements on a given market, and access to the relevant market or competition on that market is significantly restricted by the cumulative effect of parallel networks of similar agreements practised by competitors on that market, an individual agreement may fall within the

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<sup>46</sup> Paragraph 117 of the European Commission's *Guidelines on Vertical Restraints* OJ C130, 19.5.2010, p.1, is illustrative to note in this respect.

Chapter I prohibition if the agreement makes an appreciable contribution to the cumulative effect.<sup>47</sup>

## **Types of restrictions that are unlikely to appreciably restrict competition**

- 4.28 Obligations or restrictions in land agreements are unlikely to give rise to negative effects on competition where the agreement does not foreclose access to or dampen competition on a related market where the land is being used to carry out an economic activity.
- 4.29 Provisions in commercial property agreements that are unlikely to give rise to competition concerns include for example: (i) covenants relating to the payment of service charges and meeting of certain financial criteria, and (ii) restrictions imposed on a lessee regarding alterations, repairs, obstructions to the premises, applications for planning permission, advertisements, or hours of use.<sup>48</sup>

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<sup>47</sup> Case C-234/89 *Stergios Delimitis v Henniger Bräu AG* [1991] ECR I-935.

<sup>48</sup> Such restrictions could in some cases be regarded as 'ancillary' to the transfer of an interest in land and may fall outside the scope of the Chapter I prohibition. Cases such as Case 161-84 [1986] ECR 353, *Pronuptia de Paris v Schillgallis* and Case 42/82 [1985] ECR 2545, *Remia BV and Verenigde Bedrijven and Nutricia v Commission* are illustrative in this respect. A restriction is directly related to a main transaction if it is subordinate to the implementation of that transaction and is inseparably linked to it. The test of necessity implies that the restriction must be objectively necessary for the implementation of the main transaction and be proportionate to it (see paragraphs 28 to 31 of the European Commission's *Guidelines on the application of Article 81(3)* [now 101(3)], (OJ C101, 27.4.2004, p.97)). If the assessment involves weighing up the pro-competitive benefits of an agreement against its restrictive impact, this balancing should be carried out within the exemption framework. The concept of 'ancillary' restraints must therefore be distinguished from the application of the exemption criteria, which concerns the economic benefits that may be produced by a restrictive agreement and which are balanced against the restrictive effects of an agreement.

- 4.30 Provisions in commercial property agreements which relate to the use of premises are also generally unlikely to raise competition concerns.<sup>49</sup> This would include, for example, where the owner of a site such as a shopping centre or retail park restricts the specific line or lines of business that may be carried out by a lessee, in order to achieve its desired 'retail mix' and to ensure the attractiveness of a shopping centre to consumers.<sup>50</sup> However, where a restriction is reciprocal (for example, a lease in a shopping centre which restricts the lessee to selling a particular type of product and this is accepted by the lessee on the basis that no other lessee in the shopping centre will be permitted to sell that type of product), it will be necessary to consider whether the agreement may appreciably restrict competition (see paragraph 4.9 above).
- 4.31 Further, where an owner of one property benefits from a restrictive covenant that restricts activities that may be carried out on an adjacent property which could block access to or interfere with the enjoyment of their site, this would generally be unlikely to appreciably restrict competition (subject to the considerations in paragraph 4.28 above).
- 4.32 The Chapter I prohibition does not apply to an agreement to the extent it is a planning obligation, by virtue of paragraph 1, Schedule 3 of the Act. This includes planning obligations made, for example, under section 106 of the Town and Country Planning Act 1990.

### **Other types of restrictions on competition (outside the scope of this guideline)**

- 4.33 This guideline covers restrictions in land agreements that affect or limit the way in which the land may be used, or how a right over land may be exercised. To the extent that an anti-competitive agreement is not a land

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<sup>49</sup> Restrictions on the use of premise can be expressed positively (a permitted user clause) or negatively (a restricted user clause).

<sup>50</sup> The owner of the site may also request certain types of retailers to be located within a particular 'zone' of the centre in order to ensure a logical layout.



agreement because it does not create, alter, transfer, or terminate an interest in land, or a land agreement includes other restrictions on competition (restrictions not relating to the way the land may be used or how a right over the land may be exercised), it may restrict competition within the meaning of the Chapter I prohibition and Article 101.

- 4.34 For example, if a retail firm leases land to a competitor on terms which require the competitor not to undercut the landlord's retail prices, this could constitute price-fixing behaviour. An agreement between tenants as to the nature of goods they will each sell in a particular area would not be a land agreement, but could constitute a form of market-sharing. Price-fixing, market-sharing and other forms of cartel behaviour are generally considered capable of having an appreciable impact on competition regardless of the parties' market shares. The OFT guideline *Agreements and concerted practices*<sup>51</sup> provides guidance on the prohibition on anti-competitive agreements more generally.
- 4.35 A land agreement may also be entered into in the context of a trading relationship between parties and/or may contain restrictions which relate to the conditions under which a trade or activity may be carried out or under which a party may purchase, sell or resell goods or services from the premises.
- 4.36 For example, a supplier of a certain product leases land to a retailer of that product on terms may require the retailer to source all of its requirements for a particular type of product from the supplier. This type of restraint may restrict competition where, for example, this significantly forecloses the relevant market to competing suppliers.
- 4.37 The European Commission's *Guidelines on Vertical Restraints*<sup>52</sup> sets out principles for the assessment of vertical agreements under Article 101

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<sup>51</sup> *Agreements and concerted practices* (OFT401).

<sup>52</sup> OJ C130, 19.5.2010, p.1.

TFEU, including the application of the EU Block Exemption Regulation for vertical agreements.<sup>53</sup>

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<sup>53</sup> Commission Regulation on the application of Article 101(3) TFEU to categories of vertical agreements and concerted practices OJ L102, 23.4.2010, p.1. As explained in footnote 19 above, the EU Block Exemption for vertical agreements also applies under UK law by virtue of the parallel exemption regime under section 10 of the Act. Certain restrictions will remove the benefit of the block exemption from an agreement, such as restrictions which impose fixed or minimum resale prices at which goods may be sold.

## 5 APPLYING THE EXEMPTION CRITERIA

5.1 Agreements which fall within the scope of the Chapter I prohibition or Article 101 may nevertheless be exempt from the prohibition if the criteria set out below are satisfied, with no prior decision to that effect being required.<sup>54</sup> Such an agreement is valid and enforceable from the moment that the conditions in section 9(1) are satisfied and will continue to benefit from exemption for so long as those criteria remain satisfied.

5.2 It is for the party wishing to rely on exemption to prove that the criteria are satisfied. Parties therefore need to assess whether the criteria apply on a case by case basis.<sup>55</sup>

5.3 The four cumulative criteria which must be satisfied to qualify for exemption are as follows.

- The agreement must contribute to improving production or distribution, or to promoting technical or economic progress.
- It must allow consumers a fair share of the resulting benefits.
- It must not impose restrictions beyond those indispensable to achieving those objectives.
- It must not afford the parties the possibility of eliminating competition in respect of a substantial part of the products in question.

5.4 The remainder of this chapter provides guidance on how to apply the criteria to land agreements. The European Commission has issued

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<sup>54</sup> Section 9(1) of the Act and Article 101(3) TFEU.

<sup>55</sup> Regulation 1/2003 (Council Regulation (EC) No 1/2003 of 16 December 2002, often referred to as the Modernisation Regulation) abolished the system of notifying agreements for exemption under Article 81(3) of the EC Treaty [now 101(3) TFEU]. The same system was adopted in the UK through the amendment of the Act.

Guidelines on the application of Article 101(3) of the TFEU.<sup>56</sup> As set out in chapters 1 and 3, the provisions of Chapter I prohibition and Article 101 TFEU are in most respects identical in substance. The OFT will therefore have regard to the Commission's Guidelines when considering the exemption provisions in section 9(1) of the Act. Parties should also consider the Commission's Guidelines when assessing their own agreements.

### **Condition (i) – Efficiency gains**

- 5.5 For exemption to apply, the benefits of the agreement must outweigh (or at least match) its negative impact on competition. Parties must therefore show that a restrictive agreement contributes to improving production or distribution, or to promoting technical or economic progress. These benefits are sometimes referred to as the efficiency gains or benefits of the agreement.
- 5.6 There is no exhaustive list of the types of efficiency gain which might satisfy this criterion. Examples might include:
- the creation of one or more new retail outlets
  - more efficient distribution of products, or
  - a greater range of products being available to consumers.
- 5.7 By way of illustration, one retailer (a department store) might be granted the exclusive right to operate in a shopping centre. This agreement may give rise to efficiency gains because the owner of the centre considers that the department store will attract considerable footfall to the centre. Other retailers may benefit from the footfall generated by the department store, which also contributes to the profitability of the shopping centre overall.

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<sup>56</sup> *Guidelines on the application of Article 81(3) [now 101(3)]* (OJ C101, 27.4.2004, p. 97).

### Condition (iii) – Indispensability of the restrictions

- 5.8 The third criterion is that the agreement must not contain restrictions that go beyond those which are indispensable to achieving the benefits identified. For practical purposes, it is usually simplest to apply criterion (iii) before criterion (ii).
- 5.9 The question is not whether in the absence of the restriction the agreement would not have been concluded, but whether the benefits could have been achieved by means of a less restrictive agreement. Put another way, a restriction will be considered indispensable if its absence would eliminate or significantly reduce the efficiencies that follow from the agreement, or make it significantly less likely that they will materialise **and** there is no less restrictive means of achieving the benefits.
- 5.10 When considering whether there are other less restrictive means of achieving the benefits, parties are not required to consider purely theoretical alternatives, only those which are economically practicable. This requires an assessment of the market conditions and business realities facing the parties to the agreement.
- 5.11 Using the shopping centre example referred to in paragraph 5.7 above, the department store may need to invest considerable amounts in order to set up its store within the shopping centre and may only be prepared to make this investment if it has a guarantee that it will be the only department store in the shopping centre for a certain period.<sup>57</sup>

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<sup>57</sup> The profitability of a development such as a shopping centre may depend on certain conditions being offered by the developers such as exclusivity in order to secure the commitment of a particular lessee. This is different from a situation where market entry would not have occurred **at all** but for the existence of an equivalent agreement and the commitment of a particular lessee (such as an anchor tenant) is key to the commercial viability of a development. If market entry would not have occurred at all, absent the agreement in question, the agreement may not be restrictive of competition. This will require an objective assessment of the possibility of a party to penetrate the relevant market without the benefit of the restriction in question.

- 5.12 Conversely, the indispensability criterion may not be met where a shopping centre owner is granting an exclusive right to a retailer to operate as a particular type of retailer in an area in order to ensure a particular mix of different types of retailer. Although customers may benefit from the shopping centre containing a mix of retailers (or from a more efficient use of space), this objective could potentially be achieved through covenants in lease agreements which restrict how different retail units may be used. Restrictions granting exclusivity to each retailer within the centre may therefore (while ensuring a mix of retailers) go further than is necessary to achieve this type of benefit.
- 5.13 In many cases, the question of indispensability will also relate to the duration of a restriction. It is necessary to consider the duration of the restriction and whether it is longer than necessary to achieve the benefits identified. Generally, restrictions of a longer duration are less likely to be considered indispensable.
- 5.14 Such a restriction would be justified only for so long as is necessary to give the parties sufficient certainty that they will be able to recoup their investment in a development. The appropriate duration of the exclusivity will depend on the specific facts of each case. In a retail context, for example, it may be relevant to take into account the time necessary for a store to reach mature sales (at a point when its sales are projected to grow at a rate at or around inflation) that is, a stable revenue and customer base to provide the required return on investment.

### **Condition (ii) – Fair share for consumers**

- 5.15 The restrictive agreement must allow consumers a fair share of the benefits identified under the first criterion. This means that it is not sufficient for benefits to accrue to the parties to the agreement - consumers must also benefit.
- 5.16 The concept of 'fair share' implies that the benefits passed on to consumers must compensate for the negative impact from the restriction of competition. The net effect of the agreement must at least be neutral

from the point of view of those consumers that are likely to be affected by the agreement.

- 5.17 In the illustrative shopping centre example described in paragraph 5.7 above, the agreement restricts competition between retailers within the shopping centre. This restriction impacts on consumers who might otherwise benefit from greater competition between retailers. For example, if the shopping centre contained two department stores instead of one with exclusive rights, the competition between them could improve price, quality, range or service standards for the benefit of consumers.
- 5.18 In this scenario, other retailers may benefit from the footfall generated by the department store, which may lead to economies of scale which pass through to consumers. Further, there may be evidence that consumers value having this particular retailer in the centre and consumers may benefit from the shopping centre having a greater variety of different types of retailer as a result of the restriction.
- 5.19 The greater the restriction on competition, the greater must be the efficiencies and the pass-on to consumers to justify that restriction. This implies that if the restrictive effects of an agreement are relatively limited and the efficiencies substantial, it is more likely that consumers will receive a 'fair share' of the resulting benefits. If, on the other hand, the restrictive effects of the agreement are substantial and the efficiencies relatively limited, it is unlikely that this criterion will be fulfilled.

#### **Condition (iv) – No elimination of competition**

- 5.20 Finally, in order to benefit from exemption, a restrictive agreement must not allow the parties the possibility of eliminating competition in respect of a substantial part of the products in question.
- 5.21 Whether competition is being eliminated for these purposes will depend on the degree of competition existing prior to the agreement and on the

impact of the restrictive agreement – that is, the extent of the reduction of competition brought about by the agreement.

- 5.22 Where competition within a market is already weak, a relatively small reduction may result in competition being 'eliminated' for the purposes of this criterion. Similarly, the greater the reduction of competition caused by the agreement, the greater the likelihood that competition in respect of a substantial part of the products concerned will be eliminated.
- 5.23 Both actual and potential competition must be considered. While sources of actual competition are usually the more important and easier to verify, sources of potential competition must also be taken into account. The assessment of potential competition requires an analysis of barriers to entry facing firms that are not already competing within the relevant market. The OFT would expect any party to a restrictive land agreement seeking to rely on potential competition and the absence of barriers to entry to be able to identify the sources of potential competition and provide evidence that these sources constitute a real competitive constraint.



## 6 ABUSE OF DOMINANCE

6.1 Chapter II of the Act and Article 102 of the TFEU prohibit conduct by one or more undertakings which amounts to an **abuse of a dominant position** in a market and which:

- may affect trade within the United Kingdom or any part of it (in the case of the Chapter II prohibition), or which
- may affect trade in the internal market or a substantial part of it, in so far as it may affect trade between Member States (in the case of Article 102).

6.2 These provisions apply equally to conduct relating to land as they do to any other conduct. The exclusion previously in place for land agreements did not apply to the prohibitions on the abuse of a dominant position in Chapter II of the Act and Article 102 TFEU.

6.3 Firms are generally free to decide to whom they sell or lease land, and the price at which they do so. Conduct regarding land will only be prohibited by Chapter II of the Act and/or Article 102 in limited circumstances.

6.4 The tests applied under the Chapter II prohibition and Article 102 TFEU have two common elements:

- whether a firm is dominant, and
- if it is, whether it is abusing that dominant position.

6.5 The prohibition under both Article 102 TFEU and the Chapter II prohibition relates to the **abuse** of a dominant position, not the **holding** of the position.

## Dominant position

- 6.6 Whether a firm is dominant depends on two questions: the definition of the relevant market and whether the firm holds a dominant position within that market.<sup>58</sup>
- 6.7 A business holds a dominant position on a market if it is able to behave independently of the normal constraints imposed by competitors, suppliers and customers. A dominant position may be held by one firm on its own or by one or more legally independent firms where they are linked in such a way that they adopt a common policy in the market (joint or collective dominance).
- 6.8 A firm will not be dominant unless it possesses substantial market power. The OFT will assess the market power of a firm by looking at the competitive constraints it faces in the relevant market. Those constraints may include, but may not be limited to, the bargaining power of customers (including tenants) and the possibility of new entry onto the market by, for instance, converting other premises or building new premises.
- 6.9 The market share of a firm is an important factor in assessing market power but it does not, on its own, determine whether a firm is dominant. For example, it is also necessary to consider the position of other undertakings operating in the same market and how market shares have changed over time. An undertaking is more likely to be dominant if its competitors have relatively weak positions in the relevant market, or if it has enjoyed a high and stable market share.
- 6.10 Generally speaking, a market share above 50 per cent gives rise to a presumption of dominance, in the absence of evidence to the contrary.<sup>59</sup>

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<sup>58</sup> See chapter 3 regarding market definition.

<sup>59</sup> The European Court has stated that dominance can be presumed in the absence of evidence to the contrary if an undertaking has a market share persistently above 50 per cent, see Case C62/86, *AKZO Chemie BV v Commission* [1993] 5 CMLR 215.

The OFT considers that a position of dominance is unlikely where a firm's market share is below 40 per cent.

- 6.11 For further guidance on this topic see the OFT guideline *Abuse of a dominant position* (OFT402) and the European Commission's *Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty* [now Article 102 TFEU] *to abusive exclusionary conduct by dominant undertakings*.<sup>60</sup>

## **Abuse**

- 6.12 The prohibitions under Chapter II of the Act and Article 102 of the TFEU relate to the abuse of the dominant position. Holding a dominant position is not unlawful, but it is unlawful to abuse that position. The Act and Article 102 TFEU set out examples of conduct which may amount to abuse of a dominant position, but these lists are not exhaustive and are for illustration only. The important question is whether the conduct of a dominant firm can be regarded as an abuse of a dominant position. This may occur if a dominant firm pursues conduct which is different from conduct that is normally adopted in the course of competition in the market, in a way that exploits customers or has an exclusionary effect on competitors.
- 6.13 In certain circumstances, the prohibitions under Chapter II of the Act and Article 102 TFEU may apply where an undertaking that is dominant in one market commits an abuse in a different but closely associated market.<sup>61</sup>
- 6.14 Examples of conduct which may be considered to be an abuse of a dominant position are given in the OFT's guideline *Abuse of a dominant position*. In relation to land, this may include conduct which excludes competitors in a relevant market, for example by limiting access to a so-

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<sup>60</sup> OJ C45, 24.2.2009, p. 7.

<sup>61</sup> This principle was established by the European Court in Case T-83/91 *Tetra Pak v European Commission* [1994] ECR II-755.

called 'essential facility' or where a dominant firm seeks to use restrictions in land agreements as part of a strategic campaign to exclude competitors from a market, particularly where regulatory constraints such as planning or licensing limit the supply of suitable land for the competing activity.<sup>62</sup> It is also possible for a firm to abuse a dominant position through 'exploitative' conduct such as the charging of excessive prices for land (that is, prices which are significantly above the competitive level) or unjustified discrimination between tenants.

- 6.15 Unlike the Chapter I prohibition and Article 101 TFEU, there are no exemptions (or a regime equivalent to that of Article 101(3) TFEU) from the Chapter II prohibition or Article 102 of the TFEU.<sup>63</sup>

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<sup>62</sup> Generally, a dominant firm will not be obliged to sell or lease land to any potential acquirer or lessee if there are objective reasons not to do so.

<sup>63</sup> The Act sets out a number of specific exclusions from the Chapter II prohibition. Although the concept of exclusion is not specifically recognised in relation to Article 102 TFEU, under EU law certain types of conduct are in effect, excluded from the application of Article 102 TFEU. For further details on these exclusions, see OFT guideline *Abuse of a dominant position* (OFT402).

## 7 CONSEQUENCES OF BREACH

7.1 A breach of the Act has a number of potential consequences, as set out below. These include: (i) financial penalties, (ii) director disqualification orders, (iii) the unenforceability of an agreement which infringes the Chapter I prohibition, and (iv) private actions.

### Financial penalties

7.2 Parties to a prohibited agreement (that is, an agreement which falls within the scope of the prohibition and does not benefit from exemption), or a party abusing a dominant position are susceptible to enforcement action by the OFT, European Commission or a sectoral regulator.<sup>64</sup> These authorities have the power to investigate suspected infringements, to impose financial penalties and to give directions to take steps to bring an infringement to an end.<sup>65</sup> By statute,<sup>66</sup> the maximum penalty that can be imposed for an infringement is 10 per cent of a party's worldwide turnover.

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<sup>64</sup> The following sectoral regulators have concurrent powers to enforce competition law in the UK: the Office of Communications; the Gas and Electricity Markets Authority; the Water Services Regulation Authority; the Office of Rail Regulation; the Civil Aviation Authority; and the Northern Ireland Authority for Utility Regulation.

<sup>65</sup> See the OFT guideline *Enforcement* (OFT407).

<sup>66</sup> Section 36(8) of the Act and Competition Act 1998 (Determination of Turnover for Penalties) (Amendment) Order 2000 (SI 2000/309), as amended.

- 7.3 The OFT and sectoral regulators cannot make a finding of infringement of the Chapter I prohibition or impose penalties for land agreements in respect of the period prior to 6 April 2011.<sup>67</sup>
- 7.4 The OFT has published guidance on the way in which it calculates financial penalties under the Act,<sup>68</sup> and the OFT's decisional practice and the case law of the UK courts gives further guidance on how this is applied in practice. The OFT calculates the appropriate amount of a penalty on a case-by-case basis according to the principles set out in the guidance.<sup>69</sup>
- 7.5 Small businesses may be immune from financial penalties under the Act in certain circumstances.<sup>70</sup>

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<sup>67</sup> By virtue of the Competition Act 1998 (Land Agreements Exclusion and Revocation) Order 2004 (SI 2004/1260) in place prior to 6 April 2011 and, prior to that, the Competition Act 1998 (Land and Vertical Agreements Exclusion) Order 2000 (SI 2000/310). Land agreements entered into before 6 April 2011 will continue to benefit from exclusion until that date, but will cease to benefit from exclusion from that date.

<sup>68</sup> *OFT's Guidance as to the appropriate amount of a penalty* (OFT 423).

<sup>69</sup> The OFT will generally impose penalties on all parties to an infringing agreement. However, depending on the precise circumstances of the case, the OFT may consider it appropriate to distinguish between a party with the benefit of a restriction and a party with the burden in assessing either the appropriate amount of a penalty, or whether it is appropriate to impose a penalty at all.

<sup>70</sup> Sections 39 and 40 of the Act provide limited immunity from financial penalties for small agreements in relation to infringements of the Chapter I prohibition and for conduct of minor significance in relation to infringements of the Chapter II prohibition (see further Competition Act 1998 (Small Agreements and Conduct of Minor Significance) Regulations 2000 (SI 2000/262)). This immunity does not apply to any infringements of Article 101 or 102 TFEU or to infringements of the Chapter I prohibition which are price-fixing agreements. This immunity may be withdrawn by the OFT in certain circumstances. Further details are set out in the OFT guideline *Enforcement* (OFT407).

7.6 Where a party has used best endeavours<sup>71</sup> to amend or remove a clause in breach of the Chapter I prohibition from an agreement (and where relevant, to remove this restriction from the relevant land register), and has not sought to enforce it, the OFT may, depending on the relevant facts of each case, consider this to be a mitigating factor when determining the appropriate amount of any financial penalty (if the OFT considers that it is in fact appropriate to impose a financial penalty).<sup>72</sup>

### **Other consequences**

7.7 In addition to financial penalties, the OFT and certain sectoral regulators have the power to apply for disqualification orders against directors in certain circumstances following a competition law infringement.<sup>73</sup>

7.8 An agreement which contains a prohibited restriction is void and unenforceable.<sup>74</sup>

7.9 The effect of this on the remainder of an agreement is a matter for the law which governs the particular agreement. A court may consider it possible, as a matter of contract law, to sever provisions which infringe the Chapter I prohibition from the remainder of an

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<sup>71</sup> Best endeavours do not necessarily include an obligation to make any payment to procure that a party consents to the release of the restrictive covenant.

<sup>72</sup> For an illustrative example of the steps that might be taken to remove a restriction from the relevant land register, where appropriate, see Article 4 of the Groceries Controlled Land Order.

<sup>73</sup> See OFT guidance *Director disqualification orders in competition cases* (OFT510).

<sup>74</sup> Section 2(4) of the Act.

agreement. If this is the case, the unenforceability will affect only the offending provisions in question and the remaining terms of the agreement will remain valid and enforceable.<sup>75</sup> This guideline does not cover the practical consequences of a land agreement being void and unenforceable.

- 7.10 In addition, the parties to a prohibited agreement, or a party abusing a dominant position, may also be susceptible to private actions before the UK courts for damages or injunctive relief for breaches of competition law by any person who has suffered a loss as a result of the infringement.<sup>76</sup>

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<sup>75</sup> This has been stated, amongst others, by the High Court in *Inntrepreneur Estates Ltd v Mason*, [1994] 68 P&CR 53, [1993] 2 CMLR 293, QBD, and by the Court of Appeal in *Inntrepreneur Estates (GL) Ltd v Boyes*, [1995] ECC 16, [1993] 2 EGLR 112, CA. See also *Byrne v Inntrepreneur Beer Supply Co Ltd* [1999] EuLR 634. Whether a provision that infringes the Act is in fact severable from the remainder of an agreement will depend on the relevant facts. For example, the courts have previously taken into account considerations such as whether the severing of the restriction materially changes the nature of the agreement between the parties and whether the restriction formed the whole or a substantial part of the consideration for the contract.

<sup>76</sup> See the OFT's *Quick guide to private litigation in competition cases*.



## 8 THE OFT'S ADMINISTRATIVE PRIORITIES

- 8.1 The OFT is not obliged to investigate every suspected infringement. When deciding whether to take action in relation to a suspected infringement of competition law, the OFT will have regard to its prioritisation principles, which include expected impact of its work on consumers, the strategic significance of OFT action, and the risks and resources involved in possible work.<sup>77</sup>
- 8.2 Given that many types of agreements concerning the use of land have previously been excluded from the application of UK competition law and therefore parties in the property sector are adjusting to a change in the law, the OFT has set out a category of land agreements in relation to which the OFT is unlikely to consider taking further action, on the basis that it would be less likely that significant negative effects on competition and consumers would arise and/or the exemption criteria could be met in respect of such agreements.<sup>78</sup>
- 8.3 The OFT considers that only a minority of restrictions in land agreements will infringe the Chapter I prohibition. Chapter 4 of this guideline sets out examples of restrictions that generally do not give rise to competition concerns in the OFT's view and in respect of which the OFT is unlikely to take further action.

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<sup>77</sup> See *Prioritisation Principles* (OFT 953).

<sup>78</sup> Paragraphs 8.3 to 8.9 apply to land agreements which contain restrictions or obligations regarding the use of land or the way that a right in land may be exercised. These paragraphs do not replace the OFT's prioritisation principles, which will apply in all cases relating to land agreements. Restrictions which are outside the scope of this guideline are referred to in chapter 4.

- 8.4 Chapter 4 of this guideline also sets out that there are two main categories of agreement that are more likely to restrict competition.
- 8.5 First, the OFT considers that if the parties to a land agreement are competitors in a relevant market and a restriction in a land agreement is aimed at sharing markets, the agreement is very likely to constitute a serious infringement of the Chapter I prohibition. The market share threshold set out in the paragraph below will not be applied in such cases.
- 8.6 Second, the OFT may be concerned where the parties to the agreement seek to use a land restriction to foreclose existing or potential competitors in a relevant market or dampen competition in this market. However, whether such an agreement will give rise to significant negative effects on competition will depend on the scope of the relevant market where the land is being used and whether one or more of the parties to the agreement possesses market power in this market. The OFT is unlikely to take further action if none of the parties to the agreement has (or, as a result of the agreement, obtains) a share of the relevant market which exceeds 30 per cent. The 'relevant market' for this purpose refers to the (downstream) related market where the land that is the subject of the agreement is being used to carry out an economic activity. Parties will need to consider the product and geographic scope of the related market in applying this threshold.
- 8.7 Chapter 4 of this guideline sets out relevant methods of assessing market shares. In most cases, the OFT considers that the most appropriate method of calculating market shares is according to value of sales in the relevant market. However in retail markets, it may be pragmatic to calculate market shares by counting the number of independent fascias in the relevant market. In retail markets, if there are four or more independent fascias in the relevant market (including the party to the agreement that is benefiting from the restriction in

question), the OFT is likely to take the view that the market share threshold set out in paragraph 8.6 above is not exceeded.

- 8.8 It may also be relevant to consider how market shares have changed over time. In cases where a party's market share at the time of entering into an agreement is initially not more than 30 per cent but subsequently increases, the OFT will generally take the view that where a party's market share was initially not more than 30 per cent, but has subsequently increased to not more than 35 per cent, within a two-year period, the threshold is not met.
- 8.9 In exceptional cases, the OFT may decide to investigate an agreement or agreements where parties have market shares which do not exceed the 30 per cent threshold but where there appear to be significant negative effects on competition: for example, where a long-term exclusivity arrangement appears to be significantly restricting access to a particular market, or where there are cumulative effects arising from a number of similar agreements affecting a relevant market.
- 8.10 The approach set out in this chapter should not be regarded as a statement of how the Chapter I prohibition applies to land agreements (in particular, it is possible that appreciable effects on competition could arise below the market share threshold outlined in paragraph 8.6 above).
- 8.11 The OFT will keep this approach under review on the basis of further experience regarding land agreements.

## 9 WORKED EXAMPLES

### Example 1 (restrictive covenant for the benefit of adjacent land)

- 9.1 A restrictive covenant prevents the owner of land adjacent to a theatre from being used for certain industrial purposes (regardless of permitted planning uses), for so long as the theatre remains in place. The restriction has been put in place to prevent noisy activities being carried out on land adjacent to the theatre, which may interfere with performances at the theatre.

#### Summary analysis:

- 9.2 The restriction is unlikely to infringe the Chapter I prohibition, since it is unlikely to have the object or effect of restricting competition on a related market. In particular, the restriction does not appear to foreclose competitors of the party which owns the theatre or reinforce its position on this related market.
- 9.3 The scope of the restriction (affecting industrial uses, rather than all uses and lasting only for so long as the theatre remains in place) does not appear to be wider than is necessary to achieve the objective of the restriction, which is to avoid interferences with the use of the theatre).<sup>79</sup>

### Example 2 (terms of sale – planning permission allocation between competitors)

- 9.4 Company A owns a large development site and is planning to build houses on it. Having considered alternative options, as well as its

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<sup>79</sup> See footnote 48 above.

capacity and access to funding, Company A chooses to develop only a part of the site and sell the rest to other home builders. Company A divides the site into three plots, keeping one for itself and inviting offers for the other two plots from other house builders.

- 9.5 The planning permission for the whole site originally owned by Company A limits the number of houses that can be built to 300. Company A imposes a restriction on each of the two plots that are sold which specifies that a maximum of 100 houses can be built on each plot.

#### Summary analysis:

- 9.6 The restriction on the number of houses that can be built on each plot is unlikely to infringe the Chapter I prohibition. This is unlikely to constitute a restriction of competition, given that the restrictions are necessary for company A and the buyers of the two segregated parcels to know with a sufficient degree of certainty how the terms of the planning permission would apply to each of the plots, and neither of the parties would have been able to enter into the agreement without such knowledge.<sup>80</sup>

#### **Example 3 (permitted use restriction)**

- 9.7 Buildco is a property developer. Buildco has developed an office complex and rents space in this complex to business lessees. All of Buildco's leases contain covenants preventing the lessee from using the space for any purpose other than as offices. They also contain covenants preventing Buildco from leasing any of the office space for any other purposes. The complex is in an area with plenty of other

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<sup>80</sup> See footnote 48 above.

offices and retail outlets. The property market in the area is largely competitive and premises of both types are usually available to let.

- 9.8 One of the office lessees (Shopco) wants to open a shop in the office space that it is currently using, but is prevented to do so by the existing use restriction.

### Summary analysis

- 9.9 As noted above, many leases contain permitted user restrictions and the vast majority of these restrictions are unlikely to give rise to competition concerns. In this example, the restrictions are designed to ensure the continuing use of the premises as offices, given that this is the land-owner's intended purpose for the site, as well as guaranteeing a certain type of environment for other lessees using the premises as offices. These restrictions do not appear to confer exclusive use of land to any lessee or otherwise protect lessees within the complex from competition on the related market where they carry out an economic activity.
- 9.10 In this example, the permitted use restrictions are unlikely to infringe the Chapter I prohibition.
- 9.11 There is no obligation on Buildco to allow Shopco to convert office space into shop space.

### **Example 4 (development agreement including a restriction on the use of land)**

- 9.12 The University of Scholartown owns a large area of land on the fringes of Scholartown and wants to develop university accommodation for students on its land.

- 9.13 The University lacks the necessary capital to develop the land itself, so grants a long lease of part of that area to a developer. The developer agrees to build and provide accommodation at affordable prices for students (which are defined in the lease as a function of average student accommodation prices in the UK).
- 9.14 The University undertakes not to allow the construction of student accommodation on land that it owns unless a demand test for further accommodation is satisfied. The restriction ensures that, for the term of the lease, there is adequate demand for the accommodation constructed by the developer, hence ensuring sufficient profitability of the contract for the developer.
- 9.15 There are five existing student halls of residence in Scholartown. Three of these are owned by the University and the two others are owned by two different parties. Students look for accommodation both in student halls and the private accommodation market. There is also some undeveloped land near the University campus, owned by a third party, which would be suitable for the development of other halls of residence buildings.

## Summary analysis

- 9.16 The restriction on the construction of student accommodation on other land owned by the University has the potential to restrict competition in the market for the provision of accommodation to students around the University.<sup>81</sup>

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<sup>81</sup> The geographic scope of this market is likely to be determined by the distance that students are prepared to travel between their student homes and the University campus. This will be wider than the campus and will include the other halls of residence and some private accommodation in town.

- 9.17 In this example, the restriction may not have an appreciable effect on competition in the market, as there is likely to be lots of private accommodation available in Scholartown and there are also a number of other alternative student accommodation sites in Scholartown (as well as the possibility of further sites being built on land not owned by the University).
- 9.18 If other alternative accommodation for students were more limited, this agreement could appreciably restrict competition. If this were the case, it is possible that this agreement could meet the criteria for exemption. First, the agreement facilitates the development of new accommodation for students and increases the accommodation available in Scholartown overall. Secondly, these benefits are passed on to consumers, in the form of new, affordable accommodation for students.
- 9.19 In this example, it may be the case that the developer would not commit its investment in the site without the exclusivity provision regarding the use of land that is owned by the University. Notably, the demand test should ensure that the restriction will be no greater than necessary to ensure profitability for the developer. The restrictive agreement is unlikely to substantially eliminate competition in any market.

### **Example 5 (shopping centre - 'anchor tenant')**

- 9.20 Landco is a property developer that builds shopping centres and leases retail units in those centres. Landco plans to build a large, state of the art shopping centre (the Shop Here Centre), located in the fringes of Townbridge. Landco is seeking to attract a high-profile anchor tenant in the shopping centre and plans to do so by offering favourable terms.



- 9.21 Buy&Buy operates large department stores across the country. Landco has offered Buy&Buy a 25-year lease agreement for a big store in Shop Here. The financial commitment of Buy&Buy to the project is key for Landco to obtain access to finance in this project. The presence of Buy&Buy in the shopping centre will also be crucial to attract customers and other businesses to the centre.
- 9.22 The lease with Buy&Buy will contain an exclusivity clause whereby Landco will not lease other retail plots at Shop Here to a department store competing with Buy&Buy. There will be about 20 more small and medium size retail units in the Shop Here Centre, which will compete with Buy&Buy to a certain extent on some products that are sold in its store.
- 9.23 The vast majority of Shop Here's customers come from within a drive time of 25 minutes. The Shop Here Centre will be located about a 10-minute drive from the centre of Townbridge. There is also a shopping centre of a similar size, called the Shop There Centre at the other end of Townbridge, located about a 15-minute drive from Shop Here. There is one large department store in the Shop There Centre owned by a rival retailer (Buy More). There are various retail businesses in the centre of Townbridge.

#### Summary analysis:

- 9.24 The exclusivity clause protects Buy&Buy from competition from other department stores within the Shop Here Centre. It is possible that the restriction may not fall within the Chapter I prohibition if it could be demonstrated that the agreement enables market entry (that is, as a

result of the building of the shopping centre) which would not have occurred **at all** without the existence of an equivalent agreement.<sup>82</sup>

- 9.25 Otherwise, the restriction may appreciably restrict actual or potential competition in the related market in which Buy&Buy competes for customers.
- 9.26 The market where Buy&Buy competes is likely to include all stores of a similar size within the area where Buy&Buy draws its customers from. This may include other retailers within the shopping centre. On the assumption that this is a 25-minute drive-time area around Buy&Buy, it would also include the other shopping centres and retailers in the vicinity of the centre (including Buy More) and other retailers in Townbridge. On the basis that Buy&Buy competes in a sufficiently wide and competitive market, it may be that the exclusivity clause does not have an appreciable effect on competition in the related market. There may also be other land available for other potential department stores.
- 9.27 If the exclusivity clause were found to appreciably restrict competition, it would be necessary to consider whether the restrictive agreement would benefit from exemption.
- 9.28 First, the agreement gives rise to efficiencies as it facilitates the development of the new shopping centre which increases overall choice and competition in Townbridge. The presence of Buy&Buy within the centre increases footfall within the centre and contributes to the overall profitability of the centre.

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<sup>82</sup> This will require an objective assessment of the possibility of a party to penetrate the relevant market without the benefit of the restriction in question. See chapters 4 and 5 for further detail.

- 9.29 The evidence in this case suggests that investment in the shopping centre could not have taken place without a period of guaranteed exclusivity and therefore the exclusivity provision is 'indispensable' to the benefits produced by the agreement.
- 9.30 However, an exclusivity provision of unlimited duration is unlikely to be necessary to protect the investment of Buy&Buy in the centre or to ensure the overall profitability of the centre.
- 9.31 A period of exclusivity of limited duration could benefit from exemption. The appropriate duration of the exclusivity provision for the agreement to benefit from exemption needs to be determined taking into account the economic and commercial conditions in which the agreement will be implemented. In this regard, it may be relevant to take into account the time necessary for a store to reach mature sales (at a point when its sales are projected to grow at a rate at or around inflation) that is, a stable revenue and customer base to provide the required return on investment.
- 9.32 The benefits described above are likely to be passed on to consumers, since consumers benefit from the competition created by the existence of the new shopping centre, the potential economies of scale created by greater footfall within the centre as a result of the investment of Buy&Buy in the centre and also from the variety of retailers within the centre.
- 9.33 Finally the agreement does not substantially eliminate competition in any market, since Buy&Buy continues to face competition from other retailers from within and outside the shopping centre.

### **Example 6 (shopping centre - use restrictions)**

- 9.34 The situation is the same as in Example 5. Landco is currently negotiating the leases of the small and medium size retail units in the

Shop Here Centre with various retailers in different sectors, including fashion shops, electronics retailers, sports equipment retailers, bookstores, music stores and a pharmacy, as well as coffee shops and restaurants. The leases for small and medium size units will be of different durations, all between five and 10 years.

- 9.35 All lease agreements for units in the shopping centre contain a clause which restricts the use of the premise to a specific use. This enables Landco to achieve its desired 'retail mix' and to ensure the attractiveness of a shopping centre to consumers. Landco also requests certain types of retailers to be located within a particular 'zone' of the centre in order to ensure a logical layout.

#### Summary analysis:

- 9.36 Landco is generally free to decide which retailers take on leases within the shopping centre. As set out in paragraphs 4.28 and 4.30 above, restricted user provisions do not generally restrict competition, although it may be necessary to assess whether a restriction gives rise to appreciable effects on competition if it guarantees an exclusive right to the lessee to operate as a particular type of retailer within the Shop Here Centre or otherwise forecloses access to or dampens competition on a related market.

#### **Example 7 (shopping centre – exclusivity arrangements)**

- 9.37 The situation is the same as in Example 6. Landco has entered into a lease agreement with a coffee shop company (Nice Coffee), which guarantees that Nice Coffee will be the only coffee shop in the Shop Here Centre. Demand estimates suggest that multiple coffee shops would be viable in the Shop Here Centre.
- 9.38 The only other retailer selling hot beverages within the shopping centre is a fast food outlet. The nature of the restriction means that

there are no other units available to other coffee shops within the shopping centre.

### Summary analysis:

9.39 This restriction means that competing coffee shops are unable to establish a unit in the centre and therefore prevents Nice Coffee from facing competition within the shopping centre. This type of restriction could appreciably restrict competition, depending on the product and geographic scope of the related market where Nice Coffee is a competitor and the extent of competition that Nice Coffee faces within that market.

9.40 The product market in which Nice Coffee competes would be determined, in broad terms, by the products that customers see as substitutes of those offered by Nice Coffee. Nice Coffee is likely to face competitive constraints from a fairly limited geographic area, because most customers of the shopping centre are not prepared to go very far to buy alternative beverages.<sup>83</sup> The market that is affected by the exclusivity clause is therefore likely to be the market for coffee and other beverages in Shop Here.

9.41 The exclusivity in this context is likely to appreciably restrict competition, in particular if it effectively confers Nice Coffee a

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<sup>83</sup> To the extent that Nice Coffee owns a number of coffee chains in the UK, it is also relevant to consider whether its retail offer is set according to conditions of local competition. The geographic dimension of the market where other retailers in Shop Here compete may vary in relation to each of them. Given the short distance from other high street shops, a majority of the businesses in Shop Here are likely to be constrained by these shops, together with the shops in Shop There and possibly businesses in a wider market (for example, where customers would consider shopping online for the same products that are sold in Shop Here).

considerably large share of the relevant market, as there are no other coffee shops in the shopping centre and there may be very limited pressure from other lessees, such as restaurants, which offer similar beverages.

- 9.42 Although customers may benefit from the shopping centre containing a mix of retailers, it might be difficult to argue that the exclusivity clause is 'indispensable' to facilitate investment in the coffee shop (since there is demand to support multiple coffee shops in Shop Here and the specific investment necessary to open a coffee shop is likely to be low), or to argue that the exclusivity clause is necessary for Landco to ensure the presence of at least one coffee shop in Shop Here (which could equally be achieved through leasing a retail unit to a coffee shop with a user restriction in it).
- 9.43 In these circumstances the exclusivity clause is unlikely to satisfy the exemption criteria.

### **Example 8 (restrictive covenant regarding future use of premises after sale)**

- 9.44 There are two petrol stations in Townville. They are both owned and operated by an oil company, Phill-up. The petrol stations are located within a 10-minute drive of each other. There are no other petrol stations located within a 10-minute drive from either of Phill-up's petrol stations in Townville.
- 9.45 Phill-up decides to close one of these petrol stations and sell the land to a company without any interest in the petrol business. Phill-up also wants to prevent anyone else from purchasing the land and selling it in the future to potential rival petrol stations. It therefore includes a restrictive covenant in the sale of the land preventing any future owner of the land from using it as a petrol station.

## Summary analysis:

- 9.46 The restrictive covenant prevents the land from being used as a petrol station and, more specifically, is aimed at preventing others from competing with Phill-up's retained petrol station. This restriction could appreciably restrict competition in the related market for the sale of petrol, depending on the scope of the related market for the sale of petrol and the extent of competition in the related market for the sale of petrol.
- 9.47 The geographic scope of the market for the sale of petrol can be determined by the distance that the majority of Phill-up customers are prepared to travel to fill their tanks at Phill-up's retained petrol station. For the purposes of this example, it is assumed that this is a 10-minute drive time isochrone.
- 9.48 Phill-up does not currently face any competition from other petrol stations within this related market.
- 9.49 It is unlikely that the covenant would have a negative impact on competition if there are many other suitable sites for use as petrol stations, as this would mean that new entrants could establish a petrol station in future. The availability of other suitable sites may vary over time, and so would vary the assessment of the agreement.
- 9.50 Given that there are no other petrol stations located within a 10-minute drive from either of Phill-up's petrol stations in Townville, the restrictive covenant is likely to appreciably restrict competition in the local petrol station market.
- 9.51 There is no evidence of any countervailing benefits which may outweigh any restriction on competition (assuming the agreement is found to appreciably restrict competition), and so the agreement would not benefit from exemption.

## **Example 9 (restrictive covenant regarding future use of premises after sale)**

- 9.52 Littleville is a small town in a rural area. The nearest town is 10 miles away.
- 9.53 There are five licensed betting offices (LBOs) in Littleville, each with a 20 per cent share of sales in this town. They are all within walking distance of one another on or within a close proximity to the High Street. There are a number of other retailers on or near the High Street.
- 9.54 About a year ago, one of the LBOs (Bet With Us) acquired the freehold to a vacant retail unit next door to its existing unit, with a view to extending into the vacant unit. However Bet With Us eventually decided to abandon the plan to expand its office. Instead, it has decided to sell the vacant unit to Fix It, a hardware store.
- 9.55 Bet With Us wants to ensure that if the outlet becomes available again, no other company will be able to open an LBO next door. It therefore includes a restrictive covenant in the sale, which prevents the unit being used as an LBO by future owners.

### **Summary analysis:**

- 9.56 The restrictive covenant is aimed at preventing another business from competing with Bet With Us next door to it and preventing access to the site by competitors of Bet With Us. This type of restriction could appreciably restrict competition, depending on the geographic scope of the related LBO market and the extent of competition in this market.
- 9.57 The geographic dimension of the related market is broadly determined by the distance that users of an LBO in Littleville would



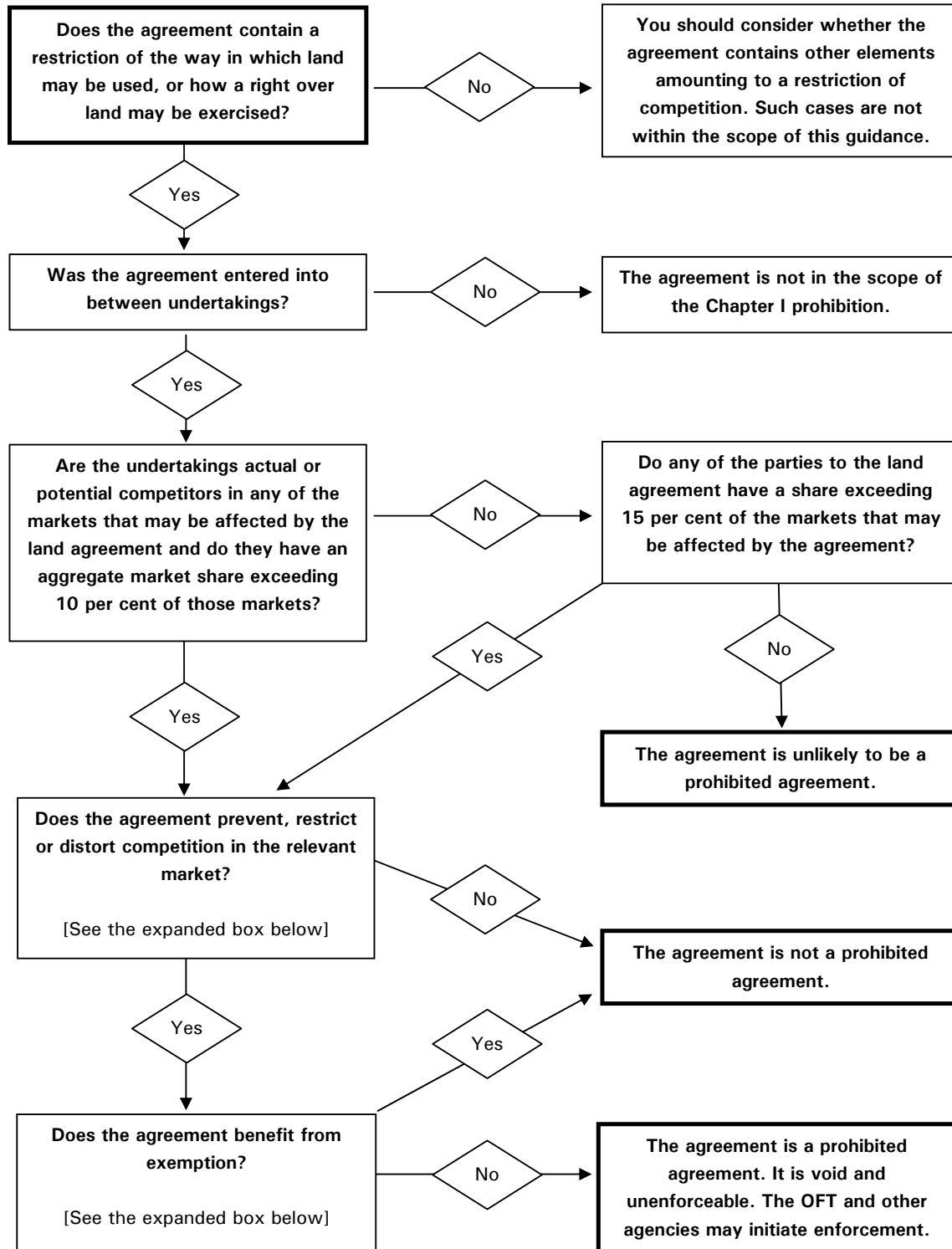
go to find an alternative LBO in response to a small but significant sustained increase in prices. Given the absence of LBOs in a radius of 10 miles, the market is likely to include only the five LBOs in Littleville.

- 9.58 Based on Bet With Us's market share, the fact that it faces relatively strong competition from other betting shops in the area that that there appear to be many other suitable retail outlets available to competitors (subject to planning permission and obtaining relevant licensing consents), the covenant may not appreciably restrict competition.
- 9.59 Although the covenant may not appreciably restrict competition at the time it is entered into, it may subsequently infringe the Chapter I prohibition as a result of changes in market circumstances. If Bet With Us's market share increases (for example, if three of the other LBOs in the area close) and if in the future, there is a shortage of other suitable sites available to potential competitors in Littleville over a short-term (one to two year) period, the analysis may differ. Therefore, the competitive assessment of the restrictive covenant may vary over time.
- 9.60 Assuming the restrictive covenant does appreciably restrict competition, there is no evidence of any countervailing benefits which may outweigh the restriction on competition at any present or future time, and so the agreement would be unlikely to benefit from exemption.

# ANNEXES

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## ANNEXE A - SELF-ASSESSMENT FLOW-CHART



**Does the agreement prevent, restrict or distort competition in the relevant market?**

To answer this question, you should consider, amongst others, the following questions:

- What is the restriction? Does it guarantee one party exclusivity or protect it from competition in a particular market?
- What is the relationship between the parties? Are they competitors or do they have a trading relationship?
- Do any of the parties have market power in the markets that may be affected by the agreement?
- Does the agreement raise barriers to entry (or expansion) in those markets? Might the agreement foreclose potential market entrants?
- Could the impact on competition result from the existence of a series of similar agreements?

**Does the agreement benefit from exemption?**

For an agreement to benefit from exemption, the four cumulative criteria must be satisfied:

- The agreement must contribute to improving production or distribution, or to promoting technical or economic progress.
- It must allow consumers a fair share of the resulting benefits.
- It must not impose restrictions beyond those indispensable to achieving those objectives.
- It must not afford the parties the possibility of eliminating competition in respect of a substantial part of the products in question.

## ANNEXE B - GLOSSARY OF TERMS

- B.1 **Chapter I prohibition** - The prohibition of anti-competitive agreements contained in Chapter I of the Act. This is the UK law prohibiting anti-competitive agreements and is also referred to as 'the prohibition' in this guideline. It is equivalent to the prohibition contained in Article 101 of the TFEU, which applies to agreements which have the potential to affect trade between EU Member States.
- B.2 **Chapter II prohibition** – This is the prohibition of conduct which amounts to an abuse of a dominant position in a market, contained in Chapter II of the Act. It is equivalent to the prohibition contained in Article 102 of the TFEU, which applies to conduct which has the potential to affect trade between EU Member States.
- B.3 **Land agreements** - Agreements which create, alter, transfer or terminate an interest in land, including transfers of freehold interests, leases and assignments of leasehold interests. Land agreements also include agreements relating to easements, licences and, in Scotland, interests under a lease and other heritable rights in or over land, such as heritable securities.
- B.4 **Prohibited agreement** – An agreement which falls within the scope of the Chapter I/Article 101 prohibition and does not benefit from exemption as a result of section 9 of the Act or Article 101(3) TFEU.
- B.5 **Sectoral regulators** - Sectoral regulators that have concurrent powers to enforce competition law in the UK: the Office of Communications; the Gas and Electricity Markets Authority; the Water Services Regulation Authority; the Office of Rail Regulation; the Civil Aviation Authority; and the Northern Ireland Authority for Utility Regulation.
- B.6 **Related market** - The market where the land affected by a land agreement is used to carry out an economic activity.
- B.7 **Relevant market** – A market in relation to which the impact of an agreement between undertakings or the conduct of one or more undertakings is assessed.

B.8 **Restrictions (in land agreements)** - Provisions which affect or limit the way in which the land may be used, or how a right over land may be exercised.