

How competition law applies to co-operation between farming businesses: Frequently asked questions

November 2011

OFT740rev

© **Crown copyright 2011**

You may reuse this information (not including logos) free of charge in any format or medium, under the terms of the Open Government Licence. To view this licence, visit www.nationalarchives.gov.uk/doc/open-government-licence or write to the Information Policy Team, The National Archives, Kew, London TW9 4DU, or email: psi@nationalarchives.gsi.gov.uk.

Any enquiries regarding this publication should be sent to us at: Marketing, Office of Fair Trading, Fleetbank House, 2-6 Salisbury Square, London EC4Y 8JX, or email: marketing@oft.gsi.gov.uk.

This publication is also available from our website at: www.oft.gov.uk.

CONTENTS

Chapter/Annexe	Page
1 Introduction	4
2 Competition law and policy in the farming sector	9
3 Collaboration in the farming sector	16
4 Mergers	27
A Annexe	29

1 INTRODUCTION

Farmers may want to enter into commercial agreements with other farmers for a variety of reasons ranging from simple agreements to share machinery and equipment to more complex arrangements involving common selling practices. The OFT recognises that many such forms of collaboration will be beneficial, increasing efficiency and benefiting consumers. We are also aware, however, that it is not always clear to farmers or their advisers whether a particular agreement will infringe competition law and this uncertainty may mean that some forms of beneficial co-operation do not happen.

The aim of these FAQs is to provide farm businesses with a brief outline of how competition law applies to the farming sector. In particular, the information provided aims to provide clarity about which sorts of behaviour and agreements are unlikely to breach competition law and which are more likely to do so.

This document should not be viewed as legal advice or relied upon as a complete statement of the law. The views and information provided in these FAQs do not bind the OFT nor are they intended as advice or a decision in specific cases. More detailed guidance on the application of competition law in the UK can be found in a number of guidance publications available from the OFT website. Links to the key ones can be found in the Annexe to this document.

Short form opinions

In addition to consulting OFT guidance or obtaining independent legal advice, businesses seeking clarity on how competition law applies to **prospective** collaboration agreements between competitors which raise novel or unresolved competition issues may be able to seek a **short-form opinion** from the OFT.

The short-form opinion process was introduced by the OFT in April 2010 as a straightforward and quick way of providing clear advice on competition law to businesses planning innovative forms of collaboration and others in similar situations in the future.

We hope this process will help ensure companies are not prevented or discouraged from embarking on legitimate and beneficial co-operation for fear of infringing competition law. Further information on the short-form opinion process, as well as on the OFT's first short-form opinion, is available on the OFT's website.¹

Key messages

The aim of competition law is to prevent harmful anti-competitive agreements and behaviour. Many forms of collaboration are beneficial, both to farmers and their customers. The key question to ask when considering whether a potential agreement is likely to infringe competition law is what effect it will have on competition in the relevant market and on customers.

The practices set out below would **almost certainly** infringe competition law. These might be considered the 'black list' of things to be avoided if you want to stay on the right side of the law:

- Anti-competitive agreements between companies where competitors **fix prices or divide markets**.² These are viewed as serious, 'hard core' infringements. Because fixing prices is very unlikely to lead to more efficient production, or better outcomes for consumers, these agreements nearly always infringe the law.³
- The prohibition on anti-competitive agreements also extends to **concerted practices**. A concerted practice may exist where there is informal co-operation between competitors, for example where sensitive commercial information may be exchanged or conveyed. **This includes, in particular, any information that may reveal a business's future commercial behaviour – in particular, pricing or marketing strategy**. In effect, exchanging information

¹ www.of.gov.uk/OFTwork/competition-act-and-cartels/short-form-opinions. See also OFT's first short-form opinion **P&H/Makro joint purchasing agreement**.

² Market sharing occurs where undertakings agree that they will not compete on some territories, type of customer or some other criterion.

³ See A20 for the very limited circumstances under which a price-fixing agreement might be exempt from competition law.

which reduces uncertainty about a business's or a competitor's behaviour is likely to be problematic. While this problem may arise with current information, it is more likely to do so with information about future activity. Through these actions the businesses in question would knowingly substitute co-operation between them for the risks of competition, thus reducing the normal commercial uncertainty that should exist between competitors. On the contrary, businesses should determine their commercial conduct, including pricing, completely independently of one another.

- Abuse of a dominant position in a relevant market by a business, particularly if this leads to the exclusion of actual and/or potential entrants.

Outside the above, there are many other forms of co-operation and collaboration between businesses which farmers could undertake and which, in the absence of market power, would be less likely to, or would almost certainly not, infringe competition law (depending on the circumstances of the situation and the size of the market affected). In this context, the FAQs set out below are intended to provide some guidance to farmers who may be considering entering into some form of co-operative arrangement, but fear – and/or are not clear whether –the arrangement may be in breach of current competition law.

Structure of the FAQs

The FAQs are organised into the following sections:

- General questions on competition law in the farming sector and how the OFT applies the law.
- More detailed questions on collaboration and agreements between farming businesses.
- Mergers.

Questions and answers

Navigate to the answer by holding down ctrl and clicking on the question:

- Q1 How can competition law and policy help farm businesses?**
- Q2 Why is the preservation of competition considered to be so important?**
- Q3 How are competition law and policy carried out in the UK?**
- Q4 Is there any other key legislation farmers should be aware of?**
- Q5 How does the OFT assess whether there is a competition problem?**
- Q6 How might 'market power' and 'dominant position' be assessed in the farming sector?**
- Q7 What sorts of behaviour may be an abuse of a dominant position?**
- Q8 In what circumstances would European competition law apply?**
- Q9 In summary, what sorts of activities are most likely to infringe competition law in the farming sector?**
- Q10 Aren't all forms of agricultural collaboration excluded automatically from EU law and the Competition Act?**
- Q11 Presumably an association of farmers or an agreement between associations of farmers that only covers a small share of the relevant market will not raise competition concerns?**
- Q12 Does competition law apply to agreements between farm businesses and other firms in the sector (for example, those which purchase the farmers' products)?**
- Q13 Are there examples of agreements in the farming sector that have infringed competition law?**

- Q14** I want to share farm overheads with other small farmers, for example, to share the use of equipment to reduce my costs. Would this cause competition concerns?
- Q15** How would competition legislation apply to an agreement to set up a co-operative, a joint production agreement or farmers' buying group in order to negotiate better prices by joint production/bulk buying?
- Q16** How would competition legislation apply to an agreement to set up a farmers' marketing or sales group?
- Q17** These collaborative arrangements, particularly joint commercialisation, are likely to require a reasonable amount of exchange of information. To what extent is this permissible?
- Q18** There seem to be a number of different market share thresholds that are used as benchmarks to assess market power for different arrangements. How do I know which one applies?
- Q19** If an agreement is likely to be caught by the TFEU or the Competition Act but the parties feel there are justifiable grounds for its retention, are there any criteria they can use to make an assessment against?
- Q20** Are there any circumstances in which price fixing would be allowed under competition law, such as where farmers may want to jointly sell, distribute, or promote their products?
- Q21** How does merger control operate?
- Q22** Is it true that the OFT / Competition Commission will seek to ban any mergers which will result in an enterprise having a market share of over 25 per cent?

2 COMPETITION LAW AND POLICY IN THE FARMING SECTOR

Q1 How can competition law and policy help farm businesses?

A1 Competition law helps farm businesses:

- (i) by establishing the conditions under which farmers can develop sustainable forms of co-operation with a view to improving their farms' efficiency and strengthening their bargaining power, without undermining their incentives to become more efficient and to innovate.
- (ii) by protecting them from anti-competitive practices which may limit access to potential customers or markets, and/or adversely affect the level of competition existing in the market or farmers' ability to compete effectively in that market.

If you believe your business is suffering because of the anti-competitive practices of others in the market, you may wish to make a complaint to the OFT. More information about how to make a complaint can be found at: www.offt.gov.uk/about-the-offt/legal-powers/legal/competition-act-1998/complaints

Q2 Why is the preservation of competition considered to be so important?

A2 Competition is at the heart of any successful market economy. As noted above, it provides a stimulus for businesses to improve their performance and to reduce their prices in order to gain an advantage over rivals and win more business. It encourages the development of new or improved products or processes and increases economic growth and living standards. Without competition in food production there would be less incentive for farmers to offer better produce to their customers and, ultimately, to final consumers.

Anti-competitive agreements and abuses of dominant market positions increase prices and harm consumer choice. They make the supply chain less efficient and undermine the performance of the economy as a whole. Stopping businesses from colluding to fix prices should ensure more

choice for consumers and prices that reflect as much as possible the costs of production (including a reasonable profit).

An effective market economy means competing to produce in the most efficient manner. Producers cut costs to become more efficient so that they can meet or beat competitors' prices. New businesses coming into a market are more likely to flourish if existing businesses do not exploit their market power in an anti-competitive way. Existing businesses should innovate to respond to new rivals.

Q3 How are competition law and policy carried out in the UK?

A3 In the UK, competition law is applied and enforced principally by the OFT. The Competition Act 1998 ('the Act') gives the OFT powers to apply, investigate and enforce the following main prohibitions (referred to as Chapter I and Chapter II prohibitions respectively) and – since 2004 - the equivalent prohibitions under EU competition law if an agreement or conduct has an appreciable effect on trade between EU member states: ⁴

- a prohibition on anti-competitive agreements between companies (Chapter I prohibition)
- a prohibition on the abuse of market power or of a dominant position (Chapter II prohibition), that focuses primarily on not excluding entrants to a particular market.

Companies which are found to have infringed the Act can face significant financial penalties of up to 10 per cent of world wide turnover. The most serious sanctions apply to cartels where competitors fix prices or divide markets.⁵

⁴ Article 101 of the Treaty on the Functioning of the EU ('TFEU') and Article 102 TFEU respectively.

⁵ The Enterprise Act 2002 makes it a criminal offence for an individual to dishonestly agree with one or more other persons that two or more undertakings will engage in certain prohibited cartel arrangements, including those that involve price fixing, market sharing, limitation of production or supply and bid rigging.

Q4 Is there any other key legislation farmers should be aware of?

A4 Yes. Under the Enterprise Act 2002, the OFT and the Competition Commission (CC) have respectively a duty to refer and, if appropriate, assess and remedy the adverse effects of mergers that would otherwise substantially lessen competition.

Also, the Enterprise Act 2002 makes provision for the OFT to carry out market studies. We may as a result of such studies refer markets to the CC to conduct more in-depth market investigations. Both the OFT and the CC may propose remedies in markets in which competition does not work well for consumers.

The OFT's decisions in competition investigations are subject to statutory rules, precedents and guidance derived from both UK and EC case law. Our decision-making is required to be transparent.⁶ We publish versions of our infringement decisions, which are also subject to appeal to the Competition Appeal Tribunal (CAT). If we do not find evidence of a competition law infringement, we sometimes publish a document explaining our reasons for not taking action. Details of OFT decisions can be found on our website.⁷

Q5 How does the OFT assess whether there is a competition problem?

A5 The OFT takes the following steps when assessing allegations of anti-competitive agreements or behaviour.

Defining the relevant market

In most cases we begin by defining a 'relevant market', so as to determine the competitive constraints acting on a supplier or purchaser of a given product or service. These include actual or potential competitors or firms that are capable of constraining those firms' behaviour and of

⁶ See the OFT publication *A guide to the OFT's investigation procedures in competition cases* (OFT1263 - March 2011). This is available from the OFT's website.

⁷ www.of.gov.uk/OFTwork/competition-act-and-cartels/ca98/decisions.

preventing them from behaving independently of effective competitive pressure (for example, by raising prices above the competitive level). This exercise also helps us to assess whether there is market power that may be being misused to restrict or prevent competition.⁸

Product markets

In brief, the relevant product market will consist of the products affected by the agreement or conduct in question, including substitute products, which are sufficiently close to the product concerned that customers or final consumers may switch to them should the price of the product concerned increase. If there are no such constraints, then that product group forms a separate market. For example, the OFT has concluded in previous merger decisions that raw milk forms a separate product market because processors cannot substitute other products for raw milk to produce dairy products.

Geographic markets

We also consider the geographic limits of these constraints. For example, the market for some agricultural products in the UK would not be considered a separate national market because, if prices were too high in the UK, produce could and would be imported from abroad. But this may not happen for all farm products. For example, the markets for perishable products, such as raw milk, which cannot be transported very far, are likely to be considered national or even regional markets.

Assessing competition in a relevant market

Once we have established a relevant market, we consider whether the restrictions in a particular collaborative arrangement or agreement are likely to have a significant adverse effect on competition. This will usually

⁸ See the OFT publication *Market Definition* (OFT 403 – December 2004). This is available on the OFT's website.

mean considering the impact on consumers in terms of prices, choice and quality.

As noted, under the law we consider certain collaborative practices such as price fixing and market sharing, and activities which may facilitate those practices, such as the sharing of future pricing and/or market strategy information as nearly always having an adverse effect on a market. We may also consider the effect on competition of conduct by single businesses that may have market power or a 'dominant position' in a particular market, to ascertain whether that business may be abusing that dominant position.

Q6 How might 'market power' and 'dominant position' be assessed in the farming sector?

A6 The prohibition on abuse of a dominant position applies if a farmer, an association of farmers or a co-operative is dominant in a relevant market. A business is said to hold a dominant position if it has substantial market power. As an indication, an undertaking⁹ might be said to have substantial market power if it has a high (say 40 per cent or over) share of the relevant market and there are few restraints on its behaviour (for example, in setting prices) from competitors, customers and/or consumers. In other words, the OFT considers it unlikely that a business will be individually dominant if its share of the relevant market is under 40 per cent, and even market shares above this level may not indicate dominance if, for example, there is strong buyer power or barriers to entry to the market are low.¹⁰

It is highly unlikely that any individual farmer or local co-operative will hold a dominant position but a national co-operative may do so if the relevant geographic market is national or sub-national.

⁹ In this document, the terms 'business' and 'undertaking' (the term used in competition legislation) are used interchangeably.

¹⁰ See also the OFT publication *Abuse of a dominant position* (OFT 402 – December 2004). This is available on the OFT's website.

It should be noted that even where a firm does hold a dominant position, this does not automatically cause concern under competition law. It is only when that dominant position is abused that the law is broken. Accordingly, in the context of co-operation agreements in the agricultural sector, this prohibition is likely to be less relevant than the prohibition on anti-competitive agreements.

Q7 What sorts of behaviour may be an abuse of a dominant position?

A7 Abusive conduct may be conduct which exploits consumers or suppliers, for example, through excessively high prices. It may also be anti-competitive conduct against actual or potential rivals which amounts to 'exclusionary' behaviour, because it excludes, removes or weakens competition from existing competitors or establishes or strengthens barriers to entry to the market. Examples of exclusionary behaviour are:

- Predatory behaviour (excessively low prices to try to drive competitors out of the market, with a view to raising prices once the competitors have exited the market).
- Activities which unduly limit or foreclose competitors' access to the market.
- In some circumstances, refusing to supply existing or potential customers without justification.

Q8 In what circumstances would European competition law apply?

A8 As noted earlier, since 2004 the OFT can apply both national competition law (Chapter I and Chapter II prohibitions) and EU competition law (Articles 101 and 102 TFEU) to agreements and/or conduct which may affect trade between member states. Therefore, EU competition law will only directly apply to co-operation among UK farmers if those arrangements have the capability to appreciably affect trade between member states.

The EU has noted that in practice this means that if a group of farmers with a combined market share of less than five per cent and an EU

aggregate turnover of less than 40 million euros were to decide to enter into any types of co-operation agreements, EU competition rules would simply not apply to them. However, UK legislation would still apply if the agreement affected trade in a relevant market in the UK.

Q9 In summary, what sorts of activity are most likely to infringe competition law in the farming sector?

A9 As noted in the introduction section, all agreements or collaborative arrangements between direct competitors in the farming sector which seek to fix prices or share markets and/or customers are considered highly likely to breach competition law. Hence they are generally prohibited. Similarly, agreements to limit supply of production to keep prices high or where the co-operation allows the parties to maintain, gain or increase market power and thereby to cause negative market effects with respect to prices, output, innovation, or the variety or quality of products would be likely to infringe competition law.

3 COLLABORATION IN THE FARMING SECTOR

Most forms of collaboration between farmers or between businesses in the farming sector will not raise any competition problems. It is only where co-operation could significantly affect the competitive process (for example, collaborating to fix prices, share markets or limit production) that the OFT is likely to have concerns. As noted, consumers are generally harmed by such collaboration.

As set out below, generally beneficial forms of collaboration (such as co-operatives, grouping together to purchase common inputs, to share expensive equipment or to engage in joint marketing or research and development and similar activities) do not cause problems under competition law, particularly when the businesses involved do not have market power.

Q10 Aren't all forms of agricultural collaboration excluded automatically from EU law and the Competition Act?

A10 No, but some are. The Treaty for the Functioning of the European Union (TFEU) and the Competition Act do exclude from consideration under EU and UK competition law many agreements between farmers or farmers' associations (or associations of such associations) which:

- concern the production or sale of agricultural products (including livestock, dairy, meat and fish products as well as fruit and vegetables and other crops), or the use of joint facilities for the storage, treatment and processing of agricultural products.

However, the exclusion only applies if the agreements meet certain conditions. The main ones are:

- The agreements are **only** between farmers or associations of farmers. For example, an agreement between a group of dairy farmers and milk processors would not come within the exclusion, nor would an agreement between livestock farmers and slaughterhouses.
- Crucially, the agreement must not involve an obligation on the farmers to charge identical prices for their products. Arrangements whereby

farmers agree to sell through a co-operative and take whatever price the co-operative realises in the market should, however, be acceptable.

Q11 Presumably an association of farmers or an agreement between associations of farmers that only covers a small share of the relevant market will not raise competition concerns?

A11 Generally that is the case. Some agreements are considered not to restrict competition because they cover a small proportion of the relevant market (see A5 for a brief summary of the meaning of 'relevant market').

As a rule, if the parties to an agreement are competitors that together have less than a **10 per cent market share**, there will be no significant restriction of competition. Undertakings in a 'vertical' (supplier/buyer) relationship may in addition benefit from an exemption from competition law provided both parties have less than a **30 per cent** share of the relevant market.

Even where agreements or collaborative arrangements cover a higher proportion of the market, there is no presumption that they will infringe the law. Whether or not they infringe will depend upon the overall effects of the agreement, the nature and structure of the market(s) in question, the extent of the parties' market power and the precise terms of the agreement.

It should be emphasised that agreements that involve **price fixing** or **market sharing** will be regarded as being likely to restrict competition significantly no matter how small the proportion of the market they cover.

Q12 Does competition law apply to agreements between farm businesses and businesses in other parts of the supply chain (for example, those which purchase the farmers' products)?

A12 Yes, EU and UK competition law apply in principle to all agreements or concerted practices between producers and other market participants such as processors and retailers.

As noted, an agreement between farmers or a farmers' association and a business in another part of the supply chain, for example, between a buyer and a seller is sometimes called a 'vertical agreement'. It is recognised that many such agreements are harmless and even beneficial. Consequently, many such agreements are generally exempted from consideration under competition law. This is provided that they do not contain certain hard-core restrictions such as price fixing, restrictions concerning the territory into which, or the customers to whom, the buyer may sell etc.

Businesses need to satisfy themselves that they are able to benefit from the EU rules on this exemption, which will also apply in UK law. As noted in A11, to benefit from the exemption, the agreement must not involve serious anti-competitive practices, and both parties must have market shares of **30 per cent** or less. The protection given by these rules can be withdrawn in circumstances where particular competition concerns arise.¹¹ There is no presumption that agreements where parties have higher market shares than 30 per cent are in breach of the law, but they may be subject to closer scrutiny, depending on the circumstances.

Q13 Are there examples of agreements in the farming sector that have infringed competition law?

A13 There is no recent UK case law on the application of competition law to the farming sector as there have been no cases since the Competition Act

¹¹ Further information is available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52010SC0411:EN:NOT>.

was introduced that have directly involved farmers. In practice, competition law is applied in the same way to agricultural markets as any other market. For example, there are a number of European cases in which agreements between businesses in the farming sector were found to include an element of agreeing or fixing prices. These agreements were considered to have infringed the law. The 'French beef' example [in the shaded box] describes an actual case of anti-competitive behaviour by French associations in the beef sector which was not covered by the exceptions to the EU competition rules for agricultural undertakings.

French beef

On 24 October 2001 six French agricultural associations entered into an agreement in the beef sector. Four of the associations represented farmers, including the association representing the co-operative movement and the FNSEA, the main French farmers union. The two others represented slaughterhouses. Under the agreement the associations jointly set a minimum price for beef. They also undertook to suspend or at least limit imports of all types of beef. The organisations knew that their action was unlawful. During the inspections carried out by the EU Commission in December 2001 documents were found which noted that the agreements were 'a bit against the law but that can't be helped' and asked 'can we close ranks, without being caught by the DGCCRF (the French Competition Authority)?'

On 3 May 2003 the EU Commission imposed fines totalling euro 16.7 million on the six participants to the agreement, of which euro 12 million was on the FNSEA.

The 'French beef' agreement was found not to benefit from the agricultural exclusion to Article 101 (**and** to have broken the law), because it involved an obligation to charge identical prices. The Commission and courts noted the difficulties that the industry was experiencing at the time, which were reflected in a reduction of the

penalty, but this did not prevent the agreement from being judged to have infringed the law. It is likely that a similar agreement in the UK would not benefit from the UK agricultural exclusion and would infringe the Competition Act prohibition on anti-competitive agreements.

Q14 I want to share farm overheads with other small farmers, for example to share the use of equipment to reduce my costs. Would this cause competition concerns?

A14 Generally no. For example, farm businesses may get together to share equipment, to purchase or deliver training courses, recruit jointly or share support services such as accountancy, payroll services or website design.

These types of activity can bring about more efficient production and distribution and are very unlikely to harm competition especially if the businesses involved do not have market power. Set out below are some examples of co-operation that, in the absence of market power, could be considered to be 'efficiency-enhancing' and would therefore be highly unlikely to breach competition law:

- Sharing facilities of any kind; for example, storage, transport, processing facilities, other common equipment.
- Sharing of skills and knowledge including staff.
- Common marketing or branding of a product to add value which is of some benefit to consumers (but not simply increasing the sale price of a product without such justification).
- Common marketing or branding of a product to ensure availability of that product on the relevant market.
- Reducing waste through better management and potential use of all by-products to their highest value rather than for disposal or for commodities.

Q15 How would competition legislation apply to an agreement to set up a co-operative, a joint production agreement or farmers' buying group in order to negotiate better prices by joint production/bulk buying?

A15 Farmers' co-operatives (within which, for example, farmers co-operate in the area of production, collection or processing their products), joint production agreements and joint agreements for bulk buying of inputs have generally been recognised under EU and UK law as pro-competitive structures, which allow farmers to compete more effectively against other suppliers.

Competition concerns are unlikely to arise unless the businesses involved have market power. For these agreements, parties with a combined market share of **20 per cent** are unlikely to be judged to have market power.¹²

Q16 How would competition legislation apply to an agreement to set up a farmers' marketing or sales group?

A16 Most agreements of this type, often referred to as commercialisation agreements, will not raise competition concerns provided they do not involve price fixing. The agricultural exclusion might apply to a marketing or sales agreement but marketing or sales groups can cover a variety of arrangements and the competition assessment will depend on the details. For example, marketing might be generic advertising or producers selling under a common brand. Alternatively, joint marketing may be needed to have the scale and professional management to meet the specifications of large customers. None of these is likely to raise competition concerns.

It is crucial that the parties to a joint selling agreement are free to set their own prices but they can sell through a common organisation such as a co-operative or commercial agent, taking whatever price the agent can

¹² See European Commission publications: *How EU competition policy helps dairy farmers in Europe*, published February 2010:

http://ec.europa.eu/competition/sectors/agriculture/summary_dairy.pdf,

get for their produce. The co-operative or agent should not otherwise restrict competition, for example by limiting quantities sold by its members, which might amount to market sharing.

Competition concerns are unlikely to arise unless the businesses involved have market power. For these agreements, parties with a combined market share of **15 per cent** are unlikely to be considered to have market power.¹³

Q17 These collaborative arrangements, particularly joint commercialisation, are likely to require a reasonable amount of exchange of information. To what extent is this permissible?

A17 Competition authorities recognise that many such collaborative arrangements involve a degree of information exchange. Much of this is harmless, particularly if it concerns historical information. However, parties should not exchange sensitive commercial information, particularly on future (and possibly current) marketing strategy, volumes and prices. Such information may reveal a business's or competitor's future commercial behaviour. Exchanging information which reduces uncertainty about a business's behaviour is likely to be problematic. Through these actions the businesses in question would knowingly substitute co-operation between them for the risks of competition, thus reducing the normal commercial uncertainty that should exist between competitors. On the contrary, businesses should determine their commercial conduct, including pricing, completely independently of one another.

Even when sharing what would otherwise be considered 'harmless' information, parties should also guard against such discussions leading to, or facilitating, an opportunity for exchanges of the above type of more commercially sensitive information. Discussions that strayed into and/or facilitated direct and/or indirect exchanges of current and future

¹³ See European Commission publications: *How EU competition policy helps dairy farmers in Europe*, published February 2010:

http://ec.europa.eu/competition/sectors/agriculture/summary_dairy.pdf,

commercially sensitive information are likely to fall foul of competition law. Commercialisation agreements where a certain degree of information exchange takes place should not be a mere cover for colluding on pricing and marketing strategies, otherwise the OFT would have scope to intervene and stop them.

Q18 There seem to be a number of different market share thresholds that are used as benchmarks to assess market power for different arrangements. How do I know which one applies?

A18 This table summarises the market share thresholds for types of agreements in the UK that, generally, will be unlikely to raise competition concerns because they would affect only a small part of the market.

Type of agreement	Applicable market share threshold	Likely competition assessment if parties to agreement are at or below market share threshold	Likely competition assessment if parties to agreement are above market share threshold
The parties form a horizontal agreement (that is, the parties are at the same level of the supply chain).	The parties' joint share of the relevant market is 10 per cent or lower.	There will be no appreciable restriction of competition unless the agreement contains a provision which directly or indirectly fixes prices, shares markets or limits production.	See below.
The parties form a joint commercialisation agreement .	The parties' joint share of the relevant market is 15 per cent or lower.	There will be no appreciable restriction of competition unless the agreement contains a provision which directly or indirectly fixes prices, shares markets or limits production.	Above a 15 per cent market share there is no presumption of illegality under competition law, and the potential restrictive and efficiency-enhancing effects of the agreement will be assessed on a case by case basis.
The parties form a production, bulk-buying, collection or processing co-operative	The parties' joint share of the relevant market is 20 per cent or lower.	There will be no appreciable restriction of competition unless the agreement contains a provision	Above a 20 per cent market share there is no presumption of illegality under competition law, and

agreement.		which directly or indirectly fixes prices, shares markets or limits production.	the potential restrictive and efficiency-enhancing effects of the agreement will be assessed on a case by case basis.
A party, or parties, enter/s into a 'vertical' agreement with another party at a different level of the supply chain (either higher or lower in the chain).	Both parties' share of the relevant market is lower than 30 per cent .	The parties would benefit from an exemption from competition law. Agreements which involve price fixing or market sharing will be regarded as likely to restrict competition no matter how small the proportion of the market they cover.	Above a 30 per cent market share there is no presumption of illegality under competition law, and the potential restrictive and efficiency-enhancing effects of the agreement will be assessed on a case by case basis.

Q19 If an agreement is likely to be caught by the TFEU or the Competition Act but the parties feel there are justifiable grounds for its retention, are there any criteria they can use to make an assessment against?

Yes, an agreement could be exempted (hence will not be prohibited) under the TFEU (if it affects other Member States) or the Competition Act if it satisfies the exemption criteria set out below.¹⁴ The restrictions must:

(a) contribute to:

- (i) improving production or distribution, or
- (ii) promoting technical or economic progress,

while allowing consumers a fair share of the resulting benefit and

(b) not:

¹⁴ Part 9 of the Competition Act or Article 101(3) of the TFEU.

(iii) impose on the undertakings concerned restrictions which are not indispensable to the attainment of those objectives, or

(iv) afford the undertakings concerned the possibility of eliminating competition in respect of a substantial part of the products in question.

Since 2004, it has been the responsibility of the parties to an agreement themselves to assess that agreement under competition law. If parties consider that an agreement they have arranged or are contemplating might meet the above exemption criteria, and this is brought to the OFT's attention, we would take into account whether or not these criteria have been met when deciding whether the prohibition against anti-competitive agreements has been infringed.

Parties may be expected to provide evidence to support their view that their agreement meets the criteria. It should be noted that it is only in exceptional circumstances that hard core restrictions of competition would meet the criteria, but it is, in principle, possible.

Q20 Are there any circumstances in which price fixing would be allowed under competition law, such as where farmers may want to jointly sell, distribute, or promote their products?

A20 Only in very exceptional circumstances would price fixing be allowed under current competition law, as price fixing is considered a hard core restriction. Such arrangements would have to meet the criteria set out in A19 above – in particular the fixing of prices would have to be indispensable to the implementation of the agreement.

In this context, it may also be worth noting that the EU has suggested two specific circumstances where price fixing could be exempted as it might be considered as indispensable for a commercialisation agreement to be implemented, these are:

- if a large buyer does not want to deal with a number of prices and requests a single supply price, or

- if farmers agree on jointly launching new products, such as a common brand, which can only be credibly achieved if all aspects of marketing, including price, are standardised.

A favourable assessment would, however, depend on the collective bargaining group not holding appreciable market power.

4 MERGERS

Q21 How does merger control operate?

A21 Some forms of co-operation may amount to a merger if a party transfers some or all parts of its business to another party in the collaboration. The OFT can consider mergers, acquisitions and joint ventures under the mergers provisions of the Enterprise Act if they involve (a) two enterprises (businesses or parts of businesses) that cease to be distinct and (b) either (i) the merging businesses both supply or acquire particular goods or services in (a substantial part of) the UK with a combined share of at least 25 per cent, or (ii) the UK turnover of the acquired business exceeds £70m.

If the OFT finds a realistic prospect that the merger results in a substantial lessening of competition, it will in principle refer the merger to the Competition Commission (CC) for further investigation. The OFT and the CC have issued several guidelines with more information about its assessment of mergers.¹⁵

Q22 Is it true that the OFT/Competition Commission will seek to ban any mergers which will result in an enterprise having a market share of over 25 per cent?

A22 No. There is no presumption that a merger leading to a market share greater than 25 per cent raises competition concerns. Rather the competition authorities assess a merger to see if it may be expected to result in a substantial lessening of competition. As noted in A21, OFT and CC merger guidance describes how we go about this. Each case is considered on its own merits. For example, the proposed merger between First Milk and Milk Link, two dairy farmers' co-operatives, which was abandoned in 2008, would have resulted in significant combined shares in

¹⁵ A brief overview is given in *A Quick Guide to UK Merger Assessment* (March 2011, OFT1313 and CC2 (summary)), with more detailed guidance in *Mergers jurisdictional and procedural guidance* (June 2009, OFT527) and *Merger Assessment Guidelines* (September 2010, OFT1254 and CC2). These can be found on the OFT's website.

the procurement of raw milk and the supply of cheddar to retailers, but the OFT concluded that the merger would not have raised competition concerns because the merged firm would have faced sufficient competitive constraints.¹⁶ Another example is the merger between Grainfarmers Group and Centaur Grain Group, two grain marketing farmers' co-operatives, which was cleared by the OFT despite shares exceeding 30 per cent in the procurement of grain in certain regions.¹⁷

¹⁶ See OFT decision of 12 December 2007.

¹⁷ See OFT decision of 23 September 2008.

A ANNEXE

OFT has produced various guidelines on competition law and these should be used if further guidance in addition to the FAQs is needed.

The main booklets relating to these FAQs are:

- the major provisions
- Market definition
- Assessment of market power
- Abuse of a dominant position
- Agreements and concerted practices
- Vertical agreements
- Competing fairly

which can be found at: www.offt.gov.uk/about-the-offt/legal-powers/legal/competition-act-1998/publications

and:

- Overview of the Enterprise Act
- Mergers – substantive assessment guidance

which can be found at:

www.offt.gov.uk/about-the-offt/legal-powers/legal/enterprise-act/publications2

Guidance booklets can also be ordered in hard copy from 0870 60 60 321.

Businesses considering making a request for a Short Form Opinion should approach the OFT informally to establish the best way to proceed. For further information, contact:

Jackie Holland
Director, Competition Policy and Procedural Adjudicator
jackie.holland@oft.gsi.gov.uk

or

Ann Pope
Director, Goods and Consumer Group
ann.pope@oft.gsi.gov.uk

The OFT is happy to receive any feedback on the views expressed in these FAQs.

Comments can be sent to:

Enquiries Unit
Farming collaboration FAQs
Office of Fair Trading
2-6 Salisbury Square
London EC4Y 8JX

Tel 020 7211 8000