

# Abuse of a dominant position

Understanding competition law

Competition  
law 2004

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

The following are the Regulators:

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

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

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

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

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# 1 Introduction

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

<sup>2</sup> Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (OJ L1, 4.1.2003, p. 1).

- 1.1** The EC Treaty<sup>1</sup> and the Competition Act 1998 (the Act) both prohibit, in certain circumstances, conduct by one or more undertakings which amounts to an abuse of a dominant position. The prohibitions are set out in Article 82 of the EC Treaty (Article 82) and section 18(1) of the Act (the Chapter II prohibition). EC Regulation 1/2003 (the Modernisation Regulation)<sup>2</sup> requires the designated national competition authorities of the Member States (NCAs) and the courts of the Member States to apply and enforce Article 82 as well as national competition law when national competition law is applied to an abuse prohibited by Article 82.
- 1.2** This guideline explains how the OFT will operate its powers under the Act and under the Modernisation Regulation in assessing the conduct of dominant undertakings. It indicates some of the factors which the OFT considers are relevant in determining whether an undertaking is dominant and whether its behaviour will or may be regarded as abusive.
- 1.3** It is intended that this guideline should be of assistance not only to those undertakings which are dominant in their market or markets, but also to their customers and other businesses. In addition to this guideline, the competition law guideline *Assessment of market power* (OFT415) provides further guidance on how the OFT assesses dominance.
- 1.4** The scope and application of Article 82 and the Chapter II prohibition are explained in Part 2 of this guideline. Part 3 of the guideline deals with the relationship between EC and national competition law. Parts 4 and 5 consider the definitions of dominance and abuse respectively. The OFT offers confidential informal advice to undertakings, and may, in certain circumstances, publish written guidance in the form of an Opinion. Further details about this can be found in Part 5.

# 2 Abuse of a dominant position: the provisions

## Scope of the provisions

**2.1** The OFT is empowered to apply two substantive provisions which prohibit conduct by one or more dominant undertakings<sup>3</sup> which amounts to abusive behaviour: Article 82 and the Chapter II prohibition. The Chapter II prohibition is based on Article 82. Article 82 provides that:

'Any abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it shall be prohibited as incompatible with the common market in so far as it may affect trade between Member States.'

The Chapter II prohibition provides that:

'...any conduct on the part of one or more undertakings which amounts to the abuse of a dominant position in a market is prohibited if it may affect trade within the United Kingdom.'

**2.2** The tests applied under Article 82 and the Chapter II prohibition have two common elements: whether an undertaking is dominant in a relevant market; and, if so, whether it is abusing that dominant position. The prohibition under both Article 82 and the Chapter II prohibition is on the **abuse** of the dominant position, not the **holding** of the position. The OFT would find an undertaking's behaviour an abuse only after detailed examination of the market concerned and the effects of the undertaking's conduct.

**2.3** Article 82 applies to conduct which 'may affect trade between Member States'. The case law of the European Court has interpreted this phrase broadly. Given the breadth of this interpretation, it is likely that in many cases conduct will be caught by both Article 82 and the Chapter II prohibition (see paragraphs 3.1 to 3.7 for further details on the application of this test).

**2.4** In determining whether Article 82 and/or the Chapter II prohibition apply, the dominant position must be held within the appropriate territory. In the case of Article 82, the dominant position must be held within the common market or in a substantial part of it. In the case of the Chapter II prohibition, the dominant position must be held within

<sup>3</sup> The term undertaking is not defined in the EC Treaty or the Act, but its meaning has been set out in Community law. It covers any natural or legal person engaged in economic activity, regardless of its legal status and the way in which it is financed. It includes companies, partnerships, firms, businesses, individuals operating as sole traders, agricultural cooperatives, associations of undertakings (e.g. trade associations), non-profit making organisations and (in some circumstances) public entities that offer goods or services on a given market.

the United Kingdom or any part of it. It is possible that a dominant position held within the United Kingdom or any part of it may also constitute a dominant position held within the common market or a substantial part of it (see paragraphs 4.26 to 4.28 below).

**2.5** Both Article 82 and the Chapter II prohibition provide, in similar terms, that conduct may constitute an abuse if it consists of:

- (a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions
- (b) limiting production, markets or technical development to the prejudice of consumers
- (c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage
- (d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of the contracts.<sup>4</sup>

**2.6** These are no more than examples, and are not exhaustive. The important issue is whether the dominant undertaking is using its dominant position in an abusive way. This may occur if it uses practices that have the effect of restricting the degree of competition which it faces, or of exploiting its market position unjustifiably.

### Exclusions

**2.7** Although the concept of an **exclusion** is not specifically recognised in relation to Article 82, under EC law certain types of conduct are, in effect, excluded from the application of Article 82. These include conduct:

- which would result in a concentration with a Community dimension and thereby be subject to the EC Merger Regulation<sup>5</sup>, or

<sup>4</sup> Section 18(2) of the Act.

<sup>5</sup> Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings. (OJ L24, 29.1.04, p. 1–22).

- which is carried out by an undertaking entrusted with the operation of services of general economic interest or having the character of a revenue producing monopoly, insofar as the application of Article 82 would obstruct the performance, in law or fact, of the particular tasks assigned to the undertaking.

**2.8** The Act sets out a number of specific exclusions from the Chapter II prohibition for certain categories of conduct<sup>6</sup>:

- to the extent that the conduct would result in enterprises ceasing to be distinct within the meaning of the merger provisions of the Enterprise Act 2002 (see the Enterprise Act guidance *Mergers: substantive assessment guidance* (OFT506) for further detail)
- which would result in a concentration with a Community dimension and thereby be subject to the EC Merger Regulation
- which is carried out by an undertaking entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly, insofar as the prohibition would obstruct the performance, in law or in fact, of the particular tasks assigned to the undertaking (see the competition law guideline *Services of general economic interest exclusion* (OFT421))
- to the extent to which the conduct is engaged in in order to comply with a legal requirement
- which is necessary to avoid conflict with international obligations and the conduct is the subject of an order by the Secretary of State, or
- which is necessary for compelling reasons of public policy and the conduct is the subject of an order by the Secretary of State.

**2.9** The Secretary of State has the power to add, amend or remove the exclusions from the Chapter II prohibition in certain circumstances.

## Exemptions

**2.10** Unlike Article 81 and the Chapter I prohibition, there are no block or parallel exemptions from Article 82 or the Chapter II prohibition.

<sup>6</sup> A domestic exclusion does not, however, exclude conduct from applicable EC law. Any conduct affecting trade between Member States that is excluded under the Act remains subject to Article 82, unless there is an equivalent exclusion at EC level. Accordingly should conduct infringe Article 82, all the consequences of infringement described at paragraphs 2.12 and 2.13 below will follow, irrespective of any domestic exclusion.

**2.11** If an undertaking's behaviour involves an agreement which is exempt from Article 81 or the Chapter I prohibition, the position under Article 82 and/or the Chapter II prohibition will depend on the type of exemption:

- the benefit of a United Kingdom or EC block exemption does not prevent the undertaking's behaviour from being an abuse under Article 82 or the Chapter II prohibition. This position also applies when the agreement benefits from a parallel exemption from the Chapter I prohibition because the agreement falls within a category of agreements which is covered by an EC block exemption regulation, but
- in cases where an agreement, prior to 1 May 2004, has been granted an individual exemption by the OFT under section 9 of the Act or benefits from a parallel exemption under section 10 of the Act because it has an individual exemption under Article 81(3), then it is unlikely to be examined again by the OFT under Article 82 and/or Chapter II, in the absence of a material change of circumstances.

### Consequences of infringement

**2.12** Conduct which amounts to the abuse of a dominant position is prohibited and the undertaking or undertakings involved may be subject to a financial penalty and/or to directions appropriate to bring the infringement to an end.

**2.13** The OFT may impose a financial penalty of up to 10 per cent of the worldwide turnover of an undertaking for an infringement of Article 82 and/or the Chapter II prohibition. When setting the amount of any penalty, the OFT must have regard to its *Guidance as to the appropriate amount of a penalty* (OFT423). Further details on penalties and directions (and other consequences of an infringement of Article 82 and/or the Chapter II prohibition) are available in the competition law guideline *Enforcement* (OFT407).



## Conduct of minor significance

**2.14** In order to avoid the prohibition regime being unduly burdensome on small businesses, the Act provides limited immunity from financial penalties for **conduct of minor significance** in relation to infringements of the Chapter II prohibition<sup>7</sup>. This immunity does not apply to infringements of Article 82. Conduct will be considered to be of minor significance if the annual turnover of the undertaking concerned does not exceed £50 million<sup>8</sup>. Undertakings will benefit from immunity from financial penalties for infringement of the Chapter II prohibition if the OFT is satisfied that they acted on the reasonable assumption that on the facts they qualified for the limited immunity for conduct of minor significance.

<sup>7</sup> Section 40 of the Act.

<sup>8</sup> Full details of how turnover is to be calculated can be found in the Competition Act 1998 (Small Agreements and Conduct of Minor Significance) Regulations 2000 (SI 2000/262).

**2.15** The OFT may still investigate conduct of minor significance and can decide to withdraw the immunity from financial penalties if, having investigated the conduct, it considers the conduct is likely to infringe the Chapter II prohibition. Withdrawal of the immunity in this way cannot have effect before the date of the decision.

## Third party action

**2.16** Third parties adversely affected by conduct which they believe infringes Article 82 and/or the Chapter II prohibition may, in addition to or instead of making a complaint to the OFT, take action in the courts to stop the behaviour and/or to seek damages.

**2.17** Where a decision of the OFT or the Competition Appeal Tribunal (the CAT) on appeal from a decision of the OFT has already found an infringement of Article 82 and/or the Chapter II prohibition, third parties who consider they have suffered loss as a result of the infringement may bring an action for damages, against the undertaking or undertakings concerned, in the CAT or the courts. The CAT and the courts will be bound, in such proceedings, by the relevant infringement decision, provided that the decision is no longer capable of being overturned on appeal.

# 3 Relationship between EC and National Competition Law

## Article 3 of the Modernisation Regulation

- 3.1** The relationship between EC competition law and national competition law is governed by Article 3 of the Modernisation Regulation. Article 3(1) provides that where national competition authorities or courts apply national competition law to conduct which would be caught by Article 82, they must also apply Article 82.
- 3.2** In all cases where the OFT examines whether undertakings have abused a position of dominance under the Chapter II prohibition, it also considers whether Article 82 is applicable. The OFT's determination of whether Article 82 is applicable will consist of assessing whether the conduct 'may affect trade between Member States'<sup>9</sup>. In practice, where the OFT considers that conduct under investigation may have an effect on trade between Member States, it will, in addition to applying Article 82, usually also apply the Chapter II prohibition. Equally, however, it is open to the OFT to apply Article 82 alone in such cases.
- 3.3** Conduct may affect trade between Member States, and yet not be prohibited by Article 82 either because the undertaking is not dominant, or because the conduct is not an abuse. In such instances, Article 3 does not prevent the application of stricter national competition law (see the competition law guideline *Modernisation* (OFT442) for further details on Article 3). In the United Kingdom the unilateral conduct of undertakings may, for example, be examined under the market investigation provisions of the Enterprise Act 2002 (the Enterprise Act) (see the Enterprise Act guidance on *Market investigation references* (OFT511) for further details).
- 3.4** Under the OFT's Rules<sup>10</sup>, the OFT may, at any time prior to making an infringement decision, elect to apply to a case one or both of Article 82 and the Chapter II prohibition. This means that a case started under Chapter II can be continued under Article 82 or (as is more likely) can be continued under both Article 82 and Chapter II, and vice versa.

<sup>9</sup> Article 82.

<sup>10</sup> The Competition Act 1998 (Office of Fair Trading's Rules) Order 2004 [SI 2004/2751]. Rule 10.

- 3.5** In cases where both Chapter II and Article 82 are applied, the decision and any remedies will be taken under both the Chapter II prohibition and Article 82. However, in such cases, when imposing penalties in respect of an infringement of both Article 82 and the Chapter II prohibition, the undertaking will not be penalised twice for the same anti-competitive effects. For further details see the OFT's *Guidance as to the appropriate amount of a penalty* (OFT423).
- 3.6** The European Commission has issued a Notice entitled *Guidance on the effect on trade concept contained in Articles 81 and 82 of the Treaty*<sup>11</sup> (the Effect on Trade Notice) to assist with the assessment as to whether or not agreements or conduct have an effect on trade between Member States. The Effect on Trade Notice sets out the principles developed by the European Court in interpreting the effect on trade concept and spells out a rule which will be applied by the European Commission in deciding whether or not agreements or conduct are likely to appreciably affect trade between Member States. A brief summary of some of the key points of the Effect on Trade Notice is set out in the competition law guideline *Modernisation* (OFT442).
- 3.7** The OFT will have regard to the guidance set out in the Effect on Trade Notice when considering whether particular conduct may have an effect on trade between Member States to determine whether Article 82 applies.

<sup>11</sup> OJ C101, 27.4.04, p. 81–96.

## Primacy of Community law

- 3.8** In applying Article 82, the OFT is bound by the fundamental principle of the primacy of EC law and must follow the case law of the European Court in interpreting EC legislation. As a consequence, conduct prohibited by Article 82 cannot be permitted under national law. National law can, however, be stricter than Article 82 so that conduct permitted under Article 82 may be prohibited under national law. The Modernisation Regulation also makes further provision to ensure consistency in the application of EC law. Article 16(2) of the Modernisation Regulation provides that where the European Commission has taken a decision on the conduct of an undertaking,

the OFT and other NCAs cannot take a decision in respect of the same conduct which would run counter to the decision adopted by the European Commission.

### **Consistency and cases brought under the Chapter I and Chapter II prohibitions**

- 3.9** In addition to its obligations under EC law, the OFT is under an obligation under section 60 of the Act to deal with cases brought under the Chapter II prohibition in such a way as to ensure consistency with EC law in so far as this is possible and having regard to any relevant differences between any of the provisions concerned. Further details about the operation of section 60 are set out in the competition law guideline *Modernisation* (OFT442).

# 4 Dominance

- 4.1** There are two tests common to assessing whether Article 82 or the Chapter II prohibition applies:
- whether an undertaking is dominant, and
  - if it is, whether it is abusing that dominant position.
- 4.2** The first test raises two questions which are considered below: (i) the definition of the market in which the undertaking is alleged to be dominant (the relevant market); and (ii) whether it is dominant within that market.
- 4.3** In addition, in determining whether Article 82 and/or the Chapter II prohibition apply, it is necessary to consider in which territory the dominant position is held (see paragraphs 4.26 to 4.28 below).

## Market definition

- 4.4** Before assessing whether an undertaking is dominant, the relevant market must be determined. This relevant market will have two dimensions:
- the relevant goods or services (the product market), and
  - the geographic extent of the market (the geographic market).
- 4.5** The OFT's approach to market definition is provided in the competition law guideline *Market definition* (OFT403), which follows a similar approach to that of the European Commission<sup>12</sup>. Market definition provides an appropriate frame of reference for competition analysis. In order to establish which products or geographic areas are included in the relevant market, a conceptual framework known as the hypothetical monopolist test is usually employed.

<sup>12</sup> See the European Commission's *Notice on the definition of relevant market for the purposes of Community competition law*, OJ C372, 9.12.97, p. 5.

## The product market

- 4.6** The market is determined by taking the product (or service) relevant to the investigation - the **focal product** - and looking at the closest substitute products, usually those products to which consumers would switch, if the price of the focal product rose. These substitute products are included in the same market as the focal product if

customers would switch to them in sufficient volumes in response to the hypothetical situation where the price of the focal product is sustained significantly above competitive levels<sup>13</sup>. The alternative products do not need to be perfect substitutes for the focal product, but alternatives which would fill a similar role to the focal product.

<sup>13</sup> For further details, see competition law guideline *Market definition* (OFT403).

**4.7** In addition to this substitution by customers (**demand-side substitution**), the price of the focal product can also be constrained by the potential behaviour of suppliers producing other products (**supply-side substitution**). This might occur where businesses which are not currently supplying the focal product could, at short notice, switch some of their existing facilities to supplying the focal product (or close substitutes) in response to prices of the focal product being sustained significantly above competitive levels. Where such switching would occur within one year and without substantial sunk costs<sup>14</sup>, supply-side substitutes may also be included in the relevant market.

<sup>14</sup> Sunk costs are costs which cannot be recovered when an undertaking leaves a market.

### The geographic market

**4.8** Similar methods are used to define the geographic market. Usually, the OFT would consider an area in which the focal product was sold as a candidate for the relevant geographic market. Then the OFT would consider whether, in response to the hypothetical situation where the price of the focal product in that area was being sustained significantly above competitive levels, customers would switch a sufficient volume of purchases to the same products sold in other areas. If so, these other areas will be included in the relevant geographic market. Supply side substitution might also occur whereby suppliers in other areas would quickly (for example, within one year), and without substantial investment, supply the candidate market in response to the higher prices there. The geographic market may be national (i.e. the United Kingdom), smaller than the United Kingdom (e.g. local or regional), wider than the United Kingdom (e.g. part of Europe, including the United Kingdom) or even worldwide.

## Precedent

**4.9** In some cases a market may previously have been investigated and defined by the OFT or by another competition authority. While such precedents can provide useful insights, the market definition used in a previous case may not always be the correct one to use in subsequent cases.

## Assessing dominance

**4.10** The European Court has defined a dominant market position as:

'...a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by affording it the power to behave to an appreciable extent independently of its competitors, customers and ultimately of its consumers.'<sup>15</sup>

<sup>15</sup> Case 27/76 *United Brands v Commission* [1978] ECR 207, [1978] 1 CMLR 429. This definition has been used in other cases.

**4.11** An undertaking will not be dominant unless it has substantial market power.

**4.12** Market power arises where an undertaking does not face sufficiently strong competitive pressure. Both suppliers and buyers can have market power. However, for clarity, market power will in this guideline refer to supplier market power. Where buyer market power is the issue, the term **buyer power** is employed to differentiate such market power from supplier market power. Market power and buyer power are not absolute but are matters of degree; the degree of power will depend on the circumstances of each case (see the competition law guideline *Assessment of market power* (OFT415)).

**4.13** Market power can be thought of as the ability profitably to sustain prices above competitive levels or to restrict output or quality below competitive levels. An undertaking with market power might also have the ability and incentive to harm the process of competition in other ways, for example by weakening existing competition, raising entry barriers or slowing innovation. However, although market power is not solely concerned with the ability of a supplier to raise prices,

this guideline, for convenience, often refers to market power as the ability profitably to sustain prices above competitive levels.

- 4.14** In assessing whether an undertaking is dominant, the OFT considers whether that undertaking faces constraints on its ability to behave independently. The most important constraints are existing competition and potential competition. Other factors, such as the countervailing influence of powerful buyers, or regulation, are sometimes relevant as well.
- 4.15** These constraints, which are relevant when assessing dominance under both Article 82 and the Chapter II prohibition, are discussed briefly below and explained in detail in the competition law guideline *Assessment of market power* (OFT415).

### Existing competition

- 4.16** Existing competition refers to competition from undertakings already in the relevant market, to whom consumers might switch if the alleged dominant undertaking sustained prices above competitive levels. The market shares of competitors in the relevant market are one measure of the competitive constraint from existing competitors.

### Market shares

- 4.17** There are no market share thresholds for defining dominance under Article 82 or the Chapter II prohibition. An undertaking's market share is an important factor in assessing dominance but does not, on its own, determine whether an undertaking 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 enjoy relatively weak positions or if it has enjoyed a high and stable market share.
- 4.18** 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<sup>16</sup>. The OFT considers it unlikely that an undertaking will be individually dominant if its share of

<sup>16</sup> Case C62/86, *AKZO Chemie BV v Commission* [1993] 5 CMLR 215.



the relevant market is below 40 per cent, although dominance could be established below that figure if other relevant factors (such as the weak position of competitors in that market and high entry barriers) provided strong evidence of dominance.

### Potential competition

**4.19** Potential competition refers to the possibility that undertakings would enter the relevant market and gain market share at the expense of an alleged dominant undertaking that sustained prices above competitive levels. The strength of potential competition is affected by **barriers to entry**. For further details on barriers to entry see competition law guideline *Assessment of market power* (OFT415).

### Other factors

**4.20** The ability of an alleged dominant supplier to exercise market power may be diminished by the existence of powerful buyers. Nevertheless, the existence of powerful buyers in a relevant market would not, in itself, preclude the OFT from finding a supplier to be dominant in that market<sup>17</sup>.

<sup>17</sup> An undertaking with strong buyer power may itself be dominant.

**4.21** Economic regulation is a further relevant factor when assessing market power in industry sectors where, for example, prices and/or service levels are subject to controls by the government or an industry sector regulator. In this situation an undertaking may still be considered to be dominant. Economic regulation may, however, limit the extent to which that dominant position may be abused, see the competition law guideline *Assessment of market power* (OFT415).

### Intellectual property rights (IPRs)

**4.22** The OFT considers that ownership of an IPR does not necessarily create a dominant position<sup>18</sup>. Whether or not dominance results from the ownership of an IPR depends upon the extent to which there are substitutes for the product, process or work to which the IPR relates.

<sup>18</sup> See, for example, Cases C-241 & 242/91P *Radio Telefis Eireann v Commission (Magill)* [1995] ECR I-743 at paragraph 46.

### Collective dominance

**4.23** Article 82 and the Chapter II prohibition prohibit conduct on the part of one **or more** undertakings which amounts to the abuse of a dominant position. A dominant position need not be held by a single undertaking. Separate undertakings may be found to hold a dominant position together where certain conditions are met. Their conduct may then be dealt with together under Article 82 and/or the Chapter II prohibition.

**4.24** A dominant position may be held collectively when two or more legally independent undertakings are linked in such a way that they adopt a common policy on the market. The European Court confirmed the principle of collective dominance in the *Italian Flat Glass* case:

'There is nothing, in principle, to prevent two or more independent economic entities from being, on a specific market, united by such economic links that, by virtue of that fact, together they hold a dominant position vis à vis the other operators on the same market.'<sup>19</sup>

**4.25** The links may be structural or they may be such that the undertakings adopt a common policy on the market<sup>20</sup>. For example, the nature of the market may be that undertakings might adopt the same pricing policy on the market without ever explicitly agreeing on price (see the competition law guideline *Assessment of market power*, OFT415)).

### Territorial scope

**4.26** In determining whether Article 82 and/or the Chapter II prohibition apply, it is necessary to consider the territory within which a dominant position is held. In the case of Article 82, the dominant position must be held in the whole or a substantial part of the common market. In respect of the Chapter II prohibition, the dominant position must be held within the United Kingdom or any part of it. A dominant position held within the UK or any part of it may also be a dominant position within a substantial part of the common market. In particular, where a dominant position is held within the UK as a whole, it will most likely

<sup>19</sup> Cases T-68/69 etc *Società Italiano Vetro SpA v Commission*, [1992] II ECR 1403, [1992] 5 CMLR 302.

<sup>20</sup> Joined Cases C-395/96 P and C-396/96 P *Compagnie Maritime Belge SA and others*, [2000] ECR I-1365 paragraph 45.

also be a dominant position within a substantial part of the common market.

- 4.27** The analysis for determining whether a market constitutes a substantial part of the common market encompasses not just a determination of the geographic scope of the market but also an assessment of the economic importance of the product market relative to the total EC market.
- 4.28** Whether an area will constitute a substantial part of the common market for the purposes of Article 82 is dependent on the facts of each individual case. In the past the European Court has considered that the Belgium-Luxembourg sugar market was a substantial part of the common market even though it constituted just nine per cent of Community sugar production and five per cent of the sugar consumption in the Community<sup>21</sup>. In the same case the European Court also found that southern Germany was a substantial part of the common market, and in a further case the European Court found that the Port of Genoa was a substantial part of the common market<sup>22</sup> for the purposes of applying Article 82.

<sup>21</sup> Case 40/73 *Suiker Unie v Commission* [1975] ECR 1663.

<sup>22</sup> Case C-179/90 *Merci convenzionale porto di Genova SpA* [1991] ECR I-5889.

## 5 Abuse

**5.1** The following paragraphs give some guidance on the second part of the test for assessing whether Article 82 or the Chapter II prohibition applies, that is, when an undertaking's behaviour might be regarded as an **abuse of a dominant position**.

### Concept of abuse

**5.2** The Act<sup>23</sup> and Article 82 list broad categories of business behaviour, within which particular examples of abusive conduct are most likely to be found. In general, the OFT considers that the likely **effect** of a dominant undertaking's conduct on customers and on the process of competition is more important to the determination of an abuse than the specific **form** of the conduct in question. Conduct may be abusive when, through the effects of conduct on the competitive process, it adversely affects consumers directly (for example, through the prices charged) or indirectly (for example, conduct which reduces the intensity of existing competition or potential competition). A dominant undertaking is under a special responsibility not to allow its conduct to impair undistorted competition.

**5.3** Neither Article 82 nor the Act contains a provision under which an abuse can be exempted because it produces benefits, but conduct may not be regarded as an abuse, even if it restricts competition, where there is an objective justification for the conduct. For example, a refusal to supply might be justified by the poor creditworthiness of the customer. However, it will still be necessary for a dominant undertaking to show that its conduct is proportionate.

**5.4** The OFT recognises the role of IPRs in encouraging creative and innovative activity. The legitimate exercise of an IPR by a dominant undertaking is not an abuse. It is, however, possible that the way in which an IPR is exercised may give rise to concern if it goes beyond the legitimate exploitation of the IPR; for example, if it is used to leverage market power from one market to another or to prevent the development of a new market.

<sup>23</sup> Section 18(2) of the Act.

## Categories of abuse

**5.5** Abusive conduct generally falls into one or both of the following categories:

- conduct which exploits customers or suppliers (for example, excessively high prices), or
- conduct which amounts to exclusionary behaviour, because it removes or weakens competition from existing competitors, or establishes or strengthens entry barriers, thereby removing or weakening potential competition.

**5.6** Exclusionary behaviour may include excessively low prices and certain discount schemes, where its (likely) effect is to foreclose a market, as well as vertical restraints or refusals to supply where these (are likely to) foreclose markets or dampen competition. However, whatever the form of the behaviour in question, its likely effect on competition will depend on the circumstances at hand and the OFT assesses alleged abuses on a case-by-case basis.

## Abuse in related markets

**5.7** As explained at paragraph 4.1 above, Article 82 and the Chapter II prohibition imply two tests: whether an undertaking is dominant, and whether it is abusing that dominant position. It is not necessary to show that the abuse was committed in the market which the undertaking dominates. In certain circumstances, Article 82 and the Chapter II prohibition may apply where an undertaking that is dominant in one market commits an abuse in a different but closely associated market. This principle was set out by the European Court in the case of *Tetra Pak II*<sup>24</sup>.

<sup>24</sup> Case T-83/91 *Tetra Pak v European Commission* [1994] ECR II-755. In this case the European Court found that Tetra Pak's activities in relation to the markets in non-aseptic machines and cartons constituted an abuse of its dominant position in the distinct, but closely associated, markets for aseptic machines and cartons intended for the packaging of liquid foods.

## 6 Informal advice and opinions

- 6.1** Undertakings will generally be well placed to analyse the effect of their own conduct under Article 82 and under the Chapter II prohibition in the light of relevant EC case law and EC legislation, including European Commission Notices which clarify the application of the law.
- 6.2** In addition to OFT competition law guidelines (such as this one) which are available to assist undertakings in the application of the law under the Act, the OFT also offers confidential informal advice to undertakings on the application of Article 81, Article 82 and/or the prohibitions in the Act through contact with OFT officials on an ad hoc basis. Views given by way of informal advice cannot bind the OFT or the national courts. Requests for informal advice are best made by calling the OFT enquiries line at 08457 22 44 99, or emailing [enquiries@oft.gsi.gov.uk](mailto:enquiries@oft.gsi.gov.uk).
- 6.3** Further, where a case raises novel or unresolved questions of law, it may be possible to obtain written guidance in the form of an Opinion from the European Commission or from the OFT. See the competition law guideline *Modernisation* (OFT442) for further details on European Commission<sup>25</sup> and OFT Opinions.

<sup>25</sup> Further information about the European Commission's approach can also be found in its *Notice on informal guidance relating to novel questions concerning Articles 81 and 82 of the EC Treaty that arise in individual cases (guidance letters)* (OJ C101, 24.4.04, p. 78–80).

## **Competition law guidelines**

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

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

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