

# Modernisation

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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## Modernisation:

The Office of Fair Trading's application of EC Regulation 1/2003 and the United Kingdom legal exception regime

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# 1 Introduction

<sup>1</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, 4.1.03, p1).

<sup>2</sup> As from 1 May 2004 the Member States are: Austria, Belgium, Cyprus, the Czech Republic, Denmark, Estonia, France, Finland, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, the Netherlands, Poland, Portugal, the Slovak Republic, Slovenia, Spain, Sweden, and the United Kingdom.

<sup>3</sup> The Treaty establishing the European Community.

<sup>4</sup> Article 81(1) prohibits agreements which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market. Agreements which fall within Article 81(1) are prohibited unless the conditions in Article 81(3) are met. Further details on Article 81 are provided in the competition law guideline *Agreements and concerted practices* (OFT401).

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- 1.1** On 1 May 2004, EC Regulation 1/2003 (the Modernisation Regulation)<sup>1</sup> came into force. The Modernisation Regulation substantially changes the framework for enforcement of European competition law. It requires the designated national competition authorities of the Member States<sup>2</sup> (NCAs) and the courts of the Member States to apply and enforce Articles 81 and 82 of the EC Treaty<sup>3</sup> (Article 81<sup>4</sup> and Article 82<sup>5</sup> respectively) when national competition law is applied to agreements which may affect trade between Member States or to abuse prohibited by Article 82. It also establishes a ‘legal exception’ regime. These changes are referred to in this guideline as ‘modernisation’.
- 1.2** The Competition Act 1998 (the Act) has been amended both to take account of the Modernisation Regulation and in order to ensure that the United Kingdom system remains aligned with the EC system post-modernisation.
- 1.3** This guideline sets out how the Modernisation Regulation and related changes to the Act will be applied by the OFT.
- 1.4** An outline of the Modernisation Regulation is set out in Part 2 of this guideline. Part 3 describes the ‘legal exception’ regime introduced by the Modernisation Regulation. Part 4 considers the relationship between EC and national competition laws. Part 5 explains how the OFT will apply Articles 81 and 82. Part 6 deals with block exemption regulations under the EC and United Kingdom ‘legal exception’ regimes. Part 7 sets out the details of opinions that may be issued by the OFT on novel or unresolved questions relating to the application of Article 81, Article 82, the Chapter I prohibition, and the Chapter II prohibition and informal advice given by the OFT on an ad hoc basis.
- 1.5** The new framework established by the Modernisation Regulation makes co-operation between the OFT, the European Commission and other NCAs more important. Part 8 explains how cooperation will be achieved in practice. Part 9 addresses confidentiality and disclosure of information under the Modernisation Regulation and the Enterprise

Act 2002 (the Enterprise Act). Part 10 sets out how the changes will affect the role of the courts and Part 11 explains the transitional arrangements that will apply to pending notifications, to individual exemptions granted by the OFT or the European Commission, and to ongoing cases.

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<sup>5</sup> Article 82 prohibits conduct by one or more undertakings which amounts to an abuse of a dominant position within the common market or in a substantial part of it and which may affect trade between Member States. Further details on Article 82 are provided in the competition law guideline *Abuse of a dominant position* (OFT402).

## 2 The Modernisation Regulation

**2.1** The Modernisation Regulation has introduced a new framework for the application of Articles 81 and 82 with the aim of creating a more effective enforcement regime across the European Union. NCAs may now apply Articles 81 and 82 alongside the European Commission. This contrasts with the situation prior to modernisation under Council Regulation (EEC) 17/62, whereby the European Commission alone had the competence to apply Article 81(3) to agreements<sup>6</sup> that infringed Article 81(1). Article 81(1) and Article 82 were directly applicable, but there was no requirement for NCAs to have the power to apply Article 81(1) or Article 82 – and the OFT did not have this power in the United Kingdom.

<sup>6</sup> Reference in this guideline to ‘agreement(s)’ should, unless otherwise stated or the context demands it, be taken to include decisions by associations of undertakings and concerted practices.

**2.2** The Modernisation Regulation:

- **decentralised the application of Articles 81 and 82:** the OFT, as an NCA, is competent to apply Articles 81 and 82 in the United Kingdom alongside the European Commission
- **abolished the system of notifying agreements** for exemption under Article 81(3) and the exclusive competence of the European Commission to apply Article 81(3)
- **created a more level playing field for the treatment of agreements throughout the European Community:** the application of national competition laws (and decisions of courts) cannot prohibit agreements, which may affect trade between Member States, which are permitted under Article 81, and
- **established a network of competition authorities** (European Competition Network or ECN), consisting of the European Commission and NCAs, to co-ordinate enforcement.

**2.3** The Modernisation Regulation requires NCAs to apply Articles 81 and/or 82 respectively where they apply national competition law to an agreement within the meaning of Article 81(1) or an abuse prohibited by Article 82 which may affect trade between Member States. The Modernisation Regulation does not, however, lay down the procedures to be followed by NCAs in applying Articles 81 and 82.

**2.4** In order to ensure the effective application of the new framework, the Modernisation Regulation requires each of the Member States to

designate NCAs for the purpose of applying Articles 81 and 82. The OFT and the Regulators have been designated as NCAs for the United Kingdom<sup>7</sup>. The Regulators will fulfil their role as NCAs in relation to their respective sectors.

**2.5** The Modernisation Regulation also addresses how the European Commission will apply Articles 81 and 82. These provisions of the Modernisation Regulation are not dealt with in this guideline, but the European Commission has issued a number of Notices explaining how it will operate under the Modernisation Regulation.<sup>8</sup>

<sup>7</sup> Note that the Competition Commission is not designated as an NCA for the purpose of applying Articles 81 and 82. The Competition Commission is an independent public body established by the Act. The Competition Commission conducts in-depth inquiries into mergers, markets and the regulation of the major regulated industries, undertaken in response to a reference made to it by another authority.

<sup>8</sup> The Notices are as follows: *Notice on cooperation within the Network of Competition Authorities* (OJ C101, 27.04.2004, p43), *Notice on the co-operation between the Commission and the courts of the EU Member States in the application of Articles 81 and 82 EC* (OJ C101, 27.04.2004, p54), *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, 27.04.2004, p78), *Notice on the handling of complaints by the Commission under Articles 81 and 82 of the EC Treaty* (OJ C101, 27.04.2004, p65), *Notice – Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty* (OJ C101, 27.04.2004, p81), and *Notice – Guidelines on the Application of Article 81(3) of the Treaty* (OJ C101, 27.04.2004, p97).

## 3 Framework for the application of Articles 81 and 82

- 3.1** The Modernisation Regulation sets out the framework for the application of Articles 81 and 82.
- 3.2** The Modernisation Regulation introduces a 'legal exception' regime. This means that an agreement that falls within the scope of Article 81(1) but which satisfies the conditions set out in Article 81(3) shall not be prohibited, no prior decision to that effect being required. Such an agreement is valid and enforceable from the moment that the conditions in Article 81(3) are satisfied and for as long as that remains the case.
- 3.3** In respect of Article 82, the Modernisation Regulation provides that abuse of a dominant position caught by Article 82 is prohibited without the need for a prior decision to that effect.

### Abolition of the EC and United Kingdom notification systems

- 3.4** The legal exception regime, with its direct application of Article 81(3), means that undertakings are no longer required to notify agreements to the European Commission in order for those agreements to be exempt from the application of Article 81(1).
- 3.5** In order to ensure consistency with the EC regime, the system of notifications under the Act has been abolished. It has been amended so that an agreement that falls within the scope of section 2 of the Act (the Chapter I prohibition) but which satisfies the conditions set out in section 9(1) of the Act shall not be prohibited, no prior decision by the OFT to that effect being required. From 1 May 2004, it is not possible for the OFT to accept notifications for decision or guidance under the Act. However, the OFT will continue to offer informal advice and may (as set out in paragraphs 7.4 to 7.19 below) provide published guidance in the form of Opinions where a case presents novel or unresolved questions about the application of Article 81, Article 82 and/or the prohibitions in the Act. The OFT's treatment of individual exemptions granted before 1 May 2004 and pending United Kingdom notifications as at 1 May 2004 is set out in Part 11 below.

## Burden and standard of proof

- 3.6** Article 2 of the Modernisation Regulation sets out who will bear the burden of proving the facts relating to the conditions for applying Articles 81 and 82. The burden of proving an infringement of Article 81(1) or Article 82 is placed on the European Commission, the NCA or the party alleging the infringement. If an undertaking is seeking to rely on Article 81(3) then it bears the burden of proving that the conditions in Article 81(3) are met.
- 3.7** In order to ensure the consistent application of EC and United Kingdom law an identical approach to the burden of proof to that under Article 2 of the Modernisation Regulation applies under section 9(2) of the Act. This means that the OFT or party alleging an infringement of the Chapter I prohibition and/or the Chapter II prohibition will be required to prove the infringement. If an undertaking seeks to rely on section 9(1) of the Act in any proceedings, then it will bear the burden of proving that section 9(1) applies.
- 3.8** The standard of proof applied to infringement decisions under Articles 81 and 82 is that applied in the United Kingdom in relation to the Chapter I and Chapter II prohibitions.

# 4 Relationship between EC and National Competition Laws

## Article 3 of the Modernisation Regulation

- 4.1** The relationship between EC competition law and national law is governed by Article 3 of the Modernisation Regulation. Article 3(1) provides that where the OFT applies national competition law to agreements within the meaning of Article 81(1) which may affect trade between Member States, it must also apply Article 81 to such agreements. Where it applies national competition law to an abuse of a dominant position prohibited by Article 82, it must also apply Article 82.
- 4.2** What happens in the event that national competition law would lead to a stricter outcome than the position under EC competition law is also dealt with under Article 3. The position is different according to whether Article 81 or Article 82 applies.
- 4.3** In relation to agreements within the meaning of Article 81(1) which may affect trade between Member States, applying national competition law may not lead to the prohibition of an agreement if the agreement would be permitted under Article 81. This could be because the agreement in question does not restrict competition within the meaning of Article 81(1), the conditions in Article 81(3) are met or the agreement is covered by an EC block exemption regulation.
- 4.4** In relation to conduct which may affect trade between Member States, Article 3(2) permits the application of stricter national law than Article 82 to prohibit or sanction unilateral conduct. In the United Kingdom the unilateral conduct of undertakings may, for example, be examined under the market investigation provisions of the Enterprise Act.

## Effect on trade between Member States

- 4.5** As outlined above, the OFT is required to apply Articles 81 and/or 82 in addition to national competition law if an agreement or an abuse prohibited by Article 82 'may affect trade between Member States'.

**4.6** 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>9</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 OFT will have regard to the *Effect on Trade Notice* in its application of competition law. Further information on the concept of effect on trade is available in the competition law guidelines *Agreements and concerted practices* (OFT 401) and *Abuse of a dominant position* (OFT402).

<sup>9</sup> OJ C101, 27.04.2004, p81.

## Primacy of Community law

**4.7** In applying Articles 81 and 82, the OFT and the national courts are bound by the fundamental principle of the primacy of Community law and must follow the case law of the European Court in interpreting Community legislation. As a consequence, an agreement prohibited by Article 81 or conduct prohibited by Article 82 cannot be permitted under national law.

**4.8** The Modernisation Regulation also makes further provision to ensure consistency in the application of Community law by NCAs. Article 16(2) of the Modernisation Regulation provides that where the European Commission has taken a decision on an agreement or conduct under Article 81 or Article 82, NCAs cannot take a decision in respect of the same agreement or conduct which would run counter to the decision adopted by the European Commission.

## Interaction with the Act

**4.9** In addition to the obligations under Community law, section 60 of the Act aims to ensure that the United Kingdom authorities deal with cases under Part I of the Act consistently with Community law in so far as this is possible having regard to any relevant differences between the provisions concerned.

**4.10** The provisions of section 60 of the Act apply to all United Kingdom authorities which are involved with the administration and enforcement of Part I of the Act: the OFT, the Regulators, the Competition Appeal Tribunal (the CAT) and the domestic courts.

- 4.11** When dealing with questions arising under Part I of the Act in relation to competition within the United Kingdom, the United Kingdom authorities are under a dual obligation. First, they must ensure that there is no inconsistency with either the principles laid down by the EC Treaty and the European Court, or any relevant decision of the European Court. Second, the United Kingdom authorities must have regard to any relevant decision or statement of the European Commission. In the OFT's view, this is limited to decisions or statements which have the authority of the European Commission as a whole, such as, for example, decisions on individual cases under Articles 81 and/or 82. It would also include European Commission Notices and clear statements about its policy approach which the European Commission has published in its Annual Reports on Competition Policy.
- 4.12** The obligation to ensure consistency applies only to the extent that this is possible, having regard to any relevant differences between the provisions concerned.

### Interaction between Articles 81 and 82 and the prohibitions in the Act

#### Dual Application

- 4.13** In cases where an undertaking has committed an infringement of both an EC prohibition (i.e. Article 81 or Article 82) and the equivalent UK prohibition (i.e. the Chapter I prohibition or Chapter II prohibition respectively), the undertaking will not be penalised twice for the same anti-competitive effects.
- 4.14** 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 more of the Chapter I prohibition, the Chapter II prohibition, the prohibition in Article 81(1) and the prohibition in Article 82 (whether or not any such election has previously been made by the OFT in that case). This means that a case started under the Chapter I prohibition can be continued under Article 81 alone or (as is more likely) under both the Chapter I prohibition and Article 81 if it is subsequently concluded that there may be an effect on trade between Member States. It also

<sup>10</sup> The Competition Act 1998 (Office of Fair Trading's Rules) Order 2004 (SI 2004/2751) (the OFT's Rules), rule 10.

means that a case started under Article 81 can be continued under the Chapter I prohibition alone if it is subsequently concluded that there is no effect on trade between Member States. The same principles apply in relation to cases commenced under the Chapter II prohibition and/or Article 82. The provisions of rules 4 (on statement of objections) and 5 (on notices, access to file and representations) of the OFT's rules shall apply to the extent that they have not already been applied.

### Exclusions

- 4.15** Although the concept of an exclusion is not specifically recognised in relation to Article 81, under EC competition law certain categories of agreement are, in effect, excluded from the application of Article 81.
- 4.16** In certain limited circumstances agreements and/or conduct may benefit from an exclusion from the application of either the Chapter I and/or II prohibitions. Lists of potentially available exclusions may be found in the competition law guidelines *Agreements and concerted practices* (OFT 401) and *Abuse of a dominant position* (OFT402). It should be noted that there are more potentially available exclusions under the Act than are available under EC law. Accordingly an agreement and/or conduct that benefits from an exclusion from the Chapter I and/or Chapter II prohibitions may still be subject to scrutiny under Article 81 and/or 82.

## Interaction with other national law

### General

- 4.17** As more fully explained in paragraphs 4.1–4.4 above, Articles 3(1) and (2) apply when national competition law is applied to agreements or conduct which may affect trade between Member States. However, Article 3(3) disapplies Articles 3(1) and (2) with respect to national merger control law. Furthermore, it states that Articles 3(1) and (2) do not preclude the application of national law that predominately pursues **objectives different from those pursued by Articles 81 and 82.**

**4.18** The following paragraphs address key areas in which Articles 81 and 82 may interact with the application of national law. There may, however, be other areas in which such interactions occur.

### Mergers

**4.19** Article 3(3) of the Modernisation Regulation disapplies the requirement to apply Articles 81 and/or 82 as well as national competition law in cases where an NCA or the courts apply national merger control. As a consequence, where a merger, acquisition or joint venture is subject to investigation under the merger control provisions of the Enterprise Act there is no obligation to apply Articles 81 and/or 82 to the transaction whether or not it may have an effect on trade between Member States. This is so even if a merger, acquisition or joint venture has a Community dimension as defined in the EC Merger Regulation<sup>11</sup> but is subject to a reference back to the United Kingdom authorities by the European Commission. The OFT would not seek to apply Articles 81 and/or 82 in such circumstances.

### Market investigation references

**4.20** Under the Enterprise Act, the OFT and, in certain circumstances, the Secretary of State have powers to make a reference to the Competition Commission for investigation where there are reasonable grounds for suspecting that any feature, or combination of features, of a market in the UK for goods or services prevents, restricts or distorts competition in connection with the supply or acquisition of any goods or services in the UK or part of it. The OFT's guidance on *Market investigation references* (OFT511) explains how this power is exercised by the OFT.

<sup>11</sup> Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation) OJ L24, 29.01.2004, p1.

## The cartel offence

- 4.21** The cartel offence under the Enterprise Act and Article 81 and the Chapter I prohibition are aimed at different legal persons. The cartel offence is aimed at dishonest activity by **individuals** whereas Article 81 and the Chapter I prohibition are aimed at anti-competitive activity by **undertakings**. The Modernisation Regulation does not apply to national laws which impose criminal sanctions on natural persons, except to the extent that such sanctions are the means whereby competition rules applying to undertakings are enforced. The OFT considers that the cartel offence is not a means whereby competition rules applying to undertakings are enforced.
- 4.22** The OFT, therefore, considers that the investigation or prosecution of an individual under the cartel offence would **not** require the OFT to apply Article 81 as well.
- 4.23** However, the circumstances leading to an infringement of Article 81 or the Chapter I prohibition may also give rise to the prosecution of an individual under the cartel offence. This may lead to parallel investigations under the criminal provisions in the Enterprise Act and Article 81 and/or the Chapter I prohibition.
- 4.24** Where parallel investigations are underway, the investigating officers of the OFT will, where appropriate, act in accordance with criminal law and procedures in collecting evidence and gathering information. Where information has been exchanged between NCAs or between NCAs and the European Commission pursuant to the Modernisation Regulation, the information exchanged will not be used in evidence for the purposes of proving the cartel offence.
- 4.25** In certain cases, parallel investigations may be progressed where the Serious Fraud Office is leading the criminal investigation. Suitable procedures will be adopted to ensure that the two investigation teams maintain an on-going dialogue and to ensure that an investigation under Article 81 and/or the Chapter I prohibition does not prejudice a parallel criminal investigation.

**4.26** In cases where the European Commission is investigating an infringement of Article 81 involving a potential criminal cartel offence in the United Kingdom, the OFT and the European Commission will co-operate to co-ordinate the investigations.

**4.27** Further details on parallel investigations under the cartel offence and Article 81 and/or the Chapter I prohibition are provided in the OFT guidance on *Powers for investigating criminal cartels* (OFT505).

### Regulated industries

**4.28** The Regulators are able to apply the Chapter I and Chapter II prohibitions in relation to their regulated industries by virtue of their concurrent powers under the Act. Additionally the Regulators are NCAs for the purposes of the Modernisation Regulation and are therefore able to apply Articles 81 and 82 in relation to their respective industries. Where the Regulators apply the Chapter I and/or Chapter II prohibitions, and there may be an effect on trade between Member States, they are also obliged, by Article 3 of the Modernisation Regulation, to apply Articles 81 and/or 82.

**4.29** The Regulators also possess sectoral powers under national law in relation to their respective industries. Some of these powers may, in certain circumstances, be capable of being used to pursue the same or similar objectives to Articles 81 and 82, i.e. the protection of competition on the market, and may therefore be considered to be 'national competition law' within the meaning of Article 3 of the Modernisation Regulation. If so the application of such sectoral powers may give rise to an obligation to apply Articles 81 and/or 82 as well as the sectoral power if trade between Member States may be affected. Sectoral powers may, however, be used predominantly to pursue a different objective to that of Articles 81 and 82. In such cases these sectoral powers would not be considered to be 'national competition law' and so the obligation in Article 3(1) would not arise.

**4.30** If an agreement or conduct could potentially fall within the scope of both Articles 81 and/or 82 and sector-specific powers which predominantly pursue a different objective to that of Articles 81 and 82, the Regulators will consider which regime is the most appropriate

to address the agreement or conduct in question. In doing so, they will be required to bear in mind their obligations as NCAs under the Modernisation Regulation and their obligations as Regulators under national law.

# 5 Application and enforcement of Articles 81 and 82 by the OFT

## General

**5.1** The OFT will generally examine anti-competitive agreements or conduct either by starting an investigation on its own initiative or as a result of a complaint received from a third party. Whilst the Modernisation Regulation gives NCAs the power to apply Article 81 and Article 82, it leaves the mechanisms for investigating infringements and enforcing decisions to procedures laid down in national law. In order to enable the application and enforcement of Articles 81 and 82 by the OFT the Act has been amended. The OFT therefore uses the powers of investigation and enforcement it has under the Act in Article 81 and Article 82 investigations. The level of financial penalties imposed will also be determined in accordance with national law<sup>12</sup>.

<sup>12</sup> see OFT's guidance as to the appropriate amount of a penalty (OFT423) for further details.

## Powers to investigate suspected infringements of Articles 81 and 82

**5.2** The OFT's powers to investigate suspected infringements of United Kingdom competition law under the Act have been extended to cover Article 81 and Article 82. The OFT may investigate on its own behalf or at the request of other NCAs or the European Commission<sup>13</sup>. A detailed description of the powers of investigation available to the OFT is provided in the competition law guideline *Powers of investigation* (OFT404).

<sup>13</sup> Article 22 of the Modernisation Regulation.

## The OFT's enforcement powers under the Modernisation Regulation

**5.3** Article 5 of the Modernisation Regulation provides that NCAs may take certain decisions applying Articles 81 and 82. When applying Articles 81 and 82, the OFT may:

- require an infringement be brought to an end
- order interim measures

- accept binding commitments, and
- impose financial penalties.

**5.4** These powers are broadly the same as those the OFT has under the Act to enforce the Chapter I and Chapter II prohibitions, including the power to accept binding commitments.

**5.5** The Modernisation Regulation does not provide for the harmonisation of powers of enforcement or procedures between Member States. Accordingly, other NCAs may apply different powers of enforcement or procedures to those applied by the OFT. The European Commission's enforcement powers are often similar to those of the OFT, but the OFT is not required to follow the enforcement procedures of the European Commission. For instance, the OFT uses court orders to enforce interim measures and binding commitments under Articles 81 and 82. The European Commission, by contrast, uses periodic penalty payments.

**5.6** A detailed description of the scope of the various powers of enforcement available to the OFT is provided in the competition law guideline *Enforcement* (OFT407) and details of the imposition of financial penalties are provided in the *OFT's guidance as to the appropriate amount of a penalty* (OFT423).

## 6 Block exemptions

### EC block exemption regulations

- 6.1** The Modernisation Regulation does not remove the existing EC block exemption regulations, nor does it affect the ability of the European Commission or the European Council to adopt further EC block exemption regulations.
- 6.2** Where the Commission has adopted a block exemption regulation, it may, in accordance with Article 29(1) of the Modernisation Regulation, withdraw the benefit of such an exemption when it finds that in any particular case an agreement, decision or concerted practice to which the exemption regulation applies has certain effects which are incompatible with Article 81(3) of the Treaty.
- 6.3** The OFT may also, in accordance with Article 29(2) of the Modernisation Regulation, withdraw the benefit of an EC block exemption regulation in a particular case from any agreement if the following conditions are met:
- the territory of the United Kingdom, or a part of it, has all the characteristics of a distinct geographic market, and
  - the agreements in question have effects that are incompatible with Article 81(3) in the territory of the United Kingdom.
- 6.4** In cases where networks of vertical agreements fall within the terms of EC block exemption regulations and the OFT has a reasonable suspicion that the conditions set out in paragraph 6.3 apply to one or more markets in the United Kingdom, it may (as an alternative to taking action itself) decide to refer the relevant markets to the Competition Commission for investigation under the Enterprise Act. If the Competition Commission finds that the above conditions are met and that competition has been prevented, restricted or distorted by the network of similar vertical agreements, the Competition Commission may recommend to the OFT that it withdraws the benefit of the relevant block exemption regulation.

## Effect on the United Kingdom block exemption regime

**6.5** The Modernisation Regulation does not affect the Secretary of State's power under the Act to make national block exemption regulations on the recommendation of the OFT (although it may affect the circumstances in which such a recommendation would be made). Existing national block exemption regulations continue to apply<sup>14</sup>. In respect of EC block exemption regulations, the operation of the Act parallel exemption similarly remains unaffected. National block exemption regulations do not apply for the purpose of Article 81.

<sup>14</sup> Currently there is one United Kingdom block exemption: Competition Act 1998 (Public Transport Ticketing Schemes Block Exemption) Order 2001 (SI 2001/319).

# 7 Opinions and informal advice

## General

- 7.1** Undertakings will generally be well placed to analyse the effect of their own conduct under Article 81 and Article 82 and under the Chapter I and Chapter II prohibitions in the light of relevant Community case law and Community instruments including EC block exemption regulations and European Commission notices. Further, United Kingdom case law and competition law guidelines such as this one are also available to assist undertakings in considering the application of the law under the Act.
- 7.2** Undertakings may request confidential informal advice on the application of Article 81, Article 82 and/or the prohibitions in the Act by contacting OFT officials on an ad hoc basis. However, in specific cases that raise novel or unresolved questions of law, it may be possible to obtain fuller written guidance from the European Commission in the form of a Guidance Letter or from the OFT in the form of an Opinion.

## The European Commission's approach

- 7.3** The European Commission has published a notice setting out its intention to issue Guidance Letters in certain circumstances, most particularly where a case gives rise to genuine uncertainty because it presents novel or unresolved questions for the application of the law. Further information about the European Commission's approach can be found in its *Notice on informal guidance relating to novel questions concerning Articles 81 and 82 of the EC Treaty that arise in individual cases (guidance letters)*.<sup>15</sup>

<sup>15</sup> OJ C101, 27.04.2004, p78.

## The OFT's approach

### Opinions

- 7.4** Where a case raises novel or unresolved questions about the application of Article 81, Article 82 and/or the prohibitions in the Act in the United Kingdom, and where the OFT considers there is an interest in issuing clarification for the benefit of a wider audience it may publish written guidance in the form of an Opinion.

**7.5** In order for the OFT to consider a request for an Opinion relating to the application of Article 81, Article 82 and/or the prohibitions in the Act all of the following conditions must be fulfilled:

- There is not sufficient precedent in Community or United Kingdom case law, or decisions, practice or previously published opinions given by the European Commission's competition services or the OFT to answer the question posed.

- The OFT considers that there is a need for a published Opinion.

The OFT's view of the need for a published Opinion will be guided in particular by the following:

- a) the economic importance from the point of view of the consumer of the goods or services to which the agreement or conduct relates
  - b) the extent to which a new type of agreement or conduct is likely to result in wide-spread usage in the market place, and
  - c) the scope of the investments related to the agreement or conduct in relation to the size of the companies concerned.
- The Opinion can be prepared on the basis of the information provided, i.e. no further substantial fact finding is required. However, the OFT may make requests for further information to assist its assessment.

**7.6** The OFT will not consider a request for an Opinion in any of the following circumstances:

- the question(s) raised in the request are identical or similar to issues raised in a case pending before the European Court or the European Commission
- the agreement or conduct to which the request refers is subject to proceedings pending before a Member State court or NCA, or
- the European Commission or another NCA is already considering a request for an Opinion in respect of the agreement or conduct which is the subject of the request before the OFT
- the request relates to hypothetical questions.

- 7.7** A request for an Opinion should only be made to the OFT in relation to an agreement or conduct that has or could potentially have substantial, direct, actual or foreseeable effects on competition in the United Kingdom or is implemented within or originates from the United Kingdom. It follows that the OFT will only give an Opinion where there exists a material link between the agreement or conduct and the United Kingdom.
- 7.8** Any request based on the above criteria is without prejudice to the power of the OFT to commence an investigation under Article 81, Article 82 and/or the prohibitions in the Act with regard to the facts presented in the request.
- 7.9** Whilst not obliged to do so under the Concurrency Regulations<sup>16</sup>, the OFT and the Regulators will always consult with each other when considering a request for an Opinion where it appears they may have concurrent jurisdiction.
- 7.10** Undertakings considering making a request should approach the OFT informally to establish the best way to proceed.
- 7.11** The OFT will, in principle, evaluate the request on the basis of the information provided but may use additional information available from public sources, former proceedings or any other source. The OFT can also undertake whatever informal fact finding measures it thinks necessary, but is under no obligation to do so.
- 7.12** Failure to provide either additional information requested by the OFT or conclusive reasoning why such information cannot be provided will be considered as a withdrawal of the request for an Opinion.
- 7.13** In relation to a request for an Opinion in relation to Article 81, Article 82 and/or the prohibitions in the Act, the OFT may share the information submitted to it with the Regulators, the European Commission and other members of the ECN, request comments from these other authorities and discuss the substance of the request

<sup>16</sup> Competition Act 1998 (Concurrency) Regulations 2004 (SI 2004/1077). Further details about the Concurrency Regulations are set out in the competition law guideline *Concurrent application to regulated industries* (OFT405).

with them in any appropriate forum. In relation to a request in relation to the Chapter I and Chapter II prohibitions, the OFT may share information submitted to it with the Regulators, seek input from these other authorities and discuss the substance of the request with them in any appropriate forum.

- 7.14** An undertaking can withdraw its request at any point although the information supplied with the request will remain with the OFT and can be used in subsequent proceedings under Articles 81 or 82 or the prohibitions in the Act.
- 7.15** The Opinion, together with the request (or a summary of it), will be published in the public register section on the OFT's website.
- 7.16** Parties requesting an Opinion should provide confidential information<sup>17</sup> in a separate annexe clearly marked as containing such material and provide a written explanation as to why they consider that the OFT should treat the information as confidential. If the OFT proposes to disclose any of the information which has been set out in such a separate annexe it will, to the extent that it is practicable to do so, consult the person who provided the information.
- 7.17** Opinions may be given by the OFT to help undertakings make their own informed assessment of their agreements. In these Opinions the OFT will set out its understanding of unresolved questions regarding the application of Articles 81 and 82 and/or the prohibitions in the Act.
- 7.18** An Opinion cannot prejudge the assessment of the same question by the European Commission, the European Court, or the CAT. An Opinion from the OFT does not bind other NCAs or courts having the power to apply Articles 81 and 82 or the prohibitions in the Act.
- 7.19** An Opinion also cannot bind the subsequent assessment of the same or similar issues by the OFT, although the OFT will have regard to its Opinion when carrying out any such assessment.

<sup>17</sup> For these purposes, information is confidential if it is: "a) commercial information whose disclosure the OFT or a regulator thinks might significantly harm the legitimate business interests of the undertaking to which it relates, or b) information relating to the private affairs of an individual whose disclosure the OFT or a regulator thinks might significantly harm the individual's interests, or c) information whose disclosure the OFT or a regulator thinks is contrary to the public interest." See the Competition Act 1998 (Office of Fair Trading's Rules) Order 2004 (SI 2004/2751) (the OFT's Rules), rule 1(1).

### Informal Advice

- 7.20** The OFT 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 are not binding. Requests for informal advice should be made in the first place by calling the OFT enquiries line at 08457 22 44 99, or emailing [enquiries@oft.gsi.gov.uk](mailto:enquiries@oft.gsi.gov.uk).

## 8 Co-operation with the European Commission and other NCAs

- 8.1** NCAs and the European Commission will work closely together to ensure the effective and consistent enforcement of Articles 81 and 82. The ECN facilitates close co-operation between NCAs and the European Commission and provides support for the consistent application of EC competition rules.
- 8.2** The Modernisation Regulation and the Joint Statement of the Council and the European Commission on the Functioning of the Network of Competition Authorities<sup>18</sup> (the Joint Statement) set out the main principles governing the ECN. The details of co-operation within the ECN are set out in the European Commission's *Notice on Cooperation within the Network of Competition Authorities* (the *Network Notice*).<sup>19</sup> The OFT acknowledges the principles set out in the Commission's Notice and will abide by those principles, which include principles relating to the protection of applicants claiming the benefit of a leniency programme, in any case in which it is acting or may act and those principles apply.
- 8.3** In the United Kingdom, the obligation to inform the European Commission under Article 11(3) of the Modernisation Regulation will arise before or without delay after using the powers of investigation set out in sections 26 to 28A of the Act.
- 8.4** Where the OFT has taken a first formal investigative measure when investigating under Article 81 or Article 82 and the case is allocated (in whole or in part) to the European Commission or to one or more other NCAs, or is to be shared with one or more other NCAs, the OFT will notify the parties it considers are concerned by the allocation of the case as soon as is reasonably practicable. Once such an allocation has occurred, the rights and obligations of the parties in relation to that case or parts of the case allocated to any other NCA will be determined in accordance with the law that is applicable to the NCA dealing with the case.
- 8.5** Article 13 of the Modernisation Regulation gives the OFT the power to suspend or terminate proceedings under Article 81 or Article 82

<sup>18</sup> Available from the European Council Register at <http://register.consilium.eu.int> (Document No 15435/02 ADD 1).

<sup>19</sup> OJ C101, 27.04.04, p43.

where the same agreement or practice that it is considering is being dealt with by the European Commission or another NCA, and to reject a complaint where the agreement or practice has already been dealt with by the European Commission or another NCA<sup>20</sup>. This is in addition to the OFT's existing ability to suspend or terminate proceedings or reject a complaint.

<sup>20</sup> Article 13 of the Modernisation Regulation.

# 9 Confidentiality and disclosure of information

## General

**9.1** There are separate provisions under the Modernisation Regulation and under the Enterprise Act as regards confidentiality and the disclosure of information.

## Disclosure under the Modernisation Regulation

**9.2** As regards disclosure under the Modernisation Regulation, the OFT acknowledges the principles set out in the *Network Notice* and will abide by those principles, which include principles relating to the protection of applicants claiming the benefit of a leniency programme, in any case in which it is acting or may act and those principles apply.

## Confidentiality and disclosure under the Enterprise Act

**9.3** The Enterprise Act sets out the requirements for safeguarding certain information and lays down the requirements that have to be met before certain public authorities, including the OFT and the Regulators, may disclose such information. The provisions in Part 9 of the Enterprise Act apply to information which has been gathered for the purpose of the OFT's and the Regulator's Enterprise Act functions and for the purposes of the OFT's and the Regulators' competition and consumer functions under specified legislation (including the Act).

**9.4** The provisions apply where the information obtained relates to the affairs of an individual or any business of an undertaking. There is a general restriction on the disclosure of information during the lifetime of the individual or during the existence of the undertaking, unless that disclosure is permitted by one of the gateways in Part 9 (as explained in paragraph 9.5 below), or the information has been lawfully made public previously or is disclosed by a public authority under powers or duties which exist apart from Part 9 of the Enterprise Act.

**9.5** The gateways under Part 9 of the Enterprise Act allow the OFT to disclose information in the following circumstances:

- the disclosure is made with the consent of the individual or undertaking to which the information relates and, if different, the provider of the information (if the provider's identity is known by the OFT and the provider lawfully held the information)<sup>21</sup>
- the disclosure is required in order to fulfil an EC obligation<sup>22</sup>

<sup>21</sup> Section 239 of the Enterprise Act.

<sup>22</sup> Section 240 of the Enterprise Act.

<sup>23</sup> Section 241(1) of the Enterprise Act.

<sup>24</sup> Section 241(2) of the Enterprise Act.

<sup>25</sup> Section 241(3) and 241(4) of the Enterprise Act.

<sup>26</sup> Section 242 of the Enterprise Act.

<sup>27</sup> Details of this type of disclosure can be found in the Enterprise Act publication *The overseas disclosure of information* (OFT507).

<sup>28</sup> Section 244 of the Enterprise Act.

- the disclosure is made by the public authority (in this case the OFT or a Regulator) for the purpose of facilitating the exercise of one of its functions under the Enterprise Act or any other enactment.<sup>23</sup> Information that is disclosed to another person in this way, but which is not made available to the public, must not be further disclosed by that person unless the public authority agrees, and the further disclosure is made for the same purpose<sup>24</sup>
- the disclosure is made to any other person to facilitate the exercise of certain statutory functions of the recipient. Information disclosed in this way may not be used for any purpose other than that for which it was disclosed<sup>25</sup>
- the disclosure is made in connection with the investigation of a criminal offence or bringing of criminal proceedings in any part of the United Kingdom. The disclosing authority must be satisfied that disclosure is proportionate in the circumstances. The recipient may only use the information for the specific purpose for which it was disclosed<sup>26</sup>, or
- disclosure is made to an overseas authority in accordance with section 243 of the Enterprise Act<sup>27</sup>.

**9.6** Before making any disclosure of information covered by Part 9, the disclosing authority must consider whether there is a need to exclude any information whose disclosure would be contrary to the public interest and whether there is a need to exclude any information whose disclosure might cause significant harm to the legitimate business interests of an undertaking (for commercial information) or information whose disclosure might significantly harm the interests of an individual (for information relating to that individual's private affairs). If the authority considers that the disclosure might significantly harm legitimate business interests or the interests of an individual, the authority is required to consider the extent to which disclosure of that information is necessary for the purpose for which disclosure is permitted to be made.<sup>28</sup>

**9.7** The disclosure gateways set out in Part 9 of the Enterprise Act do not apply to the power to exchange information with other members of the ECN under the Modernisation Regulation (as this is a power to disclose information which exists apart from Part 9 of the Enterprise Act, as explained in paragraph 9.4). However, the considerations set out in section 244 of the Enterprise Act apply to the exchange of information covered by Part 9 with other members of the ECN under the Modernisation Regulation.

# 10 Role of the courts

## Application of competition law by United Kingdom courts

**10.1** By virtue of Articles 1 and 6 of the Modernisation Regulation, United Kingdom courts have the power to apply Articles 81 and 82, including Article 81(3). As a result of changes to the Act, the United Kingdom courts also have the power to apply the conditions in section 9(1) of the Act. Further details on Article 81(3) may be found in the Commission's *Notice – Guidelines on the Application of Article 81(3) of the Treaty*<sup>28</sup> and in the competition law guideline *Agreements and concerted practices* (OFT401). The latter also gives further details on the application of section 9(1) of the Act. In the same way in which the OFT is obliged to apply Articles 81 and 82, as outlined in paragraphs 4.1 to 4.4 above, the United Kingdom courts are obliged under the terms of Article 3 of the Modernisation Regulation to apply Articles 81 and 82 as well as national competition law.

<sup>28</sup> OJ C101, 27.04.2004, p97.

**10.2** The Modernisation Regulation contains certain provisions in order to achieve consistency in the application of Articles 81 and 82 by the courts across the European Union.<sup>30</sup>

<sup>30</sup> See, in particular, Articles 3, 15 and 16.

## National courts and the European Commission

**10.3** In any case concerning Article 81 and/or Article 82 before a court in the United Kingdom, and when the coherent application of Article 81 or Article 82 so requires, the European Commission has the right to submit written observations to the court. With the court's permission, the European Commission may also submit oral observations. Further details on the European Commission's interaction with the courts in the framework of the Modernisation Regulation are set out in the European Commission's *Notice on the co-operation between the Commission and the courts of the EU Member States in the application of Articles 81 and 82 EC*.<sup>31</sup>

<sup>31</sup> OJ C101 27/04/04, p54.

## National courts and the OFT

**10.4** The Modernisation Regulation also allows the OFT, acting on its own initiative, to submit written observations to United Kingdom courts on issues relating to the application of Articles 81 or 82<sup>32</sup>. With the court's permission, the OFT may also submit oral observations to the court. The OFT has similar powers in cases before the High Court and the Court of Appeal in England and Wales on issues relating to the application of the Chapter I or Chapter II prohibitions. Further details can be found in the competition law guideline *Enforcement* (OFT407).

<sup>32</sup> Article 15(3) of the Modernisation Regulation.

# 11 Transitional arrangements

## Transitional arrangements for modernisation

**11.1** The following paragraphs set out the transitional arrangements that apply to United Kingdom notifications pending as at 1 May 2004, to individual exemptions granted by the OFT and the European Commission, and to cases ongoing as at 1 May 2004.

### Notifications

**11.2** Prior to 1 May 2004, undertakings were able to notify agreements or conduct to the OFT for a decision or for guidance. The OFT would determine the notification by deciding that, or by giving guidance as to whether it would be likely that, the agreement or conduct was (i) outside the relevant prohibition, or (ii) prohibited, or (iii) in the case of agreements only, exempt. From 1 May 2004, it is no longer possible for the OFT to accept notifications for decision or guidance under the Act.

**11.3** Notifications made to the OFT but which did not result in a final decision or guidance by the OFT before 1 May 2004 are treated from that date as requests for informal advice. Any fees paid by an undertaking in accordance with the notification process will be refunded in full.

### Individual exemptions granted

**11.4** Individual exemptions granted by the OFT prior to 1 May 2004 were time limited. Each individual exemption will be valid until expiry, although the OFT retains the power to cancel such exemptions. After expiry, individual exemptions will not be renewed.

**11.5** An individual exemption decision made by the European Commission prior to 1 May 2004 is binding on the OFT in its application of Article 81 until the expiry date of the individual exemption. The operation of the parallel exemption provisions under the Act will continue to apply.

**11.6** The OFT will consider comfort letters issued by the European Commission, but these are not binding on the OFT.

## Existing cases

- 11.7** As more fully explained in paragraphs 4.1–4.4 above, as from 1 May 2004 the OFT is required to apply Articles 81 and 82 to agreements within the meaning of Article 81 and abuses prohibited by Article 82 where there may be an effect on trade between Member States<sup>33</sup> and where the OFT is applying national competition law.

<sup>33</sup> Article 3 of the Modernisation Regulation.

## Transitional arrangements applying since entry into force of the Act

- 11.8** Provisions for the transition from competition legislation pre-dating the Act are set out in Schedule 13 to the Act. Some of these transitional arrangements still apply to agreements made prior to the introduction of the Chapter I prohibition.
- 11.9** There are no transitional periods available in respect of the Chapter II prohibition.
- 11.10** The Chapter I and Chapter II prohibitions came into force on 1 March 2000 (the starting date). Most agreements made prior to the starting date which complied with pre-existing laws benefit or benefited from periods of transition during which the Chapter I prohibition does not or did not apply (transitional periods). Generally the transitional period was one year commencing on the starting date. However, in some cases, the transitional periods run from the starting date and last for five years.
- 11.11** The following agreements made before the starting date, benefit from a five year transitional period:
- agreements to the extent to which, immediately before the starting date, they have been found not to be contrary to the public interest by the Restrictive Practices Court<sup>34</sup>
  - agreements relating to goods which, immediately before the starting date, were exempt under section 14 of the Resale Prices Act 1976 (the Resale Prices Act), to the extent to which they consist of exempt provisions<sup>35</sup>

<sup>34</sup> Schedule 13, paragraph 23(1) of the Act.

<sup>35</sup> Schedule 13, paragraph 24(1) of the Act.

<sup>36</sup> Schedule 13, paragraph 26 of the Act.

- certain agreements which have been subject to scrutiny under the Financial Services Act 1986 or the Broadcasting Act 1990<sup>36</sup>, and
- certain agreements in the electricity, gas and railway industries.

<sup>37</sup> Schedule 3, paragraph 2 of the Act.

**11.12** In addition, agreements which, immediately before the starting date, benefited from a section 21(2) Restrictive Trade Practices Act direction were excluded from the Chapter I prohibition for their duration<sup>37</sup>. This exclusion has now been repealed, although the repeal will not take effect until 1 May 2007. The exclusion, its repeal and the circumstances where its benefit may be lost during the period prior to its repeal are explained further in paragraphs 11.18 to 11.22 below.

**11.13** Agreements which benefit from the transitional arrangements in Schedule 13 of the Act or which benefit from the Schedule 3 exclusion relating to agreements benefiting from a section 21(2) Restrictive Trade Practices Act direction are not immune from the application of Articles 81 and 82. Where there is an effect on trade between Member States the OFT may apply Articles 81 and 82 to such agreements.

### The operation of the transitional periods

<sup>38</sup> Schedule 13, paragraph 19(1) of the Act.

**11.14** Generally, the transitional periods began on the starting date<sup>38</sup>. There is an exception to this rule for certain agreements relating to the utilities (see paragraph 11.16 below).

<sup>39</sup> Schedule 13, paragraph 19(2) of the Act.

**11.15** The Chapter I prohibition does not apply to the extent to which a transitional period is available<sup>39</sup>. Similarly, a number of the transitional periods set out in paragraph 11.11 above apply to the extent to which an agreement meets the relevant criteria. Therefore a particular transitional period may apply only to certain provisions of an agreement rather than its entirety. Where an agreement is only partly covered by a transitional period, the OFT is still able to have regard to the whole agreement in order to assess whether the Chapter I prohibition has been breached<sup>40</sup>.

<sup>40</sup> Schedule 13, paragraph 1(5) of the Act.

## Utilities agreements

- 11.16** Schedule 13 provides transitional periods for particular agreements in the electricity, gas and railway industries<sup>41</sup>. In summary, the pre-existing arrangements under the Restrictive Trade Practices Act were retained for five years from the starting date, in that agreements which were exempt from the application of the Restrictive Trade Practices Act benefit from transitional periods excluding them from the Chapter I prohibition during that period.
- 11.17** Further details on the transitional arrangements relating to these agreements are set out in the competition law guidelines *The application of the Competition Act in the energy sector* (OFT428) and *Application to services relating to railways* (OFT430).

<sup>41</sup> Schedule 13, paragraphs 27–34 of the Act.

## Section 21(2) of the Restrictive Trade Practices Act

- 11.18** Section 3 and Schedule 3 of the Act provide for an exclusion for agreements which benefited from directions by the Secretary of State under section 21(2) of the Restrictive Trade Practices Act (i.e. directions that the restrictions or information provisions contained in the agreements were not of such significance as to call for investigation by the Restrictive Practices Court). The majority of agreements which were furnished to the OFT under the Restrictive Trade Practices Act received section 21(2) directions.
- 11.19** All agreements which, immediately before the starting date, benefited from a direction under section 21(2) were excluded from the Chapter I prohibition for their duration<sup>42</sup>.
- 11.20** This exclusion has been repealed, although the repeal will not come into effect until 1 May 2007.
- 11.21** Where particulars of subsequent variations, made prior to the starting date, to an agreement which benefited from section 21(2) directions were duly furnished under the terms of the Restrictive Trade Practices Act, and the Secretary of State did not withdraw the section 21(2) directions, the exclusion covers the agreement as varied.

<sup>42</sup> Schedule 3, paragraph 2(1) of the Act.

**11.22** The OFT has the power to withdraw the exclusion. In addition, the benefit of this exclusion from the Chapter I prohibition is lost if, after the starting date, there is a material variation to such an agreement<sup>43</sup>.

<sup>43</sup> Schedule 3, paragraph 2(2) of the Act.

### Extension of transitional periods

**11.23** The OFT is able to extend transitional periods either on application by one of the parties to the agreement or on its own initiative<sup>44</sup>. The OFT may grant a single extension of up to six months in respect of all current transitional periods apart from the period relating to the exclusion in relation to agreements benefiting from a section 21(2) direction.

<sup>44</sup> Schedule 13, paragraph 36 of the Act.

**11.24** Applicants for an extension should apply to the OFT (in the first instance) in writing not less than three months before the end of the transitional period, enclosing the agreement and other relevant information, as required by the OFT's Rules.

**11.25** The OFT will not grant extensions as a matter of course. It is likely to grant them only where:

- it appears from the information provided that the agreement may infringe the Chapter I prohibition if it were not for the transitional period, but not seriously infringe it, and
- there are good reasons why an extension is required – for example, the agreement is being re-negotiated, or the agreement is due to expire shortly after the end of the unextended transitional period.

**11.26** Agreements involving what would be serious infringements of the Chapter I prohibition (for example, price-fixing or market-sharing) which would be unlikely to satisfy the exemption conditions in section 9(1) of the Act will not be granted an extension.

### Termination of transitional periods

**11.27** The OFT may require parties to provide information about an agreement subject to a transitional period and may terminate

transitional periods early (clawback)<sup>45</sup>. The OFT's Rules set out the procedural requirements for the termination of transitional periods in addition to those in Schedule 13. Failure to provide the information required within the time limit specified in the OFT's Rules without reasonable excuse may in itself result in the OFT giving a direction to terminate the transitional period.

<sup>45</sup> Schedule 13, paragraph 37–39 of the Act.

**11.28** The OFT is likely to exercise its power of clawback where it is concerned that an agreement may be having an appreciable effect on competition, such that it is appropriate to review the agreement under the Chapter I prohibition immediately rather than waiting for the transitional period to run its course. It will consider carefully complaints from third parties in respect of agreements subject to transitional periods.

**11.29** The OFT has equivalent information-gathering and clawback powers in respect of agreements benefiting from a direction under section 21(2) of the Restrictive Trade Practices Act and consequently excluded from the Chapter I prohibition<sup>46</sup>. The OFT's Rules set out the procedural requirements for the exercise of its powers to withdraw this and other exclusions.

<sup>46</sup> Schedule 3, paragraph 2(3)–(9) of the Act.



## **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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