

Enforcement

Incorporating the Office of Fair Trading's guidance as to the circumstances in which it may be appropriate to accept commitments

Understanding competition law

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).

This publication is divided into a guideline and, in the annexe, the OFT's guidance as to the circumstances in which it may be appropriate to accept commitments.

The guideline provides 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 II prohibitions contained in the Competition Act 1998. It 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.

Preface

The 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, the 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.

As regards the guidance contained in the annexe, the OFT is required to have regard to this guidance in considering whether to accept any commitments offered to it. It is issued in performance of the statutory obligation placed on the OFT (but not the Regulators) by section 31D(1) of the Act to prepare and publish guidance as to the circumstances in which it may be appropriate to accept commitments.

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1 Introduction

- 1.1** The EC Treaty¹ and the Competition Act 1998 (the Act) both prohibit, in certain circumstances, agreements² and conduct which prevent, restrict or distort competition. EC Regulation 1/2003 (the Modernisation Regulation)³ requires designated national competition authorities of the Member States (NCAs) and the courts of the Member States to apply Articles 81 and 82 of the EC Treaty (Article 81 and Article 82 respectively) as well as national competition law when national competition law is applied to agreements which may affect trade between Member States or to abuse prohibited by Article 82. The Act gives the OFT powers to enforce both the Chapter I and Chapter II prohibitions of the Act and Article 81 and Article 82.
- 1.2** The OFT's investigation and enforcement powers are set out in sections 25-44 of the Act. This guideline describes the power of the OFT:
- to give directions to bring an infringement to an end (Part 2)
 - to give interim measures directions during an investigation (Part 3)
 - to accept binding commitments offered to it (Part 4), and
 - to impose financial penalties on undertakings for infringing Article 81, Article 82, the Chapter I and/or Chapter II prohibitions (Part 5).
- 1.3** Private remedies arising from breach of Article 81, Article 82, the Chapter I and/or Chapter II prohibitions are described in Part 6 of this guideline. The powers of investigation of the OFT under the Act are described in the competition law guideline *Powers of investigation* (OFT404).
- 1.4** The Act requires the OFT (not including the Regulators) to prepare and publish guidance as to the circumstances in which it may be appropriate to accept binding commitments. The OFT must have regard to the guidance for the time being in force⁴. This guidance is explained, and commitments discussed more generally, in Part 4 below. The guidance appears in full as an annexe to this guideline.

¹ The Treaty establishing the European Community.

² References in this guideline to **agreements** should, unless otherwise stated or the context demands it, be taken to include decisions by associations of undertakings and concerted practices.

³ 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, p 1).

⁴ Section 31D of the Act.

2 Directions

2.1 The Act provides that the OFT may give such directions as it considers appropriate to bring an infringement to an end where the OFT has made a decision that Article 81, Article 82, the Chapter I and/or Chapter II prohibitions has or have been infringed. In each case where an infringement of Article 81, Article 82, the Chapter I and/or Chapter II prohibitions is alleged, the OFT must prove the infringement.

2.2 The directions may be given to such person(s) as the OFT considers appropriate, which includes individuals and undertakings⁵. The OFT is not limited to giving directions to the infringing parties. For example, directions may be addressed to the parent company which, though not the actual instigator of the infringement, has a subsidiary which is the immediate party to the infringement.

2.3 Directions may in particular require the person concerned to modify the agreement or conduct, or to terminate the agreement or cease the conduct in question. Directions may require positive action, such as informing third parties that an infringement has been brought to an end and reporting back periodically to the OFT on certain matters such as prices charged. In some circumstances, the directions appropriate to bring an infringement to an end may be (or may include) directions requiring an undertaking to make structural changes to its business.

Procedure

2.4 The directions must be in writing and may be given to such person(s) as the OFT considers appropriate. They are likely to form part of the infringement decision in cases where the decision and the directions are addressed to the same person. If the OFT proposes to make an infringement decision, it will send the party or parties a written statement setting out the facts on which the OFT relies, the objections raised by the OFT, the action it proposes to take and the reasons for it. The OFT's Rules⁶ provide that the OFT must allow the person receiving the notice an opportunity to make written

⁵ See paragraph 5.40 below for further detail on the definition of **undertaking**.

⁶ The Competition Act 1998 (Office of Fair Trading's Rules) Order 2004 (SI 2004/2751) (**OFT's Rules**), rule 5.

representations to it. The person receiving the notice may request in their written representations a meeting with officials of the OFT to make oral representations to elaborate on the written representations already made in this regard.

- 2.5** In accordance with the OFT's Rules the OFT will give the party or parties or their authorised representative a reasonable opportunity to inspect the documents in the OFT's file relating to the matters referred to in the notice⁷. The OFT may withhold any documents to the extent to which they contain confidential information and may withhold internal documents. ⁷ OFT's Rules, rule 5.
- 2.6** Any directions given by the OFT will set out the facts on which the direction is based and the reasons for it⁸. The directions will be published on the register maintained by the OFT, which is open to public inspection on the OFT's website. ⁸ OFT's Rules, rule 8.
- 2.7** Directions can be appealed to the Competition Appeal Tribunal (the CAT). The making of an appeal will not suspend the effect of the direction. The rules of the CAT provide, however, that the CAT can make an interim order to suspend the effect of any direction which is the subject of an appeal before it⁹. ⁹ The Competition Appeal Tribunal Rules 2003 (SI 2003/1372) (the **CAT Rules**), rule 61.

Enforcement of directions

- 2.8** In most cases directions will have immediate effect. In some cases the OFT may allow the undertakings a period of time within which to comply with a direction.
- 2.9** The OFT may apply to the court for an order requiring compliance with a direction within a specified time limit if a person fails to comply with it without reasonable excuse. The OFT will actively seek to enforce directions in the courts. The court can require the person in default, or any officer of an undertaking who is responsible for the default, to pay the costs of obtaining the order. If a direction relates to the management or administration of an undertaking the order can

compel the undertaking or any of its officers to comply with it. Any person who fails to comply with an order enforcing a direction will be in contempt of court. The sanction for contempt of court is a fine or imprisonment.

3 Interim measures directions

3.1 The Act provides that the OFT may give interim measures directions pending its final decision as to whether or not there has been an infringement of Article 81, Article 82, the Chapter I and/or Chapter II prohibitions. Interim measures directions will not affect the final decision.

3.2 The Modernisation Regulation permits the OFT to order interim measures when applying Article 81 and/or Article 82 in particular cases¹⁰. The power for the OFT to do so is found in national law. The test for when interim measures directions are available is the same whether the OFT is applying Article 81 and/or Article 82 or the Chapter I and/or Chapter II prohibitions¹¹.

¹⁰ Article 5 of the Modernisation Regulation.

¹¹ Section 35 of the Act.

3.3 The OFT may give interim measures directions before it has completed its investigation of the suspected infringement if:

- the OFT has begun an investigation under section 25 of the Act and not completed it (but only so long as the OFT has power under section 25 to conduct that investigation), and
- the OFT considers that it is necessary to act urgently either to prevent serious, irreparable damage to a particular person or category of persons, or to protect the public interest.

3.4 The circumstances in which the OFT has power to conduct an investigation under section 25 of the Act are described in the competition law guideline *Powers of investigation* (OFT404). Broadly the OFT has this power where there are reasonable grounds for suspecting that an agreement falls within Article 81 or the Chapter I prohibition, or that there has been an infringement of Article 82 or the Chapter II prohibition.

3.5 What constitutes serious damage is a question of fact and will depend upon the circumstances of each case. However, damage may be serious where a particular person or category of persons may suffer considerable competitive disadvantage likely to have a lasting effect on their position. Serious damage is likely to include significant financial loss to a person (to be assessed with reference to that

person's size or financial resources as well as the proportion of the loss in relation to the person's total revenue), and significant damage to the goodwill or reputation of a person might also constitute serious damage.

- 3.6** Irreparable does not mean that a person must be threatened with insolvency, though this will generally suffice. Less extreme forms of serious damage may still be irreparable, in so far as they cannot be remedied by later intervention. **Serious** and **irreparable** damage are cumulative, though inter-related, requirements. Thus, serious damage which is not irreparable will not suffice. The serious, irreparable damage must be shown to result from the alleged anti-competitive behaviour.
- 3.7** The OFT may consider that it is necessary to act urgently to protect the public interest, for example, to prevent damage being caused to a particular industry or to consumers as a result of the suspected infringement. It may also take action to prevent damage to competition more generally.
- 3.8** Interim measures directions may be given by the OFT on its own initiative or after receiving a request, provided that the tests in paragraph 3.3 above are satisfied and that the circumstances in paragraph 3.9 below do not apply. Any person requesting an interim measures direction should provide as much evidence as possible, demonstrating that the alleged infringement is causing, or is likely to cause, serious, irreparable damage or that it is necessary that the OFT act to protect the public interest. Such a request should also indicate as precisely as possible the nature of the interim measure sought.
- 3.9** Where the OFT's investigation under section 25 of the Act concerns an agreement, the OFT may not give interim measures directions where a party to the agreement has produced evidence to the OFT that, on the balance of probabilities, satisfies the OFT that the agreement is exempt from the Chapter I prohibition as a result of section 9(1) of the Act, or that the prohibition in Article 81(1) is inapplicable because it satisfies the conditions in Article 81(3), as appropriate¹².

¹² For more detail on section 9(1) of the Act and Article 81(3) see the competition law guideline *Agreements and concerted practices* (OFT401).

- 3.10** The OFT may give such interim measures directions as it considers appropriate. The OFT may in particular require the person concerned to terminate the agreement or cease the conduct in question, or to modify the agreement or conduct.
- 3.11** When the investigation is complete and the OFT has decided that an infringement has taken place, it may replace the interim measures direction with a direction described in Part 2 above. An interim measures direction may also be replaced, in an appropriate case, by the acceptance of binding commitments (see Part 4 below). Otherwise an interim measures direction has effect until the OFT no longer has power under section 25 to conduct the investigation or until it has completed its investigation into the matter.

Procedure

- 3.12** Before giving an interim measures direction the OFT must give written notice to the person to whom it proposes to give the direction, indicating the nature of the direction it proposes to give and the reasons for deciding to give it. The OFT must allow the person receiving the notice an opportunity to make representations on it.
- 3.13** The person who receives written notice from the OFT about the proposed interim measures direction may inspect the OFT's file on the case. The OFT's Rules provide that the OFT must give such a person or their authorised representative a reasonable opportunity to inspect the documents in the OFT's file relating to the proposed direction¹³. The OFT may withhold any documents to the extent to which they contain confidential information.
- 3.14** The interim measures direction will be published on the register maintained by the OFT, which is open to public inspection on the OFT's website. The OFT may also publish the interim measures direction in an appropriate trade journal.

¹³ OFT's Rules, rule 9.

¹⁴ CAT Rules, rule 8. The CAT may only extend this period if it is satisfied that the circumstances are exceptional.

¹⁵ See footnote 9 above.

3.15 An interim measures direction can be appealed to the CAT. Such an appeal must be brought within a period specified in the CAT Rules, currently two months from the earlier of the date upon which the appellant was notified of the decision and the date of publication of the decision¹⁴. The making of an appeal will not suspend the effect of the interim measures direction, but the CAT may suspend its effect by interim order¹⁵.

Enforcement of interim measures directions

3.16 Interim measures directions can be enforced following the procedure set out in paragraph 2.9 above.

Assurances in lieu of interim measures directions

3.17 The OFT may accept informal interim assurances offered by the person(s) concerned where it is satisfied that these will prevent any harm which might otherwise form the basis for imposition of an interim measures direction.

3.18 One of the prerequisites for an interim remedy is that it is necessary to act as a matter of urgency. The ability to accept informal interim assurances in appropriate circumstances helps facilitate quick action by the OFT.

3.19 The OFT may replace informal interim assurances by an interim measures direction.

3.20 Informal interim assurances will include provision that they will come to an end when an investigation is complete. If the OFT has decided that an infringement has taken place, it may replace any informal interim assurances with a direction described in Part 2 above. In an appropriate case, the OFT may also replace interim assurances by accepting binding commitments (see Part 4 below).

4 Commitments

- 4.1** The Act gives the OFT the power to accept commitments offered to it by a person or persons if it is satisfied that those commitments meet its competition concerns. Commitments given under the Act are binding. Exercise of this power allows the OFT to terminate its investigation into an alleged infringement of Article 81, Article 82, the Chapter I and/or Chapter II prohibitions.
- 4.2** The Act requires the OFT (not including the Regulators) to prepare and publish guidance as to the circumstances in which it may be appropriate to accept binding commitments. The OFT must have regard to the guidance for the time being in force when considering whether to accept any commitments offered to it. Although there is no equivalent statutory obligation on the Regulators to publish guidance as to the circumstances in which it may be appropriate to accept binding commitments, the Regulators are required to have regard to the guidance for the time being in force when considering whether to accept any commitments offered to them. The guidance was approved by the Secretary of State (as required under section 31D(4) of the Act) for publication on 21 December 2004. This section of the guideline explains the guidance, provides information on how the OFT will apply its provisions in practice and discusses commitments more generally. The guidance is reproduced separately as an annexe to this guideline.
- 4.3** The decision whether to accept binding commitments is at the discretion of the OFT. The OFT is likely to consider it appropriate to accept binding commitments only in cases where:
- the competition concerns are readily identifiable
 - the competition concerns are fully addressed by the commitments offered, and
 - the proposed commitments are capable of being implemented effectively and, if necessary, within a short period of time.
- 4.4** The OFT will not accept, other than in very exceptional circumstances, binding commitments in cases involving secret cartels between competitors which include:
- price-fixing

¹⁶ It is the OFT's assessment of the seriousness of an abuse and its effect on competition which will be taken into account in determining whether commitments are appropriate in a particular case. When making its assessment, the OFT will consider a number of factors, including the nature of the product, the structure of the market, the market share(s) of the undertaking(s) involved, entry conditions and the effect on competitors and third parties (the term product would be interpreted to include goods, services and property rights). The damage caused to consumers whether directly or indirectly will also be an important consideration. This assessment will be made on a case by case basis, taking account of all the circumstances of the case. However, as a general rule, the OFT will regard predatory pricing as a serious abuse.

- bid-rigging (collusive tendering)
- establishing output restrictions or quotas
- sharing markets, and/or
- dividing markets.

Nor will the OFT accept binding commitments in cases involving serious abuse of a dominant position¹⁶.

4.5 The OFT will not accept binding commitments in circumstances:

- where compliance with and the effectiveness of any binding commitments would be difficult to discern, and/or
- where the OFT considers that not to complete its investigation and make a decision would undermine deterrence.

4.6 Commitments may be structural or behavioural in nature, or a combination of both. For example, commitments might involve a person agreeing to cease or modify its conduct in a particular area, terminating an exclusive arrangement, removing a particular clause from an agreement, withdrawing from a particular activity, licensing specific assets or even divesting itself of a part of its business.

4.7 Once binding commitments have been accepted, the OFT will terminate its investigation into the aspects of the alleged infringement addressed by the commitments (see further paragraphs 4.9 and 4.10 below). The commitments will have the same force and effect as if they were directions made by the OFT (see Part 2 above). A decision by the OFT accepting binding commitments will state that the commitments offered by the undertaking meet the OFT's competition concerns, but will not include any statement as to the legality or otherwise of the agreement or conduct either prior to the acceptance of the commitments or once the commitments are in place.

4.8 Binding commitments will generally be adopted for a specified period of time. They are treated as released on the expiry of this period.

4.9 Once binding commitments have been accepted in respect of an agreement or conduct, the OFT may not continue an investigation, make an infringement decision or give interim measures directions in respect of that agreement or conduct unless it has:

- reasonable grounds for believing that there has been a material change of circumstances since the commitments were accepted
- reasonable grounds for suspecting that a person has failed to adhere to one or more of the terms of the binding commitments, or
- reasonable grounds for suspecting that information which led it to accept the binding commitments was incomplete, false or misleading in a material particular¹⁷.

If such a decision is made or the OFT gives such directions, the person will be considered released from its binding commitments as from the date of that decision or those directions.

4.10 However, the OFT is not prevented from taking action in relation to competition concerns which are not addressed by the commitments it has accepted. This may arise, for example, where an agreement or conduct raises a number of competition concerns, or where different aspects of an agreement or conduct raise different competition concerns. The OFT may accept commitments in respect of some of its competition concerns and may continue its investigation in respect of other competition concerns, even where they arise out of the same agreement or conduct.

4.11 Where the OFT has accepted binding commitments it may, for the purposes of addressing its current competition concerns, consider it appropriate to accept a variation of the commitments or commitments in substitution for them.

4.12 If the OFT's current competition concerns are different from the competition concerns it identified when the commitments were accepted, when considering the appropriateness of accepting varied or substitute commitments the OFT will take into account the considerations in paragraphs 4.3 to 4.5 above.

¹⁷ Section 44 of the Act provides that it is a criminal offence knowingly or recklessly to provide materially false or misleading information. See the competition law guideline *Powers of investigation* (OFT404) for further discussion of offences.

4.13 The OFT may consider it appropriate to release binding commitments where:

- it is requested to do so by the person or persons who gave the commitments, or
- the competition concerns identified by it at the time of their acceptance or variation no longer arise.

The OFT will generally consider it appropriate to release binding commitments at the request of the person or persons who gave them only where it has reasonable grounds for believing that the competition concerns identified by it at the time of their acceptance or variation no longer arise.

4.14 The OFT may review the effectiveness of binding commitments. Where it does so it must, if so requested by the Secretary of State, prepare a report of its findings. Such report will be given to the Secretary of State and published.

Procedure

4.15 There is no requirement for a person to offer binding commitments to the OFT at any time.

4.16 A person or persons may offer binding commitments to the OFT at any time during the course of an investigation and up until a decision is made. However, the OFT is unlikely to consider it appropriate to accept commitments offered at a very late stage in its investigation (for example, after the OFT has considered representations in relation to its statement of objections).

4.17 If a person or persons wish to offer commitments prior to the issue of the OFT's statement of objections and the OFT considers that the case is one in which commitments may be appropriate, the OFT will issue a summary of its competition concerns to such person or persons. Such a summary is not a replacement for a statement of objections. It will set out the OFT's competition concerns and a summary of the main facts on which those concerns are based.

However, it will not generally include detail of the source of the facts on which the OFT relies.

- 4.18** Once commitments have been offered, the OFT may enter into discussions with the person or persons in order to reach agreement as to the form and content of commitments which would be acceptable to the OFT.
- 4.19** The fact that the OFT has issued a summary of its competition concerns and/or entered into discussions on the form and content of commitments does not preclude the OFT from making a decision in relation to the agreement or conduct if acceptable commitments are not agreed or if other factors mean that it is not appropriate to accept commitments.
- 4.20** The OFT will not use the offer of commitments as evidence in any such subsequent decision in relation to the agreement or conduct.
- 4.21** Where the OFT proposes to accept commitments, it will give notice to such persons as it considers likely to be affected by the commitments providing a summary of the case and setting out the proposed commitments and stating the purpose of the commitments and the way in which they meet the OFT's competition concerns. Interested third parties will have an opportunity to make representations within a time limit fixed by the OFT (being not less than 11 working days starting with the date the notice is given).
- 4.22** Following this consultation period, if the OFT intends to accept the commitments with any material modifications, it will give notice to such persons as it considers likely to be affected by the commitments or the proposed modifications and the reasons for them. Interested third parties will have an opportunity to make representations on the proposed modifications within a time limit fixed by the OFT (being not less than six working days starting with the date the notice is given).
- 4.23** Once accepted, binding commitments will be published by the OFT. The procedure in paragraphs 4.21 and 4.22 above will also apply to any variation of binding commitments. Before releasing a person or

persons from any binding commitments the OFT will give notice of the proposed release, and the reasons for it, to such persons as it considers likely to be affected and send a copy of the notice to the person or persons who gave the commitments. Interested third parties will have an opportunity to make representations within a time limit fixed by the OFT (being not less than 11 working days starting with the date the notice is given). After having released commitments, the OFT will publish the release and send a copy of the release to the person or persons who gave the commitments.

4.24 In publishing information relating to binding commitments, the OFT will have regard to the need to exclude from disclosure (so far as practicable):

- commercial information, disclosure of which the OFT considers might significantly harm the legitimate business interests of the undertaking to which it relates
- information relating to the private affairs of an individual, disclosure of which the OFT considers might significantly harm the individual's interests, and
- any information the disclosure of which the OFT considers is contrary to the public interest.

This is in accordance with the provisions of Part 9 of the Enterprise Act.

4.25 Any sufficiently interested person may seek to have a commitments decision reviewed by the CAT. For this purpose, a commitments decision is a decision by the OFT to accept or release commitments or accept a variation of commitments (other than a variation which is not material in any respect) or a decision not to release commitments pursuant to a request made by the person or persons who gave the commitments. It does not include a decision by the OFT not to accept commitments.

4.26 On review, the CAT will apply the same principles as would be applied by a court on an application for judicial review. The CAT may:

- dismiss the application for review or quash the whole or part of the commitments decision to which it relates, and
- where it quashes the whole or part of that decision, refer the matter back to the OFT with a direction to reconsider and make a new decision in accordance with the ruling of the CAT.

4.27 Third parties may also pursue private actions before the courts in relation to agreements or conduct they consider constitute infringements of Article 81, Article 82, the Chapter I and/or Chapter II prohibitions, notwithstanding any binding commitments accepted by the OFT.

Enforcement of binding commitments

4.28 Binding commitments are enforceable by the OFT in the same way as directions (see paragraph 2.9 above).

5 Penalties

General powers

5.1 The Act provides that the OFT may impose a financial penalty on an undertaking which has intentionally or negligently committed an infringement of Article 81, Article 82, the Chapter I and/or Chapter II prohibitions. The amount of the penalty imposed may be up to 10 per cent of the undertaking's worldwide turnover¹⁸. It is for the OFT to determine whether a financial penalty should be imposed. The OFT can impose penalties for infringements that have already stopped as well as for ongoing infringements.

5.2 The OFT uses this power to impose penalties on infringing undertakings which reflect the seriousness of the infringement and constitute a serious and effective deterrent, both to the undertaking concerned and to other undertakings which might be considering activities contrary to Article 81, Article 82, the Chapter I and/or Chapter II prohibitions. Therefore, subject to the maximum penalty of 10 per cent of an undertaking's worldwide turnover, the OFT may adjust, where appropriate, levels of penalties to ensure that deterrence is achieved¹⁹.

5.3 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.

Intentionally or negligently

5.4 Before exercising the power to impose a financial penalty, the OFT must be satisfied, as a threshold condition, that the infringement has been committed intentionally or negligently. However, for the purposes of crossing that threshold, it does not, have to determine

¹⁸ See section 36(8) of the Act and the Competition Act 1998 (Determination of Turnover for Penalties) Order 2000 (SI 2000/309) as amended by the Competition Act 1998 (Determination of Turnover for Penalties) (Amendment) Order 2004 (SI 2004/1259).

¹⁹ See *Napp* at [502].

specifically which it was, provided that it is satisfied that the infringement was **either** intentional or negligent (although it may well have to do so at a subsequent stage of its appraisal)²⁰.

²⁰ Section 36(3) of the Act. See also *Napp* at [453]-[455] and *Aberdeen Journals Limited v The Office of Fair Trading* [2003] CAT 11 (*Aberdeen Journals (No.2)*) at [484].

- 5.5** For intention or negligence to be found it is not necessary for there to have been action by, or even knowledge on the part of, the partners or principal managers of the undertaking concerned; action by a person who can act on behalf of the undertaking suffices.
- 5.6** The OFT may consider the existence of past Restrictive Practice Court orders made against, and undertakings in lieu given by, an undertaking when considering whether or not an infringement of Article 81 and/or the Chapter I prohibition by similar anti-competitive activities of that undertaking was committed intentionally or negligently.
- 5.7** The OFT may also consider binding commitments given by an undertaking when considering whether or not an infringement of Article 81, Article 82, the Chapter I and/or Chapter II prohibition by similar anti-competitive activities of that undertaking was committed intentionally or negligently.
- 5.8** The fact that a particular type of agreement or conduct has not previously been found to be in breach of Article 81, Article 82, the Chapter I and/or Chapter II prohibition does not mean that the infringement cannot be committed intentionally or negligently.

Intention

- 5.9** The circumstances in which the OFT might find that an infringement has been committed intentionally include the following:
- the agreement or conduct has as its object the restriction of competition
 - the undertaking in question is aware that its actions will be, or are reasonably likely to be, restrictive of competition but still wants, or is prepared, to carry them out, or

²¹ See *Napp* at [456] and *Aberdeen Journals (No.2)* at [485]-[488].

- the undertaking could not have been unaware that its agreement or conduct would have the effect of restricting competition, even if it did not know that it would infringe Article 81, Article 82, the Chapter I and/or Chapter II prohibition²¹.

5.10 The intention (or negligence, referred to below) relates to the facts, not the law. Ignorance or a mistake of law (i.e. ignorance that the relevant agreement or conduct is an infringement) is thus no bar to a finding of intentional infringement.

²² See *Napp* at [456] and *Aberdeen Journals (No.2)* at [485]-[488].

5.11 In establishing whether or not there is intention, the OFT may consider internal documents generated by the undertakings in question. The OFT may regard deliberate concealment of an agreement or practice by the parties as strong evidence of an intentional infringement. It may be inferred that an infringement has been committed intentionally where consequences giving rise to an infringement are plainly foreseeable from the pursuit of a particular policy by an undertaking²².

Negligence

²³ See *Napp* at [457]. And see also Case 27/76 *United Brands Co and United Brands Continental BV v Commission* [1978] 1 CMLR 429 at paragraphs 298-301, [1977] ECR 207.

5.12 The OFT is likely to find that an infringement of Article 81, Article 82, the Chapter I and/or Chapter II prohibition has been committed negligently where an undertaking ought to have known that its agreement or conduct would result in a restriction or distortion of competition²³.

Involuntary infringement

²⁴ See the OFT's *guidance as to the appropriate amount of a penalty* (OFT423).

5.13 Where an undertaking participates in an infringement under pressure, it may still be held to have acted intentionally or negligently, although, depending on the circumstances, the penalty may be reduced²⁴.

Turnover

²⁵ The Competition Act 1998 (Determination of Turnover for Penalties) Order 2000 (SI 2000/309) as amended by the Competition Act 1998 (Determination of Turnover for Penalties) (Amendment) Order 2004 (SI 2004/1259).

5.14 The definition of turnover for the purposes of determining the maximum financial penalty of 10 per cent of worldwide turnover that can be imposed is set out in an order made by the Secretary of State pursuant to section 36(8) of the Act²⁵. A financial penalty imposed by

the OFT under section 36 of the Act will be calculated following a five step approach. Details of each of these steps and the factors to which the OFT has regard are set out in the *OFT's guidance as to the appropriate amount of a penalty* (OFT423) (and see also paragraphs 5.28 to 5.32 below).

Tax deductibility of penalties

5.15 It is the view of the Inland Revenue that financial penalties imposed under the Act will not be deductible in computing trading profits for tax purposes²⁶. This is because civil or criminal penalties imposed by or under the authority of an Act of Parliament are not deductible: they are 'losses not connected with or arising out of the trade' and so not deductible by virtue of section 74(1)(e) of the Income and Corporation Taxes Act 1988.

²⁶ *Commissioners of Inland Revenue v Alexander von Glehn & Co Ltd* (12 TC 232).

Limited immunity for small agreements and conduct of minor significance

5.16 In order to avoid the prohibition regime being unduly burdensome on small businesses, the Act provides limited immunity from financial penalties for **small agreements** in relation to infringements of the Chapter I prohibition and for **conduct of minor significance** in relation to infringements of the Chapter II prohibition. This immunity does not apply to any infringements of Article 81 or Article 82, so small businesses whose activities may have an effect on trade between Member States may be subject to penalties even in respect of small agreements or conduct of minor significance. Neither does the immunity apply to infringements of the Chapter I prohibition which are price-fixing agreements.

5.17 The term **small agreements** relates to agreements, other than price-fixing agreements, between undertakings whose combined annual turnover does not exceed £20 million²⁷. Conduct will be considered to be of minor significance if the annual turnover of the undertaking concerned does not exceed £50 million.

5.18 Undertakings will benefit from immunity from financial penalties for infringement of the Chapter I prohibition or Chapter II prohibition, as

²⁷ 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).

appropriate, if the OFT is satisfied that they acted on the reasonable assumption that on the facts they qualified for the limited immunity for **small agreements** or **conduct of minor significance**.

- 5.19** The immunity applies only to financial penalties: an anti-competitive agreement or abusive conduct by such undertakings is still an infringement, and consequently the OFT may take other enforcement action, and the immunity does not prevent third parties from claiming damages for the loss caused by such an agreement or conduct (see further paragraph 6.1 below).
- 5.20** The OFT may still investigate small agreements or conduct of minor significance and can decide to withdraw the immunity from financial penalties if, having investigated the agreement or conduct, it considers that it is likely to infringe the Chapter I prohibition and/or the Chapter II prohibition.
- 5.21** Where the OFT has withdrawn the immunity from penalties for infringement of the Chapter I prohibition or the Chapter II prohibition, it must give written notice of its decision to the person or persons from whom the immunity has been withdrawn. The notice will specify the date on which the withdrawal of immunity is to take effect. When determining that date, the OFT must have regard to the amount of time which the person or persons affected are likely to need in order to secure that there is no further infringement of the Chapter I prohibition or the Chapter II prohibition, as the case may be. That date must follow the date of the OFT's decision.

EC block exemption regulations

- 5.22** The European Commission may adopt block exemption regulations so that particular categories of agreement which it considers satisfy the conditions in Article 81(3) are not prohibited under Article 81²⁸. Where an agreement is covered by an EC block exemption regulation²⁹, the parties to the restrictive agreement are relieved of the burden of showing that their agreement satisfies the conditions in Article 81(3).

²⁸ The European Commission may only issue a block exemption regulation where it has been empowered to do so. For instance, Council Regulation (EEC) No 19/65 allows the European Commission to adopt block exemption regulations in respect of vertical agreements and industrial property rights.

²⁹ EC block exemption regulations in force include: Commission Regulation (EC) No 2658/2000 on the application of Article 81(3) of the Treaty to categories of specialisation agreements; Commission Regulation (EC) No 2659/2000 on the application of Article 81(3) of the Treaty to categories of research and development agreements; Commission Regulation (EC) No 2790/1999 on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices; Commission Regulation (EC) No 1400/2002 on the application of Article 81(3) to categories of vertical agreements and concerted practices in the motor vehicle sector; and Commission Regulation (EC) No 772/2004 on the application of Article 81(3) of the Treaty to categories of technology transfer agreements.

5.23 A parallel exemption under the Act applies to an agreement which is covered by an EC block exemption regulation, or which would be covered by an EC block exemption regulation if the agreement had an effect on trade between Member States. These types of agreement are not prohibited under the Act. In certain circumstances, the OFT may impose conditions on a parallel exemption, or vary or cancel the parallel exemption, following procedures set out in the OFT's Rules³⁰.

³⁰ OFT's Rules, rule 12.

5.24 Under Article 29(1) of the Modernisation Regulation the European Commission may withdraw the benefit of any EC block exemption regulation if it finds that in a particular case the agreement in question has effects that are incompatible with Article 81(3).

5.25 Under Article 29(2) of the Modernisation Regulation the OFT may also withdraw the benefit of any EC block exemption regulation in a particular case from any agreements if the following conditions are met:

- the agreements in question have effects that are incompatible with Article 81(3) in the territory of the United Kingdom, or part of the United Kingdom, and
- the relevant territory has all the characteristics of a distinct geographic market.

In such circumstances, the OFT will follow the procedures set out in the OFT's Rules³¹.

³¹ OFT's Rules, rule 13.

5.26 The United Kingdom courts have no power to withdraw the benefits of an EC block exemption regulation.

5.27 Agreements benefiting from a block exemption regulation or a parallel exemption are still subject to Article 82 and the Chapter II prohibition in so far as they involve undertakings in a dominant position. An infringement of Article 82 and/or the Chapter II prohibition may be found without first withdrawing the benefit of the relevant block exemption regulation³².

³² Case T-51/89 *Tetra Pak Rausing SA v Commission* [1990] ECR II-309, [1991] 4 CMLR 334.

Amount of a penalty

³³ See the *OFT's guidance as to the appropriate amount of a penalty* (OFT423).

5.28 Section 38 of the Act places an obligation on the OFT to prepare and publish guidance as to the appropriate amount of any penalty, including guidance as to the circumstances in which, in determining a penalty, the OFT may take into account the effects of an infringement in another Member State (see paragraph 5.30 below). The purpose of such guidance is to inform and guide businesses on the level of penalties. The guidance explains the steps taken and the factors to which the OFT has regard when setting the level of a penalty³³. The obligation to prepare and publish guidance is on the OFT alone, but the OFT and the Regulators must have regard to the guidance when setting the level of a penalty.

5.29 In brief, a financial penalty imposed by the OFT for an infringement of Article 81, Article 82, the Chapter I and/or Chapter II prohibitions will be calculated following a five step approach:

- step 1 – calculation of the starting point having regard to the seriousness of the infringement and the 'relevant turnover' of the undertaking
- step 2 – adjustment for duration
- step 3 – adjustment for other factors
- step 4 – adjustment for further aggravating or mitigating factors
- step 5 – adjustment if the maximum penalty of 10 per cent of the worldwide turnover of the undertaking is exceeded and to avoid double jeopardy.

Effects in other Member States

5.30 In cases concerning infringements of Article 81 and/or Article 82, the OFT may take into account the effects in another Member State in calculating the penalty to be imposed, provided the express consent of the relevant Member State or NCA, as appropriate, is given in each particular case.

5.31 If a penalty or fine has already been imposed by the European Commission or by a court or other body in another Member State in respect of an agreement or conduct, the OFT must take that penalty or fine into account when setting the amount of any penalty in relation to that agreement or conduct³⁴. This is to ensure that where an anti-competitive agreement or conduct is subject to proceedings resulting in a penalty or fine in another Member State, an undertaking will not be penalised again in the United Kingdom for the same anti-competitive effects.

³⁴ See section 38(9) of the Act.

Lenient treatment for undertakings coming forward with information

5.32 Undertakings participating in cartel activities³⁵ might wish to terminate their involvement and inform the OFT of the existence of the cartel activity, but be deterred from doing so by the risk of incurring large financial penalties. To encourage such undertakings to come forward the OFT will grant total immunity from financial penalties for an infringement of Article 81 and/or the Chapter I prohibition to a participant in cartel activity who is the first to come forward before the OFT has commenced an investigation of the cartel activity subject to certain conditions being met (including that the undertaking refrain from further participation in the cartel activity, except as directed by the OFT). An undertaking which is not the first to come forward before the OFT has commenced an investigation, or does not satisfy all of these conditions, may benefit from a reduction in the amount of the penalty imposed.

³⁵ For the purposes of the *OFT's guidance as to the appropriate amount of a penalty* (OFT423), cartel activities are agreements which infringe Article 81 and/or the Chapter I prohibition and involve price-fixing (including resale price maintenance), bid rigging (collusive tendering), the establishment of output restrictions or quotas and/or market sharing or market dividing.

5.33 Further information on immunity from, or reduction in the amount of, financial penalties is set out in the *OFT's guidance as to the appropriate amount of a penalty* (OFT423).

Leniency applications and the ECN

5.34 The European Commission and a number of NCAs also have leniency programmes that facilitate the detection of infringements³⁶.

5.35 As set out at paragraph 1.1 above, the Modernisation Regulation creates a system in which NCAs and the European Commission will

³⁶ The Commission *Notice on Immunity from Fines and Reduction of Fines in Cartel Cases* (OJ C45,

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19.2.02, p3) concerns 'secret cartels between two or more competitors aimed at fixing prices, production or sales quotas, sharing markets including bid-rigging or restricting imports or exports'. Therefore, the Notice applies to horizontal agreements only. The OFT's civil leniency policy applies to cartel activities (see footnote 35 above), namely horizontal agreements and any form of price-fixing including resale price maintenance.

³⁷ OJ C101, 27.4.04, p43.

³⁸ See <http://europa.eu.int/comm/competition/antitrust/legislation/>.

apply Articles 81 and 82. The European Competition Network (ECN) has been set up to facilitate close co-operation between NCAs and the European Commission and to ensure an effective and consistent application of EC competition rules. An NCA will be considered well placed to deal with a case where the cumulative case allocation criteria are met. Details of these criteria are provided in the European Commission's *Notice on Co-operation with the Network of Competition Authorities* (the Notice)³⁷.

- 5.36** An application for leniency to the OFT will **not** be considered as an application for leniency to another authority within the ECN, even where that other authority deals with the case in parallel with or in place of the OFT. It is therefore in the interest of the applicant to apply for leniency to all the competition authorities which have the power to apply Article 81 in the territory affected by the infringement and which may be considered well placed to deal with the infringement in question. In view of the importance of timing in most existing leniency programmes, applicants will also need to consider whether it would be appropriate to make leniency applications to the relevant authorities simultaneously. A list of competition authorities in Member States which offer a leniency programme can be found on the European Commission's website³⁸.
- 5.37** Details on how information may be exchanged within the ECN, and the safeguards in place to protect the position of a leniency applicant with regard to such information exchange, can be found in the Notice (see paragraphs 39-42).

Payment

- 5.38** Where the OFT requires an undertaking to pay a financial penalty, it must, at the same time, inform the undertaking in writing of the facts on which it bases the penalty and the reasons for requiring the undertaking to pay it³⁹. Where the OFT imposes a penalty, it must serve a written notice on the undertaking required to pay the penalty, specifying the date before which the penalty is required to be paid. It is likely that payment will be required within a period of three months from the date of the notice. The date for payment must not be earlier

³⁹ OFT's Rules, rule 8.

than the end of the period within which an appeal against the notice may be brought.

Liability for payment

5.39 The OFT may require any undertaking which is a party to an agreement which has infringed Article 81 and/or the Chapter I prohibition to pay a penalty. In respect of an infringement of Article 82 and/or the Chapter II prohibition, the OFT may require the undertaking concerned to pay a penalty. Where there has been a finding of joint dominance, so that more than one undertaking has infringed Article 82 and/or the Chapter II prohibition, the OFT can require each undertaking to pay a penalty.

5.40 The term **undertaking**⁴⁰ 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 financed⁴¹. It includes companies, firms, businesses, partnerships, 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.

⁴⁰ See competition law guideline *Agreements and concerted practices* (OFT401).

⁴¹ See case C-41/90 *Höfner and Elser v Macrotron GmbH* [1991] ECR I-1979, [1993] 4 CMLR 306 and case T-319/99 *Fenin v Commission* [2003] ECR II-357, 4 March 2003 [2003] CMLR 1.

5.41 A parent company and its subsidiaries will usually be treated as a single undertaking if they operate as a single economic unit, depending on the facts of each case. The OFT may need to consider the respective responsibility of both parent and subsidiary for an infringement and therefore for consequent liability to pay a penalty. Where the OFT decides to impose a penalty on both parent and subsidiary, it may be imposed jointly and severally.

5.42 A penalty may be imposed on a company that takes over the undertaking that has committed an infringement⁴². Changes in the legal identity of an undertaking will not prevent it or its component parts from being penalised. As far as possible, liability for penalties will follow responsibility for actions. Thus, a subsequent transfer of a business from one economically distinct undertaking to another will not automatically absolve the transferor from responsibility. Where

⁴² See joined cases 40 to 48, 50, 54 to 56, 111, 113 and 114/73 *Suiker Unie v Commission and Others* [1975] ECR 1663, [1976] 1 CMLR 295.

the original undertaking has ceased to exist by the time a penalty comes to be imposed, the penalty may be imposed on the successor undertaking.

- 5.43** The involvement of a trade association in an infringement of Article 81, Article 82, the Chapter I and/or Chapter II prohibition may result in financial penalties being imposed on the association itself, its members or both. See competition law guideline *Trade associations, professions and self-regulating bodies* (OFT408) for further details on the imposition and enforcement of financial penalties on associations of undertakings.

Enforcement of penalty decision

- 5.44** If an undertaking fails to pay within the date specified in the penalty notice, and it has not brought an appeal against the imposition or amount of the penalty within the time allowed or such an appeal has been made and the penalty upheld, the OFT may commence proceedings to recover the required amount as a civil debt.

Appeals

- 5.45** The decision to impose a financial penalty and the decision as to the amount of that penalty can be appealed to the CAT by any party to the agreement in question or by the person who engaged in the conduct in question. Third parties cannot appeal decisions on penalties. Such an appeal must be brought within a period specified in the CAT Rules, currently two months from the date on which the undertaking was notified of the penalty decision⁴³.

- 5.46** The CAT can impose, revoke or vary the amount of a penalty. A decision by the CAT as to the amount of a penalty can be appealed with leave to the Court of Appeal in England and Wales and in Northern Ireland, and the Court of Session in Scotland.

- 5.47** An appeal to the CAT against the imposition or amount of a penalty will suspend the penalty until the appeal is determined. The infringement decision itself will remain in effect (unless suspended by

⁴³ CAT Rules, rule 8. The CAT may only extend this period if it is satisfied that the circumstances are exceptional.

an interim order made by the CAT or, in the case of a further appeal, the relevant appeal court).

5.48 The CAT Rules provide that, where the CAT imposes, confirms or varies a penalty, it may in addition order that interest should be payable, as from any date after the appeal was launched, at such rate as the CAT considers appropriate. Such interest forms part of the penalty and, in the event of non-payment, is recoverable by the OFT as a civil debt in the same way as the original penalty would have been⁴⁴.

⁴⁴ CAT Rules, rule 56(1)

6 Enforcement in the courts

Third party claims

6.1 Third parties adversely affected by an agreement or conduct which they believe infringes Article 81, Article 82, the Chapter I and/or Chapter II prohibitions may take action in the courts to stop the behaviour and/or to seek damages, in addition to or instead of making a complaint to the OFT.

6.2 Following a decision of the OFT or the CAT (on appeal from a decision of the OFT) finding an infringement of Article 81, Article 82, the Chapter I and/or 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 decisions, providing that the decision is no longer capable of being overturned on appeal⁴⁵.

⁴⁵ Sections 47A(9) and 58A(2) of the Act

Section 60

6.3 When applying Articles 81 and 82, the courts are bound by the case law of the European Court and by EC block exemption regulations. Section 60 of the Act provides for the United Kingdom authorities to handle cases concerned with the Chapter I and/or Chapter II prohibitions in such a way as to ensure consistency with Community law in so far as this is possible (and having regard to any relevant differences between any of the provisions concerned) and expressly refers to the decisions of the European Court and the European Commission as to the civil liability of an undertaking for harm caused by its infringement of Community law⁴⁶.

⁴⁶ Section 60(6)(b) of the Act

Cooperation with national courts

6.4 In any case concerning Article 81 and/or Article 82 before a court in the United Kingdom, the European Commission (where the coherent application of Article 81 or Article 82 so requires) and the OFT each have a right to submit written observations. With the court's permission, the European Commission (where the coherent application of Article 81 or Article 82 so requires) and the OFT may also submit oral observations to the court⁴⁷. The OFT has similar

⁴⁷ Article 15(3) of the Modernisation Regulation.

powers in cases before the High Court or Court of Appeal in England and Wales which raise issues relating to the application of the Chapter I or Chapter II prohibitions.

- 6.5** Where a proceeding is commenced, or a defence is filed, before the High Court or Court of Appeal in England and Wales which raises an issue relating to the application of Article 81, Article 82, the Chapter I prohibition and/or the Chapter II prohibition, the party raising the issue is required to notify the OFT (in this context, not including the Regulators)⁴⁸. This is to enable the OFT to consider whether to exercise its right to submit observations. The OFT (not including the Regulators) will notify the European Commission and/or relevant Regulators where it thinks it appropriate in order to enable them to consider whether to exercise their right to submit observations.
- 6.6** The OFT intends to use its power to submit written and oral observations in a way which will best assist the courts and the development of competition law. The OFT does not intend to submit such observations frequently. The OFT will, however, submit observations whenever requested to do so by the court. The OFT does not intend to submit observations with a view to assisting any party to court proceedings and will not enter into discussions with parties regarding the detail of submissions it proposes making to the courts.
- 6.7** See the competition law guideline *Modernisation* (OFT442) for further details on the role of the courts.

⁴⁸ Practice Direction – Competition Law – Claims relating to the Application of Articles 81 and 82 of the EC Treaty and Chapters I and II of Part I of the Competition Act 1998; and Practice Direction 52 – Appeals, paragraph 21.10A.

Annexe

A The OFT's guidance as to the circumstances in which it may be appropriate to accept commitments

Introduction

Statutory background

- A.1** Section 31D(1) of the Competition Act 1998 (the Act) requires the Office of Fair Trading (the OFT)¹ to prepare and publish guidance as to the circumstances in which it may be appropriate to accept binding commitments.
- A.2** EC Regulation 1/2003 (the Modernisation Regulation)² requires the national competition authorities of the Member States (NCAs) and the courts of the Member States to apply Articles 81 and 82 (Article 81 and Article 82 respectively)³ of the EC Treaty⁴. The Act gives the OFT powers to enforce both the Chapter I and Chapter II prohibitions of the Act and Article 81 and Article 82.
- A.3** Under section 31A(2) of the Act the OFT may accept such binding commitments offered to it by a person or persons as it considers appropriate, instead of continuing with an investigation into an alleged infringement of Article 81, Article 82, the Chapter I and/or Chapter II prohibition of the Act, and for the purposes of addressing the competition concerns it has identified.
- A.4** Under section 31A(3) of the Act, where the OFT has accepted binding commitments, it may for the purposes of addressing its current competition concerns, accept from the person or persons who gave the commitments a variation of them or commitments in substitution for them.
- A.5** Under section 31A(4)(b) of the Act, the OFT may release binding commitments.
- A.6** By virtue of section 31D(8) of the Act, the OFT must have regard to the guidance for the time being in force when considering whether to accept any commitments offered to it. Although there is no statutory obligation on the Regulators to publish guidance as to the

¹ Hereafter, references to the **OFT** in this guidance include the Regulators unless the text indicates otherwise. The

Regulators are those regulators which hold powers, concurrently with the OFT, under Part I of the Act.

² 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).

³ **Article 81** prohibits agreements between undertakings, decisions by associations of undertakings and concerted practices 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.

Article 82 prohibits conduct by one or more undertakings which amounts to an abuse of a dominant position within the common market or a substantial part of it in so far as it may affect trade

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circumstances in which it may be appropriate to accept binding commitments, the Regulators are required to have regard to the guidance for the time being in force when considering whether to accept any commitments offered to them.

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between Member States. **The Chapter I prohibition and the Chapter II prohibition** of the Act are based on Article 81 and Article 82 respectively but apply to anti-competitive practices which affect trade within the United Kingdom. For further details see the competition law guidelines *Agreements and concerted practices* (OFT401) and *Abuse of a dominant position* (OFT402).

⁴ The Treaty establishing the European Community.

- A.7** Section 31D(6) requires the OFT to consult such persons as it considers appropriate when preparing guidance on commitments under section 31D. In accordance with this provision, the OFT has conducted a consultation when preparing this guidance under section 31D.
- A.8** Section 31D(7) requires the OFT to consult the Regulators where the guidance relates to a matter in relation to which they (or any of them) exercise concurrent jurisdiction. The OFT has consulted the Regulators when preparing this guidance.
- A.9** Under section 31D(4) of the Act the Secretary of State must approve any guidance on commitments before it can be published. This guidance was approved by the Secretary of State as required under section 31D(4) of the Act for publication on 21 December 2004.
- A.10** Section 31D(2) of the Act provides that the OFT (not including the Regulators) may alter the guidance on commitments at any time. Altered guidance must be published. Any alterations must be made following consultation with such persons as the OFT considers appropriate (including a Regulator where a proposed alteration to the guidance relates to a matter in respect of which the Regulator exercises concurrent jurisdiction). Altered guidance may not be published without the approval of the Secretary of State.
- A.11** This guidance on commitments will be reviewed in the light of experience in applying it over time.

Policy objective

- A.12** This guidance has been drafted with a view to increasing transparency by setting out the circumstances in which the OFT may consider it appropriate to accept binding commitments and the circumstances in which the OFT will not consider it appropriate to

⁵ **Agreement** here includes decisions by associations of undertakings and concerted practices.

accept binding commitments. It is intended that this guidance should be of assistance not only to those who are parties to an agreement⁵ or conduct, but also to their customers and other businesses.

Circumstances in which it may be appropriate to accept commitments

A.13 The decision whether to accept binding commitments is at the discretion of the OFT.

A.14 The OFT is likely to consider it appropriate to accept binding commitments only in cases where:

- the competition concerns are readily identifiable
- the competition concerns are fully addressed by the commitments offered, and
- the proposed commitments are capable of being implemented effectively and, if necessary, within a short period of time.

A.15 The OFT will not accept, other than in very exceptional circumstances, binding commitments in cases involving secret cartels between competitors which include:

- price-fixing
- bid-rigging (collusive tendering)
- establishing output restrictions or quotas
- sharing markets, and/or
- dividing markets.

Nor will the OFT accept binding commitments in cases involving serious abuse of a dominant position⁶.

A.16 The OFT will not accept binding commitments in circumstances:

- where compliance with and the effectiveness of any binding commitments would be difficult to discern, and/or

⁶ It is the OFT's assessment of the seriousness of an abuse and its effect on competition which will be taken into account in determining whether commitments are appropriate in a particular case.

When making its assessment, the OFT will consider a number of factors, including the nature of the product, the structure of the market, the market share(s) of the undertaking(s) involved, entry conditions and the effect on competitors and third parties. The damage caused to consumers whether directly or indirectly will also be an

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- where the OFT considers that not to complete its investigation and make a decision would undermine deterrence.

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important consideration. This assessment will be made on a case by case basis, taking account of all the circumstances of the case. However, as a general rule, the OFT will regard predatory pricing as a serious abuse. (The term **product** should be interpreted to include goods, services or property rights.)

A.17 Binding commitments will generally be adopted for a specified period of time. They are treated as released on the expiry of this period.

A.18 Where the OFT has accepted binding commitments it may, for the purposes of addressing its current competition concerns, consider it appropriate to accept a variation of the commitments or commitments in substitution for them.

A.19 If the OFT's current competition concerns are different from the competition concerns it identified when the commitments were accepted, when considering the appropriateness of accepting varied or substitute commitments, the OFT will take into account the considerations in paragraphs A.14 to A.16 above.

A.20 Once binding commitments have been accepted in respect of an agreement or conduct, the OFT may not continue an investigation, make an infringement decision or give interim measures directions in respect of that agreement or conduct unless it has:

- reasonable grounds for believing that there has been a material change of circumstances since the commitments were accepted
- reasonable grounds for suspecting that a person has failed to adhere to one or more of the terms of the binding commitments, or
- reasonable grounds for suspecting that information which led it to accept the binding commitments was incomplete, false or misleading in a material particular.

A.21 However, the OFT is not prevented from taking action in relation to competition concerns which are not addressed by the commitments it has accepted.

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

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

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