

Application to services relating to railways

Understanding competition law

Competition
law 2005

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Articles 81 and 82 of the EC Treaty and the Competition Act 1998 are applied and enforced in the United Kingdom by the Office of Fair Trading (the OFT). In relation to the regulated sectors these 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 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 guideline provides general advice and information about the application and enforcement by ORR and 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. It is intended to explain these provisions to those who are likely to be affected by them and to indicate how ORR and 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 and notices provided under it. Neither is this guideline a substitute for the Competition Act 1998 and the regulations and orders made under it. 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 and the Competition Act 1998 should seek legal advice.

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1 Introduction and overview

Introduction

¹ The Competition Act 1998 and other Enactments (Amendment) Regulations 2004 S.I 2004 No.1261 ('the amending Regulations') which were entered into force on 1 May 2004 make provision for implementing Council Regulation (EC) No.1/2003 (the Modernisation Regulation). The amending regulations bring about the alignment of the domestic competition regime in the Competition Act 1998 and the new European competition regime provided for in the Modernisation Regulation. The Competition Act and sectoral legislation including the Railways Act 1993 are accordingly amended.

² Sector regulators in addition to ORR with concurrent Competition Act powers are: the Office of Communications; the Gas and Electricity Markets Authority; the Director General for Water Services; the Civil Aviation Authority; and The Northern Ireland Authority for Energy Regulation.

³ ORR was established on 5 July 2004 by the Railways and Transport Safety Act 2003. It replaced the Office of the Rail Regulator.

1.1 The Competition Act 1998¹ (The Competition Act) came into force on 1 March 2000. It includes two prohibitions: one prohibiting anti-competitive agreements and concerted practices (the Chapter I Prohibition) and the other prohibiting abuse of a dominant position (the Chapter II prohibition). The Competition Act is applied and enforced by the Office of Fair Trading (OFT) and the concurrent regulators² including the Office of Rail Regulation (ORR).³

1.2 On 1 May 2004, the EC Modernisation Regulation⁴ came into force. This decentralises the application of Articles 81 and 82 of the EC Treaty⁵ to National Competition Authorities (NCAs) and the courts of the Member States. It also abolishes the system of notifying agreements for exemption under Article 81(3), and requires individual companies to assess whether their agreements comply with competition law.

1.3 Article 35 of the Modernisation Regulation requires each of the Member States to designate NCAs for the purpose of applying Articles 81 and 82. ORR has been designated as a NCA for this purpose.⁶ ORR exercises its Competition Act powers concurrently with the OFT in respect of agreements or conduct relating to the supply of services relating to railways.⁷ ORR will from 1 May 2004, when applying the Chapter I and Chapter II prohibitions, also apply Articles 81 and 82, where there is an actual and potential effect on trade between Member States.

⁴ Council Regulation EC 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty 16 December 2002 (OJ L1 4.1.2003 p1).

⁵ The Treaty establishing the European Community.

⁶ Regulation 3 of the amending regulations (v. footnote 1).

⁷ Section 67(3) of the Railways Act 1993, as amended by the Transport Act 2000 (The Railways Act).

1.4 On 16 March 2004, ORR signed a joint statement with other UK sectoral regulators and the OFT committing it to abide by the principles set out in the European Commission's 'Notice on cooperation within the Network of Competition Authorities'⁸ (the ECN Notice).

⁸ OJ (2004/C 101/03) 27 April 2004.

Purpose of this guideline

1.5 The purpose of this guideline is to explain how ORR expects to apply the provisions of the Competition Act (and Articles 81 and 82) to services relating to railways. This guideline also:

- replaces ORR's previous guideline⁹ published in November 2002 to take account of the changes brought about by the Modernisation Regulation, including the designation of ORR as a NCA for the purpose of applying Articles 81 and 82
- provides guidance on how ORR interprets its powers and functions as a regulatory body and as a NCA particularly in relation to Article 3 of the Modernisation Regulation
- describes ORR's powers under the Enterprise Act 2002 (EA02) including the power to launch market investigations and make market references to the Competition Commission, and
- provides guidance to complainants on the type of information required by ORR before it will take up a complaint about anti-competitive behaviour under the Competition Act. Annexe D contains a template form to be used by complainants wishing to submit a competition complaint to ORR.

⁹ *Application to services relating to railways* (OFT430), November 2002.

1.6 This guideline is not a comprehensive guide to the legal and economic framework for an application of competition law to agreements and conduct. Detailed guidelines on the general application of competition law were published by the OFT on 21 December 2004 and are obtainable direct from the OFT website at www.of.gov.uk

- 1.7** This guideline sets out general principles and ORR's early view of the impact that, for example, modernisation will have on the way it exercises its powers. ORR expects to develop its policy overtime as it applies those principles to each case that it considers.

Structure of this guideline

- 1.8** Part 2 of this guideline sets out ORR's jurisdiction as a NCA under the Competition Act and describes the application of competition law in the rail sector including new powers made available to ORR by the EA02. Part 3 sets out the relationship between sector specific regulation and competition law and in particular discusses the impact of Article 3 of the Modernisation Regulation. Part 4 sets out the major changes to general procedures brought about by the amending Regulations¹⁰ and which ORR will apply when conducting competition investigations including the ability to accept commitments in lieu of making an infringement decision. Part 4 also describes how concurrency works both within the UK and across Member States and provides guidance on disclosure of commercially sensitive information, and sets out guidance to prospective complainants on how to submit a competition complaint to ORR.

¹⁰ SI 2004 no 1261 (v. footnote 1).

2 The application of competition law in the railway sector

Introduction

2.1 This part sets out ORR's jurisdiction under the Competition Act and provides a summary of the major provisions of competition law and how they might apply in a railway context. It should be read in conjunction with the OFT guidelines, in particular, *Modernisation* (OFT442); *Agreements and concerted practices* (OFT401); *Vertical agreements* (OFT419); *Market definition* (OFT403); *Assessment of market power* (OFT415); *Abuse of a dominant position* (OFT402); and the draft competition law guideline on *Assessment of conduct* (OFT414A). This part also describes the range of competition powers available to ORR under the Enterprise Act 2002 (the EA02).

Definition of services relating to railways

2.2 Any agreement or conduct will fall within ORR's jurisdiction under the Competition Act and under the EA02, if it **relates to the supply of services relating to railways**. Whether ORR has jurisdiction is determined according to the subject matter of the agreement or conduct or the effect of the agreement or conduct (that is, whether it relates to services relating to railways) and not according to the identities of the parties or undertakings.

2.3 Services relating to railways is defined in section 67(3ZA) of the Railways Act 1993 (as amended)¹¹ (the Railways Act) as:

- (a) railway services¹² (meaning the carriage of passengers and goods by railway and light maintenance, station and network services);
- (b) the provision and maintenance of rolling stock; and
- (c) the development, maintenance or renewal of a network, station or light maintenance depot; and
- (d) the development, provision or maintenance of information systems designed wholly or mainly for facilitating the provision of railway services.

¹¹ As amended by the Transport Act 2000, the Enterprise Act 2002 and the amending Regulations (v. footnote 1).

¹² Section 82 of the Railways Act.

2.4 ORR, therefore, has powers in relation to a broader range of services under the Competition Act and the EA02 than it does under sector specific legislation, which is limited to railway services as defined at section 82 of the Railways Act.

2.5 ORR may therefore:

- consider complaints about possible infringements of any of Article 81, 82, the Chapter I and/or Chapter II prohibitions
- impose interim measures to prevent serious and irreparable damage
- carry out investigations both on its own initiative and in response to complaints, including requiring the production of documents and information and searching premises¹³
- impose financial penalties on undertakings up to a maximum of ten percent of its worldwide turnover in the business year preceding the date of the decision, taking into account the statutory guidance on penalties issued by the OFT¹⁴
- issue and enforce directions to bring an infringement to an end
- apply the Article 81(3) criteria to agreements which may breach Article 81 or the Section 9 criteria to agreements which may breach the Chapter I prohibition
- accept commitments that are binding on an undertaking in lieu of a decision
- publish written guidance in the form of an Opinion¹⁵ where a case raises novel or unresolved questions about the application of competition law in the rail sector and where ORR considers there is an interest in issuing clarification for the benefit of a wider audience, and
- make a market investigation reference to the Competition Commission (the CC) under Part 4 of EA02.

¹³ *Powers of investigation* (OFT404), December 2004.

¹⁴ *OFT's Guidance as to the appropriate amount of a penalty* (OFT423), December 2004.

¹⁵ *Modernisation* (OFT442), December 2004.

Market definition

2.6 Market definition is key to establishing whether or not particular agreements or conduct fall within the scope of the competition rules.

It provides a framework for competition analysis and is a key step in identifying the competitive constraints acting on a supplier of a given product or service. Market definition is crucial to understanding whether the relevant undertakings possess market power, and hence whether a particular agreement or conduct could affect competition. It also has a bearing on the ambit of the new power to carry out market investigations:

- Article 81 and the Chapter I prohibition apply to agreements which have as their object or effect an **appreciable** prevention, restriction or distortion of competition. The appreciability test usually requires definition of a relevant market and demonstration that the agreement would have an appreciable effect on competition within that market
- Article 82 and the Chapter II prohibition apply only to **dominant** undertakings. In order to assess whether an undertaking is dominant, ORR would have to establish whether that undertaking enjoyed substantial market power, the definition of relevant market is the first step in determining whether an undertaking enjoys market power, and
- the ORR may only make a reference to the CC if it ‘...has 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...’

2.7 A market is defined in terms of the products involved, the geographical area in which they are sold and, in many cases, the time period in which they are sold. Relevant markets are defined by reference to a particular good or service. The relevant market for a particular product contains all those products which effectively constrain the price of that product to the competitive level. One way in which the price of one product can be constrained to the competitive level is through substitution of products on the demand side: that is, where a price rise in excess of the competitive level would cause sufficient consumers to switch to other products such that the price rise becomes unprofitable. The price of one product can also be constrained by supply-side substitution, that is, where a price rise in excess of the competitive level causes suppliers of other

products quickly to switch into supplying that product, so that the price rise, again, becomes unprofitable. Further guidance on market definition is set out in the OFT publication *Market definition* (OFT402) and in the European Commission's notice on market definition.¹⁶

¹⁶ European Commission Notice on definition of the relevant market for the purposes of community competition law (OJ C372 9.12.97 p5).

Undertaking

2.8 The term undertaking is not defined in the EC Treaty or the Act, but its meaning has been set out in Community law. It covers any natural or legal person engaged in economic activity, regardless of its legal status and the way in which it is financed. It includes companies, partnerships, firms, businesses, individuals operating as sole traders, agricultural cooperatives, associations of undertakings (for example, trade associations), non-profit making organisations and (in some circumstances) public entities that offer goods or services on a given market. For further discussion on the definition of an undertaking for the purpose of applying competition law, please refer to Annex A to this guideline.

The Competition Act 1998 and Articles 81 and 82 of the EC Treaty

Introduction

2.9 The Competition Act is applied and enforced by the OFT. However, ORR, by virtue of section 67(3) of the Railways Act exercises these powers concurrently¹⁷ with the OFT in respect of agreements or conduct relating to the supply of services relating to railways. Article 35 of the Modernisation Regulation requires Member States to designate NCAs for the purpose of applying Articles 81 and 82, where there is an effect on trade between Member States. In the UK, regulation 3 of the amending Regulations¹⁸ designates ORR as an NCA for this purpose.¹⁹

Agreements - Chapter I and Article 81

2.10 ORR may investigate under the Chapter I or Article 81 prohibition, agreements which have as their object or effect an appreciable prevention, restriction or distortion of competition:

¹⁷ *Concurrent application to regulated industries* (OFT405), published 21 December 2004.

¹⁸ SI 2004 no 1261 (v. footnote 1).

¹⁹ With the exception of conducting investigations at the request of the competition authority of another Member State or the Commission under Article 22 of the Modernisation Regulation.

- within the common market and which may affect trade between Member States, in the case of Article 81, and
- within the UK (or a part thereof) and which may affect trade within the UK, in the case of the Chapter I prohibition.

2.11 References to ‘agreements’ should be taken to include decisions taken in trade or other associations of undertakings and/or concerted practices. The prohibition can apply to informal co-operation falling short of a formal agreement or decision. In addition, through the concept of ‘concerted practice’ the prohibition can also apply to conscious co-ordination of competitive behaviour.

2.12 The ORR in assessing whether or not the agreement has an appreciable effect, will have regard to the European Commission’s *Notice on Agreements of Minor Importance*²⁰ which sets out, using market share thresholds, what is not an appreciable restriction of competition under Article 81. The European Commission considers that agreements between undertakings which affect trade between Member States do not appreciably restrict competition if:

²⁰ OJ C368 22.12.01 p13.

- the aggregate market share of the parties to the agreement does not exceed 10 per cent on any of the relevant markets affected by the agreement where the agreement is made between competing undertakings, or
- the market share of each of the parties to the agreement does not exceed 15 per cent on any of the relevant markets affected by the agreement is made between non-competing undertakings (see also the paragraphs on vertical agreements in this Part, below).

2.13 The above approach does not apply to an agreement containing certain restrictions such as an agreement between competing undertakings which directly or indirectly fixes prices, shares markets or limits production, or in the case of an agreement between non-competing undertakings, a provision which limits a buyer’s ability to determine its resale price. For a full list of restrictions please refer to paragraph 11 of the Notice. Further, the percentage thresholds above are reduced to five per cent where competition on the relevant

²¹ For a more detailed explanation of network effects please refer to Part 5 of the OFT competition law guideline, *Assessment of market power* (OFT515), August 2004.

market is restricted by the cumulative foreclosure effect of parallel networks of agreements having similar effects on the market.²¹

- 2.14** Breach of Article 81 or the Chapter I prohibition means that the particular terms of the agreement which cause the anti-competitive effect are void, (which may or may not lead to the whole agreement itself effectively becoming unenforceable) and each party is liable to a financial penalty of up to ten per cent of its worldwide turnover. In addition, third parties who consider that they have suffered loss as a result of such behaviour may bring an action for damages to the Competition Appeal Tribunal (CAT) or the courts.
- 2.15** Examples of potentially anti-competitive agreements which may arise in the railways sector include agreements between:
- train operators not to compete with each other for certain traffic (such activity is likely to constitute a form of market sharing)
 - suppliers of railway products or services not to compete with each other for certain business
 - train operators or suppliers of railway products or services not to compete with each other on price
 - train operators or suppliers of railway products or services involving the sharing of commercially sensitive information
 - bidders not to bid for particular franchises
 - facility owners to restrict the access of third parties to facilities, or
 - train operators to boycott certain suppliers (for example, train operators agreeing to boycott certain suppliers of rolling stock maintenance services).
- 2.16** Agreements between railway undertakings, however, which are entered into as a result of directions by ORR, are excluded from the scope of both the Chapter I and Chapter II prohibitions (refer to Part 3 of this guideline 'Agreements and conduct which are subject to legal direction', for more detail on this exclusion).

Criminalisation of cartels

- 2.17** Section 188 of the EA02 makes it a criminal offence for **individuals** dishonestly to agree with one or more persons that two or more undertakings will engage in certain prohibited cartel activity, such as price-fixing, market sharing and bid rigging. Those found guilty of a section 188 offence, can face a maximum of five years imprisonment and/or an unlimited fine.
- 2.18** Sections 192 to 201 of the EA02, set out the investigative framework for criminal investigations by the OFT (regulators with concurrent Competition Act powers do not have this power). In the event that ORR uncovers a suspected criminal cartel offence, it will refer the matter to the OFT.

The legal exception regime

- 2.19** An agreement may be exempt from the Chapter I and Article 81 prohibition if it satisfies certain criteria, which are set out at section 9(1) and Article 81(3), respectively. Section 9(1) provides that the Chapter I prohibition is inapplicable in respect of any agreement:

‘which contributes to improving the production or distribution or promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:

- (a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of those objectives;
- (b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.’²²

²² Article 81(3).

- 2.20** Article 2 of the Modernisation Regulation places the burden of proving that the conditions in Article 81(3) are met on those undertakings that seek to rely on an Article 81(3) exemption. The system of notifying agreements to the European Commission for clearance or exemption is abolished. Consistent with the purpose of this legal exception regime section 4 (Individual Exemptions) of the Competition Act which empowered the OFT and ORR concurrently to

grant an individual exemption from the Chapter I prohibition no longer applies. Consequently, parties to an agreement will need to form their own view of whether the Chapter I prohibition in section 2 of the Competition Act applies, and whether their agreement fulfils the exemption criteria in section 9.

- 2.21** The European Commission has provided detailed guidance on Article 81(3) in its Notice *Guidelines on the Application of Article 81(3) of the Treaty*. This, together with considerable case law from the Commission and the European Courts on the application of Article 81(3) means that undertakings are in a position to assess for themselves whether their agreement is compatible with Chapter I/Article 81.

Opinions

- 2.22** In cases that raise novel or unresolved questions the NCAs, or the European Commission can provide informal guidance in the form of Opinions, see the European Commission *Notice on informal guidance relating to novel questions concerning Articles 81 and 82 of the EC Treaty that arise in individual cases (guidance letters)*. Further information on the subject of Opinions can also be found in the OFT's competition law guideline *Modernisation* (OFT423). An Opinion published by the OFT or ORR cannot, however, prejudice the assessment of the same question by the European Commission, the European Court or the CAT. An Opinion from the OFT or ORR does not bind any NCA or court having the power to apply Article 81 and/or the Chapter I prohibition.

Railway industry-wide arrangements and agreements

- 2.23** There are significant benefits to consumers from a co-ordinated national rail network at the retail level. The licences of passenger train operators require them to belong to industry-wide agreements which provide passenger benefits such as through-ticketing, co-ordinated timetabling, and provision of accurate and impartial information to customers. Certain agreements benefit from a block exemption from the provisions of Chapter I/Article 81 such as multi-operator travel cards. The Public Transport Ticketing Scheme Block Exemption which applies to certain ticketing schemes which benefit from the block

exemption and the OFT publication *Public transport ticketing schemes block exemption* (OFT439), are discussed in this Part, below.

2.24 Many agreements were notified to the OFT under section 24 of the Restrictive Trade Practices Act 1976 (the RTPA) and were the subject of a direction issued under section 21(2) of that Act. These agreements which benefit from such RTPA directions are excluded from the application of the Chapter I prohibition, unless a material variation²³ has been made to the agreement since 1 March 2000,²⁴ in which case the benefit of an exclusion under section 21(2) of the RTPA automatically falls away. Where ORR believes that it has competition concerns with regards to an agreement previously excluded under the RTPA, it can also 'clawback'²⁵ the exclusion to allow a review under the Chapter I prohibition, provided:

- the agreement will, but for the exclusion, infringe the Competition Act, and
- ORR is not likely to give an unconditional individual exemption.

2.25 From 1 May 2007,²⁶ agreements currently excluded under the RTPA will lose the benefit of this exclusion. Parties to such agreements will then need to form their own view of whether the Chapter I prohibition (or Article 81 where there is an effect on trade between Member States) applies.

UK block exemptions orders

2.26 Section 6 of the Competition Act provides a power for the Secretary of State, on a recommendation of the OFT or concurrently ORR, by order (a block exemption order) to exempt categories of agreement from the Chapter I prohibition where they fall within the conditions set out in section 9. An agreement which falls within the category of agreements specified in a block exemption order will be automatically exempt from the Chapter I prohibition.

2.27 The only block exemption order that has been made under the Competition Act, at the date of publication of this guideline, is the public transport ticketing schemes block exemption.²⁷ Detailed guidance regarding the scope of this block exemption is available in

²³ Refer to paragraph 4.16 of OFT guideline *Transitional arrangements* (OFT406), for an explanation of what constitutes a material change.

²⁴ Schedule 3 of the Competition Act.

²⁵ ORR will have to give a formal direction to this effect under section 3 of the Competition Act.

²⁶ SI 2004 No.1261, (v. footnote 1).

²⁷ Competition Act 1998 (Public Transport Ticketing Schemes Block Exemption) Order 2001 (SI 2001 No.319).

²⁸ OFT439, August 2002.

the OFT Competition Act guideline *Public transport ticketing schemes block exemption*.²⁸ Important points to note for those involved in the provision of railway services include:

- the order applies to five types of ticketing schemes: multi-operator travelcards; through tickets; multi-operator individual tickets; short-distance add-ons; and long-distance add-ons. Not all agreements relating to ticketing benefit from the block exemption and those which do not, will remain subject to scrutiny under Chapter I (and possibly Article 81)
- each of the ticket types covered by the order has a defined meaning (which will not necessarily accord with the meaning given to those terms when used in other contexts)
- the order stipulates various other conditions which a public transport ticketing scheme must meet in order to come within its scope (including, for public transport ticketing schemes involving multi-operator travelcards, conditions as to the distribution of revenue)
- the order applies principally to agreements relating to the supply of local public transport services. For a service to be a local public transport service, broadly speaking, one or more passengers must travel less than 15 miles on the service. Long distance services are not covered by the block exemption, except to the extent that long-distance add-ons are issued under the agreement, and
- the order applies from 1 March 2000 to 28 February 2006. It is envisaged that the operation of the order will be reviewed by the OFT before its expiry.

2.28 ORR or OFT may, by notice in writing, withdraw the benefit of the block exemption from a particular public transport ticketing scheme agreement, if satisfied that it does not meet the statutory exemption criteria, notwithstanding if it meets the conditions of the block exemption itself. Before doing so, it must give notice in writing of the proposal and consider any representations made.²⁹

²⁹ Articles 19 to 21 of the public transport ticketing schemes block exemption.

EC Parallel exemptions

- 2.29** A parallel exemption under the Competition Act applies to an agreement which is covered by a finding of inapplicability by the European Commission,³⁰ or an EC block exemption Regulation,³¹ if the agreement had an effect on trade between Member States. Agreements which so benefit are not prohibited under the Chapter I prohibition.³²
- 2.30** Relevant to the railways sector in this regard is Regulation 1017/68/EEC³³ of the European Council, which applies rules of competition to transport by rail, road and inland waterway.
- 2.31** By the terms of Regulation 1017/68, the prohibition in Article 81(1) does not apply to agreements the object and effect of which is to apply technical improvements or to achieve technical co-operation by any of a number of specified means:³⁴
- the standardisation of equipment, transport supplies, vehicles or fixed installations
 - the exchange or pooling of equipment, transport supplies, vehicles or fixed installations
 - the organisation and execution of successive, complementary, substitute or combined transport operations, and the fixing and application of inclusive rates and conditions for such operations, including special competitive rates
 - the use, for journeys by a single mode of transport, of the routes which are most rational from the operational point of view
 - the coordination of transport timetables for connecting routes
 - the grouping of single consignments, and
 - the establishment of uniform rules as to the structure of tariffs and their conditions of application, provided such rules do not lay down transport rates and conditions.
- 2.32** This can be regarded as, in effect, a block exemption for agreements meeting the specified criteria. To the extent therefore that an

³⁰ Under Article 10 of the Modernisation Regulation, the European Commission can find that Article 81 is inapplicable to an agreement either because the conditions of Article 81(1) are not fulfilled or because the conditions of Article 81(3) are satisfied.

³¹ See *Modernisation* (OFT442), December 2004, for an explanation of the EC block exemption regulations.

³² Section 10, Competition Act 1998.

³³ A substantial part of Regulation 1017/68 was repealed by Article 36 of the Modernisation Regulation such that there is now no means to apply for retroactive application for an individual exemption under the previous Article 5.

³⁴ Article 3 of Regulation 1017/68.

agreement benefits from this disapplication of Article 81(1) in Regulation 1017/68, or would do so if it affected trade between Member States, it will benefit from a parallel exemption from the Chapter I prohibition.

2.33 In certain circumstances the OFT and concurrently ORR may impose conditions on a parallel exemption or cancel the parallel exemption following procedures set out in rule 12 of the OFT's Rules.³⁵

³⁵ The Competition Act 1998 (Office of Fair Trading's Rules) Order 2004.

Vertical agreements

2.34 Vertical agreements are agreements between two or more parties who operate at a different level of the production or distribution chain. Examples of activities at different levels of the production or distribution chain include supplying raw materials, manufacturing, wholesaling and retailing. An agreement between Network Rail and a train operator (a track access agreement), which sets out the terms and conditions for access to the infrastructure, is a type of vertical agreement. Vertical agreements do not generally give rise to competition concerns unless one or more of the parties to the agreements possesses market power on the relevant market or the agreements form part of a network of similar agreements. Track access agreements are discussed further in Part 3 of this guideline.

2.35 The Competition Act 1998 (Land and Vertical Agreements Exclusion) Order 2000³⁶ (the UK Exclusion Order), made under section 50 of the Competition Act, excluded vertical agreements from the application of the Chapter I prohibition. However, this Order is repealed with effect from 1 May 2005 when the Competition Act 1998 (Land Agreements Exclusion and Revocation) Order 2004³⁷ comes into force.

³⁶ SI 2000 No 310.

³⁷ SI 2004 No.1260.

³⁸ Commission Regulation 2790/1999 on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices.

2.36 The EC block exemption³⁸ on vertical agreements and concerted practices remains in place and applies as a parallel exemption by virtue of section 10 of the Competition Act to qualifying vertical agreements that do not have an effect on inter-state trade. This provides a 'safe harbour' for many vertical agreements whilst opening up to scrutiny those agreements that are appreciably restrictive of competition and where, because of the exercise of market power, there may be reason to be concerned.

2.37 The EC block exemption, however, will **not** apply to a vertical agreement where:

- the market share of the supplier (or buyer, in the case of an agreement with an exclusive supply obligation)³⁹ exceeds 30 per cent of the relevant market
- the agreement contains one or more of the hard core restrictions listed in the block exemption, including price fixing, or
- to vertical agreements entered into between competing undertakings.⁴⁰

2.38 A vertical agreement that does not benefit from the block exemption or from any other block exemption may still not be prohibited if it falls under the legal exception regime described in this Part, above. ORR will also have regard to the European Commission *Notice on Agreements of Minor Importance* in assessing whether or not there is an appreciable effect on competition for the purposes of Article 81 and/or the Chapter I prohibition⁴¹ (for more details regarding this notice refer to the section, Agreements – Chapter I and Article 81, in this Part above).

2.39 To the extent that a vertical agreement is a land agreement it will be capable of benefiting from the exclusion provided by the Competition Act 1998 (Land Agreements Exclusion and Revocation) Order 2004.

Abuse of a dominant position – Chapter II and Article 82

2.40 Chapter II and Article 82 prohibits the abuse of a dominant position in a relevant market. For conduct to breach this prohibition the relevant undertaking or undertakings must first be found to be dominant or jointly dominant.

2.41 The European Court has defined a dominant market position as:

‘... a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition from being maintained in the relevant market by affording it the power to behave to an appreciable extent independently of its competitors, customers and ultimately its consumers.’⁴²

³⁹ Article 1(c) of the Block Exemption defines exclusive supply obligation as ‘any direct or indirect obligation causing the supplier to sell the goods or services specified in the agreement only to one buyer inside the Community for the purposes of a specific use or for resale’.

⁴⁰ Article 2(4) of the Block Exemption. The Block Exemption sets out three exceptions to the general exclusion all of which relate to non-reciprocal agreements (for instance that while one manufacturer becomes the distributor of the products of another manufacturer, the latter does not become a distributor of the products of the first manufacturer). Competing undertakings for the purpose of the Block Exemption means actual or potential suppliers in the same product market.

⁴¹ OJ C368 22.12.01 p13.

⁴² Case 27/76 *United Brands v Commission* [1978] ECR 207, [1978] 1 CMLR 429.

- 2.42** An undertaking will not be dominant unless it has substantial market power. Market power generally arises where an undertaking does not face sufficiently strong competitive pressures. An undertaking with market power will have the ability and incentive to harm the process of competition by sustaining prices above competitive levels, restricting output, pursuing policies designed to weaken existing competitors and/or raising entry barriers to potential entrants.
- 2.43** Both Article 82 and the Chapter II prohibition provide, in similar terms, that conduct may constitute an abuse if it consists of:
- (a) directly or indirectly imposing unfair purchase or selling prices or other trading conditions;
 - (b) limiting production, markets or technical development to the prejudice of consumers;
 - (c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage; and
 - (d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of the contract.
- 2.44** A non-exhaustive list of factors that ORR will take into account when assessing dominance under Article 82 or Chapter II includes: the presence of existing competitors, the likelihood of potential competitors entering the market, whether countervailing buyer power exists, barriers to entry and market shares over a period of time. Guidance on how to assess dominance is set out in the OFT guideline *Assessment of market power* (OFT415) published on 21 December 2004 and available on the OFT website at www.of.gov.uk
- 2.45** In general terms, conduct may be abusive when it is directly exploitative of customers (through the charging of excessive prices, for example) or where it has an adverse effect on the competitive process (for example, conduct which raises or enhances entry barriers, or increases competitors' costs). The significance of potential customer or consumer detriment is also a factor which the ORR will

take into account when deciding which cases to pursue as a matter of administrative priority. Each case will, however, need to be considered individually on the basis of the available evidence and taking into account any factors specific to the issues involved.

- 2.46** An undertaking can contravene Chapter II or Article 82, where dominance is in one market and the abuse is in a separate but related market. For example, the undertaking in question may attempt to leverage such dominance into another related market. An example of this, in a railway context, could be a dominant supplier of specialist railway equipment, tying in the purchaser (perhaps by means of warranty provisions which are not objectively justifiable) to long-term maintenance services or products, thereby preventing other suppliers of those services or products from entering the market.

The Enterprise Act 2002

- 2.47** The EA02, which received royal assent in November 2002, was brought into force in stages throughout 2003 and 2004.

Market investigation references

- 2.48** EA02 makes provision⁴³ for a system of market investigations by the Competition Commission (CC). ORR has a concurrent power⁴⁴ to make a market investigation reference to the CC under section 131 of the EA02 provided ORR has, in relation to services relating to railways:

⁴³ Part 4 of EA02.

⁴⁴ By virtue of S67(2) of the Railways Act as amended by schedule of 9 of EA02.

'...reasonable grounds for suspecting that any feature, or combination of features, of a market in the United Kingdom for goods or services prevents, restricts, or distorts competition...'

- 2.49** The market investigation provisions replace the existing Fair Trading Act 1973 complex monopoly provisions. Market investigation references will focus upon the functioning of a market as a whole rather than the conduct of a single firm. If single firm conduct is a concern ORR will first consider whether the Chapter II/Article 82 prohibition has been breached. However, if anti-competitive conduct of a single firm or a number of firms is associated with structural

features, it may be appropriate for ORR to make a market investigation reference to the CC. Such concerns may arise, for example, where the ORR discovers the existence of co-ordinated or tacit collusion between undertakings even in the absence of anti-competitive agreements.

2.50 ORR would consider referring a market to the CC if it believes that the market conditions make co-ordinated behaviour possible and if it has a reasonable suspicion of such co-ordinated effects. A non-exhaustive list of factors that ORR considers might enable co-ordinated behaviour may include:

- a highly concentrated market, in which firms are aware of each others behaviour
- stable market shares over a long time period
- a high degree of product homogeneity
- disincentives to compete on price due to interdependence and the fear of price matching, and
- relatively weak competitive constraints, for example, a low threat of entry to the market.

Preliminary studies

2.51 In order to reach the 'reasonable suspicion' threshold as set out in Section 131 of the EA02, ORR will conduct informal inquiries or use publicly available information, information held already within the office, or information held by other Government departments.

2.52 ORR also has a general sector specific duty to keep under review the provision of railway services⁴⁵ and to collect information with a view to facilitating the exercise of this function.

⁴⁵ Section 69 of the Railways Act.

Formal powers of investigation in the context of market references

- 2.53** Section 174 of EA02 gives ORR certain powers of investigation, including those to formally require information, which may be used when ORR believes it has the power to make a reference to the CC.
- 2.54** ORR, in exercising its concurrent powers under EA02, also has a power to accept undertakings in lieu of a market reference by virtue of section 154.

Competition disqualification orders

- 2.55** The EA02 amends the Company Directors Disqualification Act 1986 to provide the OFT and concurrent regulators (including ORR) with the power to apply to the court for orders (Competition Disqualification Orders (CDOs)) disqualifying directors of companies which have committed a breach of competition law.⁴⁶
- 2.56** The maximum period of disqualification under a CDO is 15 years, during which it is a criminal offence for a person, who has been served a CDO to be a director of a company or take on any roles relating to company management. The OFT guidance *Competition disqualification orders* (OFT510) sets out the factors OFT and concurrent regulators will take into account when deciding whether or not to apply for a CDO.

⁴⁶ Including a breach of either Chapter I/Article 81 or Chapter II/Article 82.

Super complaints

- 2.57** In section 205 of the EA02 provision is made for designated consumer bodies⁴⁷ to make 'super-complaints' to sectoral regulators, where there are market features that may be harming consumers to a significant extent. A super-complaint may be made to ORR in relation to the rail industry. ORR will have 91 days to respond to a super-complainant stating whether it will take action and what that action is likely to be. Possible action could include launching a Competition Act investigation, proposing changes to legislation or making a reference to the CC.

⁴⁷ At the time of printing the following bodies have been designated: The Consumer's Association, The National Consumer Council, The Citizen's Advice Bureau, Energy Watch and WaterVoice.

2.58 Only designated consumer bodies can make a super-complaint. Under section 11(5) of the EA02 it is specified that a consumer body has to be designated by the Secretary of State for Trade and Industry, by Order. The Secretary of State can make any organisation a designated consumer body provided it appears to him to represent the interests of consumers of any description and also meets any other criteria published by the Secretary of State. (Further guidance on how to make a super complaint is available in the *Super-complaints guidance for designated consumer bodies* (OFT514)).

Mergers and acquisitions

2.59 The OFT is the competent competition authority charged with the initial examination of mergers and acquisitions in the UK. As a matter of policy and practice the OFT consults ORR on any merger or acquisition with a potential effect in railway related markets. It is then for the OFT to decide whether a detailed inquiry needs to be carried out by the Competition Commission to examine whether the transaction may result in a substantial lessening of competition.

2.60 The award of a rail franchise is an acquisition of control by virtue of section 66(3) of the Railways Act 1993 (as amended). This may create a merger situation which can be investigated by the OFT if the annual UK turnover of the franchise is £70 million or more or if the parties will acquire or add to a share of supply of 25 per cent of the market in the UK, or any significant part of it. On this basis the OFT seeks views from ORR, amongst others, on the impact of franchise replacements.

3 The relationship between sector specific regulation and competition law

Introduction

3.1 This section discusses the impact of Article 3 of the Modernisation Regulation on ORR when carrying out its functions under sector specific and domestic competition legislation. It also discusses the sector specific functions and powers of ORR and their impact on how ORR assesses agreements or conduct under the Competition Act.

The impact of Article 3 of EC Regulation 1/2003 (The Modernisation Regulation)

3.2 Article 3(1) of the Modernisation Regulation states that that national competition authorities of the Member States (including ORR) shall also apply Articles 81 and 82 where they apply national competition law to agreements or conduct which may affect trade between Member States. The jurisdictional boundary between the application of EC competition law and national competition law therefore depends on whether the conduct in question may affect trade between Member States of the European Union (EU). A general overview on the effect on trade concept, relevant to Article 3 of the Modernisation Regulation, is provided at Annexe B and the text of Article 3 is provided at Annexe C.

3.3 Article 3 of the Modernisation Regulation⁴⁸ is a specific articulation of the principle of the supremacy of Community law over national law. Modernisation represents the decentralised application of Articles 81 and 82 and the loss of the Commission's exclusive competence over the granting of exemptions under Article 81(3). As a result of Article 3:

- if an agreement or conduct affects trade⁴⁹ between Member States, a NCA must apply Articles 81 and/or 82 **when it is applying national competition law**
- in the case of agreements which may affect trade between Member States, national competition laws may not prohibit the

⁴⁸ For full text refer to Annexe C of this guideline.

⁴⁹ Refer to Annexe B for an overview of the effect on trade concept.

agreement if it would not have been prohibited under Article 81, and

- national laws may, however, apply stricter rules than Article 82 to the unilateral conduct of undertakings.

3.4 However, the above requirements do not apply if the national laws being applied pursue objectives which are predominantly different from those pursued by Articles 81 and 82.

The objectives pursued by Articles 81 and 82

3.5 Article 3 of the EC Treaty sets out the task, activities and objectives of the EU. These include at sub-paragraph (g) 'a system ensuring that competition in the internal market is not distorted'. Furthermore, Recital 9 of the Modernisation Regulation states that the objective of Articles 81 and 82 is the **protection of competition** on the market.

3.6 Articles 81 and 82 give effect, as regards prohibitions on the conduct of undertakings, to the overriding EC Treaty objective of creating free and undistorted competition in the common market. This overriding objective also finds specific expression in, for example, the rules prohibiting the granting of state aid by Member States and state/public authorities.

The objectives pursued by the Railways Act and application of Article 3

3.7 When exercising its functions and powers under the Railways Act ORR has a number of different duties placed upon it by section 4 to promote a variety of objectives in the UK rail industry. Only one of those objectives is the **promotion of competition in the provision of railway services for the benefit of users of railway services**. Others include consumer protection, the environment, safety, financing and efficiency. ORR must, on any particular issue or case, make a judgment on the priority and balance to be achieved among these different objectives.

3.8 As a general principle, therefore, 'the protection of competition in the market' is not the predominant objective for the ORR under the

Railways Act. Generally speaking, ORR's duties under the Railways Act do not have the same objectives as Articles 81 and 82. Consequently, ORR's Railways Act powers fall outside Article 3 of the Modernisation Regulation.

3.9 In a particular case, ORR could be exercising its Railways Act powers with the protection of competition as its predominant objective. In such a case, it takes the view that Article 3 would apply. When the ORR is acting as a competition authority under Articles 81 and 82 or the Competition Act, protecting competition is the only objective, except where other considerations,⁵⁰ such as facilitating the integrated use of the UK rail network by consumers, would take arrangements outside the UK or EC prohibitions on anti-competitive agreements by virtue of the efficiencies and consumer benefits which they create.

⁵⁰ The criteria provided for in section 9(1) of the Competition Act and Article 81(3) – see Part 2 of this guideline for further details.

3.10 ORR has also considered the application of Article 3 to the conditions of railway operator's licences. It is far from clear that a licence condition could constitute a provision of national competition law within the meaning of Article 3. Even if it did, only a condition pursuing a predominantly competition objective would be within Article 3.

3.11 ORR has reviewed existing licence conditions to identify which, if any, might fall into this category. It has identified only a very limited number of conditions which could conceivably be said to pursue such an objective. In ORR's view, these will in the vast majority of situations apply to unilateral conduct and Article 3 permits an NCA to apply national competition law even if it is stricter than Article 82. If ORR were to apply any of these licence conditions to agreements it will, of course, apply them with due regard to Article 81.

Agreements and conduct which are subject to legal direction

3.12 In the rail sector there are agreements entered into to meet licence obligations or by virtue of direction pursuant to sections 17 to 19 of the Railways Act, (and which have or have the potential to have an effect on trade in Member States). These require consideration of the

principles established by a judgement of the ECJ in *France v. Ladbroke Racing Ltd*,⁵¹ where it states:

'If anti-competitive conduct is required of undertakings by national legislation or if the latter creates a legal framework which itself eliminates any possibility of competitive activity on their part, Articles 85 and 86 [now Articles 81 and 82] do not apply. In such a situation, the restriction of competition is not attributable, as those provisions implicitly require, to the autonomous conduct of the undertakings. Articles 85 and 86 may apply, however, if it is found that the national legislation does not preclude undertakings from engaging in autonomous conduct which prevents, restricts or distorts competition.'

3.13 To the extent that agreements are entered into as a result of directions by ORR under any of the following sections of the Railways Act, they are therefore excluded from the scope of both Chapter I and Chapter II prohibitions:

- sections 16A (directions to provide, improve or develop railway facilities)⁵²
- sections 17, 18 and 19 (directions to enter into access agreements or installation access contracts)
- section 19A and Schedule 4A (directions to amend access agreements following a review by ORR of access charges), and
- section 22A and 22C (directions to amend an access agreement following an application by the beneficiary, or to give effect to conditions of a licence).

3.14 It cannot be said that ORR has directed amendments made to access agreements using the procedure under section 22 of the Railways Act or any amendment provisions contained in access agreements themselves. Similarly, access agreements entered into under section 18, or installation access contracts entered into under section 19, in reliance on a general approval given by ORR, are not the subject of ORR directions.

⁵¹ C-359/95 P and C-379/95 P.

⁵² Section 16(A) is not in force at the time of writing these guidelines.

3.15 Industry-wide agreements, for example, made in accordance with a licence obligation, benefit from exclusion from the application of the Chapter I and Chapter II prohibitions to the extent that the agreements are made, or conduct is engaged in, in order to comply with that legal requirement (for example, provisions in the Ticketing and Settlement Agreement made solely in order to comply with the conditions in passenger train operators' licences relating to through-ticketing and network benefits). The exclusion, however, will apply only to provisions of the agreement, or aspects of the conduct, which relate specifically to meeting the legal requirement in question and which can be met in no other way.

Franchising

3.16 Passenger rail franchises are contracts which the franchisee enters into with the SRA,⁵³ and are let at the end of a competitive tender process conducted by the SRA. The franchise process is one where potential competitors compete to offer a range of services over a group of routes. This process, when run efficiently, means that there is 'competition for the market' as opposed to competition in the market. Potential franchisees need to assess their expectation of the overall costs and revenues which they will be able to achieve. The SRA will regulate certain fares by price caps or tariff baskets whilst leaving other fares unregulated and will also specify service levels for example frequency of trains on any given route.

⁵³ The Railways Act 2005 passes the SRA's franchising role to the Department for Transport.

3.17 In considering competition complaints about services which fall within a franchise package⁵⁴ (for example, passenger rail fares), ORR will consider whether it is appropriate to apply competition law to a particular class of service or product for which there has already been a franchise competition and where the service (including the ticket price) is specified by the franchise agreement.

⁵⁴ This guideline does not discuss ORR's policy towards Open Access applications – for further details please see www.rail-reg.gov.uk/upload/pdf/195.pdf

Services of general economic interest

3.18 Article 86(2) of the EC Treaty provides for an exclusion from the application of Article 81 and 82 in respect of undertakings entrusted with the operation of services of general economic interest or monopolies producing revenue for the State. The undertaking shall be

subject to the rules of competition, insofar as the application of such rules would not obstruct the performance, in law or fact, of the particular tasks assigned to it. Paragraph 4 of Schedule 3 of the Competition Act provides an equivalent domestic level exclusion for services of general economic interest or revenue producing monopolies from the Chapter I and Chapter II prohibitions. It states:

‘Neither the Chapter I prohibition nor the Chapter II prohibition applies to an undertaking entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly in so far as the prohibition would obstruct the performance, in law or in fact, of the particular tasks assigned to that undertaking.’

3.19 This concept is further explained in the OFT guideline, *Services of general economic interest exclusion* (OFT421), December 2004. The exclusion’s application is narrow, with undertakings seeking to benefit from the exclusion having to prove that they meet all of its requirements. ORR would, for example, need to be satisfied that the undertaking has been ‘entrusted’ with the operation of a service of general economic interest and that the application of the prohibitions of the Act or Articles 81 and 82 would obstruct the performance, in law or in fact, of the particular task entrusted to it.

3.20 The European Court of Justice (ECJ) recently gave its ruling in *Altmark*,⁵⁵ which deals with the issue of whether compensation for public service obligations imposed by a member state can constitute state aid. A German bus company, Altmark, had obtained licences and subsidies to provide local passenger transport. A competitor took a complaint on the basis that the subsidies provided amounted to illegal state aid. Under the state aid rules, for a measure to be classified as state aid it must confer an advantage on the recipient, which it would not obtain under normal market conditions. The ECJ held that no such advantage occurs where the state aid is provided in order to discharge public service obligations in the following circumstances: (i) the recipient must actually have clearly defined public service obligations to discharge; (ii) the basis of compensation must be established in advance in an objective and transparent manner;

⁵⁵ *Altmark Trans and Regierungspräsidium Magdeburg*, C-280/00 24 July 2003.

(iii) the compensation cannot exceed the costs incurred in discharging the public service obligation (and taking into account the relevant receipts and also a reasonable profit margin); and (iv) where there is no public procurement procedure, the level of compensation must be determined by comparison with what a typical undertaking might incur.

3.21 This case is significant in respect of the extent to which transport services provided by obligation of a public service contract can be classified as services of general economic interest. No undertaking in the rail sector has yet argued to the OFT or ORR that it satisfies the criteria for it to be considered as performing a service of general economic interest. Nonetheless, any consideration made by ORR of a complaint relating to a passenger service, will take into account the extent to which the service is a specified part of the franchise agreement and the nature of the obligation placed on the franchisee by virtue of that agreement.

Sector specific legislation or competition legislation – how does ORR decide?

3.22 In circumstances where ORR could proceed by way of its powers under the Competition Act or its sectoral powers, ORR will decide at an early stage under which power it is more appropriate to investigate and will advise both the complainant and the target of the complaint accordingly. It may review the position in the light of further information. The overriding principle is that ORR will seek to use the most effective, efficient and expeditious solution where a problem is found to exist. As a general guide, if there are no specific sectoral powers available to ORR (such as the access provisions in the Railways Act which allow ORR to direct the relationship between a supplier of infrastructure and the train operator), and ORR has grounds for suspecting that the Chapter I and/or Chapter II prohibition(s) in the Competition Act have been infringed, it will exercise its powers of investigation under that Act.

3.23 If ORR is satisfied that the most appropriate way of proceeding is under the Competition Act, it is relieved of its duty to take enforcement action by way of a provisional or final order under the Railways Act.⁵⁶

3.24 When seeking information under formal powers, ORR will specify the potential infringement it is investigating and the legal instrument under which the investigation is to be carried out. If ORR decides midway through an investigation to investigate under different powers, it will write to all parties involved and explain its reasons for switching between powers. Information made available to ORR for the purpose of its regulatory functions under the Railways Act may be used by ORR or disclosed in relation to the functions of ORR under the Competition Act and vice versa. This is discussed in more detail in Part 4 of this guideline.

Conforming with sector specific community law – Liberalisation of Railway Markets

European directives

3.25 The European Commission has recognised that differing frameworks, technical and operational standards across Member States can create barriers to competitive entry, which are capable of frustrating the policy of full liberalisation of rail markets in the EU. It has therefore established a range of sector specific measures aimed at liberalising these markets across Member States and harmonising standards. The first railways package (consisting of Directives 91/440 (as amended by 2001/12/EC), 2001/13/EC and 2001/14/EC) includes various requirements to establish common policies and procedures across Member States, for example, the adoption of a common format and application criteria for train operator licences, a framework for allocation and charging matters, and the separation of essential regulatory and commercial functions. Article 10(7) of EU Directive 91/440 (as amended) provides an obligation on regulatory bodies to monitor competition in rail service markets and in response to a complaint or on its own initiative to decide upon appropriate measures to correct undesirable developments in railway markets.

⁵⁶ Section 55(5A) of the Railways Act.

ORR will be the regulatory body for the purposes of implementation of these Directives and will assume that monitoring role.⁵⁷

⁵⁷ See separate ORR guidance document *Approach to Reviewing Markets*.

- 3.26** The second railways package, which has been adopted and is required to be implemented in 2006, aligns high-speed and conventional interoperability requirements (designed to remove technical barriers and introduce common standards and conformity assessment regimes) and requires implementation of the Safety Directive, which will modernise and harmonise safety regulatory structures and methods across Member States. The package also requires liberalisation of freight markets across Europe by 2007.
- 3.27** The Commission's proposed third package, currently under negotiation, may bring further harmonisation, for example, in train driver licensing.

4 New procedures for investigations and accepting binding commitments in lieu of a decision

Introduction

- 4.1** This part sets out the major changes to general procedures brought about by the amending Regulations⁵⁸ and which ORR will apply when conducting competition investigations including the ability to accept commitments in lieu of making an infringement decision. This part also describes how concurrency works both within the UK and across Member States and provides guidance on disclosure of commercially sensitive information, and sets out guidance to prospective complainants on how to submit a competition complaint to ORR. A comprehensive guideline⁵⁹ on the powers of investigation available to OFT and concurrent regulators can be accessed at www.ofr.gov.uk

⁵⁸ SI 2004 no 1261 (v. footnote 1).

⁵⁹ Guideline *Powers of investigation* (OFT404).

How concurrency works

Within the UK

- 4.2** A complaint which relates to the supply of services relating to railways may be received by ORR, by the OFT or one of the other concurrent regulators. The way that such a complaint is handled is governed by the Competition Act 1998 (Concurrency) Regulations 2004⁶⁰ (the Concurrency Regulations). These provide that the complaint should be handled by the authority best placed to conduct the investigation. In order for ORR to exercise its concurrent Competition Act powers, it will require agreement in writing from the OFT pursuant to regulation 4(3) of the Concurrency Regulations.
- 4.3** In general, however, agreements or conduct which fall within ORR's jurisdiction, will be dealt with by ORR. When an agreement or conduct relates in part to the supply of services relating to railways and in part to other goods and services, the question of whether ORR or OFT should consider the case is dealt with on a case by case

⁶⁰ Statutory Instrument 2004 No.1077 which came into force on 1 May 2004.

basis, dependent upon experience, the extent to which the competition issues raised relate to the supply of services relating to railways and the degree of interface with other (non-railway) goods and services. Regulation 6 of the Concurrency Regulations avoids the possibility of double jeopardy, by preventing more than one authority investigating the case at the same time. Once transferred, the case becomes the responsibility of one authority unless a decision is made, at a later stage, to formally transfer the case again. It will be made clear to all parties, at each stage, who has been formally designated as the competent authority and who is formally dealing with the case.

Office of Fair Trading's Rules

4.4 The OFT alone has the power to publish rules⁶¹ about procedural and other matters in connection with the application of the Competition Act, although prior to publication the OFT is obliged to consult others who have concurrent jurisdiction. These rules must receive approval by the Secretary of State and are published by Order. The most recent version, *The Competition Act 1998 (Office of Fair Trading's Rules) Order 2004* (the OFT's Rules) came into force on 17 November 2004. The OFT's Rules provide a framework within which the concurrent regulators exercise their powers under the Competition Act. Save where otherwise indicated, references to the OFT within the Rules also include the concurrent regulators. ORR, therefore, will only exercise discretion in the way that it exercises its powers where the Rules allow.

⁶¹ Section 51(1) and Schedule 9 of the Competition Act.

Across Member States

4.5 The Concurrency Regulations set out the process for determining which of the UK authorities is best placed to act in any particular case. Where Article 81 and/or Article 82 may apply, the case will be subject to the case allocation principles for determining whether a UK Competition Authority or an NCA from another Member State is best placed to act. These principles for determining which NCA in the European Competition Network (ECN) is best placed to act are set out in the EC Commission's ECN Notice⁶² and in the Joint Statement of the Council and the European Commission on the Functioning of the

⁶² OJ2004/C 101/03 27 April 2004.

⁶³ Document No 15435/02 ADD 1 [RC22]. Dated 10 December 2002—available from the European Council Register at <http://register.consilium.eu.int>

Network of Competition Authorities.⁶³ The general principles of Community case law allocation are designed to ensure that:

- cases will be dealt with by a single competition authority as often as possible, particularly in situations where the agreement or behaviour in question arises in, and where the main anti-competitive effects appear in, the same Member State
- where an agreement or practice substantially affects competition in more than one Member State, ECN members will seek to agree between them who is best placed to deal with the case, and
- in cases where single action is not possible, ECN members will coordinate their action and seek to designate one competition authority as the lead institution.

4.6 In order to prevent multiple proceedings, the Modernisation Regulation provides that NCAs must provide the European Commission with a description of any new case before, or without delay after, commencing the first formal investigative measures. ORR has adopted this requirement into its own procedures and expects to inform the ECN of any new cases where there is an actual or potential effect on trade between Member States at the time it has received agreement in writing from the OFT, pursuant to Regulation 4(3) of the Concurrency Regulations, that it is the competent UK authority to handle the case.

4.7 Further details on case allocation within the ECN are provided in the OFT competition law guideline *Modernisation* (OFT442).

Ensuring consistency with EC competition law

4.8 Article 16(2) of the Modernisation Regulation prevents UK authorities from taking decisions under Article 81 or 82, which would run counter to a decision adopted by the European Commission. Section 60 of the Competition Act obliges UK competition authorities (which includes ORR and the OFT) when exercising powers under the Act to be consistent ('having regard to any relevant difference between the provisions concerned'), with European Community law.

4.9 The Competition Act therefore places a dual obligation on the UK competition authorities. 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. Secondly, the UK authorities must have regard to any relevant decision or statement of the European Commission. In the view of ORR and the OFT 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 82. The OFT guideline *Modernisation* (OFT442) contains further detail on how conformity with EC law will be ensured.

How ORR can use information gathered under the Railways Act and the Competition Act

4.10 Section 145 (1) of the Railways Act restricts the disclosure by ORR of information it has obtained under or by virtue of the Railways Act and which relates to the affairs of a business or an individual unless consent for such disclosure is obtained from that business or individual. However, section 145(2) of the Railways Act allows disclosure for the purpose of facilitating the carrying out by ORR of any of its functions under the Railways Act and Transport Act 2000, including ORR's concurrent competition powers. Therefore, ORR can use or disclose information gathered under the Railways Act to facilitate its Competition Act functions.

4.11 Similarly Part 9 of the EA02 restricts disclosure of information which has been obtained under the Competition Act⁶⁴ which relates to the affairs of any individual or to any particular business of an undertaking, unless a relevant statutory gateway is available: for example, the individual or business concerned gives its consent⁶⁵ or the disclosure of the information is made for the purpose of facilitating the performance of any function ORR has by virtue of any enactment.⁶⁶ Before making any such disclosure, ORR must have regard to the public interest in, the necessity for and the potential harm to the business that might be caused by that disclosure.⁶⁷ These provisions are dealt with in more detail at paragraphs 4.21–4.23.

⁶⁴ Sections 237 and 238(b) of EA02.

⁶⁵ Sections 239(3) and (4) of EA02.

⁶⁶ Section 241(1) of EA02.

⁶⁷ Section 244 of EA02.

4.12 Under Schedule 15 of the EA02 both the Competition Act and the Railways Act are listed as enactments conferring functions. On this basis it is possible for information obtained by ORR in the course of a Competition Act investigation to be disclosed by it to facilitate its regulatory functions under the Railways Act.

Article 12 restrictions on use of information

4.13 Article 12 of the Modernisation Regulation permits NCAs of Member States, when applying Articles 81 and 82, to provide one another with and use in evidence any matter of fact or law (including confidential information). The information may only be used in evidence in the application of Articles 81 or 82 and in respect of the specific investigation for which it was collected by the original NCA. Therefore following the principles set out within the UK implementing legislation⁶⁸ of aligning the competition regime of the UK with that of the EC, it follows that information gathered from another member of the ECN during the course of a Competition Act investigation enjoys a similar degree of protection and therefore should not be used for any other purpose.

⁶⁸ SI 2004 No.1261 (v. footnote 1).

Handling of information for access to ORR's file

4.14 Rule 5(3) of the OFT's Rules⁶⁹ requires that ORR gives each person who has received notice under rule 4 that ORR proposes to make an infringement decision (known as the 'Statement of Objections'), a reasonable opportunity to inspect the documents which ORR has on file and that relate to the matters referred to within the notice.

4.15 ORR recognises that the information and documents (for ease referred to as 'information') received by this office in the pursuit of a competition investigation can be of a sensitive nature, commercially or otherwise. It is the policy of ORR, in the application of its competition powers to request that undertakings, which provide information, indicate which parts of that information, if disclosed, would result in significant harm to the legitimate business interests of an undertaking. ORR does, however, have the discretion to disclose information (in whole or in part) if it considers that it is necessary to do so, in the exercise of its powers under the Competition Act. It is

⁶⁹ V. footnote 55.

important, therefore, that requests to restrict the disclosure of confidential information should be supported by reasoned arguments as to what harm would ensue from its disclosure and why. It is not sufficient to simply state, for example, that the information is of a commercial nature or that it is an internal document, which may cause embarrassment if disclosed.

4.16 Rule 6(1) of the OFT's Rules requires ORR, if it proposes to disclose confidential information provided by a person, to inform that person of its proposed action and provide that person a reasonable opportunity to make representations on the proposed action.

4.17 ORR will consider representations on confidentiality from affected persons, and will assess the merits of each case put before it, including whether disclosure of this information is essential, for example, to the compiling of a response to a statement of objections, and whether the disclosure of this information facilitates ORR's statutory functions under the Competition Act.

4.18 The OFT's Rules allow ORR to withhold any document to the extent that:

- it contains information which is confidential, or
- it is an internal document.

4.19 Confidential information is defined as:

- commercial information the disclosure of which might, significantly harm the legitimate business interest of the undertaking to which it relates
- information relating to the private affairs of an individual the disclosure of which would or might, significantly harm his interest, or
- information which ORR thinks is contrary to the public interest if disclosed.

4.20 Internal documents are defined as:

- a document, which has been produced by or exchanged between any of ORR another regulator or any other public authority, and

- a document, which has been produced by any person from time to time retained under a contract for services by any of ORR, another regulator or any other public authority in connection with such a contract.

4.21 Section 237 of the EA02 imposes a general restriction on a public authority in respect of disclosure of 'specified information' which relates to: (a) the affairs of an individual; or (b) any business of an undertaking. However the EA02 provides a number of 'gateways' through which ORR has discretion to disclose information held by it to other public authorities. This discretion is subject to certain considerations, including the need to exclude from disclosure (so far as is practicable) any information it believes might significantly harm the legitimate business interests of the undertaking or the private affairs of the individual to which it relates.

4.22 Section 244 of the EA02 provides:

- a public authority must have regard to the following considerations before disclosing any specified information
- the first consideration is the need to exclude from disclosure (so far as practicable) any information whose disclosure the authority thinks is contrary to the public interest
- the second consideration is the need to exclude from disclosure (so far as practicable) –
 - (a) commercial information whose disclosure the authority 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 authority thinks might significantly harm the individual's interests, and
- the third consideration is the extent to which the disclosure of the information mentioned in subsection (3)(a) or (b) is necessary for the purpose for which the authority is permitted to make the disclosure.

4.23 ORR may accept, for example, that certain information is commercially sensitive to an undertaking. However, as permitted under section 244(4) of the EA02, ORR may wish to disclose information which it considers necessary to further its case and/or information to which it considers the undertaking under investigation has a right to access in order to compile its defence. The EA02 makes it clear that ORR must consider the extent to which the disclosure of sensitive, commercial information or information relating to an individual's private affairs is necessary for the exercise of ORR's statutory function. This entails a proportionality exercise but permits disclosure, which on a practicable level, is necessary for the conduct of the investigation and for the undertaking under investigation, to be properly informed of the allegations made against it and to understand ORR's reasons. Similarly, ORR will consider requests from other public authorities for disclosure of confidential information where that public authority is carrying out a function in respect of which the EA02 permits disclosure and provided disclosure is necessary to facilitate that proper carrying out of that function.

4.24 The judgment of the CAT in the case concerning Replica Football shirts⁷⁰ provides guidance to a competition authority on how such discretion should be interpreted. Three key limitations on the confidentiality exclusion emerge:

- the need to exclude confidential information only extends 'so far as is practicable' and therefore entails a proportionality exercise
- the words of the statute provide for a subjective judgement to be made by the competition authority, and
- the competition authority must believe there is a risk of significant harm to the company's legitimate business interests. In particular, the Tribunal has emphasised that commercial information over two to three years old will not generally present a risk of significant harm.

⁷⁰ Case 1019/1/1/03 *Umbro Holdings Limited v The Office of Fair Trading*, 27 October 2003.

Freedom of Information Act

4.25 From 1 January 2005 The Freedom of Information Act 2000 (FOIA) gives any person the right to request non-published information from

⁷¹ Freedom of Information Act 2000 – Part I, section 1(1).

ORR – this is known as ‘the right to know’.⁷¹ ORR, as an organisation, is committed to openness and transparency. However, it recognises that it will obtain information in the context of competition investigations that should not be widely disclosed. There are certain exemptions from the FOIA which could be relevant to information held by ORR through the exercise of its competition functions.

⁷² Freedom of Information Act 2000 – Part II, section 44.

⁷³ Information gathered under CA98 and EA02 fall within the definition of the s44 of the FOIA exemption due to Part 9 of the EA02 which states that any investigating authority must not disclose information which relates to the affairs of an individual or the business of an undertaking - either during the lifetime of that individual or while that undertaking continues in existence.

⁷⁴ SI 2004 No 1261 (v. footnote 1).

- 4.26** Where information obtained by ORR in the course of investigations made under either the Competition Act or EA02 falls within the prohibition of disclosure contained in Part 9 of EA02 (see above) it would be exempt from disclosure under section 44 of the FOIA.⁷² This states that where the disclosure of information is ‘prohibited by another enactment’ it is exempt information for the purposes of FOIA.⁷³ There are also exemptions, for example, for information, the disclosure of which would prejudice any civil proceedings (which would include competition proceedings).

Binding commitments

- 4.27** The ability to take commitments, prior to the making of a formal decision under the Competition Act⁷⁴ came into force on 1 May 2004. This applies to investigations of suspected infringements of Articles 81 and 82 as well as Chapter I and Chapter II prohibitions. Section 31A of the Competition Act, applies where an investigation has begun but a decision has not been made. This provides:

‘For the purposes of addressing the competition concerns it has identified, [ORR] may accept from such person (or persons) concerned as it considers appropriate commitments to take such action (or refrain from taking such action) as it considers appropriate.’

- 4.28** Commitments come into force when accepted. Section 31B of the Competition Act establishes that it is at this stage that the investigation and the power of ORR to make a decision or give directions ceases. Section 31E of the Competition Act lays out the procedure for the enforcement of commitments when they are not being adhered to. ORR may apply to the court for an order to make good the default with costs to be paid by the defaulter.

Statutory notice of commitments

4.29 Schedule 6A of the Competition Act sets out the procedural requirements for the acceptance of commitments. The key procedural issue here is that ORR must give notice before accepting commitments and consider any representations made. Paragraph 2(2) of Part 1 of Schedule 6A establishes that a notice must state:

- (a) 'that [ORR] proposes to accept the commitments...;
- (b) the purpose of the commitments...and the way in which the commitments...would meet [ORR's] competition concerns;
- (c) any other facts which [ORR] considers are relevant to the acceptance...of the commitments; and
- (d) the period within which representation may be made...'

4.30 The period of notice must be at least 11 working days starting with the date the notice is given. Further notice periods are required (of at least six working days), should ORR modify the commitments following each consultation. This statutory consultation is achieved by sending a copy of the notice to persons likely to be affected by it or by publication.

Appeal

4.31 Section 47(1) of the Competition Act allows appeals by third parties of a decision made by ORR and this includes a decision to accept commitments. Specifically in respect of third party appeals against the acceptance of commitments, the CAT is, limited to applying the same principles as would be applied by a court on an application for judicial review.⁷⁵

⁷⁵ Paragraph 3A(2), Schedule 8 Competition Act.

OFT guidance

4.32 Section 31D(1) of the Competition Act obliges the OFT to prepare and publish guidance as to the circumstances in which it may accept commitments and must have regard to this guidance when exercising its discretion. Although ORR has no statutory obligation to interpret its powers in respect of commitments in the same way as the OFT,

it is required to have regard to guidance for the time being in force. The OFT guidance on commitments, therefore, provides a useful starting point for those who wish to understand the basis upon which commitments, in lieu of an infringement decision, may be accepted by this office. ORR does not expect to deviate from the general principles adopted by the OFT unless it is persuaded that the circumstances are sufficiently distinguishable, that the public interest is so served and the circumstances in which commitments are accepted do not establish an undesirable precedent going forward.

4.33 The OFT guidance⁷⁶ states that the OFT is likely to consider it appropriate to accept commitments only in cases where:

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

but not where:

- (a) compliance with and the effectiveness of any binding commitments would be difficult to discern (a factor in this would be the requirement for any long term compliance commitment by the office), and/or
- (b) where the OFT considers that not to complete its investigation and make a decision would undermine deterrence.

4.34 The guidance also states the OFT will not accept commitments in cases involving serious abuse of a dominant position,⁷⁷ taking into account such factors as the structure of the market, the market share of the undertaking, entry conditions and the effect on competitors and third parties.

General points to note

4.35 The Competition Act provides a right for an undertaking to propose commitments and ORR is of the view that it is for undertakings to take the initiative if they believe such an approach might be

⁷⁶ *Enforcement* (OFT407), December 2004.

⁷⁷ For example, predation would generally be regarded as a serious abuse.

appropriate and they are satisfied that they can, in this way, address the competition concerns identified. In general, ORR will not indicate during the course of an investigation that commitments might be acceptable nor will it propose or recommend the form or content of such commitments. ORR will, however, be prepared to explore the possibility of commitments, if presented as a proposal, and each case will be considered on its merits.

- 4.36** An investigation into a suspected infringement will not be suspended on submission of a proposal for commitments. Discussions with an undertaking on commitments will, therefore, take place in parallel with the investigation. It is important to note that an investigation does not cease until ORR either reaches a decision, or accepts commitments in lieu.

Submitting competition complaints

- 4.37** Competition Act investigations are lengthy and resource intensive. They impose significant costs on ORR and all parties involved throughout the investigation. To ensure that ORR deploys its resources to address the most significant and important issues, ORR will require evidence from complainants to back up any allegations of anti-competitive behaviour. A general allegation that the Competition Act (and/or Articles 81 and 82 of the EC treaty) has been breached is unlikely to be adequate.

Evidential requirements

- 4.38** ORR will require evidence before it launches an investigation. The CAT⁷⁸ has stated that it would expect large well-resourced companies to make adequate submissions to competition authorities. There is, however, clearly a question of proportionality and ORR is prepared to offer more assistance to small businesses, new entrants and individuals and will advise on the type of evidence they will need to present to ORR to enable it launch an investigation.
- 4.39** A template submission can be found at Annexe D to this guideline, together with the contact details of the ORR competition team. The minimum requirements are designed to increase the speed with

⁷⁸ *Freeserve.com PLC v Director General of Telecommunications*, 16 April 2003.

which ORR can handle competition complaints by making complainants aware of the type of information/evidence ORR requires prior to it committing resources in the investigation of a complaint.

Non-confidential versions of the submission

- 4.40** ORR encourages complainants to provide two versions of their submissions; a confidential version and a clearly marked non-confidential copy of the same submission, removing any business sensitive information that complainants do not wish ORR to disclose (see above for the policy on access to the file).

ANNEXES

A Definition of an undertaking for the purposes of competition law

A.1 Central to the application of UK and EC competition law is the concept of an undertaking. The Chapter I prohibition and Article 81 refer to agreements between Undertakings and the Chapter II prohibition and Article 82 refers to an abuse of a dominant position by an undertaking

A.2 The first and most important point to note in summarising the law in this area is that any entity may be an undertaking for some activities and not for others. European competition law defines the concept of an undertaking as any entity engaged in economic activity, regardless of its legal status or the way it is financed.⁷⁹ The European Court has defined the characteristic feature of economic activity as the offering of goods and services on a given market.⁸⁰ Public sector bodies engaging in economic activities can be undertakings for these purposes.⁸¹ For ORR the principles enshrined in the case law below would be key to assessing the position of public bodies in their purchasing and selling activities in relation to services relating to railways.

A.3 The Court of First Instance (CFI) held in *FENIN v Commission*,⁸² that it is inappropriate for the purposes of determining whether an entity is engaged in economic activity, to dissociate the activity of purchasing goods from their subsequent use. It follows therefore, that the nature of the purchasing activity has to be determined according to whether the purchased goods are used in economic activity. However, not all instances of a public body using goods or services, which it has purchased to then provide goods or services itself qualify as

⁷⁹ *Hofner and Elser v Macrotron GmbH* C-41/90, [1991] ECR I-1979.

⁸⁰ Case C35/96 *Commission v Italy* [1998] ECR I-3851.

⁸¹ OFT policy note 1/2004 *The Competition Act 1998 and public bodies*.

⁸² Case T-319/99 *FENIN v Commission* paragraph 36.

economic activity. In particular, the CFI considers that where a public authority provides goods or services to fulfil a 'social function', this does not constitute economic activity.

- A.4** The majority of European Court cases concerning the definition of economic activity have involved the provision of subsidised public services (in particular, pension and sickness funds) and it is in these cases where the Court has recognised an exception to the general rule that selling good or services constitutes economic activity – that is, the Court has recognised that the provision of goods and services does not constitute economic activity where that provision takes place in the context of performing an exclusively social function.
- A.5** In determining whether the provision of those goods or services is a purely social function the Court has typically looked to whether there is some element of 'solidarity' in the manner in which goods and services are provided. In *FENIN*, for example, the Court held that where a public body (in that case, the Spanish national health system) is funded from social security contributions and other state revenue and provides services using the purchased goods which are free of charge and which are provided on the basis of universal coverage, it is acting according to the principle of solidarity.
- A.6** The Court has also generally required that the activity in question be non-profit making.
- A.7** The more recent judgment of the Court in *AOK Bundesverband*⁸³ confirms, however, that the mere fact that the public body levies some charge in providing subsequent goods or services will not, of itself, mean that subsequent activity is 'economic activity'. In that case (again concerning public health services), the Court emphasised the non-profit making character of the public body's activities and the 'social' function of the services, which it provides, in concluding that it is not engaged in 'economic activity', despite the fact that it levies some form of charges from those.
- A.8** The CAT in its judgment in *Bettercare*⁸⁴ has advocated a different approach, suggesting that any activity which may generate the economic effects, which the Competition Act is intended to regulate,

⁸³ Joined cases C-264/01, C306/01, C-354/01 and C-355/01 judgment of 16 March 2004.

⁸⁴ Competition Commission Appeal Tribunal judgment in *BetterCare Group Limited v Director General of Fair Trading* (Case 1006/2/1/01).

is subject to the Act and this may include mere purchasing. In that case, the CAT was of the view that North and West Belfast Health and Services Trust (NW) was acting as an undertaking, both by 'purchasing' nursing and residential care home services from third party providers – that is, paying such third parties to provide those services to sick and elderly members of the community - and in providing such services itself. This was so even though such services were provided on a subsidised and, as far as NW was concerned, non profit-making basis.

A.9 ORR notes that on 14 May 2003 *FENIN* appealed the CFI's judgment to the European Court of Justice.⁸⁵ Therefore the legal position with regard to public bodies as undertakings is very much in a state of development. In the meantime, ORR, in line with OFT, will adopt the approach of the European Court in determining whether a public body can be classified as an undertaking.

⁸⁵ Case C-205/03 P, judgment awaited.

B The effect on trade concept

B.1 Article 3 of the Modernisation Regulation requires NCAs to apply Articles 81 and 82 of the EC Treaty where they seek to apply national competition law where an agreement or conduct may affect trade between Member States. The following section provides an overview on the effect on trade concept.

B.2 The effect on trade concept draws the jurisdictional boundary between national and EC competition laws. Articles 81 and 82 of the Treaty are applicable to horizontal and vertical agreements and practices on the part of undertakings, which ‘may affect trade between Member States’. The Commission Notice⁸⁶ *Guidelines on the effect on trade concept* provides guidance, based on the principles developed by the Community Courts, as to how this is to be interpreted by national competition authorities within Member States.

B.3 The Notice states⁸⁷ that: ‘The effect on trade criterion confines the scope of application of Articles 81 and 82 to agreements and practices that are capable of having a minimum level of cross-border effects within the Community’, and the ability of the agreement or practice to affect trade between Member States must be ‘appreciable’.⁸⁸ It is not required that the agreement or practice will actually have or have had an effect on trade between Member States. It is sufficient that the agreement or practice is ‘capable’ of having such an effect.⁸⁹

B.4 The concept of ‘trade’ is not limited to the actual exchange of goods and services across borders but also applies to the potential for goods and services to be traded across the borders of Member States. Therefore an agreement or conduct may be physically limited to the UK or a part of it, but still affect trade between Member States due to a blocking or deterrent (exclusionary) effect. The requirement that there must be an effect on trade implies that there must be an impact on cross-border economic activity involving at least two Member States. Neither is the application of the effect on trade criterion dependent upon the definition of a relevant geographic market.

⁸⁶ OJ/2004/C 101/07
27 April 2004.

⁸⁷ Paragraph 13, *ibid.*

⁸⁸ Case 22/71, *Béguelin*, [1971] ECR p.949, paragraph 16.

⁸⁹ Case T-228/97, *Irish Sugar*, [1999] ECR II-2969, paragraph 170, and Case 19/77, *Miller*, [1978] ECR 131, paragraph 15.

- B.5** Thus the application of Articles 81 and 82 may be appropriate to more railway markets than those that are concerned simply with the carriage by rail of goods and passengers across Member State borders, that is, international services which access the national network by the channel tunnel or freight that leaves or enters the UK via ports.
- B.6** The Notice states that, in principle, agreements are incapable of appreciably affecting trade between Member States where the following cumulative conditions are met:
- a turnover threshold:
 - in the case of horizontal agreements, the aggregate annual Community turnover of the undertakings concerned in the products covered by the agreement does not exceed €40 million, or
 - in the case of vertical agreements, the aggregate annual Community turnover of the supplier in the products covered by the agreement does not exceed €40 million
 - a market share threshold:
 - the aggregate market share of the parties on any relevant market within the Community affected by the agreement does not exceed five per cent.
- B.7** Horizontal agreements between railway undertakings may be capable of affecting trade between Member States where such agreements make it more difficult for undertakings from other Member States to penetrate the national market. This could occur, for example, where such agreements establish sector-wide standardisation and certification regimes, which are more easily fulfilled by undertakings from the Member State in question.
- B.8** Vertical agreements, covering the whole of a Member State, may be capable of affecting patterns of trade between Member States when they make it more difficult for undertakings from other Member States to penetrate national markets. For example, a long-term exclusive agreement between an infrastructure provider and a

supplier or a long-term exclusive rail haulage contract between a freight train operator and a customer, may foreclose (or may be capable of foreclosing) markets to entry from within the UK and from other Member States. Where the Community turnover of the supplier in the product or service covered by the agreement(s) exceeds €40 million and the aggregate market share of the parties exceeds five per cent, it is possible that Article 81 would also apply.

- B.9** Similarly where a railway undertaking, or a supplier of railway services which holds a dominant position covering the whole of the UK, engages in exclusionary abuses, trade between Member States is normally capable of being affected, where it makes it more difficult for competitors from other Member States to enter the market. Alternatively, exclusionary conduct by a dominant undertaking within a UK railway market, which is designed to eliminate a competitor who only operates within the UK, may not be deemed to have (or be capable of having) an effect on trade between Member States, though should there exist a pattern of such behaviour, an effect on trade may arise from the reputational impact of the abuse among other potential competitors.
- B.10** The foregoing provides a brief summary of the principles within the Effect on Trade Notice which ORR will have regard to when considering, on a case-by case-basis, the appropriateness of applying Articles 81 and 82 to agreements and conduct in the supply of railway services. It is not, however, a comprehensive guide, and should not be relied upon as a substitute for the Notice itself.

C Text of Article 3 of Regulation 1/2003

C.1 Article 3(1) states:

‘Where the competition authorities of Member States or national courts apply national competition law to agreements, decisions by associations of undertakings or concerted practices within the meaning of Article 81(1) of the Treaty which may affect trade between Member States within the meaning of that provision, they shall also apply Article 81 of the Treaty to such agreements, decisions or concerted practices. Where the competition authorities of the Member States or national courts apply national competition law to any abuse prohibited by Article 82 of the Treaty, they shall also apply Article 82 of the Treaty.’

C.2 Article 3(2) states:

‘The application of national competition law may not lead to the prohibition of agreements, decisions by associations of undertakings or concerted practices which may affect trade between Member States but which do not restrict competition within the meaning of Article 81(1) of the Treaty, or which fulfil the conditions of Article 81(3) of the Treaty or which are covered by a Regulation for the application of Article 81(3) of the Treaty. Member States shall not under this Regulation be precluded from adopting and applying on their territory stricter national laws which prohibit or sanction unilateral conduct engaged in by undertakings.’

C.3 Article 3(3) states:

‘Without prejudice to general principles and other provisions of Community law, paragraphs 1 and 2 do not apply when the competition authorities and the courts of the Member States apply national merger control laws nor do they preclude the application of provisions of national law that predominantly pursue an objective different from that pursued by Articles 81 and 82 of the Treaty.’

D Template for submitting competition complaints to ORR

Format for submitting a Competition complaint to ORR

1. Competition complaints should be submitted to:

The Competition Team
Office of Rail Regulation
1 Waterhouse Square
138–142 Holborn
London EC1N 2TQ

phone 020 7282 2122 or 020 7282 3874

email competition@orr.gsi.gov.uk

2. ORR may send a non-confidential version of your complaint to the parties named in your complaint. If your submission contains confidential information, you should provide a separate non-confidential version. Unless you specifically request not to do so, ORR may disclose your business name to the target of the complaint. ORR recognises that there are some circumstances in which you may wish to remain anonymous but experience has shown that this may limit the effectiveness of the complaint and ensuing investigation.

Part A: The essence of your complaint and background information

- summary of complaint:
 - what has occurred, how it affects your business, a summary of the abuse and how you might classify it, that is, pricing (excessive or predatory, selective discounting, refusal to supply, cartel behaviour etc). This should include a short history of what has occurred including companies and products or services involved
- the urgency of the complaint:
 - with reasons (providing information on whether your business is in danger of suffering serious/irreparable damage or why the conduct complained about is contrary to the public interest)
- a chronological list of events leading to the complaint
- a brief description of your business or interest:
 - products/services, annual turnover, sales areas covered, for example, local or national
- a brief description of the company or individual about whom you are complaining:
 - business name and address and your relationship with them (for example, competitor/supplier etc)
- your contact details, business name and address, telephone and email details.

Part B: The legal basis for your complaint

- please explain whether you believe Chapter I and/or Article 81 of the EC Treaty or Chapter II and/or Article 82 of the EC Treaty have or are likely to be breached
- a clear explanation of why you believe any of the above provisions have or are likely to be infringed (please include any relevant UK or EC case law).

Part C: A description of the relevant market(s) in which the alleged infringement is said to have occurred

- a description of the relevant market(s) in which the alleged infringement is said to have occurred to include a full description of the product/service concerned, including a description of the characteristics and intended use of the product/service
- a description of where your company sits within that market. Are you, for example, a supplier or a user/consumer. If you are a supplier, who are your main competitors and what are your respective market shares (by volume or value). Alternatively if you are a user/consumer what percentage of the product market does your purchase represent – that is, how big a purchaser are you relative to others who may have a requirement for the product/service
- a description of where the target sits within that market. Is it a supplier or user/consumer? To the best of your knowledge what is its market share (by revenue/volume supplied or if possible both). Who are its main competitors (what is their respective market share)?
- how have the above market shares changed within the last 2–3 years?

On the demand side

- a description of the customers/users of the product/service (this could be by type or if possible by list). What features of the product/service are important to them?

- a description/list of other products/services, which could be substituted for the product/service concerned. How easily could the customers/users switch to an alternative product/service?
- a description of the contractual mechanisms for the supply of the product/service in question, that is, does the customer, for example, typically invite tenders to supply or is the product/service supplied on request. In the latter example are there published pricing tariffs for the product/service, how much price competition exists? To the extent that written contracts exist between the supplier and the purchaser, what sort of length would these contracts be?

On the supply side

- describe the structure of the supply side, that is, provide details/list of those companies who also supply this product/service
- are there other undertakings who do not currently supply the product/service who could feasibly and relatively quickly (within a year) switch to the supply of the product/service concerned?

Geographic market

- what is the geographical extent of the relevant market, does it operate on a national or local level? Are there factors, which would suggest that the geographic market should be defined narrowly, that is, confined to a particular railway route or routes or to a particular facility? Is the relevant market likely to be wider than that of the UK?

Barriers to entry and exit from the market(s)

- what barriers exist?
- are there any legal/regulatory barriers?

Part D: Supporting evidence

- chronological list of documentary evidence
- copies of: emails, contracts (highlighting offending clauses if any), estimates and/or quotations, invoices for goods/services, minutes of any meetings
- your analysis of price/cost margins before and after the alleged infringement
- copies of relevant industry reports/consumer surveys.

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:

phone 0800 389 3158

fax 0870 60 70 321

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