An Overview of the UK Competition Rules

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1. Introduction

The UK competition rules can be considered under four broad headings:

- Anti-competitive agreements and cartels
- Abuse of market power
- Market investigations
- Merger control

ANTI-COMPETITIVE AGREEMENTS AND CARTELS

Chapter I of the Competition Act 1998 (the Competition Act) prohibits any agreement or concerted practice which has the object or effect of preventing, restricting or distorting competition unless an exemption from the prohibition applies. Where the agreement or concerted practice affects trade between Member States of the EU, it may also be prohibited by Article 101 of the Treaty on the Functioning of the European Union (TFEU). Companies and individuals found to have breached the Chapter I prohibition are liable to fines of up to a maximum level of 10% of worldwide turnover for companies and disqualification from serving as a director for a period of up to 15 years for individuals.

Cartels are considered to be the most serious form of anti-competitive agreement. Criminal offences for individuals involved in cartels were introduced in the UK in 2003. Under provisions contained in the Enterprise Act 2002 (the Enterprise Act), dishonest participation by an individual in price-fixing, bid-rigging, market sharing or limitation of output or supply may lead to the imposition of a prison sentence of up to 5 years’ duration, unlimited fines, or both.

Immunity from both civil penalties and criminal sanctions may be available to cartel whistleblowers under the Office of Fair Trading’s (OFT) leniency programme.

The OFT is primarily responsible for enforcement of the Chapter I prohibition which may also be invoked in private litigation before UK Courts. When applying the Chapter I prohibition to an agreement or concerted practice to which Article 101 also applies, neither the OFT nor the UK Courts may prohibit the relevant agreement or concerted practice under UK competition law if it would be permitted under Article 101.

ABUSE OF MARKET POWER

Chapter II of the Competition Act prohibits the abuse of a dominant market position in the UK. Such an abuse may also breach Article 102 TFEU to the extent that it affects trade between EU Member States. The civil sanctions for breach of the Chapter II prohibition are the same as those that apply to breach of the Chapter I prohibition and it can be enforced by the OFT or private litigants in the same way. There are no criminal sanctions for purely unilateral conduct which is deemed to constitute an abuse of market power.

The OFT is primarily responsible for enforcement of the Chapter II prohibition which may also be invoked in litigation before UK Courts. In contrast to the
position in relation to Article 101, the OFT and UK Courts are permitted to apply UK competition law that is stricter than Article 102 to abusive conduct.

MARKET INVESTIGATIONS

The OFT and the Competition Commission (CC) have wide powers under the Enterprise Act to investigate markets where there are concerns that competition may not be operating effectively, including by reason of the structure of the relevant market. In the event of an adverse report a wide range of remedial steps may be taken, including the unwinding of agreements, the imposition of price controls to specific markets, and the introduction of other statutory-based controls.

MERGER CONTROL

UK merger control provisions are contained in the Enterprise Act. They are considered in a separate Slaughter and May publication UK Merger Control under the Enterprise Act 2002. They apply to mergers which do not fall within the exclusive competence of the European Commission (the Commission) under the EU Merger Regulation (see the separate Slaughter and May publication The EU Merger Regulation).
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2. Anti-competitive agreements

THE CHAPTER I PROHIBITION

The Chapter I prohibition applies to anti-competitive agreements and practices between undertakings. Chapter I is based upon Article 101 TFEU and comprises four elements, each of which must be satisfied in order for the prohibition to be infringed. There must be:

- an agreement, decision or concerted practice;
- between undertakings;
- which may affect trade within the UK; and
- which has as its object or effect, the prevention, restriction or distortion of competition within the UK.

The OFT is primarily responsible for enforcement of the Chapter I prohibition, but certain sectoral regulators have concurrent jurisdiction to enforce the prohibition within their regulated sectors. The Chapter I prohibition may also be raised in private litigation, for example as a defence to an action to enforce a contractual restriction or, as is being seen more frequently, as the basis for a claim for damages to recover loss suffered as a result of a competition law infringement.

AGREEMENTS, DECISIONS AND CONCERTED PRACTICES

The Chapter I prohibition covers not only formal written agreements between undertakings, but also ‘gentlemen’s agreements’ and other kinds of informal arrangements or understandings, whether oral or in writing and whether or not intended to be legally enforceable. It also extends to decisions of trade associations. These are deemed to constitute agreements between the members of the trade association. The prohibition also applies to trade association rules and regulations that may limit members’ commercial freedom of action.

Concerted practices sometimes found in oligopolistic markets where few undertakings are present are also caught by the Chapter I prohibition. For example, a system of advance price announcements, where there is an underlying understanding that other market players will amend their own pricing accordingly, may be prohibited.

In this publication, references to “agreements” should be understood as including concerted practices and decisions of associations.

UNDERTAKINGS

The term "undertaking" is broadly interpreted to include any natural or legal person engaged in economic activity, irrespective of its legal status and the way in which it is financed. Public sector bodies engaging in economic activities can be undertakings for these purposes.

A parent company and its subsidiary, or two companies having the same parent, will normally be regarded as a single undertaking where they function as an economic whole, with agreements between
them regarded as the mere allocation of functions within a single group. In Anaesthetists’ Groups (15 April 2003), the OFT found that a group of anaesthetists operated as a single undertaking for the purposes of competition law and therefore a price-fixing agreement between the individual members of the group was not capable of falling within the Chapter I prohibition. It based this conclusion on the fact that the individuals did not engage in activities other than through the group and the group itself was clearly engaged in an economic activity.

RESTRICT, DISTORT OR PREVENT COMPETITION

Whether a given agreement restricts, distorts, or prevents competition will depend on a careful analysis of the facts of each individual case, including market structure and characteristics. The following are some examples of the types of agreements considered by the OFT to breach the Chapter I prohibition:

• Price-fixing
• Collusive tendering
• Resale price maintenance
• Exchange of price information
• Market sharing
• Anti-competitive trade association rules and recommendations
• Rules of sporting bodies governing entry criteria

The Chapter I prohibition refers to agreements that have “the object or effect” of adversely affecting competition. Where an agreement has the object of preventing, restricting or distorting competition within the UK, no analysis into the effects of the agreement is necessary. The Competition Act includes a non-exhaustive list of examples of the type of agreements that will generally be considered by the OFT to have the object of preventing, restricting or distorting competition: agreements to fix prices, limit production, share markets, discriminate between customers and tie-in other products.

APPRECIABILITY

The Chapter I prohibition will be applicable where an agreement has the object of preventing, restricting or distorting competition within the UK or an appreciable effect on competition within the UK. In determining whether an agreement has an appreciable effect on competition for the purposes of the Chapter I prohibition (i.e. in cases where no anti-competitive object is found), the OFT will have regard to the Commission’s approach as set out in its Notice on Agreements of Minor Importance. The Notice specifies that an agreement between competing undertakings will not have an appreciable effect on competition if their combined share of the relevant market does not exceed 10%. The relevant threshold for agreements between non-competing undertakings is 15%. In both cases, these thresholds are reduced to 5% where parallel networks of similar agreements cumulatively result in foreclosure of the relevant market. However, even where the thresholds are met, the OFT may still find that the effect on competition is not appreciable. This will depend on factors such as the structure and characteristics of the market affected.
EXCLUSIONS AND EXEMPTIONS

Excluded Agreements

The Competition Act sets out a number of specific exclusions from the Chapter I prohibition, namely:

(a) mergers and concentrations;
(b) competition scrutiny under other enactments; and
(c) general exclusions.

The Act allows the Secretary of State to add additional exclusions or remove existing ones.

Mergers and concentrations

The Chapter I prohibition will not apply to mergers under the Enterprise Act, nor to concentrations in respect of which the Commission has exclusive jurisdiction under the EC Merger Regulation. This exclusion is discussed in further detail in the Slaughter and May publication *UK Merger Control under the Enterprise Act 2002*.

Competition scrutiny under other legislation

The Act excludes from the ambit of the Chapter I prohibition agreements that are subject to competition scrutiny under the Broadcasting Act 1990, the Financial Services and Markets Act 2000 or the Communications Act 2003.

General exclusions

The most important of the general exclusions from the scope of the Chapter I prohibition are the following:

- Services of general economic interest:
  The Chapter I prohibition does not apply 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 task assigned to that undertaking". This exclusion is based on Article 106(2) TFEU.

- Avoidance of conflict with international obligations: The Secretary of State has power to make an order to exclude the application of the Chapter I prohibition to an agreement where this would be appropriate in order to avoid a conflict between provisions of the Competition Act and an international obligation of the UK.

- Public policy: The Secretary of State may, by order, exclude the application of the Chapter I prohibition to an agreement where there are "exceptional and compelling reasons of public policy" for doing so.

- Compliance with legal requirements: The Chapter I prohibition does not apply to an agreement to the extent to which it is made to comply with a legal requirement. For this purpose, a legal requirement is one imposed by or under (i) any enactment in force in the UK, (ii) the TFEU or the EEA Agreement and having legal effect in the UK without further enactment, or (iii) the law in force in another Member State and having legal effect in the UK. In *Vodafone/Pre-pay Mobile Phone Vouchers* (5 April 2002), it was accepted that, to the extent that Vodafone was required by its operating licence to publish prices, that could not form the basis of any allegation of infringement of the Chapter I prohibition by reason of resale price maintenance.

Exemptions

Individual exemption

The Competition Act provides that an agreement is exempt from the Chapter I prohibition if it satisfies certain criteria – broadly, that the competitive disadvantages to which the agreement gives rise are outweighed by other economic benefits. Such benefits should accrue to customers and the agreement should contain the least restrictive means of achieving the
relevant benefits. An agreement is unlikely to be exempt if parties cannot show that there will continue to be effective competition in the market for the goods or services concerned. An agreement which falls within the Chapter I prohibition but which satisfies the exemption criteria is not prohibited and no prior decision to that effect is required. Such an agreement is valid and enforceable from the moment the exemption criteria are satisfied and for as long as that remains the case.

It is no longer possible to notify an agreement to the OFT for exemption; instead parties are expected to “self-assess” whether or not an exemption is likely to be available. Individual assessment of whether an agreement satisfies the exemption criteria may be unnecessary where the agreement benefits from a block or parallel exemption.

**Block exemption**  
A block exemption covers particular categories of agreements that satisfy the exemption criteria. The Secretary of State may adopt block exemptions, acting upon a recommendation from the OFT. Only one block exemption, for public transport ticketing schemes, has been adopted to date.

**Parallel exemption**  
The parallel exemption applies to:

- (a) agreements that benefit from an EU block exemption, a finding of inapplicability by the Commission, or an individual exemption granted prior to 1 May 2004 under the EU competition rules; and

- (b) agreements which fall within the scope of a block exemption at EU level, but which are not subject to the EU competition rules because they do not affect inter-state trade.

The most significant block exemption at EU level is that relating to vertical agreements such as supply contracts and distribution arrangements. The Vertical Restraints Block Exemption (VRBE) is available where the market share of both the seller and the buyer is less than 30% and the agreement does not contain hardcore restrictions such as resale price maintenance obligations or reselling restrictions on the buyer. There are other block exemptions at EU level such as those relating to:

- technology transfer agreements licences for know-how, patents and software copyright;
- motor vehicle vertical agreements;
- specialisation agreements;
- joint research and development agreements;
- certain agreements in the insurance sector; and
- various agreements in the air transport sector.

The OFT may impose, vary or remove conditions and obligations subject to which a parallel exemption is to have effect, or even cancel a parallel exemption. However it should be noted that, as a matter of EU law, it is not clear whether the OFT could impose stricter standards than those determined by the Commission under Article 101(3). Under the Modernisation Regulation (see Chapter 7 post) it is not possible to prohibit an agreement which benefits from a parallel exemption without having first acted to withdraw the benefit of the block exemption from the agreement, which must be notified in advance to the Commission. The OFT has indicated that a decision to withdraw the benefit of a block exemption may form the subject of a market investigation reference under the Enterprise Act (see further below).

**Advice**

Prior to 1 May 2004, the Competition Act provided an option for parties to notify their agreements for
guidance or a decision on compatibility with the Chapter I prohibition.

To mirror changes introduced at EU level under the Modernisation Regulation, the Government abolished the system of notification in the UK in its entirety with effect from 1 May 2004. As from this date, an agreement which falls within the Chapter I prohibition but which satisfies the exemption criteria is not prohibited, no prior decision to that effect being required. Such an agreement is valid and enforceable from the moment the exemption criteria are satisfied and for as long as that remains the case.

Notwithstanding the abolition of the notification system, the OFT may be willing to provide informal advice to undertakings on the application of the Competition Act prohibitions to particular agreements and conduct. It may also issue non-binding written Opinions to this effect. In addition, the OFT is currently trialling a new ‘short-form’ opinion procedure whereby undertakings can apply for guidance on how the law applies to prospective collaboration agreements with competitors.

These procedures fall under the OFT’s general ‘Opinions’ process. The OFT has indicated that the circumstances in which it will issue Opinions are narrowly confined to cases which present genuinely novel or unresolved questions and where is an interest in issuing clarification for the benefit of a wider audience. Undertakings seeking guidance are encouraged to provide a complete statement of facts in order to maximise the relevance of any resulting OFT guidance. Moreover, Opinions are not conclusive as to the application of competition law.

Subject to the possibilities for seeking informal advice or a written Opinion, the intention is that parties, in consultation with their legal advisors and taking into account guidance published by the OFT, should be able to form their own views as to the compatibility of their agreement or conduct with the relevant prohibitions.

SANCTIONS

Companies found to have breached the Chapter I prohibition may face fines up to a maximum level of 10% of worldwide turnover. Individuals within a company associated with the infringement may be disqualified from serving as a director for a period of up to 15 years (and potentially liable for criminal penalties – see Chapter 3 post). Civil enforcement and procedure relating to the Chapter I prohibition are common to those relating to the Chapter II prohibition and are examined in further detail at Chapter 5 post.
3. Cartels

THE CARTEL OFFENCE

Criminal liability may be imposed in addition to fines and other civil penalties for breach of the Chapter I prohibition where the breach takes the form of a cartel.

Under the Enterprise Act, dishonest participation in a cartel is a criminal offence, punishable by a prison sentence of up to 5 years’ duration, unlimited fines, or both. A cartel for this purpose is an arrangement between at least two persons that undertakings will engage in price-fixing, limiting supply or production, market sharing or bid-rigging. Vertical agreements such as resale price maintenance (RPM) do not fall within the scope of the offence. It is important to note that it is not the dishonest participation in a Chapter I Competition Act infringement that is criminalised; the cartel offence under the Enterprise Act is quite separately defined.

In determining whether or not participation in a cartel has been ‘dishonest’, the appropriate standard is whether the acts alleged to constitute the cartel offence were dishonest by the ordinary standards of honest and reasonable people and whether the defendant realised that the acts were dishonest by those standards, as per the Ghosh test\(^\text{14}\). As suggested by the House of Lords in Norris\(^\text{15}\), participation in secret meetings, deception, or attempts to suppress any evidence of the agreement may be relied upon to prove the requisite degree of dishonesty.

The cartel offence may be punished on conviction on indictment by up to five years’ imprisonment or to an unlimited fine, or to both. A custodial sentence can be imposed only where the relevant court is satisfied that the gravity of the offence is such that only a jail term will adequately reflect its seriousness. Moreover, the duration of any sentence must be proportionate to the gravity of the offence.

It is possible for individuals to be prosecuted for attempts to commit the cartel offence, or for conspiracy to commit the cartel offence.

The Enterprise Act designates both the Serious Fraud Office (SFO) and the OFT as the prosecuting authorities. In Scotland, this authority is held by the Lord Advocate. In practice, however, it is the OFT which both conducts the investigatory work and acts the sole prosecuting authority.

The first ever convictions for cartel offences under the Enterprise Act were made in June 2008 in relation to the global marine hose cartel. Three company directors were sentenced to imprisonment for between two-and-a-half and three years. The defendants had pleaded guilty to agreeing dishonestly to allocate markets and customers, restrict supplies, fix prices and rig bids relating to the supply of marine hose and ancillary equipment in the UK. All three were also disqualified from acting as directors for periods of between five and seven years. In November 2008 the Criminal Court of Appeal\(^\text{16}\) in reducing the upper bound of the sentences, identified the factors to be taken into account in sentencing in future cases, namely:

- the gravity and nature of the offence;
- the duration of the offence;
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- the degree of culpability of the offender in implementing and/or enforcing the cartel agreement;

- whether the offenders’ conduct was contrary to guidelines laid down in a company compliance manual; and

- mitigating factors such as any co-operation the offender may have provided in respect of the inquiry, whether or not the offender was compelled to participate in the cartel under duress, and any personal circumstances of the offender which the courts might regard as a factor favouring leniency.

The cartel offence, attempts to commit the offence and conspiracy to commit the offence are crimes in relation to which an individual may be extradited to the UK under the European Convention on Extradition, provided that the extraditing country has a similar provision which is punishable by at least 12 months’ imprisonment. Only a limited number of EU countries presently have such criminal liability for competition law infringements. The extradition of suspected offenders to and from the US is dealt with under the Extradition Treaty signed with the US in 2003. Whilst that Treaty also incorporates a ‘dual criminality’ requirement, the US has had criminal liability for antitrust violations for many years.

An individual who has participated dishonestly in a cartel may also be guilty of money laundering under the Proceeds of Crime Act 2002. This is a criminal offence punishable by a prison sentence of up to 14 years’ duration, unlimited fines, or both.
4. Abuse of market power

THE CHAPTER II PROHIBITION

Whereas the Chapter I prohibition is aimed at anti-competitive agreements between undertakings, the Chapter II prohibition targets anti-competitive conduct by undertakings exercising significant market power.

The Chapter II prohibition is based on Article 102 and prohibits:

- abusive conduct;
- by one or more undertakings which, either singly or collectively, hold a dominant position in a market; and
- which may affect trade within the UK.

The prohibition operates alongside the market investigation powers contained in the Enterprise Act.

ABUSE

The concept of abuse is broad: any conduct by a dominant company which allows it to enhance or exploit its market position to the detriment of competitors or consumers may be considered abusive. Most of the cases considered by the OFT to date have related to conduct alleged to have excluded competitors from a market. The forms of conduct that have been reviewed by the OFT and sectoral regulators for their potential exclusionary effects include the following:

- Refusal to supply so as to prevent effective competition
- The conclusion of exclusive purchasing, supply or distribution agreements so as to create a barrier to entry
- Tying or leveraging so as to extend a position of dominance from one market to another
- Pricing with exclusionary effects
- Applying discriminatory standards to independent contractors compared to those applied to affiliate companies.

Cases considered by the OFT in which conduct has been alleged to exploit customers have been fewer in number and most have related to excessive pricing. However, concerns have also been raised by the OFT in relation to conduct that discriminated between customers.

DOMINANCE

A determination that an undertaking enjoys such a position of economic strength that it can be considered dominant may depend crucially on how the relevant market is defined. This must be carefully considered through an assessment of:

(a) the goods or services which form part of the market; and

(b) the geographic extent of the market.

Dominance within a market will depend on a close examination of the conditions of competition within
the relevant market, including factors such as market shares, the position of competitors, barriers to entry and the bargaining strength of customers. As a rule of thumb, dominance will not generally be considered to exist below a market share of 40%. Above 50%, however, a rebuttable presumption of dominance exists (see Napp Pharmaceuticals, 30 March 2001). Dominance can be held either singly or, where sufficient economic or structural links exist between market players, jointly. However, cases of joint dominance are more likely to be considered under Enterprise Act provisions that allow for investigations of markets (see further below).

The OFT has taken the view that a dominant position may be abused by conduct in a market distinct from but related to that in which the position of dominance is held. In Consignia/Postal Preference, 15 June 2001, the OFT investigated whether Consignia’s dominance in the ordinary mail market had been abused by allowing a company (in which Consignia held a 44.6% interest) to use the Royal Mail trade mark in the market for consumer lifestyle data.

**EFFECT ON TRADE WITHIN THE UK**

It should be noted that there is no requirement that the abuse occurs in a UK market. It is sufficient that the undertaking committing the abuse is dominant in relation to a UK market, and that the conduct complained of produces effects in the UK or part of the UK.

**EXCLUSIONS AND EXEMPTIONS**

The Competition Act sets out a number of specific exclusions from the Chapter II prohibition, namely:

(a) mergers and concentrations; and

(b) general exclusions.

**Mergers and concentrations**

The Chapter II prohibition does not apply to mergers under the Enterprise Act nor to concentrations in respect of which the Commission has exclusive jurisdiction under the EUMR.

**General exclusions**

The most important of the general exclusions from the scope of the Chapter II prohibition are as follows:

- **Services of general economic interest:** The Chapter II prohibition does not apply to undertakings “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 task assigned to that undertaking”.

- **Compliance with legal requirements:** The Chapter II prohibition does not apply to conduct engaged in to comply with a legal requirement. In BetterCare, it was held that to the extent that the North and West Belfast Health and Social Services Trust was limited by law in relation to the prices it paid to suppliers, it could not be held to have abused any position of dominance as a purchaser of those supplies.

- **Avoidance of conflict with international obligations:** The Secretary of State has the power to make an order to exclude the application of the Chapter II prohibition to specified conduct where this would be appropriate to avoid a conflict between provisions of the Competition Act and an international obligation of the UK.

- **FSMA:** The Chapter II prohibition does not apply to conduct encouraged or required by the Financial Services and Markets Act 2000.
• Public policy: The Secretary of State may by order exclude the application of the Chapter II prohibition to specified conduct where there are "exceptional and compelling reasons of public policy" for doing so.

These exclusions can be amended, added to or removed by the Secretary of State.

EXEMPTIONS

There is no possibility of exemption from the Chapter II prohibition.

SANCTIONS

Companies found to have breached the Chapter II prohibition may face fines up to a maximum level of 10% of worldwide turnover. Individuals within a company associated with the infringement may be disqualified from serving as a director for a period of up to 15 years. Civil enforcement and procedure relating to the Chapter II prohibition are considered at Chapter 5 post.
5. OFT investigation and enforcement

OFT PRIORITISATION PRINCIPLES

The OFT has principal responsibility for enforcing the Chapter I and Chapter II prohibitions. When assessing which cases to investigate, or to continue investigating, the OFT takes into account a range of factors as set out in the “OFT Prioritisation Principles”. Work is generally prioritised according to its impact on consumers and strategic significance and these are balanced against the resources involved. This reflects an attempt by the OFT to encourage private enforcement as an alternative to public authority intervention so as to alleviate the regulatory burden on public resources.

POWERS OF INVESTIGATION

Where the OFT does decide to investigate, it will either do so following a complaint by a third party or on its own initiative.

The Competition Act provides for three forms of investigation for breaches of the Chapter I and II prohibitions. These powers are also available to the OFT when acting under Articles 101 and 102:

(a) written requests for information;

(b) entry without a warrant; and

(c) entry with a warrant.

Each form of investigation may be carried out where the OFT has “reasonable grounds for suspecting” that either of the prohibitions has been infringed.

Written requests for information

An OFT request is made by notice (a ‘Section 26 Notice’) requesting the production of documents to the OFT or information which the OFT considers relevant to the investigation. The OFT is not limited to approaching the undertakings alleged to have infringed one of the prohibitions. For example, the notice may be addressed to third parties such as complainants, suppliers, customers and competitors. The notice must state the subject matter and purpose of the investigation, and should set out the offences involved in non-compliance.

The OFT may ask for an explanation of any documents produced in response to the notice and, for documents not produced, may enquire as to the whereabouts of the documents.

Entry without a warrant

Where entry is without warrant, force may not be used, either to enter premises or on the premises. The investigating officer has broad powers to take away equipment, to require the production of documents, to copy documents and to require e-mails and other electronically held information to be printed and produced for inspection. The investigating officer also has the power to take any other steps necessary in order to preserve the documents or prevent interference with them. This includes requiring that the premises (or any part of the premises, including offices, files and cupboards) be sealed for such time as is reasonably necessary to enable the inspection to be completed.
The power to carry out inspections without a warrant is limited to business premises, which are defined in the Competition Act as premises, or part of premises, not used as a dwelling. A warrant is required in all cases of entry to domestic premises.

The power to require an explanation of documents is subject to the right against self-incrimination. Thus, the OFT may not ask for explanations that might involve admissions of an infringement and should instead limit questioning to matters of fact. The distinction will not always be clear-cut.

**Entry with a warrant**

The OFT has a power of entry with a warrant issued by a High Court judge where the following conditions are met:

- (a) there are reasonable grounds for suspecting that a document sought by a Section 26 notice or in the course of an ‘on-the-spot’ investigation without warrant, which has not been produced, is on the premises;

- (b) there are reasonable grounds for suspecting that a document that the OFT could obtain by Section 26 notice is on the premises, but would be concealed or interfered with if its production were to be required; or

- (c) entry without a warrant for the purposes of investigation has been impossible and there are reasonable grounds for suspecting that documents are on the premises that could have been acquired if entry had been obtained.

In the case of entry with a warrant, reasonable force may be used to obtain entry. No force may be used against persons.

Entry to domestic premises must be authorised by warrant. Domestic premises are defined by the Competition Act as premises, or any part of premises, used as a dwelling and also used in connection with the affairs of an undertaking or where documents relating to the affairs of an undertaking are kept.

**Access to legal advice**

Whilst an undertaking subject to an on-site investigation may take legal advice at any time during the investigation, the investigating officer will not unduly delay the start of the investigation until the undertaking’s external lawyer arrives.

**Legal professional privilege**

The requirement to produce documents, whether by written notice or at an on-site investigation, does not extend to documents protected by legal professional privilege. There are two main types of legal professional privilege:

- (a) legal advice privilege which applies to confidential communications between a client and his or her lawyer made for the dominant purpose of obtaining or giving legal advice; and

- (b) litigation privilege which applies to confidential communications between a client and his or her lawyer or between a client or lawyer and certain other third parties, such as a witness, made for the dominant purpose of obtaining or giving legal advice or collecting evidence for current or contemplated litigation.

For English law purposes, in-house lawyers are included in the definition of “lawyer” and communications with foreign lawyers can also attract legal professional privilege. The scope of legal professional privilege allowed for in investigations of breaches of UK competition law is wider than that allowed under EU law where privilege does not extend to in-house lawyers, and independent professional lawyers must be qualified in an EU Member State.
In the case of a dispute over whether documents are privileged or not, the investigating officer will attempt to resolve the dispute by way of a discussion. If this is not possible, the documents will be placed in a sealed envelope signed across the flap and held by the OFT until the dispute can be resolved. The undertaking claiming legal privilege should put its claims for particular documents in writing to the OFT as soon as possible.

Confidentiality

The OFT can request documents which contain commercially sensitive information or contain details of an individual’s private affairs, whose disclosure may seriously damage a party’s interest. In such a scenario, the affected party should provide such documents separately in an annexe which is clearly marked as confidential, accompanied by a written explanation as to why such documents should be considered confidential. The OFT will then decide whether such documents will need to be disclosed. If the OFT decides that such documents will need to be disclosed, the OFT will give prior notice to the affected party and allow a reasonable opportunity for the affected party to make its views known.

Offences

There are criminal sanctions for non-compliance with powers of investigation under the Competition Act. The relevant offences fall into four main categories:

(a) failing to comply with the requirements imposed by a notice, or at an on-site investigation;
(b) intentionally obstructing an officer investigating with or without a warrant;
(c) intentionally or recklessly destroying, disposing of, falsifying or concealing documents or causing or permitting those things to happen; and

(d) knowingly or recklessly supplying information which is false or misleading either directly to the OFT or to anyone else knowing it is for the purpose of providing information to the OFT.

Penalties for non-compliance

The penalties for non-compliance with an investigation can be substantial. Usually the penalties are financial, but in the case of any obstruction of investigators with a warrant, destruction of documents or provision of false or misleading information, imprisonment for up to 2 years is possible.

ENFORCEMENT BY THE OFT

The OFT’s enforcement powers are:

• to give interim measures directions during the course of an investigation;
• to accept binding commitments offered to it;
• to give a direction to the undertaking concerned to modify or terminate the agreement, or to modify or cease the abusive conduct;
• to impose a financial penalty on the undertaking concerned; and
• to apply for a disqualification order to be made against a company director for a period of up to 15 years.

The burden of proving an infringement lies with the OFT. The burden of proving that exemption from the Chapter I prohibition is available lies upon the party making that claim. A decision by the OFT that a person has infringed the Chapter I or and Chapter II prohibitions must be based on strong and compelling evidence. However, this standard of proof does not inevitably require documentary or written evidence.
the OFT may rely on oral witness statements where it is satisfied on the basis of the surrounding circumstances that the statements can be taken as reliable

Interim measures

The OFT may, before completing its assessment of an agreement or conduct, give interim measures directions where the following conditions are met:

- it has a "reasonable suspicion" that an infringement has occurred; and
- it considers it necessary to act as a matter of urgency for the purpose either:
  - of preventing serious, irreparable damage to a particular person or category of persons; or
  - of protecting the public interest.

The "reasonable suspicion" standard for ordering interim measures applies when the OFT is applying the EU prohibitions, notwithstanding the fact that the European Commission has the power to order interim measures only where it is satisfied that there is a prima facie case of infringement, a much higher standard.

Commitments

In order to provide greater certainty for undertakings under investigation and to align the UK remedies system with the changes introduced by the Modernisation Regulation, the Competition Act 1998 and Other Enactments (Amendment) Regulations 2004 was introduced, granting the OFT a formal power to accept binding commitments offered to it where satisfied that these commitments meet its competition concerns.

Once accepted, binding commitments are published and the OFT may not continue an investigation, make an infringement decision or give interim measures directions in respect of the alleged infringement addressed by the commitments unless it has:

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

Binding commitments are generally adopted for a specified period of time. Whilst they are in force, the OFT may review their effectiveness from time to time and take such action as regards their variation or release as it deems appropriate. Commitments can be enforced by court order. Sufficiently interested third parties may appeal to the CAT against the OFT’s decision to accept, vary or release commitments.

Findings of infringement and directions

If, the OFT considers that it is likely that an agreement or conduct does infringe competition law and proposes to make a final infringement decision, it will send the party or parties a written statement setting out the matters to which it has taken objection, the action it proposes to take and the reasons for it (a Statement of Objections, "SO"). The SO should set out all the allegations and facts upon which the OFT proposes to base its final decision. The OFT must give the party or parties an opportunity to make representations in response to the SO. The party or parties may request a meeting with the OFT staff to make oral representations to elaborate on written representations already made. Where requested, the party or parties must also be given an opportunity to
inspect the OFT’s file relating to the proposed decision. The OFT’s file will not include documents to the extent that they contain confidential information or the OFT’s internal documents.

In the case of an infringement decision, the OFT may give “to such person or persons as it considers appropriate, such directions as it considers appropriate to bring the infringement to an end”. Whilst the powers of the OFT to issue directions are sufficiently broad to allow it to require divestitures or structural remedies, these are more likely to flow from a market investigation reference under the Enterprise Act (see Chapter 6 post). It will be more typical for directions under the Competition Act to require agreements or conduct to be terminated or modified.

**Voidness**

On its face, the Chapter I prohibition, following Article 101(2) TFEU, renders void and unenforceable any agreement falling within its terms.

Nonetheless, when applying the Chapter I prohibition, it may be possible to sever from an agreement the offending elements, leaving the remainder of the agreement intact. This follows the common practice as established by the Court of Justice in Luxembourg.

The Chapter I prohibition is a dynamic instrument and the position of an agreement under the prohibition must be assessed in the light of all relevant economic facts and circumstances. Voidness under the prohibition is not for all time, and an agreement can move into and outside the scope of the prohibition as economic and market conditions develop.

Whilst the Chapter II prohibition does not expressly render void contractual provisions that constitute an abuse of a dominant position, this result flows automatically from the illegality of the conduct constituting the abuse.

**Fines**

On making a decision that an undertaking has infringed Article 101/Chapter I or Article 102/Chapter II, the OFT may impose a fine up to a maximum of 10% of the worldwide turnover of the undertaking concerned in the previous business year, provided it is satisfied that the infringement has been committed intentionally or negligently.

The OFT has published guidance as to the appropriate amount of a penalty. Factors to be taken into account in determining the level of a fine include the seriousness and duration of the infringement. Market-sharing, price-fixing (including resale price maintenance) and predatory pricing will be regarded as particularly serious infringements. The economic strength of the companies involved in the infringement will be taken into account, as will the company’s degree of participation – more passive, reactive participants are likely to be seen as less culpable.

When dealing with an infringement of Article 101/Chapter I or Article 102/Chapter II that also has effects in another EU Member State, the OFT may, with the consent of the relevant Member State, take into account the effects of the infringement in that Member State in calculating the appropriate level of penalty. In imposing penalties under the Competition Act or when acting under Articles 101 and 102, the OFT must take account of fines imposed by the Commission or NCA in relation to the same conduct or agreement. No account need be taken of fines imposed by competition authorities outside the EU.

**Limitation periods**

When acting under the Competition Act or Articles 101 and 102, the OFT’s powers to impose penalties and enforce payment of penalties are arguably subject to the six year limitation period for tortious actions as set out in the Limitation Act 1980. However this theory has yet to be tested in the courts.
Disqualification of directors for competition infringements

Finally, the OFT may apply to court for disqualification of a director of a company in the event of competition law infringements. The OFT will not generally apply for a disqualification order unless there has been a prior finding of infringement of competition law by the relevant company. However, exceptionally, it may do so where an infringement decision or judgment has not yet been made; in the context of cases where no fine has been imposed; where the relevant directors have resigned or have been removed from office as a result of their conduct in connection with the breach; or where the relevant directors failed to keep themselves properly informed of the company’s conduct even though they were not involved directly in the breach.33

If there has been a prior finding of infringement but leniency (see below) was granted to the relevant company, the OFT is unlikely to apply for an order in relation to the cartel activity to which the grant of leniency relates.

Courts may make disqualification orders for up to 15 years against a director of a company which commits a breach of the competition rules. The court must make such an order if it considers that the director’s conduct was such as to render him unfit to be concerned in the management of a company. A director can be considered unfit for these purposes either because of direct participation in the infringement or on the basis of having turned a blind eye to breaches of the competition rules.

The effect of a disqualification order is to prevent an individual being involved (directly or indirectly) in the management of a company without leave from a court. Breach of a disqualification order is a criminal offence and may lead to imprisonment for up to two years and a fine of up to £5,000. Any person involved in management of a company in breach of a disqualification order is personally liable for all the relevant debts of the company.

The OFT has power to accept undertakings in lieu of disqualification orders. Such undertakings may be for periods of up to 15 years and have broadly the same effect as orders.

COMPETITION LITIGATION

Appeals

Addressees of a decision of the OFT have a right of appeal to the CAT. A decision of the OFT for these purposes includes not only a finding of infringement, but also a decision to impose penalties, a decision to accept, vary or release commitments, and a decision in relation to interim measures.

Whether the response of the OFT to a complaint can form the subject of an appeal to the CAT has been the subject of significant litigation under the Competition Act. The CAT has clarified the position as follows:

• Where the OFT does not reach a view as to the merits of the case in exercise of its discretion as to how to deploy its resources, no ‘decision’ is involved and the complainant’s only right of recourse will be an application for judicial review.

• In contrast, where the OFT closes its file on a complaint or elects not to pursue a complaint on the basis that there is no evidence of an infringement or if it considers that it will not be able to establish an infringement, it has reached a decision which is capable of appeal.

The CAT will determine the appeal on the merits by reference to the grounds of appeal set out in the notice of appeal and may:

(a) adopt interim measures;

(b) confirm or set aside all or part of the decision.
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(c) remit the matter to the OFT or relevant sectoral regulator;  
(d) impose, revoke or vary the amount of any penalty; and  
(e) give any direction, take any steps or make any other decisions which the OFT (or sectoral regulator) could have given, taken or made.

The decisions of the CAT must be reasoned and published. There is a further right of appeal from decisions of the CAT, either on a point of law or as to the amount of any penalty to the Court of Appeal (or Court of Session in Scotland). Further appeal lies to the House of Lords under the normal rules.

A third party or a representative body showing a sufficient interest in a decision of the OFT under the Competition Act may also appeal that decision to the CAT. The CAT determines the question of “sufficient interest”. A third party with a sufficient interest may further appeal the decision of the CAT to the Court of Appeal, but on a point of law only.

Appeals, whether by addressees of the OFT decision or by interested third parties, must be made within two months of the notification or publication of the decision.

Damages actions

There is a well established principle that breaches of competition law give rise to claims for private damages actions and other relief in the English courts. Such cases have not been common and have often resulted in out of court settlements. However, since the introduction of the Enterprise Act and a shift in competition policy focus, private enforcement of competition law in the UK has become a credible alternative to public enforcement by the competition regulators. Cases where third parties claiming to have suffered damage as a result of an agreement or conduct which infringes Article 101/Chapter I or Article 102/Chapter II bring civil actions before the English courts.

This subject is considered in greater detail in a separate Slaughter and May publication: Competition Litigation in the UK.

SPECIFIC ASPECTS OF INVESTIGATION AND ENFORCEMENT RELATING TO CARTELS

Burden of Proof

The criminal burden of proof (beyond reasonable doubt) applies to all prosecutions of the cartel offence.

OFT investigatory powers

The powers of the OFT to conduct a criminal investigation arise where there are reasonable grounds to suspect that a cartel offence has been committed, which is an objective test. Whether the results of an OFT investigation into a potentially anti-competitive agreement will support criminal proceedings for breach of the cartel offence or civil proceedings for infringement of the Chapter I prohibition may not be apparent at the outset of an inquiry. To support a criminal prosecution, the investigation must be conducted to criminal standards, taking into account in particular the privilege against self-incrimination and the need to caution individuals before taking any voluntary statement of admission.

To minimise the risk that information gathered by the OFT is excluded from consideration in any criminal prosecution, the OFT has stated that it will, as a matter of course, conduct its civil investigations and inquiries to a criminal standard.

In addition to those powers that are available to it in the context of a civil investigation (see Chapter 5,
post), in the criminal context the OFT also has power to engage in covert surveillance and use informants44.

The OFT may record interviews of those suspected of having committed any offence with a view to obtaining an admission. These interviews must be conducted in accordance with those Codes of Practice that have been developed under the Police and Criminal Evidence Act 1984. These require that an interviewee should be offered independent legal advice and that a caution should be given at the start of an interview.

The Regulation of Investigatory Powers (Communications Data) Order 200345 allows the OFT to intercept post and access telephone lines. The powers do not allow the OFT to obtain details about the content of the communications, but only details of the time, duration and recipients. Use of the powers must be pre-authorised by the OFT’s Director of Cartel Investigations in writing (except in urgent cases where it may be given orally if necessary) and the Home Office Codes of Practice must be observed in their exercise. In addition to the powers granted under the Order, the OFT may plant bugging devices in homes or vehicles, provided that this is authorised in advance by the OFT Chairman and the Office of Surveillance Commissioners.

Under the Regulation of Investigatory Powers (Directed Surveillance and Covert Human Intelligence Sources) Order 2003 the OFT can observe the movements of individuals with a view to gathering a detailed picture of their activities and associations. Only authorised officers of the OFT may use these powers and the powers will be authorised for only a limited duration. Authorisation involves an application to the OFT’s Director of Cartel Investigations.

Privilege against self incrimination

In relation to self incrimination, statements made by a person in response to a requirement imposed by the OFT using criminal powers of investigation may only be used as evidence in criminal proceedings against that person in two circumstances:

- where that person has knowingly or recklessly made a false or misleading statement in response to that requirement and is then prosecuted for an offence of knowingly or recklessly making a false or misleading statement;
- where that person is being prosecuted for some other offence and he or she makes a statement that is inconsistent with it and if evidence relating to it is adduced or a question relating to it is asked by that person or on their behalf.

Appeals

A conviction of the cartel offence by the Crown Court may be appealed to the Criminal Division of the Court of Appeal. Leave is required from either the trial judge or the Court of Appeal except in cases where the appeal relates to a point of law. The decision of the Court of Appeal may also be appealed, with leave, to the House of Lords where the case raises a point of law of public importance. A notice of appeal or an application for leave to appeal must be given within twenty-eight days of the conviction, verdict or finding contested.

LENIENCY PROGRAMME

In relation to cartel activity, the OFT is prepared to offer lenient treatment to undertakings that come forward with information. The Enterprise Act gives the OFT power to grant leniency to individuals who would otherwise face prosecution, but who inform the OFT of the cartel and fully co-operate with its investigation. The policy applies not only to horizontal arrangements, but also to vertical RPM (not a criminal cartel offence). The OFT’s Guidance on Leniency and No-action, published in December 200846, lists the
following categories of immunity and leniency as available under the Enterprise Act, namely:

- **Type A immunity**: where an undertaking is the first to apply for leniency and there is no pre-existing criminal or civil investigation, it may qualify for automatic civil immunity and its employees and directors who co-operate with the OFT may qualify for automatic criminal immunity.

- **Type B immunity**: where an undertaking is first to apply for leniency and there is no pre-existing civil or criminal investigation into the activity, it may qualify for discretionary civil immunity and its employees and directors who co-operate with the OFT may qualify for discretionary criminal immunity.

- **Type B leniency**: where an undertaking is the first to apply for leniency but there is a pre-existing civil or criminal investigation into the relevant cartel activity, it may qualify for a reduction of, but not immunity from, a financial penalty imposed under the Competition Act.

- **Type C leniency**: where the undertaking is not the first to apply for leniency, it may qualify for a reduction of up to 50% of the level of financial penalty imposed under the Competition Act (regardless of whether there is a pre-existing civil or criminal investigation).

In order to qualify for any type of leniency the undertaking must first ensure that there is a ‘concrete basis’ for suspicion of cartel activity and it must have a ‘genuine intention to confess’. In addition, the OFT must not already have sufficient evidence to establish the existence of the cartel activity and the undertaking must satisfy certain conditions (e.g. it must co-operate throughout the investigation and, in order for all current and former employees/directors to be granted criminal immunity, it must not have coerced others to take part in the cartel activity).

**EARLY RESOLUTION AGREEMENTS**

In some cases the OFT may reach an early resolution agreement with one or more of the parties involved in a cartel prior to issuing an infringement decision. A party may opt to “settle” its case with the OFT in this manner where it is prepared to admit liability for the infringements alleged by the OFT and co-operate fully with the OFT’s investigation. In such cases the OFT will reduce the fine that would have been imposed had the investigation continued and an infringement decision later been made. Recent examples of early settlement agreements reached with the OFT include cases relating to dairy and tobacco products.
6. Market studies and investigations

The Chapter I and Chapter II prohibitions exist alongside powers for the OFT, the sectoral regulators and the CC to investigate markets where there is a concern that competition is not working effectively and where action under the Competition Act is considered unlikely to be effective to address the problem.

OFT MARKET STUDIES

In fulfilling its responsibility proactively to investigate markets that do not appear to be functioning effectively, the OFT can carry out market studies to determine whether there are reasonable grounds for suspecting that any feature of a market prevents, restricts or distorts competition and decide whether to refer a market to the CC for further investigation. Market features for this purpose include the structure of the market and the behaviour of suppliers and customers. It should be noted that market studies can be used for a number of different competition and consumer protection related purposes and are not used solely to assess the circumstances for a potential market investigation reference to the CC. In the past five years, very few completed market studies have resulted in market investigation references to the CC under the Enterprise Act.

Under Section 5 of the Enterprise Act, the OFT has the general function of obtaining, compiling and keeping under review information about matters relating to the carrying out of its functions. This forms the legal basis for the market studies conducted by the OFT. Its investigating powers for these purposes extend to requiring the production of documents, the provision of information, or for persons to appear before the OFT. Failure to comply with these requirements constitutes a criminal offence. Information gathered by the OFT in the context of a Competition Act investigation (where its investigatory powers are broader) may be used in the context of a subsequent market study.

The sectoral regulators also have the power to conduct market studies (similar to those of the OFT). They have concurrent powers with the OFT to make market investigation references to the CC within their regulated sectors. There is the potential for overlap between markets investigated by the OFT and markets covered by the sectoral regulators. Where this occurs, the OFT’s Guidance states that it will try to work in conjunction with the regulator concerned to avoid any duplication.

Market studies are carried out by the OFT’s Markets and Projects division and can be lengthy in duration. The potential outcomes of a market study by the OFT or a sectoral regulator, aside from a market investigation reference to the CC, include: publishing information to help consumers; encouraging firms to take voluntary action; making recommendations to the government or sectoral regulators; infringement proceedings against companies suspected of breaching competition law; and recommending a consumer code of practice. To the extent that an OFT market study or investigation results in a reference to the CC (or action under the Competition Act), the overall review period for the companies concerned may extend over several years.
The OFT and the sectoral regulators may opt not to make a market investigation reference, even if there are reasonable grounds to suspect that features of a market are adversely affecting competition, in circumstances which include the following:

- Where it would be more appropriate to deal with the issues under the Competition Act on the basis that the problems arise from agreements or behaviour that infringe the Chapter I or Chapter II prohibitions.
- Where undertakings in lieu of a reference may adequately address the problems identified (see below).
- Where the OFT or the sectoral regulator considers that the adverse effects on competition of the relevant market features are not significant. In making this assessment, the size of the relevant market, the proportion of the market affected by the features at issue and the persistence of the relevant features will be taken into account. These factors will be balanced against the costs of a CC market investigation reference on the relevant companies and the public purse.
- Where it is considered that remedies are unlikely to be available at the conclusion of such a reference. This may be the case if the markets are global in scope so that any remedy relating to the UK will have only a limited impact on its operation, or if the adverse effects on competition derive principally from legislation or government policy, in which case a direct recommendation to the relevant government department or regulator for changes in legislation or policy would be more effective.
- Where the OFT or the sectoral regulator considers that it has sufficient powers to take effective enforcement action. For example, the OFT has a dual role as a competition and consumer enforcement body. Therefore, it may consider that where the problem is due to lack of consumer awareness, campaigns to educate consumers may be the best way to remedy the problem.

CC MARKET INVESTIGATION REFERENCES

Companies active in markets susceptible to tacit collusion are those most exposed to market investigations. Market investigations relating to the conduct of a single firm will be exceptional, although a recent example is provided by the CC’s market investigation into BAA Airports, completed in March 2009. Investigations will most usually relate to the conduct of several companies, or industry-wide market features such as those identified in the Groceries inquiry (completed in April 2008). However, a market investigation reference may be used to impose a structural remedy to an infringement of the Chapter II prohibition which, whilst possible under the Competition Act powers, would more usually be dealt with by means of directions to stop the infringing conduct. Market investigations will not generally relate to agreements entered into by a single firm, but the cumulative effect upon a market of a network of agreements may be the subject of such an investigation.

Where the OFT (or sectoral regulator) proposes to make a market investigation reference, it will provide the companies concerned with a statement of its reasons for the proposed reference, which will form the basis of consultation with those parties. In practice however, the OFT can be expected to consult widely with the companies concerned prior to the issue of a statement of reasons. Any decision to refer will be published, supported by a statement of reasons for reference. The decisions tend to be relatively detailed in terms of their description of the markets and the market features considered to give rise to concern.
Undertakings in lieu of a reference

The OFT or sectoral regulator may accept undertakings in lieu of a reference where it believes that it has the power to make a market investigation reference to the CC. In other words, the OFT must already be satisfied that it has reasonable grounds for suspecting that any feature of a market prevents, restricts or distorts competition.

This procedure is most likely to be used by the OFT where the reference deals with, and the adverse effect on competition arises from, single firm dominance or a small number of firms, or where a market has already been the subject of a detailed investigation by the OFT. In other cases, the OFT, as opposed to the sectoral regulators who are closely acquainted with the markets they regulate, is unlikely to have a sufficient understanding of the market and the issues raised to be able to conclude within a reasonable period of time that the case is a suitable candidate for undertakings in lieu. The OFT Guidance states that undertakings in lieu of a market investigation reference will be rare. To date, undertakings in lieu have been accepted by the OFT in only one case (Postal franking machines, 17 June 2005) and by Ofcom in one further case (Telecommunications, 22 September 2005). The effect of undertakings in lieu is to prevent a market investigation in relation to the same market being undertaken for a minimum period of 12 months from the acceptance of the undertakings unless the undertakings are breached or based upon false or misleading information provided by the company(ies) giving the undertakings.

Proportionality

Market investigation references should be appropriate and proportionate. In relation to the Rolling Stock Leasing Market investigation (7 April 2009), the Department for Transport (DfT) had asked the ORR to consider making a market investigation reference to the CC. The ORR carried out a market study into the issues raised by the DfT with a view to gathering evidence to decide whether to make a reference to the CC. In deciding to refer the market to the CC, the ORR considered that it was appropriate and proportionate to make the reference because there were no other powers under which the investigation could be made. A Competition Act investigation would not have been appropriate as the competition problems in the market derived from the operation and structure of the market, rather than the result of abusive conduct by a few dominant players. Also the ORR concluded that it did not have any powers to regulate rolling stock leasing companies under the Railways Act 1993. It was also considered that the suite of remedies available to the CC could be more appropriate to deal with the concerns. The CC could seek behavioural undertakings from the rolling stock leasing companies, or impose an order to remedy any adverse effects identified. Whilst the ORR can accept undertakings that are offered voluntarily, it has no order making powers in this regard.

The availability of more extensive remedies is a significant motivation for market investigations to the CC. In comparison with the powers available to the OFT and sectoral regulators, the CC may impose, inter alia, structural remedies such as divestment or the licensing of intellectual property rights; remedies directing firms to discontinue certain behaviour or to adopt certain behaviour; and the imposition of a price cap.

Ministerial intervention

The Secretary of State also has powers to make market investigation references in two circumstances:

- when he (or she) is not satisfied with a decision by the OFT not to refer a market for investigation; or
- when he (or she) has brought to the OFT information relevant to a reference decision, but is
In addition, the Secretary of State has more general powers of intervention in relation to references that raise defined public interest issues. Currently only national security, which includes public security, exists as a defined public interest issue for the purpose of market investigations. To date, no public intervention notices have been issued in relation to market investigations.

The OFT must, when considering whether to make a reference, bring to the attention of the Secretary of State any defined public interest issues to which the reference may give rise. In cases that raise public interest issues, the Secretary of State may, by service of an intervention notice addressed to the OFT, veto any undertakings in lieu of reference that might be proposed by the OFT.

By an intervention notice addressed to the CC within four months of the date of reference, the Secretary of State may require the CC to consider the defined public interest issue in its investigation. Should the CC conclude that remedial action is necessary at the conclusion of its investigation, the Secretary of State may consider whether any public interest considerations are relevant to the remedies proposed and, if so, decide what, if any, remedial action should be taken. However, if the Secretary of State decides that no public interest consideration is affected, the CC retains full responsibility for remedial action.

**CONDUCT OF MARKET INVESTIGATIONS**

The CC has no power to initiate its own market investigations. On a reference from the OFT or the sectoral regulators the CC is required to decide whether features of the market are having an adverse effect on competition and, if so, whether remedial action would be appropriate to address the adverse effect on competition or any detrimental effects on consumers resulting from that adverse effect.

The CC’s approach to the issue of whether there is an adverse effect on competition is set out in more detail in its Market Investigation Guidelines. Having defined the relevant market, it will conduct a competition assessment. This assessment will focus, firstly, on how the process of rivalry between companies operates in the relevant market and, secondly, on the effects upon that process of the market features giving rise to the reference. In its guidelines, the CC divides these features into structural features (market shares, concentration levels, buyer power, entry barriers, information asymmetries and government regulations) and conduct features (the behaviour of buyers and sellers in the market). The CC guidelines emphasise, however, that it is unlikely to focus upon a single feature of the market, but will review all those features that may contribute to an adverse effect on competition.

**Procedure**

CC market investigations are conducted by groups comprising a minimum of three members (including a chairman) appointed by the CC Chairman.

The CC has taken a statutory maximum of two years to conclude each of its investigations. An administrative timetable for each inquiry is drawn up and posted on the CC’s web-site. The main stages of a market investigation reference are:

- The information-gathering phase, when the CC collects and seeks to verify information. This is typically done by means of factual questionnaires to the companies active within the market under investigation and others, site visits, surveys and hearings. The companies subject to the investigation will typically at this early stage file a submission, setting out their views on the fundamental issues raised by the reference.
The issues phase, when the CC prepares a statement of issues and releases it to those subject to the investigation for their comments. An issues hearing will typically be held with those companies at this stage in the inquiry.

The findings phase, when the CC publishes its provisional findings and notifies them to the parties for their comments. The provisional findings may also include proposals for remedies. A further hearing may take place at this phase.

The remedies phase, when the CC, taking into account the response of the parties to the provisional findings, decides what remedies may be appropriate.

A market investigation reference represents a significant burden on resources, especially for companies subject to investigation. Submissions need to be drafted, extensive information needs to be provided on an ongoing basis to the CC and senior management need to be prepared for hearings before the CC. The issue of remedies needs to be considered by the companies subject to the investigation from the very outset of the inquiry.

Hearings are generally held in private, but may be held with more than one company at a time and may, at the discretion of the investigation group, be held in public. Guidance issued by the CC Chairman in 2006 envisaged that at least one public hearing would take place in each reference which involved a significant consumer interest. However, out of the nine completed market investigation references to date under the Enterprise Act, there have been only two public hearings, both prior to 2006 (Store card credit services, July 2004 and Home credit, May 2005). Although subsequent CC market investigations have involved a high level of consumer interest, such as Northern Irish personal banking (May 2007) and BAA airports (March 2009), there have been no further public hearings.

The CC has extensive powers to require information to be provided and for documents to be produced. It may also compel witnesses to appear in person before it. Failure to comply with such directions from the CC may lead to the imposition of a fixed penalty of up to £20,000, a daily penalty of up to £5,000, or a combination of both. Intentionally to alter, destroy or suppress information required to be produced constitutes a criminal offence that may be punished by up to two years’ imprisonment. Information that is submitted late may be ignored by the CC in its deliberations.

The CC’s final report is published, subject to redactions for information that the CC recognises to be confidential. Non-determinative parts of the draft report will be “put-back” to the parties so that they may verify the accuracy of the contents. In general, a high and increasing degree of transparency is associated with market investigation inquiries, so that the administrative timetable for the inquiry, the statement of provisional findings, key background information provided in the course of an inquiry and final orders and undertakings can be expected to be published.

ENFORCEMENT

Following a reference to the CC for a market investigation, if at least two thirds of the CC inquiry panel decide that features of a market have an adverse effect on competition, the CC must consider remedial action. The CC’s powers in this respect are wide – it has power to order divestment of assets or businesses, compulsory licensing, prohibition of certain types of behaviour, price caps or obligations periodically to report on aspects of behaviour to the OFT. However, the CC has no powers to impose penalties in the event that it reaches an adverse conclusion. If the proposed remedial action risks jeopardising customer benefits, the CC may decide to take lesser action, or no action at all.
Although the Enterprise Act requires the CC to have regard to the need to achieve as comprehensive a solution as is reasonable and practicable, structural remedies as the outcome of a market investigation are likely to be the exception rather than the rule. Remedies must be proportionate to the adverse effects identified. The CC’s own actions may be combined with recommendations to others to act; for example, the CC might not only decide to impose price controls, but may recommend that the Government change legislation that limits market entry. The Government has given a commitment to respond to CC recommendations within 90 days.

The CC has no powers to order the parties to refrain in the course of an inquiry from taking action that might pre-empt or undermine its final conclusions. However, once it has published its report and while the market investigation reference is not finally determined, it may take steps to ensure that the efficacy of any remedial action it proposes is not undermined by action taken by the parties.

APPEALS

Decisions of the OFT, CC or Secretary of State in relation to market investigations (other than decisions of the OFT to impose penalties for failing to produce information or for obstructing the copying of documents) may be appealed to the CAT. A decision for this purpose should be interpreted broadly – the Enterprise Act specifically provides that it includes a failure to act in connection with a reference or possible reference – and Competition Act precedents may be relevant (see above).

In determining the appeal, the CAT applies the judicial review standard so that grounds for appeal will include procedural impropriety, irrationality or unlawfulness, but will not extend to review of the substantive basis for the decision.

The right of appeal extends to “any person aggrieved by a decision” made under the market investigation provisions of the Act. Appeals must be lodged within two months of publication or notification of the decision. An appeal does not have a suspensory effect. With leave of the CAT or the Court of Appeal, an appeal against a decision of the CAT on points of law only may be made to the Court of Appeal, with a right of further appeal to the House of Lords under normal rules.

Most recently in the BAA airports reference51, BAA challenged the CC’s report and findings (which required divestment of three UK airports) on grounds of apparent bias on the part of one of the panel members52. The CAT found in favour of BAA and the CC subsequently appealed this decision to the Court of Appeal53 which upheld the CC’s appeal to the extent that the apparent bias arose at a late period during the reference and did not contaminate the decision of the other members of the CC responsible for the market investigation i.e. the CC’s report was in substance unsullied and its findings would stand.
EU competition law is of critical importance to the interpretation and application of the UK competition rules and assumed even greater significance after the coming into force of the Modernisation Regulation on 1 May 2004.

COMPETITION ACT

The Competition Act prohibitions are modelled upon those contained in Articles 101 and 102. To minimise divergence between the application of the respective prohibitions, Section 60 of the Competition Act incorporates into UK law:

- a governing principle that UK law should not diverge in its substantive application from EU law;
- an obligation on national courts and tribunals to ensure consistency of interpretation between the Competition Act, TFEU and established and future jurisprudence of the European Courts; and
- a general duty to have regard in determining any matter to any “relevant decision or statement” of the Commission.

Section 60 applies whether or not the relevant agreement or conduct affects trade between Member States. In cases where there is an effect on inter-state trade, the obligation to observe consistency with Community law is reinforced by the Modernisation Regulation (see below).

THE GOVERNING PRINCIPLE

The governing principle requires that every substantive provision of the Competition Act must be interpreted against the background of established EU law, and against the need to ensure a harmonious interpretation between the Competition Act and EU competition law.

However, harmonious interpretation need be achieved only “in so far as is possible (having regard to any relevant differences between the provisions concerned)”. This ‘opt-out’ is significant in a number of respects:

- The Competition Act confers a greater degree of legal professional privilege against production of documents than exists under EU law and is specifically designed to override the EU position and to extend legal professional privilege to documents produced by in-house counsel.
- A key difference between the EU rules and the Competition Act is that, under the Competition Act, there is no requirement of an effect on inter-state trade. This is of enormous consequence, since the clear (although often unstated) objective behind much EU law is the achievement of a single market.

Furthermore the goal of consistent interpretation applies “in relation to competition”. This begs the question whether the governing principle clause should apply, for example, to procedural matters, or to the general principles of law recognised by the
European Courts. It is now accepted that Section 60 imports the ‘high-level principles’ as basic procedural safeguards, as well as the specific case law on Articles 101 and 102. Examples of ‘high-level principles’ are equality, legal certainty, legitimate expectations, proportionality and privilege against self-incrimination.

**CONSISTENCY OF INTERPRETATION**

The Competition Act imposes a positive obligation on national courts and tribunals (including the OFT) when determining a question under the Competition Act to secure that there is no inconsistency between their decision and the relevant principles and decisions of the European Courts.

Furthermore Article 267 TFEU allows national courts to request preliminary rulings from the European Court of Justice (the ECJ) on matters of EU law. In relation to particularly difficult cases involving the interpretation of the Competition Act prohibitions on which there is no existing authority at the EU level, the UK government is of the view that a reference to the ECJ under Article 234 of the EC Treaty is open to the UK competition authorities. The ECJ has itself confirmed that it does have jurisdiction to rule on the interpretation of national law in appropriate cases insofar as the national law directly incorporates or mirrors provisions of EU law.

**STATEMENTS OF THE COMMISSION**

As well as being guided by the European Courts, the UK courts are required in addition to have regard to any relevant decision or statement of the Commission. A number of points should be noted in relation to this:

- first, unlike the obligation in relation to Court decisions, there is no absolute obligation on UK courts and tribunals to ensure consistency between national decisions and decisions of the Commission. Rather, these will be of persuasive authority only;
- secondly, the Competition Act is silent in relation to statements by European institutions other than the Commission. A national court could, nonetheless, clearly have regard to minutes of Council meetings or reports of Parliamentary debates if it considered these of relevance to the case at hand; and
- thirdly, the reference to “statements” of the Commission encompasses, for example, Notices on Interpretation, Competition Policy Reports, Guidance (including that on enforcement priorities) Bulletins and even Press Releases.

**THE MODERNISATION REGULATION**

The Modernisation Regulation was the cornerstone of a move to re-orientate enforcement of EU competition rules away from the Commission towards the Member States and to minimise conflicts between national and EU competition rules. Since the introduction of the Modernisation Regulation the UK competition authorities and the UK Courts have the following powers and responsibilities:

- The competition authorities in the UK and the UK Courts are able to apply directly Articles 101 and 102 in full – formerly only the Commission could grant exemptions under Article 101(3).
- Whenever applying UK competition rules to agreements or conduct ‘affecting inter-state trade’ – a concept which is broadly interpreted – the UK competition authorities and the UK Courts must also apply Articles 101 and 102.
- When applying Article 101 and the Chapter I prohibition to agreements, the UK competition authorities and the UK Courts must not prohibit an
agreement if it would be permitted under Article 101. However, the Modernisation Regulation does allow for the application of stricter national laws relating to unilateral conduct so that unilateral conduct may be prohibited under the Chapter II prohibition even if it falls short of an abuse of a dominant position under Article 102.

**COMMISSION PROCEEDINGS**

Should the Commission initiate proceedings in relation to an agreement or conduct that affects inter-state trade, this automatically relieves the competence of the UK competition authorities and UK Courts to apply Article 101 or Article 102 in that case.

The Modernisation Regulation imposes a specific duty on courts to refrain from taking a decision which may conflict with a decision contemplated by the Commission. This may require the court to stay proceedings or to refer questions for a preliminary ruling to the ECJ under Article 267 TFEU.

**EUROPEAN COMPETITION NETWORK**

The European Competition Network (ECN), a network of national competition authorities (NCAs), was established to facilitate the decentralisation objective of the Modernisation Regulation. This network allows for close co-operation between NCAs so as to ensure the harmonised application of EU and national competition laws across Europe.

Members of the ECN are able to exchange information (including confidential information) for the purposes of ensuring full enforcement of the competition rules across the EU and allocating cases affecting more than one Member State to the NCA best placed to conduct the investigation. Information provided by one NCA to another may be used for applying national competition law only in parallel with EU law and only where it does not lead to a different outcome. Use of information provided by NCAs in prosecuting cartel offences is more restricted (see Chapter 3 ante).

The Modernisation Regulation also provides for NCAs to carry out inspections and other fact-finding measures, either on behalf of another NCA or on behalf of the Commission where necessary to establish whether or not there has been an infringement of Articles 101 or 102. For these purposes, the OFT has all those powers available to it for the purposes of its own investigations under the Chapter I and II prohibitions.
An Overview of the UK Competition Rules

END NOTES

3. Namely, the Office of Communications (Oftcom), the Gas and Electricity Markets Authority (Ofgem), the Office of Water Services (Ofwat), the Northern Ireland Authority for Energy Regulation (OfReg NI), the Civil Aviation Authority (CAA) and the Office of Rail Regulation (ORR).
4. See Paragraph 11, OFT guideline: Trade associations, professions and self-regulated bodies. See also for example, Northern Ireland Livestock and Auctioneers Trade Association (17 February 2003).
5. See Association of British Insurers’ General Terms of Agreement (22 April 2004).
7. Commission Notice on agreements of minor importance which do not appreciably restrict competition under Article 81(1) of the Treaty establishing the European Community (de minimis) (OJ C368, 22.12.01, p 13).
9. Under Article 10 of the Modernisation Regulation, the Commission may, where the public interest so requires, find by decision that Article 101 is not applicable to an agreement either because the conditions of Article 101(1) are not fulfilled, or because the conditions of Article 101(3) are satisfied.
22. Section 9(2) Competition Act.
26. Formerly known as a Rule 14 Notice.
29. Section 36(3) of the Competition Act provides that the OFT may impose a penalty on an undertaking only if it is satisfied that the infringement has been committed intentionally or negligently. It does not, for the purposes of crossing that threshold, have to determine specifically which it was. See Napp Pharmaceutical Holdings Limited v DGFT [2002] CAT 1 and Aberdeen Journals Limited v OFT [2003] CAT 11.
30. Guidance as to the appropriate amount of a penalty (OFT423).
33. Director disqualification orders in competition cases (OFT 510, 2010).
39. See Albion Water Limited v Water Services Regulation Authority, op. cit.
41. For example, in Office of Communications & Anor v Floe Telecom Ltd [2009] EWCA Civ 47, T-Mobile (which had intervened in Floe Telecom Limited v Office of Communications op. cit) was given leave to appeal the CAT’s judgment on whether or not Vodafone and T-Mobile had abused their dominant position in refusing to supply GSM gateway service to Floe telecom. (This case was however exceptional in that the appellant was essentially the successful party in the previous appeal and it was not strictly speaking on a point of law. The Court of Appeal agreed to hear the case only because it was of significant public interest.)
43. Cf the collapsed trial against former BA executives on evidential grounds (R v Martin George and others (Southwark Crown Court)) in May 2010.
44. The powers of the SFO derive from the Criminal Justice Act 1987, those of the OFT from sections 199 to 200 of the Enterprise Act.

46 Leniency and no-action: OFT’s guidance note on the handling of applications, December 2008 (OFT 803).
47 Market studies: Guidance on the OFT approach (OFT 519).
48 Market Investigation References (OFT 511).
52 Chairman’s Guidance to Groups (CC6).
51 BAA Airports, 29.03.07-19.03.09
52 BAA Limited v Competition Commission, Case number 1110/6/8/09 (2009)
53 Court of Appeal judgment in Competition Commission v BAA Limited, [2010] EWCA Civ 1097
54 Napp Pharmaceutical Holdings Ltd v DGFT [2001] CAT 3.
55 See, in particular, Case C-7197, Oscar Bronner v Mediaprint, at paragraphs 16 to 20.
56 Subject to the general duty to avoid conflict with the interpretation of Articles 101 and 102 imposed by the Modernisation Regulation in relation to agreements or conduct that affect inter-state trade.
57 Guidance on the Commission’s Enforcement Priorities in Applying Article 82 EC Treaty (now Article 102 TFEU) to Abusive Exclusionary Conduct by Dominant Undertakings, 9 February 2009.