

Concurrent application to regulated industries

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

The following are the Regulators:

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

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

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

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

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1 Introduction

² The Treaty establishing the European Community.

³ Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the EC Treaty (OJ L1, 4.1.03, p1).

1.1 For a number of industries the application and enforcement of Article 81 and Article 82 of the EC Treaty² (Article 81 and Article 82 respectively) in the United Kingdom and of the Competition Act 1998 (the Act) is carried out by the sector regulators listed in paragraph 2.1 ('Regulator' or 'the Regulators' where referred to collectively) concurrently with the Office of Fair Trading (the OFT). EC Regulation 1/2003 (the Modernisation Regulation)³ requires the designated national competition authorities of the Member States (NCAs) and the courts of the Member States to apply and enforce Article 81 and Article 82 as well as national competition law when national competition law is applied to agreements which may affect trade between Member States or to abuse prohibited by Article 82. The OFT and the Regulators with concurrent competition powers under the Act are designated as NCAs with the power to apply Articles 81 and 82.

1.2 This guideline provides information about which regulated sectors are affected by the concurrency provisions and the scope of the concurrent powers.

1.3 Part 2 of this guideline sets out the concurrent powers of the Regulators.

1.4 Part 3 describes the procedures for making complaints and the way in which they are dealt with under concurrent powers. It describes the Concurrency Working Party (CWP), which is a forum set up to co-ordinate matters relating to concurrency. This part explains how the Regulators work with the OFT and with each other, using the powers in the Act, including under the Competition Act 1998 (Concurrency) Regulations 2004 (SI 2004, No. 1077) (the Concurrency Regulations)⁴. It also explains how the OFT and the Regulators will work in the European Union with other NCAs who have been given the responsibility of applying Article 81 and Article 82 in their territories.

1.5 Part 4 explains how the use of these powers interacts with the Regulators' sectoral powers and duties and the powers under the Enterprise Act 2002 (the Enterprise Act).

⁴ See Annexe A.

- 1.6** Part 5 describes the restrictions on the disclosure of information contained in the Modernisation Regulation and within the Enterprise Act.
- 1.7** Annexe A contains the Concurrency Regulations.
- 1.8** Annexe B provides the Competition Law Terms of Reference for the CWP.
- 1.9** Sector-specific guidelines have been produced and reference should be made to those guidelines, where appropriate.

2 The concurrent powers

2.1 The industry sectors where the Regulators have concurrent powers with the OFT are:

⁵ References in this guideline to 'agreement' should, unless otherwise stated or the context demands it, be taken to include decisions by associations of undertakings and concerted practices.

Agreements⁵ or conduct relating to:	Statute	Regulatory body
activities connected with communications matters	The Communications Act 2003	OFCOM
the shipping, conveyance or supply of gas and activities ancillary thereto	The Gas Act 1986	OFGEM
commercial activities connected with the generation, transmission or supply of electricity in Northern Ireland	The Electricity (Northern Ireland) Order 1992	OFREG NI
the conveyance, storage or supply of gas in Northern Ireland	The Gas (Northern Ireland) Order 1996	OFREG NI
commercial activities connected with the generation, transmission or supply of electricity	The Electricity Act 1989	OFGEM
commercial activities connected with the supply of water or securing a supply of water or with the provision or securing of sewerage services	The Water Industry Act 1991	OFWAT

⁶ References in this guideline to 'agreement' should, unless otherwise stated or the context demands it, be taken to include decisions by associations of undertakings and concerted practices.

Agreements⁶ or conduct relating to:	Statute	Regulatory body
supply of services relating to railways	Railways Act 1993 (as amended by the Transport Act 2000)	ORR
the supply of air traffic services	The Transport Act 2000	CAA

2.2 The Regulators have all the powers of the OFT to apply and enforce Article 81 and Article 82 and the Act in order to deal with anti-competitive agreements or abuses of a dominant position which relate to activities in relation to their respective sectors, with the exceptions noted in paragraph 2.4 below. In many cases, the undertakings whose agreement or conduct is relevant will be licensees, franchisees or similar right holders under one of the statutes listed above, although it is the subject matter to which the agreement or conduct relates rather than the identity of the undertakings involved which will determine whether there is concurrent jurisdiction.

2.3 A Regulator may:

- consider complaints about possible infringements of any of Article 81, Article 82, the Chapter I prohibition and the Chapter II prohibition,
- impose interim measures to prevent serious and irreparable damage,
- carry out investigations both on the Regulator's own initiative and in response to complaints. The Regulators have the same powers as the OFT to require the production of documents and information and to search premises. Further details about these powers are given in the competition law guideline *Powers of investigation* (OFT404),
- impose financial penalties, taking account of the statutory guidance on penalties issued by the OFT⁷,
- give and enforce directions to bring an infringement to an end,
- accept commitments that are binding on an undertaking,
- offer information and confidential informal advice on how Article 81 and Article 82 and the prohibitions in the Act apply to its sector in the United Kingdom, and
- publish written guidance in the form of an Opinion⁸ where a case raises novel or unresolved questions about the application of Article 81, Article 82, the Chapter I prohibition and/or the Chapter II prohibition in the United Kingdom, and where the Regulator

⁷ See the OFT's guidance as to the appropriate amount of a penalty (OFT423).

⁸ See the competition law guideline *Modernisation* (OFT442) for more details on Opinions.

considers there is an interest in issuing clarification for the benefit of a wider audience.

2.4 The OFT alone, however, has powers to issue guidance on penalties, to issue guidance on commitments and to make and amend procedural rules (the OFT's Rules)⁹. The OFT's Rules set out the procedures to be followed in carrying into effect the provisions of the Act. In issuing guidance on penalties, in issuing guidance on commitments and in making and amending the OFT's Rules, the OFT is required to consult with the Regulators (assuming that such guidance and the OFT's Rules relate to a matter in which the regulator exercises concurrent jurisdiction).

2.5 Once it has been decided which United Kingdom authority will exercise **prescribed functions** in relation to a case, the Concurrency Regulations prevent another authority from exercising the prescribed functions unless the case is formally transferred under the Concurrency Regulations to that authority (Regulation 7). Prescribed functions arise from the Act and are defined in Regulation 2 of the Concurrency Regulations. They include:

- the exercise of the formal powers of investigation in sections 25 to 29 of the Act,
- the withdrawal of an exclusion from the Chapter I prohibition in relation to an individual agreement, and
- the making of certain formal decisions, including requiring that an infringement be brought to an end, ordering interim measures, accepting commitments by decision and imposing fines.

⁹ The procedural rules are currently set out in *The Competition Act 1998 (Office of Fair Trading's Rules) Order 2004/2751*.

3 Concurrency in practice

3.1 The Concurrency Regulations contain provisions for the co-ordination of the performance by the OFT and the Regulators of their concurrent functions under the Act. These provisions include:

- allowing for the exchange of information between the OFT and the Regulators for the purpose of determining who has jurisdiction to exercise prescribed functions¹⁰ in relation to a case (Regulation 3),
- determining who should exercise prescribed functions in relation to a case (Regulation 4),
- resolving disputes as to who should exercise prescribed functions in relation to a case (Regulation 5),
- preventing the simultaneous exercise by more than one authority of prescribed functions in relation to a case (Regulation 6),
- transfer of a case from one authority to another (Regulation 7), and
- use of staff of the OFT or a Regulator by the OFT or another Regulator (Regulation 8).

¹⁰ See paragraph 2.5 above for an explanation of this term.

3.2 The Concurrency Regulations set out the process for determining which of the UK authorities is well placed to act in any particular case. Where Article 81 and/or Article 82 may apply, the case will also be subject to the case allocation principles for determining whether the UK NCA or an NCA from another Member State is well placed to act. The case allocation principles for determining which NCA in the European Competition Network is well placed to act are set out in the European Commission's *Notice on Cooperation within the Network of Competition Authorities*¹¹. Further details on case allocation within the European Competition Network are provided in the competition law guideline *Modernisation* (OFT 442).

¹¹ OJ C101, 27.04.04, p. 43.

3.3 The Concurrency Regulations are not intended to deal comprehensively with all aspects of the relationship between the OFT and the Regulators. Matters which are not addressed specifically in the Concurrency Regulations are dealt with by means of informal arrangements between the OFT and the Regulators.

Ensuring consistency of decision-making

Primacy of Community Law

- 3.4** In applying Articles 81 and 82 the OFT, the Regulators and the national courts are bound by the fundamental principle of the primacy of Community law and must follow the case law of the European Court interpreting Community legislation. As a consequence, and in addition to the Article 3 obligations set out in Part 4 below, an agreement or conduct prohibited by Article 81 or Article 82 cannot be permitted under national law. The OFT and the Regulators cannot therefore permit an agreement or conduct which has been prohibited under Article 81 or Article 82.
- 3.5** The Modernisation Regulation contains further provisions to ensure consistency in the application of Community law by NCAs. Article 16(2) of the Modernisation Regulation provides that where the European Commission has taken a decision on an agreement or conduct under Article 81 or Article 82, NCAs (including the OFT and the Regulators) cannot take a decision under Article 81 or Article 82 in respect of the same agreement or conduct which would run counter to the decision adopted by the European Commission.
- 3.6** Part 4 provides further details on Article 3 of the Modernisation Regulation.

Consistency provisions under United Kingdom law

- 3.7** In addition, section 60 of the Act sets out principles for ensuring that the United Kingdom authorities deal with questions arising in relation to the application of the Chapter I and Chapter II prohibitions of the Act in such a way as to ensure consistency with the treatment of corresponding questions arising in Community law in so far as this is possible, having regard to any relevant differences between any of the provisions concerned. This is considered in more detail in the competition law guideline *Modernisation* (OFT442).

Appeals

- 3.8** Most decisions taken by the OFT or a Regulator under Article 81, Article 82 and/or under the Act are subject to appeal to the Competition Appeal Tribunal (the CAT) on both the substance of the decision and on any penalties imposed.

CWP practice and procedure

- 3.9** The OFT and each Regulator are represented on the CWP, chaired by a representative of the OFT. The CWP was formed in 1997 to facilitate a consistent approach by the Regulators and the OFT in the exercise of their functions and powers under the Act, to consider the practical working arrangements between them, to provide a vehicle for the discussion of matters of common interest and the sharing of information where appropriate and where legally permitted, and to coordinate the provision of advice and information on the application of the Chapter I prohibition and the Chapter II prohibition (and now, also Article 81 and Article 82) to the public. The CWP's Terms of Reference are set out at annexe B.

- 3.10** The issues with which the CWP deals include:

- **general principles and information sharing** – subject to the obligations under the Modernisation Regulation and/or Part 9 of the Enterprise Act, information about cases in progress is shared. This includes matters of general policy and the way in which Articles 81 and 82 and the prohibitions in the Act are interpreted, applied and enforced. In each instance, this is with a view to ensuring consistency of decision-making. Where necessary, information about complaints received and investigations in progress or contemplated is also shared to ascertain whether there is concurrent jurisdiction. This includes any matters that are also capable of being investigated under sector-specific legislation,
- **guidelines** – the CWP keeps under review the existing guidelines, both general and sector-specific, and will consider the necessity for revision or replacement in the light of developments in the

application of Article 81, Article 82, the Chapter I prohibition and the Chapter II prohibition (or other relevant legislation),

- **disagreement over who should exercise jurisdiction** – members of the CWP may be called upon to advise if the OFT and a Regulator, or two or more Regulators, are unable in the first instance to reach agreement under Regulation 4 of the Concurrency Regulations as to who should exercise prescribed functions¹² in relation to a case. (For the procedure in cases where agreement can still not be reached, see paragraph 3.15 below).

3.11 At all times, the members of the CWP are mindful of the confidentiality provisions of the Enterprise Act and their obligations to safeguard information provided by other NCAs which are contained in the Modernisation Regulation (see Part 5 below).

Case handling

3.12 The OFT and the Regulators will always consult with each other before acting on a case where it appears that they may have concurrent jurisdiction. They must consult under the Concurrency Regulations before exercising prescribed functions. Such consultation will include the circulation of details of complaints.

3.13 In general, an agreement or conduct which relates to the industry sector of a Regulator (listed in paragraph 2.1 above) will be dealt with by that Regulator, although in some cases the OFT will deal with such a case. The general principle is that a case will be dealt with by whichever of the OFT or the relevant Regulators is better or best placed to do so. The factors considered in determining which of the OFT or Regulators deals with the matter include:

- the sectoral knowledge of a Regulator,
- whether the case affects more than one regulatory sector,
- any previous contacts between the parties or complainants and a Regulator or the OFT, and
- any recent experience in dealing with any of the undertakings or similar issues which may be involved in the proceedings.

¹² See paragraph 2.5 above for an explanation of this term.

- 3.14** When a complaint has been made and it gives rise to concurrent jurisdiction between two or more United Kingdom authorities, the complainant will be informed, as a matter of policy, which authority is handling the complaint.
- 3.15** It is expected that agreement will generally be reached as to which United Kingdom authority is better or best placed to deal with a particular complaint within one month of receipt of the complaint by the first authority to receive it. Experience since the introduction of the Act is that agreement is reached much sooner. In circumstances where Regulation 4 of the Concurrency Regulations applies and agreement cannot be reached between the relevant authorities within a reasonable time, the matter will be referred to the Secretary of State who will decide which United Kingdom authority should deal with a case (Regulation 5).
- 3.16** Neither the OFT nor the Regulators may exercise prescribed functions in relation to a case where it appears that they may have concurrent jurisdiction until the matter has been determined under Regulations 4 or 5 of the Concurrency Regulations (Regulation 6). Once the matter has been determined under Regulations 4 or 5, Regulation 6 also prohibits any other United Kingdom authority from exercising prescribed functions in relation to that case unless it is formally transferred to that authority under the procedures laid down in Regulation 7.
- 3.17** Even where Regulation 6 does not apply (because a determination has not been made under Regulations 4 or 5 and it is not yet proposed to exercise prescribed functions), it is the policy of the OFT and the Regulators that, once it has been decided which United Kingdom authority should deal with a case, only that authority will handle the investigation, decision making and enforcement for that case, unless the case is subsequently transferred from that authority to another. However, the OFT and the other relevant Regulators will be consulted as appropriate.
- 3.18** The Concurrency Regulations set out the procedure which must be followed in the cases of transfers under Regulation 7. When it is intended to transfer a complaint, the undertaking which is the subject

of the investigation will in certain circumstances be given an opportunity to make representations on the proposed transfer, and be notified of the outcome. This will not be the case where the undertaking has not yet been informed that it is the subject of the investigation (Regulation 7). Those making such representations should assume that such representations will be seen by both or all of the authorities concerned. The complainant will also be notified of any transfer.

3.19 Although not obliged under the Concurrency Regulations, the OFT and the Regulators will always consult with each other when considering a request for an Opinion¹³ where it appears they may have concurrent jurisdiction. The criteria set out in paragraph 3.13 will be used to assess which authority is better or best placed to deal with the request.

¹³ See paragraph 2.3 above.

Complaints

3.20 Complaints may be made either to the OFT or directly to the relevant Regulator. The principles relating to case handling will apply as outlined above. Complaints alleging both breach of Article 81, Article 82, the Chapter I prohibition and/or the Chapter II prohibition and of licence conditions (or equivalent) in sector-specific legislation in relation to the same subject matter would normally be considered by the Regulator. Complainants should, however, make one complaint only, sent either to the OFT or to the relevant Regulator, but not to both. Complaints about breaches of sector legislation alone should be sent directly to the relevant Regulator. Complainants will be told as soon as is practicable which authority is dealing with the case. They will also be notified of any subsequent change. Submitting substantially the same complaint to a different United Kingdom authority will not lead to a re-examination of the complaint under Article 81, Article 82, the Chapter I prohibition and/or the Chapter II prohibition. Substantial new factual evidence (not known at the time of the original complaint) which subsequently comes to light should be submitted to the authority which dealt with the original complaint.

3.21 The principles of case allocation set out in the European Commission's *Notice on Cooperation within the Network of Competition Authorities*¹⁴ will also be taken into account where Article 81 and/or Article 82 may apply. Pursuant to those case allocation principles, a UK NCA can be considered well-placed to act in relation to a complaint where the following three cumulative criteria are met:

¹⁴ OJ C101, 27.04.04, p. 43.

- The agreement or conduct has substantial, direct, actual or foreseeable effects on competition and is implemented within or originates from within the United Kingdom,
- The UK NCA is capable of bringing effectively to an end the entire infringement, and
- The UK NCA can gather, possibly with the assistance of other authorities, the evidence required to prove the infringement.

3.22 It follows that the OFT or a Regulator will only deal with a complaint where there exists a material link between the infringement and the United Kingdom. For further details on case allocation within the European Competition Network see the competition law guideline *Modernisation* (OFT 442).

3.23 Submissions that urgent interim measures are needed to prevent 'serious, irreparable damage' as a result of a breach of Article 81, Article 82, the Chapter I prohibition and/or the Chapter II prohibition will be treated in the same way as complaints and the same comments apply. Further guidance on interim measures is given in the competition law guideline *Enforcement* (OFT407).

4 Regulators' other powers and duties

Statutory sectoral duties

4.1 The duties of the Regulators under the individual statutes listed in the table in Part 2 above are set out in those statutes. In general, the Regulators must ensure that there is sufficient provision of the regulated service throughout the United Kingdom, they must promote or facilitate competition, and they must protect the interests of customers and consumers. The Regulators are not required to have regard to those sectoral duties when exercising prescribed functions¹⁵ under the Act. However, they may have regard to matters covered by their sectoral duties if they are matters to which the OFT could have regard in exercising its powers under the Act.

¹⁵ See paragraph 2.5 above for an explanation of this term.

Relationship between the Regulators' powers under the Act and their other functions and powers contained in sector specific legislation

4.2 In some circumstances, a particular agreement or practice may fall within the scope of a Regulator's sector specific legislation as well as within the Chapter I prohibition, the Chapter II prohibition, Article 81 and/or Article 82. Regulated companies may, for example, have licences which prevent them from showing undue preference to, or undue discrimination against, any class of persons. Some types of price discrimination, for example, may also infringe the Chapter II prohibition and/or Article 82. Further details are given in the competition law guideline *Abuse of a dominant position* (OFT402).

4.3 In some circumstances, sector-specific legislation requires a Regulator to enforce a licence condition; sometimes, however, it may be more effective or more efficient to use the powers available under the Act. A Regulator's duty to take licence enforcement action therefore does not apply where it is satisfied that, in a particular case, it is more appropriate to proceed under the Act (and take action in relation to an infringement of the Chapter I prohibition, the Chapter II prohibition, Article 81 and/or Article 82). In doing so, they will be required to bear in mind their obligations as NCAs under the Modernisation Regulation, in particular under Article 3(1) in cases where trade between Member States may be affected

(see paragraph 4.4 below) and those as Regulators under national law. The Regulators' approach to this process will be set out in their sector-specific guidelines on the application of competition law to their particular sectors. If it appears during an investigation by a Regulator using its sector-specific powers that action under the Act is more appropriate (or, in the reverse case, under its sector-specific powers), the parties will be informed.

Relationship between EC competition law and sector specific legislation

- 4.4** The relationship between EC competition law and national law is governed by Article 3 of the Modernisation Regulation. Article 3(1) provides that where the OFT and the Regulators apply national competition law to agreements which may affect trade between Member States, they must also apply Article 81. Where they apply national competition law to conduct prohibited by Article 82 they must also apply Article 82. In applying their sectoral powers the Regulators will need to consider the extent to which, if any, the use of these powers may be considered to be the application of national competition law for the purposes of Article 3.
- 4.5** It is important to consider what happens in the event that the application of national competition law would lead to a stricter outcome than the position under Community law. The position is different according to whether Article 81 or Article 82 applies.
- 4.6** When applying Article 81 and national competition law in parallel, the OFT and the Regulators may not prohibit an agreement if the agreement would be permitted under Article 81. An agreement could be permitted under Article 81 because the agreement in question does not restrict competition within the meaning of Article 81(1), the conditions in Article 81(3) are met or the agreement is covered by an EC block exemption regulation.
- 4.7** However, the OFT and the Regulators are permitted under Article 3(2) to apply national law which is stricter than Article 82 to unilateral conduct. In the United Kingdom the unilateral conduct of undertakings may, for example, be examined under the market investigation

provisions of the Enterprise Act 2002 (the Enterprise Act) (see paragraphs 4.13 to 4.15 below).

- 4.8** Article 3 does not, however, preclude the application of national law that predominantly pursues objectives different from those pursued by Articles 81 and 82. This means that the Regulators may still apply powers set out in their sector-specific legislation to agreements which are compatible with Community competition law provided they do so predominantly in pursuit of objectives different from that pursued by Article 81 and Article 82 of the Treaty (the protection of competition on the market). The interaction of Article 3 and national competition law is dealt with in more detail in the competition law guideline *Modernisation* (OFT442).

Exceptions in the Act for services of 'general economic interest'

- 4.9** In line with Article 86(2) of the EC Treaty, the Act provides, in Schedule 3, an exclusion from the Chapter I and Chapter II prohibitions:

- where an undertaking has either been entrusted with a service of general economic interest, or has the character of a revenue-producing monopoly (that is, an undertaking that has been granted monopoly powers by the State to raise money for the State)¹⁶, and
- insofar as the application of the prohibitions in the Act would obstruct the performance of the particular task assigned to the undertaking.

- 4.10** The OFT and the Regulators are required to apply these principles when applying the exclusion in Schedule 3.

- 4.11** The fact that the Act may not apply to certain activities of a regulated business in these circumstances does not, however, mean that the Regulators cannot apply their sectoral powers to those activities. Indeed it is precisely in these situations that the Regulators' ability to ensure services are available to consumers throughout the United Kingdom on reasonable terms through use of their sectoral powers is particularly relevant. Further information on the exclusions under the

¹⁶ For further details see competition law guideline Services of general economic interest exclusion (OFT421).

Act and Article 86(2) of the EC Treaty can be found in the competition law guideline *Services of general economic interest exclusion* (OFT421).

Regulators and the European Competition Network

4.12 The Regulators are designated as NCAs with the responsibility to apply Articles 81 and 82 in accordance with the provisions in the Modernisation Regulation in relation to their respective sectors. They are obliged to apply Community competition rules in close cooperation with the European Commission and other NCAs. To this end, the European Commission and designated competition authorities of the Member States have formed the European Competition Network (the ECN) which facilitates close cooperation in the enforcement of Articles 81 and 82 in the European Union. Further details on the ways in which the Regulators can participate in the work of the ECN can be found in the European Commission's *Notice on Cooperation within the Network of Competition Authorities*¹⁷ and the competition law guideline *Modernisation* (OFT442).

¹⁷ OJ C101, 27.04.04, p. 43.

Market investigation references

4.13 The Enterprise Act makes provision for a system of market investigations by the Competition Commission. Under the Enterprise Act, the OFT and the Regulators may make market investigation references to the Competition Commission (in the case of the Regulators, references may only be made in relation to their respective sectors). The purpose of these investigations is to inquire into markets where it appears that the structure of the market or the conduct of the suppliers or customers is harming competition. When making a reference, the OFT or the Regulator concerned must have reasonable grounds for suspecting that one or more features of a market prevents, restricts or distorts competition in relation to the supply or acquisition of goods or services in the United Kingdom (or a part of the United Kingdom).

4.14 The OFT or the Regulator concerned will, as a matter of policy, consider whether a matter which needs investigation might involve an infringement of Article 81, Article 82, the Chapter I prohibition or

the Chapter II prohibition before it considers whether to initiate a market study or make a market investigation reference to the Competition Commission.

- 4.15** Further details concerning these powers under the Enterprise Act can be found in the Enterprise Act guidance on *Market investigation references* (OFT 504) and in the competition law guideline *Modernisation* (OFT442).

Concurrent super-complaints

- 4.16** The Enterprise Act provides for a super-complaint to be made by a designated consumer body that any feature, or combination of features, of a market in the United Kingdom for goods or services is or appears to be significantly harming the interests of consumers. The Regulators with concurrent competition powers have a duty to respond to super-complaints made to them under the Enterprise Act if the complaint concerns a regulated sector in relation to which that Regulator has functions (as set out in the table in Part 2)¹⁸. The co-ordination of super-complaint duties will be based on policies agreed and applied through the CWP. Information on the super-complaint process can be found in the Enterprise Act guidance *Super-complaints: guidance for designated consumer bodies* (OFT 514).

¹⁸ The Enterprise Act 2002 (Super-complaints to Regulators) Order 2003, SI 2003/1368.

5 Confidentiality and disclosure of information

5.1 In the course of any investigation the OFT or the Regulator will indicate the purpose for which any requested document or information is required, and under which powers they are sought. Further detail on the information seeking powers is given in the competition law guideline *Powers of investigation* (OFT404).

Disclosure under the Modernisation Regulation

5.2 The power of all members of the ECN to exchange and use information which has been collected for the purpose of applying Article 81 or 82 is important to the functioning of the ECN. Regulators will fulfil their role as NCAs in relation to their sectors, as described in paragraph 4.12 above.

5.3 Information on the exchange and use of confidential information within the Network can be found in the European Commission's *Notice on Cooperation within the Network of Competition Authorities*¹⁹. Information on confidentiality and the disclosure of information can be found in the competition law guideline *Modernisation* (OFT442).

¹⁹ OJ C101, 27.04.04, p. 43.

5.4 The exchange between the OFT and the Regulators of information obtained by them under Part I of the Act is governed by Part 9 of the Enterprise Act rather than the Modernisation Regulation. Further details on Part 9 of the Enterprise Act are set out in paragraphs 5.5 and 5.6 below.

Confidentiality and disclosure under national law

5.5 The Enterprise Act sets out the requirements for safeguarding certain information and lays down the requirements that have to be met before public authorities, including the OFT and the Regulators, may disclose such information. These are set out in Part 9 of the Enterprise Act which applies to information which has been gathered for the purpose of the OFT's and the Regulators' Enterprise Act functions, and for the purposes of the OFT's and the Regulators' competition and consumer functions under specified legislation (including the Act). Further information on confidentiality and the disclosure of information can be found in the competition law guideline *Modernisation* (OFT442).

- 5.6** Where information has been obtained under Part I of the Act or under the Enterprise Act, its disclosure by a Regulator for sector-specific purposes is subject to the restrictions set out in Part 9 of the Enterprise Act rather than the provisions of any sector-specific legislation.

ANNEXES

A The competition act 1998 (concurrency) regulations 2004

The Secretary of State, in exercise of the powers conferred on her by section 54(4), (5) and (6) and section 71 of the Competition Act 1998, hereby makes the following Regulations:

Citation and Commencement

A.1 These Regulations may be cited as the Competition Act 1998 (Concurrency) Regulations 2004 and shall come into force on 1st May 2004.

Interpretation

A.2 In these Regulations -

- (a) 'the Act' means the Competition Act 1998;
- (b) 'Article 81(1)' means Article 81(1) of the treaty establishing the European Community;
- (c) 'Article 82' means Article 82 of the treaty establishing the European Community;
- (d) 'the Chapter I prohibition' has the meaning given in section 2(8) of the Act;
- (e) 'the Chapter II prohibition' has the meaning given in section 18(4) of the Act;
- (f) 'competent person' means the OFT or a regulator;
- (g) 'OFT' means the Office of Fair Trading;
- (h) 'OFT's rules' means rules made by the OFT and approved by an order made by the Secretary of State in accordance with section 51 of the Act;

- (i) 'Part 1 functions' means any functions of the OFT under the provisions of Part 1 of the Act which can be exercised by a regulator;
- (j) 'prescribed functions' means –
 - (i) the exercise by any competent person of any of the functions of the OFT under the provisions of sections 25 to 29, sections 31A to 31C, section 31D(8) or section 31E of the Act or Schedule 6A to the Act;
 - (ii) making a decision, as defined in section 46(3) of the Act;
 - (iii) exercising functions under paragraph 4 of Schedule 1 or paragraph 2 of Schedule 3 to the Act or in accordance with an order made pursuant to section 50 of the Act;
- (k) 'regulator' means any regulator mentioned in section 54(1) of the Act; and
- (l) 'working day' means a day which is not –
 - (i) Saturday,
 - (ii) Sunday,
 - (iii) Christmas Day,
 - (iv) Good Friday, or
 - (v) a day which is a bank holiday under the Banking and Financial Dealings Act 1971 in any part of the United Kingdom.

Information

- A.3** For the purpose of determining which competent persons have jurisdiction to exercise Part 1 functions in relation to a case a competent person may send to any other competent person details of any information he receives that an infringement of -

- (a) the Chapter I prohibition,
 - (b) the Chapter II prohibition,
 - (c) the prohibition in Article 81(1), or
 - (d) the prohibition in Article 82,
- may have taken place.

Determination of the exercise of prescribing functions

- A.4** (1) If a competent person proposes to exercise any of the prescribed functions in relation to a case and he considers that another competent person has or may have concurrent jurisdiction to exercise Part 1 functions in relation to that case, he shall inform that other competent person of his intention to exercise prescribed functions in relation to that case.
- (2) Where a competent person has informed another competent person of his intention to exercise prescribed functions in accordance with paragraph (1) in relation to a case all such competent persons (together 'the relevant competent persons') shall agree who shall exercise prescribed functions in relation to that case.
- (3) When agreement has been reached in accordance with paragraph (2), the case shall be transferred to the competent person who is to exercise prescribed functions in relation to that case and the OFT shall as soon as practicable inform in writing the relevant competent persons which competent person is to exercise prescribed functions in relation to the case.

Dispute

- A.5** (1) If the relevant competent persons are not able to reach agreement in accordance with regulation 4(2) within a reasonable time, the OFT shall inform the Secretary of State in writing.

- (2) Any relevant competent person may make representations in writing to the Secretary of State no later than the date upon which the OFT informs the Secretary of State in accordance with paragraph (1) of the failure to reach agreement.
- (3) The Secretary of State shall within 8 working days of receipt of a communication made in accordance with paragraph (1) –
 - (a) determine which competent person shall exercise prescribed functions in relation to the case and direct that the case shall be transferred to that competent person; and
 - (b) inform in writing all relevant competent persons which competent person is to exercise jurisdiction in relation to the case and the date of transfer of the case.
- (4) In making a determination in accordance with paragraph (3)(a) the Secretary of State shall take into consideration any representations made in accordance with paragraph (2).

Avoidance of double jeopardy

- A.6** (1) Where two or more competent persons may have concurrent jurisdiction in relation to a case, no competent person shall exercise any prescribed functions in relation to that case before agreement has been reached in accordance with regulation 4(2) or a determination has been made in accordance with regulation 5(3)(a) as to which competent person is to exercise prescribed functions in relation to a case.
- (2) Subject to regulation 7, once agreement has been reached in accordance with regulation 4(2) or a determination has been made in accordance with regulation 5(3)(a) as to which competent person is to exercise prescribed functions in relation to a case, no other competent person shall exercise any of the prescribed functions in relation to that case.

Transfer

- A.7** (1) Subject to paragraphs (2) and (4), a competent person who has exercised any Part 1 functions in relation to a case ('the transferor') may agree with another competent person who has concurrent jurisdiction to exercise Part 1 functions in relation to that case ('the transferee') to transfer the case to the transferee.
- (2) Subject to paragraph (4), if the transferor and the transferee propose to agree a transfer in accordance with paragraph (1), the transferor shall notify in writing the undertaking which is the subject of the exercise of Part 1 functions in that case of the proposed transfer and shall invite the recipient of the notice to make written representations upon the proposal within seven working days of the date of that notice.
- (3) Subject to paragraph (4), if a transfer is agreed in accordance with paragraph (1), the transferor shall inform the undertaking which is the subject of the exercise of Part 1 functions in that case in writing that the transferee is to exercise jurisdiction in relation to the case from the date of the transfer and of the reasons for this transfer.
- (4) The transferor shall not be under any obligation to notify an undertaking in accordance with paragraph (2) or to inform an undertaking in accordance with paragraph (3) if –
- (a) the transfer takes place before agreement has been reached in accordance with regulation 4(2) or a determination has been made in accordance with regulation 5(3)(a) as to which competent person is to exercise prescribed functions in relation to a case; or
 - (b) the transferor has not informed that undertaking that he has exercised Part 1 functions in relation to the case.

Use of staff

- A.8** (1) A competent person who wishes to exercise Part 1 functions in relation to a case ('the appointor') may appoint an officer of another competent person ('the appointee') to act as his officer in relation to that case provided that the competent person of which the appointee is an officer gives his written consent to the appointment on or prior to the date upon which the appointment commences.
- (2) An appointee shall be an officer of the appointor for the purposes of sections 27 to 29 inclusive of the Act.
- (3) Any act or omission of the appointee within the terms of the appointment shall be deemed to be an act or omission of the appointor.

Service of notices

- A.9** Any notice to be served on any person under regulation 7 may be served by post, and a letter containing that notice shall be deemed to be properly addressed if it is addressed to that person at its registered office or last known residence or last known place of business in the United Kingdom.

Revocation

- A.10** The Competition Act 1998 (Concurrency) Regulations 2000 are hereby revoked.

Gerry Sutcliffe,

Parliamentary under Secretary of State for Employment Relations,
Competition and Consumers, Department of Trade and Industry

6th April 2004

B Competition law terms of reference for the concurrency working party

Introduction

- B.1** The Competition Act 1998 (the Act) is applied and enforced by the Office of Fair Trading (OFT) and, in relation to the regulated utility sectors, concurrently with Office of Communications (OFCOM), 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) (the Regulators).
- B.2** The Concurrency Working Party (CWP) was formed in 1997. Membership consists of the OFT and the Regulators, and includes Postcomm who sits as an observer but does not have concurrent powers. The CWP is chaired by a representative of the OFT.
- B.3** The aims of the CWP are:
- to facilitate, to the greatest extent possible, a consistent approach by the Regulators and the OFT in the exercise of their functions and powers under the Act (including their functions and powers in relation to the application of Article 81 and Article 82),
 - to consider the practical working arrangements between them,
 - to provide a vehicle for the discussion of matters of common interest, and the sharing of information where appropriate and where legally permitted, and
 - to co-ordinate the provision of advice and information on the application of Article 81, Article 82, the Chapter I prohibition and the Chapter II prohibition to the public.
- B.4** This document represents a commitment by the members of the CWP to work together to achieve the aims outlined. It does not in any way fetter the discretion of the OFT or the Regulators in the exercise of their functions under the Act.

Legal requirements

B.5 It is desirable that powers to apply Article 81, Article 82, the Chapter I prohibition and the Chapter II prohibition should be exercised so as to ensure consistency of approach in casework.

B.6 The Modernisation Regulation¹ imposes the following legal requirements:

- **Primacy of Community law** - In applying Articles 81 and 82 the OFT and the Regulators are bound by the principle of primacy of Community law. This means that the OFT and the Regulators must follow the case law of the European Court interpreting Community legislation. As a consequence an agreement or conduct prohibited by Article 81 or Article 82 cannot be permitted under national law.
- **Article 3 and national competition law** - Article 3 of the Modernisation Regulation makes further provision to ensure consistency. Where the OFT and the Regulators apply national competition law to agreements which may affect trade between Member States, they must also apply Article 81. Where they apply national competition law to conduct prohibited by Article 82 they must also apply Article 82. However, Article 3 does not preclude the application of national law that predominantly pursues objectives different from those pursued by Articles 81 and 82.
- **Article 16(2): Consistency with European Commission decisions** - The Modernisation Regulation contains further provisions to ensure consistency in the application of Community law by national competition authorities (NCAs). Article 16(2) of the Modernisation Regulation provides that where the European Commission has taken a decision on an agreement or conduct under Article 81 or Article 82, NCAs (including the OFT and the Regulators) cannot take a decision under Article 81 or Article 82 in respect of the same agreement or conduct which would run counter to the decision adopted by the European Commission.

¹ Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the EC Treaty (OJ L1, 4.1.03, p1)

B.7 The Act itself imposes the following legal requirements.

- **Section 60: Consistency with EC law.** So far as is possible, the OFT and the Regulators are required by section 60 of the Act to deal with questions arising under Part I of the Act in relation to competition in a manner which is consistent with the treatment of corresponding questions under EC competition law.
- **Section 52: Provision of advice and information.** The OFT is required by section 52 of the Act to prepare and publish general advice and information about the application and enforcement of the Chapter I prohibition, the Chapter II prohibition, Article 81 and Article 82. In preparing such advice or information the OFT is required to consult the Regulators. The Regulators can also provide advice or information under section 52 and must consult the OFT and other Regulators when doing so.

Disclosure of Information: Article 12 of the Modernisation Regulation:

B.8 Article 12 of the Modernisation Regulation gives the European Commission and designated NCAs (which include the OFT and the Regulators) the power to provide one another with, and use in evidence, any matter of fact or law, including confidential information for the purposes of applying Articles 81 and 82 (and for the purposes of applying national competition law where national competition law is applied in the same case and in parallel with EC competition law and does not lead to a different outcome), subject to a number of safeguards.

B.9 Disclosure between the OFT and the Regulators of information collected by them under Part I of the Act is governed by Part 9 of the Enterprise Act 2002 (the Enterprise Act). Further details on Part 9 of the Enterprise Act are set out below.

Disclosure of information: Part 9 of the Enterprise Act

B.10 The Enterprise Act imposes restrictions on the disclosure of information by a public authority in connection with the exercise of functions it has under or as a result of the competition and consumer

legislation identified in section 238(1) of the Enterprise Act. The OFT and the Regulators need to comply with these restrictions.

- B.11** When members of the CWP disclose information obtained under or as a result of the exercise by the OFT or the Regulators of any of their functions under the legislation referred to in section 238(1) of the Enterprise Act, and which relates to the affairs of any living individual or to any business of an existing undertaking, they will need to be satisfied that one of the gateways in Part 9 of the Enterprise Act applies, unless either that disclosure is made under a separate power or duty of disclosure that exists apart from Part 9, such as Article 12 of the Modernisation Regulation, or the information is already lawfully in the public domain.
- B.12** In any event, unless the information is lawfully in the public domain already, members of the CWP will also need to ensure that they have regard to the matters in section 244 of the Enterprise Act before making the disclosure.

The Competition Act 1998 (Concurrency) Regulations 2004 (the Concurrency Regulations)

- B.13** The Concurrency Regulations contain provisions for the co-ordination of the performance of concurrent functions under the Act by the OFT and the Regulators. In particular, the Concurrency Regulations require the OFT and the Regulators:
- to agree who shall exercise prescribed functions in relation to a case,
 - to refer the case to the Secretary of State, where agreement cannot be reached, in order that he may determine the matter, and
 - to agree when they wish to transfer a case between each other.

Areas of cooperation

- B.14** The OFT and the Regulators believe that the CWP is a means of facilitating compliance with the requirements of the Act and to meet the common objective of achieving, as far as possible, a consistent

approach to casework under Articles 81 and 82 and the prohibitions in the Act. The OFT and the Regulators recognise that there are benefits to be derived from cooperation and consistency of approach, where possible, in administering the legal framework. The OFT and Regulators also recognise the benefits to be derived from cooperation between members of the European Competition Network.

Determining who shall exercise jurisdiction on a case

- B.15** The Concurrency Regulations anticipate cooperation between the OFT and the Regulators in determining who should exercise jurisdiction in cases under Article 81, Article 82, the Chapter I prohibition and/or the Chapter II prohibition. It is not practical for the CWP to deal with day to day administrative matters. Appropriate procedures will be agreed to ensure compliance with the Concurrency Regulations and facilitate efficient case handling, e.g. by identifying relevant contacts to ensure there will be no undue delays in processing cases, agreeing timetables for action where appropriate, and providing for written confirmation where a case is transferred under the Concurrency Regulations.
- B.16** Any Regulator receiving a complaint or initiating an investigation in cases under Article 81, Article 82, the Chapter I prohibition and/or the Chapter II prohibition will have responsibility for identifying whether there is concurrent jurisdiction and contacting the OFT and any other Regulator who may have concurrent jurisdiction.
- B.17** A case under Article 81, Article 82, the Chapter I prohibition and/or the Chapter II prohibition will be dealt with by whichever of the OFT or the relevant Regulator(s) is better, or best, placed to do so. In general, an agreement or conduct which falls within the industry sector of a Regulator will be dealt with by that Regulator, although in some cases the OFT may deal with such a case. The factors to be taken into account in reaching a decision include:
- the sectoral knowledge of a Regulator,
 - whether the case affects more than one regulatory sector (for these purposes gas and electricity are considered to be one regulatory sector),

- any previous contacts between the parties or complainants and the OFT or a Regulator, and
- any recent experience in dealing with any of the undertakings or similar issues which may be involved in the proceedings.

B.18 Discussions will take place initially between the OFT and the relevant Regulator(s) with a view to determining who has jurisdiction in a case under Article 81, Article 82, the Chapter I prohibition and/or the Chapter II prohibition and who shall exercise it. Such agreement will be confirmed in writing between the OFT and the relevant Regulator(s). Where agreement cannot be reached between the OFT and the relevant Regulator(s) the CWP will have an advisory role in assisting them to agree the matter amongst themselves.

B.19 Whilst not obliged under the Concurrency Regulations, the OFT and the Regulators will always consult with each other when considering a request for an Opinion where it appears they may have concurrent jurisdiction. The factors in Term 17 above will be taken into consideration when deciding who is better or best placed to deal with a request where there appears to be concurrent jurisdiction.

Information sharing

B.20 The CWP will share information with regard to general policy and precedent relating to the application and interpretation of Articles 81 and 82 and the prohibitions in the Act in order to facilitate a consistent approach and compliance with the provisions in the Modernisation Regulation and section 60 of the Act. At the bi-monthly CWP meeting the OFT and each Regulator will provide wherever possible and in an appropriate form, having regard to any legal restrictions on disclosure, a brief summary of policy issues arising from current cases. Where a case raises new issues of general policy or of precedent in respect of the application or interpretation of Articles 81 or 82 in the United Kingdom or the Act generally, the CWP member who is dealing with the case will endeavour to bring these issues to the attention of the CWP for discussion before they are decided. Where a case has been decided the CWP may wish to discuss any issues of common interest arising from the case.

- B.21** The OFT will produce an internal monthly bulletin which includes information on relevant United Kingdom cases, European Commission and European Court cases, references to articles and publications of note, knowledge of which will assist consistency and compliance with the provisions in the Modernisation Regulation and section 60 of the Act. Members of the CWP may contribute to the bulletin and issues arising may be discussed at CWP meetings.
- B.22** Internal case handling procedures of the OFT and the Regulators will be influenced by caseloads and the resources available. However, information relating to procedures will be shared and common procedures may be used where that is considered appropriate.
- B.23** The OFT and the Regulators have between them considerable knowledge, experience, and expertise across a wide range of sectors and this should be shared where appropriate and possible. The particular sectoral knowledge of Postcomm is noted in this respect.
- B.24** Members of the CWP may at their discretion identify relevant cases that raise issues which could be usefully shared with the CWP, e.g. the reasons why a Regulator has dealt with a case under the Act rather than under its sector legislation.

General advice and information

- B.25** A consistent approach is desirable in respect of general advice or information which is published by the OFT or a Regulator.
- B.26** In the case of general advice or information which falls under section 52 of the Act, consultation amongst the OFT and the Regulators will take place through the CWP. The text will be circulated for discussion at a CWP meeting and comments invited. The OFT and the Regulators will aim to reach agreement on the text of such advice or information prior to publication.
- B.27** What constitutes advice or information falling under section 52 of the Act will need to be determined on a case by case basis but will normally include:

- the series of guidelines which have been produced by the OFT and the Regulators. The form and content of these are normally agreed by the CWP prior to publication. Where it is necessary to revise the existing guidelines and to devise new ones, this will also fall under section 52,
- additional advice produced by the OFT or the Regulators in the form of guidance booklets or leaflets which deal generally with the application or enforcement of Article 81, Article 82, the Chapter I prohibition and/or the Chapter II prohibition, and
- publications which make a new statement about the application or enforcement of Article 81, Article 82, the Chapter I prohibition and/or the Chapter II prohibition, e.g. about a development in EC case law, or which deviate from advice or information which has already been published.

B.28 Where the OFT or a Regulator is preparing a new publication which includes general advice or information which has previously been published (e.g. as part of one of the guidelines) this will not fall under section 52. However, the CWP should, so far as is practicable, be invited to comment on the draft. It would be helpful in such cases if the CWP could be made aware in advance of the thinking behind the publication, its target audience, and the likely messages in any documentation. In the case of general advice and information which falls outside section 52, consideration should be given as to whether it would be appropriate to refer the matter to a CWP meeting for discussion.

B.29 The time agreed for comment needs to allow for the complexity of the matter, the length of the document, and the timescales for publication. Before the document is circulated it should be checked for consistency with the guidelines and specific areas highlighted where comments might be appropriate with reasons given as to why this is the case. In the case of general advice or information which falls outside section 52, consideration should be given as to whether it would be appropriate to refer the matter to a CWP meeting for discussion.

Working arrangements

- B.30** The CWP will normally meet bi-monthly and, to aid efficient handling of business, attendance will generally be limited to one or two persons from each authority. There will be flexibility to ensure that additional meetings to deal with specific issues can be called at short notice where necessary. Ad hoc groups may be formed where appropriate.
- B.31** Cooperation on training programmes is desirable to aid liaison and to make effective use of resources. Common training needs may be identified and proposals made to address them, where appropriate. In principle members will aim to make any relevant in-house training they develop available to each other's staff.
- B.32** The use by the OFT or a Regulator of the staff of another Regulator or the OFT is provided for in the Concurrency Regulations and is supported as an aid to effective case handling through shared knowledge and expertise, e.g. to assist the carrying out of on-site investigations.
- B.33** Some common performance targets for handling complaints and enquiries may be agreed in the light of experience where practicable. Publication of targets is at the discretion of the individual members of the CWP.

Competition law guidelines

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

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

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