
Liaison on competition matters

18 December 2003

This paper summarises how the OFT and Ofcom will work together when Ofcom gains its full competition powers under the Communications Act 2003. The OFT and Ofcom anticipate that, by setting out the arrangements for liaison in future, they can ensure a productive working relationship, to the benefit of consumers and other stakeholders. This summary is published to ensure transparency and to assist those wishing to raise competition issues with either body.

This paper covers the following areas in which the OFT and Ofcom will be working together:

- enforcement of the Chapter I and Chapter II prohibitions of the Competition Act 1998 and, from 1 May 2004, Articles 81 and 82 EC Treaty
- exercise of market investigation and reference powers under the Enterprise Act 2002, and
- other duties covered by the Communications Act regime.

Competition Act Enforcement

Ofcom's powers

Ofcom will have the power to enforce the Competition Act against parties to anticompetitive agreements (including decisions or concerted practices) or engaged in conduct abusing a dominant position, in relation to 'activities connected with communications matters'. This power is to be exercised concurrently with the OFT. Under existing Competition Act concurrency procedures, it is generally assumed that agreements or conduct relating to the sector covered by a concurrent regulator will be dealt with by that regulator. This principle will apply to Ofcom.

Under the Communications Act, communications matters include the provision of electronic communications networks and services and broadcasting and related matters. The scope of Ofcom's jurisdiction for electronic communications networks and services will be broadly similar to the competition jurisdiction currently held by Oftel. Ofcom's jurisdiction also encompasses competition issues relating to the allocation, use or trading of spectrum, in so far as these activities are connected with communications matters. In relation to broadcasting and related matters, the scope of activities counting as broadcasting is clear. In determining what activities may be viewed as 'related matters', there will clearly be borderline cases. When such cases arise in the future, the OFT and Ofcom anticipate discussing them between themselves on a case by case basis with a view to determining which authority is better placed to investigate whether there has been an infringement of the Competition Act, in accordance with normal concurrency procedures.

Concurrency procedures

Rules are already in place to co-ordinate regulators' exercise of concurrent jurisdiction under the Competition Act. These rules are primarily designed to ensure that only one competent authority may launch a formal Competition Act investigation into the same conduct. Further information on the operation of concurrency procedures is provided in the OFT's concurrency guidelines.

In practice, the OFT's first step after receiving a complaint concerning an agreement or conduct relating to a sector covered by a concurrent regulator is to contact that regulator to discuss whether the regulator has an interest in the case. If it is decided, following such a discussion, that the regulator is better placed than the OFT to undertake an initial investigation of the complaint, it is passed across and the complainant informed accordingly. This approach will be adopted for cases concerning sectors covered by Ofcom.

From 1 May 2004, the OFT and, with respect to its sectors, Ofcom will gain powers to apply Articles 81 and 82 EC Treaty. The Concurrency Regulations will apply in determining which of the OFT and Ofcom will investigate a case falling under Community competition law, where a UK authority is considered well placed to deal with the case.

Transitional arrangements

Existing cases

The OFT is currently investigating a number of cases concerning conduct that could be viewed as relating to 'communications matters'. The OFT will continue to investigate these cases after December this year and will be responsible for any final decision on whether or not the Competition Act has been infringed.

Cases commenced after 29 December

These will be dealt with in accordance with normal concurrency procedures, as outlined above.

Notifications

The arrangements for the handling of notifications by concurrent regulators differ from those concerning the handling of complaints, in that all such notifications must be sent to the OFT in the first instance, after which the OFT must forward a copy to any concurrent regulator whose sector is affected by the notified conduct. Should the OFT receive a notification after 29 December 2003 that relates to communications matters, it will therefore be obliged to forward a copy to Ofcom. Should the OFT receive such a notification before that date, it will inform Ofcom that it has received it and, to the extent possible, inform Ofcom about its subject matter and meet Ofcom to discuss it, if requested to do so.

Ongoing liaison

Ofcom already sits on the Concurrency Working Party (CWP), as an observer. From 29 December, Ofcom will participate in the CWP as a full member. Since 1998, the OFT has held regular meetings with representatives of the ITC and Oftel (together with the OFT, known as the Group of 3 or G3) to discuss various issues of common interest and to co-ordinate competition policy in the communications area. Since April 2003, when Ofcom started attending these meetings, they have been referred to as G4 meetings. This arrangement, which has worked well, effectively came to an end with the last G4 meeting on 10 December.

The OFT and Ofcom recognise that some form of ongoing liaison between the two bodies will be valuable and on that basis will continue to hold bilateral liaison meetings on competition issues on a regular basis.

Enterprise Act investigations and references

The Enterprise Act permits the OFT to refer a market to the Competition Commission for further investigation, by means of a market investigation reference, if it 'has reasonable grounds for suspecting that any feature, or combination of features, of a market ... prevents, restricts or distorts competition'. Such references are prepared by the OFT's Markets and Policy Initiatives Division (MPI).

Ofcom will have the power to make market investigation references relating to 'commercial activities connected with communications matters'. The OFT and Ofcom will consult each other before exercising concurrent functions in this area, as required by legislation.

Other duties

BBC independent productions monitoring

The OFT's duty to report on the BBC's compliance with its duty to commission at least 25 per cent of qualifying programmes from independent producers will end on 29 December. Although the BBC will be under a similar duty after that date, compliance will be monitored by Ofcom, rather than the OFT. The OFT published its last report on the BBC's compliance with this duty, for the year 1 April 2002 to 31 March 2003, on 30 October. To enable a smooth transition to the Ofcom regime, Ofcom will prepare and publish the next report, covering the period from 1 April 2003 to 31 March 2004.

Channel 3 networking arrangements

At present, the OFT has a role in reviewing the competition impact of Channel 3 networking arrangements. Primary responsibility for such reviews will pass to Ofcom when the Communications Act comes into force. The OFT will retain some involvement, however, as it must be consulted before Ofcom makes any decision as to whether networking arrangements meet the Communications Act's competition test.

Channel 3 news provision

At present, the DTI are required to seek the OFT's advice before deciding to remove any agreement relating to Channel 3 news provision from the scope of the Competition Act's Chapter I prohibition. In addition, the OFT and DTI are obliged to notify each other before taking certain actions affecting such agreements. Under the Communications Act, the OFT and Ofcom will have joint responsibility in this area.