



# The Major Provisions

# Contents

|  | page |  | page |
|--|------|--|------|
| 1  | 2    | 8  | 13   |
| What this guideline is about                                 | 2    | Complaints                                       | 13   |
| Terms used in the guidelines                                 | 3    | Procedure  | 13   |
| 2  | 3    | Confidentiality of complaints                    | 13   |
| The Prohibitions   | 3    | 9  | 14   |
| 3  | 4    | Confidentiality and disclosure<br>of information | 14   |
| The Chapter I Prohibition -<br>anti-competitive agreements   | 4    | 10   | 15   |
| The prohibition  | 4    | Fees   | 15   |
| Appreciable effect   | 5    | 11   | 15   |
| Exemptions   | 5    | Investigation and<br>enforcement                 | 15   |
| 4  | 6    | Powers of investigation                          | 15   |
| The Chapter II Prohibition -<br>abuse of a dominant position | 6    | Production of documents and<br>information       | 15   |
| The prohibition  | 6    | Entry without a warrant                          | 16   |
| Dominance and market definition                              | 7    | Entry with a warrant                             | 16   |
| Exemptions   | 7    | Offences   | 17   |
| 5  | 7    | Enforcement powers                               | 17   |
| Exclusions   | 7    | - Provisional decisions                          | 17   |
| 6  | 8    | - Infringement decision and<br>directions        | 17   |
| Community law  | 8    | - Interim measures directions                    | 18   |
| Section 60   | 8    | 12   | 19   |
| Direct application of<br>Community law                       | 9    | Consequences of Breach                           | 19   |
| Interrelationship between<br>Community law and the Act       | 9    | Penalties  | 19   |
| 7  | 10   | Immunity from penalties for<br>small businesses  | 19   |
| Procedures   | 10   | Other consequences of breach                     | 19   |
| Notification   | 10   | 13   | 20   |
| Notification forms   | 11   | The Fair Trading Act 1973                        | 20   |
| Public register  | 12   | 14   | 21   |
| Confidentiality  | 12   | The Competition<br>Commission and appeals        | 21   |
| Procedural rules   | 13   | Appealable decisions                             | 21   |
|  |      | Appeals  | 21   |
|  |      | Third party appeals                              | 22   |



# 1 What this guideline is about

- 1.1 Competition lies at the heart of any successful market economy and is crucial to the protection of consumers' interests and the efficient allocation of resources. It is a process whereby undertakings constantly try to gain an advantage over their rivals and win more business by offering more attractive terms to customers or by developing better products or more effective ways of meeting their requirements. Competition has several dimensions of which price is only one, albeit in many markets the most important. It encourages the development of new or improved products or processes and enhances economic growth and living standards. The Director General will apply and enforce the provisions of the Competition Act 1998 ('the Act') in order to ensure that the competition process is unhindered by anti-competitive activity.
- 1.2 The Act replaces or amends legislation including the Restrictive Trade Practices Act 1976, the Resale Prices Act 1976 and the majority of the Competition Act 1980. The old legislation was unduly technical, and did not contain sufficient sanctions against genuinely harmful anti-competitive conduct, while unnecessarily catching many innocuous agreements. It did not prohibit any particular kinds of conduct and had become a burden for businesses and cumbersome for the authorities to operate.
- 1.3 The new legislation introduces two prohibitions: one of agreements (whether written or not) which prevent, restrict or distort competition and which may affect trade within the United Kingdom ('the Chapter I prohibition'); the other of conduct by undertakings which amounts to an abuse of a dominant position in a market and which may affect trade within the United Kingdom ('the Chapter II prohibition').
- 1.4 This guideline gives an overall summary of the Act's provisions. Parts 2, 3 and 4 explain the basic elements of the Chapter I and Chapter II prohibitions which are based on Articles 85 and 86 of the EC Treaty<sup>1</sup> (Articles 85 and 86, respectively). Part 5 of this guideline describes the exclusions provided for in the Act.
- 1.5 Section 60 of the Act sets out principles which provide for the United Kingdom authorities to handle cases in such a way as to ensure consistency with Community law. This is considered in more detail in part 6 of this guideline.
- 1.6 Explanations of the procedure for notifications and for complaints can be found in parts 7 and 8 and a description of the provisions relating to confidentiality and disclosure of information appears in part 9. The Act provides for certain fees to be charged by the Director General, as explained in part 10. The powers under the Act of investigation of undertakings believed to be involved in anti-competitive activities, and of enforcement, are described in part 11 of this guideline. The consequences of breach and the power to impose financial penalties on undertakings is discussed in part 12. Part 13 explains the continuing relevance of the Fair Trading Act 1973 and the new Competition Commission established by the Act and the appeal system is discussed in part 14.

<sup>1</sup> To be renumbered Articles 81 and 82 following ratification of the Treaty of Amsterdam.

- 1.7 Other guidelines provide more details on specific areas. The guidelines will be revised and reissued from time to time and new ones may be published. The current list of guidelines appears at the back of this guideline.
- 1.8 The two prohibitions come into force on 1 March 2000. Until then, the legislation which the Act replaces continues to operate in a modified form. In particular, under the Restrictive Trade Practices Act 1976 all new agreements except those involving price-fixing are non-notifiable. After 1 March 2000, many existing agreements which complied with previous competition legislation will benefit from further transitional periods (in most cases one year, but five years for some) during which the prohibition on anti-competitive agreements will not apply. Agreements which are the subject of a direction under section 21(2) of the Restrictive Trade Practices Act benefit from an exclusion from the prohibition on anti-competitive agreements (see part 5 below). Further details of the transitional provisions are given in the Competition Act guideline [Transitional Arrangements](#).

### Terms used in this guideline

- 1.9 Agreement covers agreements between undertakings, decisions by associations of undertakings and concerted practices. These may be spoken, as well as written, and need not necessarily be legally binding (for example unwritten 'gentlemen's agreements'). It may cover co-operation without any agreement or decision.

Undertaking includes any natural or legal person capable of carrying on commercial or economic activities relating to goods or services, irrespective of its legal status. It includes companies, firms, businesses, partnerships, individuals operating as sole traders, agricultural cooperatives, trade associations and non-profit making organisations. A parent company and its subsidiaries will usually be treated as a single undertaking if they operate as a single economic unit, depending on the facts of each case.

These concepts are discussed further in the Competition Act guideline [The Chapter I Prohibition](#).

## 2 The prohibitions

- 2.1 The Chapter I and Chapter II prohibitions in the Act are based on Articles 85 and 86. Articles 85 and 86 continue to apply to agreements or conduct which may affect trade between EC Member States. The Act applies to agreements or conduct that affect trade within the United Kingdom. Issues arising in relation to the overlap between the United Kingdom and Community prohibitions are dealt with in the Competition Act guidelines [The Chapter I Prohibition](#) and [The Chapter II Prohibition](#).
- 2.2 The prohibitions in the Act apply to business in the same way as the Community models in Articles 85 and 86. As far as possible, agreements and practices which are prohibited under one regime are therefore prohibited under the other, and those that are permitted are permitted under both. The Act therefore provides for the United Kingdom authorities to handle cases in such a way as to ensure consistency with Community law (see part 6 below).



4

2.3 The Act has two main features:

- a prohibition of agreements between undertakings, decisions by associations of undertakings or concerted practices which have the object or effect of preventing, restricting or distorting competition in the United Kingdom (or a part thereof) and which may affect trade within the United Kingdom (the Chapter I prohibition).

The Chapter I prohibition is subject to certain exclusions and exemptions. Anti-competitive effects may occur without any clearly expressed or overt agreement and the prohibition therefore covers decisions by associations of undertakings, and concerted practices, whether written or not. The anti-competitive nature of the agreement is judged according to its effects on competition, or its objective, rather than its wording or form; and

- a prohibition of conduct by one or more undertakings which amounts to the abuse of a dominant position, in a market in the United Kingdom (or a part thereof), which may affect trade within the United Kingdom (the Chapter II prohibition).

The Chapter II prohibition is subject to certain limited exclusions. There is no possibility of an exemption. The prohibition is on the abuse of the dominant position: there is no prohibition on the holding or acquisition of a dominant position.

## 3 The Chapter I prohibition – anti-competitive agreements

### The Prohibition

- 3.1 The Chapter I prohibition covers agreements between undertakings that have the object or effect of preventing, restricting or distorting competition in the United Kingdom and which may affect trade within the United Kingdom, or a part thereof.
- 3.2 The Act gives examples of the sorts of agreements that will be caught by the Chapter I prohibition - those which:
- (a) directly or indirectly fix purchase or selling prices or any other trading conditions;
  - (b) limit or control production, markets, technical development or investment;
  - (c) share markets or sources of supply;
  - (d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
  - (e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.'

- 3.3 This list is not exhaustive and is for illustration only. More detailed examples of agreements which may be considered to be prohibited by the Act are given in the Competition Act guideline [The Chapter I Prohibition](#).

### Appreciable effect

- 3.4 An agreement will infringe the Chapter I prohibition only if it has as its object or effect an appreciable prevention, restriction or distortion of competition in the United Kingdom. This follows from established case law of the European Court which the Director General and the United Kingdom courts will be bound to follow under section 60 of the Act. Any agreement which does not have an appreciable effect on competition in the United Kingdom should not be notified to the Director General.
- 3.5 The Director General takes the view that an agreement will generally have no appreciable effect on competition if the parties' combined share of the relevant market does not exceed 25 per cent, although there will be circumstances in which this is not the case.
- 3.6 The Director General will, in addition, generally regard any agreement between undertakings which:
- directly or indirectly fixes prices or shares markets; or
  - imposes minimum resale prices; or
  - is one of a network of similar agreements which have a cumulative effect on the market in question
- as being capable of having appreciable effect even where the combined market share falls below the 25 per cent threshold. Further details on networks of agreements are given in the Competition Act guideline [Vertical Agreements and Restraints](#).
- 3.7 Even where the parties' combined market share is higher than 25 per cent, the Director General may find that the effect on competition is not appreciable. This will depend on other factors such as the content of the agreement and the structure of the market affected.
- 3.8 Further details on defining the relevant market are given in the Competition Act guideline [Market Definition](#) and further guidance on appreciability is given in the Competition Act guideline [The Chapter I Prohibition](#).

### Exemptions

- 3.9 The Act provides for exemption from the prohibition of agreements which satisfy certain exemption criteria. There are three kinds of exemption:
- an individual exemption may be granted in respect of an individual agreement where it can be shown to contribute to improving production or distribution, or to promoting technical or economic progress, and which allows consumers a fair share of the resulting benefit. Any restrictions contained in the agreement must be indispensable to the attainment of those objectives, and the overall agreement must not afford the possibility of eliminating competition in a substantial part of the products concerned. An agreement must be notified to the Director General in order to receive an individual exemption;



6

2 Agreements covering exclusive distribution, exclusive purchasing, motor vehicle distribution and servicing, specialization, research and development cooperation, franchises, technology transfer, and certain types of agreement in the insurance sector are currently the subject of European Commission block exemptions.

- a block exemption covers particular categories of agreements which meet the same exemption criteria as for an individual exemption. An agreement which falls within a block exemption will be exempt automatically and does not need to be notified in order to benefit from the exemption;
- a parallel exemption applies to agreements that benefit from individual or block exemption under Article 85(3)<sup>2</sup>. This exemption also covers agreements which fall within the terms of a European Commission block exemption but which are not subject to Article 85 because they do not affect inter-state trade. These are automatically exempted under the Act without the need for individual notification. In certain circumstances the Director General may impose conditions on a parallel exemption, or vary or cancel the parallel exemption, following procedures specified in the [Director General of Fair Trading's Procedural Rules](#).

- 3.10 Exemptions are time limited and may be granted subject to certain specified conditions or obligations. The exemption can have effect from a date which is earlier than that on which it is granted.

## 4 The Chapter II prohibition – abuse of a dominant position

### The prohibition

- 4.1 The Chapter II prohibition covers conduct by one or more undertakings which amounts to the abuse of a dominant position in a market in the United Kingdom (or a part thereof) which may affect trade within the United Kingdom.
- 4.2 The Act gives examples of conduct which may amount to abuse of a dominant position:
- '(a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;
  - (b) limiting production, markets or technical development to the prejudice of consumers;
  - (c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
  - (d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of the contracts.'
- 4.3 This list is not exhaustive and is for illustration only. More detailed examples of conduct which may be considered to be an abuse of a dominant position are given in the Competition Act guideline [The Chapter II Prohibition](#).

## Dominance and market definition

4.4 An undertaking will be dominant if it can behave ‘to an appreciable extent independently of its competitors and customers and ultimately of consumers’ when making commercial decisions<sup>3</sup>. This must be judged against the background of a properly defined relevant market through assessment of:

- the goods or services which form part of the market (the product market); and
- the geographic extent of the market.

4.5 Further details are available in the Competition Act guidelines [The Chapter II Prohibition and Market Definition](#).

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

## Exemptions

4.6 There is no possibility of exemption from the prohibition of abuse of a dominant position.

# 5 Exclusions

5.1 The Act provides for certain exclusions from the Chapter I and Chapter II prohibitions in Schedules 1 to 4. Broadly, these are as follows:

Agreements excluded from the Chapter I prohibition:

- an agreement which is subject to competition scrutiny under the Financial Services Act 1986, the Companies Act 1989, the Broadcasting Act 1990, or the Environment Act 1995;
- an agreement which is required in order to comply with, and to the extent that it is, a planning obligation;
- an agreement which is the subject of a direction under section 21(2) of the Restrictive Trade Practices Act 1976;
- an agreement for the constitution of a European Economic Area regulated market, to the extent that it relates to the rules made or guidance issued by that market;
- an agreement where it relates to production of or trade in ‘agricultural products’ as defined in the EC Treaty and in Council Regulation (EEC) No. 26/62, or to farmers’ co-operatives;
- an agreement which constitutes a designated professional rule, imposes obligations arising from such a rule, or constitutes an agreement to act in accordance with such rules.





Agreements and/or conduct excluded from the Chapter I and/or Chapter II prohibition:

- to the extent to which an agreement/conduct would result in a merger or joint venture within the merger provisions of the Fair Trading Act 1973 (see the Competition Act guideline [Mergers and Ancillary Restrictions](#) for further detail);
- an agreement/conduct which would result in a concentration with a Community dimension and thereby be subject to the EC Merger Regulation;
- an agreement/conduct to the extent to which it is made/engaged in to comply with a specified legal requirement;
- an agreement/conduct which is necessary to avoid conflict with international obligations and which is also the subject of an order by the Secretary of State;
- an agreement/conduct which is necessary for compelling reasons of public policy and which is also the subject of an order by the Secretary of State;
- an agreement/conduct which relates to a coal or steel product within the ECSC Treaty;
- an agreement made or conduct engaged in by an undertaking entrusted with the operation of services of general economic interest or of a revenue producing monopoly, insofar as the prohibition would obstruct the performance of those tasks (see the Competition Act guideline [General Economic Interest](#)).

5.2 The Secretary of State has the power to add, amend or remove exclusions in certain circumstances.

5.3 Section 50 provides for special treatment under the Chapter I prohibition for certain types of vertical agreements and agreements relating to land. It is intended that orders will be introduced whereby the Chapter I prohibition will not apply to agreements falling into either of these categories, although subject to a clawback provision (see the Competition Act guidelines [Vertical Agreements and Restraints](#) and [Land Agreements](#)).

## 6 Community law

### Section 60

6.1 Section 60 of the Act sets out certain principles with a view to ensuring that the United Kingdom authorities handle cases in such a way as to ensure consistency with Community law.

6.2 The Act therefore places a dual obligation on the United Kingdom authorities in considering and dealing with the application of the Chapter I and Chapter II prohibitions. First they must ensure that there is no inconsistency with either the principles laid down by the EC Treaty and the European Court or any relevant decision of the European Court. Secondly, the United Kingdom authorities must have regard to any relevant decision or statement of the

European Commission. In the Director General's view this is limited to decisions or statements which have the authority of the European Commission as a whole, such as, for example, decisions on individual cases under Articles 85 and 86. It would also include clear statements about its policy approach which the European Commission has published in the Annual Report on Competition Policy.

- 6.3 The obligation to ensure consistency applies only to the extent that this is possible, having regard to any relevant differences between the provisions concerned. This means that there will be certain areas where the Community principles will not be relevant. For example, the Community single market objectives designed to establish a European common market would not be relevant to the domestic prohibition system.
- 6.4 The provisions of section 60 apply to all United Kingdom authorities which are involved with the administration and enforcement of the Act: the Director General, the Competition Commission and the domestic courts.

### Direct application of Community law

- 6.5 Community law applies to anti-competitive agreements and abuses of a dominant position where they may affect trade between EC Member States. United Kingdom undertakings may, therefore, be subject to Community law as well as the prohibitions in the Act.
- 6.6 There is a considerable volume of Community law, and, while the relevant principles and provisions are reflected in this and other guidelines, the guidelines should not be regarded as a substitute for, or as an authoritative interpretation of, Community law.

### Interrelationship between Community law and the Act

- 6.7 There are provisions in the Act designed to reduce the possibility of investigation of the same issue by both the European Commission and by the Director General:
- agreements which are exempt from the Article 85 prohibition (whether under an individual exemption or by virtue of a European Commission block exemption Regulation) benefit from an automatic parallel exemption under the Act (see paragraph 3.9 above);
  - an agreement which has been notified to the European Commission is provisionally immune from penalties under the Act, in the same way as it is provisionally immune from European Commission fines, until the European Commission formally determines the matter or withdraws the immunity. This will be the case whether or not it has also been notified to the Director General under the Act. The Director General can, however, still investigate the agreement, notwithstanding that it has been notified to the European Commission.
- 6.8 The relevance of Community law to the operation of the Act is also discussed in the Competition Act guideline [The Chapter I Prohibition](#).



## 7 Procedures

### Notification

- 7.1 There is no statutory requirement to notify agreements or conduct to the Director General of Fair Trading. It is for the parties to an agreement or conduct themselves to take on the responsibility of ensuring that their agreements and conduct are lawful and to decide whether notification is appropriate in any particular case.
- 7.2 Notification may be made for guidance or for a decision, but cannot be made in respect of prospective agreements (that is, those into which the parties have not yet entered) or prospective conduct. Notification to the Director General of Fair Trading is necessary if a decision is sought granting an individual exemption. Notification provides the parties with provisional immunity from financial penalties in respect of an agreement from the time a valid notification is received by the Director General of Fair Trading. Provisional immunity from financial penalties does not apply to conduct notified under the Chapter II prohibition.
- 7.3 Guidance may indicate whether or not the agreement or conduct would be likely to infringe the relevant prohibition and, in the case of agreements only, whether or not it would be likely to be granted an exemption if application were made for a decision. Favourable guidance provides immunity from financial penalties. The Director General is not able to reopen a case once guidance has been given unless he has reasonable grounds for believing that there has been a material change of circumstance since the guidance was given; or he has a reasonable suspicion that materially incomplete, misleading or false information had been given; or a complaint is received from a third party, or, in respect of the Chapter I prohibition only, where one of the parties to the agreement applies for a decision with respect to the agreement.
- 7.4 A decision may be that the agreement or conduct is (i) outside the relevant prohibition (including those covered by an exclusion), or (ii) that it is prohibited, or (iii) in the case of agreements only, that it is exempt. The decision entails an assessment of the relevant market and of the individual circumstances of the case, including the economic effects, and any views received from third parties. The Director General is not able to reopen a case once a decision has been given that the prohibition has not been infringed unless he has reasonable grounds for believing that there has been a material change in circumstances or he has a reasonable suspicion that materially incomplete, misleading or false information had been given. Unlike guidance, a decision cannot be reopened simply because a complaint is made by a third party.
- 7.5 In all decision cases a notice is published containing details of the notification (the parties involved, a brief summary of the provisions of the agreement and the goods or services) on the register at the Office of Fair Trading and on the Office of Fair Trading's website on the Internet. This notice corresponds to the 250 word summary required in Part 4 of Form N. The Director General of Fair Trading will also publish a weekly gazette containing summaries of notifications for decisions as well as the results of notifications for decisions.

- 7.6 In the case of exemption decisions, the Director General will invite further comments by third parties before reaching a final decision. Such an invitation will be published on the register kept at the Office of Fair Trading and its website on the Internet, and will usually be published in the weekly gazette and in the relevant trade press or national press.
- 7.7 If, after a preliminary investigation, the Director General considers that it is likely that an agreement will infringe the Chapter I prohibition, and that it would not be appropriate to grant an individual exemption, he may make a provisional decision notifying the parties of his preliminary conclusion. The decision means that the provisional immunity from financial penalties which arose as a consequence of notification will be treated as never having applied in respect of that agreement. A similar procedure will be followed where the Director General considers that conduct will infringe the Chapter II prohibition (although in such cases there is no immunity from financial penalties to be removed).
- 7.8 If the Director General proposes to make an infringement decision, he will send the party or parties a written statement setting out the matters to which he has taken objection, the action he proposes to take and the reasons for it. The Director General must allow the person receiving the notice an opportunity to make representations to him. The person receiving the notice may request a meeting with officials of the office of the Director General to make oral representations to elaborate on his written representations already made in this regard. If requested, the Director General must give the party or parties or an authorised representative an opportunity to inspect the Director General's file relating to the proposed decision. The Director General's file will not include documents to the extent that they contain confidential information or the Director General's internal documents.

### Notification forms

- 7.9 All notifications must be made to the Director General of Fair Trading, even if the notification relates to a market which is subject to sectoral regulation. The original Form N plus two copies should be sent to the Office of Fair Trading. An original or certified copy of any relevant agreement and annexes plus two further copies should also be sent. Where the market is subject to the concurrent jurisdiction of another regulator or regulators, one further copy of the Form N (together with its annexes and copies of agreements) for each of those regulators must be sent to the Office of Fair Trading. A copy of the Form N (together with its annexes and copies of agreements) should also be sent direct to the relevant regulator(s). A notification will not be deemed incomplete simply because the notifier fails to send an additional copy of the form to or for a relevant regulator.
- 7.10 Form N contains the checklist of information which must be supplied to the Director General to enable him to determine a notification. It is available from the Director General of Fair Trading and from the regulators.
- 7.11 Form N is similar to Form A/B used for notifications to the European Commission. If a simultaneous notification is being made to the Director General of Fair Trading and to the European Commission, parties may choose to send three copies of the completed Form A/B and supporting documents (and a further copy, if information has been given in response to question 3.5 of Part 2 of Form N relating to concurrent jurisdiction, both to the



2

Director General of Fair Trading and direct to the relevant regulator) as well as the Form N. In this way it will be unnecessary for the parties to repeat information given on Form A/B in the Form N, although cross-references to the relevant information on Form A/B should be given. Further, information specific to the United Kingdom market will still be necessary (following the format in question 7.1 of Part 2 of Form N) to the extent that it has not been given on Form A/B, and should be provided separately. Simultaneous notifications to both the European Commission and to the Director General are, however, undesirable in terms of the compliance costs for undertakings and the duplication of effort by the competition authorities. Dual notifications are also dealt with in Part 7 of the Competition Act guideline [The Chapter I Prohibition](#).

- 7.12 In some limited circumstances, it may be possible to dispense with some of the information requirements on Form N. This should be discussed, in advance, with the Office of Fair Trading or the relevant regulator where appropriate.
- 7.13 The party notifying an agreement must take all reasonable steps to notify the other party or parties to the agreement that it is doing so. If a party is notifying conduct and the conduct in question is being carried on by more than one party, the party notifying should inform the other(s).

- 7.14 Notifications must be sent to:

The Office of Fair Trading  
Competition Act Notifications  
Field House  
Bream's Buildings  
London  
EC4A 1PR

The addresses of the regulators are set out at the front of this guideline.

### Public register

- 7.15 The Director General of Fair Trading will maintain a public register containing details of each notification for a decision and an indication of the outcome of the notification. The register will contain a summary of the nature and objectives of the agreement or conduct. Parties are asked at Part 4 of Form N to provide the details which will appear on the public register. The register will be accessible via the Internet and may be inspected at the Office of Fair Trading during office hours. Applications for guidance will not appear on the register.

### Confidentiality

- 7.16 Parties are asked in completing Form N to set out any information that they consider to be confidential in a separate annex and explain why it is to be so regarded. Confidentiality and disclosure of information are discussed further in part 9 below.

## Procedural rules

- 7.17 Fuller details relating to procedural matters are contained in, and reference should be made to, the [Director General of Fair Trading's Procedural Rules](#) which are available from the Office of Fair Trading.

# Complaints

## Procedure

- 8.1 Complaints alleging breach of either prohibition may be made to the Director General of Fair Trading or, if appropriate, to a regulator. Where the complaint relates to issues falling within the concurrent jurisdiction of a regulator, the complaint will usually be dealt with by that regulator rather than by the Office of Fair Trading.
- 8.2 There is no form to complete to make a complaint. Guidance about the information likely to be required is available from the Office of Fair Trading and each of the regulators. While the Office of Fair Trading or regulator will do its best to pursue even anonymous complaints, there may be practical difficulties in doing so where full information is not available and clarification cannot be sought from the complainant. Information should be given as to whether, for example, the complainant is a competitor or customer of the undertaking complained about or a final consumer, together with an explanation of the reasons for and details of the complaint (including, if appropriate, copies of relevant correspondence or notes of telephone conversations). If possible and appropriate, information should also be provided about the market concerned (its annual value, the undertakings involved in it, together with information about their market shares, and details of any recent independent studies of the market). Officials of the Office of Fair Trading or of one of the regulators will always be willing to discuss the situation before a complaint is made.
- 8.3 The Director General may pursue the complaint or he may consider that the complaint does not reveal a possible breach of either of the prohibitions. If he intends to take no further action he will inform the complainant as soon as possible and the matter will be closed or redirected to another body if appropriate. If the complaint does provide grounds for further investigation of a possible breach of the prohibitions, he may need to seek further information from the complainant before he can pursue the matter. If the Director General concludes that either of the prohibitions has been infringed, appropriate enforcement action will be taken.

## Confidentiality of complaints

- 8.4 If the Director General decides to pursue a complaint, he will seek further information from the undertaking which has been complained about. At that stage it may be necessary to divulge the source of the complaint in order to provide the undertaking with full details of the agreement or conduct about which the complaint has been made and in order to verify details. In some cases, a complainant may not want to be identified to the undertaking



4

which has been complained about and, in such cases, this should be made clear at the earliest opportunity. In addition, to facilitate the speedy handling of complaints, it is sometimes necessary for letters from complainants to be shown or copied to the target of the complaint. Complainants should therefore put any confidential material into an annex clearly marked as containing such material and explain why it should be treated as confidential. The amount of such material should be kept to a minimum to enable the complaint to be pursued effectively.

- 8.5 The Director General recognises the importance of complainants voluntarily supplying information and also recognises their interest in confidentiality. If he proposes to disclose any of the information in the annex he will, if it is practicable to do so, consult the person who provided the information. Confidentiality and disclosure of information is also discussed in part 9 below.

## 9 Confidentiality and disclosure of information

- 9.1 The Act imposes limits on the disclosure of information obtained under or as a result of Part I of the Act that relates to the affairs of any individual or to any particular business of an undertaking. This will not be limited to information supplied in the context of a notification for guidance or a decision, but will include information obtained during the course of an investigation by the Director General. The Act requires that such information is not to be disclosed during the lifetime of that individual or while the business is carried on unless consent has been obtained from the person who originally provided the information and, if different, the individual to whose affairs the information relates or the person carrying on the business to which the information relates.
- 9.2 There are several exceptions to this requirement. These include, but are not limited to, where the disclosure is:
- made for the purpose of facilitating the performance by the Director General of Fair Trading or by the regulators of any of their functions under Part I of the Act;
  - made for the purpose of facilitating the performance by the regulators of their functions under the sector-specific legislation;
  - made with a view to the institution of civil proceedings under Part I of the Act or otherwise in connection with such proceedings;
  - made for the purpose of criminal proceedings or the investigation of any criminal offence in any part of the United Kingdom;
  - made for the purpose of facilitating the performance of any of the European Commission's functions in respect of Community competition law; and
  - required to meet a Community obligation.

- 9.3 In addition, when the Secretary of State or the Director General is considering whether to disclose any information acquired under or as a result of Part I, he must have regard to the need for excluding, so far as is practicable, information the disclosure of which would in his opinion be contrary to the public interest.
- 9.4 The Director General and Secretary of State must also consider the need to exclude, so far as is practicable:
- commercial information which, if disclosed, would, or might, significantly harm the legitimate business interests of the undertaking to which it relates; or
  - information relating to the private affairs of an individual which, if disclosed would, or might, significantly harm his interests.
- 9.5 When considering whether information should be excluded, the Director General must also consider the extent to which the disclosure of such information is necessary for the purposes for which it is to be disclosed.

## 10 Fees

- 10.1 The Act provides for the Director General to charge fees for notifications and for other designated functions of the Director General. These will be explained further in a separate booklet.

## 11 Investigation and enforcement

### Powers of investigation

- 11.1 The Act gives the Director General powers to investigate suspected infringements of the prohibitions. This part sets out the powers that can be exercised by authorised officials if the Director General has reasonable grounds for suspecting that an undertaking is infringing either of the prohibitions. Details of related offences are also provided below. Further details are given in the Competition Act guideline [Powers of Investigation](#).

### Production of documents and information

- 11.2 The Director General or authorised officials can:
- require the production of any document or information that is specified or that falls within a specified category, which he considers relates to any matter relevant to the investigation, at a time and place, and in the manner or form, specified;
  - take copies of, or extracts from, any document produced;
  - require an explanation of any such document; and
  - if a document is not produced, require a statement as to where it can be found.





6

### Entry without a warrant

- 11.3 The Director General or authorised officials can enter premises without a warrant and:
- require the production of any document that he considers relates to any matter relevant to the investigation;
  - take copies of, or extracts from, documents produced;
  - require any person to provide an explanation of any document produced or to state where it may be found; and
  - require any relevant information held in a computer to be produced in a form in which it can be read and can be taken away.
- 11.4 At least two working days' written notice must be given to the occupier, unless the Director General has a reasonable suspicion that premises are, or have been, occupied by a party to the agreement or conduct under investigation, or if the investigating officer has been unable to give notice to the occupier, despite taking all reasonably practicable steps to do so. The notice must state the subject matter and purpose of the investigation and the nature of the offences committed if a person fails to comply when the powers of investigation are exercised (see paragraph 11.8 below).

### Entry with a warrant

- 11.5 On the authority of a High Court or Court of Session warrant, the Director General or authorised officials can enter premises without notice, subject to taking certain steps if the premises are unoccupied, using such force as is reasonably necessary, and search the premises, if there are reasonable grounds for suspecting that there are on the premises documents which:
- have previously been required to be produced by written notice or during an investigation without a warrant and which have not been produced;
  - could be required to be produced, but if they were so required, would be concealed, removed, tampered with or destroyed; or
  - could have been required to be produced during an investigation without a warrant but the investigating officer has been unable to enter the premises.
- 11.6 The warrant must specify the subject matter and purpose of the investigation and the nature of the offences committed if a person fails to comply when the powers of investigation are exercised (see paragraph 11.8 below).
- 11.7 Having obtained the warrant, the Director General or an authorised official can:
- search the premises and take copies of, or extracts from, any documents appearing to be of the kind in respect of which the warrant was granted;
  - take possession of any documents appearing to be of the kind in respect of which the warrant was granted if such action appears to be necessary for preserving the documents or preventing interference with them, or if it is not reasonably practicable to take copies of

the documents on the premises. They can also take any other steps which appear necessary in order to preserve the documents or prevent interference with them;

- require any person to provide an explanation of any such document or to state where it may be found; and
- require any relevant information held on computer to be produced in a form in which it can be read and can be taken away.

### Offences

11.8 Any person who:

- fails to comply with a requirement imposed under the investigation powers (subject to certain defences);
- intentionally obstructs an investigator carrying out an investigation;
- intentionally or recklessly destroys, disposes of, falsifies or conceals documents; or
- knowingly or recklessly supplies materially false or misleading information either to the Director General, or to another person, knowing that the information is to be used for the purpose of providing information to the Director General;

commits an offence.

11.9 No person can be required to produce a privileged communication, that is a communication:

- between a professional legal adviser (including an in-house legal adviser) and a client; or
- made in connection with or in contemplation of legal proceedings;

which would be protected from disclosure on grounds of legal professional privilege in the High Court or the Court of Session.

### Enforcement powers

#### Provisional decisions

11.10 Where the Director General has conducted a preliminary investigation of an application and considers that it is likely that an agreement will infringe the Chapter I prohibition, and that it would not be appropriate to grant an individual exemption, he may make a provisional decision notifying the parties of his preliminary conclusion (see paragraph 7.7 above).

#### Infringement decision and directions

11.11 Where the Director General proposes to make a decision that a breach of either prohibition has occurred (an infringement decision), he will send the party or parties a written statement setting out the matters to which he has taken objection, the action he proposes to take and the reasons for it. The Director General must allow the person receiving the notice an opportunity to make representations to him. The person receiving the notice may request a meeting with officials of the office of the Director General to make oral representations to elaborate on his written representations already made in this regard and, if he requests it,



11.12 will be given an opportunity to inspect the Director General's file on the case.

Where the Director General has made an infringement decision, he may give a direction to the parties concerned, or to such persons as he considers appropriate, to bring the infringement to an end. This may include a direction to modify or terminate the agreement, or to modify or cease the conduct in question. Any directions given by the Director General will set out the facts on which the direction is based and the reasons for it. The directions will be published on the register that will be kept at the Office of Fair Trading and on a website on the Internet. The Director General may seek a court order to enforce the direction if a person fails to comply. Breach of such an order would be punishable as a contempt of court.

#### 11.13 Interim measures directions

The Director General has the power to impose interim measures directions during an investigation. Interim measures directions may be imposed when the Director General has a reasonable suspicion that one of the prohibitions has been infringed and he considers that it is necessary for him to act as a matter of urgency to prevent serious, irreparable damage to a person or category of persons or to protect the public interest. He may give such directions as he considers appropriate, which may include modification or termination of the

11.14 agreement or conduct.

Before he gives an interim measures direction, the Director General must give written notice to the person(s) to whom he proposes to give the direction, indicating the nature of the proposed direction and stating the reasons for wishing to give it. The Director General must allow such person(s) the opportunity to make representations to him. They may request a meeting with the Director General to make oral representations to elaborate on their written representations already made in this regard. If requested, they will be given an opportunity to inspect the Director General's file on the case.

11.15 An interim measures direction may last for as long as the Director General continues to have a reasonable suspicion that there has been an infringement and until the investigation is completed. It can be replaced by final directions when the investigation is completed.

11.16 Powers of enforcement are addressed in more detail in the Competition Act guideline [Enforcement](#).

## 12 Consequences of breach

### Penalties

- 12.1 Financial penalties of up to a maximum of 10 per cent of the turnover of an undertaking in the United Kingdom may be imposed for an infringement of either of the prohibitions. Further guidance on penalties (and other consequences of breach of the prohibitions) is available in the Competition Act guideline [Enforcement](#).

### Immunity from penalties for small businesses

- 12.2 In order to avoid the prohibition regime being unduly burdensome on small businesses, the Act provides limited immunity from financial penalties for 'small agreements' in relation to infringements of the Chapter I prohibition and for 'conduct of minor significance' in relation to infringements of the Chapter II prohibition. The immunity does not apply to price-fixing agreements.
- 12.3 Small agreements and conduct of minor significance can be defined (among other ways) by the turnover or the market share of the undertaking(s). The criteria to be used will be defined by the Secretary of State by order and are expected to be based on the turnover of the undertaking(s) in the United Kingdom. Undertakings which are immune from financial penalties are not exempt either from other enforcement action by the Director General or from third party actions for damages in the courts.
- 12.4 The Director General may still investigate small agreements or conduct of minor significance and can decide to withdraw the immunity from financial penalties if, having investigated the agreement or conduct, he considers that it is likely to infringe the relevant prohibition. Withdrawal of the immunity in this way cannot precede the date of this decision.

### Other consequences of breach

- 12.5 Any agreement which infringes the Chapter I prohibition is void and cannot be enforced.
- 12.6 Third parties who consider that they have suffered loss as a result of any unlawful agreement or conduct have a claim for damages in the courts.



## 13 The Fair Trading Act 1973

- 13.1 The United Kingdom competition law framework which deals with monopolies in the Fair Trading Act 1973 is retained in addition to the Competition Act.
- 13.2 The Fair Trading Act allows scale or complex monopolies to be examined by the Director General (which includes the regulators, who have concurrent jurisdiction to exercise such powers under the Fair Trading Act). He may make a reference to the Competition Commission (which is established by the Act and assumes this role of the Monopolies and Mergers Commission - see part 14 of this guideline) in order to establish whether a monopoly situation operates, or may be expected to operate, against the public interest. A scale monopoly situation exists where a single company (or a group of interconnected companies) supplies or acquires at least one quarter of the goods or services of a particular type in all or part of the United Kingdom. A complex monopoly situation exists where a group of companies which are not connected and which together account for at least one quarter of the supply or acquisition of any particular description of goods or services in all or part of the United Kingdom engage in conduct which has or is likely to have the effect of restricting, distorting or preventing competition.
- 13.3 It is not intended that the prohibitions in the Competition Act and the retained complex monopoly and scale monopoly provisions in the Fair Trading Act should be used in parallel to investigate the same matters. A suspected infringement of one of the Competition Act prohibitions will normally be investigated under the Competition Act rather than under the monopoly provisions of the Fair Trading Act.
- 13.4 The complex monopoly provisions are retained for activities which are not caught by the Competition Act prohibitions: where, for example, a group of companies all adopt similar practices or engage in parallel behaviour which appears to be anti-competitive, but there is no evidence of collusion or agreement. The scale monopoly provisions are intended for dealing with the situation where a prior infringement of the prohibitions in the Competition Act has already been proven but where the Director General believes that there is a real prospect of further abuse by the same company. The structural remedies available under the scale monopoly powers may be the only effective means of preventing those further abuses.
- 13.5 Because of the special circumstances of the utility sectors, and the difficulty of establishing competition, the full use of the scale monopoly provisions is retained for the regulated utility sectors. This means that the scale monopoly provisions may be used in respect of those sectors whether or not there has been a prior infringement of the prohibitions in the Competition Act.
- 13.6 The provisions in the Fair Trading Act which deal with mergers remain unchanged. Further details are found in the Competition Act guideline [Mergers and Ancillary Restraints](#).

## 14 The Competition Commission and appeals

- 14.1 Appeals against decisions of the Director General are heard by the Competition Commission which is established by the Act. In addition to acting as an appeals tribunal, the Competition Commission has also assumed the previous reporting role of the Monopolies and Mergers Commission under the monopoly and mergers provisions in the Fair Trading Act 1973.

### Appealable decisions

- 14.2 Any party to an agreement in respect of which the Director General has made a decision, and any person in respect of whose conduct the Director General has made a decision, may appeal to the Competition Commission against, or with respect to, the decision. Appeals against decisions made under the Act are possible on both the substance of the decision and on any penalties imposed. The making of an appeal against a decision does not suspend the effect of that decision, unless the appeal is against the imposition or level of a penalty, in which case the penalty only is suspended.

### Appeals

- 14.3 Any appeal made to the Competition Commission against a decision of the Director General will be determined by an appeal tribunal. The Secretary of State may make rules with respect to appeals and appeal tribunals.
- 14.4 The appeal tribunal can:
- confirm the decision;
  - remit the matter to the Director General;
  - impose or revoke, or vary (either higher or lower) the amount of a penalty;
  - grant or cancel an individual exemption or vary any conditions or obligations;
  - give such directions or take other steps as the Director General himself could have taken;
  - make any other decision which the Director General himself could have made.
- 14.5 The appeal tribunal will not carry out investigation work: if substantial new evidence comes to light at the appeal stage, the case will be referred back to the Director General.
- 14.6 Any decision of the appeal tribunal of the Competition Commission has the same effect and is enforced in the same way as a decision of the Director General. Decisions of the appeal tribunal are subject to appeal to the Court of Appeal (or the Court of Appeal in Northern Ireland or Court of Session in Scotland) on points of law and levels of penalty only.



### Third party appeals

- 14.7 A person who is not the subject of a decision may apply to the Director General asking him to withdraw or vary any decisions made by him, except those concerning the imposition of any penalty or the withdrawing or varying of a decision following an appeal by a third party. Such third party appeals may be made either by individuals or by a representative organisation. These appeals may be made only by third parties that either have 'sufficient interest' in the decision themselves, or represent those with 'sufficient interest' in the decision, as judged by the Director General. Parties should explain in their application why they consider that they (or their representatives) have sufficient interest. The application must be made within one month of publication of the relevant decision.
- 14.8 If the Director General rejects a third party application for an appeal, the third party may appeal to the Competition Commission against that decision. The original decision will remain in force during the appeal process.





