

Land agreements

Understanding competition law

Competition
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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

¹ The Treaty establishing the European Community.

² References in this guideline to **agreements** should, unless otherwise stated or the context demands it, be taken to include decisions by associations of undertakings and concerted practices. The meaning of the terms **undertaking, agreement, decision by an association of undertakings** and **concerted practice** are described in the competition law guideline *Agreements and concerted practices* (OFT401).

³ SI 2004/1260.

- 1.1** This guideline explains how the Competition Act 1998 (the Act) and Articles 81 and 82 of the EC Treaty¹ (Article 81 and Article 82 respectively) operate in relation to agreements² and conduct relating to land. In particular, it explains the application of the Competition Act 1998 (Land Agreements Exclusion and Revocation) Order 2004 (the Exclusion Order)³.
- 1.2** Section 2 of the Act prohibits agreements which prevent, restrict or distort competition and which may affect trade within the United Kingdom or any part of it (the Chapter I prohibition). Article 81 (on which the Chapter I prohibition is modelled) prohibits agreements which prevent, restrict or distort competition and which may affect trade between Member States.
- 1.3** Section 18 of the Act prohibits conduct by one or more undertakings which amounts to an abuse of a dominant position in a market and which may affect trade within the United Kingdom or any part of it (the Chapter II prohibition). Article 82 (on which the Chapter II prohibition is modelled) prohibits conduct by one or more undertakings which amounts to an abuse of a dominant position in the common market or a substantial part of it and which may affect trade between Member States.
- 1.4** Details on how these provisions are applied and enforced are contained in the competition law guidelines *Agreements and concerted practices* (OFT401) and *Abuse of a dominant position* (OFT402).
- 1.5** The Exclusion Order, made under section 50 of the Act, excludes land agreements (as defined in the Exclusion Order) from the application of the Chapter I prohibition. The purpose of the Exclusion Order is to provide certainty for business concerning the scope of the Chapter I prohibition. It avoids an unnecessary burden on business of scrutinising a large number of agreements that raise no competition concerns. It also helps to ensure that the OFT is able to concentrate its resources on matters of significant competition concern.

- 1.6** The Exclusion Order does not exclude land agreements from the application of Article 81. Therefore, where a land agreement may affect trade between Member States, Article 81 may apply to the agreement. However, in most cases, land agreements are unlikely to affect trade between Member States, and therefore Article 81 will not apply.
- 1.7** Part 2 of this guideline describes the scope and effects of the exclusion for land agreements provided in the Exclusion Order and Part 3 describes the limits to the scope of the exclusion. Part 4 of this guideline explains the limited circumstances in which the benefit of the exclusion may be withdrawn by the OFT and the consequences of such withdrawal.
- 1.8** There is no equivalent to the Exclusion Order for land agreements in relation to the application of the Chapter II prohibition or Article 82. Part 5 of this guideline describes the possible application of the Chapter II prohibition and Article 82 to conduct relating to land.
- 1.9** Agreements that do not fall within the definition of a land agreement in the Exclusion Order fall outside the scope of the exclusion. Such agreements do not, however, necessarily fall within the scope of the Chapter I prohibition. Agreements will fall within the scope of the Chapter I prohibition only where they may have an appreciable effect on competition within the United Kingdom.
- 1.10** In determining whether an agreement has an appreciable effect on competition, the OFT will have regard to the approach of the European Commission as set out in its *Notice on Agreements of Minor Importance*⁴. It is the OFT's practice to consider, on a case by case basis, whether an agreement falls within its administrative priorities so as to merit investigation.
- 1.11** Further details on defining the relevant market are given in the competition law guideline *Market definition* (OFT403). Further guidance on appreciability is given in the competition law guidelines *Agreements and concerted practices* (OFT401) and *Assessment of market power* (OFT415).

⁴ European Commission's Notice on agreements of minor importance which do not appreciably restrict competition under Article 81(1) of the Treaty establishing the European Community (*de minimis*) (OJ C 368, 22.12.01, p 13).

⁵ Schedule 3 to the Act, paragraph 1.

1.12 Agreements which do not benefit from the exclusion for land agreements provided by the Exclusion Order will not infringe the Chapter I prohibition, even if they have an appreciable effect on competition, if they benefit from another exclusion or satisfy the conditions in section 9(1) of the Act, are covered by an EC block exemption regulation, benefit from a parallel exemption or continue to benefit from an individual exemption granted prior to 1 May 2004. (See the competition law guideline *Agreements and concerted practices* (OFT401) for further details). The Act contains, for example, an exclusion for agreements to the extent that they are planning obligations⁵. This includes planning obligations made, for example, under section 106 of the Town and Country Planning Act 1990.

2 The exclusion for land agreements

2.1 The Exclusion Order states: 'The Chapter I prohibition shall not apply to an agreement to the extent that it is a land agreement'. This exclusion is automatic and does not require any action to be taken to benefit from it.

2.2 The Exclusion Order defines a **land agreement** in terms of:

- the creation, alteration, transfer or termination of an interest in land, and
- certain obligations and restrictions.

These elements are considered below.

Interest in land

2.3 A land agreement is defined in the Exclusion Order as an agreement which creates, alters, transfers or terminates an interest in land. Only those parts of an agreement which have such results benefit from the exclusion (see further paragraph 3.3 below). A land agreement includes, for example, transfers of freeholds, leases or assignments of leasehold interests and easements. The term **interest in land** is defined in the Exclusion Order. This covers what is usually understood to be an interest in land and includes licences and, in Scotland, interests under a lease and other heritable rights in or over land including heritable securities. The exclusion also covers agreements to enter into land agreements.

2.4 The exclusion does not cover agreements which relate to land but which do not create, alter, transfer or terminate an interest in land. An agreement, for example, between landowners in a particular area to fix levels of rent to be charged to tenants, or an agreement between tenants as to the nature of goods they will each sell in a particular area, are not land agreements as defined in the Exclusion Order because they do not create, alter, transfer or terminate an interest in land. Therefore, they do not benefit from the exclusion.

Obligations and restrictions

2.5 Obligations and restrictions set out in the Exclusion Order, which affect a person as a holder of land, benefit from the exclusion for land agreements. Such obligations and restrictions are defined in the Exclusion Order in relation to the concepts of **capacity** and **activity** which are described below. Those obligations and restrictions set out in the Exclusion Order are ones which are generally included in agreements which have the effect of creating, altering, transferring or terminating an interest in land and will benefit from the exclusion. These include, for example, covenants in commercial property agreements relating to payment of rent, service charges, user clauses and alienation. Restrictions on a tenant relating to alterations, repairs, applications for planning permission, the presence of shop signs, advertisements or the hours of use of the premises may also benefit from the exclusion.

Capacity

2.6 For an obligation or restriction to benefit from the exclusion, it must be either accepted in, or for the benefit of, an undertaking's capacity as holder of an interest in land. This requirement ensures that such obligation or restriction relates to the interest in land, as opposed to any trading capacity or other (non land) business interests of the undertaking.

2.7 Whether an undertaking is acting in its capacity as holder of an interest in land will depend on the relationship between the undertakings which are parties to the agreement by which an interest in land is created, altered, transferred or terminated. Where their relationship is based solely on the creation, alteration, transfer or termination of the interest in land, it is likely that the OFT will take the view that the undertakings are acting in their capacity as holders of interests in land. Where their relationship is also based on other trading interests and where the obligations and/or restrictions included are relevant to those other interests, it is unlikely that the OFT will view the undertakings as acting in their capacity as holders of interests in land. Where undertakings do not act in their capacity as

holders of interests in land, any obligations and/or restrictions they accept, and any of which they have the benefit, will not have the benefit of the exclusion.

2.8 If, for example, a widgets and blodgets manufacturer sells its only blodgets factory to another undertaking and accepts a restriction not to open another blodgets factory and not to produce blodgets from its widgets factory, such a restriction would not be covered by the exclusion⁶. Equally, a restriction in a lease which required that the tenant of a petrol station must buy the petrol he sells only from the landlord would not be covered by the exclusion.

2.9 Similarly, an obligation in a lease for a tenant to insure the leased property **with** its landlord, which is an insurance company, would not have the benefit of the exclusion. Such an obligation would be regarded by the OFT as relating to the trading interests of the insurance company and the insurance company would be regarded as acting in its capacity as an insurer. An obligation to insure a property **through** an insurance company landlord, however, would be likely to benefit from the exclusion. Such an obligation would be likely to be regarded by the OFT as relating solely to the relevant interests in land of the undertakings involved and the insurance company would be regarded as acting in its capacity as holder of an interest in land.

⁶ Such a restriction may, however, benefit from a different exclusion from the Chapter I prohibition. If the sale of the factory is excluded by the provisions relating to mergers in Schedule 1 to the Act, the restriction could be regarded as an ancillary restraint and may therefore be excluded; see the competition law publication *Mergers – Substantive assessment guidance* (OFT516).

Activity

2.10 Certain restrictions may, in relevant circumstances, be placed on the activity which may be carried out from **relevant land** or **other relevant land** (as defined in the Exclusion Order). Such restrictions can be expressed in positive language (for example that the premises may be used only as a wet fish shop) or negative language (for example that the premises may not be used for the sale of greetings cards). Restrictions on activity which will be likely to have the benefit of the exclusion include, for example in the context of a parade of shops, restrictions on the types of goods that may be sold from each premises, including restrictions relating to quality of goods.

2.11 Restrictions as to the conditions on which a trade or activity may be carried out, however, are not covered by the exclusion. These include, for example, restrictions which have the effect of fixing minimum resale prices at which goods may be sold, the quantity of goods which may be sold or the suppliers or sources of goods sold or services provided on or from the premises.

Reciprocal restrictions

2.12 Reciprocal restrictions may benefit from the exclusion. A lease in a shopping centre, for example, that restricts the tenant to selling wet fish, and accepted by the tenant on the basis that no other tenant in the centre will be permitted to sell wet fish, may benefit from the exclusion. Such a restriction can be either mutually enforceable or the landlord may covenant to enforce it.

3 Limits to the scope of the exclusion

The application of Article 81

3.1 Where a land agreement has an effect on trade between Member States, the Exclusion Order does not exclude it from the application of Article 81. An effect on trade between Member States can include direct, indirect, actual and potential effects. Particular issues may arise where a land agreement has effects close to an international border, or has some other international significance. Further information on what may constitute an effect on trade between Member States is provided in the European Commission's Notice *Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty*⁷.

⁷ European Commission's Notice – *Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty*, C OJ C 101 27.4.04 pp81-96).

3.2 However, as land agreements are generally localised in their effects, in most cases it is unlikely that there will be an effect on trade between Member States.

Partial exclusion

3.3 The Exclusion Order provides that the Chapter I prohibition does not apply to an agreement **to the extent that** it is a land agreement. The exclusion may therefore benefit only certain provisions of an agreement rather than an agreement in its entirety. An agreement which transfers an interest in land may, for example, include provisions relating to the financing of the transaction. The financing provisions fall outside the definition of a land agreement and do not therefore benefit from the exclusion. Because an agreement does not fall within the exclusion does not, however, mean that it is likely to be caught by the Chapter I prohibition. It is likely that most agreements relating to land which fall outside the scope of the exclusion will not have an appreciable effect on competition within the United Kingdom and will therefore not be caught by the Chapter I prohibition.

3.4 Where an agreement is only partly covered by the exclusion, and the OFT has competition concerns about the object or effect of that agreement, it will be able to have regard to the whole agreement (including those parts of the agreement that benefit from the

exclusion) to assess whether the Chapter I prohibition has been infringed. The OFT will not, however, be able to take any action under the Chapter I prohibition against the parts which benefit from the exclusion without first withdrawing the exclusion (see Part 4).

4 Withdrawal of the exclusion for land agreements

4.1 The term land agreement is defined widely in the Exclusion Order to provide certainty for business. This means that some agreements which potentially raise competition concerns may escape scrutiny by the OFT. The OFT therefore has the power to remove the benefit of the exclusion from individual agreements which will enable them to be considered under the Chapter I prohibition⁸. The OFT can exercise this power only:

- if it is considering whether to withdraw the benefit of the exclusion and has written to any party to the agreement requiring it to provide information in connection with the agreement, and, without reasonable excuse, that party fails to comply with such requirement within 10 working days, or
- where it considers that the land agreement in question will, if not excluded, infringe the Chapter I prohibition, and that the land agreement is not likely to satisfy the conditions in section 9(1) of the Act⁹.

4.2 In practice, it is likely that the OFT will exercise these powers only rarely. To infringe the Chapter I prohibition, the agreement must have an appreciable effect on competition (see Part 1 and the competition law guidelines *Agreements and concerted practices* (OFT401) and *Assessment of market power* (OFT415)). The OFT considers carefully complaints in respect of agreements which have the benefit of the exclusion.

4.3 Where the OFT intends to give a direction withdrawing the benefit of the exclusion from an agreement, it must consult the parties to that agreement. Such a direction must specify the date from which it is to take effect; it may not take effect from a date earlier than the date on which it was given. If the OFT gives such a direction it will be published on the register which is open to public inspection on the OFT's website.

⁸ Article 6 of the Exclusion Order and Schedule 1 to the Act, paragraph 4.

⁹ See the competition law guideline *Agreements and concerted practices* (OFT401).

Consequences of withdrawal

- 4.4** If the benefit of the exclusion is withdrawn from a particular agreement, that agreement does not automatically infringe the Chapter I prohibition. A withdrawal direction allows the OFT to consider the application of the Chapter I prohibition to the agreement and to use the information-gathering powers in the Act to require the parties to the agreement (and any third parties) to provide information. The OFT will then consider the effect of the whole of the agreement on competition and decide whether it infringes the Chapter I prohibition.
- 4.5** If the OFT withdraws the benefit of the exclusion from a land agreement, and finds that it does infringe the Chapter I prohibition, such an infringement finding can have effect only from the date of the withdrawal. The agreement will be void only from the date of withdrawal and any financial penalties imposed in respect of that agreement can relate only to the period after the withdrawal of the exclusion.
- 4.6** The Exclusion Order prevents undertakings from avoiding the consequences of a withdrawal direction. If, following a direction withdrawing the benefit of the exclusion from an agreement, the undertakings enter into another agreement which has a similar object or effect as the agreement which was the subject of the withdrawal direction, that subsequent agreement will not benefit from the exclusion.

5 Application of the Chapter II prohibition and Article 82 to land agreements

5.1 The Chapter II prohibition and Article 82 apply to conduct by one or more undertakings which amounts to an abuse of a dominant position in a market and which may affect trade within the United Kingdom or any part of it (in the case of the Chapter II prohibition) or in the common market or a substantial part of it and which may affect trade between Member States (in the case of Article 82). These provisions apply equally to conduct relating to land as they do to any other conduct. The Exclusion Order provides no exclusion from the Chapter II prohibition or Article 82 for land agreements.

5.2 There are two tests common to assessing whether the Chapter II prohibition and/or Article 82 applies:

- whether an undertaking is dominant, and
- if it is, whether it is abusing that dominant position.

Dominant position

5.3 Whether an undertaking is dominant raises two questions which are considered below: the definition of the market in which the undertaking is alleged to be dominant and whether it is dominant within that market.

Market definition

5.4 A market definition should normally contain two dimensions: a product and a geographic area¹⁰. The purpose of market definition is to provide a framework for competition analysis. The issue in market definition is usually to determine products or areas to which customers might switch in response to a hypothetical price rise in the product relevant to the investigation and also whether undertakings which do not currently supply the product or area might be able to start supplying it at relatively short notice¹¹.

¹⁰ The term **product** includes services and property rights.

¹¹ See the competition law guideline *Market definition* (OFT403).

- 5.5** In relation to land, market definition will depend in part on the availability of substitute premises suitable for similar purposes and the propensity of customers to go elsewhere. Market definition will vary from case to case.

Dominance

- 5.6** The essence of dominance is the power to behave independently of competitive pressures. A dominant position may be held by one undertaking on its own or by one or more legally independent undertakings where those undertakings are linked in such a way that they adopt a common policy in the market (**joint** or **collective dominance**¹²).

- 5.7** An undertaking will not be dominant unless it possesses substantial market power. The OFT will assess the market power of the allegedly dominant undertaking by looking at the competitive constraints it faces in the relevant market. Those constraints may include, but may not be limited to, the bargaining power of customers (including tenants) and the possibility of new entry onto the market by, for instance, converting other premises or building new premises to act as a substitute. The market share of an undertaking is an important factor in assessing market power but it does not, on its own, determine whether an undertaking is dominant. The OFT considers it unlikely that an undertaking will be individually dominant if its share of the relevant market is below 40 per cent, although dominance could be established below that figure if other relevant factors (such as the weak position of competitors in that market and high entry barriers) provided strong evidence of dominance. Further details of the way in which market power will be assessed are contained in the competition law guideline *Assessment of market power* (OFT415).

Abuse

- 5.8** The prohibitions under Article 82 and Chapter II relate to the **abuse** of the dominant position; there is no prohibition on the **holding** of the position. The Act and Article 82 set out examples of conduct which may amount to abuse of a dominant position, but these lists are not exhaustive and are for illustration only. The important issue is whether

¹² See the competition law guidelines *Abuse of a dominant position* (OFT402) and *Assessment of market power* (OFT415).

the dominant undertaking is using its dominant position in an abusive way. This may occur if it uses practices different from those normally adopted in the course of competition in the market, with the effect of restricting the degree of competition which it faces, or of exploiting its market position unjustifiably.

- 5.9** Examples of conduct which may be considered to be an abuse of a dominant position are given in the competition law guideline *Abuse of a dominant position* (OFT402). In relation to land, examples of conduct which could be an abuse of a dominant position may include charging excessive rents which are significantly above the market level, discrimination between tenants, charging predatory rents, vertical restrictions that fix the resale prices of goods and services provided by occupants of the land in question or limiting access to an **essential facility**. They may also include the possibility of abuse in a related market. In addition, the OFT would be concerned if a dominant undertaking sought to use restrictive covenants as part of a strategic campaign to exclude competitors from a market, particularly where regulatory constraints such as licensing limit the supply of suitable land for the competing activity. Where the OFT has a reasonable suspicion that an abuse of a dominant position is or has been taking place, it will carry out the kind of assessment described in the competition law guideline *Abuse of a dominant position* (OFT402).

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.offt.gov.uk

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

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