

# Services of general economic interest exclusion

Understanding competition law

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.

# Contents

<b>Part</b>		<b>Page</b>
<b>1</b>	Introduction	2
<b>2</b>	Services of general economic interest	6
<b>3</b>	Extent to which restrictions on competition benefit from the exclusion	12
<b>4</b>	Undertakings having the character of a revenue-producing monopoly	14

# 1 Introduction

<sup>1</sup> The Treaty establishing the European Community.

<sup>2</sup> Reference in this guideline to **agreement(s)** 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 term **undertakings** is set out in Part 2 of this guideline. The meaning of the terms **agreement, decisions by associations of undertakings and concerted practices** in the context of the EC Treaty and the Act are described in the competition law guideline *Agreements and concerted practices* (OFT401).

<sup>3</sup> Council Regulation (EC) 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (OJ L1, 4.1.2003, p 1).

<sup>4</sup> For a list of the Regulators please see inside cover.

- 1.1** Article 81 of the EC Treaty<sup>1</sup> (Article 81) and section 2 (the Chapter I prohibition) of the Competition Act 1998 (the Act) prohibit agreements<sup>2</sup> between undertakings which have as their object or effect the prevention, restriction or distortion of competition. Article 82 of the EC Treaty (Article 82) and section 18 of the Act (the Chapter II prohibition) prohibit conduct by one or more undertakings which amounts to an abuse of a dominant position. Such activities within the common market which may affect trade between Member States fall within Article 81 and/or Article 82; activities which may affect trade in the United Kingdom (or part of it) will fall within the Chapter I and/or the Chapter II prohibition. Further details on the prohibitions contained in the Act and the EC Treaty are available in the competition law guideline *Modernisation* (OFT442).
- 1.2** EC Regulation 1/2003 (the Modernisation Regulation)<sup>3</sup> requires the designated national competition authorities of the Member States (NCAs) and the courts of the Member States to apply and enforce Articles 81 and 82 as well as national competition law, when national competition law is applied to agreements which may affect trade between Member States or to abuse prohibited by Article 82.
- 1.3** The OFT and the Regulators, within their particular sectors<sup>4</sup>, have concurrent powers to enforce the prohibitions of the Act and Article 81 and 82. Further details as to how the concurrent powers operate are given in the competition law guideline *Concurrent application to regulated industries* (OFT405).
- 1.4** The Act and Article 86(2) of the EC Treaty exclude from the application of the prohibitions certain categories of agreements and types of conduct.
- 1.5** This guideline explains how the OFT interprets and applies the exclusion for 'services of general economic interest' and 'revenue-producing monopolies'.
- 1.6** Article 86(2) of the EC Treaty provides for an exclusion from the application of Articles 81 and 82 in respect of undertakings entrusted with the operation of services of general economic interest or monopolies producing revenue for the State. Article 86(2) states:

'Undertakings entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly shall be subject to the rules contained in this Treaty, in particular to the rules on competition, insofar as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them. The development of trade must not be affected to such an extent as would be contrary to the interests of the Community.'

- 1.7** The exclusion from the Chapter I prohibition and Chapter II prohibition (the Competition Act prohibitions) for 'services of general economic interest' and 'revenue-producing monopolies' is contained in paragraph 4 of Schedule 3 of the Act. Although not identical this is closely modelled on Article 86(2). The exclusion states that:

'Neither the Chapter I prohibition nor the Chapter II prohibition applies to an undertaking entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly in so far as the prohibition would obstruct the performance, in law or in fact, of the particular tasks assigned to that undertaking.'

- 1.8** The exclusion contained in the Act was introduced in order to ensure that, as under EC law, undertakings entrusted with services of general economic interest, or having the character of a revenue producing monopoly, are protected from the full application of the UK domestic competition law prohibitions. For ease of reference, unless otherwise stated, the exclusions contained in the Act and Article 86(2) will be referred to as 'the exclusion' for the purposes of this guideline.

- 1.9** The OFT will interpret the exclusion strictly. Undertakings seeking to benefit from the exclusion will have to demonstrate that all the requirements of the exclusion are met. In considering whether the exclusion applies, the OFT will, in particular, need to be satisfied that the undertaking has been 'entrusted' with the operation of a service of general economic interest, and that the application of the Competition Act prohibitions or Articles 81 and 82 would obstruct the performance, in law or in fact, of the particular task entrusted to it.

- 1.10** Section 60 of the Act sets out principles for ensuring that the United Kingdom authorities deal with questions arising in relation to the application of the Competition Act prohibitions in such a way as to ensure consistency with the treatment of corresponding questions arising in Community law in so far as this is possible having regard to any relevant differences between any of the provisions concerned.
- 1.11** When applying the Competition Act prohibitions, the United Kingdom authorities are under a dual obligation. 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. Second, the United Kingdom authorities must have regard to any relevant decision or statement of the European Commission. In the OFT'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 81 and 82. It would also include European Commission Notices and clear statements about its policy approach which the European Commission has published in its Annual Reports on Competition Policy. Section 60 of the Act is considered in more detail in the competition law guideline *Modernisation* (OFT442).
- 1.12** The OFT considers that due to the extent of deregulation and liberalisation of the economy that has occurred in the United Kingdom compared to other parts of the EU, it is unlikely that there will be a significant number of cases in which previous European Commission decisions will be directly relevant when considering whether the exclusion applies in the United Kingdom. When considering the relevance of previous European Commission decisions, the OFT will consider the extent to which those decisions address questions which correspond to those raised in a particular case before the OFT.

### Structure of the guideline

- 1.13** For an undertaking to benefit from the exclusion, it must satisfy the requirements of the exclusion as set out in paragraph 4 of Schedule 3 of the Act or Article 86(2), as applicable. This guideline considers each of the requirements of the exclusion in turn.

- 1.14** Part 2 considers the meaning of an undertaking under the Act and the EC Treaty, explains the requirements to be met for an undertaking to be considered to have been entrusted with a service of general economic interest and discusses the characteristics of 'services of general economic interest'.
- 1.15** Part 3 discusses how the OFT will assess whether the application of the Competition Act prohibitions or Article 81 and Article 82 would obstruct the performance, in law or in fact, of the particular tasks entrusted to an undertaking.
- 1.16** Part 4 discusses the factors relevant to determining whether tasks entrusted to an undertaking have the character of a revenue-producing monopoly.

## 2 Services of general economic interest

**2.1.** In order to benefit from the exclusion from the Competition Act prohibitions and Articles 81 and 82, an undertaking must be able to demonstrate that it has been **entrusted** with the operation of a 'service of general economic interest'. This part of the guideline explains what is meant by an **undertaking**, discusses how an undertaking might be entrusted with the operation of such a service and provides guidance on the interpretation of the terms **service** and **general economic interest**.

### 'Undertakings' capable of benefiting from the exclusion

**2.2** The Competition Act prohibitions and Articles 81 and 82 only apply to undertakings. This section of the guideline explains when an organisation will be considered to be acting as an **undertaking** for the purpose of competition law and, in particular, for the application of the exclusion for services of general economic interest and revenue-producing monopolies. In addition, the guideline explains the circumstances in which public sector bodies or state-owned organisations will be considered to be undertakings.

### Commercial / economic activity

**2.3** The term **undertaking** is not defined in the EC Treaty or the Act, but its meaning has been set out in Community law. An undertaking includes any natural or legal person engaged in economic activity, regardless of its legal status or the way it is financed<sup>5</sup>. It includes companies, firms, businesses, partnerships, individuals operating as sole traders, agricultural co-operatives, associations of undertakings (for example, trade associations), non profit-making organisations and (in some circumstances) public entities that offer goods or services on a given market<sup>6</sup>. The key consideration in assessing whether an entity is an undertaking is whether it is engaged in economic activity. An entity may engage in economic activity in relation to some of its functions but not others. 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.

<sup>5</sup> Case C-41/90 *Höfner & Elser v Macrotron GmbH* [1991] ECR I-1979, and Case T-319/99 *FENIN v Commission* [2003] ECR II-357, CFI; on appeal C-205/03P judgment pending.

<sup>6</sup> See OFT's Policy Note 1/2004 available on its website at [www.offt.gov.uk](http://www.offt.gov.uk).



## The state

- 2.4** A public sector body will be considered to be an undertaking in so far as it carries out economic activities. The Competition Act prohibitions and Articles 81 and 82 will not apply to the public sector body in so far as it carries out non-economic administrative or social functions.
- 2.5** When assessing whether the provision of state services is economic in nature or relates to non-economic administrative or social functions, the OFT will, while taking into account the particular circumstances of each case, consider how the characteristics of the service provided by the state meet the general principles established by the relevant EC jurisprudence.
- 2.6** As stated, in considering whether state functions are economic or administrative, the legal status of a state organisation and the way in which it is financed are not relevant considerations. Whether the organisation is profit making will also not be determinative. An entity does not engage in economic activity simply through buying goods or services; the buying must be considered in conjunction with the end use of the goods or services bought. For example, an entity buying goods or services to advance a purely social activity is unlikely to be engaging in economic activity<sup>7</sup>. Equally, the supply of goods or services in the execution of an exclusively social function (such as the provision of health services on a non-profit making basis on the principle of solidarity, where the entitlement to services is not dependent on the amount of contributions) is unlikely to be an economic activity<sup>8</sup>. It is expected that the circumstances in which a public body operates as an undertaking for the purposes of the Competition Act prohibitions and Articles 81 and 82 will be clarified once the European Court of Justice has handed down its judgment in the appeal of the Court of First Instance's decision in *FENIN*<sup>9</sup>.
- 2.7** The policy of successive UK governments has been to expose the activity of parts of the public sector to competition or economic regulation, sometimes coupled with privatisation. It is therefore possible that, over time, functions that may once have been

<sup>7</sup> Case T-319/99 *FENIN v Commission* [2003] ECR II-357; on appeal C-205/03P judgment pending. C.f. the approach taken by the Competition Commission Appeal Tribunal in Case 1006/2/1/01 *Bettercare Group Limited v Director General of Fair Trading* [2002] CompAR 229 (*Bettercare II*).

<sup>8</sup> Case C-264/01, C-306/01, C-354/01 and C355/01 *AOK Bundesverband*, judgment of 16 March 2004 (unpublished). See also Cases C-159 and 160/91 *Poucet & Pistre* [1993] ECR I-637 [C.f. *Bettercare II*]. See also OFT Policy Note 1/2004 available on its website at [www.offt.gov.uk/nr/rdonl/yres/b63accdc-73bc-4af9-b452-a8b46535d069/0/oft443.pdf](http://www.offt.gov.uk/nr/rdonl/yres/b63accdc-73bc-4af9-b452-a8b46535d069/0/oft443.pdf)

<sup>9</sup> Case T-319/99 *FENIN v Commission* [2003] ECR II-357; on appeal C-205/03P judgment pending.

considered to be exclusively administrative or social will come to be regarded as economic.

- 2.8** It should be noted that these questions cannot be looked at in isolation, and that the OFT will in each case take into account all relevant factors.

### Entrusted

- 2.9** The Act and Article 86 require an undertaking seeking to benefit from the exclusion for services of general economic interest to demonstrate that it has been **entrusted** with the service in question by a public authority. This part of the guideline explains the circumstances in which a public authority might be considered to have **entrusted** an undertaking with the operation of a service of general economic interest.

- 2.10** A public authority capable of entrusting a task to an undertaking can be part of national, regional or local government. It can also include the Regulators.

- 2.11** The act of entrustment may be by way of legislative measures or regulation<sup>10</sup>. An undertaking may also be entrusted through the grant of a concession<sup>11</sup>, or licence governed by public law. In *Almelo*<sup>12</sup> the European Court held that the state-owned regional electricity distribution company Energiebedrijf IJsselmij, through being granted a non-exclusive licence governed by public law, had been entrusted with the operation of the provision of a service of general economic interest, as laid out in the licence.

- 2.12** Alternatively, the method of entrustment could be through an act of a public authority. In *IJsselcentrale*,<sup>13</sup> the European Commission concluded that an electricity distribution company was entrusted with a task, even though the grant was awarded by a ministerial order and not by statute. However, mere approval by a public authority of the activities carried out by the undertaking will be insufficient<sup>14</sup>.

<sup>10</sup> *British Telecommunications* OJ 1983 L360/36

<sup>11</sup> C-159/94 and C-160/94 *EC Commission v the French Republic* [1997] ECR I-05815.

<sup>12</sup> Case C-393/92 *Municipality of Almelo and Others v NV Energiebedrijf IJsselmij* [1994] ECR I-1477.

<sup>13</sup> Commission Decision 91/50/EEC relating to a proceeding under Article 85 of the EEC Treaty (IV/32.732 – *IJsselcentrale and others*) OJ 1991 L28/32.

<sup>14</sup> See Commission Decision 85/77/EEC relating to a proceeding under Article 85 of the EEC Treaty (IV/30.717 – *Uniform Eurocheques*) OJ L 35 7.2.1985 p.43.

- 2.13** The exclusion applies only to the particular tasks entrusted to the undertaking and not in respect of the undertaking or its activities generally.
- 2.14** For obligations imposed on an undertaking entrusted with the operation of a service of general economic interest to fall within the particular tasks entrusted to it, they must be linked to the subject matter of the service of general economic interest in question and contribute directly to that interest<sup>15</sup>. In a number of regulated sectors, organisations participating in these sectors are required to sign agreements that ensure the safe and secure operation of networks. If obligations under parts of these agreements were found to be services of general economic interest and therefore benefit from the exclusion, it should not be presumed that other parts of the agreement also benefit from the exclusion. This is discussed in more detail in Part 3 of this guideline.
- 2.15** While a public authority can entrust the operation of a service to an undertaking, it can only do so in its role as a public authority. The OFT will not consider a private contract entered into by a public authority, the purpose of which is for the authority itself to undertake an economic activity, to amount to an entrustment of the service. An example of this type of private agreement would be a local authority that 'self wins' a franchise awarded by the authority for the provision of refuse services.

<sup>15</sup> Case C-159/94 *Commission v. France (French Gas and Electricity Monopolies)* [1997] ECR I-5815.

## Services of general economic interest

- 2.16** The definition of **services** in this context is broad and may include the distribution of goods<sup>16</sup> as well as the provision of services. The OFT will interpret 'services' in accordance with EC case law.
- 2.17** The European Commission has stated<sup>17</sup> that services of general economic interest are services that public authorities consider should be provided in all cases, whether or not there is an incentive for the private sector to do so. It has also stated that EU Member States are free to determine those services which they consider to be in the general interest<sup>18</sup>. Where public authorities consider that such services will not be satisfactorily provided by the market, the

<sup>16</sup> Case C-172/82 *Fabricants Raffineurs D'huile de Graissage v Inter-Huiles* [1983] ECR 555.

<sup>17</sup> Communication from the Commission, Services of general interest in Europe, European Commission, 19 January 2001 OJ 2001 C17/4.

<sup>18</sup> Communication from the European Commission, Services of general interest in Europe, European Commission, 19 January 2001 OJ 2001 C17/4, paragraph 22.

<sup>19</sup> Communication from the European Commission, Services of general interest in Europe, European Commission, 19 January 2001 OJ 2001 C17/4, paragraph 14.

European Commission has stated that public authorities are free to set specific service obligations on undertakings that are entrusted to operate the services of general interest<sup>19</sup>.

- 2.18** Although the OFT recognises the need to ensure the provision of certain services which the market would not otherwise provide, it considers that, in the majority of cases, the free operation of the market will be best able to provide services of general economic interest to meet the needs of consumers.

### Distinction between services of general interest and services of general economic interest

<sup>20</sup> Communication from the Commission, Services of general interest in Europe, European Commission, 19 January 2001 OJ 2001 C17/4.

- 2.19** The European Commission has distinguished between services of general economic interest and services of general interest. Services of general interest include all services whether of an economic nature or not. In general, the internal market and competition rules under the Treaty have no impact on services of general interest to the extent that these services constitute non-economic activities<sup>20</sup>. Therefore, the exclusion is only services of a general economic interest.

<sup>21</sup> Case C-109/92 *Wirth v Landeshauptstadt Hannover* [1993] ECR I – 6447. This case related to the provisions of the Treaty on the freedom to provide services and not to the interpretation of Article 86.

- 2.20** The term **economic** has been interpreted as referring to the nature of the service itself, rather than the **interest**. The European Court has held that services of an economic nature may include activities in the cultural, social, public health and educational fields if their aim is to make an economic profit<sup>21</sup>.

<sup>22</sup> Case 127/73 *Belgische Radio en Televisie et Societe Belge des Auteurs, Compositeurs et Editeurs v. SV SABAM et NV Fonior* [1974] ECR 313.

- 2.21** To be a service of general economic interest, a service must not be one that is concerned with managing private interests. For example, the service of managing the copyrights of an association's members is not a service of general economic interest<sup>22</sup>.

- 2.22** To be a service of general economic interest the European Commission and the European Court have considered that the service must be widely available and not restricted to a class, or classes, of customers. However, a service directed at a particular group of customers may be able to benefit from the exclusion if the assessment of whether to offer the service was based on furthering

the general economic interest. For example, a service of general economic interest may include the provision of services which aid regional development and are restricted to certain geographical areas<sup>23</sup>.

<sup>23</sup> Case 66/86 *Ahmed Saeed Flugreisen and Silver Line Reisebüro GmbH v Zentrale zur Bekämpfung unlauteren Wettbewerbs e.V.* [1989] ECR 803.

# 3 Extent to which restrictions on competition benefit from the exclusion

- 3.1** Restrictions on competition from other economic operators must be allowed in so far as they are necessary in order to enable the undertaking entrusted with the service of general economic interest to provide the service in question. In that regard, it is necessary to take into consideration the economic conditions in which the undertaking operates and the constraints placed on it, in particular the costs which it has to bear<sup>24</sup>. The European Court has held that the exclusion may apply where the restriction on competition is necessary for an undertaking to perform the service of general economic interest under economically acceptable conditions<sup>25</sup>. An undertaking seeking to benefit from the services of general economic interest exclusion must show that the application of the Competition Act prohibitions or Articles 81 and 82 would require it to perform the task entrusted to it under economically unacceptable conditions.
- 3.2** The OFT would need to be satisfied that the obligations on the undertaking could not be discharged in ways which would have a less restrictive or distorting effect on competition.
- 3.3** The European Court has held that it is sufficient that the performance, in law or fact, of the obligations on the undertaking would not be possible were the prohibitions to apply. It is not necessary that the survival of the undertaking itself is threatened for the exclusion to apply<sup>26</sup>.
- 3.4** In a number of cases<sup>27</sup> the exclusion was found to apply to exclusive rights to provide a service of general economic interest in order to protect a 'universal service' obligation, as otherwise the undertakings in question would not have been able to meet their service obligations. Without the benefit of the exclusion, competition would allow new entrants to target profitable customers (so called 'cherry picking' or 'cream skimming'), while leaving unprofitable customers to the incumbent (leading to higher prices being charged to those customers or a reliance on state subsidies).

<sup>24</sup> Case C-393/92 *Municipality of Almelo and Others v NV Energiebedrijf Ijsselmij* [1994] ECR I-1477.

<sup>25</sup> Case C-157/94 *Commission v Netherlands*, Case C-158/94 *Commission v Italy* [1997] and Case C-159/94 *Commission v France* [1997] ECR I-5815, ECR I-5699, 5789, 5815.

<sup>26</sup> Joined cases C-157/94 *Commission v Netherlands*, C-158/94 *Commission v Italy* and C-159/94 and C-160/94 *Commission v France* [1997] ECR I-5699, 5789, 5815.

<sup>27</sup> Including Case C-320/91 Criminal proceedings against *Paul Corbeau* [1993] ECR I-2533, and Case C-266/96 *Corsica Ferries France SA v Gruppo Antichi Ormeggiatori del Porto di Genova Coop. and Others* [1998] ECR I-3949.

- 3.5** Over the last two decades privatisation and liberalisation in the United Kingdom has significantly reduced the number of services for which exclusive rights are held. In addition, the introduction of EC Directives concerning common rules for the internal market in electricity<sup>28</sup> natural gas<sup>29</sup> and postal services<sup>30</sup> and the development of measures to promote competition in electronic communications and rail services since the above Article 86(2) cases were considered will also render these precedents less relevant in the EU as more of the markets are opened up to competition and the number of exclusive rights over aspects of services are reduced.
- 3.6** The OFT considers that, in general, effective competition will best serve the interests of consumers over time. Therefore, as stated, the OFT will interpret the exclusion strictly.
- 3.7** The OFT considers that it will in principle be for the undertaking seeking to benefit from the exclusion to show that the application of the Competition Act prohibitions or Article 81 or 82 would require it to perform the task entrusted to it under economically unacceptable conditions. The OFT will expect to see evidence that applying one or more prohibitions would necessarily result in economically unacceptable conditions<sup>31</sup>. The OFT considers that it is insufficient to show that there is a mere possibility that the application of one or more of the prohibitions would lead to a situation where the prevailing economic conditions were unacceptable.
- 3.8** The OFT will also need to be satisfied by the undertaking that the obligations on the undertaking could not be discharged in other ways, which would have a less restrictive or distorting effect on competition.

<sup>28</sup> Directive 2003/54/EC of the European Parliament and of the Council of 26 June 2003 Concerning Common Rules for the Internal Market in Electricity and repealing Directive 96/92/EC, OJ 176 17.7.2003 p 37-56.

<sup>29</sup> Directive 2003/55/EC of the European Parliament and of the Council of 26 June 2003 concerning the Common Rules for the Internal Market in Natural Gas and repealing Directive 98/30/EC, OJ 176 15.7.2003 p 57-78.

<sup>30</sup> Directive 97/67/EC of the European Parliament and the Council of 15 December 1997 on common rules for the development of the internal market of Community postal services and the improvement of quality of service OJ 015, 21.1.1998 p14-25 as amended by directive 2002/39/EC with regard to further opening to competition of Community postal services OJL 176, 5.7.2002 p.21.

<sup>31</sup> See Case C-157/94 *Commission v Netherlands* at paragraph 51 and Case-159/94 *Commission v France* at paragraph 94 [1997] ECR I-5815, ECR I-5699, 5815

## 4 Undertakings having the character of a revenue-producing monopoly

**4.1** The exclusions contained in paragraph 4 of schedule 3 of the Act and Article 86(2) also allow for tasks entrusted to undertakings which have the character of a revenue-producing monopoly to be excluded from the prohibitions of the Act and of Articles 81 and 82. This part of the guideline discusses the criteria that need to be met in order to benefit from the exclusion as a revenue-producing monopoly and discusses why the OFT considers it extremely unlikely that any revenue-producing monopolies exist or will exist in the United Kingdom.

**4.2** The OFT considers that in order to benefit from the exclusion as a revenue-producing monopoly, an undertaking must have as its principal objective the raising of revenue for the state through the provision of a particular service. Undertakings must have been granted an exclusive right to provide the service, and hence be the monopoly provider of that service. A revenue-producing monopoly must also show that the application of the prohibitions of the Act or Article 81 or Article 82 would obstruct the performance, in law or in fact, of the particular tasks assigned to it<sup>32</sup>.

**4.3** There are very few cases in the jurisprudence of the EC courts or in the decisions of the European Commission in which the revenue-producing monopoly exclusion has been considered<sup>33</sup>. The main reason for this is that very few monopolies are established with the principal objective of raising revenue for the state.

**4.4** The OFT considers that it is unlikely that there are any revenue-producing monopolies in the United Kingdom at this time. None of the privatised utilities would qualify nor would they have done so when under state ownership, as the raising of revenue was not their principal objective.

<sup>32</sup> See the wording of the exclusion.

<sup>33</sup> The application of exclusion to the French and Italian match monopolies was considered and rejected in two Commission recommendations in 1962. (*Recommandation de la Commission à la République française au sujet de l'aménagement du monopole des allumettes*; not available in English [1962] JO 48/1502; and *Recommandation de la Commission à la République italienne au sujet de l'aménagement du monopole des allumettes*; not available in English [1962] JO 48/1505).







## **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](http://www.offt.gov.uk)

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

phone 0800 389 3158

fax 0870 60 70 321

email [oft@eclogistics.co.uk](mailto:oft@eclogistics.co.uk)

post EC Logistics, PO Box 366, Hayes UB3 1XB

