

# Trade associations, professions and self-regulating bodies

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

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

<sup>2</sup> References 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.

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

- 1.1** 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, decisions by associations of undertakings or concerted practices 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 the abuse of a dominant position. Such activities within the common market which may affect trade between Member States will 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 prohibition and/or the Chapter II prohibition. Further details of the prohibitions contained in the Act and the EC Treaty are available in the competition law guidelines *Agreements and concerted practices* (OFT401) and *Abuse of dominant position* (OFT402).
- 1.2** EC Regulation 1/2003 (the Modernisation Regulation)<sup>3</sup> requires 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** This guideline explains how the OFT will apply Article 81 and the Chapter I prohibition when assessing the activities of trade associations, professions and self-regulating bodies. It should be read in conjunction with the competition law guideline *Agreements and concerted practices* (OFT401).
- 1.4** This guideline refers to trade associations, professions and other self-regulating bodies but there are no definitions of these terms in Article 81 or the Act and, in practice, the boundaries between the three may be indistinct. The term used in both Article 81 and the Chapter I prohibition is an **association of undertakings**. Any body formed to represent the interests of its members in commercial matters may be an association of undertakings. An association of undertakings is deemed to represent the interests of those undertakings which have chosen to join, and it is therefore irrelevant how the association is

organised. It is not necessary for it to have any formal constitution for its activities to fall within the scope of Article 81 and/or the Chapter I prohibition. An association of undertakings will fall within Article 81 and/or the Chapter I prohibition if its decisions, rules, recommendations or other activities lead to an appreciable restriction of competition, regardless of the exact form that the association takes<sup>4</sup>.

<sup>4</sup> See Case 209/78 *Heintz van Landewyck* [1980] ECR 3125; Joined Cases 96/82 etc *NAVEWA v Commission* [1983] ECR 3369; Case 123/83 *BNIC v Clair* [1985] ECR 391.

- 1.5** Part 2 of this guideline focuses on the application of Article 81 and the Chapter I prohibition to the decisions of associations of undertakings although, as explained above, the prohibition applies equally to agreements between undertakings. The definition of ‘undertaking’ is wide and may include an association of undertakings (see the competition law guideline *Agreement and concerted practices* (OFT401)). The relationship of an association of undertakings with third parties is likely to be considered an agreement between undertakings for the purposes of Article 81 and the Chapter I prohibition. The internal relationship between the undertakings which form the association is likely to be considered as a decision of that association, although this will depend upon the facts of the case. Other activities of an association of undertakings may also fall within Article 81 and the Chapter I prohibition, either as a decision or because they constitute agreements (or both), and this too will depend upon the circumstances of the case. (See also paragraph 2.1 below.)
- 1.6** Examples of the decisions, rules, recommendations or other activities of associations of undertakings that may prevent, restrict or distort competition and therefore fall within the scope of Article 81 and/or the Chapter I prohibition are described in Part 3 of this guideline.
- 1.7** Decisions which fall within Article 81 and/or the Chapter I prohibition but which satisfy certain specified conditions are not prohibited, no prior decision to that effect being required. The conditions which need to be satisfied as part of the legal exception regime as well as the kinds of activities of associations of undertakings which might meet these conditions are explained in Part 4. The specific relevance of the application of Article 81 and/or the Chapter I prohibition to

associations of undertakings and the possible exclusion from the application of the Chapter I prohibition that is available to certain self-regulating bodies are described in Parts 5, 6 and 7 of this guideline.

- 1.8** Article 82 and/or the Chapter II prohibition may also apply to the conduct of trade associations, professions and self-regulating bodies and/or their members. Article 82 and the Chapter II prohibition apply to ‘conduct on the part of **one or more undertakings** which amounts to the abuse of a dominant position’; therefore such organisations themselves may constitute undertakings, or their members may comprise ‘one or more undertakings’ the conduct of which may fall within the scope of *Article 82 and the Chapter II prohibition*. These provisions are not covered in detail in this guideline and further reference should be made to the competition law guideline *Abuse of a dominant position* (OFT402).
- 1.9** The involvement of an association of undertakings in an infringement of Article 81, Article 82 and/or the prohibitions contained in the Act may result in financial penalties being imposed on the association itself, its members, or both. Further details on the imposition on and enforcement of penalties against trade associations, professions and other self-regulating bodies are given in Part 8 of this guideline. More general information on penalties is available in the competition law guideline *Enforcement* (OFT407) and in the *OFT’s guidance as to the appropriate amount of a penalty* (OFT423).
- 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 Chapter I and Chapter II 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. This is considered in more detail in the competition law guideline *Modernisation* (OFT442).

## 2 Application of Article 81 and the Chapter I prohibition to associations of undertakings

### Decisions by associations of undertakings and agreements between undertakings

**2.1** Article 81 and the Chapter I prohibition cover **decisions by associations of undertakings** in addition to **agreements between undertakings** and **concerted practices**. It will be a matter of fact in each case if an agreement between undertakings which is carried out within the structure of an association (for example, an agreement to abide by the rules of the association) is considered to be a 'decision' or an 'agreement' for the purposes of Article 81 or the Chapter I prohibition (see also paragraph 1.5 above). This part explains the nature of decisions for the purposes of Article 81 and the Chapter I prohibition; elsewhere the guideline deals with the application of Article 81 and the Chapter I prohibition to associations of undertakings by virtue of their activities more generally.

### Decisions

**2.2** **Decision** has a wide meaning. It may include, for example, the constitution or rules of an association of undertakings or its recommendations or other activities<sup>5</sup>. In the day to day conduct of the business of an association, resolutions of the management committee or of the full membership in general meeting, binding decisions of the management or executive committee of the association, or rulings of its chief executive, the effect of which are to limit the commercial freedom of action of the members in some respect, will all be **decisions** of the association. The key consideration is whether the effect of the decision, whatever form it takes, is to limit the freedom of action of the members in some commercial matter.

<sup>5</sup> See *National Sulphuric Acid Association Ltd*, Re OJ L260, 3.10.80, p24; [1980] 3 CMLR 429.

### Rules

**2.3** The rules of an association may constitute a decision of the association, as may any co-ordination of the members' conduct in accordance with its constitution. Any rule which has an appreciable effect on competition within the common market and which may affect trade between Member States will fall within Article 81. A rule which has an appreciable effect on competition within the United Kingdom and which may affect trade in the United Kingdom will fall within the Chapter I prohibition. It may be possible for a rule to fall within both Article 81 and the Chapter I prohibition.

### Recommendations

**2.4** A recommendation of an association of undertakings may also be a decision, as may an oral exhortation which it is intended that members should follow. This will be the case even if the recommendation is not binding on the members or has not been fully complied with<sup>6</sup>. Any recommendation which has an appreciable effect on competition within the common market and which may affect trade between Member States will fall within Article 81. A recommendation which has an appreciable effect on competition within the United Kingdom and which may affect trade in the United Kingdom will fall within the Chapter I prohibition. It may be possible for a recommendation to fall within both Article 81 and the Chapter I prohibition.

### Other activities

**2.5** Other activities which are organised by or through associations of undertakings may fall within Article 81 if they have an appreciable effect on competition within the common market and may affect trade between Member States and/or they may fall within the Chapter I prohibition if they have an appreciable effect on competition within the United Kingdom and may affect trade in the United Kingdom. As noted in paragraph 2.1 above, these other activities may

<sup>6</sup> See Case C-96/82 *IAZ International Belgium NV v Commission* [1983] ECR 3369, [1984] 3 CMLR 276.



take the form of decisions of associations of undertakings or agreements between the undertakings which form part of the association. For example, they would cover the exchange of specific price information as discussed in Part 3 below.

## 3 Scope of Article 81 and the Chapter I prohibition

**3.1** The fact that members of an association of undertakings are acting through the association does not affect the way in which Article 81 and/or the Chapter I prohibition apply to their decisions, rules, recommendations or other activities; their position is no better and no worse than if they were acting in the same manner outside the forum of such an association. In each case Article 81 and/or the Chapter I prohibition will only apply if the relevant activity has an appreciable effect on competition in the relevant market. Any such activity which appreciably restricts competition under Article 81(1) and/or the Chapter I prohibition may however still be valid and enforceable where it satisfies the conditions in Article 81(3) and section 9(1) of the Act respectively. A number of the examples below may satisfy these conditions and therefore will not be prohibited. (Further details on the legal exception regime are provided in Part 4 below.)

<sup>7</sup> OJ C3, 6.1.01, p2.

**3.2** The remainder of this part sets out examples of the decisions, rules, recommendations or other activities of associations of undertakings that have the potential to appreciably prevent, restrict or distort competition for the purposes of Article 81(1) and/or the Chapter I prohibition. This is a non-exhaustive list; it includes types of activities which would generally fall within Article 81(1) and/or the Chapter I prohibition, although the particular circumstances of a case may mean that an activity of one of these types does not do so. Equally, there will clearly be instances of activities not listed in the types shown below which are prohibited. More general examples of anti-competitive behaviour which may fall within Article 81(1) and/or the Chapter I prohibition can be found in the competition law guideline *Agreements and concerted practices* (OFT401). In assessing specific agreements, the OFT will also have regard to the European Commission's *Guidelines on the applicability of Article 81 of the EC Treaty to horizontal cooperation agreements*<sup>7</sup>.

### Pricing

**3.3** The OFT believes that any decision including any recommendation as to prices and charges, including discounts and allowances, is likely to have an appreciable effect on competition.

## Information sharing

### General

- 3.4** As a general principle, the more informed customers are, the more effective competition is likely to be and so making information publicly available to customers does not usually harm competition.
- 3.5** In the normal course of business, undertakings exchange information on a variety of matters legitimately and with no risk to the competitive process. Indeed, competition may be enhanced by the sharing of information, for example, on new technologies or market opportunities. There are therefore circumstances where there is no objection to the exchange of information, even between competitors, and whether or not under the aegis of a trade association. For example, the collection and publication of statistics are legitimate functions of associations of undertakings.
- 3.6** The exchange of information may, however, have an adverse effect on competition where it serves to reduce or remove uncertainties inherent in the process of competition. The fact that the information could have been obtained from other sources is not necessarily relevant. Whether or not the information exchange has an appreciable effect on competition will depend on the circumstances of each individual case: the market characteristics, the type of information and the way in which it is exchanged. As a general principle, the OFT will consider that there is more likely to be an appreciable effect on competition the smaller the number of undertakings operating in the market, the more frequent the exchange and the more sensitive, detailed and confidential the nature of the information which is exchanged. There is also more likely to be an appreciable effect on competition where the exchange of information is limited to certain participating undertakings to the exclusion of their competitors and consumers<sup>8</sup>.
- 3.7** The general approach of the OFT to information exchange, based on the relevant principles established by the European Court<sup>9</sup> as appropriate, is set out below.

<sup>8</sup> Case T-141/94 *Thyssen Stahl AG v Commission* [1999] ECR II-347, upheld on appeal, Case C-194/99P.

<sup>9</sup> See for example, *United Kingdom Agricultural Tractor Registration Exchange* OJ L68 17.02.92, p19, [1993] 4 CMLR 358, upheld on appeal, Case T34/92; Case C-8/95 *New Holland Ford Limited v Commission* [1998] 5 CMLR 311 and Case T-35/92 *John Deere v Commission* [1994] II ECR 957.

### Exchange of price information

- 3.8** The exchange of information on prices may lead to price co-ordination and therefore diminish competition which would otherwise be present between the undertakings. This will be the case whether the information exchanged relates directly to the prices charged or to the elements of a pricing policy, for example discounts, costs, terms of trade and rates and dates of change.
- 3.9** The more recent or current the information exchanged, the more likely that exchange will have an appreciable effect on competition. Therefore, the circulation of purely historical information or the collation of price trends is unlikely to have an appreciable effect on competition, particularly if, for example, the exchange forms part of a scheme of inter-business comparison which is intended to spread best industrial practice, or if the information is collected, aggregated and disseminated by an independent body.
- 3.10** The regular and systematic exchange of specific information on prices between competitors is, however, likely to reduce the uncertainties inherent in the competitive process and to facilitate the coordination of market conduct, whether the exchange is organised by the members themselves or, as is often the case, by or through an association of undertakings. While the compilation of general information, for example general price trends for an industry, may not have an appreciable effect on competition, it must not cover (or enable undertakings to divine) confidential information relating to individual undertakings<sup>10</sup>.

<sup>10</sup> See *Bundesverband Deutscher Stahlhandel eV* OJ L62, 7.03.80, p34; [1980] 3 CMLR 193.

### Exchange of non-price information

- 3.11** The exchange of information on matters other than price may have an appreciable effect on competition depending on the type of information exchanged and the market to which it relates. The exchange of historical statistical data, market research, and general industry studies for example are unlikely to have an appreciable effect on competition, since exchange of such information is unlikely to inhibit individual undertakings' commercial and competitive independence.

**3.12** In general, the exchange of information on output and sales should not affect competition provided that it is sufficiently historic and aggregated and cannot influence future competitive market behaviour. There may however be an appreciable effect on competition if it is possible to disaggregate the information and identify the participants. This may also be the case if the exchange relates to recent or current information, or information which relates to future plans.

**3.13** As an example of this, in *United Kingdom Agricultural Tractor Registration Exchange*, the exchange of information by members of the trade association on sales and market shares, broken down by territory, product line and time period, was found to have infringed Article 81(1)<sup>11</sup>. Significant to this decision was the detail of the information exchanged and the fact that the market was concentrated, with four undertakings accounting for 80 per cent of total sales. It was held that the information exchanged created a degree of transparency in such an oligopolistic market which could destroy any remaining competition and enhance entry barriers by identifying any newcomers to the market thus facilitating a strategic response by the established undertakings.

<sup>11</sup> *United Kingdom Agricultural Tractor Registration Exchange* OJ L68 17.02.92, p 19, [1993] 4 CMLR 358, upheld on appeal, Case T34/92.

## Advertising

**3.14** Restrictions on advertising, whether relating to the amount, nature or form of advertising, have the potential to restrict competition. Whether the effect is appreciable depends on the purpose and nature of the restriction, and on the market in which it is to apply. Rules or decisions of associations of undertakings aimed at curbing misleading advertising, or at ensuring that advertising is legal, truthful and decent are unlikely to have an appreciable effect on competition, but restrictions which more generally prevent members from using advertising are another matter. Rules or decisions of associations of undertakings prohibiting members from soliciting for business, from competing with other members, or from advertising prices, or prices below a minimum or recommended level, are all likely to have an appreciable effect on competition.

### Joint purchasing/selling

**3.15** An agreement between purchasers to fix (directly or indirectly) the price that they are prepared to pay, or to purchase only through agreed arrangements, limits competition between them. An example of one type of agreement which might be made between purchasers is an agreement as to those with whom they will deal. Any joint activity, for example joint purchasing, joint selling or joint research, coordinated through an association of undertakings will be subject to Article 81 and/or the Chapter I prohibition to the same extent as if it were done outside the medium of an association of undertakings, for example, by the undertakings individually in an agreement.

### Codes of conduct

**3.16** A code of conduct may seek to introduce best practice into a particular sector and may include provisions, for example, for dealing with consumer complaints and a redress procedure. A code is unlikely to be successful in promoting consumer protection unless it is widely adopted and effectively enforced, but at the same time it may limit the way participants can compete. If, however, the structure of the market is competitive and the code does not deal with prices or involve any element of market sharing or customer sharing, the effects on competition are less likely to be appreciable. For further information on the OFT's consumer codes scheme, please visit the OFT's website or call the Codes Team on 020 7211 8815. It should be kept in mind that the process of approval of a code by the OFT's Codes Team and subsequent compliance with a code of conduct do not mean that an undertaking complies with the competition rules contained in Chapter I, Chapter II, Article 81 or Article 82.

### Technical standards

**3.17** Associations of undertakings may play a role in the negotiation and promulgation of technical standards in an industry. This will limit the members in the make-up of the products or services that they can offer and there is therefore a restriction of competition. If entry

barriers were to be significantly raised as a result of adoption of the standard, the effects on competition could be appreciable.

## Standard terms and conditions

**3.18** Associations of undertakings may be involved in the formulation of standard terms and conditions to be applied by members. This may be no more than a useful simplification of what otherwise might be complex and, to the customer, potentially confusing conditions. If an association of undertakings imposes on its members an obligation to use common terms and conditions of sale or purchase, this will inevitably restrict competition to some degree. Such standard conditions are less likely to have an appreciable effect on competition where members remain free to adopt different conditions if they so wish. Standard conditions may also have an appreciable effect on competition if a large proportion of members adopt those standard conditions leaving customers little choice in practice.

## Terms of membership

**3.19** Rules of admission as a member of an association of undertakings should be transparent, proportionate, non-discriminatory and based on objective standards. Those that are not may appreciably restrict competition for the purposes of Article 81(1) and/or the Chapter I prohibition. Terms of membership will have an appreciable effect on competition where the effect of exclusion from membership is to put the undertaking(s) concerned at a competitive disadvantage. Similarly, procedures for expelling members of an association may have an appreciable effect on competition, particularly where they are not based on reasonable and objective standards or where there is no proper appeals procedure in the event of refusal of membership or expulsion.

## Certification

**3.20** An association of undertakings may certify or award quality labels to its members to demonstrate that they have met minimum industry standards. While such a scheme has benefits for consumers in the form of quality assurances, it may lead to a restriction of competition.

A scheme is less likely to have an appreciable effect on competition for the purposes of Article 81(1) and/or the Chapter I prohibition where certification is available to all manufacturers that meet objective and reasonable quality requirements. Where manufacturers must accept additional obligations governing the products which they can buy or sell, or restrictions as to pricing or marketing, the scheme is likely to have an appreciable effect on competition for the purposes of Article 81(1) and/or the Chapter I prohibition.



# 4 The legal exception regime

## General

- 4.1** The Modernisation Regulation introduces a legal exception regime. This means that an agreement that falls within Article 81(1) but which satisfies the conditions set out in Article 81(3) shall not be prohibited, no prior decision to that effect being required. Such an agreement is valid and enforceable from the moment that the conditions in Article 81(3) are satisfied and for as long as that remains the case. The Modernisation Regulation provides that the burden of proof rests on the undertaking(s) claiming the benefit of Article 81(3).
- 4.2** The Act has been amended to mirror this approach so that an agreement that falls within the Chapter I prohibition but which satisfies the conditions set out in section 9(1) of the Act shall not be prohibited, no prior decision to that effect being required. Such an agreement is valid and enforceable from the moment that the conditions in section 9(1) are satisfied and for as long as that remains the case. The Act provides that the burden of proof rests on the undertaking(s) claiming the benefit of section 9(1) of the Act.

### The conditions in Article 81(3) and section 9(1)

- 4.3** Article 81(3) and section 9(1) set out four conditions which must all be met. Article 81(3) provides that the prohibition in Article 81(1) is inapplicable in respect of any agreement:

‘which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:

- (a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;
- (b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.’

- 4.4** The wording of section 9(1) is similar to that of Article 81(3) except that in the first condition in section 9(1) the phrase **of goods** is not

included. The omission of these words is intended to make clear (consistent with the practice of the European Commission in relation to Article 81(3)) that the conditions in section 9(1) apply also to agreements which contribute to improvements in relation to services.

<sup>12</sup> OJ C101, 27.4.04, p. 81-96.

**4.5** The European Commission has issued a Notice entitled *Guidelines on the Application of Article 81(3) of the Treaty*<sup>12</sup> to assist companies and their advisers in determining whether an agreement satisfies the conditions in Article 81(3). The OFT will have regard to this Notice in considering the application of Article 81(3) and section 9(1) of the Act.

**4.6** The following paragraphs provide examples of the kinds of activities of associations of undertakings which, where they have an appreciable effect, might meet the above conditions and so be legally enforceable without requiring any prior approval. Each activity will be judged on the facts of each case against the criteria set out in paragraph 4.3 above.

### Standard terms and conditions

**4.7** Given the potential benefit to consumers from clearly expressed standard terms and conditions, such terms and conditions may fall within the conditions in Article 81(3) and/or in section 9(1) and result in the standard terms not being prohibited, notwithstanding that competition is inevitably restricted to some degree. The restrictions on competition are, however, likely to outweigh the benefits to consumers – and thus not meet the conditions in Article 81(3) and/or section 9(1) – if the standardisation covers terms that are likely to be relevant to a customer in choosing between competing suppliers, for example, if they indirectly affect the prices to be charged.

### Technical standards

**4.8** Technical standards can help to promote safety and protect consumers. The benefits would have to be assessed against any effects on competition in deciding whether the conditions in Article 81(3) and/or section 9(1) of the Act are satisfied.

## 5 Trade associations

**5.1** Trade associations are the most common form of association of undertakings. There are trade associations in almost every sector of the United Kingdom economy. Further, many United Kingdom companies are members of international trade associations. The functions of such associations in furthering the trade interests of their members are diverse but they can be broadly categorised as:

- representing to Government, the European Commission and other public bodies the interests of members on legislation, regulations, taxation and policy matters likely to affect them
- promoting and protecting the interests of members in the media
- collecting and disseminating statistics and market information, and information about legislation and Government policy
- promulgating standards, codes of practice or standard terms and conditions of sale
- providing a range of services of an advisory or consultancy nature on, for example, legal, accounting, training or environmental matters, and
- providing advice of a more commercial nature.

**5.2** The functions of trade associations are clearly useful to members – especially, perhaps, to smaller firms – and they may also be beneficial in increasing the efficiency of the market system as a whole. Activities of trade associations which have no appreciable effect on competition will be of no concern. A trade association may, however, provide directly or indirectly the vehicle for anti-competitive, or even collusive, activity, and any decision, rule or recommendation of a trade association or agreement between its members which has an appreciable effect on competition may fall within Article 81 and/or the Chapter I prohibition. Where the activities of a trade association fall within Article 81 but satisfy the conditions in Article 81(3), or fall within the Chapter I prohibition but satisfy the conditions in section 9(1) of the Act, they will not be prohibited, no prior decision to that effect being required.

**5.3** The nature of the membership of a trade association is likely to be relevant in assessing whether an activity has an appreciable effect.

An association will usually seek to make its membership as comprehensive as possible to maximise its influence on behalf of its members. A wide membership will also increase the effectiveness of any code of practice on members' conduct, devised and implemented by a trade association in its self-regulatory role. However, the wider the membership among those engaged in a market within the United Kingdom, the greater the risk that any anti-competitive behaviour carried on by the association will have an appreciable effect. This will be of greater significance where members of a trade association are likely to be actual or potential competitors. The appreciable effect test is looked at in more detail in the competition law guideline *Agreements and concerted practices* (OFT401).

## 6 Professions

- 6.1** A professional body may lay down educational and experience qualifications for membership, keep a register of members, promulgate standards of conduct to be maintained by the members, and enforce the standards through a complaints and disciplinary procedure. A professional body represents its members' interests in dealing with Government and other public bodies and the media. Organisationally, the functions of representation and of registration and the establishment and enforcement of standards may be separated, as, for example, in the medical profession, between the British Medical Association and the General Medical Council. Increasingly, professional bodies have involved themselves in wider matters of professional practice such as professional indemnity insurance and relationships with other professions.
- 6.2** A professional body is capable of being an **association of undertakings** within the meaning of Article 81(1) and the Chapter I prohibition. As such, the rules and decisions of professional bodies are subject to the application of Article 81 and the Chapter I prohibition. The legal framework within which such decisions are taken, for example, whether or not the professional body is set up by and operates under statute or charter is irrelevant to the question of the applicability of Article 81 or the Chapter I prohibition to its decisions. However, in assessing their rules and decisions, professional bodies should be aware that not every agreement between undertakings or every decision of an association of undertakings which restricts competition necessarily infringes Article 81 or the Chapter I prohibition<sup>13</sup>.
- 6.3** The OFT has conducted a detailed study on competition within the professions. The report that resulted from this study was published in March 2001<sup>14</sup> and identified several restrictions on competition within the provision of professional services in England and Wales. The report focused on three professions - law, accountancy and architecture - and highlighted restrictions, whether arising from law, professional rules or other sources, which continued to constrain

<sup>13</sup> In Case C-309/99 *Wouters* [2002] ECR I-1577, the European Court of Justice found that there was no infringement of Article 81 because the professional regulation in question, despite its inherent restrictive effects could be reasonably considered to be necessary for the proper practice of the legal profession as it was organised in the Member State concerned.

<sup>14</sup> *Competition in professions* (OFT328).

freedom to compete in those professions. The OFT noted in the report its intention that the lessons of the report would inform work across the whole range of professions and throughout the United Kingdom.

<sup>15</sup> *Competition in professions – progress statement* (OFT385).

- 6.4** A number of restrictions were found to originate in professional rules. These include restrictions on advertising (including comparative advertising), restrictions on forms of service provision (such as rules against partnership), and the issuing by professional bodies of recommendations on fees. The professional bodies concerned were called upon to take prompt action to remove the unjustified restrictions. In April 2002 the OFT issued a progress statement indicating the progress that had been made in addressing the restrictions identified and indicating areas of continuing concern<sup>15</sup>.
- 6.5** The concerns identified in the OFT's report are not limited to the three professions that were reviewed. They may arise across the whole range of professions. The OFT encourages all professions to take account of the conclusions in the report in assessing whether their rules and practices may fall within Article 81 and/or the Chapter I prohibition.
- 6.6** The European Commission has also identified concerns with restrictions originating in certain professional rules in its *Report on Competition in Professional Services*<sup>16</sup>.
- 6.7** The Commission's report recommends<sup>17</sup> that in assessing whether any of their rules and decisions infringe Article 81, professional bodies should apply a proportionality test, ie. they should consider whether existing restrictions pursue a clearly articulated and legitimate public interest objective, whether they are necessary to achieve that objective and whether there are no less restrictive means to achieve this.

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<sup>16</sup> COM (2004) 83 final, 9 February 2004, paragraphs 37 to 47, available at: [http://europa.eu.int/comm/competition/liberal\\_professions/final\\_communication\\_en.pdf](http://europa.eu.int/comm/competition/liberal_professions/final_communication_en.pdf). Note also the European Commission's decision in relation to the Belgian architects' fee system, see European Commission's press release at: <http://europa.eu.int/rapid/pressReleasesAction.do?reference=IP/04/800&format=HTML&aged=0&language=EN&guiLanguage=en>

<sup>17</sup> COM (2004) 83 Final at paragraphs 93 and 94.

# 7 Self-regulating bodies

- 7.1** There are self-regulating bodies that fall outside the field of the professions. An example is the Committee on Advertising Practice which devises and enforces the British Codes of Advertising and Sales Promotion and the members of which include organisations representing the advertising and sales promotion industries and most media businesses. Self-regulating bodies may have statutory backing, such as those concerned with investment business set up under the Financial Services and Markets Act 2000. The essence of any system of self-regulation is that the conduct of the members of a profession, trade or industry is subject to a degree of monitoring and control by its representative body, or an organisation set up by that body or its members, to ensure that users or consumers are protected from unethical or otherwise unacceptable behaviour.
- 7.2** Self-regulating bodies are associations of undertakings and Article 81 and the Chapter I prohibition apply to their rules and decisions in exactly the same way as to those of any other association of undertakings. The discussion as to the scope of Article 81(1) and the Chapter I prohibition above applies equally to self-regulating bodies. Article 81(1) and/or the Chapter I prohibition apply to self-regulating bodies only where their decisions or rules have an appreciable effect on competition and, where they have such an effect, they will not be prohibited if they meet the conditions contained in Article 81(3) and/or section 9(1) of the Act.
- 7.3** The agreements or conduct of some self-regulating bodies, notably those operating under the Financial Services and Markets Act 2000, are excluded from the Chapter I prohibition and Chapter II prohibition. In these cases, competition scrutiny of the self-regulating body's rules is already provided for under its own specific legislation.

# 8 Consequences of infringement

## Voidness

- 8.1** Any agreement which has an appreciable effect on competition for the purposes of Article 81 and/or the Chapter I prohibition is void unless it meets the conditions contained in (respectively) Article 81(3) and/or section 9(1) of the Act.

## Financial penalties

- 8.2** Section 36 of the Act provides that the OFT may impose a financial penalty on an undertaking which has intentionally or negligently committed an infringement of Article 81 and/or the Chapter I prohibition. The amount of the penalty imposed may be up to 10 per cent of the worldwide turnover of the undertaking. See *OFT's Guidance as to the appropriate amount of a penalty* (OFT423) for further details.
- 8.3** The involvement of an association of undertakings in an infringement of Article 81 and/or the Chapter I prohibition may result in financial penalties being imposed on the association itself, its members or both.
- 8.4** Where the infringement of an association of undertakings relates to the activities of its members, the penalty shall not exceed 10 per cent of the sum of the worldwide turnover of each member active on the market affected by the infringement.
- 8.5** If the penalty is not paid within the date specified by the OFT, and an appeal against the imposition or amount of the penalty within the time allowed has not been brought or such an appeal has been made and the penalty upheld, the OFT may commence proceedings to recover the required amount as a civil debt.

## Third party claims

- 8.6** Third parties adversely affected by an agreement which they believe is prohibited by Article 81 and/or the Chapter I prohibition may take action in the courts to stop the behaviour and/or to seek damages.



- 8.7** Where a decision of the OFT or the Competition Appeal Tribunal (CAT), on appeal from a decision of the OFT, has already found an infringement of Article 81 and/or the Chapter I prohibition, third parties who consider they have suffered loss as a result of the infringement may bring an action for damages, against the undertaking or undertakings concerned, in the CAT or the courts. The CAT and the courts will be bound, in such proceedings, by the relevant infringement decision, provided that the decision is no longer capable of being overturned on appeal. For further details, see the competition law guideline *Enforcement* (OFT407).



## **Competition law guidelines**

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

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

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