OFFICE OF FAIR TRADING

Public bodies and competition law

A guide to the application of the Competition Act 1998

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1 INTRODUCTION

1.1 Markets for public services continue to be opened up to the private and voluntary sectors. Effective competition in those markets can benefit the wider economy by encouraging greater productivity and innovation and preserving long term growth, while continuing to provide greater value for money for users and taxpayers. Public bodies are also increasingly seeking to generate revenues by utilising assets or spare capacity in markets beyond their core public functions. Such developments reinforce the need for public bodies to be aware of their existing and ongoing obligations under UK and EU competition law when carrying out their functions.

1.2 To that end, this guide[1] seeks to assist public bodies by providing a high level outline of the circumstances in which their activities will be subject to the UK and EU competition law prohibitions on:

- anti-competitive agreements, including price-fixing, market-sharing or bid-rigging arrangements and potentially, depending on their effect, agreements involving exclusivity, restrictions of long duration or certain collaborative arrangements with competitors such as joint selling or purchasing, and

- abuses of a dominant position, such as the setting of unfair prices or trading conditions or the refusal to supply an existing customer without objective justification.[2]

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[1] This guide replaces the Office of Fair Trading's (OFT) policy note OFT443 *The Competition Act and public bodies* (August 2004).

[2] Public bodies should be aware that their conduct may also (or alternatively) be subject to other laws within the field of competition law, including public procurement, merger control and/or State aid laws. Those laws are outside the scope of this guide. OFT guidance on the UK merger control rules is available on its website www.oft.gov.uk/OFTwork/mergers/publications Guidance on the application of the EU State aid laws in the UK can be found on the BIS website www.bis.gov.uk/policies/europe/state-aid

1.3 Those prohibitions, set out in the Competition Act 1998 (CA98)[3] and the Treaty on the Functioning of the European Union (TFEU)[4] apply to the conduct of all '**undertakings**'.

1.4 Public bodies will fall within the definition of an undertaking when they carry out an '**economic activity**'. It is for public bodies themselves to assess on a case-by-case basis whether, in carrying out any of their functions, they are acting as undertakings.

1.5 In making this assessment, it is the **nature of the particular activity being conducted** that is key, not the legal form, or public or private sector status, of the body that carries it out. Thus, a body – including a public body – may be an undertaking (and therefore subject to competition law) in respect of some of its activities, but not others. **Section 2** below discusses further the concept of 'economic activity'.

1.6 Where UK or EU competition law does apply to the activity of a public body, it is not necessarily the case that that body's existing conduct infringes such competition law or that it will have to amend its conduct. Indeed, compliance with competition law should not materially impede public bodies' efficient exercise of their functions.

1.7 However, non-compliance with competition law can have serious consequences. These include the unenforceability of the relevant agreement or decision and an adverse reputational impact, as well as the possibility of financial penalties and/or claims for damages. Breaches of competition law may also have consequences for the

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[3] Anti-competitive agreements between undertakings are prohibited under Chapter I of the CA98 (the Chapter I prohibition). Chapter II of the CA98 prohibits undertakings with a dominant position in a market from abusing that dominant position (the Chapter II prohibition).

[4] The Chapter I and Chapter II prohibitions are the UK law equivalents of, respectively, Articles 101 and 102 TFEU, which apply where the anti-competitive agreement or conduct may affect trade between EU Member States. European case law on these provisions of the TFEU is directly relevant to the interpretation of the equivalent CA98 provisions due to section 60 CA98.

individuals involved in some cases. **Section 4** below discusses further the consequences of non-compliance with UK and EU competition law.

1.8 This guide sets out factors to which public bodies should have regard in determining whether they act as undertakings in any of their activities. It is not intended to be a comprehensive guide to the legal and economic frameworks for applying competition law to agreements and conduct.[5] Public bodies seeking a more definitive indication as to whether any of their specific activities are subject to UK or EU competition law should seek legal advice in the first instance.

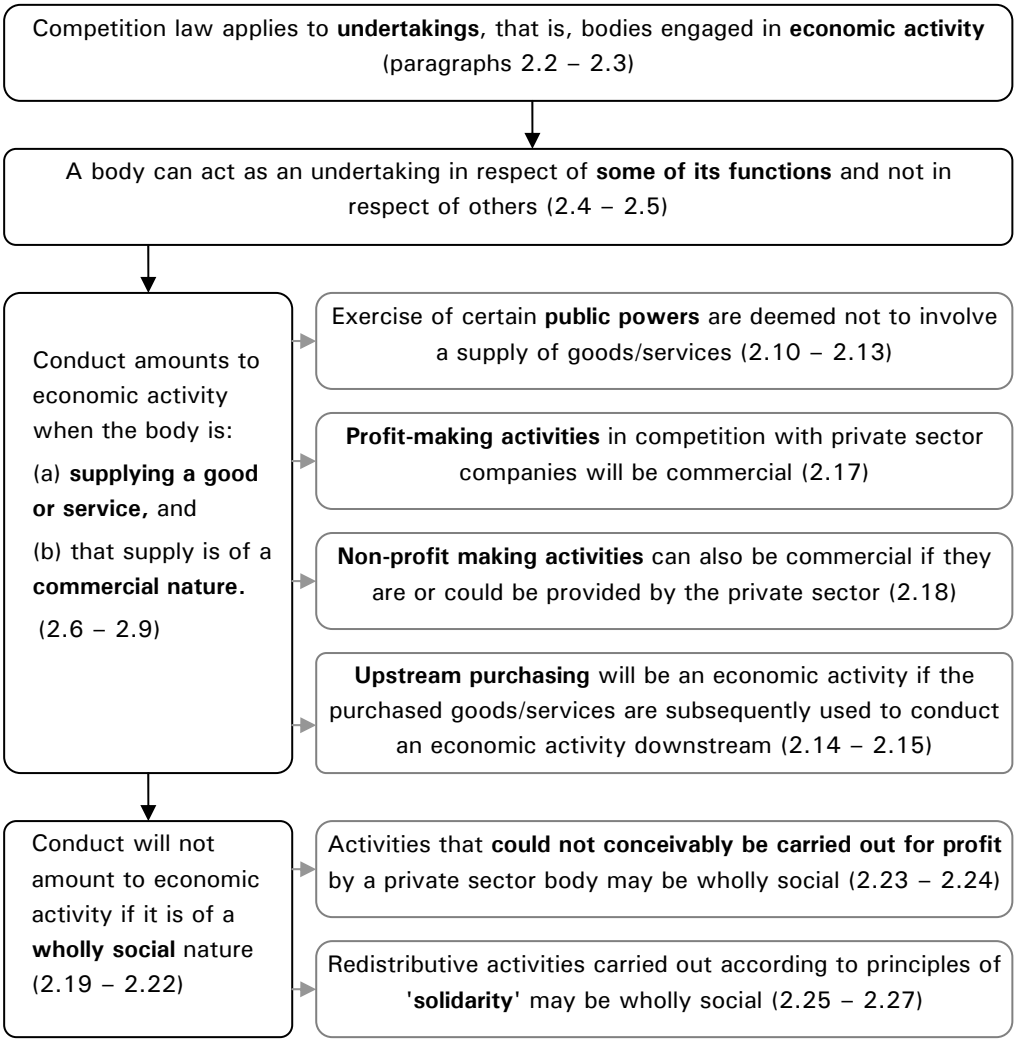
1.9 In cases involving genuine uncertainty, the OFT should be approached, as it may – in appropriate circumstances – provide a public body with a non-binding 'Short-form Opinion' on the application of the CA98 to a specific collaborative activity.[6] To enquire as to the possibility of a Short-form Opinion, or for other queries about this guide that cannot be addressed through legal advice, please contact the OFT's Enquiries and Reporting Centre on 0845 7 22 44 99, who will be able to direct you to an appropriate person.

[5] The OFT has previously published guidelines on the general application of competition law. These are available from the OFT website (www.oft.gov.uk) See, in particular, OFT401 *Agreements and concerted practices* (December 2004); OFT402 *Abuse of a dominant position* (December 2004); and OFT1341 *How your business can achieve compliance with competition law* (June 2011).

[6] See Section 4, paragraphs 4.12 and 4.13 below.

2 THE APPLICATION OF COMPETITION LAW TO PUBLIC BODIES

2.1 Below is a high-level overview of the key principles to which a public body should have regard when assessing whether its activities will be subject to UK or EU competition law.[7]



[7] This overview is intended as a framework and to facilitate ease of reference to the remainder of this section. It is not a substitute for the more detailed paragraphs that follow, which explain how the various terms have been used and interpreted by the UK and EU courts in past cases.

Public bodies as 'undertakings'

2.2 A public body will be subject to the UK and EU competition law prohibitions discussed in this guide if and when it acts as an 'undertaking'. The term 'undertaking' is not defined in the CA98 or the TFEU, but its meaning has been considered in UK and EU case law.

2.3 That case law has defined 'undertaking' as covering any natural or legal person engaged in 'economic activity', regardless of its legal form or the way in which it is financed.[8] The focus of the assessment of whether a body is an undertaking is therefore on the nature of the **particular activity** undertaken, not the nature of the body that undertakes it. As such:

- The term 'undertaking' can apply equally to public sector bodies and not-for-profit bodies, as well as to private sector bodies. Public authorities, State-controlled enterprises, charities,[9] etc. all fall within the definition of an undertaking, if they are carrying on an economic activity.

- The legal form of the body in question is also irrelevant to the question of whether it acts as an undertaking. A body need not, for example, be an incorporated company in order to be an undertaking.

- The fact that a body is intended to be non-profit making will not, of itself, be sufficient to deprive it of its status as an undertaking.[10]

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[8] Case C-41/90 *Höfner & Elser v Macrotron* [1991] ECR I-1979 ('*Höfner & Elser*'), paragraph 21.

[9] See, for example, OFT decision of 20 November 2006, *Exchange of information on future fees by certain independent fee–paying schools* (Case CA98/05/2006).

[10] Case C-67/96, *Albany International BV v Stichting Bedrijfspensioenfonds Textielindustrie* [1999] ECR I-5751 ('*Albany*'), paragraph 79.

2.4 It is also important to note that this 'functional' approach means that a public body may act as an undertaking – and therefore be subject to competition law – in respect of some of its activities, but not in respect of others.

- For example, a body vested with public powers to grant applications to organise motorcycling events was found not to be acting as an undertaking when making such authorisation decisions, but was considered to act as an undertaking when carrying out economic advertising and sponsorship activities relating to such events.[11]

2.5 As a result, each activity carried out by a public body must be considered separately to assess whether or not it is 'economic'.[12]

Identifying 'economic activity'

2.6 Whether a particular activity carried on by a public body is treated as an economic activity necessarily depends on the specific facts at hand. For this reason, past cases may provide only limited wider guidance to public bodies seeking to apply legal precedent to their own specific circumstances. Nevertheless, the case law has set out certain broad principles that public bodies should take into account when assessing whether their own conduct amounts to economic activity.

2.7 In broad terms, a public body should ask itself the following questions for each of its activities separately:

- Am I offering or supplying a good or service, as opposed to, for example, exercising a public power?

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[11] Case C-49/07, *MOTOE v Elliniko Dimosio* [2008] ECR I-4863 ('*MOTOE*'), paragraph 25 onwards.

[12] Joined cases C-264/01, C306/01, C-354/01, C-355/01 *AOK Bundesverband* [2004] ECR I-2493, paragraph 58.

- If so, is that offer or supply of a 'commercial' – rather than an exclusively 'social' – nature?

2.8 If the answer to both these questions is yes, then – **for the purposes of that activity (and any related upstream purchasing)** – the public body is likely to be regarded as an undertaking subject to UK and EU competition law. Further detail on each of these elements of the assessment is set out below.

Does the public body offer or supply goods or services?

2.9 It is the activity of **offering or supplying** goods or services on a given market[13] that is the characteristic feature of an economic activity.[14] Where – by contrast – an activity does not itself involve such offer or supply and is not related to a subsequent downstream offer or supply of goods and services by the body in question, that activity will generally not be considered economic activity.

Exercise of 'public powers'

2.10 The exercise by a body of powers which are 'typically those of a public authority' (that is, where it carries out State prerogatives or essential functions of the State) are deemed not to involve the offer or supply of goods or services on a market.[15]

2.11 Certain 'core' State activities, such as the provision of a national military or the administration of justice would typically be considered to

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[13] The question of whether a good or service is offered or supplied 'on a market' is considered further below.

[14] Case C-205/03 P *Federación Española de Empresas de Tecnología Sanitaria (FENIN) v Commission* [2006] ECR I-6295 ('*FENIN*'), paragraphs 25 to 26.

[15] Case C-343/95 *Diego Cali & Figli SrL v Servizi Ecologici Porto di Genova Spa* [1997] ECR I-1547 ('*Diego Cali*'), paragraphs 22 to 23.

involve the exercise of essential functions of the State, and thus not to involve the offer or supply of goods or services.

2.12 In past cases, certain functions relating to air traffic control,[16] environmental protection[17] and tax collection on behalf of the State[18] have, similarly, each been deemed to involve such an exercise of 'public powers'.

2.13 Ultimately, the distinction between such public functions and economic activities involving the provision of a good or service on a market will depend on the facts of each case. As noted above, the exercise by a body of certain 'public powers' would not prevent other 'non-core' activities carried out by the same body being subject to competition law.

- For example, where a body acts in a purely administrative capacity and merely regulates the provision of goods and services on a market, it has been considered not to be offering or supplying such goods or services.[19] That such administrative activity is undertaken in exchange for a fee will not necessarily render the activity 'economic'.[20] However, to the extent that the body also participates in the market, such participation may constitute an economic activity.[21]

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[16] Case C-113/07 P, *SELEX Sistemi Integrati SpA v Commission* [2009] ECR I-2207 ('*SELEX*').

[17] See *Diego Cali*.

[18] Case C-207/01, *Altair Chimica SpA v ENEL Distribuzione* SpA [2003] ECR I-8875.

[19] See, for example, case C-30/87, *Corinne Bodson v SA Pompes funebres des regions liberes*, [1988] ECR 2479 ('*Bodson*'), in which the grant by a public body of a concession to provide funeral services in a particular locality was found not to be an economic activity.

[20] See, for example, *Bodson*, paragraph 18.

[21] See *MOTOE*, paragraphs 24 – 26.

Purchase of goods or services

2.14 Competition law may apply to agreements and conduct relating to a public body's **purchasing** activities (whether individually or jointly with others). However, in determining whether a public body is acting as an undertaking in relation to such purchase of goods or services in a market, the economic or non-economic nature of that purchasing activity depends on **the end use to which the public body puts the goods or services bought**:[22]

- If the purchased goods are related to a subsequent offer or supply of goods or services on a market by the public body in question (for example, the purchased goods form an input to such supply of goods or services), then, if the downstream supply is considered to be an economic activity, the purchasing activity is also likely to be deemed to be 'economic'.

- By contrast, where a public body purchases goods or services in a given market, but does **not** directly offer or supply any goods or services in that (or a related) market,[23] that body will not typically

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[22] *FENIN,* paragraph 26. The Court of Justice (CJ), in examining whether organisations in charge of the Spanish health system were engaging in economic activity, confirmed that a public body's purchasing activity should not be dissociated from the downstream use (in that case, the management of the health system) to which those purchases are put. See also *SELEX*, paragraph 102 (cf. the approach taken in *BetterCare Group Limited v Director General of Fair Trading* [2002] CAT 7 ('*BetterCare II*'), referred to at n.34 below).

[23] For example, where the good or service is purchased entirely for the public body's own use (that is, as an end consumer). See, by contrast, joined cases C-180/98 - C184/98 *Pavel Pavlov and Others v Stichting Pensioenfonds Medische Specialisten* [2000] ECR I-6451, paragraphs 78-82, in which payments made by self-employed doctors into a single occupational pension fund were found not to have been made as end customers, but rather were held to relate to the doctors' downstream activity of providing private medical services to patients. As that downstream supply of medical services was an economic activity, the making of pension contributions (in effect, the activity of 'purchasing' pensions) was itself also an economic activity.

be acting as an undertaking for the purposes of UK or EU competition law when it makes such purchases.

2.15 Public bodies should note that, even where they are carrying out essential functions of the State, or merely purchasing goods, their conduct may — even if not subject to the UK and EU competition law prohibitions discussed in this guide —still be subject to other legal controls. These may include public and administrative law or public procurement law.[24] Discussion of such laws, including, for example, the extent to which public bodies are required to undertake an open competitive procurement when making purchases, is beyond the scope of this guide.

Where goods or services are offered or supplied by the public body, is that offer or supply of a 'commercial' nature, as opposed to an exclusively 'social' nature?

2.16 Where public bodies do offer or supply goods or services, it is necessary to consider whether that downstream supply is of a commercial or, instead, an exclusively social nature.[25]

Commercial activity

2.17 The provision of goods or services on a 'commercial' basis will constitute economic activity. The clearest example of this is an activity undertaken for profit in direct competition with private sector companies:

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[24] Furthermore, the OFT has used its broader markets-focused powers to investigate the impact of procurement activities on competition in markets. See, for example, OFT1314 *Commissioning and competition in the public sector* (March 2011) and OFT1214 *Choice and competition in public service markets* (March 2010).

[25] As noted at paragraph 2.14, the commercial or social nature of the downstream supply is relevant not only to whether **that downstream supply** is an economic activity, but also to whether the public body's **upstream purchase** of goods or services required for such supply is itself also an economic activity.

- For example, Companies House has been found to act as an undertaking when competing with private sector information providers in the supply of online company data search tools.[26]

- Similarly, a public body will also generally be regarded as engaging in economic activity when it carries out 'wider markets activities' (being 'non-core', discretionary activities using capacity not needed for the body's statutory duties, which are provided in a competitive market with a view to generating revenues).

2.18 However, the concept of 'commercial' activity should not be considered limited to such examples: importantly, an activity need not in fact generate a profit[27] – or even have a profit-making motive[28] – in order to be deemed to be commercial in nature (and thus to be an 'economic' activity). Thus, the fact that a public body provided employment recruitment services free of charge did not prevent the EU courts finding that those services were an economic activity, as they could be (and had previously been) provided by private sector companies.[29]

'Social' activity

2.19 By contrast, where public bodies carry out an activity of an exclusively social nature, neither that activity, nor the bodies' purchase of goods or services for the purpose of that activity, will generally be treated as an economic activity.

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[26] See the OFT decision of 25 October 2002, *Companies House, the Registrar of Companies for England and Wales* (Case CP/1139-01).

[27] Case C-244/94, *Fédération Française des Sociétés d'Assurance and Others v Ministère de l'Agriculture et de la Pêche* [1995] ECR I-4013 ('*FFSA*'), paragraph 21.

[28] *MOTOE*, paragraph 27.

[29] See *Höfner & Elser.*

2.20 Again, any assessment of whether an activity is of an exclusively social nature will necessarily be highly fact specific, and must take account of all aspects of the activity in question. While certain individual features of an activity – such as, for example, a lack of connection between the cost of providing a good or service and the price (if any) paid by end users[30] – may suggest that an activity is inherently 'uncommercial', all aspects of the activity must be considered as a package, rather than feature by feature.

2.21 Past case law on this issue does not provide a clear definition of when an activity will be considered to be 'social'. Those cases do establish certain principles, however, that public bodies can seek to apply when determining in a given case whether they are undertaking a social activity:

- The activity must be **exclusively** social – an activity that is fundamentally 'commercial' but also pursues some public service objectives will still be an economic activity.
- Activities which by their very nature could not – even in principle – be carried out for profit without State support have previously been characterised as being 'exclusively social'.
- In the context of social security and insurance schemes, the operation of a scheme according to certain wholly 'uncommercial', redistributive principles (known as '**solidarity**') has been considered to be an exclusively social activity.

Each of these is discussed further below.

Exclusively social

2.22 The activity must be of an **exclusively** social nature. An activity that would otherwise be deemed to be commercial in nature (and therefore

[30] See the opinion of Advocate General Maduro in *FENIN*, paragraph 31.

'economic') will not necessarily be sheltered from competition law simply because it also pursues some additional public service objectives.

- For example, a public body's operation of a pension fund was found by the EU court to be an economic activity as the fund operated on the principle of 'capitalisation' (the level of benefit it paid out was based on the financial results of its investment of contributions) and in competition with insurance companies.[31] That the fund also pursued some social objectives,[32] was governed to an extent by certain principles of solidarity and was non-profit making, was not, in the court's view, sufficient to render such activity 'non-economic'.

Impossibility of profit

2.23 Exclusively 'social' activities have previously been characterised as those which **by their very nature could not – even in principle – be carried out for profit without State support**.[33] Where the nature of the activity is such that profitable private sector involvement is impossible, no 'market' for the activity exists. Market forces do not (and could not) therefore play any part in the activity and, as such, that activity would not be capable of having anti-competitive effects.[34]

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[31] *Albany*, paragraph 86. See also *FFSA*, paragraph 18.

[32] In that case, supplementing the low-level state pension for all workers within a particular sector.

[33] See the opinion of AG Jacobs in *AOK Bundesverband*, paragraph 27, citing *Albany* and *Höfner & Elser*.

[34] The fact that a public body's conduct **was** capable of having anti-competitive effects in the market has been taken by the UK Competition Appeal Tribunal as evidence that that conduct was economic (see *BetterCare II*). To the extent that that judgment focused on purchasing conduct, it must now be considered in the light of the principles subsequently endorsed by the CJ in *FENIN* and *SELEX* (n.22 above).

2.24 Importantly, however, the fact that private sector companies **currently** do not carry out activities in the market does not preclude the possibility of the activity being found to be 'economic'.[35]

- For example, where private sector companies have in fact carried out the activity in question in the past, this may indicate that it is not an activity that must necessarily be carried out by a public authority, and therefore that the activity is 'economic'.[36]

- Similarly, the fact that a government or public body decides not to allow private sector companies to provide a certain good or service (and, for example, instead provides it wholly in-house) does not necessarily mean that that activity is not 'economic'.[37]

'Solidarity'

2.25 Past cases in which public bodies' activities have been found to be 'exclusively social' have focused on the fields of compulsory social security and insurance. In that context, the EU courts have found the operation of certain compulsory healthcare and insurance schemes subject to State control to be 'exclusively social' where those schemes:

- provided members with the relevant service (for example, insurance cover) regardless of their financial status and state of health

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[35] See Case C-475/99 *Firma Ambulanz Glöckner v Landkreis Südwestpfa*l [2001] ECR I-8089 ('*Ambulanz Glöckner*'), paragraph 20 and *Höfner & Elser*, paragraph 22.

[36] See *Ambulanz Glöckner*, paragraph 20: the ambulance transport services that the bodies in question had the exclusive right to provide had previously been carried out by private sector companies. As such, they were found to constitute an economic activity.

[37] See *Höfner & Elser*, paragraph 22: German law prohibited any parties other than public bodies from providing the 'employment procurement' services under consideration. Such services were nonetheless held to be an economic activity, as they had not always been, and were not necessarily, carried out by public bodies.

- did not take a member's level of contributions into account when paying benefits, and
- were non-profit-making.[38]

Given those features, the schemes were said by the court to be governed by the principle of '**solidarity**' and not to constitute economic activity.

2.26 By contrast, an insurance scheme which was optional and operated according to the principle of 'capitalisation' (that is, the scheme paid benefits solely based on the amount of the beneficiary's contributions and the financial results of the investments made by the managing organisation) was deemed to be engaging in economic activity.[39]

2.27 To date, it appears that 'solidarity' has been found to exist where public bodies' activities led to the redistribution of income between those who are 'better off' (be that in terms of their finances, health, age, etc.) and those who, given their resources, would otherwise be deprived.[40] As set out above, however, an activity must be considered on its own specific facts in order to determine whether, as a whole, it could be considered to be governed entirely by principles of 'solidarity'.

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[38] Joined cases C-159/91 and C-160/91 *Poucet and Pistre* [1993] ECR I-637 ('*Poucet and Pistre'*), paragraph 10 (concerning management of the public social security system). See also cases C-350/07 *Kattner Stahlbau GmbH v Maschinenbau- und Metall- Berufsgenossenschaft* (insurance against accidents at work and occupational diseases) [2009] ECR I-1513, *AOK Bundesverband* (operation of sickness funds), and C-218/00 *Cisal di Battistello Venanzio v INAIL* [2002] ECR I-691 (compulsory insurance against accidents at work).

[39] *FFSA*, paragraph 17.

[40] *Poucet and Pistre*, paragraph 10.

3 SPECIFIC EXCLUSIONS FROM COMPETITION LAW

3.1 Where public bodies **do** act as undertakings, there may be certain limited circumstances in which their conduct may fall within the scope of a specific exclusion from competition law provided for in the relevant UK and/or EU legislation.

3.2 Schedule 3 paragraph 4 of the CA98 and its EU law equivalent, Article 106(2) TFEU, exclude from the application of the UK and EU prohibitions respectively undertakings that are entrusted with providing 'services of general economic interest' or that are 'revenue-producing monopolies', insofar as those prohibitions would obstruct, in law or in fact, the performance by those undertakings of the particular tasks assigned to them.[41] These exclusions therefore seek to ensure that the application of competition law does not prevent the effective provision of important public services or the proper operation of fiscal monopolies.[42]

3.3 The OFT will interpret these exclusions strictly, and the exclusions will generally be applicable in only a limited number of circumstances. In the past, the European courts have applied the 'services of general economic interest' exclusion in certain sectors in which a universal

[41] Note that where entrustment of a service of general economic interest to an undertaking involves the grant of State aid, it will be necessary to comply with applicable EU State aid rules. Those rules are beyond the scope of this guide.

[42] For guidance on how the OFT interprets and applies these exclusions, see OFT421 *Services of general economic interest exclusion* (December 2004). Broadly, services of general economic interest are services that the State considers should be provided in all cases, whether or not there is an incentive for the private sector to do so. Revenue-producing monopolies are bodies granted a legal monopoly over the production or distribution of a particular good or service in order to raise revenue for the State.

service obligation exists, such as core postal services or emergency ambulance transport services.[43]

3.4 The CA98[44] also excludes from the scope of its prohibitions any agreements that an undertaking must enter into, or conduct that it must engage in, in order for it to comply with a '**legal requirement**' (for example, a requirement imposed by primary or secondary UK legislation or directly-effective EU legislation). Again, the OFT expects that this exclusion will be applicable in only a very limited number of circumstances. These might include, for example:

- agreements that are entered into as a result of formal directions issued by a sector regulator,[45] or
- where a party is specifically required by legislation to disclose publicly certain information that would otherwise be considered competitively sensitive. Thus, the Chapter I prohibition has previously been found not to apply to a regulated undertaking's publication of its prices, insofar as such publication was mandated by the terms of its statutory licence.[46]

The legislation or other legal instrument must **require** (explicitly or in practice) undertakings to engage in the agreement or conduct in

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[43] See, respectively, case C-320/91 *Corbeau* [1993] ECR I-2533 and *Ambulanz Glöckner*. In the UK, such sectors are typically governed by sector specific regulation. It should be noted that the significant privatisation and liberalisation in the UK has significantly reduced the number of services where a single body has been entrusted with the exclusive right to provide the relevant service.

[44] Schedule 3, paragraph 5 CA98.

[45] For example, the Office of Rail Regulation considers that, where it directs undertakings to enter into access agreements under section 17 of the Railways Act 1993, those agreements are excluded from the scope of both the Chapter I and Chapter II prohibitions.

[46] Decision of the Director General of Fair Trading of April 2002, *Vodafone: distribution agreements for pre-pay mobile phone vouchers* (Case 5/04/2002).

question. If that agreement or conduct is only encouraged or facilitated by the relevant legal instrument and the undertaking therefore retains some freedom of action, competition law will still apply.[47]

3.5 The CA98 also confers on the Secretary of State power to issue orders excluding certain categories of agreement between undertakings from the scope of the CA98,[48] if such exclusion is necessary either to avoid conflict with international obligations or for compelling reasons of public policy. To date, only three such orders have been made, each excluding on public policy grounds narrow categories of agreement in the defence sector from the application of the CA98. Furthermore, such orders do not serve to disapply EU competition law where the agreement affects trade between EU Member States.

[47] See Case C-280/08 P, *Deutsche Telekom v. Commission,* [2010] ECR I-0000, paragraphs 80-81: the fact that the undertaking's abusive pricing conduct was encouraged by pricing rules laid down by a national regulatory authority did not absolve the undertaking of competition law liability, as it retained some freedom to determine its prices. See also joined cases C-359/95 P and C-379/95 P *Commission and France* v *Ladbroke Racing* [1997] ECR I-6265, paragraphs 33-34.

[48] Schedule 3, paragraph 7 CA98.

4 THE CONSEQUENCES FOR PUBLIC BODIES OF ENGAGING IN ECONOMIC ACTIVITY

4.1 The fact that a public body acts as an undertaking and is subject to UK and EU competition law does not necessarily mean that it will have to amend its practices. Indeed, compliance with competition law should not materially impede public bodies' efficient exercise of their functions. Instead, public bodies need to self-assess whether their conduct is compliant with competition law to determine whether any amendments are required.

4.2 However, the OFT is keen to ensure that, where public bodies do engage in economic activities, a level playing field and a similar commitment to compliance exists for all operators in those markets, particularly in mixed markets in which public bodies, private firms and third sector organisations (for example, charities) compete alongside one another. Effective competition in those markets can benefit the wider economy by encouraging greater productivity and innovation and preserving long term growth, while continuing to provide greater value for money to the taxpayer.

4.3 If a public body is acting as an undertaking, the types of agreement and conduct that are prohibited by competition law will be the same for that public body as for any other undertaking.

4.4 Thus, for example, types of agreement (whether formal or informal) that are likely to be prohibited under the Chapter I prohibition and/or Article 101 include those which fix the price charged for goods or services, limit production, allocate markets or customers (whether geographically or by some other division), or involve collusive tendering (also known as bid-rigging).

4.5 Other agreements between undertakings, such as those involving the joint purchase or sale of goods or services or those which have a long exclusivity period, may also breach competition law where they have anti-competitive effects. Anti-competitive effects include enabling the undertakings concerned to raise prices or to reduce quality or service

standards, and/or making it difficult for other undertakings to compete. For these types of agreements, any competition law concerns will be assessed alongside any economic benefits arising from the arrangements.[49]

4.6 Under the Chapter II prohibition and/or Article 102, a public body acting as an undertaking must refrain from certain conduct where it holds a dominant position, which is only likely if that undertaking is able to behave independently of the normal constraints imposed by competitors, suppliers and consumers. Examples of the kind of conduct that might amount to an abuse of that dominant position include: charging prices so low that they do not cover the costs of the product or service sold in order to exclude competitors, offering different prices or terms to similar customers without objective justification, or refusing to supply an existing or long standing customer without objective justification.

4.7 The OFT has published separate guidance on how undertakings can achieve compliance with competition law.[50] The information above is therefore intended as a brief overview of the principal categories of potentially unlawful conduct, and not as a substitute either for that more detailed guidance or for bodies seeking legal advice, where appropriate.

Sanctions for breach of competition law

4.8 Failure by a public body to comply with competition law in carrying out an economic activity can have serious consequences:

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[49] For example, the agreement may be permitted under section 9 CA98 or Article 101(3) TFEU on the basis of the efficiencies and consumer benefits generated by that agreement, either in general terms or pursuant to a specific UK or EU block exemption.

[50] See OFT1341 *How your business can achieve compliance with competition law* (June 2011) and OFT1330 *Quick Guide to competition law compliance* (June 2011).

- An agreement entered into, or decision made, which breaches UK or EU competition law will be automatically void and unenforceable.

- Third parties (including injured competitors, customers and consumer groups) that have suffered loss as a result of an undertaking's infringement of competition law can bring a civil damages claim against that undertaking in the UK courts.

4.9 Furthermore, the OFT also has a wide range of powers to investigate undertakings (and in some cases individuals within those undertakings) that are suspected of breaching competition law[51] and, where appropriate, may impose substantial penalties:

- Undertakings that are found to have breached competition law can be fined up to 10 per cent of their annual worldwide turnover and directed to change their behaviour.

- Individuals who dishonestly engage in cartel activity can be prosecuted under the criminal cartel offence[52] and sentenced to up to five years in prison and/or a fine.

- To the extent that the undertaking in breach is formed as a company – whether in public or private ownership – directors of that company can be disqualified from managing a company for up to 15 years.[53]

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[51] See further OFT 404 *Powers of* investigation (December 2004), OFT407 *Enforcement* (December 2004), and OFT515 *Powers for investigating criminal cartels* (January 2004).

[52] Section 188, Enterprise Act 2002. While the 'cartel offence' in section 188 is committed by individuals, the scope of the offence is determined by reference to arrangements between 'undertakings'. Section 188(7) makes clear that 'undertaking' for this purpose has the same meaning as under the CA98.

[53] See further OFT510 *Competition Disqualification Orders* (June 2010) and OFT1340 *Company directors and competition law* (June 2011).

4.10 The OFT uses its tools flexibly and applies a range of measures.[54] It will pursue the course of action that it deems to be the most suitable, effective and efficient, taking into account the specific circumstances of the case and the markets at issue, and the OFT's prioritisation principles.[55]

4.11 For example, in response to a competition concern in a public services market, the OFT will consider the range of options available to it, and will balance the beneficial deterrent effect of a formal decision and possible fine against the impact that payment of a fine might have on the public body and ultimately, the taxpayer.

Further guidance

4.12 Notwithstanding the principle that bodies must self-assess whether they are compliant with competition law, the OFT may – where genuine uncertainty exists – provide public bodies that are proposing to enter into some form of collaboration agreement with existing or potential competitors with its non-binding views under the OFT's Short-form Opinion process.

4.13 The OFT will consider giving a Short-form Opinion where the proposed agreement raises novel or unresolved questions regarding the application of the CA98, the clarification of which would benefit a

[54] For example, if the OFT is made aware of a potential breach of competition law, but decides not to prioritise a full CA98 investigation, it may, in appropriate cases, send that body a warning letter (see further OFT1263 *A guide to the OFT's investigation procedures in competition cases* (March 2011), paragraph 4.8).

[55] These describe the principles that the OFT uses in prioritising its enforcement and other work, based on the impact, strategic significance, risks and resources associated with such action. See OFT953 *OFT Prioritisation Principles* (October 2008).

wider audience. The OFT will consider requests for such Short-form Opinions under its usual prioritisation principles.[56]

OFT publications

4.14 The OFT has published further guidance on the application of the CA98, including:

- OFT401 *Agreements and concerted practices* (December 2004)
- OFT402 *Abuse of a dominant position* (December 2004)
- OFT407 *Enforcement* (December 2004)
- OFT421 *Services of general economic interest exclusion* (December 2004)
- OFT953 *OFT Prioritisation Principles* (October 2008)
- OFT1330 *Quick Guide to competition law compliance* (June 2011)
- OFT1341 *How your business can achieve compliance with competition law* (June 2011)

4.15 These guidance documents are available to download from the OFT's website www.oft.gov.uk

European Commission publications

4.16 For information on the application of EU competition law to:

- agreements between competitors, see *European Commission Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements* (OJ 2011 C11/1)

[56] Further detail on the circumstances in which the OFT may issue Short-form Opinions is provided in *OFT's Approach to Short-form Opinions* (April 2010).

- agreements between businesses at different levels of the distribution chain (such as suppliers and retailers), see *European Commission Guidelines on Vertical Restraints* (OJ 2010 C130/1).

4.17 These Guidelines are available to download from the European Commission website http://ec.europa.eu/competition