

## **Government response to the consultations on giving effect to Regulation 1/2003 and aligning the Competition Act 1998 including exclusions and exemptions**

### **1. Introduction**

In April 2003 the Government published a consultation document “Modernisation – a consultation on the Government’s proposals for giving effect to Regulation 1/2003 EC and for re-alignment of the Competition Act 1998”. This was followed by the publication in June 2003 of a second consultation document “Modernisation – a consultation on the Government’s proposals for exclusions and exemptions from the Competition Act 1998 in light of Regulation 1/2003 EC”. These documents set out how the Government intends to give effect to Regulation 1/2003 and discussed changes that may be needed to the UK competition regime.

When it was first published on 16 January 2004, this document did not deal with the proposal to repeal the domestic exclusion for vertical agreements from the Competition Act. The newspaper and magazine publishers and wholesalers raised significant concerns about the application of competition law to their distribution agreements. Following representations from the industry, including representatives of the newspaper and magazine publishers, wholesalers and retailers, the Government agreed to delay its announcement on this proposal to allow a 30 day period for industry discussions to address their concerns. Following the conclusion of the 30 day period, this document has been revised. It now includes the Government response to the consultation on this proposal.

Over 200 copies of the first consultation document and over 300 copies of the second document were sent out. Both these documents were also published on the DTI website. The Government received 38 responses to the first consultation and 55 responses to the second. Lists of those who submitted representations to the two consultations can be found in Annexes A & B. Written responses (excluding those where confidentiality was requested) may be viewed by appointment with the DTI’s Open Government and Data Protection Unit at 1 Victoria Street, London SW1H 0ET or on 020 7215 6618.

Responses to the two consultations fell into the following categories:

	First consultation	Second consultation
Law firms/Legal groups	17	16
Representative bodies	7	23
Regulators	4	5
Companies	5	8
Others	5	3
<b>Total</b>	<b>38</b>	<b>55</b>

In addition to these written responses the Government held four workshops on various aspects of these consultations where lawyers and business representatives were able to air their views and discuss the issues with us. We have also held a series of meetings

with competition law experts to discuss these proposals as well as meetings and informal telephone conversations with companies and other bodies on an individual basis.

The Government has considered all these representations very carefully in deciding the way forward. This document summarises the responses and explains the decisions taken as a result of the two consultations. The questions asked in the two consultation documents are set out one by one with a summary of the responses followed by the Government's decision on each issue.

As with both consultations, where an OFT power is specified it should also be taken to mean a power of a sectoral regulator<sup>1</sup>.

Copies of this document and the two consultation documents can be found at [www.dti.gov.uk/ccp/consultations.htm](http://www.dti.gov.uk/ccp/consultations.htm) and are also available free of charge from the DTI Publications Unit (quoting reference URN 04/550):

- by telephone on 0870-150 2500 (10am - 4pm, Mon - Fri)
- by fax on 020-7215 0031
- by minicom on 020-7215 6740
- by e-mail to [pubs.unit@dti.gsi.gov.uk](mailto:pubs.unit@dti.gsi.gov.uk)

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<sup>1</sup> OFCOM, OFGEM, OFWAT, OFREG NI, ORR and CAA all have concurrent powers under the Competition Act.

## **Consultation on the Government's proposals for giving effect to Regulation 1/2003 and for re-alignment of the Competition Act 1998**

### **2. A Legal Exception Regime**

*The Government seeks views on its proposal to remove the domestic notification system and to create a legal exception regime in the UK to correspond with that introduced by the Regulation. The Government also intends to clarify the boundary between the claimant and the defendant under this new system by making express provision on where the burden of proof lies.*

Twenty-five respondents were completely in favour of the Government's proposal with only three coming out firmly against and two with mixed views.

#### **Government decision**

The Government will amend the Competition Act to remove sections 4-5, 7, 12-16 and 20-24, which currently provide for the Chapter I and II notifications system. Sections 9-10 will also need to be amended and section 41 removed to take account of the removal of both the domestic and Commission notifications systems.

The Government will make a new provision to clarify, as necessary, where the burden of proof lies.

Regulation 1/2003 makes provision for individual exemptions, granted before 1 May 2004 and existing at that time, to continue to have effect until the date on which they expire or until such time as they are revoked in accordance with Article 8(3) of Regulation 17/62. Accordingly, we will take the same approach in the UK and make a similar provision in our domestic law for individual exemptions granted under the Competition Act.

*The Government seeks views on whether the OFT should operate an extra-statutory system of written opinions in cases which raise genuine uncertainty because they present novel or unresolved questions of law under the Competition Act or Articles 81 and 82, or whether the current method of providing informal advice is sufficient for these purposes.*

Twenty-nine respondents were broadly in favour of the Government's proposal, with twenty-one being unreservedly in favour. Only two respondents were opposed to the proposal. Eight of the twenty-nine who were in favour raised some concerns about the operation of the system – in particular questions were asked about the degree of legal weight carried by these opinions, and the dangers of conflicting opinions being given by the OFT and the Commission. The Government expects that opinions issued, whilst not binding on the OFT, other regulators or the courts, will at least be considered in any future action and may be persuasive.

#### **Government decision**

The Government will work with OFT to establish a system of non-binding written opinions as proposed. The issues raised by respondents will be properly addressed in

OFT guidelines, on which it intends to consult, and in the rules governing the operation of the European Competition Network.

### **3. Powers of Investigation**

*The Government believes the existing powers to enter domestic premises without a warrant should be changed to require a warrant in every case. Views are sought on the merits or otherwise of this proposal.*

Twenty-five respondents were in favour of this proposal, with only one opposed and one expressing mixed views. Very few substantive comments were made. The vast majority welcomed this added safeguard for inspections of domestic premises.

#### **Government decision**

The Government will introduce a requirement that entry onto domestic premises must be authorised by a warrant in all cases.

*The Government believes that the OFT should be given an express power to seal in connection with inspections, with or without warrant, both in relation to investigations concerned with Articles 81 and 82 and in investigations concerned with the Chapter I and II prohibitions. The Government seeks views on whether this is desirable.*

The overwhelming majority of respondents were in favour of the proposal – twenty-three for and only three against. Many of those who were in favour of the proposal qualified this support by stressing that sealing carried out by the OFT should be time-limited. Most called for a limit of three working days (or 72 hours).

#### **Government decision**

The Government will amend sections 27 and 28 of the Competition Act to include an express power to seal when inspecting business premises without a warrant and any premises under a warrant. The Government agrees with respondents concerning the need for a specified time limit. OFT will provide guidance, on which it will consult, concerning how long seals can be affixed.

### **4. Penalties**

*The Government considers that section 38(9) of the Competition Act<sup>2</sup> should also apply when the OFT is considering breaches of Article 81 or 82 and seeks your views on this.*

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<sup>2</sup> Section 38(9) provides that if a penalty or a fine has been imposed by the Commission, or by a court or other body in another Member State, in respect of an agreement or conduct, the Director, an appeal tribunal or the appropriate court must take that penalty or fine into account when setting the amount of a penalty under this Part in relation to that agreement or conduct.

Twenty-five respondents who commented on this proposal were in favour, none opposed it and only one expressed mixed views.

### **Government decision**

The Government will amend the Competition Act so that section 38(9) of the Act will also apply when the OFT is considering breaches of Articles 81 and 82. This is a logical extension of this provision, which aims to prevent double jeopardy.

*The Government proposes that the maximum penalties for infringements of the Competition Act prohibitions and the Articles 81 and 82 prohibitions be aligned and seeks views on whether they should be aligned to match the Commission's maximum penalties or the OFT's current maximum penalties.*

The consultation document proposed the following three options for penalties:

- (a) aligning the maximum penalties for breaches of Articles 81 and 82 and Chapter I and II with the current maximum penalties for breaches of Chapter I & II of the Competition Act;
- (b) aligning the maximum penalties for breaches of Articles 81 and 82 and Chapter I and II with the current maximum penalties available to the Commission for breaches of Articles 81 and 82; and
- (c) keeping our existing maximum penalties for breaches of Chapter I and II and using the current maximum penalties available to the Commission for breaches of Articles 81 and 82.

Nineteen respondents were in favour of option (b). Ten respondents who did not choose option (b) favoured option (c). However many of those who chose option (c) focussed on the need for penalties relating to infringements of UK competition law to relate to UK turnover and market shares. These arguments are more relevant to the calculation of a penalty in each individual case rather than the maximum available penalty. The OFT's starting point for the calculation of a penalty is the relevant market. This policy will remain unchanged and OFT will consult on its guidance on the appropriate amount of a penalty, but intends to retain consideration of the relevant market as a key element in its initial calculations.

### **Government Decision**

In light of these responses, the Government intends to amend the Competition Act 1998 (Determination of Turnover for Penalties) Order 2000, SI 2000/309, so that the maximum penalty for infringing Article 81 or 82 or Chapter I or II will be 10% of an undertaking's worldwide turnover for the previous business year in line with the current approach of the European Commission.

## **5. Remedies**

***We welcome your views on the circumstances in which the OFT should be able to accept commitments and the circumstances in which the OFT should be able to re-open its proceedings after having accepted commitments.***

Nineteen respondents were in favour of the OFT adopting the formal practice of accepting commitments in both Article 81 and 82 cases and Chapter I and II cases. Most respondents thought that commitments should operate in a similar manner to the approach adopted by the European Commission and were also in favour of the conditions suggested in the first consultation document under which the OFT should be able to re-open its proceedings after having accepted commitments (see below).

### **Government Decision**

The power for OFT to accept commitments will be introduced for both Article 81 and 82 cases and Chapter I and II cases. Undertakings may offer commitments at any stage in an investigation after the OFT has commenced an investigation under section 25 of the Competition Act, up until OFT has made a decision. The OFT will publish guidance, which will be approved by the Secretary of State, detailing the cases in which it is likely to accept commitments. The OFT will consult third parties on commitments which it is proposing to accept and will then publish a final commitments decision. OFT will be able to re-open its proceedings where it has:

- a reasonable belief that there has been a material change in any of the facts on which the decision was based; or
- a reasonable suspicion that the undertakings have acted contrary to their commitments; or
- a reasonable suspicion that the decision was based on incomplete, incorrect or misleading information provided by the parties.

***The Government's preferred method for dealing with a breach of commitments is to enforce the commitment by a court order. We welcome your views on how to treat a breach of commitments made binding by decision.***

Twenty respondents favoured this approach, with only two favouring other methods of enforcing commitments and one expressing mixed views.

### **Government Decision**

The Government intends to make commitments enforceable by court order in the same way as directions are enforced by the OFT.

***We welcome your views on whether rights of redress should be afforded to third parties and if so what these should be.***

The results of the consultation on this issue were very mixed with nine people in favour of a third party right of appeal, nine opposed and four mixed responses. The Government has given the issue much further thought and discussed it in detail with the OFT and CAT.

## **Government Decision**

The Government intends to introduce a third party right of review to the CAT with the grounds for the appeal being the same as those for judicial review. This will give the CAT the power to decide whether the commitments accepted address the competition concerns, but will not allow it to review a case on its merits, unlike a full appeal.

*The Government believes that the OFT should be able to give interim measures directions in relation to investigations under Articles 81 and 82 in the same way as it currently does under section 35 of the Competition Act. The Government believes that all interim measures directions given by the OFT should be enforceable by court order. We would welcome your views on these points.*

Sixteen respondents agreed with our proposal. Nine respondents suggested that using the EC test of a *prima facie* finding of infringement rather than the reasonable suspicion test currently used in the Competition Act would be appropriate for cases under Articles 81 and 82.

## **Government Decision**

As the consultation document argued, the Government believes it is not desirable for the OFT to apply a different test depending on whether EC law or UK law is being applied. At the stage of an investigation where interim measures directions are being considered by the OFT it may not be clear whether inter-state trade is affected. Equally, the Government believes that the evidential burden required to satisfy a test of *prima facie* infringement is too high. Therefore the Government will extend section 35 of the Competition Act to apply to investigations under Articles 81 and 82 as well as the Chapter I and II prohibitions. Any interim measures directions given in relation to investigations under Article 81 and 82 will be enforceable by court order.

## **Consultation on the Government's proposals for exclusions and exemptions from the Competition Act 1998 in light of Regulation 1/2003**

### **6. Block Exemptions**

*Consequent to its proposal to remove the domestic notification system and to create a legal exception regime in the UK, the Government also proposes to remove the power in section 7 of the Competition Act<sup>3</sup> to introduce opposition procedures into Block Exemption Orders. The Government seeks views on its proposal.*

The Government received eighteen responses to this proposal, all of which were in favour of removing the power in section 7 of the Competition Act.

#### **Government decision**

The Government will remove the power in section 7 of the Competition Act to introduce opposition procedures into Block Exemption Orders.

### **7. Vertical Agreements**

*The Government proposes to remove the Exclusion Order and seeks views on the likely impact of this proposal.*

The Government received thirty-nine responses to this proposal, sixteen of which were in favour, seventeen of which were against, five of which were mixed and one of which was unclear.

Respondents raised several arguments against the proposal to repeal the domestic exclusion. These included arguments that:

- Regulation 1/2003 does not require the exclusion to be repealed

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<sup>3</sup> Section 7 states that:-

- (1) A block exemption order may provide that a party to an agreement which –
  - (a) does not qualify for the block exemption created by the order, but
  - (b) satisfies specified criteria.may notify the Director of the agreement for the purposes of subsection (2).
- (2) An agreement which is notified under any provision included in a block exemption order by virtue of subsection (1) is to be treated, as from the end of the notice period, as falling within a category specified in a block exemption order unless the Director –
  - (a) is opposed to its being so treated; and
  - (b) gives notice in writing to the party concerned of his opposition before the end of that period.
- (3) If the Director gives notice of his opposition under subsection (2), the notification under subsection (1) is to be treated as both notification under section 14 and as a request for an individual exemption made under subsection (3) of that section.
- (4) In this section "notice period" means such period as may be specified with a view to giving the Director sufficient time to consider whether to oppose under subsection (2).

- the exclusion came into effect only in March 2000 and it is therefore too early to consider removing it
- vertical agreements are largely benign and should not be subjected to extra regulation.
- the Government knew the precise terms of the EC block exemption but chose to follow another route and business now has a legitimate expectation that its agreements will be protected under the domestic exclusion
- repeal will require business to examine vertical agreements for compliance with the more complicated EC verticals block exemption, which is a substantial burden
- the EC verticals block exemption contains provisions which pursue single market aims and that these cannot be applied where there is no effect on inter-state trade

The Government's approach to modernisation has been to remove or reduce any differences between the two systems of law that, post-modernisation, will present an obstacle to the effective operation of the regime in the UK. The Government strongly believes that the best regulatory approach is to ensure that the substantive law and procedures are, as far as practicable, similar under both the UK and EC competition regimes. The majority of respondents to both consultation documents have endorsed this approach.

On this basis, we have considered repealing those exclusions from the Competition Act where it is possible that agreements covered by the exclusion may affect trade between Member States and where the treatment of such agreements differs between the UK and the EC. The domestic exclusion for vertical agreements falls into this category.

The Government accepts that Regulation 1/2003 does not require the repeal of the domestic exclusion for vertical agreements. However, the Government believes that to leave it in place post-modernisation will create exactly the kind of dual regulatory approach that we are aiming to avoid. There are currently two sets of provisions governing the treatment of vertical agreements under UK law. As the law currently stands, after 1<sup>st</sup> May 2004, both would be applied to similar agreements by the same competition authority. Before being able to decide which regime applied, both business and the competition authorities would need to decide whether vertical agreements affected trade between Member States. This would place a burden on both business and the competition authorities and the Government believes it would hamper significantly the effective operation of the regime.

Although the domestic exclusion was introduced in March 2000, the Government made clear at that time that it would keep the operation of the exclusion under review. The Competition Act 1998 has now been in force for over three years and the OFT has been shown to apply its terms in a robust but proportionate way, focussing its resources on the more serious competition infringements. Modernisation fundamentally changes the framework within which the competition authorities must operate.

The Government is also aware of the changes other Member States are making to their own domestic laws to align more closely with the approach under European law. This will lead increasingly to harmonised treatment of agreements across Europe and

it is in this context that the Government has decided to review the UK exclusion for vertical agreements.

The Government accepted in its consultation that the majority of vertical agreements are benign. Agreements that are not appreciably restrictive of competition do not generally fall to be considered under competition law and are lawful. It is therefore not necessary to exclude them from the terms of the Competition Act. The Government believes that those agreements that are appreciably restrictive of competition should not be protected unless they carry significant countervailing benefits. Where this is the case, they will, in any case, be lawful at the outset under a legal exception regime.

Although the Government was aware of the terms of the European Block Exemption Regulation in draft, it took the view that a domestic exclusion for vertical agreements was required to cover the period between the coming into force of the Competition Act 1998 and the European Regulation. The Government's concern was to avoid business making precautionary notifications to OFT of largely benign agreements. The verticals exclusion was introduced to aid the transition from a primarily form-based regime under the Restrictive Trade Practices Act 1976 to an effects-based regime under the Competition Act 1998. It was not intended to provide protection for those agreements that may appreciably prevent, restrict or distort competition.

However, the responses to the consultation and other discussions we have had with business reveal a strong perception that the domestic exclusion provides blanket protection from the Chapter I prohibition, despite the existence of the OFT's claw back power. In the consultation, the Government noted that this was not its legal effect. However, given the perception of blanket protection, it is possible that business has not adequately considered the risk that restrictive provisions in vertical agreements could be scrutinised.

Several respondents argued against the proposal because the EC block exemption is more complex and therefore more difficult to apply.

The Government has considered the arguments about the complexity of applying the EC Block Exemption Regulation, in comparison with the UK verticals exclusion. The EC block exemption contains numerous prescriptive clauses that are not drafted explicitly in the UK verticals exclusion. It is therefore more complex in structure.

The Government acknowledges that many businesses value the degree of protection and legal certainty that they perceive the UK exclusion provides. However, the Government notes that it is inherent in an effects-based competition law regime, that agreements should be understood in their economic context, to ensure that only those agreements that should be regulated are in fact regulated.

The repeal of the domestic exclusion does not place any new burden on the majority of businesses. The burden of repeal falls mainly on those businesses with agreements that fall within the categories outlined in paragraph 4.24 of the second consultation document. Most vertical agreements, except those where one or more parties enjoy a degree of market power or which contain hardcore restrictions, will remain protected under the EC Block Exemption Regulation. The domestic exclusion does not provide

blanket protection from competition law and those businesses with agreements containing restrictive provisions should, in any case, have been considering the potential effects of those agreements on competition.

Some respondents argued that certain of the provisions of the EC block exemption derive from and are relevant only to the objective of creating a single European market rather than strict competition policy and it would therefore not be relevant, necessary or appropriate to import those elements into UK law. The Government does not foresee any particular difficulties in applying the EC Block Exemption Regulation in the UK. The aim to protect competition by promoting market integration and by avoiding the partitioning of markets is as relevant to the UK competition authorities as it is to the Commission in the European context. Equally, provisions relating to market share and to specific definition of terms within the regulation do not create particular problems when cast purely within the context of the UK.

To help business understand the approach taken when applying the EC Block Exemption Regulation under the Competition Act 1998, the OFT has agreed to issue revised guidelines on the treatment of vertical agreements post-modernisation. This is intended to help business understand both the principles and application of the EC block exemption in UK law.

Many of the respondents who were opposed to the proposal suggested that an alternative might be to amend the claw-back power in the domestic exclusion to make it easier to use, rather than repeal the exclusion. Although this would mean that anti-competitive agreements could more easily be scrutinised by the OFT, it would not align the two regimes and does not therefore address the problems created, post-modernisation, of two different approaches to the treatment of vertical agreements being applied in the UK by the same competition authorities.

Respondents suggested ways in which the effects of repealing the domestic exclusion might be reduced. As mentioned above, OFT has agreed that it will issue guidelines on the treatment of vertical agreements under the Competition Act 1998 post-modernisation. OFT will be able to issue non-binding opinions where vertical agreements raise novel points of law and will continue to offer informal advice to business. The Government has also considered the value of providing a longer transition for vertical agreements to allow those businesses affected to amend any restrictive provisions which cannot otherwise be justified.

### **Government decision**

For the reasons set out above, the Government intends to repeal the domestic exclusion for vertical agreements. However, the Government recognises business concerns about this proposal and will therefore make provision for a transitional period of one year (from 1 May 2004) to allow those companies affected to consider relevant provisions in their agreements.

## **8. Competition scrutiny regimes**

### **Statutory Audit**

***The Government proposes to repeal the separate competition scrutiny regime for statutory audit services and consequential exclusion from the Competition Act. We would welcome your views on this proposal.***

The Government received fifteen responses about the proposal to repeal the separate competition scrutiny regime for statutory audit services and the consequential exclusion from the Competition Act. Thirteen responses were in favour.

One response argued that the current scrutiny regime should be retained but that, if it were to be discontinued, the OFT should issue guidance on how competition law might be applied to rules or guidance of recognized qualifying or supervisory bodies. Another response suggested that the new Financial Reporting Council should take over from OFT the responsibility for scrutinising such rules or guidance.

The Government considers that modernisation, by imposing a requirement to apply EC law when inter-state trade is affected, will constrain the effective operation of the statutory audit regime and the scrutiny regime under the Companies Act 1989 and the exclusion from the Competition Act will be of little value as a result. To remove the prior scrutiny regime is consistent with the Government's decision to repeal the Competition Act notification system under the Competition Act and to move to a legal exception regime, where agreements (which may include rules or guidance) are either lawful or unlawful at the outset.

Parties to an agreement may seek informal advice from the OFT on how competition law applies to their agreement; this will continue after modernisation.

### **Government decision**

In line with the majority of responses and with the Government's proposal in its consultation document, the Government will repeal the separate competition scrutiny regime for statutory audit services and consequential exclusion from the Competition Act.

## **9. Environment**

***The Government proposes to repeal the provisions of the Environment Act that allow for the creation of a separate competition scrutiny regime for Producer Responsibility Schemes and for the exclusion of such schemes from the Competition Act. We welcome your views on this proposal.***

The Government received thirteen responses to this proposal, all of which were in favour of repealing the provisions of the Environment Act that allow for the creation of a separate competition scrutiny regime for the Producer Responsibility Schemes and for the exclusion of such schemes from the Competition Act.

### **Government decision**

The Government will repeal the provisions of the Environment Act that allow for the creation of a separate competition scrutiny regime for the Producer Responsibility Schemes and for the exclusion of such schemes from the Competition Act.

## **10. Agreements given directions under section 21(2) of the Restrictive Trade Practices Act 1976**

*The Government seeks your views on whether to remove the exclusion from the Competition Act for agreements given clearance under section 21(2) of the restrictive Trade Practices Act 1976, and on the number of agreements that might be affected if the exclusion were to be removed.*

The Government received twenty-four responses to this proposal, nine were in favour, fourteen were against and one was mixed.

Respondents raised several arguments against removing the exclusion, including:

- agreements cleared under section 21(2) RTPA were granted permanent exclusion under the Competition Act; it could be expected that such exclusion would not be revisited.
- the principles of better regulation should apply to the extent that regulation should be “extended” only to deal with an identified problem. Absent such problem, there is no case for further regulation.
- repeal of the exclusion would impose substantial compliance costs on those businesses with section 21(2) agreements because such businesses might then seek professional advice on the lawfulness of those agreements.
- Regulation 1/2003 does not require repeal, and there is no evidence that the asymmetry between the EU and UK regimes creates a substantive competition problem.
- The OFT can use its claw-back powers to deal with any perceived anti-competitive effects of section 21(2) agreements.
- The OFT had already assessed a section 21(2) agreement and did not find a problem.

In response to these arguments, the Government considers that there are matters of both principle and practicality that justify repeal of the exclusion.

One of the Government’s main aims, in giving effect to Regulation 1/2003 and in reviewing the operation of the Competition Act three years after it came into force, is to align European and UK competition regimes as far as possible. For exclusions, the guiding principle was to review those exclusions covering agreements that could affect trade between Member States, where EC law did not have an equivalent provision.

An agreement, which benefits from a section 21(2) direction, excluding it from the Competition Act (‘the RTPA exclusion), may affect inter-state trade.<sup>4</sup> If it does, then after modernisation, the OFT will be empowered to look at the agreement under Articles 81 and 82. The domestic exclusion will be of limited value to an undertaking. But it is also undesirable for either undertakings or regulators to have to decide early in proceedings whether an agreement may affect trade between Member States before being able to determine whether it is excluded.

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<sup>4</sup> Analysis of a random sample of 150 registrations under s21(2) of the RTPA indicated that 11% had cross-border effects.

The retention of the exclusion is not consistent either with a legal exception regime, or with developing an effects-based competition law system. Agreements need to be assessed in their economic context, which is partly a function of market structure at the time of the economic assessment. To retain a permanent exclusion, that protects a minority of historical agreements and takes no account of changes in economic circumstance, would be inconsistent in the long-term with an effects-based competition law system.

Removing the exclusion will affect those agreements, which currently benefit from the RTPA exclusion; by implication, these agreements do not affect trade between Member States and have not yet expired or been materially varied.

The Government has conducted analysis of both the OFT's database of directions given between 1978 and 1998<sup>5</sup> and a sample of agreements on the register itself. This analysis is detailed in the draft Regulatory Impact Assessment published alongside this document. The information we have gathered from the OFT's RTPA database suggests that fewer than 4,500 registrations may still be live and only 400 are likely to be affected directly by repeal of the RTPA exclusion<sup>6</sup>. The Government's estimate of the number of agreements affected does not include any assessment of the numbers of agreements that may have been materially varied. Nor does it represent the number of businesses affected. Larger businesses often have multiple registrations. Therefore the number of businesses affected may be somewhat lower again than the number of registrations affected.

The vast majority of agreements subject to the RTPA exclusion are vertical agreements, which will remain protected under provisions in the Competition Act. With the introduction of a legal exception regime, many RTPA agreements which remain live and which do not infringe the Chapter I prohibition or which meet the conditions for exemption in section 9 of the Competition Act, will be lawful from 1<sup>st</sup> May 2004 without prior administrative decision. In view of this it is not necessary to retain a permanent exclusion.

### **Government decision**

For the reasons set out above, the Government intends to repeal the domestic exclusion for agreements subject to directions under section 21(2) of the Restrictive Trade Practices Act 1976 but will make provision for a transitional period of three years from 1 May 2004. This will mean that agreements subject to the exclusion will cease to be excluded from the Competition Act in May 2007 but this will allow time for any businesses with agreements still covered by the exclusion to adapt. It will also mean that more than eight years will have elapsed from the last agreements receiving section 21(2) directions to expiry of the exclusion for those agreements.

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<sup>5</sup> Directions under section 21(2) of the RTPA could not be given after 8<sup>th</sup> November 1998, the date the Competition Act gained Royal Assent.

<sup>6</sup> Owing to margins of error in data capture within the OFT database the range could be between 290 and 530 registrations

## **Annex A - List of Respondents to the First Consultation**

Abbey National  
Baker & McKenzie  
Bristows  
BT  
Clifford Chance  
Competition Law Association  
Confederation of British Industry  
Davies Arnold Cooper  
European Commission  
Freshfields Bruckhaus Deringer  
Innogy  
International Chamber of Commerce  
International Underwriting Association of London  
Joint Working Party of the Bar and Law Societies  
Latham & Watkins  
Linklaters  
Lord Borrie  
Martin Howe  
Martineau Johnson  
Merseytravel  
National Federation of Retail Newsagents  
Newspaper Publishers Association  
Northumbrian Water  
Norton Rose  
Office of Rail Regulator  
OFGEM  
OFWAT  
Royal Pharmaceutical Society  
S J Melinek  
Simkins Partnership  
Simmons & Simmons  
Slaughter & May  
Strategic Rail Authority  
Taylor Wessing  
Travers Smith Braithwaite  
Valentine Korah  
Welsh Consumers Council

In addition 1 respondent requested that their response and identity remain confidential.

## **Annex B - List of Respondents to the Second Consultation**

ACCA  
Association of News Retailing  
Association of Newspaper & Magazine Wholesalers  
Association of Train Operating Companies  
Baker & McKenzie  
Barclays plc  
Bond Pearce  
Bristows  
British Brands Group  
British Ceramic Confederation  
British Sky Broadcasting Ltd  
BT  
Charles Russell  
Clifford Chance  
Competition Commission  
Competition Law Association  
Confederation of British Industry  
Corus  
Council on Tribunals  
European Commission  
Forum of Private Business  
Freshfields Bruckhaus Deringer  
Institute of Chartered Accountants in England & Wales  
Institute of Chartered Accountants in Scotland  
International Chamber of Commerce  
International Underwriting Association of London  
Joint Equipment and Materials Initiative (JEMI)  
Joint Working Party of the Bars and Law Societies  
Latham & Watkins  
Linklaters  
Lord Borrie  
Lovells  
Manufacturing Technologies Association (MTA)  
METCOM  
National Consumer Council  
National Federation of Retail Newsagents  
News International  
Newspaper Publishers Association  
Northumbrian Water  
Office of Rail Regulator  
OFGEM  
OFWAT  
Periodical Publishers Association  
Railway Forum  
Richards Butler  
Royal Pharmaceutical Society  
Scotch Whisky Association  
Simmons & Simmons  
Singletons  
Slaughter & May  
Strategic Rail Authority  
The Co-operative Group  
TraversSmith  
Water UK  
WHSmith

## Annex C - Summary of Responses to the First Consultation

Total number of responses = 38 (of which 4 were nil returns)

	<b>For</b>	<b>Against</b>	<b>Mixed</b>	<b>No comments</b>	<b>Total</b>
Legal exception regime	25	3	2	4	34
Opinions	21	2	8	3	34
Warrants for domestic premises	25	1	1	7	34
Sealing	23	3	1	7	34
Section 38(9) to apply for Art 81/82	25	0	1	8	34
Max penalties	Align with EC max = 19, Different max for 81/82 & ChI/ChII = 10, No comments = 5				34
Commitments	19	0	5	10	34
Enforcement of commitments by court order	20	2	1	11	34
3rd party rights of appeal for commitments	9	9	4	12	34
Interim measures to apply for Art 81/82 in same way as CA98	16	0	9	9	34

## Annex D – Summary of Responses to the Second Consultation

Total number of responses = 55 (of which 9 were nil returns)

	<b>For</b>	<b>Against</b>	<b>Mixed</b>	<b>No comments</b>	<b>Total</b>
Block exemption opposition procedure	18	0	0	28	46
Repeal of statutory audit exclusion	13	1	1	31	46
Repeal of environment exclusion	12	0	0	34	46
Repeal of RTPA exclusion	9	14	1	22	46

End

Department of Trade and Industry  
Consumer and Competition Policy Directorate