INTRODUCTION

This publication gives details of cases that were considered under the Competition Act 1998, and subsequently closed during 2003. The summaries do not necessarily set out the full reasons the OFT has for closing a case. Nor will they reflect all the kinds of cases that we handle.

These summaries were originally published on a monthly basis as a part of the OFT’s online Weekly Gazette, which is no longer published.
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1-31 March 2003

INTRODUCTION

Welcome to the first issue of this section of the Gazette. The purpose of this section is to inform the public of a selection of cases that have been considered under the Competition Act 1998 (the Act), and subsequently closed. This issue includes cases that were closed in March 2003. The next issue of this section will be in the Gazette published in June 2003.
CLOSED CASES

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List of closed case summaries

Royal Institute of British Architects
Alleged price fixing of Volkswagen replacement spare parts
Title: Royal Institute of British Architects

Complainant:

Complaint against: Royal Institute of British Architects (RIBA)
Case closed: 14 March 2003
Issue: Whether RIBA’s guidance to clients on fees restrict competition
Relevant provision: Chapter I of CA98

Outline of the case

The Office of Fair Trading has concluded that the Royal Institute of British Architects (RIBA) has demonstrated that revisions to its guidance to clients on fees have addressed competition concerns highlighted in the OFT report ‘Competition in professions’ published in March 2001\(^1\) and the subsequent progress statement.\(^2\) The report called on RIBA to justify its fee guidance as benefiting consumers or to remove it. The report indicated that the fee guidance issued by RIBA could facilitate collusion.

RIBA sought to justify the existence of its fee guidance on the basis that it could not restrict competition because it was merely indicative and that it was a useful yardstick by which clients who may be ignorant of what a reasonable charge was could forecast the cost of architectural services.

OFT considers that architects that are members of RIBA are likely to be undertakings within the terms of the Chapter I prohibition. RIBA is an association of these undertakings. Circulation of guidance on fees issued by an association of undertakings or a professional body may encourage tacit collusion as it is likely to provide a lead on prices which may hinder the ability or incentive of efficient firms to compete by reducing price to reflect their lower costs\(^3\). It may also protect those who are less efficient and reduce the incentive to improve. The fact that the guidance was in the form of an indication rather than a binding decision did not prevent it from being a decision by an association of undertakings.

RIBA has amended and revised its fee guidance. New fee guidance is based on historical information and the collation of price trends which do not provide a

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\(^1\) OFT 328, at paragraph 50
\(^2\) OFT 385, at paragraph 38
\(^3\) This approach is apparent in a number of the European Commission and Court of Justice decisions e.g. Verband der Sachversicherer e.V v Commission, Case C-45/85, point 26, Case C-8/72 Vereeniging van Cementhandelaren v Commission [1972] ECR 977, [1973] CMLR 7, points 19-21, IV/34.983-FENEX.
lead on this year’s prices. The historical information is collated and aggregated by an independent body. OFT considers that this change meets the competition concerns expressed in the report and progress statement and in subsequent correspondence with RIBA.

OFT’s action: Case closed
Case Officer: Grahame.Horgan@oft.gsi.gov.uk
            Juliette.Twumasi-Anokye@oft.gsi.gov.uk
Case reference: GP/908

Title: Alleged price fixing of Volkswagen replacement spare parts

Complainant: A private consumer
Complaint against: Volkswagen dealers and Volkswagen Group UK Limited
Case closed: 19 March 2003
Issue: Whether agreements existed between Volkswagen and its franchised dealers to fix the resale prices of replacement parts to customers in the UK
Relevant provision: Chapter I of CA’98

Outline of the case

In June 2002, the OFT received a complaint from a consumer about the price of spare parts, based on a letter he had received from a Volkswagen (VW) dealer. This letter stated that the prices charged by VW franchised dealers were governed and set by the manufacturer.

On the basis of this complaint, The OFT carried out an extensive investigation, obtaining evidence from a representative sample of VW franchised dealers throughout the UK.

The OFT has completed its investigation into this complaint, and has found no evidence of resale price maintenance.

OFT’s action: Case Closed
Case Officer: Stephan.pukas@oft.gsi.gov.uk
              Geoffrey.kenton@oft.gsi.gov.uk
Case reference: CE/1637/02
INTRODUCTION

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List of closed case summaries

- Supply of fishing tackle
- Nominet UK and Scotnom Limited
- Capita Business Services Limited (trading as 'Capita Education Services') and Bromcom Computers plc
Title: Supply of fishing tackle

Complainant: Greys of Alnwick, a supplier of fishing tackle
Complaint against: Greys of Alnwick, a supplier of fishing tackle
Case closed: 16 April 2003
Issue: Whether Greys had any agreements with its retailers to set minimum retail prices (resale price maintenance)
Relevant provision: Chapter I of CA98

In November 2002, Greys of Alnwick, a subsidiary of House of Hardy Ltd, had been quoted in a fishing trade magazine as purportedly stating that it was introducing a selective distribution system and would try to avoid its products becoming discounted by retailers.

Concerned that this might suggest resale price maintenance, the OFT requested documentary evidence and information from Greys. Greys provided a full and helpful response which indicated that its policy was to suggest recommended retail prices only. However, some of the order documents it had provided were ambiguous. Greys also said that it had been mis-quoted in the original article in the magazine.

As a result of Greys' response, the OFT contacted Greys again, who agreed to:

1. ensure that its order documents referred only to recommended retail prices
2. write to the trade magazine making clear that Greys' retailers are entirely free to set their own retail prices.

Greys' co-operation enabled a swift and satisfactory conclusion to this case.

OFT's action: Case closed
Case officer: dave.troy@oft.gsi.gov.uk
Case reference: CE/2160/02 CE/2430/03
Nominet UK and Scotnom Limited

Complainant: Scotnom Limited
Complaint against: Nominet UK
Case closed: 15 April 2003
Issue: Whether parts of Nominet UK’s policy rules and procedure for the application and introduction of new second level domains into the UK’s top level domain infringe the Competition Act 1998.

Relevant provision: Chapter II – Abuse of a dominant position

Nominet UK (Nominet) is the not-for-profit company that operates the UK registry for the top level domain, ‘.uk’. It also manages the application and introduction of new second level domains (SLD), for example, co.uk and org.uk.

In January 2001, Scotnom Limited (Scotnom) applied to Nominet to introduce and run a new SLD, ‘scot.uk’. Nominet’s policy outlined a series of rules which SLD applicants needed to meet to be successful. The Scotnom application was rejected by Nominet in June 2001 because it failed to demonstrate that it met all the necessary SLD policy rules.

In November 2002, after receiving a complaint from Scotnom, the OFT opened an investigation into Nominet’s SLD policy rules and procedure for the application and introduction of new SLDs. After examining Scotnom’s complaint, the OFT identified more general competition concerns with parts of the SLD policy rules and procedure. In particular, the OFT considered that parts of the SLD policy rules and procedure may have had the potential to discriminate against third party applications to introduce and operate new SLDs within the .uk top level domain.

When considering an abuse of a dominant position, it is necessary to define the market in which a dominant position may exist. Given that the general purpose of a domain name appears to be to give registrants (customers) an online presence that associates the registrant with particular categories (such as .com, a global top level domain, indicating the registrant wishes to be associated with the international company category, or co.uk for a UK company), existing and potential registrants of .uk domain names may consider that a non-.uk domain name (ie a domain name not using .uk as an identifier) provides only limited substitutability for a .uk domain name.

Although there are a few examples where non-.uk country domain names may provide substitution, such as .tv, (the top level domain for Tuvalu), for international media companies, and .com or .org may provide substitution for co.uk for certain categories of registrants, it appears Nominet may have had a dominant position in relation to the supply of .uk domain names. However, it was not necessary for the OFT to take a definitive view on market definition in this case.

Prior to the OFT investigation, Nominet had suspended the SLD policy rules and procedure following its own internal review in May 2002. Nominet has subsequently decided to propose amended SLD policy rules and procedure. Under this proposal, all
SLD applications (including SLDs to be operated by Nominet) will be assessed by an independent panel and the underlying SLD policy rules and procedure will be reviewed to ensure that they are objective, fair, non-discriminatory and achievable.

Nominet’s proposal is subject to approval by the Nominet Policy Advisory Board and public consultation. On the assumption that the proposal in its current form will be adopted in due course, the OFT has concluded that the revised SLD policy rules and procedure will not in themselves discriminate against applications to introduce and operate new SLDs within the .uk top level domain. As a result, the OFT’s concerns have been addressed.

OFT’s action: Case closed
Case officer: Edward.Anderson@oft.gsi.gov.uk
               Neil.Maxey@oft.gsi.gov.uk
Case reference: CE/1823/02
Title: Capita Business Services Limited and Bromcom Computers plc

Complainant: Bromcom Computers plc

Complainee: Capita Business Services Limited (trading as ‘Capita Education Services’)

Case closed: 2 May 2003

Issue: Whether the technical method of access and terms by which Capita Business Services Limited offered interface information to access data on its Microsoft SQL Server infringed the Competition Act 1998

Relevant provision: Chapter II of the Competition Act 1998

In March 2002, the Office of Fair Trading (OFT) opened an investigation into the terms by which Capita Business Services Limited (Capita) offered interface information to third parties to provide access to data on Capita’s Microsoft SQL Server and the technical method adopted for such access.

Capita’s Microsoft SQL Server forms a key part of its school information management system (branded as ‘SIMS’) and contains various data relating to staff and pupils (such as the grades and attendance of pupils), room allocation/timetables, as well as data necessary that schools are required to keep for legal and policy reasons.

School information management systems are installed in the majority of primary and secondary schools throughout the UK, of which Capita’s SIMS is by far the most prevalent. Under Capita’s business model, schools license a number of ‘modules’, which effectively sit on top of Capita’s Microsoft SQL Server, enabling schools to extract and input data which they view on a fixed network of computers within the school. For example, with Capita’s attendance module, teachers can enter lesson attendance marks in their classroom, and can see the day’s registration marks and previous lesson attendance, on screen by accessing attendance related data on Capita’s Microsoft SQL Server. Schools using SIMS can also purchase a number of third party products which may offer improved or complementary functionality to Capita’s modules.

Bromcom Computers plc (Bromcom) developed a wireless attendance product which required interface information to access the attendance related data on Capita’s Microsoft SQL Server. Until Capita’s decision to migrate to Microsoft SQL Server, the Bromcom had the necessary interface information, enabling it to compete with Capita’s own attendance module.

Given Capita’s stable and high market share in the schools information management system sector generally, the presence of entry barriers such as high switching costs for schools, the generally risk averse and financially constrained nature of schools as purchasers and the low market shares of competitors, the OFT decided it had reasonable grounds for suspecting Capita was dominant. Given that Capita was able to
control or prevent access to such data, it could potentially limit innovation and choice by excluding competition between Bromcom’s products and Capita’s own modules.

Bromcom alleged that Capita was abusing its dominant position by constructively refusing to supply interface information to enable access to the attendance related data by offering an interface at an unreasonable price and on inadequate terms (namely that the technical method of access was inappropriate for Bromcom’s product). Bromcom further alleged that Capita sought to tie the provision of such interface information with the supply of an interface written and charged for by Capita. Bromcom predominantly focussed on interface information which accessed attendance related data on the Microsoft SQL Server. Although Bromcom had also sought relief in relation to interface information accessing such data on Capita’s Microsoft SQL Server as the Complainant ‘may reasonably require’, Bromcom only subsequently confirmed this by widening its complaint to cover interface information which accessed the entire range of data on Capita’s Microsoft SQL Server at a reasonable price and on adequate terms.

The OFT considered the appropriateness of the technical method of accessing Capita’s Microsoft SQL Server used by Capita and the nature of the interface offered to Bromcom to access Capita’s Microsoft SQL Server.

The OFT, assisted by an independent IT Expert, initially concluded that, whilst Capita used an appropriate technical method of access, there were competition concerns about making the availability of the necessary interface information to use this method of access conditional on the supply of an interface written and charged for by Capita.

When informed of the OFT’s initial conclusions, Capita offered voluntary assurances covering the disclosure to Bromcom of interface information to enable access to data on Capita’s Microsoft SQL Server, subject to the agreement of commercial terms. Following receipt of the Voluntary Assurances, the Office believes its competition concerns have been allayed and has subsequently closed its investigation.

OFT’s action: Case closed
Case officer: Edward.Anderson@oft.gsi.gov.uk
Case reference: CP/01476-01

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2 A copy of the voluntary assurances is available on written request to the case officer.
INTRODUCTION

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List of closed case summaries

- Supply of hang gliding variometers
- Xchanging Ins-sure Services Ltd
- British Standards Institution
- BBC’s Digital Curriculum service
- Association of the British Pharmaceutical Industry
Title: Supply of hang gliding variometers

Complainant: Digifly Europe SRL ('Digifly'), an Italian manufacturer of hang gliding variometers and Snowdon Gliders, a seller of hang gliding equipment and exclusive UK agent for Digifly products.

Case closed: 9 June 2003

Issue: A clause in the sales agreement between Digifly and Snowdon Gliders appeared to establish a minimum resale price below which Snowdon could not sell the variometers (resale price maintenance).

Relevant provision: Chapter I of the CA`98

Outline of the case

The Contract of Exclusive Resale agreed between Digifly Europe SRL and Snowdon Gliders, dated 19 April 2001, included the following clause (Article 8 of the agreement):

- **“Prices and conditions for business between general importer** [Snowdon Gliders] and **customer** [retail customers of Snowdon]. The general importer is free in prices and conditions management, but in any case, the final prices of contractual products [the Digifly variometers] shall not be lower than those granted by the producer [Digifly].”

Concerned that this suggested resale price maintenance, the OFT contacted Snowdon Gliders and Digifly. The parties told us that the intention was not to enforce a minimum resale price nor had they done so in practice. As a result of our enquiry, the parties agreed to amend the clause. The clause now reads:

- **“The general importer is free in prices and conditions management.”**

The parties’ co-operation enabled a swift and satisfactory conclusion to this case.

OFT’s action: Case closed

Case officer: dave.troy@oft.gsi.gov.uk

Case reference: CE/2092/02
Outline of the case

In April 2003, the OFT received a complaint from Eurobase Systems, a supplier and developer of software for the insurance industry, claiming that Xchanging Ins-sure Services was abusing its dominant position in the supply of back office services to Lloyd’s and the London Insurance Market in order to promote its own insurance software.

The OFT considers that it is unlikely that the market will be as narrow as the provision of back office services to participants in Lloyd’s and the London Insurance Market, and that it is unlikely that Xchanging Ins-sure Services will hold a dominant position. Moreover, evidence has suggested that insurance companies at all times are free to choose both their supplier of back office services (including continuing to provide it in-house) and to choose their software supplier.

The OFT has seen no evidence to suggest that Xchanging Ins-sure Services is acting in a way that would to adversely affect competition.

OFT’s action: Case closed
Case officer: David.duparc@oft.gsi.gov.uk
Case reference: CE/2709-03
Outline of the case

Barbour Index plc (Barbour) raised a number of competition concerns with the OFT, the principal competition concern was an allegation that BSI, by its refusal to supply Barbour with an online licence for British Standards, was infringing the Chapter II prohibition.

In January 2000, BSI and Information Handling Services Group (IHSG) entered into a joint venture to create BSPL. The agreement made BSPL the sole worldwide content provider of BSI’s standards online. The service provided by BSPL enables online subscribers to access the full text of current and withdrawn British Standards. Subscribers are able to check revisions and changes to standards online at any time. The immediate benefit to subscribers is faster delivery over the internet of up-to-date standards in a more convenient and flexible format than is obtainable through other distribution formats, such as CD-ROM and micro-fiche.

In May 2001 Barbour complained to the OFT that BSI effectively had refused to supply it with an online licence. Barbour argued that without an online licence it could not compete effectively in the market for the reproduction of British Standards. Barbour further contended that because BSI was dominant in a relevant market (the supply of online British Standards) that its refusal to supply an online licence was an abuse of a dominant position. BSI denied that there had been a refusal to supply.

The OFT considered, on the basis of the complaint, that there were reasonable grounds to suspect an infringement of the CA’98 and issued a Notice to BSI requiring the production of specified documents and the provision of specified information under section 26 of the Act. The OFT also wrote to a number of BSI’s and Barbour’s competitors and customers seeking information in relation to the operation of the standards market.

In November 2002 the OFT invited BSI and Barbour to enter into further negotiations for the grant of an online licence for British Standards in lieu of formal action by the OFT under the Act. A licence for online standards was signed by BSI and Barbour in March 2003.

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1 A ‘standard’ in this context is defined as a document, established by consensus and approved by a recognised body, that provides, for common and repeated use, rules, guidelines or characteristics for activities or their results.
Accordingly, as the conduct complained of has now ceased, the OFT does not consider that continuing enforcement action is warranted and has therefore closed its investigation.

OFT’s action: Case closed
Case officer: darren.eade@oft.gov.uk
Case reference: CP/0980/01

Title: BBC’s Digital Curriculum service
Complainants: British Educational Suppliers Association (BESA) and Research Machines plc (RM)
Complaint against: British Broadcasting Corporation (BBC)
Case closed: 29 May 2003
Issue: Whether the BBC’s Digital Curriculum service (the “Service”) infringed Chapter I and/or Chapter II of the CA’98.

Outline of the case
In March 2002 the OFT received a complaint from RM alleging that the BBC had infringed the Chapter II prohibition by creating a service to provide on-line educational content to schools without charge. This was followed, in October 2002, by a second similar complaint by BESA. As the complaints concerned the same subject matter, the files were joined.

The OFT concluded that it did not have reasonable grounds to suspect that the BBC’s activities with respect to the Service had at this point in time breached the Chapter II prohibition. This conclusion was based on the early stage of the Service’s development and the lack of any current abuse. Therefore, the OFT did not have to consider whether the BBC was dominant on any market relevant for the purposes of the complaints.

Although the OFT concluded that there was likely to be a significant adverse effect on competition in the supply of educational software, arising from the announcement by the BBC of its decision to enter the sector with a licence-fee funded service, the OFT concluded that this was not, in itself, capable of constituting an abuse under the CA’98.

The OFT’s decision to dismiss the complaint and to close the file reflected the OFT’s general view that the provision by the BBC, for free, of a service that it is specifically empowered by its Charter to provide, and for which it will receive licence-fee funding, is unlikely in itself to constitute an abuse prohibited by the CA’98.

This is on the basis that there is no *per se* prohibition on a dominant undertaking becoming active in a neighbouring market. Also, since the BBC is currently prevented from charging end-users for the Service, and given that the Service will be directly funded by licence-fee payers, rather than from commercial income, normal predation analysis (which prohibits below cost pricing if it is likely to lead to the expulsion of a
competitor and thus enable the dominant undertaking subsequently to increase prices above competitive levels) would not apply.

The OFT also concluded that, since there were no relevant agreements relating to the Service in place at the time of its investigation, there was no scope for applying the Chapter I prohibition.

OFT’s action: Case closed
Case Officer: tanja.salem@oft.gsi.gov.uk
Case reference: CE/2037/02

**Title: Association of the British Pharmaceutical Industry (ABPI) - Alleged abuse of a dominant position**

Complainant: The Association of the British Pharmaceutical Industry
Complaint against: The Association of the British Pharmaceutical Industry
Case closed: 28/29 May 2003
Issue: Whether the ABPI has refused to supply training materials for the Medical Representatives Examination to independent training providers.
Relevant provision: Chapter II of the CA’98

**Outline of the case**
The OFT received a number of complaints alleging that the Association of the British Pharmaceutical Industry (ABPI) was restricting competition for the supply of training services to candidates wishing to take the Medical Representatives (MR) examination run by the ABPI. Specifically, it was alleged that the ABPI had refused to supply independent training providers with learning materials relating to newly proposed ABPI examination routes, and that this would prevent these independent training providers from competing with the ABPI to provide training services.

The ABPI issued a circular in September 2002 announcing the introduction of a number of new programmes leading to the MR examination. The ABPI continued to offer the examination through the previously available (traditional) route for which independent training providers had provided tuition. The ABPI announced:

(i) a distance learning and mock examination programme for candidates following the traditional examination programme;
(ii) the ABPI Integrated Programme which allows the 6 exams of the MR examination to be taken individually and to be fitted in to other training programmes provided by the sponsoring company;
(iii) the Accreditation Programme where company materials are approved by the ABPI and used as the basis for exams created for that company; and
(iv) a distance learning programme (including full tuition, workshops and mock papers) for new papers to be introduced. These papers would be based on materials newly produced by the ABPI.
The ABPI has indicated to the OFT that it has gone on to develop the first three programmes shown above. The ABPI claims that the only materials they have refused to supply were in relation to the undeveloped training materials for the fourth route. As this route is now defunct, the ABPI will not be supplying any of the materials that were being developed for that route.

The ABPI has indicated that the independent training providers can continue to obtain the *ABPI Syllabus and Learning Materials, third edition*, and the *British National Formulary*. This allows them to provide training for the traditional examination route and the Integrated Programme. The ABPI has also indicated that pharmaceutical companies may use external training providers to deliver training for the Accreditation Programme. The training providers would still need to make arrangements with the sponsoring companies that hold the copyright of the company materials developed and approved. This copyright is not held by the ABPI.

It appears that the ABPI is not refusing to supply training materials so as to exclude competitors from providing services to candidates wishing to take the MR examination.

The OFT has therefore closed its investigation.

OFT’s action: Case closed
Case Officer: hugh.mullan@oft.gsi.gov.uk
Case reference: CE/2111/02, CE/2120/02, CE/2121/02
INTRODUCTION

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List of closed case summaries

- Abuse of a dominant position by Calor Gas Northern Ireland in the supply of cylinder LPG
- Supply of Skechers footwear
- England Rugby Limited Entry and Ongoing Criteria
- Licensed betting offices market foreclosure investigation
Title: Abuse of a dominant position by Calor Gas Northern Ireland in the supply of cylinder LPG

Complainant: An LPG wholesaler
Complaint against: Calor Gas Northern Ireland Limited (CGNI)
Case closed: 30 June 2003
Issue: Whether CGNI’s 5-year exclusive purchasing agreements with dealers and stockists may have foreclosed the Northern Ireland cylinder LPG market.
Relevant provision: Chapter II of the CA’98

Outline of the case

The OFT received a complaint in the Spring of 2002 from a small wholesaler of cylinder Liquid Petroleum Gas (LPG) in Northern Ireland about its inability to expand due to most cylinder LPG retailers already being under exclusive purchasing contracts of five years duration.

On the basis of this complaint, the OFT commenced an investigation into the effects of Calor Gas Northern Ireland (CGNI) agreements under Chapter II of the CA’98. On the evidence obtained, the OFT believed that CGNI was in a dominant position in cylinder LPG supply in Northern Ireland. CGNI was suspected of having abused its dominant position, because its network of vertical agreements with retailers across the province may have foreclosed the market by making new entry and expansion more difficult.

Following discussions, the case was resolved through a negotiated settlement. The OFT has accepted assurances from CGNI that it would reduce the term of its agreements with retailers from five years down to a maximum of two. As a result of the assurances, the OFT has decided to close its investigation without reaching a conclusion on whether CGNI had abused its dominant position. The investigation did not reveal any evidence that CGNI intended to abuse its dominant position.

This should serve to open up the market and make it easier for newcomers to enter and existing suppliers to expand.

OFT’s action: Case closed
Case Officer: John.Templeton@oft.gsi.gov.uk
               David.Golledge@oft.gsi.gov.uk
Case reference: CE/1289-02
Title: Supply of Skechers footwear
Complainant: Skechers USA Limited (‘Skechers’), a manufacturer of sports/leisure footwear; and Florence Clothiers (Scotland) Limited, trading as Sports Connection, a retailer of sports goods and footwear
Complaint against: Skechers USA Limited (‘Skechers’), a manufacturer of sports/leisure footwear; and Florence Clothiers (Scotland) Limited, trading as Sports Connection, a retailer of sports goods and footwear
Case closed: 22 July 2003
Issue: Whether or not Skechers and Sports Connection had entered into an agreement to establish minimum resale prices below which Sports Connection could not sell Skechers’ products (resale price maintenance)
Relevant provision: Chapter I of the CA’98

Outline of the case

In August 2002, the OFT obtained evidence which suggested that Sports Connection¹ had entered into a resale price maintenance agreement with Skechers for certain Skechers products. As a result, the OFT undertook a full investigation under the CA’98.

After an extensive investigation, including using formal powers to obtain information and evidence from Skechers and various retailers, the OFT has decided that the evidence before it is not sufficient for it to proceed further with the case. During the course of the investigation, the OFT obtained further evidence that such an agreement may have been reached between the parties for a short period of time (i.e. a matter of weeks) but it was not sufficiently strong to confirm that this was the case. The fact that the evidence was inconclusive, and that the timescale in question was short, meant that the case did not warrant further action by the OFT.

OFT’s action: Case closed
Case Officer: dave.troy@oft.gsi.gov.uk
Case reference: CE/1890/02

¹ Sports Connection has since gone into receivership.
Title: England Rugby Limited Entry and Ongoing Criteria

Complainant: First Division Rugby

Complainee: England Rugby Limited

Case Closed: 6 August 2003

Issue: Whether the Entry and Ongoing Criteria of England Rugby Limited were discriminatory and disproportionate.

Relevant Provision: Chapter I the CA’98

Case outline

In August 2002, OFT received a complaint from First Division Rugby2 (‘FDR’) that:

(i) the Entry and Ongoing Criteria (the ‘Criteria’) of England Rugby Limited (‘ERL’)3 were discriminatory in favour of a number of clubs incumbent in the Zurich Premiership (the ‘Premiership’); and

(ii) the Criteria set disproportionate rules regarding the ownership of stadia.

FDR alleged that some First Division clubs would be denied promotion to the Premiership, even if they finished the previous season at the top of Division One, because they failed to meet the Primacy of Tenure requirements set down by ERL. The Primacy of Tenure rule required a Premiership club to have first call on use of its own ground. According to the complaint, the fact that the most successful non-Premiership rugby clubs tend to share grounds with football clubs, who have first call on their own grounds, meant that, in practice, this rule restricted membership to existing Premiership clubs. FDR complained that this was a breach of competition law, on the grounds that, since a number of clubs already in the Premiership did not meet the same standards, it both discriminated against First Division clubs and was disproportionate to the aim of the rule, namely to ensure that clubs could provide a venue for home games when required.

The OFT was concerned that the Primacy of Tenure requirements could raise the costs of aspirant clubs relative to at least some incumbent clubs and that this could distort commercial competition between those clubs. The OFT put these points to ERL. Following discussions between the OFT and ERL, ERL has revised the Criteria.

Under ERL’s revised Criteria, aspirant clubs are no longer required to have first call over the ground at which they play their home matches. Instead, all clubs have to demonstrate that they are able to provide a venue with certain minimum facilities for home matches on dates specified in advance by the League. Clubs may utilise two grounds if necessary to meet this requirement. The new Criteria also allow for a play-off for promotion/relegation, in the event that neither the aspirant club nor the Premiership club at the bottom of the table meets this requirement.

2 FDR represents the fourteen clubs in National Division One, the second tier league of English rugby union.

3 ERL is jointly controlled by the Rugby Football Union, the governing body of rugby union in England, and Premier Rugby Limited, a body comprising the twelve clubs in the Premiership. ERL is responsible for agreeing the Entry and Ongoing Criteria which are proposed to it by Premier Rugby Limited and which set out certain conditions for membership of the Premiership.
These changes removed the OFT’s competition concerns over the operation of the Entry Criteria.

OFT’s action: Case closed
Case officer: James.macbeth@oft.gsi.gov.uk
Case reference: CE/1517-02

Title: Licensed betting offices market foreclosure investigation
Complainant: 
Complainee: 
Case Closed: 10 June 2003
Issue: Whether the complainee had attempted to foreclose a local betting market by the leasing and sub-letting of property with strategic anti-competitive intent.
Relevant Provision: Chapter II of the CA’98

Case outline

In January 2003, OFT opened an investigation into the agreements entered into by, and the conduct of, the complainee in respect of its purchase and sub-letting of property suitable for use as a licensed betting office (LBO).

The OFT had received a complaint from the complainant concerning the complainee’s conduct in a town in the South East of England. The complainant had alleged that the complainee had successfully out-bid the complainant for the lease of a property that was suitable for use as an LBO and then immediately sub-let the property with a restrictive covenant that prevented the property from being used as an LBO in an attempt to exclude, or at least substantially reduce, competition from the complainant and other competitors on the local market. Specifically, the OFT investigated whether the complainee had abused a dominant position by the leasing and subsequent sub-letting of property, in each case with strategic anti-competitive intent.

The local nature of price competition between LBOs and the relatively large distance (2.5km) between the complainee’s LBO and the nearest other LBOs in the closest neighbouring town gave the OFT reasonable grounds to suspect that the complainee held a dominant position in respect of the local market for LBO betting services. Evidence was obtained that the complainee had only attempted to lease the property after the complainant had announced its intention to develop the property as an LBO, the property having been on the market for some months. This, combined with the decision immediately to offer the property for sub-lease subject to it not being used as an LBO, gave the OFT reasonable grounds to suspect that there had been an infringement of Chapter II of the CA’98.

Information obtained during the investigation appeared to support the OFT’s initial concerns. Specifically, the OFT objected to the complainee’s behaviour on the grounds that it was apparently designed to exclude a competitor from the market and to prevent
competition on the merits between the two LBOs concerned. The evidence appeared to indicate that, at the time of obtaining the lease, the complainee did not intend to use the property as an LBO. In addition the complainee had written to the local magistrate in respect of the complainant’s application for a betting licence for the property, recommending that the property not be granted a betting licence on the grounds that it was unsuitable for such purposes and that the grant would be inexpedient, having regard to the then existing demand for LBOs in the locality.

The OFT obtained further evidence demonstrating that the complainee paid well above the prevailing market rate in order to obtain the lease, in preference to the complainant. That evidence also appeared to indicate that the complainee justified this expenditure by virtue of the benefits of excluding a competitor from the market. Once the complainee had obtained the lease on the property, it immediately offered the property for sub-lease subject to the property not being used as an LBO. Overall, in the OFT’s initial view, the complainee’s conduct appeared to go beyond what could be characterized as “normal competition”.

During the course of the OFT’s investigation, the situation in respect of the property changed. The property has been withdrawn from the market for sub-lease and is being converted into an LBO, to be operated by the complainee alongside their existing LBO. In addition, the complainant is now proceeding with its strategy to enter the market in the town in question. Accordingly, the OFT took the view that the competition concerns arising in this specific case that existed at the time the investigation commenced had been removed and that, as a result, further enforcement action was not warranted.

The OFT has therefore closed its file in respect of this specific complaint. The OFT will be concerned to learn of further examples of the kind of conduct witnessed in this case.

OFT’s action: Case closed
Case officer: James.macbeth@oft.gsi.gov.uk
Case reference: CE/2299-03
INTRODUCTION

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CLOSED CASES

The Office of Fair Trading has the power to investigate complaints of breaches of the Chapter I and Chapter II prohibitions under the Act. The Chapter I prohibition covers agreements between undertakings, decisions by associations of undertakings and concerted practices which prevent, restrict or distort competition in the United Kingdom or are intended to do so, while the Chapter II prohibition covers the abuse of a dominant position in a market in the United Kingdom.

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List of closed case summaries

- Endoscopy UK Ltd.: Refusal to supply medical equipment parts by KeyMed Ltd.
- Supply of diagnostic equipment and software to independent repairers of Citroen cars
- Provision of airport services in Scotland
Title: Endoscopy UK Ltd.: Refusal to supply medical equipment parts by KeyMed Ltd.

Complainant: Endoscopy UK Ltd.
Complaint against: KeyMed Ltd.
Case closed: 9 September 2003
Issue: Refusal to supply
Relevant provision: Chapter II of the CA’98

Outline of case

EUK Ltd., a distributor of Fujinon endoscopes in the UK complained that KeyMed Ltd., a member of the Olympus group of companies, refused to supply it with spare parts. EUK had requested parts in order that it could repair and service Olympus endoscopes used in UK hospitals.

As there was evidence that NHS Trusts whole-life costed endoscope purchase, the relevant market was believed to be a unified market for endoscopes, spare parts and service. KeyMed was believed to be dominant in this market. But an implication of whole-life costing by purchasers is that competition takes place at the overall level of the ‘package’ of equipment plus parts and service. Therefore KeyMed’s refusal to supply only the spare parts was not considered to eliminate competition on the relevant market.

KeyMed had not previously supplied EUK with spare parts, nor were spare parts considered to constitute an essential facility in this case. On the facts of the case, KeyMed’s refusal to supply spare parts did not appear to be an abuse of a dominant position. KeyMed cited EUK’s close links with Fujinon, Olympus’s competitor to manufacture endoscopy equipment, as reason to believe that the confidentiality of important technical information about its products would be at risk if it were to supply EUK with manuals and other information, allowing EUK to service and repair KeyMed endoscopes. During the investigation KeyMed stated its willingness to supply spare parts to competent independent service organizations but maintained that EUK’s links with Fujinon meant that EUK could not be considered independent.

OFT’s action: Case closed
Case Officer: John.Templeton@oft.gsi.gov.uk
Case reference: CE/1165-02
Title: Supply of diagnostic equipment and software to independent repairers of Citroen cars

Complainant: An independent repairer of Citroen cars
Complaint against: Citroen UK Limited
Case closed: 14 August 2003
Issue: Alleged refusal to supply independent repairers of Citroen cars with diagnostic equipment and associated software
Relevant provision: EC Regulation 1400/2002 – the motor vehicles block exemption. Where an agreement is covered by an EC block exemption, it automatically receives parallel exemption from action in the UK under the provisions of the Competition Act 1998. The OFT can withdraw that parallel exemption if an agreement produces significantly adverse affects on competition in a UK market.

Outline of the case

In April, a repairer of Citroen cars complained to the OFT that he was unable to use Citroen diagnostic equipment because he could not obtain the necessary start up software to operate it. He claimed that this placed him, as an independent firm, at a competitive disadvantage to Citroen’s Authorised Repairers.

The OFT raised the matter with Citroen, making reference to a provision in the EC Regulation (1400/2002) which requires that independent operators have access to diagnostic equipment, and any software relevant to it.

Citroen informed the OFT that it was in the process of establishing its procedures for the sale and support of its bespoke diagnostic machines, and associated software, to independent repairers, in order to fully meet the EC Regulation requirements, and, in August, confirmed that the appropriate arrangements to allow this were in place.

OFT’s action: Case Closed
Case Officer: Geoffrey.kenton@oft.gsi.gov.uk
Case reference: CE/2790/03
Title: Provision of airport services in Scotland

Complainant: Scottish Airports Limited ('SAL').

Complaint against: Scottish Airports Limited ('SAL').

Case closed: 16 September 2003

Issue: Reasonable grounds for suspecting that SAL had offered to provide Air-Scotland.com ('AS'), an airline that has recently commenced operation in Scotland, with services at Edinburgh Airport at a substantially discounted rate if it also used SAL’s Glasgow Airport.

Relevant provision: Chapter II of the CA’98

Outline of case

SAL operates three airports in Scotland – situated in Glasgow, Edinburgh and Aberdeen. SAL is a wholly-owned subsidiary of BAA plc. As well as the services that it offers to airlines, SAL manages all commercial facilities at each of its airports, including shops, catering outlets, foreign currency exchange, car hire and car parks.

The OFT obtained information that gave it reasonable grounds for suspecting that SAL had offered to provide Air-Scotland.com ('AS'), an airline that has recently commenced operation in Scotland, with services at Edinburgh Airport at a substantially discounted rate if it also used SAL’s Glasgow Airport.

Given that it is possible that SAL holds a dominant position in relation to the provision of airport services in Scotland, or in part or parts of Scotland, this practice could have amounted to a tie-in sales or exclusive dealing arrangement in contravention of the Chapter II prohibition of the CA’98.

The OFT obtained information from both SAL and AS regarding the negotiations preceding their agreement, as well as the agreement itself. SAL also provided information regarding its pricing practices at Glasgow and Edinburgh Airports.

Analysis of this information, a witness statement from SAL and a written submission from AS, did not reveal evidence that SAL had unlawfully required AS to use Glasgow Airport as well as Edinburgh Airport, or that SAL had unlawfully required AS to use SAL airports to the exclusion of other airports.

The OFT therefore has no evidence of a tie-in sales or exclusive dealing arrangement in contravention of the Chapter II prohibition and has closed its investigation. The OFT will continue to monitor the provision of airport services in Scotland.

OFT’s action: Case Closed

Case Officer: chris.bowden@oft.gsi.gov.uk

Case reference: CE/2356/03
INTRODUCTION

Welcome to the sixth issue of this section of the Gazette. The purpose of this section is to inform the public of a selection of cases that have been considered under the Competition Act 1998 (the Act), and subsequently closed. This issue includes cases that were closed in October 2003. The next issue of this section will be in the Gazette published in December 2003.
CLOSED CASES

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List of closed case summaries

- Resale Price Maintenance (RPM) in Gas Fires
Title: Resale Price Maintenance (RPM) in Gas Fires

Complainant: An LFL Retailer
Complaint against: LFL Group Limited
Case closed: 17 October 2003
Issue: Whether LFL had any agreements with its retailers to set minimum resale prices.
Relevant provision: Chapter I of CA98

Outline of case

In August 2002, the OFT received a complaint from a retailer stating that LFL was enforcing a minimum resale price for the sale of its 'Brilliant Gas Fires'. The evidence supplied contained, inter alia, a circular dated 10 October 2000 from LFL sent to all its 'Brilliant Fireplace Specialists' enforcing a minimum selling price for its Brilliant Gas Fires.

As part of the resulting section 25 investigation the LFL was contacted and admitted that it had sent out the circular enforcing minimum prices. LFL stated that after receiving several complaints from its retailers that such a measure was illegal it then took advice from its solicitor on 26 October 2000. As a result of this advice immediately contacted its retailers and orally rescinded the circular so far as it related to minimum retail prices.

Due to LFL's admissions noted above and the potentially relatively short period involved the OFT was willing to accept the following assurances:

'LFL Group Limited, a private limited company registered in England and Wales with registration number 02031766, and having its registered office at Sett End Road, Shadsworth Industrial Estate, Blackburn BB1 2PT (the ‘Company’) hereby gives the Office of Fair Trading the following assurances:

1. The Company will not itself or through any officer of the Company or any person authorised to act on behalf of the Company:

   (a) include in a contract for sale or agreement relating to the sale of goods a term or condition which purports to establish or provide for the establishment of minimum prices to be charged on the resale of goods in the United Kingdom; or

   (b) require, as a condition of supplying goods to a dealer, the inclusion in a contract or agreement of any such term or condition, or the giving of any undertaking to the like effect; or

   (c) notify to dealers, or otherwise publish on or in relation to any goods, a price stated or calculated to be understood as the minimum price which may be charged on the resale of those goods in the United Kingdom; or
(d) withhold supplies of goods from a dealer seeking to obtain them for resale in the United Kingdom on the ground that the dealer has sold or is likely to sell below the recommended resale price.

2. The Company will circulate to all its dealers within one month from the date of these assurances a statement conveying their substance and advising such dealers that they are free to sell, advertise and display for sale goods supplied by the Company at whatever price they may choose. A copy of this statement will be sent to the Office of Fair Trading marked for the attention of The Director of Competition Enforcement Division 7.

For and on behalf of LFL Group Limited'

LFL has now signed and returned the above assurances to the OFT. The OFT has therefore closed its file in respect of this specific complaint.

OFT’s action: Case closed
Case officer: david.lee@oft.gsi.gov.uk
Case reference: CE/1887-02
INTRODUCTION

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List of closed case summaries

- Glasgow Solicitors Property Centre
- Steel Deck Flooring Industry
**Glasgow Solicitors Property Centre**

**Complainant:** Conveyancing Direct  
**Complaint against:** Glasgow Solicitors Property Centre  
**Case closed:** 31 September 2003  
**Issue:** That the rules of admission to an association of undertakings should be transparent, proportionate, non-discriminatory and based on objective standards.  
**Relevant provision:** Chapter I of the CA’98

**Outline of case**

In December 2002 the OFT opened a formal investigation into the admission rules for membership of the Glasgow Solicitors Property Centre (GSPC).

The GSPC is an association of Solicitor Estate Agents (SEAs) in the Glasgow area which provides marketing assistance for its members to sell property. In January 2001 Conveyancing Direct (CD), a Glasgow based conveyancing firm, applied to join the GSPC in order to provide estate agency services as an SEA. This application was rejected by the board of the GSPC.

The rules of admission to an association of undertakings such as the GSPC should be transparent, proportionate, and non-discriminatory and based on objective standards. Those that are not may breach Chapter I prohibition where they have an appreciable effect on competition, for example by restricting entry to a market. The OFT expressed concern, to the GSPC, that its admission rules did not meet these criteria.

Following discussions in July 2003, the GSPC voluntarily offered to change its admission procedures to meet the OFT’s concerns. The new procedures, which are now in operation, provide prospective members with an application pack setting out the grounds for admission and a written report if their application is rejected; they also introduce an appeals procedure. As a result of these changes the OFT has decided to close its investigation.

**OFT’s action:** Case closed  
**Case officer:** philip.hand@oft.gsi.gov.uk  
**Case reference:** CE/00523/01
Steel Deck Flooring Industry
Complainant: A member of the Construction Confederation
Case closed: 10 October 2003
Issue: Six major supply and fix contractors in the steel deck flooring industry were alleged to have jointly agreed not to accept the imposition of payment retention terms in contracts.
Relevant provision: Chapter I of the CA’98

Outline of case

The Construction Confederation was approached by one of its members about the refusal of some firms within the steel deck flooring industry to accept retentions in contracts. Retentions allow customers to retain a proportion of the payment for work in case problems arise in the future.

These concerns were passed on to the OFT in light of our previous intervention with trade associations representing piling contractors, precast concrete floorers, steelwork fabricators and lift manufacturers which led to termination of similar arrangements (see OFT PN 32/02 and PN 2/03).

The OFT contacted the six contractors (who together account for a large share of the market) in August 2003. Each stated that the agreement (effective from January 2000) is no longer in effect. Each contractor is now free to decide the terms that it offers, including whether or not to have retentions.

As there is no evidence that the agreement complained of is still in operation, the OFT does not consider that continuing enforcement action is warranted and has therefore closed its investigation.

OFT's action: Case closed
Case officer: john.griffin@oft.gsi.gov.uk
Case reference: CE/3252/03
INTRODUCTION

Welcome to the eighth issue of this section of the Gazette. The purpose of this section is to inform the public of a selection of cases that have been considered under the Competition Act 1998 (the Act), and subsequently closed. This issue includes cases that were closed between November and December 2003. The next issue of this section will be in the Gazette published in February 2004.
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List of closed case summaries

- Network Ticketing Limited
- The Outdoors Show
- Video Stores
Network Ticketing Limited (NTL) – multi-operator travelcard revenue distribution mechanism

Complainant: St George Travel Limited.
Complaint against: Network Ticketing Limited
Case closed: November 2003
Issue: Whether the NTL scheme for distribution of travel ticket revenue falls within the Chapter I prohibition. And if so, whether it satisfies the criteria for exemption set out in the Public Transport Ticketing Schemes Block Exemption Order 20011 (the Block Exemption).

Outline of case

A complaint was received from St George Travel Ltd about the multi-operator travelcard revenue distribution mechanism of Network Ticketing Limited (NTL). NTL was established by the bus operators in Tyne and Wear to operate the travelcard scheme in the Tyne and Wear area. Tyne and Wear Passenger Transport Executive (now known as Nexus) was invited to become an original member as operator of the Tyne and Wear Metro system and of secured socially necessary bus services in the area. The basis of the complaint was that the bus operator was carrying more passengers than was reflected in the revenue received through the distribution mechanism.

To the extent that the parties to the NTL agreement are public transport operators, they are clearly undertakings for these purposes. Furthermore, to the extent that the agreement between them provides for the Board of NTL to agree prices on the various tickets available, the scheme has an appreciable effect on competition.

From this it would seem that the agreements would fall within the Chapter I prohibition but to see whether this is the case it is necessary to consider whether they satisfy the criteria for exemption set out in the Block Exemption and in particular comply with conditions set out in Article 112.

The evidence that has been presented to the OFT suggests that the reimbursement system used by NTL fulfils the conditions of the Block Exemption. The allocation methodology that has been devised would seem to fulfil criteria for a weighting system and satisfy the reasons why use of pure passenger miles as the basis of revenue allocation would not be ‘reasonably practicable’.

Given these conclusions3 the complaint regarding inequalities resulting from operation of the reimbursement system has been dismissed.

1 SI 2001 No.319.
2 Article 11 requires that “the parties to a public transport ticketing scheme which provides for members of the public to purchase a multi-operator travelcard shall not distribute between themselves the revenue received by virtue of the operation of that scheme other than pursuant to terms contained in that scheme which reflect, as far as reasonably practicable, the actual passenger miles travelled on the vehicles or vessels of each party by passengers using tickets issued under that scheme during the accounting period in which such revenue was received.”
3 A fuller summary can be obtained from the case officer.
The Outdoors Show
Complainant:
Complaint against: Brand Events
Case closed: 2 December 2003
Issue: Retail policy instituted by Brand Events at the Outdoors Show
Relevant provision: Chapter I of the CA’98

Outline of case
In September 2003 the OFT received a copy of the retail policy for the Go Diving! section of The Ordnance Survey Outdoors Show 2004 (the Show) organised by Brand Events. Brand Event has organised the exhibition annually since 2002. The agreement between Brand Events and the retail exhibitors restricted the level of discounting by retail exhibitors attending the show and limited the percentage of goods on sale to which a discount could be applied.

The OFT launched a formal investigation. Brand Events cooperated with the OFT throughout this investigation and supplied detailed information relating to its retail policy. Following discussions with the OFT, Brand Events agreed to change the retail policy for the Show to remove all references to prices or discounting. In the light of these changes, and taking into account the relatively small size of Brand Events and the fact that the agreements relate to one exhibition lasting only a few days, the OFT has decided, on grounds of administrative priority, to cease its investigation.
Video stores
Complainant: An owner of an independent video rental store.
Complaint against: Various video rental distributors and video rental chains.
Case closed: December 2003
Issue: Whether the video rental distributors and/or video rental chains had infringed the CA98.
Relevant provision: Chapter I of the CA’98

Outline of the case

In November 2002 the OFT received a complaint from an owner of an independent video rental store who purchased ex-rental videos from the video rental chains to then supply them for rental purposes. The owner alleged that the video rental chains, at the behest of the film studios, were restricting him from buying ex-rental videos. He claimed that he was either limited to buying only one or two copies of each title or not permitted to buy any copies at all.

The agreements in question are supply agreements from video distributors to video rental outlets concerning the terms under which the outlets may rent videos distributed to them. It is our understanding that the distributors concerned, own the appropriate licences for the rental right of these video recordings. These supply agreements are vertical in nature and while they include provisions which relate to the use by the video rental outlet of an intellectual property right (IPR), in this case the rental right over a film recording, these provisions do not constitute the primary object of the supply agreements and they relate directly to the use, sale and resale of the videos. They are therefore excluded from the Chapter I prohibition of the CA98 by the Competition Act 1998 (Land and Vertical Agreements Exclusion) Order 2000 (the Exclusion Order). However, the OFT may withdraw the Exclusion Order in limited circumstances, for example, where it considers that the agreement will, if not excluded, infringe the Chapter I prohibition and that it would be unlikely to grant the agreement an unconditional individual exemption.

A preliminary consideration of the complaint, suggested that the re-sale restrictions might have the effect of appreciably restricting competition, particularly as there appeared to be a network of similar vertical agreements containing the same restrictions. The OFT on 17 February 2003 therefore requested information from three video rental chains and seven video distributors, including requests for copies of their video rental agreements, correspondence and policies which relate to the terms and conditions under which ex-rental videos can be sold.

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4 Also known as previously viewed video cassette and refers to video cassettes originally supplied for rental purposes but which are, after a certain period of time, then sold by the video rental outlet as surplus stock.

5 SI 2000/310.

6 Schedule 1, paragraph 4(5)(a) of the CA98. The agreement must also not be a “protected agreement”: Schedule 1, para. 4(5)(b) of the CA98.

7 The OFT did so pursuant to Schedule 1, paragraph 4(2) of the CA98, which allows the OFT to obtain any information in connection with an agreement from any party to the agreement, if the OFT is considering withdrawing the benefit of an exclusion.
From the responses to this information request, the OFT identified four video distributors that included a restriction in their agreements on whom ex-rental videos could be sold to (i.e. to members of the public for their own home use only) and two who included a restriction on how many copies of each title per transaction could be sold (i.e. either one or two copies). The OFT wrote to these distributors on 30 May 2003 asking for an explanation and justification of these restrictions. The distributors submitted that the restrictions were necessary to protect the rental right in the films being supplied on video.

The Copyright Designs and Patents Act 1988 (CDPA) makes clear that copyright exists in a film recording. Under section 16(1)(ba) and section 18A(1) of the CDPA the owner of copyright in a work enjoys the exclusive right to rent the work to the public. This is defined as the right to make “a copy of the work available for use, on terms that it will or may be returned, for direct or indirect economic or commercial advantage”\(^8\).

The Copyright and Related Rights Regulations 1996\(^9\) transpose the provisions contained in Council Directive 92/100/EEC\(^10\), which in Article 1(4) provides that the rental rights referred to in the Directive “shall not be exhausted by any sale or other act of distribution of originals and copies of copyright works”. Thus, subject to time limitations\(^11\), the owners of the copyright in such a work are entitled to enforce that copyright, even after it has been distributed or sold\(^12\).

The OFT considers that the existence of an IPR, such as a copyright in a film, will not raise competition concerns. However, the way that IPR is exercised could infringe the CA98. The OFT’s view is that a restriction in an agreement that does not go beyond what is necessary to protect the essential function or specific subject matter of an IPR cannot infringe the Chapter I prohibition. It is therefore important to establish whether each restriction identified is necessary to protect the essential function of the copyright concerned, as defined in section 18A(2)(a) CDPA.

The restriction on whom ex-rental videos can be sold to could be considered a necessary restriction to protect the essential function of the rental right concerned, as it appears to protect the owner’s rental right from unlicensed rental. Further, it does not appear to go beyond what is necessary to protect the essential function of the rental right. Therefore it is unlikely that this restriction would infringe the Chapter I prohibition, even if the benefit of the Exclusion Order were withdrawn.

The restriction on the number of copies of each ex-rental video title that can be sold per transaction may go beyond what is necessary to protect the essential function of the video distributors’ rental right. The quantitative restriction on the sale of ex-rental videos does not distinguish between sales to members of the public for their own

\(^8\) As defined in section 18A(2)(a) of the CDPA.
\(^9\) SI 1996/2967.
\(^11\) In the case of film copyright, 70 years from the end of the calendar year of the death of the last to die of the principal director, the author of the screenplay, the author of the dialogue or the composer of music specially created for and used in the film. See section 13B CDPA.
\(^12\) The video distributors are the holders or exclusive UK licensees of their respective copyrights in the films supplied on video cassette by them for rental.
personal use and sales to other video rental stores for re-rental. Whilst the intention of the restriction may be to protect the distributors’ rental right in the rental market, it seems to go beyond protecting that right as it also has a restrictive effect on the sale of ex-rental videos to members of the public for their own personal use. It is therefore likely that, but for the Exclusion Order, this restriction would be caught by the Chapter I prohibition. However, this restriction is unlikely to result in significant consumer detriment as it is likely that the majority of consumers will, at most, only want to purchase one or two copies of each film. Furthermore, the OFT was also less concerned about the network effects arising from this restriction given that it appears that, following our information requests, only two distributors included this restriction in their agreements. This restriction does not therefore seem to justify withdrawing the Exclusion Order, which as stated in our guideline13, is a power we intend to exercise only rarely.

Based on the conclusions reached above, the OFT has therefore closed its file.

OFT’s action: Case closed
Case Officer: mark.lea@oft.gsi.gov.uk
Case reference: CE/2328/03

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