GRA
GIBRALTAR REGULATORY AUTHORITY

THE CHAPTER 1 PROHIBITION

DRAFT GUIDELINES

2024

CP xx/24

FOREWORD

These guidelines set out some of the circumstances in which the Gibraltar Competition and Markets Authority (the "GCMA") considers that agreements will or may be regarded as anti-competitive. It explains how the GCMA will operate its powers under the Competition Act 2020 when assessing agreements between undertakings.

The guidelines are intended to be of assistance not only to those undertakings which are parties to an agreement, but also to their customers and other businesses.

It is the GCMA's practice to consider, on a case-by-case basis, whether an agreement falls within its administrative priorities so as to merit investigation.

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1. ACKNOWLEDGEMENTS

Where appropriate, the Gibraltar Competition and Markets Authority will seek to ensure that locally published guidance notes are consistent with those published by fellow Competition Authorities in other jurisdictions.

As well as reflecting the existing competition standards and practices in Gibraltar, parts of this document reflect and/or incorporate the guidance from the UK's Competition and Markets Authority.

The following documents were used in the drafting of these guidelines:

(a) "OFT401: Agreements and Concerted Practices", Office of Fair Trading (UK)[1]

(b) "OFT407: Enforcement", Office of Fair Trading (UK)[2]

The competition cases cited in this guidance document represent landmark decisions which at the time of publication represent the latest positions within each particular field of competition law.

[1] "OFT401: Agreements and Concerted Practices", Office of Fair Trading (UK), 12/04/2000 <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/284396/oft401.pdf>, accessed 15/10/23.

[2] "OFT407: Enforcement", Office of Fair Trading (UK), 12/04/2000 <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/284436/oft407.pdf>, accessed 15/10/23.

2. INTRODUCTION

The Gibraltar Regulatory Authority (the "Authority") is designated as the competent authority for the promotion and enforcement of competition law in Gibraltar. Pursuant to such designation, the Authority must discharge all the functions, duties and obligations in accordance with the Competition Act 2020 (the "Act"), acting in its capacity as the **Gibraltar Competition and Markets Authority (the "GCMA").**

The Chapter 1 prohibition contained in the Act states that agreements between undertakings, decisions by associations of undertakings or concerted practices which may affect trade within Gibraltar and have as their object or effect the prevention, restriction or distortion of competition within Gibraltar are prohibited unless they are exempt. Any agreement or decision which is prohibited is void. The Chapter 1 prohibition can be found in section 3(1) of the Act.

These guidelines set out some of the circumstances in which the GCMA considers that agreements will or may be regarded as anti-competitive. It explains how the GCMA will operate its powers under the Act when assessing agreements[3] between undertakings. The guidelines are intended to be of assistance not only to those undertakings which are parties to an agreement, but also to their customers and other businesses.

Agreements which fall within the Chapter 1 prohibition but which satisfy certain specified criteria[4] are not prohibited, no prior decision to that effect being required. Certain categories of agreement are also excluded from the Chapter 1 prohibition.

Breach of the Chapter 1 prohibition means that the agreement is void and each party is liable to a financial penalty of up to 10 per cent of its turnover.

It is the GCMA's practice to consider, on a case-by-case basis, whether an agreement falls within its administrative priorities so as to merit investigation.

It is important that the GCMA continually adapts its approach to the application and enforcement of the Chapter 1 prohibition to ensure that it is fulfilling its statutory duty in light of a dynamic and evolving economy. It therefore reserves the right to amend these guidelines from time to time in line with regulatory experience gained and expertise acquired.

[3] References in these guidelines to agreement(s) should, unless otherwise stated or the context demands it, be taken to include decisions by associations of undertakings and concerted practices.

[4] See section 7 of the Competition Act 2020.

3. ANTI-COMPETITIVE AGREEMENTS

SCOPE OF THE PROVISIONS

Section 3(2) of the Act provides a list of agreements to which the provisions apply, namely those which:

"*(a) directly or indirectly fix purchase or selling prices or any other trading conditions;*

(b) limit or control production, markets, technical development or investment;

(c) share markets or sources of supply;

(d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;

(e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts".

This is a non-exhaustive, illustrative list and does not set a limit on the investigation and enforcement activities of the GCMA under the Chapter 1 prohibition. Discussion of the GCMA's approach to these types of agreement and other potentially anti-competitive agreements, can be found in these guidelines. It should be noted, however, that any agreement that has an appreciable adverse effect on competition is likely to fall within the Chapter 1 prohibition irrespective of whether or not it is of a type described in section 3(2) of the Act. Such an agreement may nevertheless be enforceable without prior approval if it meets the conditions set out in section 7(1) of the Act.

TERMS USED IN THE PROVISIONS

The terms used in the Chapter 1 prohibition and the concepts relevant to their application are dealt with in this section.

UNDERTAKINGS

The term undertaking is not defined in the Act, but its meaning has been set out in European Community law. It refers to any entity engaged in economic activity, regardless of its legal status and the way in which it is financed[5]. It includes companies, firms, businesses, partnerships, individuals operating as sole traders, agricultural cooperatives, associations of undertakings (e.g. trade associations), non-profit making organisations and (in some circumstances) public entities that offer goods or services on a given market. The key consideration in assessing whether an entity is an undertaking for the application of the Chapter 1 prohibition is whether it is engaged in economic activity. An entity may engage in economic activity in relation to some of its functions but not others.

[5] See case *Network Rail Infrastructure v Achilles Information Ltd* (2020) EWCA Civ 323.

The Chapter 1 prohibition does not apply to agreements where there is only one undertaking, i.e. between entities which form a single economic unit. In particular, an agreement between a parent and its subsidiary company, or between two companies which are under the control of a third, will not be agreements between undertakings if the subsidiary has no real freedom to determine its course of action on the market and, although having a separate legal personality, enjoys no economic independence. Whether or not the entities form a single economic unit will depend on the facts of each case.

AGREEMENT

Agreement has a wide meaning and covers agreements whether legally enforceable or not, written or oral; it includes so-called gentlemen's agreements. There does not have to be a physical meeting of the parties for an agreement to be reached; an exchange of letters or telephone calls may suffice.

The fact that a party may have played only a limited part in the setting up of the agreement, or may not be fully committed to its implementation, or may have participated only under pressure from other parties does not mean that it is not party to the agreement, although these facts may be taken into account in deciding the level of any financial penalty.

DECISIONS BY ASSOCIATIONS OF UNDERTAKINGS

The Chapter 1 prohibition also covers decisions by associations of undertakings. Trade associations are the most common form of associations of undertakings, but the provisions are not limited to any particular type of association. A decision by a trade association may include, for example, the constitution or rules of an association of undertakings or its recommendations or other activities. In the day-to-day conduct of the business of an association, resolutions of the management committee or of the full membership, binding decisions of the management or executive committee of the association, or rulings of its chief executive may all be "decisions" of the association. The key consideration is whether the object or effect of the decision, whatever form it takes, is to influence the conduct or coordinate the activity of the members. A trade association's co-ordination of its members' conduct in accordance with its constitution may also be a decision even if its recommendations are not binding on its members, and may not have been fully complied with. It will be a question of fact in each case whether an association of undertakings is itself a party to an agreement.

CONCERTED PRACTICES

The Chapter 1 prohibition applies to concerted practices as well as to agreements. The boundary between the two concepts is imprecise. The key difference is that a concerted practice may exist where there is informal co-operation without any formal agreement or decision.

The GCMA will need to establish that the parties, even if they did not enter into an agreement, knowingly substituted cooperation between them for the risks of competition.

The following are examples of factors which the GCMA may consider in establishing if a concerted practice exists:

- whether the parties knowingly entered into practical co-operation;
- whether behaviour in the market is influenced as a result of direct or indirect contact between undertakings;
- whether parallel behaviour is a result of contact between undertakings leading to conditions of competition which do not correspond to normal conditions of the market;
- the structure of the relevant market and the nature of the product involved;
- the number of undertakings in the market and, where there are only a few undertakings, whether they have similar cost structures and outputs.

THE PREVENTION, RESTRICTION OR DISTORTION OF COMPETITION

The Chapter 1 prohibition applies where the object or effect of the agreement is to prevent, restrict or distort competition within Gibraltar. Any agreement between undertakings might be said to restrict the freedom of action of the parties. That does not, however, necessarily mean that the agreement is prohibited. The GCMA does not adopt such a narrow approach and will assess an agreement in its economic context.

THE APPRECIABLE EFFECT ON COMPETITION TEST

An agreement will fall within the Chapter 1 prohibition only if it has as its object or effect an appreciable prevention, restriction or distortion of competition within Gibraltar.

In determining whether an agreement has an appreciable effect on competition for the purposes of the Chapter 1 prohibition, the GCMA will have regard to the Competition (Small Agreements and Conduct of Minor Significance) Regulations 2021[6] (the "Minor Significance Regulations").

As a matter of practice, the GCMA is likely to consider that an agreement will not fall within the Chapter 1 prohibition when it is covered by the Minor Significance Regulations. Where the GCMA considers that undertakings have in good faith relied on the terms of the Minor Significance Regulations, the GCMA will not impose financial penalties for an infringement of the Chapter 1 prohibition.

The mere fact that the parties' combined turnover exceeds the threshold set out in the Minor Significance Regulations[7], does not mean that the effect of an agreement on competition is appreciable. Other factors will be considered in determining whether the agreement has an appreciable effect.

Relevant factors may include for example, the content of the agreement and the structure of the market or markets affected by the agreement, such as entry conditions or the characteristics of buyers and the structure of the buyers' side of the market.

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[6] LN.2021/031 https://www.gibraltarlaws.gov.gi/legislations/competition-small-agreements-and-conduct-of-minor-significance-regulations-2021-5809/download

[7] All agreements between undertakings, the combined applicable turnover of which the business year ending in the calendar year preceding one during which the infringement occurred does not exceed £7 million.

4. EXAMPLES OF ANTI-COMPETITIVE AGREEMENTS

This part contains a discussion of various types of agreements which might appreciably restrict competition and fall within the Chapter 1 prohibition.

Although an agreement may appreciably restrict competition within the meaning of the Chapter 1 prohibition, it will not be prohibited (and will still be valid and enforceable) where it satisfies section 7(1) of the Act.

EXAMPLES OF AGREEMENTS WHICH MIGHT APPRECIABLY RESTRICT COMPETITION

The types of agreements discussed in this part are agreements which have the object or effect of:

- directly or indirectly fixing prices;
- fixing trading conditions;
- sharing markets;
- limiting or controlling production or investment;
- collusive tendering (bid-rigging);
- joint purchasing or selling;
- sharing information;
- exchanging price information;
- exchanging non-price information;
- restricting advertising;
- setting technical or design standards.

The examples provided in this part are not exhaustive as there are other types of agreements which may be anti-competitive.

DIRECTLY OR INDIRECTLY FIXING PRICES

An agreement whose object is to directly or indirectly fix prices, or the resale prices of any product or service, almost invariably infringes the Chapter 1 prohibition. The GCMA considers that such price-fixing agreements, by their very nature, restrict competition to an appreciable extent.

There are many ways in which prices can be fixed. Price fixing may involve fixing either the price itself or the components of a price, setting a minimum price below which prices are not to be reduced, establishing the amount or percentage by which prices are to be increased, or establishing a range outside which prices are not to move.

Price fixing may also take the form of an agreement to restrict price competition. This will include, for example, an agreement to adhere to published price lists or not to quote a price without consulting potential competitors, or not to charge less than any other price in the market. An agreement may restrict price competition even if it does not entirely eliminate it. Competition may, for example, remain in the ability to grant discounts or special deals on a published list price or ruling price.

An agreement may also have the object of fixing prices while only indirectly affecting the price to be charged. It may cover the discounts or allowances to be granted, transport charges, payments for additional services, credit terms or the terms of guarantees, for example. The agreement may relate to the charges or allowances quoted themselves, to the ranges within which they fall, or to the formulae by which ancillary terms are to be calculated.

Price fixing issues are not limited to agreements between competing undertakings. They can also arise between undertakings operating at different levels in the supply chain, where an agreement directly or indirectly (whether on its own or in combination with other factors under the control of the parties) has the object of restricting a buyer's ability to determine its resale price[8].

AGREEMENTS TO FIX TRADING CONDITIONS

Undertakings may agree to regulate the terms and conditions on which goods or services are to be supplied, in addition to prices.

AGREEMENTS TO SHARE MARKETS

Undertakings may agree to share markets, whether by territory, type or size of customer, or in some other way. This may be as well as or instead of, agreeing on the prices to be charged, especially where the product is reasonably standardised. Where the object of the agreement is to share markets in this way, it will almost invariably infringe the Chapter 1 prohibition. The GCMA considers that such market sharing agreements, by their very nature, restrict competition to an appreciable extent.

There can be agreements, however, which have the effect (rather than the object) of sharing the market to some degree as a consequence of the main object of the agreement. Each Party may agree, for example, to specialise in the manufacture of certain products in a range, or of certain components of a product, in order to be able to produce in longer runs and therefore more efficiently. Such an agreement may fall within the Chapter 1 prohibition where there is, or is likely to be, an appreciable effect on competition.

[8] Except that a supplier may impose a maximum resale price or recommend a resale price, provided that pressure from the parties to the agreement does not result in that becoming a fixed or minimum price.

AGREEMENTS TO LIMIT OR CONTROL PRODUCTION OR INVESTMENT

An agreement whose object is to limit or control production will almost invariably infringe the Chapter 1 prohibition. Such an agreement may be the way in which prices are fixed, or it may relate to production levels or quotas, or it may be intended to deal with structural overcapacity. In some cases, it will be linked to other agreements which may affect competition.

Competitive pressures may be reduced if undertakings in an industry agree to limit investment or at least to coordinate future investment plans. The GCMA considers that any agreement whose object is to limit or control investment will, by its very nature, restrict competition to an appreciable extent.

COLLUSIVE TENDERING (BID-RIGGING)

Tendering procedures are designed to provide competition in areas where it might otherwise be absent. An essential feature of the system is that prospective suppliers prepare and submit tenders or bids independently. Any tender submitted as a result of collusion between prospective suppliers will almost invariably infringe the Chapter 1 prohibition. The GCMA considers that bid-rigging agreements, by their very nature, restrict competition to an appreciable extent.

JOINT PURCHASING/SELLING

An agreement between purchasers to fix (directly or indirectly) the price that they are prepared to pay, or to purchase only through agreed arrangements, limits competition between them. An example of one type of agreement which might be made between purchasers is an agreement as to those with whom they will deal. Such an arrangement may fall within the Chapter 1 prohibition if it has an appreciable effect on competition.

The same issues potentially arise in agreements between sellers, in particular where sellers agree to boycott certain customers. This type of agreement may have an appreciable effect on competition.

INFORMATION SHARING

As a general principle, the more informed customers are, the more effective competition is likely to be and so making information publicly available to customers does not usually harm competition.

In the normal course of business, undertakings exchange information on a variety of matters legitimately and with no risk to the competitive process. Indeed, competition may be enhanced by the sharing of information, for example, on new technologies or market opportunities. There are therefore circumstances where there is no objection to the exchange of information, even between competitors, and whether or not under the aegis of a trade association.

The exchange of information may however have an adverse effect on competition where it serves to reduce or remove uncertainties inherent in the process of competition. The fact that the information could have been obtained from other sources is not necessarily relevant. Whether or not exchange of information has an appreciable effect on competition will depend

on the circumstances of each individual case, such as the market characteristics, the type of information and the way in which it is exchanged. As a general principle, the GCMA will consider that there is more likely to be an appreciable effect on competition the smaller the number of undertakings operating in the market, the more frequent the exchange and the more sensitive, detailed and confidential the nature of the information which is exchanged.

EXCHANGE OF PRICE INFORMATION

The exchange of information on prices may lead to price co-ordination and therefore diminish competition which would otherwise be present between the undertakings. This will be the case whether the information exchanged relates directly to the prices charged or to the elements of a pricing policy, for example discounts, costs, terms of trade and rates and dates of change.

The more recent or current the information exchanged, the more likely it is that exchange will have an appreciable effect on competition. Therefore, the circulation of purely historical information or the collation of price trends is unlikely to have an appreciable effect on competition, for example, where the exchange forms part of a scheme of inter-business comparison which is intended to spread best industrial practice. Exchange of information that is aggregated and which cannot be disaggregated, is also unlikely to have an appreciable effect on competition.

EXCHANGE OF NON-PRICE INFORMATION

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

In general, the exchange of information on output and sales should not affect competition provided that it is aggregated or, if it enables participants to identify individual undertakings' competitive behaviour, provided that it is sufficiently historic. In such circumstances, it is unlikely that an agreement to exchange such information would influence the participants' competitive market behaviour. There may however be an appreciable effect on competition if the information exchanged is current or recent or concerns future plans, and if it can be ascribed to particular undertakings, whether because it is broken down in this way or because it can be disaggregated.

ADVERTISING

Restrictions on advertising, whether relating to the amount, nature or form of advertising, have the potential to restrict competition. Whether the effect is appreciable depends on the purpose and nature of the restriction, and on the market in which it is to apply. Decisions aimed at curbing misleading advertising, or at ensuring that advertising is legal, truthful and decent are unlikely to have an appreciable adverse effect on competition.

STANDARDISATION AGREEMENTS

An agreement on technical or design standards may lead to an improvement in production by reducing costs or raising quality, or it may promote technical or economic progress by reducing waste and consumers' search costs. Some such agreements will, however, be likely to infringe the Chapter 1 prohibition if they are, in effect, a means of limiting competition from other sources, for example by raising entry barriers. Standardisation agreements which prevent the parties from developing alternative standards or products that do not comply with the agreed standard may also infringe the Chapter 1 prohibition.

OTHER ANTI-COMPETITIVE AGREEMENTS

Competition in a market can be restricted in less direct ways than by fixing prices or sharing markets or the other examples set out above – for example, a scheme under which a customer obtains better terms the more business it places with the parties to the scheme could be regarded as anti-competitive. Each case will need to be considered in its own circumstances. Other agreements where the parties agree to cooperate may fall within the Chapter 1 prohibition if they have an appreciable effect on competition. However, not all these, or other, agreements having appreciable effect on competition will necessarily be prohibited. As mentioned above, certain agreements which have an appreciable effect on competition within the meaning of the Chapter 1 prohibition will not be prohibited (and will still be valid and enforceable) where they satisfy section 7(1) of the Act.

5. THE LEGAL EXCEPTION REGIME

An agreement that falls within the Chapter 1 prohibition, but which satisfies the conditions set out in section 7(1) of the Act is not prohibited, with no prior decision to that effect being required. Such an agreement is valid and enforceable from the moment the conditions in section 7(1) are satisfied and for as long as that remains the case. The Act provides that the burden of proving that the conditions are satisfied rests on the undertaking(s) claiming the benefit of section 7(1) of the Act.

THE CONDITIONS IN SECTION 7(1)

Section 7(1) sets out four conditions which must all be met for an agreement to have the benefit of the provision.

Section 7(1) states,

> "*An agreement is exempt from the Chapter 1 prohibition if it –*
>
> *(a) contributes to –*
>
> *(i) improving production or distribution, or*
>
> *(ii) promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit; and*
>
> *(b) does not -*
>
> *(i) impose on the undertakings concerned restrictions which are not indispensable to the attainment of those objectives; or*
>
> *(ii) afford the undertakings concerned the possibility of eliminating competition in respect of a substantial part of the products in question*".

EXCLUSIONS

THE CHAPTER 1 PROHIBITION

Schedules 1 (mergers) and 2 (general exclusions) of the Act, specifically exclude from the Chapter 1 prohibition certain categories of agreement:

- an agreement to the extent to which it would result in a merger within the merger provisions of the Act (the "Merger Exclusion");
- an agreement made by an undertaking entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly, insofar as the prohibition would obstruct the performance, in law or in fact, of the particular tasks assigned to that undertaking;
- an agreement to the extent to which it is made to comply with a legal requirement;

- an agreement which is necessary to avoid conflict with international obligations and which is also the subject of an order by the Minister for Business (the "Minister");

- an agreement which is necessary for exceptional and compelling reasons of public policy and which is also the subject of an order by the Minister.

The Merger Exclusion does not apply to a particular agreement if the GCMA gives a direction to that effect.

The Minister also has the power to add, amend or remove exclusions under certain circumstances.

BLOCK EXEMPTIONS

THE CHAPTER 1 PROHIBITION

Under the Act the Minister may, acting on the GCMA's recommendation, make block exemptions that specify particular categories of agreement which the GCMA considers are likely to be exempt from the Chapter 1 prohibition as a result of section 7(1) of the Act. An agreement which falls within a category specified in the block exemption will not be prohibited under the Chapter 1 prohibition. Any such block exemption may impose conditions or obligations subject to which the block exemption will have effect.

Breach of a condition imposed by the block exemption cancels the block exemption in respect of an agreement. The failure to comply with an obligation imposed by the block exemption enables the GCMA to cancel the block exemption in respect of an agreement. Furthermore, if the GCMA is of the view that an agreement is not exempt from the Chapter 1 prohibition as a result of section 7(1) of the Act, the GCMA may cancel the block exemption in respect of that agreement.

Where the GCMA proposes to exercise its powers to withdraw the benefit of a block exemption from an agreement, it must publish details of its proposed recommendation in such a way as it thinks most suitable for bringing it to the attention of those likely to be affected and consider giving them an opportunity to make representations. If the GCMA has decided to withdraw the benefit of a block exemption, it will notify the parties to that agreement of its decision.

6. ENFORCEMENT ACTION

The GCMA's enforcement powers are set out in sections 29 to 37 of the Act.

These guidelines describe the power of the GCMA:

- to give directions to bring an infringement to an end;
- to give interim measures directions during an investigation;
- to impose financial penalties on undertakings for infringing the Chapter 1 prohibition.

DIRECTIONS

The Act provides that the GCMA may give such directions as it considers appropriate to bring an infringement to an end where the GCMA has made a decision that the Chapter 1 prohibition has been infringed. Where an infringement of the Chapter 1 prohibition is alleged, the GCMA must prove the infringement.

The directions may be given to such person(s) as the GCMA considers appropriate, which includes individuals and undertakings. The GCMA is not limited to giving directions to the infringing parties. For example, directions may be addressed to the parent company which, though not the actual instigator of the infringement, has a subsidiary which is the immediate party to the infringement.

Directions may in particular require the person concerned to modify or to terminate the agreement in question. Directions may require positive action, such as informing third parties that an infringement has been brought to an end and reporting back periodically to the GCMA on certain matters such as prices charged. In some circumstances, the directions appropriate to bring an infringement to an end may be (or may include) directions requiring an undertaking to make structural changes to its business.

PROCEDURE

The directions must be in writing and may be given to such person(s) as the GCMA considers appropriate. They are likely to form part of the infringement decision in cases where the decision and the directions are addressed to the same person. If the GCMA proposes to make an infringement decision, it will send the party or parties a written notice setting out the facts on which the GCMA relies, the objections raised by the GCMA, the action it proposes to take and the reasons for it. The GCMA shall allow the person receiving the notice an opportunity to make written representations to it. The person receiving the notice may request in their written representations a meeting with officials of the GCMA to make oral representations to elaborate on the written representations already made in this regard.

ENFORCEMENT OF DIRECTIONS

In most cases directions will have immediate effect. In some cases, the GCMA may allow the undertakings a period of time within which to comply with a direction.

The GCMA may apply to the court for an order requiring compliance with a direction within a specified time limit if a person fails to comply with it without reasonable excuse[9]. The GCMA will actively seek to enforce directions in the courts. The court can require the person in default, or any officer of an undertaking who is responsible for the default, to pay the costs of obtaining the order. If a direction relates to the management or administration of an undertaking, the order can compel the undertaking or any of its officers to comply with it.

INTERIM MEASURES DIRECTIONS

The Act provides that the GCMA may give interim measures directions pending its final decision as to whether or not there has been an infringement of the Chapter 1 prohibition. Interim measures directions will not affect the final decision.

The GCMA may give interim measures directions before it has completed its investigation of the suspected infringement if:

- the GCMA has begun an investigation under section 12 of the Act and not completed it; and

- the GCMA considers that it is necessary to act urgently either to prevent significant damage to a particular person or category of persons, or to protect the public interest.

The GCMA has the power to conduct an investigation under section 12 of the Act where there are reasonable grounds for suspecting that an agreement falls within the Chapter 1 prohibition.

What constitutes significant damage is a question of fact and will depend upon the circumstances of each case. However, damage may be significant where a particular person or category of persons may suffer considerable competitive disadvantage likely to have a lasting effect on their position. Significant damage is likely to include substantial financial loss to a person (to be assessed with reference to that person's size or financial resources as well as the proportion of the loss in relation to the person's total revenue), and extensive damage to the goodwill or reputation of a person might also constitute significant damage.

The GCMA may consider that it is necessary to act urgently to protect the public interest, for example, to prevent damage being caused to a particular industry or to consumers as a result of the suspected infringement. It may also take action to prevent damage to competition more generally.

Interim measures directions may be given by the GCMA on its own initiative or after receiving a request. Any person requesting an interim measures direction should provide as much evidence as possible, demonstrating that the alleged infringement is causing, or is likely to cause, significant damage or that it is necessary that the GCMA act to protect the public interest. Such a request should also indicate as precisely as possible the nature of the interim measure sought.

Where the GCMA's investigation under section 12 of the Act concerns an agreement, the GCMA may not give interim measures directions where a party to the agreement has produced

[9] Section 31(1) of the Competition Act 2020.

evidence to the GCMA that, on the balance of probabilities, satisfies the GCMA that the agreement is exempt from the Chapter 1 prohibition as a result of section 7(1) of the Act.

The GCMA may give such interim measures directions as it considers appropriate and, may also, require the person concerned to terminate the agreement in question or modify the agreement.

When the investigation is complete and the GCMA has decided that an infringement has taken place, it may replace the interim measures direction with a direction as described above. An interim measures direction may also be replaced, in an appropriate case, by the acceptance of commitments. Otherwise, an interim measures direction has effect until the GCMA no longer has power under section 12 of the Act to conduct the investigation or until it has completed its investigation into the matter.

PROCEDURE

Before giving an interim measures direction, the GCMA must give written notice to the person to whom it proposes to give the direction, indicating the nature of the direction it proposes to give and the reasons for deciding to give it. The GCMA must allow the person receiving the notice an opportunity to make representations on it.

ENFORCEMENT OF INTERIM MEASURES DIRECTIONS

Interim measures directions can be enforced following the same procedure as the enforcement of directions above.

ASSURANCES IN LIEU OF INTERIM MEASURES DIRECTIONS

The GCMA may accept informal interim assurances offered by the person(s) concerned where it is satisfied that these will prevent any harm which might otherwise form the basis for imposition of an interim measures direction.

One of the prerequisites for an interim remedy is that it is necessary to act as a matter of urgency. The ability to accept informal interim assurances in appropriate circumstances helps facilitate quick action by the GCMA.

The GCMA may replace informal interim assurances by an interim measures direction.

Informal interim assurances will include provision that they will come to an end when an investigation is complete. If the GCMA has decided that an infringement has taken place, it may replace any informal interim assurances with a direction as described above. In an appropriate case, the GCMA may also replace interim assurances by accepting commitments.

PENALTIES

GENERAL POWERS

Under the Act, the GCMA may impose a financial penalty on an undertaking which has intentionally or negligently committed an infringement of the Chapter 1 prohibition. The amount of the penalty imposed may be up to 10 per cent of the undertaking's turnover. It is for the GCMA to determine whether a financial penalty should be imposed. The GCMA can impose penalties for infringements that have already stopped as well as for ongoing infringements.

The GCMA uses this power to impose penalties on infringing undertakings which reflect the seriousness of the infringement and constitute a robust and effective deterrent, both to the undertaking concerned and to other undertakings which might be considering activities contrary to the Chapter 1 prohibition. Therefore, subject to the maximum penalty of 10 per cent of an undertaking's turnover, the GCMA may adjust, where appropriate, levels of penalties to ensure that deterrence is achieved.

INTENTIONALLY OR NEGLIGENTLY

Before exercising the power to impose a financial penalty, the GCMA must be satisfied, as a threshold condition, that the infringement has been committed intentionally or negligently. However, for the purposes of crossing that threshold, it does not have to determine specifically which it was, provided that it is satisfied that the infringement was either intentional or negligent (although it may well have to do so at a subsequent stage of its appraisal).

For intention or negligence to be found it is not necessary for there to have been action by, or even knowledge on the part of, the partners or principal managers of the undertaking concerned; action by a person who can act on behalf of the undertaking suffices.

The GCMA may also consider commitments given by an undertaking when considering whether or not an infringement of the Chapter 1 prohibition by similar anti-competitive activities of that undertaking was committed intentionally or negligently.

The fact that a particular type of agreement has not previously been found to be in breach of the Chapter 1 prohibition does not mean that the infringement cannot be committed intentionally or negligently.

INTENTION

The circumstances in which the GCMA might find that an infringement has been committed intentionally include the following:

- the agreement has as its object the restriction of competition;
- the undertaking in question is aware that its actions will be, or are reasonably likely to be, restrictive of competition but still wants, or is prepared, to carry them out; or

- the undertaking could not have been unaware that its agreement would have the effect of restricting competition, even if it did not know that it would infringe the Chapter 1 prohibition.

The intention (or negligence, referred to below) relates to the facts, not the law. Ignorance or a mistake of law (i.e. ignorance that the relevant agreement is an infringement) is therefore not an action which prevents a finding of an intentional infringement.

In establishing whether or not there is intention, the GCMA may consider internal documents generated by the undertakings in question. The GCMA may regard deliberate concealment of an agreement by the parties as strong evidence of an intentional infringement. It may be inferred that an infringement has been committed intentionally where consequences giving rise to an infringement are plainly foreseeable from the pursuit of a particular policy by an undertaking.

NEGLIGENCE

The GCMA is likely to find that an infringement of the Chapter 1 prohibition has been committed negligently where an undertaking ought to have known that its agreement would result in a restriction or distortion of competition.

INVOLUNTARY INFRINGEMENT

Where an undertaking participates in an infringement under pressure, it may still be held to have acted intentionally or negligently, although, depending on the circumstances, the penalty may be reduced.

TURNOVER

The definition of turnover for the purposes of determining the maximum financial penalty of 10 per cent of turnover that can be imposed is set out in an order made by the Minister, pursuant to section 33(9) of the Act.

LIMITED IMMUNITY FOR SMALL AGREEMENTS

In order to avoid the prohibition regime being unduly burdensome on small businesses, the Act provides limited immunity from financial penalties for small agreements in relation to infringements of the Chapter 1 prohibition[10]. However, immunity does not apply to infringements of the Chapter 1 prohibition which are price-fixing agreements.

The term small agreements relates to agreements, other than price-fixing agreements, between undertakings whose combined annual turnover does not exceed £7 million[11].

[10] Section 36 of the Competition Act 2020.

[11] Regulation 4, Competition (Small Agreements and Conduct of Minor Significance) Regulations 2021.

Undertakings will benefit from immunity from financial penalties for infringement of the Chapter 1 prohibition, if the GCMA is satisfied that they acted on the reasonable assumption that on the facts they qualified for the limited immunity for small agreements.

The immunity applies only to financial penalties: an anti-competitive agreement by such undertakings is still an infringement, and consequently the GCMA may take other enforcement action, and the immunity does not prevent third parties from claiming damages for the loss caused by such an agreement.

The GCMA may still investigate small agreements and can decide to withdraw the immunity from financial penalties if, having investigated the agreement, it considers that it is likely to infringe the Chapter 1 prohibition.

Where the GCMA has withdrawn the immunity from penalties for infringement of the Chapter 1 prohibition, it must give written notice of its decision to the person or persons from whom the immunity has been withdrawn. The notice will specify the date on which the withdrawal of immunity is to take effect. When determining that date, the GCMA must have regard to the amount of time which the person or persons affected are likely to need in order to secure that there is no further infringement of the Chapter 1 prohibition. That date must follow the date of the GCMA's decision.

AMOUNT OF A PENALTY

Section 35 of the Act places an obligation on the GCMA to prepare and publish guidance as to the appropriate amount of any penalty. The purpose of such guidance is to inform and guide businesses on the level of penalties.

PAYMENT

Where the GCMA requires an undertaking to pay a financial penalty, it must, at the same time, inform the undertaking in writing of the facts on which it bases the penalty and the reasons for requiring the undertaking to pay it. Where the GCMA imposes a penalty, it must serve a written notice on the undertaking required to pay the penalty, specifying the date before which the penalty is required to be paid. The date for payment must not be earlier than the end of the period within which an appeal against the notice may be brought.

LIABILITY FOR PAYMENT

The GCMA may require any undertaking which is a party to an agreement which has infringed the Chapter 1 prohibition to pay a penalty.

A parent company and its subsidiaries will usually be treated as a single undertaking if they operate as a single economic unit, depending on the facts of each case. The GCMA may need to consider the respective responsibility of both parent and subsidiary for an infringement and therefore for consequent liability to pay a penalty. Where the GCMA decides to impose a penalty on both parent and subsidiary, it may be imposed jointly and severally.

A penalty may be imposed on a company that takes over the undertaking that has committed an infringement. Changes in the legal identity of an undertaking will not prevent it or its

component parts from being penalised. As far as possible, liability for penalties will follow responsibility for actions. Thus, a subsequent transfer of a business from one economically distinct undertaking to another will not automatically absolve the transferor from responsibility. Where the original undertaking has ceased to exist by the time a penalty comes to be imposed, the penalty may be imposed on the successor undertaking.

The involvement of a trade association in an infringement of the Chapter 1 prohibition may result in financial penalties being imposed on the association itself, its members or both.

ENFORCEMENT OF PENALTY DECISION

If an undertaking fails to pay within the date specified in the penalty notice, and it has not brought an appeal against the imposition or amount of the penalty within the time allowed or such an appeal has been made and the penalty upheld, the GCMA may commence proceedings to recover the required amount as a civil debt.

APPEALS

The decision to impose a financial penalty and the decision as to the amount of that penalty can be appealed to the Supreme Court by any party to the agreement in question. Third parties can also appeal decisions on penalties[12].

[12] Section 48 of the Competition Act 2020.

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