The UK Approach to Vertical Restraints of Competition
Report to the XVIth International Congress of Comparative Law, July 2006

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I. Framework

This first part aims at providing a sketch of the substantive and institutional framework, and policy context, in which vertical restraints of competition (VR) are being assessed.

A. Substantive framework

1 What are the general provisions of national competition law applicable to VR?

In the UK, vertical restraints are considered under standard competition law. This is contained in the Competition Act 1998. The ‘Chapter I prohibition’ mirrors Article 81 EC, while the ‘Chapter II prohibition’ mirrors Article 82 EC. The vertical effects of mergers are also subject to assessment under the Enterprise Act 2002 regime (although this area is not considered in this report).

Chapter I:

Section 2(1) of the Act contains a prohibition on “agreements between undertakings, decisions by associations of undertakings or concerted practices which (a) may affect trade within the United Kingdom, and (b) have as their object or effect the prevention, restriction or distortion of competition within the United Kingdom”. This prohibition is subject to a small number of exemptions and exclusions (ss.3 and 50). It applies only where “the agreement, decision or practice is, or is intended to be, implemented in the United Kingdom” (s.2(3)). Any agreement prohibited under s.2(1) is void (s.2(4)).

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Section 9 of the Act mirrors Article 81(3) EC and details conditions for exemption for agreements that fall foul of s.2. There are two positive and two negative conditions. They are that the agreement (a) must “contribute to (i) improving production or distribution, or (ii) promoting technical or economic progress, while (b) allowing consumers a fair share of the resulting benefit”. It must not (c) impose on the undertakings concerned restrictions which are not indispensable to the attainment of those objectives, or (d) afford the undertakings concerned the possibility of eliminating competition in respect of a substantial part of the products in question.

After the coming into force of the Act in 2000, the UK regime was based on a system of notification for individual exemption (s.4). Following modernisation / decentralisation of the EC regime, the UK government revised this approach so that the UK system now also operates a ‘legal exception’ approach whereby s.9 can be argued as a defence in court or before the competition authority without the parties first notifying for an individual exemption.

Agreements that fall within the prohibition detailed in s.2(1), and which are not either excluded or exempted under s.9 are void by virtue of s.2(4).

The EC system of legislative block exemptions covering categories of agreement subject to the satisfaction of associated conditions is also emulated in the UK law (ss.6-8). The one UK Block Exemption issued to date (see SI 2001/319) does not have any bearing on vertical agreements. Importantly, s.10 of the Competition Act provides for the ‘parallel exemption’ of certain types of agreement. This entails that agreements that have been individually exempted, or that fall within the criteria for block exemptions legislated at the EC level (or that would have fallen within such criteria if the agreement had had an effect on trade between member states) are also to be treated as exempt from the s.2 prohibition. This section imports, for example, Regulation 2790/1999/EC on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices ((1999) OJ L336/21 - the Vertical Agreements Block Exemption) into domestic law. The benefit of a parallel exemption can be modified or withdrawn by the Office of Fair Trading (OFT).

The influence of EC competition law on UK domestic competition law is also secured by s.60 of the Competition Act: the ‘governing principles’ clause. This is designed to ensure coherence between domestic and EC law on an ongoing basis. Section 60(1) provides that “so far as is possible (having regard to any relevant differences between the provisions concerned), questions arising… in relation to competition within the United Kingdom are dealt with in a manner which is consistent with the treatment of corresponding questions arising in Community law in relation to competition within the Community”. This obligation lies in respect of the primary and secondary law of the EC, and in respect of decisions of the Community courts. The UK authorities must also “have regard to any relevant decision or statement of the Commission” (s.60(3)).

In addition to the relevant law detailed above, the Office of Fair Trading has published a series of guidelines that are intended to offer advice to parties interested in competition laws. These ‘soft laws’ explain the law, and outline the manner in
which the OFT interprets and will apply it to particular cases. This guidance includes:

- Article 81 and the Chapter I prohibition, OFT 401, and
- Vertical Agreements, OFT 419.

When the Competition Act originally came into force, vertical agreements were excluded from the purview of the Chapter I prohibition by the operation of an order made by the Secretary of State under s.50 (SI 2000/310). This exclusion order was introduced on the understanding that the relevant EC law was under-developed. Since the introduction of the new-style Vertical Agreements Block Exemption, the UK government has removed the exclusion order (SI 2004/1260) – at least in its application to vertical agreements – so that domestic competition law and (by virtue of s.10) the parallel exemption will now apply to vertical agreements that do not have an effect on trade between member states.

Chapter II:

Section 18 of the Competition Act mirrors Article 82 EC. It provides that “any conduct on the part of one or more undertakings which amounts to the abuse of a dominant position in a market is prohibited if it may affect trade within the United Kingdom”. This Chapter II prohibition is subject to a small number of exclusions (s.19).

The interpretation of s.18 is clearly influenced by the s.60 general principles clause. Moreover, the Office of Fair Trading has published a series of guidelines that are intended to offer advice to parties interested in competition laws. These ‘soft laws’ explain the law, and outline the manner in which the OFT interprets and will apply it to particular cases. This guidance includes Article 82 and the Chapter II prohibition, OFT 402.

2 Are some sectors of the industry made subject to specific provisions (retail, telecoms, utilities, healthcare, etc.)? If so, what are these sectors and what are the provisions applicable thereto? How do these sector-specific provisions interact with general provisions?

The competition law described above applies to regulated sectors – for example, telecommunications / broadcasting, energy, water – in the same way as it does to general sectors. With respect to the business agreements and practices of companies operating in these sectors, the OFT is competent concurrently with the relevant sectoral regulator. The regulators and economic sectors in question are:

- Communications (telecommunications and broadcasting): Office of Communications (Ofcom);
- Gas and electricity: Gas and Electricity Markets Authority (Ofgem) (or Ofreg NI for Northern Ireland);
- Water and sewerage: Director General of Water Services (Ofwat);
- Railways: Office of Rail Regulation (ORR);
- Air traffic services: Civil Aviation Authority (CAA).
In these areas, regulators must sometimes decide whether to bring action against impugned behaviour of companies under competition laws or the wider regulatory scheme (such as penalties for breach of licence conditions imposed on companies under regulatory law).

The specific purposes pursued by each regulator are dependent on the empowering statute, but - in general – they include ensuring that there is sufficient provision of the regulated service throughout the United Kingdom, promoting competition, and protecting the interests of customers and consumers.

In line with Article 86(2) EC, the Competition Act provides for an exclusion from the Chapter I and Chapter II prohibitions where an undertaking is entrusted with a service of general economic interest or has the character of a revenue-producing monopoly (Schedule 3).

**B. Institutional framework**

3 What national administrative and/or judicial authorities are competent, in first and second instance, for enforcing VR control?

The OFT (and sectoral regulators) are competent to apply and enforce domestic competition law (the Chapter I and II prohibitions). Private enforcement actions can be brought by affected individuals to the Chancery Division of the High Court.

Substantive decisions of the OFT (or sectoral regulators) are subject to appeal to the Competition Appeal Tribunal (CAT) on questions of both fact and law. The CAT holds the status of the High Court. It comprises a panel of three judges, of whom the Chairman will be legally and judicially qualified, while the other members will possess business and / or technical expertise. The Competition Appeal Tribunal is competent to make preliminary references to the European Court of Justice under Article 234 EC.

Judgments of the CAT can be appealed with permission on points of law only to the Court of Appeal, and then on with permission to the House of Lords.

4 When more than one authority is competent, how are powers allocated and coordinated?

As regards regulated sectors of the economy (see Q2 above), the Competition Act provides for the OFT to apply and enforce competition law concurrently with relevant regulators (s.54 and Schedule 10, Competition Act 1998). The regulators have all the powers of the OFT to apply and enforce domestic competition law (and Article 81 and 82 EC), although the OFT retains the exclusive right to issue guidance on some issues and to revise procedural rules.

Concurrency Regulations (SI 2004/1077) issued by the Secretary of State provide for the co-ordination of the performance by the OFT and the regulators of their concurrent functions under the Act. The OFT and the regulators must consult each other before exercising prescribed functions (reg.6). To this end, they are empowered to share information (reg.3) in order to determine which body should exercise
jurisdiction. Once it has been decided which authority is to exercise prescribed functions in relation to a case (reg.4), another authority is precluded by the Concurrency Regulations taking action (reg.6), unless the case is formally transferred (reg.7). There is also provision for dispute settlement (reg.5). Matters which are not addressed specifically in the Concurrency Regulations are dealt with by means of informal arrangements between the OFT and the regulators.

As a general principle, a case will be considered by the authority that is best-placed to do so. Factors pertinent to this consideration include the importance of sectoral knowledge; the scope of the impact of a case, and the extent of previous experience with the parties or issues concerned in the case.

Representatives of the OFT and of each regulator sit on a Concurrency Working Party (CWP). The CWP serves a number of objectives: to ensure a consistent approach in the exercise of functions and powers under the Competition Act; to consider the practical working arrangements between the authorities; to provide a vehicle for the discussion of matters of common interest and the sharing of information, and to coordinate the publication of advice to the public on the application of competition law.

The OFT and regulators have published a series of guidelines on the operation of the concurrency provisions and application of competition laws in regulated sectors:

- Application to Services Relating to Railways, OFT 430;
- Application in the Energy Sector, OFT 428;
- Application in the Water and Sewerage Sectors, OFT 422;
- Application in the Telecommunications Sector, OFT 417;
- Concurrent Application to Regulated Industries, OFT 405.

C. Policy context

5 When administrative authorities are competent, does their current approach to VR reveal the existence of policy choices vis-à-vis VR? If so, which ones?

The analysis undertaken by the OFT or regulators under competition law is based on considerations of economic efficiency only. Where companies are engaged in providing a service of general economic interest (see Q2 above) competition law is excluded.

6 Does their approach also reveal the existence of priorities? For example, have administrative authorities recently studied (e.g. in a report), or focused on, specific types of VR?

Complaints based on competition law or own-initiative investigations are pursued on a case-by-case basis by reference to the provisions stipulated in the Competition Act. That said, the OFT has recently conducted / sponsored research into selective price cuts and fidelity rebates (July 2005).
II. Horizontal aspects

This second part aims at over-viewing substantive and procedural conditions in which VR are assessed by national authorities. The questions asked relate, first, to VR that are deemed to be pro- or anticompetitive, second, to VR that may be found pro- or anticompetitive and, third, to the assessment of this second category by national authorities.

A. Presumptions

1. VR deemed legal

1 Are some VR deemed to be legal per se? If so, which ones?

There is no per se rule in UK competition law, other than in respect of excluded agreements.

That said, agreements involving firms holding less than 15% of their respective market shares are presumed not to raise appreciable effects on competition (de minimus rule), but this presumption can be overturned. Formerly, the de minimus presumption arose below a 25% market share, but the OFT has recently stated that in considering this issue it will have regard to the Commission’s Notice on Agreements of Minor Importance ((2001) OJ C368/13).

Moreover, agreements that satisfy the conditions stipulated in the Vertical Agreements Block Exemption (or which would satisfy them were they to have an effect on trade between member states) are deemed lawful without a full analysis of their impact on competition.

2 Is this per se rule absolute or modified? If modified, to what extent and under which conditions?

Paragraph 11 of the Commission Notice on Agreements of Minor Importance stipulates a range of situations in which the presumptions it introduces will not be upheld. As regards agreements between non-competing undertakings (including vertical restraints), these conditions include, for example, resale price maintenance and the preclusion of passive selling by a retailer.

The criteria for application of the Vertical Agreements Block Exemption include a market share cap (30%), and non-inclusion of hard-core restrictions.

3 Are some VR formerly deemed legal per se now made subject to a rule of reason? If so, which ones?

Formerly, all vertical restraints arising out of agreements between non-dominant firms were considered to be per se lawful, bar those that involved price-fixing. That is, they were the subject of an exclusion order under s.50 of the Competition Act (see Q1 above). This position has changed, however, and domestic competition law now applies to all vertical agreements.
2. VR deemed illegal

4 Are some VR deemed to be illegal per se? If so, which ones?
No

5 Is this per se rule absolute or modified? If modified, to what extent and under which conditions?
N/a

6 Are some VR formerly deemed illegal per se now made subject to a rule of reason, or even legal per se? If so, which ones?
N/a

B. Proof

1. Standard of proof

a. Anticompetitive effects

7 What standard of proof of the anticompetitive effects attributed to a VR is imposed on the undertaking which complains about it before the competent authority? Is the standard of proof the same where this authority is administrative and where it is judicial?

In the UK, complaints can be made either to the OFT (or sectoral regulator) or to the courts where a party considers that some other party's conduct infringes either the Chapter I or Chapter II prohibitions in the Competition Act.

There is no specified process by which a party should make a complaint to the OFT. In making such a complaint, the complainant must provide details of its relationship with the impugned party / parties, details of the complaint (with any supporting documentation or other evidence), details of affected markets, details of the harm caused, contact details for other parties whom might corroborate matters, and an indication of the perceived severity of the problem. The OFT will then launch an investigation using powers available to it under the Act (ss.25-31) should it consider that there are “reasonable grounds for suspecting” that either of the Chapter I or Chapter II prohibitions has been infringed (s.25, Competition Act 1998). Therefore, the evidence submitted by the complainant must be such as to ground this reasonable suspicion. The Office of Fair Trading has indicated that only a small proportion of complaints (around 5%) meet this threshold. It has published a guideline for prospective complainants: Making a Complaint, OFT 427.

Where a complaint is made before the High Court, the complainant must prove his/her case in accordance with a civil standard of proof (that is, on the preponderance or balance of probabilities – see Q8 below).
What standard of proof of the anticompetitive effects attributed to a VR is imposed on the authority competent for investigating and prosecuting it? Is the standard of proof the same where this authority is administrative and where it is judicial?

The requisite standard is the civil standard of proof (that is, on the preponderance or balance of probabilities). Ostensibly, this is the same for both the Office of Fair Trading, the Competition Appeal Tribunal (CAT) on appeal from decisions of the Office of Fair Trading, or the High Court in private actions.

Importantly, this point - as regards administrative enforcement (the Office of Fair Trading / CAT on appeal) - has been considered by the CAT in *Napp Pharmaceutical Holdings Limited v Director General of Fair Trading* (Case No. 1001/1/1/01). While accepting that there is no intermediate ground between the civil and criminal standards of proof, the CAT noted that “the more serious the allegation, the more cogent should be the evidence before the court concludes that the allegation is established on the preponderance of probability” (para 107). The view of the CAT was that “whether we are, in technical terms, applying a civil standard on the basis of strong and convincing evidence, or a criminal standard of beyond reasonable doubt, we think in practice the result is likely to be the same” (para 108). This attitude was based on an understanding of the procedural safeguards required by Article 6 of the European Convention on Human Rights where financial penalties imposed by the state are involved.

A question therefore arises as to whether the same logic applies in the case of private actions for breach of competition law brought before the mainstream courts. Such actions involve the determination of private rights and recompense for infringement of rights, rather than the imposition of penalties by the state. Thus, the force of Article 6 is not as direct, and elements of Article 6 may not apply (the proceedings not being defined functionally as ‘criminal’).

b. Pro-competitive effects

What standard of proof of the pro-competitive effects attributed to a VR is imposed on the undertaking author of this VR? Are potential effects treated differently from actual effects?

See above (Q7), and note that the burden of proving pro-competitive effects in a court-based assessment will fall on the defending party.

What degree of causal link must the undertaking author of a VR prove between this VR and the pro-competitive effect expected from it (direct or indirect; probable or possible)? Are certain types of markets treated differently (emerging markets, innovative markets, etc.)?

Efficiencies / pro-competitive effects must be proven objectively; they must flow from the activity that forms the object of the agreement, and they must normally be direct (claims based on indirect effects are generally considered to be too uncertain/remote to be taken into account).
2. Type of evidence

a. Evidence submitted by the parties

11 Is the undertaking author of a VR allowed to submit any type of evidence? Is the rule different where the competent authority is administrative and where it is judicial?

In administrative proceedings, a complainant must provide details of its relationship with the impugned party/ies, details of the complaint (with any supporting documentation or other evidence), details of affected markets, details of the harm caused, contact details for other parties whom might corroborate matters, and an indication of the perceived severity of the problem. The value of evidence submitted by any undertaking will be assessed by reference to gamut of information available to the Office of Fair Trading. In judicial proceedings, evidence will be assessed by reference to the standard rules of civil procedure.

12 Is the submission of certain types of evidence, i.e. industrial evidence (internal document of the undertaking or of a trade association) and/or economic evidence (market study, expertise, economic model, etc.) made subject to certain conditions? If so, what are these types of evidence and under which conditions are they admissible?

In order to gain formal complainant status (see below Q13), a third party must provide certain information and may provide other information. Mandatory information includes basic details regarding itself and the impugned parties, evidence relating to the complaint, details of its motivation for making the complaint, and an explanation of how it is materially affected by the impugned agreement/conduct, and details of any action sought. The complainant must provide all available evidence. The complainant has the option also to provide more full information on itself and the relevant markets concerned to assist the OFT.

A complainant can ask for information submitted to remain confidential, but if doing so must also supply a non-confidential version of material submitted.

The perceived strength of evidence is one of the OFT’s key criteria for taking an investigation forward.

13 Are third parties allowed to ask to intervene in the proceedings to represent an individual or collective interest? If so, are they granted access to the evidence in the file? Are they allowed to submit their own evidence?

In administrative proceedings, a complainant must provide details of its relationship with the impugned party/ies, details of the complaint (with any supporting documentation or other evidence), details of affected markets, details of the harm caused, contact details for other parties whom might corroborate matters, and an indication of the perceived severity of the problem.

The view of the Office of Fair Trading is that input from well-informed complainants and other third parties at various stages during an investigation can often significantly assist it in the effective exercise of its functions under the Act. It seeks to provide such third parties with an opportunity to comment on its provisional findings in a formal
and structured manner, on the basis that this is likely to contribute to robust decision-making at the administrative stage. It ensures that third parties’ views are fully taken into account before a definitive conclusion is reached. The value of evidence submitted by any undertaking will be assessed by reference to gamut of information available to the Office of Fair Trading.

The OFT has published guidelines on the involvement of third parties in competition investigations: Involving Third Parties in Competition Act Investigations, OFT 451. First, this indicates that should it decide to close a case without issuing a Statement of Objections, the OFT will consult with ‘formal complainants’. This status is accorded to any third party whom (normally) has submitted a reasoned complaint, who has requested the status, and whose interests are, or are likely to be, ‘materially affected’ by the agreement / conduct in question. There can be more than one formal complainant in respect of a given agreement/conduct.

Secondly, the guidance indicates that the OFT may further consult formal complainants and other third parties in cases where it has issued a statement of objections and intends to proceed with its investigation. In particular, it will consult with third parties whom are likely to be materially affected by the agreement / conduct, whom request to be consulted, and whom are likely materially to assist the OFT in its investigations. The OFT will normally publish a note indicating that a statement of objections has been issued, and inviting third party consultees. Where respondents satisfy the above the conditions, they will be sent a non-confidential version of the statement of objections and invited to respond.

b. Evidence requested by the authority

14 What are the main investigative powers enabling the national authorities to complement and evaluate evidence submitted by the parties? Are these powers different where the authority is administrative or judicial?

The OFT can invite parties and third parties to submit information pertinent to its inquiries (see above Q13). The Competition Act also provides formal investigative powers. These include:

- A power (exercised by a notice in writing) to require any person to produce a specified document, or to provide specified information, which is considered to relate to any matter relevant to the investigation (s.26).
- A power to enter without a warrant any premises in connection with an investigation, insofar as at least two working days notice are provided (s.27).
- A power to seek a warrant to enter premises where there are reasonable grounds for suspecting that there are on any premises documents which have been requested but not delivered, or documents which would be concealed, removed, tampered with or destroyed should they be requested (s.28).

By virtue of s.42, failure to comply with a requirement imposed under ss.26-28 is an offence. Similarly, it is an offence to destroy information requested (s.43), or to provide false information (s.44).
A party cannot be required to disclose privileged communications (that is those between a professional legal adviser and his client, or those made in connection with, or in contemplation of, legal proceedings and for the purposes of those proceedings) (s.30).

15 In particular, are they vested with the power and the means to carry out their own inspection? How is this power used in practice?

Yes (see above Q 14). In the year 2004-05, the OFT completed 36 investigations using powers available to it under the Act.

16 Are they empowered to order an independent expertise? If so, according to which procedure and under which conditions is the independent expert selected? How is this power used in practice?

The OFT has substantial in-house expertise.

17 Are they empowered to consult third parties? How do they use it in practice?

Yes (see above Q 13).

3. Substance of evidence

a. Anticompetitive effects

18 How is market power preexisting to the VR assessed in practice? In particular, how are countervailing powers taken into account (market power of actual or potential competitors; of resellers; of end-users; barriers to entry; regulatory framework; etc.)?

Vertical agreements are not generally thought to give rise to competition concerns unless one or more of the parties to the agreement possesses market power on the relevant market or the agreement forms part of a network of similar agreements. The analysis of vertical restraints under Chapter I and Chapter II is similar.

Due to the governing principles and parallel exemption clauses of the Competition Act (ss.60 and 10 respectively), the approach of the OFT to vertical restraints is much in line with that of the European Commission. In particular, the OFT will pay regard to the European Commission’s Guidelines on Vertical Restraints ((2000) OJ C291/1). In addition, the OFT has published relevant guidance on the assessment of market power and of vertical restraints:

- Assessment of Market Power, OFT 415;
- Vertical Agreements, OFT 419.

This guidance indicates the OFT view that market power arises where an undertaking does not face effective competitive pressure. The OFT does not adopt a mechanistic approach to the determination of market power. Rather, it utilizes a conceptual framework within which evidence can be organised. Therefore, it is not possible to give a prescriptive guide to market power since its existence is dependent on the circumstances of each case. The consideration of each case will involve a wide range
of relevant evidence on market definition, market structure, entry conditions, the degree of buyer power from the undertaking’s customers, and the behaviour and financial performance of undertakings.

The OFT considers that a firm is dominant (and thereby liable to the Chapter II prohibition) where it possess substantial market power, and that market power is a matter of degree. When assessing whether and to what extent market power exists, the OFT views it as helpful to consider the strength of any competitive constraints. These include:

- Existing competitors – their market shares, and the movement of respective shares over time;
- Potential competition – the scope for new entry;
- Buyer power – the strength of negotiating position enjoyed by customers;
- The extent of control of prices or other market conditions by governmental economic regulation. Such regulation may limit the capacity for a firm to exploit market power.

Existing Competition
Market power is deemed more likely to exist if an undertaking (or group of undertakings) has a persistently high market share. Consideration of market shares over time allows a dynamic understanding of the position. Data on market shares is collated from a range of sources including information provided by the parties and third parties (including trade associations), and market research reports.

Potential Competition
In considering this issue, the OFT considers it useful to distinguish between a number of factors which, depending on the circumstances, can contribute to barriers to entry. These include:

- Sunk costs. The OFT’s view is that sunk costs can be important to entry barriers, but that the mere existence of sunk costs in any particular industry does not necessarily mean that entry barriers are high.
- Poor access to key inputs and distribution outlets. The OFT considers that ‘essential facilities’ are rare in practice, and that they must be identified by reference to strict criteria. These criteria will be considered in line with the recent ECJ decision in *IMS Health*.
- Regulation. The OFT considers it important for the differential impact of government regulation to be assessed.
- Economies of scale. The OFT is conscious that, where economies of scale exist, an incumbent firm may be able to exercise market power for some significant time even after entry.
- Network effects. Similarly, the OFT will assess whether network effects leave new entry less feasible / attractive than might otherwise be the case.
- Exclusionary behaviour. The OFT will pay close attention to exclusionary conduct such as predatory response to entry or the potentially foreclosing effects of strong vertical restraints.
The OFT has indicated that it will seek evidence relating to these issues from the parties and complainants. It considers that claims that potential competition is waiting in the wings are more persuasive if there is fully documented evidence of plans to enter a market, or where hard evidence of successful entry in the recent history of the market is provided. Clearly, the OFT will consider the timescale within which new entry may be feasible. It will also take into account any limitation on the scale of new entry.

**Buyer Power**

The OFT considers that a buyer’s bargaining strength might be influential in its analysis should certain conditions hold:

- The buyer is well informed about alternative sources of supply, and could readily switch substantial purchases from one supplier to another.
- The buyer could commence production of the item itself or ‘sponsor’ new entry by another supplier.
- The buyer is an important outlet for the seller.
- The buyer can intensify competition.

The OFT will be keen to assess whether the benefit of buyer power is passed on to the final consumer or absorbed by the buyer itself.

19 How is the increase in market power caused by the VR assessed in practice?

20 Must market power become superior to a given threshold to be caught (minimum/appreciable power)? If so, how is this threshold measured?

In assessing the effect of vertical restraints, the OFT is guided by the European Commission’s *Notice on Agreements of Minor Importance* ((2001) OJ C368/13). Extrapolating, this means that agreements between undertakings which affect trade within the UK do not appreciably restrict competition where:

- the aggregate market share of the parties to the agreement does not exceed 10% on any of the relevant markets affected by the agreement where the agreement is made between competing undertakings.
- the market share of each of the parties to the agreement does not exceed 15% on any of the relevant markets affected by the agreement where the agreement is made between non-competing undertakings.
- these thresholds are reduced to 5% where competition on the relevant market is restricted by the cumulative foreclosure effect of parallel networks of agreements having similar effects on the market.

In addition, by virtue of the parallel exemption available under s.10 of the Competition Act, agreements that satisfy the conditions stipulated in the Vertical Agreements Block Exemption ((1999) OJ L336/21) are deemed to be lawful where neither party enjoys a market share in excess of 30%.

As regards undertakings that may possess market power / dominance, there is a presumption of dominance at 50% market share, although the accuracy of this fact will be assessed on the basis of all relevant circumstances.
21 Are there successive thresholds, the overcoming of which implies treatment under different rules or different tests (substantial power; dominance; monopoly)? If so, how are these threshold measured?

Yes – see above Q 20.

22 How are vertical effects measured? In particular, is the allocation of profit within the distribution channel taken into consideration, or left to provisions other than those of competition law (unfair trading practices, etc.)?

23 How are horizontal effects measured? In particular, what test is used to measure market foreclosure?

24 In the case of a network of like VR, how is cumulative effect measured?

25 Are other elements taken into account? If so, which ones?

26 Is the analysis of vertical mergers taken as a point of comparison?

The factors taken into consideration in the analysis of vertical agreements are analogous to those relevant to the assessment under the Chapters I and II prohibitions.

b. Pro-competitive effects

27 Which positive effects on vertical competition are admissible (solving a problem of double marginalization, of cost, of hold-up, of incentive, of free-riding, of image and/or service; entry on a new market; etc)? Under what conditions?

Positive effects of vertical restraints can be taken into account where they satisfy the conditions for exemption stipulated in s.9 of Chapter I, or where they found a claim of ‘objectively justification’ for the purposes of the Chapter II prohibition (see above Part I Q1). The OFT will be particularly interested where the agreement / conduct promotes efficiencies (for example by reducing transaction costs), promotes non-price competition (for example, reducing the free-rider problem by dampening price-competition and providing incentives to improve sales conditions and support), or promotes investment and innovation (for example, where exclusivity ensures retailer investment in sales conditions).

28 Which positive effects on horizontal competition are admissible? Under what conditions?

29 Is any positive effect on competition admissible? In particular, in which conditions is an effect benefiting to a market other than the relevant production or distribution market, i.e. an upstream market (for instance, the R&D market) or a neighbour market, admissible?

30 Are positive effects for the economy admissible (environment, regional development, etc)? If so, which ones and under what conditions?

31 Is the analysis of vertical mergers taken as a point of comparison?
C. Evaluation and control of evidence

I. Evaluation in first instance

a. Standard of evaluation

32 What standard of evaluation of pro- and anticompetitive effects of a VR is imposed on the authority competent for adjudicating in first instance? Is it required to ascertain possible effects (‘reasonableness’) or likely effects (‘balance of probabilities’) in the second case, it is a simple (‘likely’) or a qualified (‘very likely’) balance of probabilities?

See above QQ 7-10.

b. Substance of the evaluation

33 Does the evaluation carried out account only for consumer surplus or also for producer surplus? If so, under which conditions?

Consumer surplus.

34 May other interests be taken into account (public interest, shareholder interest, etc.)? If so, under which conditions?

No.

35 Is the regulatory framework taken into account, in particular in the case of regulated markets? If so, how?

As regards regulated markets, the Competition Act prohibitions will be enforced by the sectoral regulator. In some instances, where both Competition Act and sectoral powers are available, the regulator is obliged to apply the sectoral statutory power. However, regulators must sometimes decide whether to bring action against impugned behaviour of companies under competition laws or the wider regulatory scheme (such as penalties for breach of licence conditions imposed on companies under regulatory law).

36 Are these elements balanced (‘consumer welfare’) according to certain criteria? If so, which ones?

37 Are these criteria prioritized (‘structured rule of reason’) or not (‘unstructured rule of reason’)?

38 Has the authority taken the step of formalizing and publishing these criteria, through a document such as guidelines or an opinion? If so, what is the legal value of this document? Is this document updated so as to reflect accumulated experience, in particular with respect to economics? Is it possible to challenge the substance of this document before a superior authority? If so, has it already been the case? With what result?
The OFT and the sectoral regulators have published guidance on the operation of their concurrent powers, and on how the overlaps between sectoral and competition powers will be managed:

- Application to Services Relating to Railways, OFT 430;
- Application in the Energy Sector, OFT 428;
- Application in the Water and Sewerage Sectors, OFT 422;
- Application in the Telecommunications Sector, OFT 417;
- Concurrent Application to Regulated Industries, OFT 405.

This guidance is not binding on the authorities concerned, but may give rise to legitimate expectations on the part of parties affected by its (non-)application.

c. Conclusion of the evaluation

39 In case of residual doubt as to the balanced effects of a VR, do the decisional practice and the case-law allow to say if the authority currently prefers to make a ‘type I error’ (over-applying the law: prohibiting a perhaps pro-competitive VR) or a ‘type II error (under-applying the law: allowing a perhaps anticompetitive VF)? Is this preference a statistical trend or the result of an explicit choice?

There is a preference for Type-II errors. This is reflected in the exercise of administrative discretion as to whether to open investigations and the high standards of proof that must be met if a given agreement is to be challenged.

40 Where the authority concludes that the VR is, on balance, anticompetitive, is it empowered to suggest, negotiate and/or impose remedies?

Under the Competition Act, the OFT has a range of powers to enforce any finding of a breach of the Chapter I or Chapter II prohibitions. These involve:

- the power to give to such person or persons as considered appropriate such directions in writing as are considered appropriate to bring the infringement to an end. In particular, these directions may include an instruction requiring the parties to the agreement to modify or to cease / terminate the conduct / agreement (ss.32 and 33).
- where the infringement has been committed intentionally or negligently, the power to impose a financial penalty (s.36). This penalty may not exceed 10% of the turnover of the undertaking concerned.
- the power to accept binding commitments from the parties (s.31A).

Should a directed party fail to comply without reasonable excuse, the OFT may apply to the court for an order requiring the defaulter to make good its default within a specified time period (s.34). An interim order can be imposed should the OFT consider that action is needed as a matter of urgency to prevent serious irreparable harm or to protect the public interest (s.35)
41 Is it also empowered to test these remedies on the market and/or to monitor their implementation? How are these powers applied in practice? With what results?

The OFT will undertake a public consultation on any intention to accept binding commitments bringing an infringement to an end. This process was undertaken in the Associated Newspaper Ltd case (2005). In response to issues arising from the consultation, ANL agreed to clarify certain of the proposed commitments. Following this clarification, the commitments were accepted by the OFT in March 2006.

2. Review in second instance

42 What degree of review of the (administrative or judicial) decision of first instance is applied by the authority of second instance (appeal or judicial review)? Is first instance adjudication on the remedy reviewed differently from adjudication on the VR itself?

The Competition Appeal Tribunal conducts a full appeal from decisions of the OFT, both adjudicatory and remedial.