

# Memorandum of Understanding between the Office of Fair Trading and the Department of Trade and Industry

## Linked aims

1. The Government is committed to promoting competition in the economy to improve the UK's productivity performance and to make markets work well for consumers so as to achieve prosperity for all.
2. The OFT's goal is to make markets work well for consumers, through enforcement of competition and consumer protection rules, investigating how markets are working and explaining and improving awareness and understanding.

## Individual responsibilities

3. The DTI has responsibilities for setting the overall policy and legal framework for competition and consumer issues in the UK.
4. The OFT is an independent body with statutory powers and responsibilities covering both competition and consumer issues.

## Relationship

5. In agreeing this MOU:
  - the DTI fully recognises the operational independence of the OFT; and
  - the OFT recognises the legitimate interest of the DTI in the overall work of the OFT.

## Working together

6. DTI and OFT undertake to help each other carry out their individual responsibilities more effectively by working together. They will do so wherever it does not cut across their ability to carry out their own responsibilities in addition to exchanges arising from legal responsibilities or other requirements. Such working together will include:
  - exchange of information, including aggregate information on enforcement action
  - provision of advice based on relevant experience
  - joint working up of ideas and policy options
  - joint problem solving
  - joint research
  - partnership working with stakeholders.

In particular, the following arrangements set out below should be put in place.

#### Meetings and informal contact

7. The SoS and the Chairman and Executive Director of the OFT will meet twice a year to discuss issues of mutual interest. One of these meetings will take place approximately one month before the publication of OFT's annual plan and will normally be attended by non-executive members of the OFT's Board.
8. There will be quarterly meetings between the Minister for Competition and Consumer Affairs and the Chairman and Executive Directors of the OFT as part of the general exchange of views.
9. These meetings will be underpinned by regular meetings at official level. In addition DTI and OFT will encourage staff at all levels to have good informal contacts with those working in similar areas in the other organisation.

#### OFT Annual Plan

10. In drawing up the annual plan, the OFT will have regard to the consultations it has had with the SoS and Ministers during the previous year and the issues raised.

#### Good communications practice

11. The DTI and the OFT will keep each other informed of matters relating to the effective operation of commercial markets and the economic interests of consumers in the UK.
12. The OFT and DTI will continue with good communications practice on casework (having regard to the need not to jeopardise effective enforcement) and other issues leading to significant announcements. This means:
  - OFT where practical and appropriate, keeping DTI informed in general terms of live issues, the timing and progress of significant issues and the timing and progress but not the substance of individual cases, well ahead of announcements;
  - short-notice advance warning by OFT on significant and sensitive announcements;
  - similar levels of consultation by DTI on matters that affect OFT.
13. This MOU confirms that DTI should receive short-notice advance warning of significant and sensitive OFT announcements on competition and consumer issues and vice versa. The purpose of this arrangement is not to consult on the substance of the announcement, but to ensure that Ministers and OFT are appropriately informed and to facilitate media handling by DTI and OFT.

14. The arrangements for handling OFT/DTI communications on significant and sensitive announcements are attached as Annex A to this text. They are already in operation as part of an earlier agreement.
15. The OFT will contact the DTI on a weekly basis to draw attention to announcements of mutual interest for the week ahead.

#### Matters of Mutual Interest

16. Where the SoS becomes aware of matters of concern relating to the competitive operation of commercial markets which she wishes to request the OFT to examine, she will inform the OFT without delay and provide the OFT with relevant material in her possession that would assist the OFT to conduct such an examination. Where the OFT decides to investigate the matter under its enforcement powers, it will so inform the SoS. Thereafter, the investigation will be conducted under the appropriate OFT rules of procedure (e.g. the [Director's] Rules for investigations under the Competition Act 1998). Where the matter involves a possible market investigation, the OFT will endeavour to respond to the SoS within a reasonable time period (where possible within 30 days) on what if any action it intends to take. The OFT will make its response public.
17. Similarly where the OFT becomes aware of matters that affect or may affect the economic interest of consumers, which it proposes should fall to the SoS or Government to remedy, it will inform the SoS and supply at that time any material in its possession to assist timely corrective action (subject to confidentiality requirements).
18. Both parties, when undertaking their functions, will have regard to the interest of the other in being kept informed of significant developments that affect or may affect the economic interests of consumers and the working of the commercial markets. For the OFT, this will be subject to statutory restraints on keeping information from parties confidential and to the operational need for secrecy on some investigations.
19. In areas where both the DTI and the OFT have powers and responsibilities, notably the provision of information to consumers, and the pursuit of consumer education activities, each party will keep the other informed of its priorities and planned activities in order to avoid duplication and maximise their impact.
20. As the Secretary of State has responsibilities for setting the overall framework for competition and consumer issues in the UK, the DTI has responsibility for legislative initiatives in the UK and negotiating new competition and consumer law at European level and increasingly internationally. The OFT has a valued advisory role in both these regards.

#### Case handling

21. The SoS recognises the OFT's independent decision-making process in relation to UK competition (except where relevant public interest considerations arise) and consumer protection cases. However, the DTI will, if requested by the OFT, co-operate with any OFT inquiries.

22. The OFT has a duty to draw the attention of the SoS to any competition cases that the OFT considers may raise material issues in relation to an existing defined exceptional public interest (EPI) issue. OFT also has a duty to report to the SoS on any representations asking for new EPI gateways that OFT feels the SoS may wish to consider. The OFT will endeavour to undertake these tasks in a timely manner.
23. Specific arrangements will continue to apply to the handling of UK input on cases considered by the European Commission under Regulation 17/62/EEC or the EC Merger Regulation (Regulation 4046/89/EEC). These arrangements are set out in Annex B. [Current annex covers only ECMR. Arrangements for Regulation 1/03 matters to be agreed in light of outcome preparations for EC Modernisation proposals].

#### Information Exchange

24. The SoS may prohibit the disclosure of information for the use in overseas civil and criminal investigations and proceedings related to anti-competitive practices where the SoS considers that it is or would be more appropriate for matters to be investigated or any proceedings to be carried out by the United Kingdom or a third country or the European Commission. Where in the course of a request for disclosure of information by an overseas authority, the OFT becomes aware of a potential extraterritorial application it will submit the request to the SoS for final decision. Arrangements are set out in Annex C.

#### Interchange

25. The complementary roles of OFT and DTI mean that secondments of staff between them can provide valuable experience. Both organisations will encourage such secondments when suitable opportunities arise. Value will also be gained by shorter attachments, joint training, where appropriate (for example in inducting new staff), and regular policy exchanges.

**SHORT-NOTICE ADVANCE WARNING ON SIGNIFICANT AND SENSITIVE  
ANNOUNCEMENTS: PROCEDURE FOR OFT/DTI HANDLING**

A detailed procedure is needed because the short notice leaves little flexibility or margin of error. This procedure works as follows:

1. OFT notify DTI half a working day in advance of the content and timing of significant and sensitive announcements – e.g. 3pm the day before for an 11am announcement or 9am for a 4pm announcement. This initial contact will be between the most senior person closely involved in the case – i.e. the relevant OFT Branch Director in Competition Enforcement, Consumer Regulation Enforcement or Markets and Policy Initiatives Division on the one hand, and the relevant lead Director in CCP (or, in their absence, a relevant Assistant Director).
2. This information will be passed to the Secretary of State's office by the CCP Director (or Assistant Director) immediately.
3. The Director (or Assistant Director) will also put in hand the drafting of press briefing – in the vast majority of cases, this will consist of background and a line to the effect that this is a matter for OFT. (In some cases, SoS may wish to add a welcome or comment on related DTI action where appropriate).
4. The submission and press briefing will be given a very restricted circulation within DTI, on a strict need-to-know basis. In particular, DTI undertake not to divulge any information provided by OFT under this procedure in dealing with press queries prior to the announcement.
5. OFT Press Office will pass the Press Release to NEWS one hour in advance of the announcement.
6. The relevant lead Director in CCP will ensure that the OFT Chairman's office is informed, within the same time-scales set out above, of all significant DTI announcements on matters affecting the OFT. The OFT undertake not to divulge any information provided by DTI under this procedure in dealing with press queries prior to the announcement.

## HANDLING OF ECMR CASEWORK

### Introduction

1. Ministers have agreed that arrangements for the handling of ECMR casework should be consistent with the new division of responsibilities established by the Enterprise Act.

### Division of responsibilities

#### **DTI**

2. To reflect the division of responsibilities set out in the Enterprise Act, **Ministers** will retain responsibility for decisions in relation to exceptional public interest issues raised in relation to ECMR cases. This will include :-
  - i) decisions on the use of Article 296 EC Treaty to protect the essential interests of the UK's security;
  - ii) action under Article 21(3) ECMR to protect security and other 'legitimate interests';
  - iii) decisions on whether to seek recognition of additional 'legitimate interests' under Article 21(3).
3. Due to the retention of these residual responsibilities, **DTI** will remain a UK 'competent authority' for the purposes of the ECMR alongside OFT and the Competition Commission. Article 21(3) letters will continue to be sent to the Commission via UKRep and will be copied, in advance, to OFT and the relevant sectoral regulator or the MoD as appropriate.
4. **DTI** will bring to OFT's attention, either at its own initiative or in response to a request for background information from OFT, wider government policy issues which might affect, or be affected by, an ECMR merger. DTI will retain its discretion to bring to the attention of DGCOMP (either directly, and/or through UKRep) non-competition issues arising from wider policy considerations which might affect or be affected by a merger.
5. **Ministers** will also remain responsible for the final decision on the UK line on legislative initiatives relating to the ECMR.
6. **UKRep** will provide support on cases of UK interest, either to OFT, or DTI, as appropriate to the relevant issues and circumstances.

#### OFT

7. **OFT** will have sole responsibility for formal UK input to the European Commission on the competition aspects of ECMR cases. This will include both the provision of oral or written comments to DG COMP on the competition issues raised by a case at any stage of the process and representing the UK in

the discussion of individual cases at meetings of the phase II Advisory Committee. The final decision on the line to be taken in any such input will be a matter for the OFT alone.

8. **OFT** will have sole responsibility for the final decision on whether to seek repatriation of all or part of an ECMR case to the UK under Article 9 of the ECMR or, on the other hand, to request the Commission to consider the UK aspects of a merger falling to the UK merger regime in accordance with Article 22 ECMR. OFT will transmit such requests direct to the Commission (rather than via UKRep as has been the case hitherto). For information purposes, OFT will keep CCP and UKRep informed regarding any such likely requests and their progress.

#### Practical working arrangements on casework

##### **OFT**

9. To keep DTI informed of developments on ECMR casework, OFT will continue to copy to CCP and UKRep their updated case list. In response to an enquiry from DTI on the status of an ECMR merger in the procedure, OFT will provide an informal update and provide a copy of the Form CO if so requested. OFT will inform DTI at the earliest opportunity of the possibility of making an Article 9 request or Article 22 referral. If requested by DTI or UKRep, OFT will copy the draft proposal for the OFT's agreement to write to the European Commission on these proposals. Copies of the final request will also be copied to DTI and UKRep.
10. In order to assist the OFT in its overall assessment of the competition effects of an EC merger, OFT will continue to consult UK sectoral regulators, officials in DTI or other Government Departments with industry sponsorship responsibilities, on all cases involving UK companies, UK markets, markets in which UK competitors may have a significant interest, sectors undergoing liberalisation.
11. **OFT** will draw to the attention of DTI and the relevant sectoral regulator or MoD as appropriate, any UK cases in which it considers that "exceptional public interest" may arise at the earliest opportunity. In all cases raising such issues, OFT will provide CCP and the relevant sectoral regulator or MoD with a copy of the form CO for the case and any relevant information it has regarding the non-competition issues involved.
12. **OFT** will direct any parties wishing to make representations on non-competition issues arising in an EC merger to DTI.

##### **DTI**

13. **DTI** will provide OFT with a list of relevant Government contacts and provide updates as required.
14. **DTI** will refer any parties wishing to make representations on competition issues arising in a merger to OFT.

15. **DTI** will inform **OFT** as soon as possible if they become aware that an **ECMR** case may raise exceptional public interest issues in respect of which action may be required under Article 296 EC Treaty or Article 21(3) **ECMR**.

#### Policy work

16. **Ministers** will remain ultimately responsible for decisions regarding the UK line on all legislative initiatives related to the **ECMR**. **DTI** will continue to consult **OFT** to benefit from its practical case experience and will lead for the UK in discussions on legislative initiatives.
17. **OFT**, in the context of its representation of UK at Advisory Committees, will usually deal with non-case related issues raised at the Advisory Committee. Where such issues raise broader policy implications, **OFT** and **DTI** will discuss and agree which department should lead in order to best convey the UK view, taking into account relevant expertise available in each department and authority lent to the department speaking.
18. **CCP** and **OFT** will liaise closely on the preparation of the UK line on all legislative initiatives and policy issues.

Any revisions to these arrangements necessary in the light of changes to law, practice and procedure arising from future changes to the **ECMR** will be agreed between **DTI** and **OFT**.

## ARRANGEMENTS FOR HANDLING REQUESTS FOR INFORMATION FROM FOREIGN AUTHORITIES

The Secretary of State and the OFT have agreed the importance of ensuring that information is only disclosed to overseas authorities where the information is required to further civil or criminal proceedings in the area of competition or consumer protection law or, in exceptional circumstances, other criminal proceedings.

When considering a request for information from an overseas authority, the OFT will have regard to criteria published in accordance with the Enterprise Act before reaching a decision on disclosure.

Requests for information from overseas authorities that raise issues of extra-territorial jurisdiction will be decided by the Secretary of State. The OFT will first consider the request in the usual way with reference to the published criteria. If they consider that the request fulfils the usual criteria but raises extra-territorial issues, they will pass the request to the Secretary of State for a final decision with reference to the extra-territorial issues raised. Where the Secretary of State becomes aware that a particular request raises such issues she will inform the OFT and the final decision regarding disclosure will fall to the Secretary of State.

Issues of extra-territorial jurisdiction occur when an overseas authority makes a request for information to support an investigation or proceeding that would more properly fall under the jurisdiction of the United Kingdom or a country other than the one where the request originates, or where the matter falls within the competences of the European Union.

This annex does not apply when it is necessary to supply information to fulfil Community obligations.

End