

OFT response to the consultation on Prioritisation Principles

October 2008

OFT953resp

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1. INTRODUCTION

- 1.1. The consultation on the Office of Fair Trading (OFT's) approach to the prioritisation of its work was published in September 2007 to seek the views of businesses, business representatives, consumer groups and other stakeholders. This paper outlines the main issues raised by stakeholders on the principles proposed in the consultation document and the OFT's response to them.
- 1.2. The OFT received responses from nine stakeholders following a four-month consultation period. The categorisation of these is as follows:
 - One financial services company
 - One industry representative body
 - One trading standards regional body
 - Three law firms
 - One economic regulator
 - Two consumer bodies

2. MAIN POINTS RAISED AND OFT RESPONSE

- 2.1. In general, those who responded to the consultation welcomed the proposed approach to prioritisation of the OFT's work and found the consultation document useful. The OFT would like to thank all respondents for their considered and helpful responses.
- 2.2. This document seeks to address only those stakeholder comments which, in the OFT's view, relate directly to the Prioritisation Principles and how the OFT applies them. We do not attempt to address every comment made, particularly in the case of detailed submissions.
- 2.3. The document setting out the principles has been amended in a number of places to reflect comments received, and is being published simultaneously with this summary of responses to the consultation.¹
- 2.4. The remainder of this section sets out the main points raised in the consultation and the OFT's response to them. General comments are addressed first, followed by comments under each of the four main headings under which the Prioritisation Principles are grouped.

General comments

- 2.5. *One respondent asked that the Prioritisation Principles include reference to the OFT's remit being UK-wide.*

Response

We have clarified this in the new version of the Prioritisation Principles.

¹ OFT 953, available at www.offt.gov.uk/shared_offt/about_offt/offt953.pdf

- 2.6. *Three respondents asked if the sectoral regulators will use these, or similar principles, when deciding which competition cases to take on.*

Response

The Prioritisation Principles only apply to the OFT. The concurrent regulators use their own discretion in setting their priorities and have in some cases published their own approaches to the prioritisation of their work.

- 2.7. *One respondent thought it would be helpful to have more clarity than is provided by the Prioritisation Principles as to when the OFT might exercise its discretion to pursue cases, so as to give victims of competition law infringements a reasonably clear idea as to whether any complaint they make is likely to be pursued.*

Response

As stated in paragraph 2.2 of the Prioritisation Principles, aside from instances where the OFT has a duty to act, it is not possible for the OFT to give guidance which would allow a party considering making a complaint to assess whether the OFT would be likely to progress a particular case. This is because the assessment of individual cases and complaints according to the Prioritisation Principles involves consideration of factors such as the range of other work that the OFT is currently undertaking or planning to undertake, the resource implications of such work and the need to have a balanced portfolio. The OFT will therefore not be amending the principles to include this point.

- 2.8. *One respondent asked how the principles will be applied to the OFT's existing case load and projects.*

Response

As indicated at paragraph 2.3 of the Prioritisation Principles, at particular

points in the lifecycle of a project the OFT may consider whether the continued commitment of resources is justified.

The Prioritisation Principles will be used to inform decisions on whether to stop pieces of work on administrative priority grounds, and reallocate the resources dedicated to them.

It is the responsibility of the OFT's senior management to ensure that the Prioritisation Principles are applied consistently across the organisation.

2.9. One respondent asked for clarification as to how the OFT's Preliminary Investigations Unit will use the Prioritisation Principles.

Response

The Prioritisation Principles are applied by all OFT staff who have a role in taking decisions on whether to pursue a particular project. The Preliminary Investigations Unit will use the Prioritisation Principles in considering whether issues and complaints raised fall within the OFT's administrative priorities.

2.10. One respondent expressed concern that the approach of rejecting a very significant proportion of cases at a very early stage (as a result of the application of the Prioritisation Principles) could potentially have an adverse effect on enforcement. In particular it could reduce the possibility of informal resolution whereby the parties voluntarily make changes to the agreement or conduct complained of to eliminate concerns so that the file can be closed.

Response

Whilst the OFT seeks to focus the bulk of its enforcement resources on cases which it anticipates will have a high impact, the application of the Prioritisation Principles to a case involves considering how that case affects the OFT's portfolio of work. A balanced portfolio, among other characteristics, uses the full range of instruments available to the OFT (including informal resolution), and has a balance of risk. Maximising the

diverse overall impact of the OFT's work requires a portfolio which contains interventions of different types in markets of different sizes.

Informal resolution is an instrument which can offer a low risk intervention that has lower resource implications. The OFT is therefore of the view that the application of the Prioritisation Principles will not lead to a reduction in informal resolutions.

2.11. One respondent asked the OFT to clarify whether the Prioritisation Principles apply in merger control cases.

Response

Under the Enterprise Act 2002, the OFT has a function to obtain and review information relating to merger situations, and a duty to refer to the Competition Commission for further investigation any relevant mergers where it believes that it is or may be the case they have resulted or may be expected to result in a substantial lessening of competition in a UK market. As a result, the Prioritisation Principles do not apply in this area. We will state this explicitly in the Prioritisation Principles.

2.12. One respondent commented that community law obliges the OFT to apply Articles 81 and 82.

Response

When the OFT applies national competition law it is obliged to apply Articles 81 and 82 of the EC Treaty where applicable and appropriate. We will state this explicitly in the Prioritisation Principles.

2.13. One respondent suggested that the Prioritisation Principles should be tailored for each area of the OFT's work.

Response

Having different Prioritisation Principles for different areas of the OFT's work would hinder our ability to allocate resources flexibly across the OFT on the basis of an overall assessment of how we can maximise our impact for the benefit of UK consumers. We recently reorganised our work in a structure that is arranged by markets, rather than legislation. This enables us to look more easily at whole markets and to choose the most appropriate tools to remedy competition or consumer problems.

2.14. One respondent encouraged the OFT to report annually on why we have taken some but not other complaints or cases forward.

Response

While we can explain to stakeholders with a legitimate interest (such as complainants) why particular complaints or cases have not been taken forward, it would be impractical for us to make a general report of the kind proposed. There is a high volume, and a wide range of matters which receive varying degrees of internal consideration in the course of a year. We are required to report annually on how our prioritisation framework has been reflected in projects carried out under the commitments we made as part of the 2007 Comprehensive Spending Round, but producing a detailed report on prioritisation decisions would require a disproportionate use of resources, and would detract resources from the work that we are taking forward.

2.15. One respondent asked the OFT to indicate when we will next review the Prioritisation Principles and suggested that this should be within two years.

Response

We will continue to keep the Prioritisation Principles under review in the light of our own experience and the views of stakeholders. We do not, however, propose to commit to a full review at a specific time. The value

of such a review would itself need to be assessed against other calls on the OFT's resources.

Comments concerning Impact

2.16. *One respondent suggested the deletion of a paragraph in the 'Impact' section of the principles which refers to efficiency/productivity, saying that the OFT should strictly focus on problems of competition and consumer welfare. (The same respondent made the general comment that productivity growth, while an objective for the Treasury, should not be for the OFT.)*

Response

The Annual Plan 2008-09 (produced following consultation with stakeholders) stated that the OFT 'aim[s] to take a market-informed approach, focusing on outcomes which support productivity growth and the prosperity of the UK economy, and our belief that this approach is in the best interests of businesses, consumers, the UK economy and society.'² We take the view that an assessment of the economic impact of our interventions on efficiency/productivity is a valid input to the prioritisation of our work and have therefore maintained it in the Prioritisation Principles.

2.17. *One respondent expressed doubt as to whether the impact of OFT intervention on efficiency/productivity could be calculated in practice, given that any prioritisation assessment is made at a stage when little investigation has taken place.*

Response

It is not intended, or considered necessary, that a detailed assessment of the market should be carried out in order to be able to apply the

² www.offt.gov.uk/shared_offt/about_offt/ap09/ap09.pdf. Para. 2.6

Prioritisation Principles. In many cases the OFT's existing knowledge of the market, or evidence presented as part of a complaint, will provide sufficient information for this factor to be taken into account as part of the overall application of the Prioritisation Principles.

2.18. One respondent argued that as well as the direct effect on consumer welfare, the potential unintended consequences of intervention should also be considered.

Response

The OFT's assessment of both the likely direct and indirect effects of intervention is intended to include both positive and negative effects. We regard this as implicit and do not consider it necessary to amend the Prioritisation Principles to address this point specifically.

2.19. One respondent recommended that the Prioritisation Principles should include the estimated cost to businesses of OFT intervention.

Response

This view was also put forward by respondents to the consultation on *Approach to calculating direct benefits to consumers* (OFT955).³ The OFT have started to conduct ongoing ex-post evaluations to assess whether there are substantial costs to businesses from implementing recommendations that result from the OFT's work and to explore ways to minimise unnecessary burdens to business whilst still achieving our objectives. However, the OFT does not report on costs to businesses across all cases, mainly because in most cases the effort involved in measuring such costs is not proportionate. The OFT will therefore not be amending the Prioritisation Principles.

³ www.oft.gov.uk/shared_oft/reports/Evaluating-OFTs-work/oft955.pdf

2.20. *One respondent asked for clarification of the OFT's assessment of consumer benefit in cases relating to markets where the customers are businesses.*

Response

Paragraph 4.2 of the consultation document stated that 'where the problem is in an upstream market and benefit arises in the first instance to business customers, we will assume that benefits will be passed on to final consumers as a direct effect unless there is evidence to the contrary.'

The respondent said that it would be useful if the OFT could clarify how the Prioritisation Principles would operate when the problem is in a downstream market and the benefits of OFT intervention would arise in upstream markets (for example, in a situation where retail buyer power was impacting on the food production sector). In such a scenario, the OFT would require evidence that consumers, as well as the suppliers directly affected, would benefit from its intervention. Such benefits might take the form of improved quality and choice rather than just price, but would need to be weighed against the advantages that the exercise of retail buyer power can bring to consumers. We do not consider it necessary to amend the Prioritisation Principles to address this point specifically.

Comments concerning Strategic Significance

2.21. *One respondent suggested that the Prioritisation Principles should, under strategic significance, only include high impact outcomes that benefit consumers.*

Response

As outlined in paragraph 4.11 of Prioritisation Principles, the OFT's overall vision is underpinned by four themes, of which high impact outcomes that benefit consumers is one. The other three are to be a centre of intelligence and excellence, to work well with partners, and to develop

the talent and skills of OFT staff. When considering whether a proposed project fits within the OFT's strategy and objectives, it is relevant to consider not only one, but all four themes of the OFT's overall vision. The OFT will therefore not be amending the Prioritisation Principles.

2.22. Two respondents questioned the validity of the capacity building of the OFT and the consumer and competition policy systems being taken into account when carrying out prioritisation assessments. One suggested that the consultation document placed too much emphasis on this principle and the other suggested that it should be deleted from the final version.

Response

The OFT considers that building its organisational capacity is important and is a valid factor to be taken into account when carrying out an assessment based upon the Prioritisation Principles. In common with other factors, however, in practice it is unlikely that capacity building would be the most significant factor in deciding to take a piece of work forward. Attention is drawn to Section 2 of the Prioritisation Principles, in particular paragraph 2.2 which states that 'we will not apply the principles in a mechanical way: judgment and a reasoned balancing exercise are required for each case which necessitates that we consider the principles in the round and on a case-by-case basis'. The OFT will therefore not be amending the Prioritisation Principles.

2.23. One respondent suggested that the order of the alternatives to OFT action in paragraph 3.5 of the consultation document should be reversed, to place market developments first and private actions last.

Response

The text is clear that the list is illustrative, and that the alternatives mentioned are not intended to be read as being in order of importance. We therefore do not consider that such an amendment is necessary.

2.24. One respondent considered that the 1:5 cost-benefit ratio in the performance targets the OFT agreed with HM Treasury should be a financial management benchmark, not a factor in prioritisation.

Response

This view was also put forward by respondents to the OFT's recent consultation on *Approach to calculating direct consumer benefits* (OFT955)⁴. These respondents expressed concern that this target could lead to perverse incentives towards cases which will contribute to meeting the target, rather than facilitating effective competition.

Direct impact, and by extension the contribution to the 1:5 ratio, will be taken into consideration when making prioritisation assessments. However, as indicated in paragraph 2.2 of the Prioritisation Principles document, direct impact is only one of the factors taken into account when deciding whether to undertake a project. In any event, each individual work stream is not required to conform exactly to the 1:5 ratio, rather it applies to the total impact of the OFT's work when taken as a whole. Therefore, we do not think that amendment of the Prioritisation Principles is required to address this point.

2.25. Three respondents expressed concern that private actions are not a realistic alternative for many complainants turned away by the OFT. One of these further noted that OFT might wish to take action to enable follow-on actions to be brought.

Response

The OFT notes the respondents' views on whether private actions are an alternative action, but still considers that private actions are one of a range of possible alternatives available to complainants.

⁴ www.offt.gov.uk/shared_offt/reports/Evaluating-OFTs-work/oft955.pdf

Follow-on actions have an important role to play in securing effective redress to those who have been harmed as a result of a competition law infringement. However, it would be inappropriate for the OFT to take action solely in order to enable a follow-on action to be brought. The OFT must act in the public interest. By focusing its limited resources on the impact on consumer welfare (including benefits for disadvantaged consumers) and efficiency/productivity, it is expected that OFT action would occur when it matters most, thus also enabling those affected to bring a follow-on action where appropriate.

There are also limitations on the extent to which, in the context of the cases the OFT chooses to deal with, the OFT can include in its decisions, or otherwise disclose, information which would increase the possibility of private action.⁵

2.26. One respondent, while supporting the OFT's view that establishing or testing new approaches can benefit the consumer and competition policy system, suggested that the Prioritisation Principles should also acknowledge the benefits of providing clarification of the law in areas of practical commercial importance, thus facilitating compliance and potentially promoting productivity.

Response

We have acknowledged this point and have added a further point to the illustrative list in paragraph 4.13 of the Prioritisation Principles.

⁵ For details, see OFT 916; *Private actions in competition law: effective redress for consumers and businesses*, paras. 6.6 – 6.10.

www.oft.gov.uk/shared_oft/reports/comp_policy/oft916.pdf

2.27. In relation to the impact of projects on the OFT's ongoing portfolio of work, two respondents suggested that, while it would be unhelpful if the OFT's statutory powers were not balanced, the OFT should only take meritorious cases with clear consumer detriment. They suggested that this issue should be kept under close review.

Response

The OFT acknowledges this concern. As indicated in paragraph 2.2 of the Prioritisation Principles, while portfolio considerations are a contributory factor in prioritisation assessments, it is unlikely that this would be the most significant factor for the OFT in deciding to take a piece of work forward. Therefore, we do not think that amendment of the Prioritisation Principles is required to address this point.

Comments concerning Risks

2.28. One respondent commented that the risk of appeal to the Competition Appeal Tribunal should not mean that the OFT does not pursue a case. The OFT should recognise the significant contribution which appeals make to the OFT achieving its objectives and should also remember that appeals are a mechanism for users to hold the OFT accountable.

Response

While recognising the points made by the respondent, the OFT maintains that the possibility of an eventual decision being appealed, with its attendant costs and risks, is a relevant factor, among others, for it to take account in prioritising its work. However, paragraph 4.18 of the Prioritisation Principles makes clear that in some cases the desired impact may be to establish consistent standards, and create legal certainty rather than 'win' a case. Therefore, we do not think that amendment of the Prioritisation Principles is required to address this point.

2.29. *Commenting on the statement in the principles that the OFT needs to consider the likelihood of a successful outcome, one respondent argued that 'successful' needed to be carefully defined, and that potential unintended consequences needed to be taken into account.*

Response

The OFT is mindful of these concerns. The characteristics of a successful outcome can vary on a case by case basis. As stated above, in some cases the desired impact may be to establish consistent standards, create legal certainty and send clear long-term messages rather than 'win' a case. The OFT does not believe that amendment of the Prioritisation Principles is required to address this point.

Comments concerning Resources

2.30. *One respondent, while accepting that resourcing requirements must be considered, hoped that cases would not be taken on in the unlikely event that the OFT was short of workload, and that if a case was worth investigating it should be investigated even if this meant reallocating and rescheduling resources.*

Response

It is the overall purpose of the Prioritisation Principles to provide a basis for allocating the OFT's limited resources to projects, and for reallocating those resources should the need arise. The OFT accepts both these points, but does not believe that the Prioritisation Principles need to be worded specifically to address them.

2.31. *One respondent considered that it would be difficult to judge whether resources would be proportionate to benefits as benefits cannot be assessed until detailed investigations are underway.*

Response

The OFT has invested considerable resource in developing a framework

for measuring our impact which is relevant to the estimation of the likely impact of potential work. We consider that we have the necessary experience and expertise to conduct sufficiently robust estimates. A large proportion of staff have been trained in conducting impact estimations for potential work.

3. ACCESS TO RESPONSES

- 3.1. The OFT was asked to treat one of the responses as confidential and to not quote another one directly.
- 3.2. Copies of the other responses will be available from 31 October 2008 for public viewing on the OFT website: www.oft.gov.uk or in hard copy at OFT Fleetbank House, 2-6 Salisbury Square, London, EC4Y 8JX.

A. FULL LIST OF RESPONDENTS

Ashurst

Cattles

Confederation of British Industry (CBI)

Freshfields Bruckhaus Deringer

Maclay Murray & Spens LLP

National Consumer Council (NCC)

Office of Rail Regulation (ORR)

The Consumer Council of Northern Ireland

Trading Standards North West