

Involving third parties in Competition Act investigations

**Response to comments received
during the public consultation on
the draft guideline on involving
third parties in Competition Act
investigations**

April 2006

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1 INTRODUCTION

- 1.1 In May 2005 the Office of Fair Trading (OFT) published for comment a number of proposals as to the circumstances in which the OFT could consult with complainants and other third parties to assist its investigations under the Competition Act 1998 (the Act).¹
- 1.2 Following that process, in November 2005 the OFT formally consulted on a draft guideline (the Guideline) which sets out how the OFT intends to involve complainants and other third parties in its investigations under the Act and provides guidance on how to make complaints to the OFT about anti-competitive behaviour.²
- 1.3 The OFT received 19 replies to the formal consultation. All respondents welcomed the introduction of a guideline explaining the OFT's approach to involving third parties in investigations under the Act. Most of them fundamentally agreed with the OFT's proposed approach, but commented on specific points that they considered would make the proposals clearer and more workable. Chapter 2 of this document contains a summary of the key issues raised and the OFT's response to them.
- 1.4 A guideline under section 52 of the Act will be published in April 2006, and will be available on the OFT website.

¹ *Involving third parties in OFT investigations under the Competition Act 1998*, Issues Paper of May 2005 (OFT449) (Issues Paper).

² *Involving third parties in Competition Act investigations, Incorporating guidance on the submission of complaints*, Consultation on the text of a guideline under section 52 of the Competition Act 1998 of November 2005 (OFT451).

2 KEY ISSUES AND OFT RESPONSE

File closures

- 2.1 Most respondents agreed that before closing its file on an investigation, the OFT should consult a limited class of complainants who have been granted Formal Complainant status.

Standing test for Formal Complainant status

- 2.2 The majority of respondents preferred the simplified test set out in the Guideline compared with the original one proposed in the Issues Paper which they found to be complex.³

Submission of a written, reasoned complaint

- 2.3 **Issue:** A number of respondents considered that the OFT should retain a greater discretion over whether to grant Formal Complainant status. In particular, they suggested that the submission of a written, reasoned complaint containing the information set out in Part B of the annexe to the Guideline should not give rise to a presumption that the complainant will be likely materially to assist the OFT in its investigation, since this could result in third parties submitting frivolous and/or unfounded complaints being granted Formal Complainant status.

Response: The submission of a written, reasoned complaint will not of itself confer Formal Complainant status. Complainants will also be required to (i) request Formal Complainant status and (ii) satisfy the OFT that they are, or are likely to be, materially affected by the alleged anti-

³ Originally the OFT proposed to consult complainants: (i) who have submitted a written, reasoned complaint, (ii) who demonstrate that they are materially affected by the alleged anti-competitive conduct/agreement(s), and (iii) with whom consultation is likely materially to assist the OFT's assessment of a case, based on a number of presumptions. See paragraph 2.3 of the Issues Paper.

competitive agreement(s). Therefore, we consider it likely that in the vast majority of cases, only parties with a genuine ability to assist an investigation will be granted Formal Complainant status. We take the view that the minimal risk of a frivolous complaint falling within the scope of this policy is outweighed by the broader benefits of increased transparency and certainty which the policy will engender.

Materially affected complainants

2.4 Issue: Some respondents felt that the revised definition of Formal Complainant should be further amended. A number took the view that the standing test (in particular the 'materially affected' limb) should capture parties who would have a 'sufficient interest' in the complaint for the purposes of appeal to the Competition Appeals Tribunal (the CAT) under section 47 of the Act.⁴ Others suggested that the OFT should adopt the 'legitimate interest' test used by the European Commission in admitting complainants.⁵

Response: The proposed approach (which received general support) to involving third parties in our investigations has been devised in light of our desire to benefit further from the knowledge of well-informed third parties who are likely to assist us during the administrative process, as well as the need to ensure that our investigations are conducted in a procedurally fair manner according to the standards of administrative law, and within the bounds of our governing legislative framework (in particular Part 9 of the Enterprise Act 2002). It would not necessarily be appropriate for the OFT to seek to align with standing tests adopted by

⁴ Section 47(2) of the Act states that a person may only appeal against an OFT decision if the CAT considers that he has a sufficient interest in the decision with respect to which the appeal is made.

⁵ Article 7(2) of Regulation 1/2003/EC provides that, inter alia, natural or legal persons who can show a legitimate interest are entitled to lodge a complaint with the European Commission alleging infringement of Article 81 and/or Article 82.

other bodies in different legal contexts and/or at different stages in cases.

As to how the proposed test will operate in practice, we anticipate that the majority of complainants who would have a sufficient interest within section 47 of the Act, or a legitimate interest within the meaning of Article 7(2) of Regulation 1/2003, are likely to fall into the 'materially affected' category. The Guideline also makes clear that we will retain the discretion to consult with any complainant or other third party at any stage of an investigation where it is appropriate or necessary to do so.

2.5 Issue: One respondent queried whether the 'materially affected' limb includes those third parties who have been materially affected by alleged anti-competitive agreements and/or conduct in the past (but are not necessarily still affected at the time of the complaint).

Response: The phrase 'whose interests are, or are likely to be materially affected' should be read so as to encompass third parties who have been materially affected by anti-competitive agreements and/or conduct in the past.

2.6 Issue: A number of respondents suggested that consumer organisations should be included in the list of examples of 'materially affected' parties.⁶

Response: The list has been amended to incorporate consumer organisations where some or all of the consumers represented are, or are likely to be, materially affected by the alleged anti-competitive behaviour.

⁶ See paragraph 2.12 of the Guideline.

Exceptions to the requirement for a written, reasoned complaint

- 2.7** There was broad agreement that the OFT should retain a discretion to grant in limited cases Formal Complainant status to third parties who are unable to provide all of the information set out in Part B of the annex but who are nonetheless likely to be able materially to assist the OFT's investigation, provided they are, or are likely to be, materially affected by the alleged anti-competitive behaviour.
- 2.8** **Issue:** One respondent was concerned that the Guideline does not include an exception to the requirement for a complainant to demonstrate that it is materially affected by the alleged anti-competitive behaviour, and does not provide for cases where the OFT may wish to consult third parties that have not requested Formal Complainant status.

Response: In the OFT's experience it is unlikely that third parties that are not materially affected by the anti-competitive behaviour about which they are complaining will be able to assist its investigations. For this reason, we do not consider it necessary to include provision for such third parties to be granted Formal Complainant status. The OFT will however retain a discretion to consult any complainant or other third party, whether formally or informally, at any stage of an investigation where it is appropriate to do so.

Requests for Formal Complainant status: timing issues

- 2.9** **Issue:** One respondent asked whether a request for Formal Complainant status can be made once an investigation has already commenced.

Response: Yes it can, and there can be more than one Formal Complainant in a case (a case can also have no Formal Complainants).

2.10 Issue: Some commentators suggested that the Guideline should contain a timeframe within which the OFT will respond to a request for Formal Complainant status.

Response: The Guideline has been amended to make it clear that the OFT will endeavour to respond to a request for Formal Complainant status within four weeks of receipt of the request. However, the Guideline also makes it clear that this may not be possible in all cases, for instance when further information is required to assess Formal Complainant status. This will allow for situations where, for example, the OFT requests further clarification of how an applicant for Formal Complainant status is materially affected by an agreement or conduct.

Confidentiality issues

Provision of non-confidential version of complaint to complainee

2.11 Issue: A number of respondents requested clarification as to when a complainee will be provided with a non-confidential version of the complaint.

Response: The question of whether it is appropriate to provide a copy of the complaint to the complainee will be assessed on a case-specific basis, taking account of a number of factors, notably the extent to which such action is likely to assist the OFT in progressing its investigation. We recognise that in many cases there will be merit in providing a non-confidential copy of the complaint to the complainee at an early stage. The complaint will in any event be placed on the OFT's investigation file, and if the case proceeds to Statement of Objections stage, a non-confidential version will be available to the parties on access to file.

Identity of complainants

2.12 Issue: A number of respondents requested clarification as to whether the OFT will disclose the complainant's identity to the complainee, in particular where it provides a copy of the complaint to the complainee.

Response: We recognise that complainants may in some cases be justifiably concerned about the disclosure of their identity to the complainee. The Guideline has been amended to clarify that this information will be treated in the same way as other information contained in the complaint, that is, it is open to the complainant to explain to the OFT why it considers that disclosure of its identity would be harmful to its interests. If the OFT considers that this is confidential information which should be withheld, it will endeavour to retain the complainant's anonymity, to the extent that this is consistent with its statutory obligations.

Provisional Closure Letters

2.13 Issue: One respondent sought an explanation as to what restrictions apply to the use by recipients of information contained in Provisional Closure Letters.

Response: Provisional Closure Letters containing information which falls within section 237(1) of the Enterprise Act 2002 are subject to the disclosure provisions of Part 9 of that Act. Before disclosure to the Formal Complainant, the OFT will have regard to the confidentiality considerations set out in section 244 of that Act. Recipients of Provisional Closure Letters will also be bound by restrictions on further use of information contained within them. The Guideline made this clear in relation to non-confidential versions of Statements of Objections that are provided to third parties. The text has now been amended to include similar clarification in relation to Provisional Closure Letters and Provisional Dismissal Letters (interim measures).

Access to additional documents at file closure stage

2.14 Issue: Comments varied in relation to the OFT's suggestion that Formal Complainants should not, in general, be given access to documents in addition to the Provisional Closure Letter at file closure stage. Some respondents agreed with the OFT's proposed approach. Others noted that it might prove necessary to provide access to additional documents on a more frequent basis than the Guideline envisaged.

Response: It is important that Formal Complainants are in a position to understand as fully as possible the reasons for the OFT's proposed file closure. In that context we recognise the concerns that have been expressed in relation to the approach set out in the Guideline. At the same time, this policy has been developed on the basis of a need to balance efficient delivery and administrative workability with transparency, keeping within the legal framework (in particular Part 9 of the Enterprise Act 2002), and in light of the OFT's complaint profile (approximately 1,200 competition-related complaints are received annually). In the light of these factors, and bearing in mind the intention that Provisional Closure Letters (and Provisional Dismissal Letters in interim measures cases) will contain sufficient detail for Formal Complainants to understand the reasons for the proposed decision, to enable them to provide informed comments on it, we currently propose to retain the approach set out in the Guideline.

Responses to Provisional Closure Letters

2.15 Issue: One respondent took the view that where a complainant's response to a Provisional Closure Letter leads the OFT to change its preliminary view, such that it decides to proceed with an investigation, the complainee should be given an opportunity to comment on the complainant's response before the OFT changes its view definitively.

Response: The OFT will consider the extent to which it may be necessary to consult the complainee on the complainant's response on a case-by-case basis. This may be appropriate in certain circumstances, for example where the complainant and complainee put forward different versions of the same facts. The Guideline has been amended accordingly.

Statements of Objections

- 2.16** The majority of respondents welcomed the proposals to publish a notice giving a brief summary of the case and requiring interested third parties to demonstrate standing before receiving a non-confidential version of the Statement of Objections for comment.

Consulting third parties other than Formal Complainants

Publication of summary Notice

- 2.17 Issue:** One respondent suggested that the Notice which the OFT will publish on its website when a Statement of Objections has been issued should make clear that a Statement of Objections is a provisional finding only, and does not constitute a final decision on infringement of the Act.

Response: We agree with this suggestion and will include wording to that effect in published Notices when Statements of Objections are issued.

Extent of consultation

- 2.18 Issue:** Responses on how widely the OFT should consult at this stage were divided. Opinions differed on whether third parties not involved in the investigation prior to issue of the Statement of Objections should be consulted at this stage. A number of respondents agreed with the OFT's proposal to take into account the extent to which a third party has been involved in the OFT's investigation prior to the issue of the Statement of Objections. Others considered that the Statement of Objections should only be provided in exceptional circumstances to third parties, in

particular due to the potentially sensitive nature even of non-confidential versions. In contrast, a few respondents found too restrictive the circumstances in which the OFT proposes to include third parties other than a Formal Complainant at this stage. They generally favoured a broader approach enabling the OFT also to consult third parties whose interests are not materially affected by the alleged infringement or who have not themselves requested to be consulted.

Response: There are numerous, and on occasion divergent, points of view on this issue. Based on our experience to date, the approach proposed in the Guideline is likely to strike the best balance between the need to consult third parties who are likely to assist the OFT in robust decision-making, with the need to avoid unnecessarily imparting potentially sensitive information to third parties. We therefore propose to retain the approach set out in the Guideline.

Interim measures

2.19 Issue: One respondent suggested that provision of a non-confidential version of the Interim Measures Notice to a Formal Complainant applicant could work against the applicant's interests, in that it could potentially lengthen the process and delay the adoption of the interim measures decision.

Response: In order to avoid any delay, applicants will be requested to submit any comments on an Interim Measures Notice within a specified time period (which is likely to be short, given the nature of the interim measures process). However, there is no obligation on applicants to respond; it is also open to them to inform the OFT that they do not wish to see the Interim Measures Notice before the decision is adopted.

Annexe –Guidance on the submission of complaints to the OFT about anti-competitive behaviour

- 2.20** There was general support for detailed guidance on the information that should be included in a complaint.

Distinction between mandatory and optional information

- 2.21 Issue:** A small number of respondents suggested that the annexe was too prescriptive and that it could be onerous for complainants to fulfil the requirements for a reasoned, written complaint. One respondent raised the point that the obligatory submission of the information under the heading 'other information' in Part B of the annexe may deter persons wishing to make a complaint who may otherwise be able to provide the OFT with useful information about anti-competitive agreements or conduct.

Other commentators suggested that it could be too easy to obtain Formal Complainant status. In particular, they queried the need for a distinction between mandatory and optional information, proposing that the OFT should instead provide an indicative list of information that it would generally find useful, and conduct a case-by-case screening process to determine whether information provided in each case is sufficient to justify Formal Complainant status.

Response: The policy set out in the Guideline is based on the premise that there is merit, both for the OFT and for third parties to its investigations, in moving away from our current case-by-case approach to third party involvement, and towards implementing a structured and formal approach at key stages in investigations. In this context, we do not favour a case-by-case screening process for determining Formal Complainant status.

In determining the distinction between mandatory and optional information, we have sought to include in the mandatory category (Part B of the annexe) the minimum amount of information⁷ that we would generally regard as being necessary materially to assist our early assessment of a case, whilst not excluding complaints of the nature likely to be made by less well-resourced or advised complainants. Furthermore, our experience with complaints to date suggests that the provision of the type of information in Part B of the annexe should not be too onerous. It is also worth noting that the provision of 'other information' set out in Part B of the annexe is mandatory only to the extent that the complainant already possesses the information or is able to obtain it readily.

The OFT will of course continue to retain a discretion to waive the requirement to provide the information set out in Part B of the annexe where the OFT considers that a complainant is able materially to assist the OFT's investigation even though the complainant is not in a position to provide all of the requested information (see paragraphs 2.15 – 2.17 of the Guideline).

Informal approaches

2.22 Issue: One respondent queried whether the OFT would be open to initial informal written approaches (as well as oral approaches) by potential complainants.

⁷ In addition to the information set out in Part B of the annexe, there is much information that we would generally find useful during early stage assessment, but which certain (even well-informed) third parties may not necessarily be in a position to provide. In order to assist potential complainants (whether or not they wish to request Formal Complainant status), that information is set out in the optional category of the annexe (Part C).

Response: We will accept initial written approaches, and the annexe has been amended to clarify this.

Relationship between complainant and complaine

2.23 Issue: One respondent suggested that the complainant should be required to describe its relationship with the complaine.

Response: This requirement is already included in the 'material effect' section of Part B of the annexe.

Readily available information

2.24 Issue: A respondent queried the meaning of 'readily available' and 'readily accessible' information.

Response: Complainants should adopt a common sense approach to considering what falls within this category, and can if necessary discuss their particular situation informally with the OFT. As a general indication, the annexe has been amended to give information available from public sources as an example of information that would fall within this category.

Other comments

Relationship with concurrent regulators

2.25 Issue: Some respondents suggested that the OFT and regulators with concurrent powers under the Act (the Regulators)⁸ should adopt the same or a broadly consistent approach to third party involvement in their investigations under the Act.

⁸ OFCOM, OFGEM, OFREG NI, OFWAT, ORR and CAA.

Response: We agree that it would be beneficial for the OFT and the Regulators to seek to adopt a broadly consistent approach to third party involvement in our investigations. To that end, we have consulted with the Regulators in developing our policy and have drawn upon their existing guidance on complaint handling. At the same time, a number of Regulators have pointed out that their complainant profiles and volumes differ to those of the OFT. In these circumstances, and given that a number of Regulators already have in place their own procedures for third party involvement, the current Guideline relates to the OFT's practice only.

In the interests of broader consistency we intend, however, to review the operation of our third parties policy in around 18 to 24 months time, and will be seeking the Regulators' input as part of that process.

Application of Guideline to merger cases and to remedies in Chapter II cases

2.26 Issue: One respondent suggested that the Guideline should apply to merger cases.

Response: The assessment of mergers is governed by the Enterprise Act 2002 and has its own procedural framework and associated procedural guidance.⁹ The current guideline is confined to investigations under the Competition Act 1998.

2.27 Issue: The same respondent also suggested that the Guideline should address third party consultation in relation to remedies in Chapter II and Article 82 cases.

Response: Proposed remedies in Chapter II and Article 82 cases are necessarily closely tailored to the facts of the case in question. The

⁹ See *Mergers - Procedural guidance* OFT526.

extent of appropriate consultation or other market-testing can only be assessed on a case-by-case basis. In that context, it would not be appropriate to seek to impose specific consultation requirements and procedures in relation to Chapter II and Article 82 proposed remedies.

Interaction with the super-complaints process

2.28 Issue: A number of respondents requested clarification of how the super-complaints procedure and the procedure in the Guideline will interact.

Response: The Guideline does not apply to the super-complaints process under section 11 of the Enterprise Act 2002. However, in some cases, a super-complaint may raise issues that are better dealt with under the Competition Act 1998. If the OFT takes a case forward on that basis, the designated consumer body that originally submitted the super-complaint will be granted Formal Complainant status, and will be informed of this. The Guideline has been amended to include a section on super-complaints.

Application to on-going cases

2.29 Issue: One respondent asked how ongoing investigations under the Act will be affected by the Guideline.

Response: The Guideline will not have retrospective effect, and will not apply to on-going investigations under the Act, although we will seek to adopt a consistent approach as far as possible to third party involvement in our current investigations.

Review of the Guideline

2.30 Issue: A number of respondents suggested that the Guideline should note that the OFT's policy will be kept under review and amended as appropriate.

Response: We agree. This is a new policy and will be kept under review, and developed and/or amended as necessary in the light of our

increasing experience and other relevant developments. The Guideline has been amended to make this clear.

3 LIST OF RESPONDENTS

Berwin Leighton Paisner

Burges Salmon

Cattles PLC

CBI

Clifford Chance

Competition Law Association

Freshfields Bruckhaus Deringer

Joint Working Party of the Bars and Law Societies of the UK

Lawrence Graham

Macfarlanes

MacRoberts

National Consumer Council

OFCOM

OFWAT

SJ Berwin

Slaughter and May

The Newspaper Society

Travers Smith

Which?