

Under investigation?

A guide to investigations by the OFT under the
Competition Act 1998



Competition
law 2005

Understanding competition law

Under investigation? is one of several quick guides designed to inform businesses about how the Office of Fair Trading (OFT) applies competition law in the UK. You may wish to read this together with *Competing fairly* which provides an overview of all the quick guides in the series. More comprehensive information is available in a number of detailed competition law guidelines published by the OFT in conjunction with the sector regulators. Turn to the back of this guide to find out how to obtain copies of other OFT publications.

Competition law is enforced in the UK principally by the OFT. However, in certain industries, such as gas and electricity, the sector regulators have been given 'concurrent powers' to apply and enforce competition law. Although this guide is based on OFT experience and practice, it should also be of assistance if you are dealing with one of the sector regulators. You will find a list of these sector regulators and their contact details at the back of this guide.

This quick guide provides an introduction to competition law only and should not be relied on as a substitute for the law itself. If you have any doubts about your position under the law, you should seek legal advice.

Introduction

In the UK, anti-competitive behaviour is prohibited under Chapters I and II of the Competition Act 1998 and may be prohibited under Articles 81 and 82 of the EC Treaty. These laws prohibit anti-competitive agreements between businesses and the abuse of a dominant position by a business. Businesses that infringe competition law may face substantial financial penalties of up to ten per cent of their worldwide turnover.

The Competition Act 1998 gives the OFT significant powers to investigate suspected infringements of competition law including the ability to enter premises to conduct investigations.

This guide explains our powers of investigation under the Competition Act 1998 and what procedural steps may result during an investigation. You may find it useful not only if you are already under investigation but also if you want to train your employees about what to do in the event of an inspection at your premises. You may wish to read this together with the quick guide *Competing fairly* which provides an overview of the law.

Further information

For further information on our powers of investigation, see the more detailed guideline *Powers of investigation*.

Definition of 'business'

Throughout this guide, we refer to a 'business'. This term (also referred to as an 'undertaking' in our more detailed competition law guidelines) means any entity engaged in economic activity irrespective of their legal status, including companies, partnerships, Scottish partnerships and individuals operating as sole traders.

The OFT's powers of investigation

When can the powers be used?

We can carry out an investigation if there are **reasonable grounds for suspecting** that competition law has been breached. This might result from a complaint received by us from another business or following an inquiry that we have started on our own initiative.

What powers do we have?

We have a range of powers under the Competition Act 1998 to obtain information to enable us to establish whether an infringement has been committed. These include:

- requiring the production of specified documents or information
- entering premises without a warrant, and
- entering and searching premises with a warrant.

We can either send written requests for information or visit premises to obtain the information. We can make visits with or without notice.

Written requests for information

We can send a written notice by post or fax. This will:

- tell the recipient what the investigation is about
- specify or describe the documents and/or information that are required
- give details of where and when they must be produced, and
- set out the offences that may be committed if the recipient fails to comply.

We also have the power to:

- ask for information that is not already written down (eg: a sales manager might need to use their knowledge or experience to provide estimates of market shares)
- obtain information not only from the business suspected of committing an infringement but also from other parties (such as competitors, customers or suppliers), and
- require past or present officers or employees of the business to give an explanation of any document that is produced.

The time given to respond will depend on the amount and complexity of the material required but will typically be two to four weeks from receipt of the notice. Where necessary, we may ask for further

explanations and make additional requests for documents and information.

What happens if the required material is not produced?

If the recipient of a notice does not respond or refuses to produce the required information they may be guilty of a criminal offence which can be punishable by a fine. The notice will also describe the other actions which may give rise to criminal offences. These are set out on pages 10 - 11.

Entering premises

In some cases we will visit premises to request information. Where a warrant has been obtained (from the High Court in England and Wales or Northern Ireland or the Court of Session in Scotland), we can also **search** premises for information.

Which premises can be entered?

The power to enter depends on whether we intend to inspect **business premises** (eg: an office or warehouse) or **domestic premises** (eg: an employee's home).

We can:

- enter business (but not domestic) premises **with or without** a warrant, and
- enter **and search** business and domestic premises **with** a warrant.

We do not need to suspect the occupier of the premises of having committed an infringement, eg: the occupier might be a supplier or customer of the alleged infringer.

What will happen upon arrival?

The OFT officer will produce:

- evidence of their identity
- written authorisation by the OFT
- a written notice explaining:
 - what the investigation is about, and
 - describing what criminal offences may be committed if a person fails to cooperate, and
- a separate document setting out the powers of the authorised officers and the right of the occupier to request that a legal adviser is present.

Where we have obtained a warrant, we will produce it prior to entry. The warrant will list the names of the OFT officers authorised to exercise the powers under the warrant and will state what the investigation is about and describe the criminal offences that may be committed if a person fails to cooperate.

What powers do we have when entering business premises without a warrant?

Once they have gained access, OFT officers can:

- require anyone present to produce any document (eg: invoices, minutes, diaries, travel records) that is relevant to the investigation
- take copies of, or extracts from, any document produced
- ask for information on a computer to be reproduced in a form that can be read and taken away
- ask anyone on the premises to explain any document that has been produced (eg: request an employee to explain entries or codes on an invoice or spreadsheet)
- ask anyone present to tell them where the documents they want to see are kept (although they cannot search the premises themselves), and
- take any necessary steps to preserve or prevent interference with documents (eg: require offices/files/cupboards to be sealed for as long as is reasonably necessary).

OFT officers can bring with them any equipment that may assist in their inspection (eg: computers or tape recorders).

What additional powers do we have when carrying out an inspection **with** a warrant?

A warrant allows OFT officers to use force that is reasonably necessary to gain access to the premises (although they cannot use force against any person).

Having gained access, OFT officers can (in addition to the powers outlined above):

- search the premises for relevant documents
- take copies of, or extracts from, relevant documents
- in limited circumstances, take away original documents (although these will not be retained for more than three months)
- on business premises only, take copies, or possession, of any document to determine later whether it is relevant, when it is not practicable to do so at the premises, and
- on business premises only, take copies, or possession, of any relevant document contained in something else where it is not practicable to separate out the relevant document at the premises.

The search may extend to offices, desks and filing cabinets. OFT officers can bring any equipment to help them gain access to the premises and search for documents. The warrant may also authorise other

persons, such as computer technicians or industry experts, to accompany OFT officers.

Further information

For further information regarding when a warrant may be necessary, see the more detailed guideline *Powers of investigation*.

Can a legal adviser be present?

A legal adviser may be present during an OFT on-site visit, whether conducted with or without a warrant. If the occupier has not been given notice of the inspection and there is no in-house lawyer on the premises, the OFT officers may wait a short time for a legal adviser to arrive.

If an inspection is delayed until a legal adviser arrives, the OFT officers may impose appropriate conditions to prevent evidence being tampered with or other parties to a suspected infringement being warned about the inspection, eg:

- sealing filing cabinets
- keeping business records in the same state and place as when the OFT officers arrived
- suspending external email, and/or
- allowing OFT officers to enter and remain in offices of their choosing.

What if there is nobody at the premises?

If there is nobody at the premises, OFT officers can still attempt entry if a warrant has been obtained. The OFT officers must take reasonable steps to advise the occupier of the intended entry. If contact is made, the OFT officers must allow the occupier and their representatives a reasonable opportunity to be present before the warrant is executed. If it has not been possible to make contact, the warrant must be displayed in a prominent place and reasonable force may be used to gain access. The premises must then be left secured as effectively as they were found.

What actions might constitute criminal offences?

Individuals may be guilty of a criminal offence if they:

- fail, without reasonable excuse, to comply with a requirement imposed under the powers of investigation (eg: to provide information within the requested time)
- intentionally obstruct an authorised officer who is carrying out an on-site inspection without a warrant
- intentionally obstruct an authorised officer who is carrying out an on-site inspection **with** a warrant

- intentionally or recklessly destroy, dispose of, falsify or conceal a document that has been required to be produced, or cause or permit this to be done, or
- knowingly or recklessly provide information that is false or misleading, either directly to us or indirectly knowing that it will be used for the purpose of providing information to us.

The maximum penalty for the first two offences is an **unlimited fine**, while for the remaining three offences it is an **unlimited fine and/or up to two years' imprisonment**.

Are there any limits on our powers of investigation?

Privileged communications

Our powers of investigation do not allow us to obtain **privileged communications**. These are communications between a professional legal adviser and their client, or those which are made in connection with, or in contemplation of, legal proceedings, and for the purposes of those proceedings. An example of a privileged communication would be a letter from a business' lawyer to the business advising on whether a particular agreement infringed the law.

Under UK law, communications of in-house lawyers as well as those of lawyers in private practice can be privileged. Under EU law, however, communications of in-house lawyers are not privileged. If we receive communications of in-house lawyers from a national competition authority (NCA) of another Member State where such communications are not privileged, we may use the information received in our investigation.

Privilege against self-incrimination

It is for us to prove that there has been an infringement of competition law. When requesting documents, information or explanations we cannot compel a business to provide answers that might involve an admission of an infringement on their part. We can, however, request documents or information relating to facts, such as whether a given employee attended a particular meeting.

Confidential documents

If you think that any information you provide is commercially sensitive or contains details of an individual's private affairs and that disclosure might seriously damage your interests or those of the individual, you should

- provide it separately in an annexe clearly marked as confidential, and
- give a written explanation as to why the information should be considered confidential.

We will decide whether or not information may need to be disclosed. However, if we propose to disclose information identified as confidential, we will give prior notice of our proposed action and allow a reasonable opportunity for you to make your views known.

Further information

For further information regarding disclosure of confidential information, see Part 6 of the more detailed guideline *Powers of investigation*.

What if a business has a complaint about the conduct of an on-site inspection?

An on-site inspection will inevitably cause some disruption, but officers and employees of a business are entitled to be treated with courtesy and respect. If anyone is unhappy with the conduct of an on-site inspection, they should register their complaint with the leader of the inspection team. If the response is unsatisfactory, they may write to us (or the appropriate sector regulator, as the case may be).

What happens next?

We will carefully examine the information we have obtained. We may send the business a Statement of Objections and invite the business to respond by making **representations** within a specified period. If after considering the representations the evidence still leads us to believe that an infringement has been committed, we will issue an **infringement decision**.

Definition of 'Statement of Objections'

If we take the view that a business has infringed competition law, we will send them a **Statement of Objections** which is, in effect, a proposed infringement decision and we will invite views from the business.

Written representations

We will invite the business to respond to the Statement of Objections by submitting written representations. The deadline for these written representations will be set out in the Statement of Objections. We will allow the business access to our file to enable the business to understand the case against them. We will then consider the written representations made by the business.

Oral representations

We will also allow a business an opportunity to make oral representations at a meeting with us if the business has indicated in their written representations that they wish to do so.

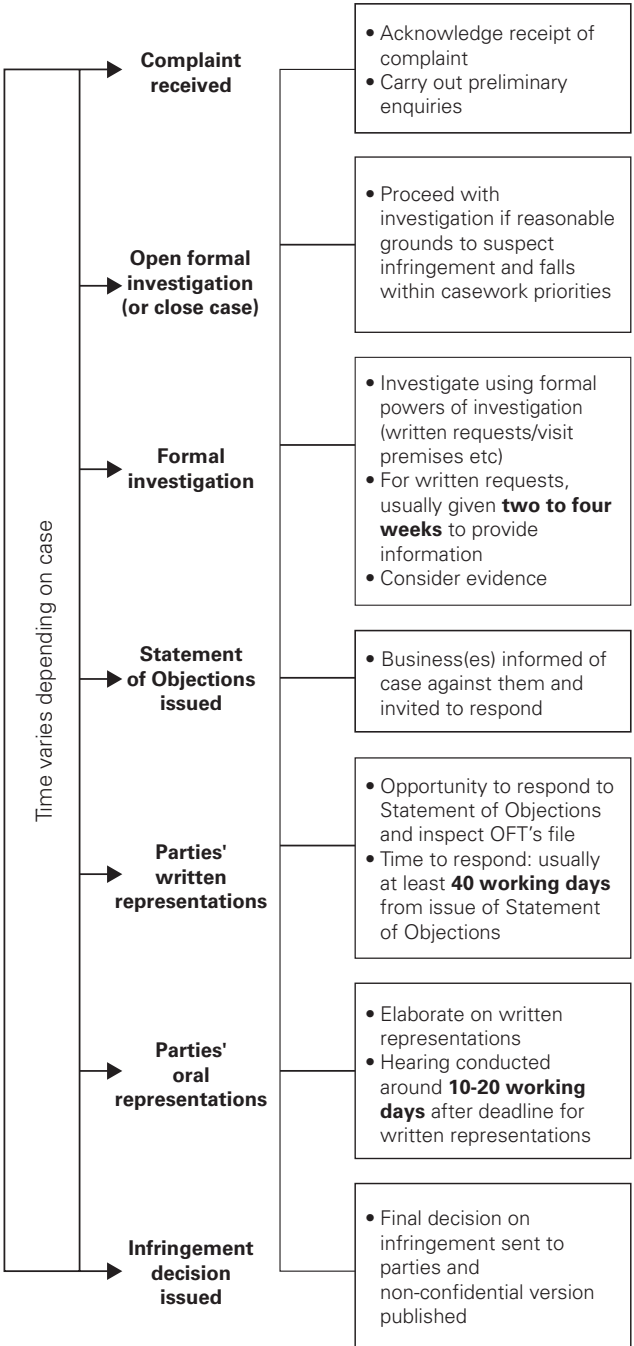
Steps in a typical investigation

While the duration of an investigation will depend on the complexity of the particular case and the amount of evidence to be considered, the following page shows an illustration of the steps leading up to an infringement decision.

What about investigations by the European Commission and national competition authorities of other Member States?

We (but not the sector regulators) may be required to assist in European Commission investigations relating to Articles 81 and 82 when European Commission officials carry out inspections in the UK, or may be requested to undertake inspections **on behalf of** the European Commission. We (but not the sector regulators) may also undertake an inspection or other fact-finding measure in the UK on behalf of an NCA of another Member State in order to assist the NCA in establishing whether there has been an infringement of Article 81 or Article 82.

Steps in a typical investigation



Further information

Further information regarding our powers when assisting the European Commission and other NCAs in their investigations is found in the more detailed guideline *Powers of investigation*.

If your business is being investigated

- Remain calm.
- You may consult your legal adviser.
- You are entitled to be treated with courtesy and respect at all times.
- You should answer questions truthfully, to the best of your knowledge.
- You should not:
 - hide, destroy or falsify documents
 - or
 - obstruct the OFT officerif you do, you will commit a criminal offence.
- If you have any concerns, you should raise them with the OFT officer.
- If the investigation proceeds to a Statement of Objections, you will be able to respond through written/oral representations.

Where can you get further information?

You can order free copies of our publications by phoning **0800 389 3158** or emailing **oft@ecgroup.uk.com**

You can also download our publications from **www.oft.gov.uk**

Quick guides

This booklet is one of a series of quick guides designed to inform you about how we apply competition law in the UK. *Competing fairly* gives an overview of the law while the other guides cover specific areas.

Competing fairly (OFT447)

How your business can achieve compliance (OFT424)

Under investigation? (OFT426)

Cartels and the Competition Act 1998 (OFT435)

Leniency in cartel cases (OFT436)

This information is available in other formats and languages on request.

CD-Rom on compliance

We also provide a CD-Rom called *Compliance matters!* (OFT723) explaining the importance of compliance.

Competition law guidelines

Detailed information on the Competition Act 1998 and Articles 81 and 82 of the EC Treaty is given in a series of guidelines we have published in conjunction with the sector regulators. The titles shown below are currently available:

Agreements and concerted practices (OFT401)

Abuse of a dominant position (OFT402)

Market definition (OFT403)

Powers of investigation (OFT404)

Concurrent application to regulated industries (OFT405)

Enforcement (OFT407)

Trade associations, professions and self-regulating bodies (OFT408)

Assessment of conduct (draft) (OFT414a)

Assessment of market power (OFT415)

Vertical agreements (OFT419)

Land agreements (OFT420)

Services of general economic interest exclusion (OFT421)

OFT's guidance as to the appropriate amount of the penalty (OFT423)

Modernisation (OFT442)

Dealing with the OFT

Individuals, businesses and their advisers are entitled to be treated with courtesy, respect and in a non-discriminatory manner. If you have a concern or complaint about our procedures, you may contact us by phone (phone **OFT Enquiries** on **08457 22 44 99**) or write to us setting out your concerns. Complaints in writing should be sent to us at:

Office of Fair Trading
Fleetbank House
2-6 Salisbury Square
London EC4Y 8JX

Sector regulators

Office of Communications (OFCOM)
Riverside House
2a Southwark Bridge Road
London SE1 7DB
Tel: 020 7981 3000
www.ofcom.org.uk

Gas and Electricity Markets Authority (OFGEM)
9 Millbank
London SW1P 3GE
Tel: 020 7901 7000
www.ofgem.gov.uk

Northern Ireland Authority for Energy
Regulation (OFREG NI)
Brookmount Buildings
42 Fountain Street
Belfast BT1 5EE
Tel: 028 9031 1575
ofreg.nics.gov.uk

Office of Water Services (OFWAT)
Centre City Tower
7 Hill Street
Birmingham B5 4UA
Tel: 0121 625 1300
www.ofwat.gov.uk

Office of Rail Regulation (ORR)
1 Waterhouse Square
138-142 Holborn
London EC1N 2TQ
Tel: 020 7282 2000
www.rail-reg.gov.uk

Civil Aviation Authority (CAA)
CAA House
45-59 Kingsway
London WC2B 6TE
Tel: 020 7379 7311
www.caa.co.uk

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