

# **Super-complaints: guidance for designated consumer bodies**

A consultation paper

August 2002

Part of a series of consultation papers about how the provisions of the Enterprise Bill will work in practice.

OFT504

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**ENTERPRISE BILL: Public consultation on guidance for designated consumer bodies making super-complaints**

The Office of Fair Trading (OFT) is conducting a public consultation on the guidance it is required to publish about the making of super-complaints once the Enterprise Bill becomes law.<sup>1</sup> A copy of the proposed guidance is enclosed. A copy can also be found on the OFT's website, [www.oft.gov.uk](http://www.oft.gov.uk) The introduction to the consultation draft is available in Welsh, please see the OFT's website for details.

Details about the Enterprise Bill, including an explanatory note can be found on the Department of Trade and Industry's website, [www.dti.gov.uk/enterprisebill](http://www.dti.gov.uk/enterprisebill)

The Enterprise Bill remains subject to parliamentary debate and approval. This draft guidance reflects the content and clause numbering of the Bill as at 20 June. The OFT will publish the finalised guidance after the Bill receives Royal Assent and becomes the Enterprise Act 2002.

The Enterprise Bill gives the OFT a formal duty to accept and review super-complaints from designated consumer bodies. This duty may later be extended to certain specified sectoral regulators. Prior to the enactment of the Enterprise Bill the OFT is informally examining super-complaints using its market investigation powers under section 2 of the Fair Trading Act 1973. This draft guidance is intended to explain what activates the super-complaint process, to confirm who can make super-complaints, who can accept them and how they will be dealt with.

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<sup>1</sup> [Clause 11(7)] of the Enterprise Bill.



Representatives of business and consumer bodies as well as sectoral regulators are being invited to comment on the proposed guidance in order to improve its clarity. Consultees responding to this consultation are asked to supply a brief summary of the people and organisations they represent, where appropriate. We are open to suggestions of other individuals or organisations that should be consulted.

We will be taking queries by phone, but any suggested changes or comments should be submitted in writing - by letter or email as indicated below. We will acknowledge all written submissions or queries. The OFT can only consider suggested changes to the guidance, not the underpinning legislation, as the latter is a matter for Parliament and not covered by the consultation exercise. Responses may be made public unless confidentiality is specifically requested.

This consultation exercise will last for 12 weeks. The OFT therefore asks that your comments on the proposed guidance are submitted to it no later than 31 October 2002. It may not be possible to take into account any suggested changes or comments after the deadline for receipt. Please send any comments to:

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If you have any questions about the guidance please contact either Keith Davis on 020 7211 8255 or email [keith.davis@oft.gsi.gov.uk](mailto:keith.davis@oft.gsi.gov.uk); or Helen Creeke on 020 7211 8743 or email [helen.creeke@oft.gsi.gov.uk](mailto:helen.creeke@oft.gsi.gov.uk).

I hope that you will be able to assist in this invaluable procedure.

Keith Davis

### **Further copies**

Further copies of this paper can be downloaded from our web site at [www.offt.gov.uk/news/consultations/supercomplaints.htm](http://www.offt.gov.uk/news/consultations/supercomplaints.htm)

### **OFT publications order line**

OFT information leaflets can be ordered free of charge on 0870 6060321.

### **Information on the internet**

You can also order OFT publications online and find advice and information on consumer rights and on the work of the OFT at [www.offt.gov.uk](http://www.offt.gov.uk)

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# 1 INTRODUCTION

## **This guidance**

- 1.1 This guidance is designed to help those making super-complaints to the Office of Fair Trading (OFT). It explains what activates the super-complaint process, confirms who can make super-complaints and who can accept them, and how they will be dealt with.
- 1.2 This guidance is indicative rather than definitive. The super-complaints process is new and the guidance will be amended in the light of further experience in handling super-complaints. It will also be amended to take account of the policy intentions of the Department of Trade and Industry (DTI) on the criteria for designating consumer bodies and the issue of concurrency for specified sectoral regulators.

## **Who is this guidance for?**

- 1.3 It has been written for those consumer bodies who will be designated by the DTI and thus be entitled to make super-complaints. In addition others, such as businesses or trade associations, may find it useful to know what is expected from a super-complainant and how the complaint is then managed.

## **Why issue guidance?**

- 1.4 We want the new provision for super-complaints to work successfully and contribute to our aims of making markets work well for consumers
- 1.5 The OFT has a commitment to transparency. We want to explain clearly our procedures and the reasons behind them. [Clause 11(7)] of the Enterprise Bill (the Bill) also places upon the OFT a duty to issue guidance as to the presentation by the complainant of a reasoned case for the complaint.

## What is in the guidance?

1.6 This guidance seeks to indicate the level and quality of evidence the OFT would normally expect to see in a reasoned case. It also describes the processes and procedures the OFT will apply in dealing with any super-complaint.

1.7 The guidance is organised by chapter:

- **Chapter 2** sets out the super-complaint process in more detail. It provides a general explanation of what a super-complaint is and who can make one. It also describes the factors the OFT will take into account when considering a super-complaint and sets out how it will be dealt with.
- **Chapter 3** explains the potential role of the sectoral regulators.
- **Chapter 4** lists OFT contacts for further advice and information.
- The annexes provide information as follows:
  - A Guidance as to the kind of evidence that should be provided by super-complainants
  - B Factors that may indicate that markets may not be working well
  - C Super-complaints received by the OFT to date and their outcome

## 2 SUPER-COMPLAINTS

### What is a super-complaint?

2.1 A super-complaint, as defined in [clause 11(1)] of the Bill, is a complaint submitted by a designated consumer body that 'any feature, or combination of features, of a market in the UK for goods or services is or appears to be significantly harming the interests of consumers'<sup>1</sup>. In broad terms, a 'feature' may be any conduct by firms or consumers or the structure of the market, or any aspect of that structure. A super-complaint can therefore concern any commercial activity. It will not concern the activity of a particular company within the market, but rather features of the market itself.

### Why have super-complaints?

2.2 Super-complaints give consumer organisations an efficient way of bringing genuine concerns about market failure to the attention of regulatory bodies. They are distinct from complaints that consumer protection law or competition law has been breached. It is possible however, that an initiation of a super-complaint could uncover evidence that leads to enforcement action.

### Who can make a super-complaint?

2.3 Only designated consumer bodies can make a super-complaint. Under [clause 11(5)] of the Bill it is specified that a consumer body has to be designated by the Secretary of State by order. The Secretary of State can make any organisation a designated consumer body provided it appears to represent to her the interests of consumers of any description and also meets any other criteria published by the Secretary of State. It is expected that those designated will be informed bodies who are in a strong position to represent the collective interests

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<sup>1</sup> [Clause 11(9)(a)] of the Bill indicates that 'references to a feature of a market in the United Kingdom for goods or services have the same meaning as if contained in Part 4'. A feature of a market is defined in [clause 126(2)].

of groups of consumers. They may include consumer bodies for sectors such as energy, postal, railway and financial services, telecommunications and water.

- 2.4 The DTI [is issuing] separate guidance setting out the criteria for achieving designation status and the application process.

### **How is a super-complaint made?**

- 2.5 Super-complaints should be made in writing to the Markets and Policy Initiatives Division of the OFT (MPI). Contact details, which should be used in the first instance, are at Chapter 4.

### **What needs to be in a super-complaint?**

- 2.6 When making a complaint, the super-complainant should provide a short paper setting out the reasons why they consider that a UK market for goods or services has a feature, or features, that are or appear to be, significantly harming the interests of consumers and should therefore be investigated. This paper should be supported, wherever possible, by documented facts and evidence.
- 2.7 Super-complainants are not expected to provide the level of evidence necessary for the OFT to decide that its investigation criteria are satisfied and that an MPI market investigation should be launched immediately. However, they should present a reasoned case, supported by evidence. The objective of presenting the case and supporting evidence is to help the OFT to undertake a fuller appraisal of whether there are factors indicating market failure that may warrant launching an MPI market investigation or whether one of the other outcomes listed at paragraph 2.18 below may be appropriate. Complaints that are not supported by a reasoned case, or contain little or no supporting evidence may not be progressed. Complaints that are, or that appear to be, frivolous or vexatious will be rejected.

- 2.8 Annexe A lists the kind of evidence that designated consumer bodies may want to consider providing when deciding whether or not to make a super-complaint. Factors that may indicate that a market may not be working well for consumers are listed in Annexe B.
- 2.9 Complaints raised by individuals or bodies about specific instances of anti-competitive behaviour or infringements of consumer legislation will continue to be considered by the OFT as at present. Procedural safeguards that ensure fairness for those who may be the subject of enforcement action are unaffected by super-complaints.

### **How will the OFT deal with super-complaints?**

- 2.10 The OFT will deal with super-complaints on a fast-track procedure. This requires the OFT to publish a reasoned response to any super-complaint within a 90 day deadline<sup>2</sup>.
- 2.11 On receipt of a super-complaint the OFT will contact the super-complainant within five working days to acknowledge receipt and let them know who within the OFT will be the main contact.
- 2.12 The assigned official and supporting team will examine the contents of the complaint in more detail, assessing the quality of information and evidence supplied. The team will form a view as to whether the super-complaint is frivolous or vexatious, in which case it will reject the complaint and, if not, whether it has sufficient information to proceed or whether further evidence or clarification is required. At the same time the team will also note whether the complaint raises issues that may fall within the remit of a sectoral regulator. If the team finds that this is the case it will liaise with the relevant regulator so that an early decision can be made as to who is the most appropriate body to deal with the complaint.

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<sup>2</sup> By virtue of [clause 11(2)] of the Bill.

2.13 Where the team decides that it does not have sufficient information to proceed, or that it requires clarification of the super-complaint, the team will write to the super-complainant as soon as possible, setting out what further information or clarification it needs from the super-complainant. The super-complainant will be given a set time in which to respond to such a request. If it fails to do so, the team may consider making a formal response that the OFT will take no action with regard to the complaint.

2.14 If appropriate, a meeting will be arranged between the team and the super-complainant to pose any immediate questions about the evidence submitted and to indicate the broad lines of enquiry the OFT will take to establish whether the super-complaint is well founded.

2.15 The OFT will then carry out wider enquiries with a view to testing the evidence provided and obtaining any further information it considers necessary to form a reasoned view on whether the super-complaint justifies further action by the OFT. Exactly how it does this will be determined on a complaint by complaint basis but may involve:

- internal research
- public requests for information
- approaching any relevant businesses or trade associations for information
- approaching consumer organisations, Trading Standards Organisations, government departments and/or other public bodies for information.

2.16 The OFT will keep the super-complainant informed of progress on a regular basis and may make contact to request clarification of issues or further information as appropriate.

2.17 Within 90 days of receiving the super-complaint the OFT will publish a response stating what action, if any, it intends to take in response to the complaint. Ninety days is the maximum the OFT will take to respond. Clearly, for some of the outcomes listed at paragraph 2.18 - for example transferring a super-complaint to a sectoral regulator - a swifter decision may be made. The response will give the OFT's reasons for its decision.

### **What action will result from a super-complaint?**

2.18 The possible outcomes of any super-complaint include:

- launching an MPI market investigation into the issue<sup>3</sup>
- referring for possible enforcement action by the OFT's competition or consumer regulation divisions
- making a market investigation reference to the Competition Commission
- referring the complaint to a sectoral regulator for enforcement action under sectoral powers
- transferring the complaint to one of the sectoral regulators with concurrent powers as being a more appropriate body to deal with the complaint
- dismissing the complaint as frivolous or vexatious
- finding the complaint to be unfounded.

### **Market investigations**

2.19 The market investigations referred to at paragraph 2.18 above are distinct from market investigations that are undertaken by the Competition Commission (CC) under Part 4 of the Bill. The majority of the CC's market investigations will

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<sup>3</sup> Possible outcomes for this course of action are wider than direct outcomes for a super-complaint and may also include:

- recommendations that Government consider changes to the laws and regulations and/or that regulators, self-regulatory bodies and others consider changes to their rules
- campaigns to promote consumer education and awareness.

result from a referral by the OFT<sup>4</sup>. Further details on when an issue is considered suitable by the OFT for reference to the CC can be found in *Market Investigation References*<sup>5</sup>.

## **Publicity for super-complaints**

2.20 It is for a super-complainant to decide whether or not to issue a news release recording that it has made a super-complaint. Super-complainants should however consult with the OFT as there could be some situations where OFT investigations would be hampered by prior disclosure of the complaint. In such circumstances, the OFT would seek the agreement of the super-complainant to keep the existence of the super-complaint confidential.

2.21 In some circumstances the OFT will take the view that it would be appropriate to issue a news release itself, for example if it wished to combine the announcement of the complaint with a public request for information. This will be decided on a complaint by complaint basis.

## **OFT decisions**

2.22 When making a final response to a super-complainant the OFT is required by the Bill to publish its decision on further action, with reasons<sup>6</sup>. The OFT will, as a minimum, place a copy of the response on its website to achieve publication. The OFT may also, if considered appropriate, issue a news release to accompany its response.

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<sup>4</sup> The Bill also provides for market investigation references to be made by regulators with concurrent powers and, in certain circumstances, by ministers.

<sup>5</sup> OFT501

<sup>6</sup> [Clause 11(2) and 11(3)] of the Bill

### 3 THE ROLES OF OTHER REGULATORS

#### Sectoral regulators

- 3.1 Currently, only the OFT has the formal duty to accept super-complaints. However, [clause 200] of the Bill gives the Secretary of State the power to provide by order for specified sectoral regulators to have concurrent powers and duties in relation to super-complaints<sup>7</sup>. Prior to any order being made, where a super-complaint received by the OFT is concerned with markets falling within specified regulated sectors the OFT will seek the views of the relevant regulator as a part of its consideration of the complaint.
- 3.2 If an order is made extending super-complaint powers and duties to specified sectoral regulators any super-complainant will be able to make a complaint directly to a specified regulator rather than the OFT. In that event, the super-complainant should consider which organisation is best placed to deal with the complaint prior to making one.
- 3.3 It is recognised that there may be circumstances where it is not easy to make this choice, for example where the super-complaint raises issues with potentially overlapping responsibilities between regulators. As and when there are regulators with concurrent powers, the OFT and concurrent regulators will ensure that suitable co-ordination procedures are put in place so that a decision can be taken at an early stage as to which is the most appropriate body to deal with a super-complaint. Concurrency arrangements are already in place for handling complaints submitted under the Competition Act 1998 and are working well. The OFT envisages extending these arrangements to cover super-complaints.

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<sup>7</sup> [Clause 200] of the Bill specifies that regulators have the meaning given in section 54(1) of the Competition Act 1998 (CA98). Only regulators listed in that section may be specified.

## 4 CONTACT POINTS

- 4.1 Anyone with any queries regarding super-complaints, or designated consumer bodies considering making a complaint, should contact, in the first instance:

**Helen Creeke**

Office of Fair Trading

Fleetbank House

2-6 Salisbury Square

London EC4Y 8JX

Telephone: 020 7211 8743

Fax: 020 7211 8391

Email: [supercomplaints@oft.gsi.gov.uk](mailto:supercomplaints@oft.gsi.gov.uk)

# ANNEXES

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## **A GUIDANCE AS TO EVIDENCE TO BE PROVIDED BY SUPER-COMPLAINANTS**

A.1 It may not always be clear whether a particular issue would be a suitable subject for a super-complaint. In addition to considering the factors outlined in Annexe B it is recommended that any designated consumer body should consider the following, non-exhaustive, list of evidence before making a super-complaint. It is not expected that every item of information would be provided in each case, but the evidence is indicative of the kind and level of information the OFT would normally expect a super-complaint to contain:

- details of the market (nature of the good or service) to which the complaint relates and whether there are particular aspects of the good or service relevant to potential problems for consumers such as infrequency of purchase
- details of the nature of the complaint
- whether the complaint relates to the market as a whole or only to certain suppliers or parts of the market
- how consumers' interests are harmed
- whether all, or only certain consumers of the relevant good or service, are affected by the aspect(s) of the market to which the complaint relates

- whether there is disproportionate purchase of the good or service by particularly vulnerable groups of consumers such as the elderly or those on low incomes
- available information on market shares by volume and value of suppliers in the relevant market for the good or service; any information on changes in market shares over the past few years
- evidence of barriers to entry to the market by existing or new suppliers
- information on the level and impact of buying power in the relevant market and whether any benefits from exercising buyer power are passed onto consumers
- details or information on:
  - current retail/wholesale prices (as relevant) for the good or service
  - discounts to some or all customers
  - different prices charged to different classes or categories of customer
  - levels of price dispersion in the market more generally
  - price trends over the past few years
  - comparative information on different suppliers' prices and the timing of price changes
- information (if available) on the general level of profitability of suppliers in the relevant sector for the good or service
- any evidence of practices by suppliers in the sector that may be restricting or distorting competition
- any evidence of high-pressure selling techniques or other sales practices that could be having detrimental effects on consumers

- whether there are complex contractual terms for the good or service
- whether the relevant good or service is only supplied together with other goods or services (rather than separately)
- details of any costs incurred by consumers as a direct result of switching to alternative suppliers of the relevant good or service. Evidence of the degree of switching
- any available indicators of the general level of quality of goods or services in the relevant sector
- any available indicators showing how well informed consumers in the sector are relative to suppliers about the quality and prices of goods and services offered by different suppliers
- information relating to whether complex aspects of the good or service, the way in which it is supplied, or difficulties in assessing quality, presents particular problems for consumers
- details of means of redress available to consumers of the good or service who have complaints, and their effectiveness
- details of any codes of practice, whether or not approved by the OFT, that apply to the good or service.

## **B FACTORS THAT MAY INDICATE MARKETS ARE NOT WORKING WELL**

B.1 When considering whether a particular issue would be a suitable subject for a super-complaint, it is recommended that designated consumer bodies consider the following together with the suggested types of evidence outlined in Annexe A.

### **Possible indicators that a market is not functioning effectively**

B.2 Generally, significant harm to consumers' interests will only occur where markets are not functioning effectively. In assessing whether there are reasonable grounds to suspect that a market is not functioning effectively, the OFT will review a variety of possible indicators. These may include some or all of the following.<sup>8</sup>

### **Primary Indicators**

B.3 When markets are working well, the competitive process should act to benefit consumers. Specifically, it should ensure that:

- suppliers' costs reflect efficient operation
- prices reflect costs
- quality and variety of goods and services are in line with consumer preferences
- levels of innovation are optimal.

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<sup>8</sup> Although it should be noted that the lists are not necessarily comprehensive and that other indicators may also be relevant.

B.4 As such, any of the following may be important indicators that competition in a market is not working well for consumers:

- low productivity
- high profitability, substantial price dispersion or prices that otherwise do not reflect costs
- poor quality and/or variety
- a poor record of innovation.

B.5 However, none of these indicators on its own necessarily indicates competition problems. For example, high profitability might simply reflect high levels of efficiency and innovation. As such, before initiating any market investigation, we would also want to consider 'secondary indicators' of factors that might be causing the market to work imperfectly.

### **Secondary indicators**

B.6 The effectiveness of competition in a market may be compromised by any of the following factors:

- a. structural features of the market
- b. co-ordination by firms in the market
- c. other forms of anti-competitive conduct or agreements by firms in the market
- d. high levels of switching costs
- e. high levels of search costs

- f. quality of products not easily observable/complex
- g. regulations that constrain (directly or indirectly) the supply, quality or price of products.

Or a combination of two or more of the above.

B.7 Possible indicators of each of these are set out below.

a. Structural features of the market that will tend to limit competition include:

- few firms
- high barriers to entry
- low buyer power.

b. Co-ordination by firms in the market will be most likely to take place where we observe the factors set out at (a) and also:

- homogeneity of the firms' products
- transparency of prices, outputs and market shares
- similarity of the firms with respect to their market shares, cost structures, time horizons of their decisions and strategies
- stability of market conditions on both the demand and the cost side
- a degree of excess capacity
- a high degree of multi-market contact.

c. Other forms of anti-competitive conduct or agreements by firms in the market might include:

- predation
- price discrimination
- discounts
- refusal to supply

- other vertical restraints
  - bundling/tying.
- d. Switching costs will often be an important factor constraining competition, and may be indicated by:
- low levels of switching
  - relatively static market shares
  - substantial cancellation charges/exit fees and/or significant joining fees/initial required investments
  - products that are sold as a secondary purchase (e.g. razorblades).
- e. High levels of search costs may limit competition between firms, and may be indicated by:
- low levels of consumer information about different suppliers/products
  - high levels of price dispersion
  - pressure selling (which prevents consumers from taking the time to look around for a better deal).
- f. Quality of products not easily observable/complex can be indicated by:
- no market for high quality products (due to adverse selection/moral hazard – where customers cannot distinguish good from bad, they will only pay an average price, and at this price good products will not be sold)
  - high levels of consumer complaints
  - no means of obtaining redress.
- g. Regulations which constrain (directly or indirectly) the supply, quality or price of products will often thereby constrain competition. Indicators of possible problems may include:

- prices being higher/quality being lower in markets where these regulations are more stringent
- barriers to entry of innovative/high quality suppliers or products

A combination of two or more of the above will tend to exacerbate any impact on the effective functioning of markets.

B.8 Again, whilst none of these features, of themselves, confirm the existence of competition problems, they can provide indications that these might exist.

## **C SUPER-COMPLAINTS TO DATE**

### **Private dentistry**

- C.1 In October 2001 the Consumers' Association asked the OFT to look at concerns about the private dentistry market which is worth around £1 billion a year.
- C.2 The Consumers' Association's own research highlighted problems with the operation of the private dentistry market and the place of the consumer within that market. These concerns included lack of price transparency, the level of competition, the way complaints are handled and redress offered. There were also questions on access to dental services and on how much guidance patients are given before treatment is undertaken.
- C.3 The OFT decided to launch a comprehensive investigation into private dentistry after establishing that the Consumers' Association's case warranted further research.
- C.4 The investigation will examine how the provision of NHS and private dental services together operate, the incentives for dentists to treat patients under the NHS or privately, and the constraints and incentives to provide new services. It will also study the expectations and rights of consumers, and the availability and quality of information for consumers to enable them to make informed choices.
- C.5 The investigation will be completed by the end of 2002.

