

**Response to points raised
during the consultation on
guidance for the Enterprise
Act 2002 market
investigation references**

March 2003

OFT511b

Introduction

- 1.1 The Office of Fair Trading (the OFT) received 15 responses to its consultation paper on market investigation references published on 10 July 2002. The main issues raised and the OFT's comments on them are summarised below.

Single firm conduct

- 1.2 There were a number of comments on the investigation of markets in which the conduct of a single firm was the main feature adversely affecting competition. Views were mixed but most respondents who referred to this point considered that market investigation references should not be used as a less demanding alternative to an investigation under the Competition Act 1998 (CA98). Some respondents objected in particular to the possibility of references of markets in which the only feature adversely affecting competition was the conduct of a single non-dominant firm. In the light of the points made we have revised the relevant part of the published guideline (paragraphs 2.7 and 2.8) to make it clear that it is not the present intention of the OFT to make market references based on the conduct of a single firm, where there are no other features of a market that adversely affect competition, unless a structural remedy going beyond what is appropriate under CA98 is likely to be the only effective remedy.

Significant effect on competition

- 1.3 A number of respondents were concerned about the referral of markets whose features did not adversely affect competition to a significant extent, or where adverse effects impacted on less than 25 per cent of the market. We accept that the effect on competition must be significant for a reference to be justified and the published guideline says so explicitly (paragraph 2.27). Although it would be rare for features which affect less than 25 per cent of a market to have a significant effect, they may do so in certain circumstances. We do not wish to rule out the possibility of making references in such cases.

Use of information

- 1.4 Some respondents questioned whether information obtained under one Act could properly be used for the purposes of another. We accept that the OFT should only use its powers to obtain information under a particular piece of legislation if at the time of doing so it has the intention to proceed under that legislation. However, we remain of the view that there

is no legal restriction on the subsequent use of the information obtained for investigations under other legislation provided that the relevant restrictions on confidentiality and disclosure are met. We do not accept that the rights of defence are compromised by such action. Moreover, it would increase the burden of business if firms were required to provide the same information again whenever the OFT moved from an investigation under CA98 to one under the Enterprise Act (EA), or vice versa.

Other issues

- 1.5 Many respondents argued that a formal consultation period of two weeks before the making of the reference was too short. The revised guidance meets this concern by stating that the OFT will ensure that the length of the total consultation period, formal and informal, is sufficient to enable parties to make representations, without specifying the precise timetable (which will vary from case to case). More generally, some respondents requested further detail on procedures and timetables. We felt unable to meet this request at present, partly because these details may be case specific.
- 1.6 There seemed to be considerable confusion over the distinction between the formal content of a reference to the Competition Commission and the OFT's statement of its reasons for making it. We have attempted to deal with this point by a clarification in paragraph 3.11 of the published guideline. Although the formal reference is likely to be limited to the matters specified in section 133 of the EA, the statement for the reasons for the reference will give as much detail as practicable about possible markets affected and possible features that give rise to anti-competitive effects.
- 1.7 There were a number of requests for more detailed information about the relationship between the EA and, respectively, CA98 and EC competition law. The section of the guidance on EC competition law has been expanded considerably. Some respondents suggested further examples of where the EA might be used instead of CA98. However, we believe that the most important areas have been covered in so far as it is possible to do so without carrying out detailed analyses of particular cases. There is a danger that without such analyses we could inadvertently pre-judge which competition powers are most appropriate.
- 1.8 More generally, when giving examples about market features that might be tackled under the EA we have tried to avoid being too specific about

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what might (or might not) be anti-competitive, thereby pre-judging potential cases.

- 1.9 Finally, there were numerous individual points raised and drafting suggestions made. Although a number of these have been accepted we believe that little purpose would be served by a detailed commentary on each. We would nevertheless like to thank all of those who contributed.