

Market studies

Guidance on the OFT approach



The Enterprise Act 2002 received Royal Assent in November 2002. The competition and consumer provisions came into force during the course of 2003.

The Act makes a number of significant reforms to competition law and consumer law enforcement in the UK. The new provisions work alongside the Competition Act 1998 and various pieces of consumer legislation, largely replacing the Fair Trading Act 1973.

The Act established the Office of Fair Trading (the OFT), replacing the former statutory office of the Director General of Fair Trading. The OFT will apply and enforce the new competition and consumer measures alongside the Competition Commission, the sectoral regulators, the Competition Appeal Tribunal, Trading Standards Departments and others.

Office of Fair Trading,
Fleetbank House,
2-6 Salisbury Square,
London EC4Y 8JX
Telephone 020 7211 8000
Fax 020 7211 8800

Enterprise Act enquiries 020 7211 8181 or
email enterpriseact.enquiries@oft.gsi.gov.uk
web www.oft.gov.uk/enterpriseact.htm

Introduction

This booklet is designed to provide guidance to companies and their advisers and other interested parties on the procedures that the OFT will normally follow when selecting markets for study and in performing such studies. The OFT has published separate guidance on market investigation references and super-complaints, which may also be of interest.

This booklet is not intended to be comprehensive in that it cannot cover every possible set of circumstances. It aims to set out the general principles and framework of operation of the OFT so that firms which have an interest in markets that are being studied, or considered for study, and other stakeholders, including consumer bodies and the Government, will be aware of the broad processes that will be followed.

This guidance on procedures covers a range of topics and should not be regarded as a legal authority. While the booklet does set out certain legal requirements that must be adhered to, many of the processes are not subject to detailed regulations: our approach here is to be proportionate and, wherever possible, open. Where the law provides flexibility, the OFT reserves the right to depart from the general principles set out in this guidance. The OFT may also revise and reissue this guidance in the light of experience and other developments in law and practice.

Contents

Chapter	Page
1 Why does the OFT study markets?	3
2 How does the OFT choose markets to study?	6
3 Types of market study	10
Annexe	
A Form for suggesting markets for the OFT to study	19

1 Why does the OFT study markets?

- 1.1** The OFT aims to make markets work well for consumers¹. We achieve this by promoting and protecting consumer interests throughout the UK, while ensuring that businesses are fair and competitive.
- 1.2** In the White Paper *Productivity and Enterprise, a world class competition regime*², the Government stated its wish for competition authorities to take on a high profile advocacy role, both by advising on the impact of the Government's own laws and regulations on competition; and acting more widely to promote competition in the economy in a variety of ways. The Government saw strong competition contributing to productivity, innovation and economic growth – hence to long-run economic benefits as well as to more immediate and direct consumer benefits.
- 1.3** Market studies were introduced by the OFT as a means of identifying and addressing all aspects of market failure, from competition issues to consumer detriment and the effect of government regulations. As well as looking at particular economic markets, the studies may also relate to practices across a range of goods and services, eg: doorstep selling; the term 'market studies' is therefore not limited to markets in the economic sense.
- 1.4** While most regulators can receive super-complaints and make market investigation references (and guidance on those subjects therefore applies also to them) they are not bound by this guidance. The OFT will usually carry out market studies under section 5 of the Enterprise Act 2002, which relates solely to the OFT and its general functions.
- 1.5** Regulators have responsibility for specific sectors and will be monitoring markets in those sectors on an ongoing basis using a range of powers available to them. While the broad framework set out in this guidance may be useful to them in forming a preliminary view on whether markets in their relevant sectors are working effectively, the procedure that each regulator adopts is a matter for them to determine. It is possible that the OFT might study a market which falls wholly or partly within the remit of a regulator. If so, this would normally be the subject of advance consultation with the regulator concerned and might involve joint working³.
- 1.6** When working effectively, competition involves a process of rivalry between firms who strive to win business by achieving the lowest level of costs and prices, developing new products or services or exploiting their strengths, skills and other advantages to meet customer needs more effectively than competitors.

¹ This aim is published in the OFT's *Annual plan* and on our website at www.of.gov.uk/About/default.htm

² Cm 5233, DTI, July 2001

³ As occurred, for example, in the investigation of doorstep selling relating to energy supply, which was largely taken forward by OFGEM.

- 1.7** This process is good for consumers and firms alike. Competition encourages innovation and diversity of offerings. It also gives a strong incentive for firms to compete on price and quality of customer service. When competition does not work effectively consumers can suffer.
- 1.8** Consumers can also suffer as a result of commercial misconduct such as misleading advertisements, can be disadvantaged by complicated contracts, or can make poor decisions when not given clear information. They can also suffer when products are mis-sold. Consumer protection legislation, which the OFT and trading standards departments enforce, covers these, and other issues.
- 1.9** Government regulations can adversely impact on markets and distort or restrict competition by, for example, creating unnecessary barriers to entry. They can have unintended consequences and affect market structures and dynamics, thereby holding back innovation and progress. The OFT's role to advise the Government on the effects of regulation is a key difference between market studies and other OFT work. It is given force by the Government's commitment to respond publicly to OFT advice within 90 days of the OFT report.
- 1.10** Market studies will usually be performed under section 5 of the Enterprise Act 2002 in order to identify whether perceived problems should be addressed through the OFT's other functions. There is a range of possible outcomes of a study including:
- giving the market a clean bill of health (ie: a decision that intervention is not appropriate on the evidence available)
 - publishing information to help consumers
 - encouraging firms to take voluntary action
 - encouraging a consumer code of practice
 - making recommendations to the Government or regulators
 - investigation, or enforcement action against companies or individuals suspected of breaching consumer law or competition law,⁴ and
 - a market investigation reference⁵ to the Competition Commission.
- 1.11** These outcomes are listed broadly in order of the degree of intervention required in the market. The OFT will wish to intervene at the level that it considers most appropriate to the nature of the problem. The legal basis, and nature, of each of these outcomes will be explained in this guidance.

⁴ In this guidance we use the term 'competition law' to refer to the Competition Act 1998, Articles 81 and 82 of the EC Treaty and the criminal cartel offence under the Enterprise Act 2002.

⁵ The OFT may also accept undertakings in lieu of making a reference.

1.12 Market studies should not be confused with the market investigations carried out by the Competition Commission. The OFT is able to make a market investigation reference to the Competition Commission when it suspects that a feature or combination of features of a market prevents, restricts or distorts competition⁶. If a reference is made, the Competition Commission will conduct a detailed public investigation and reach its own conclusions about the market concerned. The Competition Commission has the power to impose remedies which go beyond the outcomes available from an OFT market study. Further details are available in the Competition Commission's published guidance⁷.

⁶ The OFT published a guidance document on *Market investigation references* (OFT511) in March 2003. It is also available on the OFT website.

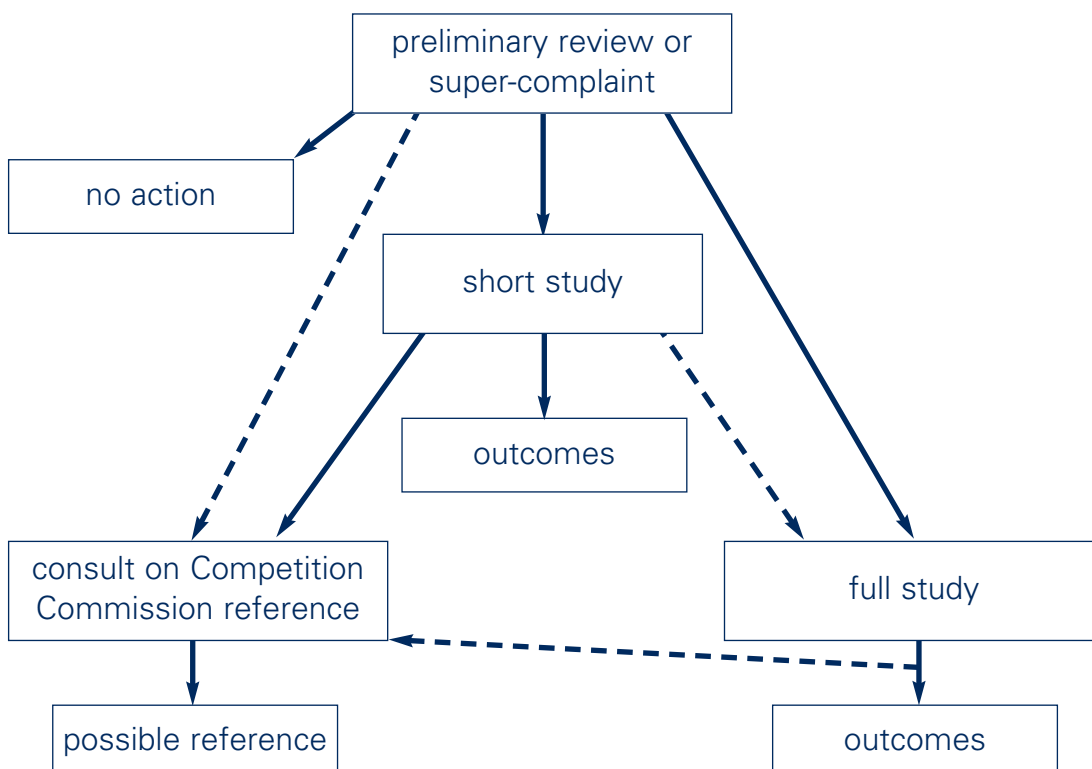
1.13 Most OFT market studies can be classified as:

- short studies (often fact-finding), or
- full studies.

⁷ Available at www.competition-commission.org.uk/rep_pub/rules_and_guide/index.htm

The following diagram gives an overview of the linkages between these studies, preliminary reviews (to select studies) and Competition Commission references.

Diagram 1.1: Market studies process diagram



Solid line = main route
Dashed line = less likely

2 How does the OFT choose markets to study?

Sources of candidates for studies

2.1 The OFT makes use of a wide range of sources to identify possible candidates for market studies. These may include the following:

- information acquired in the course of its own competition or consumer enforcement work
- evidence from enquiries and complaints to the OFT
- suggestions from other interested parties, such as businesses, trade associations or consumer groups
- suggestions made by other government departments, trading standards departments, and regulatory bodies, and
- internal OFT research.

2.2 Market studies may also be launched in response to super-complaints by designated consumer bodies if, on consideration of the complaint, it is felt to meet the criteria for a study⁸.

2.3 Ideas may be generated through research work. In particular, the OFT has commissioned research which has reviewed the possible use of quantitative data (for example, on concentration ratios, churn rates, profitability, and productivity) which could be used in combination to identify markets which might not be working well, and would thus be suitable candidates for study⁹.

2.4 If it is more appropriate to remedy problems using the OFT's enforcement powers such action will be taken; however, a market study, or market investigation reference, approach may be adopted where, for example, the problems identified are industry-wide practices, or for some reason are not susceptible to enforcement action.

Selecting markets for review

2.5 From the list of ideas produced from these sources, the OFT will select those which appear to be the best candidates for study, and conduct a preliminary review into them. This initial selection will take into account factors such as the following:

- the scale and significance of the possible problems/ consumer detriment in the market, or significance to productivity and economic growth

⁸ Super-complaints are assessed in a similar manner to preliminary reviews, subject to the statutory requirement to publish an OFT response within 90 days from the day after receipt - see *Super-complaints: guidance for designated consumer bodies* (OFT514)

⁹ This research was performed by NERA for the OFT and has been published at www.offt.gov.uk/News/Press+releases/Statements/2004/indicators.htm

- the prospects of obtaining evidence and – should a study subsequently be launched – of identifying remedies
- whether the likely benefits from a study would justify the possible cost and disruption to business
- whether the OFT is the most appropriate body to undertake the study, and
- whether a study appears preferable to enforcement action¹⁰.

¹⁰ Enforcement action may still be undertaken if a study reveals evidence that warrants it.

No single criterion is judged in isolation, and all the information is assessed in the context of the particular market.

- 2.6** At this stage, however, depending on the source of the idea, it is recognised that information on these questions may be limited. As a result, a proportion of candidate areas which are selected for a preliminary review will not proceed to a market study.

Preliminary reviews

- 2.7** Preliminary reviews typically take about one month to complete, although this will depend on such factors as the complexity of the market involved, and the number of markets being considered at any one time. Because of their preliminary nature, such reviews are not normally in the public domain, and the OFT will not normally contact external parties such as suppliers and customers in the market concerned. Rather, use will be made of publicly available information (such as company reports and websites, and market research reports), and knowledge of the market held within the OFT; the OFT may contact other government departments, sector regulators and enforcement bodies. In particular it will contact relevant government departments and devolved administrations where there are concerns about regulations distorting the workings of markets.

- 2.8** As part of the preliminary review the team will work closely with enforcement colleagues around the office to ensure that the potential for taking enforcement action is considered.

- 2.9** The OFT will seek to gather further, more detailed information during the preliminary review stage. The kind of information to be collected is likely to vary according to the nature of the concerns which have given rise to the preliminary review, but will typically include the following:

- the value and significance of the market
- details of the firms operating in the market and their profitability

- the types of products and services offered and their prices
- information on market entry and exit
- the type of customers served
- regulation affecting the market
- other public sector involvement, particularly where there are multiple roles such as purchaser, supplier, regulator, or related statutory functions
- details of stakeholders, eg: government departments, trade bodies, consumer bodies with an interest, and
- complaints of trading malpractices or anti-competitive conduct, and information on any enforcement action which has previously been considered or carried out.

2.10 Where appropriate, the OFT will adopt a preliminary view of how the market might be defined on the basis of this information and an assessment will be carried out to determine whether there are grounds to suspect that the market may not be working well. In particular, the OFT will take into account available evidence on any or all of the following issues:

- whether the market is highly concentrated - ie: a small number of firms have a high combined market share
- whether market shares are static – ie: there has been little change in market share over several trading periods
- whether there are high costs or other barriers associated with market entry or market exit
- whether consumers would incur significant penalties (or whether there are significant other costs) associated with changing their suppliers for the goods or services concerned
- whether it is easy or difficult for consumers to gain the information they need about alternative suppliers
- whether consumers are at a disadvantage because markets operate using technical information, or terms of trade that are not transparent
- whether there are any potential adverse impacts on particular groups such as ethnic minorities, the disabled and the elderly
- whether there has been a lack of innovation in the market

- the degree of variation in pricing in the market
- the degree of consistency, and stability in market prices, and
- whether gross profit margins appear high, or productivity appears low.

2.11 Where information is available, and appropriate, comparisons will be drawn with similar markets in other countries.

2.12 The assessment will seek to establish the potential scale of any problem identified, taking into account factors such as the strength of the evidence described above, the size of the market, the number of consumers affected and the extent of the detriment to them, the level of complaints, and the level of concern expressed by third parties such as consumer bodies, business organisations and other sources.

2.13 The assessment will also reconsider the criteria listed in the previous section (scale and significance of the problem, whether the likely benefits outweigh the cost, prospect of obtaining evidence and finding remedies, whether the OFT is the most appropriate body, and whether a market study is preferable to enforcement action) in the light of the further information gathered during the preliminary review.

The decision to launch a study

2.14 On the basis of the assessment made, OFT officials may determine that no further action would be warranted and the case will be closed. Where, on the other hand, significant issues do appear to arise, a short or full market study may be launched, and where appropriate, interested parties informed of the decision.

2.15 A decision to launch a short study will usually be made by the Director of the OFT's Markets and Policy Initiatives Division. Decisions to launch full studies will be made by the OFT Board.

3 Types of market study

Short or full study?

- 3.1** Most market studies can be categorised as either 'short' or 'full' market studies. The OFT aims to complete short studies in three to six months, while full studies may take around a year. The decision whether to conduct a short or full study will take into account factors such as the following:
- the nature of the market in question
 - the breadth and complexity of the issues to be considered
 - the amount of information already available, and
 - the scale of the consultation and research (including external consultancy) to be conducted.
- 3.2** The potential outcome of the study will also be a factor. In particular, a short study is more likely if it can be anticipated that – were the criteria to be met – a market investigation reference to the Competition Commission would be made.
- 3.3** A short study is also likely to be considered appropriate where a preliminary review has been unable to obtain enough information to determine what further action, if any, might be called for but where problems are still suspected and where further information can only be gathered by publicising the OFT's interest in a particular market. In such cases the study will be essentially fact-finding in nature. It is possible that a short study of this type will lead to a conclusion that a further, full, study should be conducted. In such cases the availability of the information gathered during the short study should mean that the subsequent full study should require less than a further year to complete.

Procedures

- 3.4** Studies will usually be announced at the outset with a news release indicating the OFT's expected timescale for completion. If the announcement could be market sensitive it will be made to the Stock Exchange through the Regulatory News Service (RNS). The OFT will usually publish the study's 'terms of reference' which indicates the scope of the study and the particular points that interested parties are asked to address. The OFT may wish to examine particular issues in more detail, or may wish to consider related issues that emerged during the preliminary review but which could not be pursued in that context.

- 3.5** Early in the course of a study the OFT will write to a range of stakeholders who are associated with the market to seek factual information and views. At the preliminary review stage (paragraph 2.10) the OFT will assess the potential adverse impacts on particular groups such as ethnic minorities, the disabled and the elderly. Where these are regarded as significant in the context of the study, the OFT will ensure that the appropriate stakeholder groups are contacted with specific questions to inform the study.
- 3.6** We will often send detailed questionnaires to interested parties to gain a full understanding of how the particular markets work and to shed light on the issues raised and how concerns might be addressed. There will usually be a specified timetable for a reply, adherence to which will be highly desirable if the study is to be completed on time and to reach reliable conclusions.
- 3.7** The OFT may also conduct meetings, structured interviews and telephone surveys. In consumer markets the OFT may commission 'mystery shopping' exercises to gauge the way the market works in practice.
- 3.8** All studies are subject to internal quality control, and check and review procedures, including assessment by a cross-office steering group made up of senior OFT officials. The steering group reviews, and assists with, decisions on all aspects of the study, including scope and outcomes.
- 3.9** The OFT may commission specific research from consultants who will be selected by a competitive tender process. In selecting potential bidders, as well as in selecting contractors, the OFT will have regard to potential conflicts of interest. It will wish to ensure that contractors are able to demonstrate the capability to handle commercially sensitive information in accordance with the provisions of the Official Secrets Act 1989, Data Protection Act 1998 and Enterprise Act 2002.
- 3.10** The OFT will publish an indicative timescale for completion of the study, based upon on the preliminary review (or super-complaint). The timescale will take account of the perceived complexity of the issues, the extent to which new information needs to be gathered and whether research needs to be commissioned. The timetable may be affected by other factors: for example, analysis of the (new) information may reveal additional issues which require scrutiny, or

¹¹ The quotation is taken from section 169(4) of the Enterprise Act which relates to consultation (or not) with parties prior to a decision on a market investigation reference.

external research may not be delivered when expected. The OFT will aim to keep key stakeholders informed on timing issues, and may, on occasion, make interim statements. This is subject to the need, in certain circumstances, 'to keep what is proposed, or the reasons for it, confidential'.¹¹ The OFT may also need to preserve confidentiality under other circumstances for reasons of share price sensitivity.

Publication of reports

3.11 The OFT will publish a report of its findings in both a short and full study. Where found, we will highlight significant differences in the operation of the market relating to particular groups such as ethnic minorities, the disabled and the elderly. If the sole outcome of a study is a market investigation reference the report will take the form of the reference document and the reasons for making a reference.

3.12 Members of the OFT project team may approach those who have given evidence to discuss the excision of potentially sensitive information¹² prior to publication.

3.13 OFT reports and reference decisions will normally be published with an accompanying news release highlighting significant conclusions.

¹² This will include information which if disclosed might significantly harm the interests of a business or an individual (section 244(3) of the Enterprise Act).

Legal basis for gathering information and publishing reports or decisions

3.14 The OFT has the power to request information under section 5(1) of the Enterprise Act 2002, and this will normally be the legal basis for any requests for information made in the course of market studies. Section 5 states that 'the OFT has the function of obtaining, compiling and keeping under review information relating to the carrying out of its functions'. These functions include, amongst others, the enforcement of consumer regulations, the promotion of consumer information and education, the enforcement of competition legislation and making market investigation references to the Competition Commission.

3.15 The OFT will normally publish market study reports using its powers in section 4(4) of the Enterprise Act, which state that the OFT 'may prepare other reports in respect of matters relating to any of its functions and may arrange for any such report to be published'. The OFT has certain other functions relevant to market studies, including a function of publishing information and advice for the benefit of the

public¹³ and of making proposals or giving advice to ministers or public bodies.¹⁴

3.16 When a study appears to raise competition concerns the OFT may require information for the purpose of deciding whether to make a market investigation reference to the Competition Commission, or for the purpose of deciding about undertakings in lieu of such a reference. If the relevant criteria are satisfied¹⁵ the OFT has the power to require any person carrying on a business to provide information, including forecasts¹⁶. When using these formal powers, the OFT will always set out the legal basis of the requirement, and will inform recipients of the possible consequences of non-compliance.¹⁷ There is a formal procedure for consultation with the parties who would be mainly affected by a reference decision.¹⁸

¹³ Section 6 of the Enterprise Act.

¹⁴ Section 7 of the Enterprise Act.

¹⁵ See *Market investigation references* (OFT511).

¹⁶ Section 174 of the Enterprise Act.

¹⁷ Section 174(6) of the Enterprise Act.

¹⁸ See section 169 of the Enterprise Act and the OFT guidance on *Market investigation references* (OFT511).

¹⁹ See *The overseas disclosure of information – consultation paper* (OFT507).

Disclosure of information

3.17 Part 9 of the Enterprise Act 2002 and the Data Protection Act 1998 restrict the ability of the OFT to disclose information it receives in the course of its work.¹⁹ In particular, the Enterprise Act 2002 contains a general prohibition against the disclosure of information which relates to the affairs of a business or an individual, unless disclosure is otherwise permitted – for example, because the parties have given their consent. It is a criminal offence to disclose information in breach of the Enterprise Act's provisions and there are similar restrictions on disclosure in other relevant legislation.

Outcomes

3.18 The principal outcomes of market studies are:

- giving the market a clean bill of health
- publishing information to help consumers
- encouraging firms to take voluntary action
- encouraging a consumer code of practice
- making recommendations to the Government or sector regulators
- investigation and enforcement action against companies suspected of breaching consumer law or competition law, and
- a market investigation reference to the Competition Commission.

Any of these outcomes may follow either a short or full study. The OFT would, however, aim where practicable to avoid waiting until the end of a full study before deciding that either enforcement action using its own powers, or a market investigation reference to the Competition Commission – both of which would be likely to require significant further investigation, with consequences in terms of resources and continuing uncertainties for those concerned - was an appropriate way forward. In all cases the OFT has a general intention to seek to avoid an ongoing series of sequential investigations or studies.

3.19 The following paragraphs discuss the circumstances in which the OFT may regard each of these outcomes as appropriate.

Clean bill of health

3.20 The OFT will study markets in order to test particular allegations or propositions, and may also examine new claims which are made during the study. If, as a result of our study, we conclude that the allegations are unwarranted, unsubstantiated, or insufficient to justify OFT intervention we will normally give the market a clean bill of health and will take no further action at that time. Such markets may be revisited, however, if new evidence is brought to our attention.

Information campaigns

3.21 The OFT may publish information and give media interviews to raise consumer awareness when we believe that they could make better purchasing decisions if they were better informed. We might publish information leaflets indicating the factors to consider before making particularly significant purchases, for example. We may also seek to inform consumers if a study suggests that consumers are unaware of their existing rights in a particular area.

3.22 Information campaigns may be the sole new activity to result from a market study but will often be conducted in conjunction with other outcomes, such as voluntary action by firms.

Voluntary action by firms

3.23 The OFT will encourage firms to take voluntary action where we perceive there is an issue to be addressed but do not believe enforcement action would be appropriate (or proportionate).

3.24 An example was the recommendation to firms selling PCs to give clearer information about the availability and costs of using telephone support services if customers needed advice following the purchase. This recommendation arose from a study which found that many consumers seriously underestimated their likely use, and hence the costs, of such support services.

Encouraging a consumer code of practice

3.25 The OFT has the power to approve consumer codes of practice²⁰ which are produced by code sponsors²¹ and which safeguard or promote the interests of consumers. There is a two-stage process of approval, which is described in detail in OFT publications²². A key element of such codes is an independent mechanism for considering complaints by consumers about particular retailers and deciding on redress (if appropriate).

3.26 The OFT is likely to encourage a code of practice if a market study finds that there is a significant problem with consumer complaints without a specific breach of competition or consumer law. We will also be likely to take this route if we consider that the industry concerned wants to make things better for consumers.

²⁰ Section 8 of the Enterprise Act 2002.

²¹ Code sponsors will usually be trade associations or similar bodies.

²² See *Core criteria for consumer codes of practice* (OFT390) and *The OFT's Consumer Codes Approval Scheme: guidance for consumer organisations, enforcement bodies and advisory services* (OFT631).

Making recommendations to the Government or sector regulators

3.27 The OFT is likely to make recommendations to the Government, sector regulators or other public bodies when we believe that they are best-placed to take action to remedy the problems identified in the study through changes to the law or regulatory practice.

3.28 There will be some instances, such as the report on the regulation of licensed taxis and PHV services²³, in which an OFT study focused on the effect of particular regulations that only the Government can change. It is self-evident that reports to the Government are the most likely outcome from such studies.

3.29 But there will also be other circumstances in which the OFT may identify government regulations or licensing as affecting the operation of particular markets even when the main focus of the study has concerned the behaviour of firms and their customers. In these circumstances the OFT may make recommendations for changes which we believe will improve the working of markets, having regard to any relevant published policy objectives.

²³ See www.of.gov.uk/Business/Market+studies/taxis.htm

²⁴ See www.dti.gov.uk/ccp/topics2/marketreport.htm

3.30 It is important to note that a report to the Government is not the only possible outcome of a study of a market affected by regulations. The OFT may make a market investigation reference if we have reasonable grounds to suspect that one or more features of the structure of the market prevents, restricts or distorts competition.

3.31 Where an OFT market study report makes regulatory recommendations, the Government's response is coordinated by the Department for Trade and Industry (DTI)²⁴ and published within 90 calendar days.

Investigation and enforcement action

3.32 A market study may uncover evidence which indicates a breach of competition law or of consumer protection legislation. If so, the evidence may be transferred to the part of the OFT which deals with the legislation concerned, and we may investigate or take enforcement action under these other powers. We may also transfer such information to another public body (eg: a sector regulator) with concurrent powers. In some cases this will be the principal action arising from a market study, while in others, there may be further action, or continuing study, relating to other aspects of the market.

3.33 We do not expect such action to occur regularly in the OFT's own-initiative studies as the potential for enforcement action will have been considered before a market study is commenced (see paragraph 2.8).

Market investigation references to the Competition Commission

3.34 The OFT is able to make a market investigation reference to the Competition Commission when we have reasonable grounds to suspect that a feature or combination of features of a market prevents, restricts or distorts competition.

3.35 In considering whether a market should be the subject of a full OFT study or referred to the Competition Commission the OFT will weigh a number of factors including:

- the nature and significance of the competition problems that the OFT suspects may exist in the market concerned
- whether a reference would be a proportionate response to the scale of the competition problems identified

- whether remedies are likely to be available or whether a Competition Commission report might provide a useful contribution, and
- whether the OFT is in a position to fully address the concerns itself.

These are discussed in the paragraphs below.

- 3.36** Where matters are unclear at the end of a short study (eg: for lack of clear-cut evidence) but the OFT considers there to be significant concerns in the market, we will consider whether or not we are likely to gain significant insight ourselves during a full study, or whether the Competition Commission's powers to require information and impose remedies will be more appropriate (assuming the reference test is satisfied).
- 3.37** An OFT study will often be appropriate if the outcome is perceived as likely to lead to action within the OFT's own areas of responsibility. In particular, where a study is considered likely to lead to OFT enforcement action, recommendations to consumers, or involve voluntary action by firms, including, perhaps, a code of practice, as the sole necessary outcomes, the OFT considers that a reference will not usually be appropriate. A reference may be made, however, if the OFT suspects that a competition problem could not be adequately or appropriately addressed under our competition enforcement powers.
- 3.38** Where the OFT considers that the likely outcome will be a report to the Government recommending changes to regulation because of perceived competition problems we will consider whether to conduct a full study ourselves or to make a reference. We will often study such markets ourselves, when we consider there may be scope for consumer information campaigns as part of the outcome.
- 3.39** A market investigation reference may be appropriate if one of the remedies available to the Competition Commission²⁵ appears to be a feasible outcome. Such remedies may not be available to the OFT except as undertakings in lieu of a reference, which requires the agreement of the parties. The Competition Commission may negotiate undertakings or can impose orders if it finds an adverse effect on competition following a reference.

²⁵ The possible remedies are listed in Schedule 8 to the Enterprise Act.

- 3.40** Paragraphs 3.35 to 3.39 above should be read in the context that a reference may also be made where the competition problem occurs in complex markets, where a reference may be made because the Competition Commission has stronger, and more wide-ranging powers to require information than those available in an OFT market study. A reference may also be made where the greater resources that the Competition Commission is able to apply to each investigation are considered appropriate, or where its more formal (and sometimes public) evidence-taking is felt to be particularly suitable.
- 3.41** Before making any reference decision we will ensure that in our opinion the legal test for reference is met and that the relevant procedures have been followed. These are discussed in our published guidance on *Market investigation references* (OFT511). Decisions to make market investigation references are taken by the OFT Board.

Annexe A

Form for suggesting markets for the OFT to study

- A.1** We welcome reasoned suggestions of UK markets that we should consider for study. In order to facilitate the process of making such suggestions we reproduce below a form which may be used to submit them. An electronic version of this form is available on the OFT website, whereby suggestions can be emailed directly to the preliminary review team.
- A.2** As indicated in Chapter 2, the OFT receives suggestions for market studies from a variety of sources. All suggestions, from whatever source, are subject to scrutiny and a prioritisation process, so we cannot guarantee that any individual suggestion will be selected for study. Suggestions received from external sources will, however, be acknowledged, and we will contact you if we require further information or if we decide to carry out a study into the market you have suggested.

Market studies: suggestion for OFT consideration

Electronic version available at www.offt.gov.uk

Please send to marketstudyideas@oft.gsi.gov.uk or Market Study Ideas (MPI4), Office of Fair Trading, Fleetbank House, 2-6 Salisbury Square, London EC4Y 8JX

Your name, organisation and contact details:

(Please state if you would like your organisation's identity kept confidential)

Market for consideration:

Nature of the problem for consumers or working of the market:

Reasons why the problem and the market are important:

(Eg: indications of market size)

Whether laws, regulations or public sector involvement are part of the problem: *(Please give details)*

Supporting information: *(Please attach any supporting evidence you have available, or set out sources if these are readily accessible)*

Further assistance: *(Please indicate if you or your organisation would be able to offer further evidence or analysis – broadly along the lines required for super-complaints²⁶ – if this market area is felt to be a promising one for consideration)*

²⁶ See the annexe of *Super-complaints: guidance for designated consumer bodies* (OFT514).

Enterprise Act publications

The OFT has published a series of guidance booklets on various aspects of the Act. New guidance may be published and the existing guidance revised from time to time. For the most up-to-date information, go to www.offt.gov.uk

OFT Enterprise Act publications available as at November 2004

Overview of the Enterprise Act: the competition and consumer provisions
June 2003 (reference: OFT518)

Competition disqualification orders
May 2003 (reference: OFT510)

Market investigation references: guidance about the making of
references under Part 4 of the Enterprise Act
March 2003 (reference: OFT511)

Enforcement of consumer protection legislation: guidance on
Part 8 of the Enterprise Act
June 2003, with addendum September 2003 (reference: OFT512)

The cartel offence: guidance on the issue of no-action letters for individuals
April 2003 (reference: OFT513)

Super-complaints: guidance for designated consumer bodies
July 2003 (reference: OFT514)

Powers for investigating criminal cartels
January 2004 (reference: OFT515)

Mergers: substantive assessment guidance
May 2003, with addendum October 2004 (reference: OFT516)

Mergers: procedural guidance
May 2003 (reference: OFT526)

The overseas disclosure of information
Consultation paper issued April 2003 (reference: OFT507)

All of these guidance booklets can be ordered or downloaded from the OFT's website at www.offt.gov.uk or you can request them by:

phone 0870 60 60 321

fax 0870 60 70 321

email oft@eclogistics.co.uk

post EC Logistics, Swallowfield Way, Hayes, Middlesex UB3 1DQ

Published by the Office of Fair Trading
Printed in the UK on paper comprising 75% post-consumer waste and 25% ECF pulp
Product code OFT519
Edition 11/04 Printed 11/04/3,000
© Crown Copyright 2004