

Market studies guidance

Consultation

May 2009

OFT1080con

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Scope of this consultation

Topic of this consultation	The Office of Fair Trading's Market Studies Guidance. The current version of the guidance on the OFT's approach to market studies was issued in 2004. The topic of this consultation is a revision of the current guidance. The revision brings the guidance up to date, reflecting the processes and principles the OFT applies to its market studies work.
Scope of this consultation	The consultation is intended to give stakeholders the opportunity to provide views and comments on the OFT's revised Market Studies Guidance.
Geographical scope	There is no specific geographic dimension to this consultation.
Impact assessment	Not applicable for this consultation.

Basic information

To	The consultation is aimed at all those who have an interest in the OFT's market studies. In particular, it may be of interest to businesses and their legal advisors, and organisations representing consumers' interests.
Duration	12 May 2009 to 4 August 2009
Enquiries	By telephone: Natalie Lam 020 211 8129 By e-mail to: Natalie.lam@oft.gov.uk By fax to: Natalie Lam 020 211 8757 By post to: Natalie Lam Markets Policy and Remedies Office of Fair Trading Fleetbank House 2-6 Salisbury Square London EC4Y 8JX

How to respond	Consultees responding to this consultation are asked to supply a brief summary of the interests or organisations they represent. We ask that any suggested comments or changes to the document be made in writing (by email, or alternatively by fax or letter).
Additional ways to become involved	We may meet with stakeholders who wish to discuss their views in person.
After the consultation	We will collate responses to the consultation and publish a formal summary of these, along with a final version of the Market Studies Guidance, in September 2009. The final version will reflect how we address the responses to the consultation. All consultees will be informed of the publication of the summary of responses and the final version of the guidance. Both documents will be available on the OFT website: www.of.gov.uk
Compliance with the <i>Code of Practice on Consultation</i>	This consultation complies with the Code of Practice on Consultation.

Background

Getting to this stage	In 2007, the OFT undertook a review of its markets work which included reviewing its work on market studies. It was determined that the current guidance was out of date as the OFT's principles and processes with respect to market studies had evolved. At the OFT's 4 June 2008 Market Studies Conference, the chairman of the OFT, Philip Collins, announced that the Market Studies Guidance would be updated.
Previous engagement	During its markets work review, the OFT sought feedback on its market studies work from groups representing businesses representatives, legal advisors, consumer groups and other stakeholders.

Feedback about this consultation

If you wish to comment on the conduct of this consultation or make a complaint about the way this consultation has been conducted, please write to:

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A copy of the key criteria from the Better Regulation Executive's *Code of Practice on Consultation* can be found in Annexe B.

Data use statement for responses

Personal data received in the course of this consultation will be processed in accordance with the Data Protection Act 1998. All information received (including personal data) is subject to Part 9 of the Enterprise Act 2002. We may choose to refer to comments received in response to this consultation in future publications. In deciding whether to do so, we will have regard to the need for excluding from publication, as far as that is practicable, any information relating to the private affairs of an individual or any commercial information relating to a business which, if published, would or might, in our opinion, significantly harm the individual's interests, or, as the case may be, the legitimate business interests of that business. If you consider that your response contains such information, that information should be marked 'confidential information' and an explanation given as to why you consider it is confidential.

Please note that Information provided in response to this consultation, including personal information, may be the subject of requests from the public for information under the Freedom of Information Act 2000 (FOIA). In considering such requests for information we will take full account of any reasons provided by respondents in support of confidentiality, the Data Protection Act 1998 and our obligations under Part 9 of the Enterprise Act 2002.

If you are replying by email, these provisions override any standard confidentiality disclaimer that is generated by your organisation's IT system.

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1 INTRODUCTION AND CONSULTATION QUESTIONS

- 1.1 In 2004, the OFT published its first guidance document on how it conducts market studies.¹ At that time, market studies conducted under the Enterprise Act 2002 were a relatively new tool for the OFT. Since then the principles and processes the OFT uses when selecting markets to study, collecting information for market studies and evaluating market studies have evolved.
- 1.2 In 2007, the OFT carried out an internal review of all its markets work such as market studies and market investigation references. The purpose of the review was to collate the results from our markets work and identify ways to improve its efficiency and effectiveness. As well as seeking the views of OFT staff, the review asked for feedback from stakeholders by way of a questionnaire. In terms of the market studies guidance, the review concluded that the existing guidance needed to be revised to reflect current practice. The OFT's intention to update the market studies guidance was made public at an OFT conference *Market studies: finding and fixing problem markets*, held on 4 June 2008.
- 1.3 The guidance presented in this consultation document follows a similar structure to the 2004 guidance. It begins with an introduction to the guidance and then provides an explanation of why the OFT conducts market studies. The guidance then sets out the principles the OFT uses to select markets for study. It explains how the OFT manages market studies projects once a decision has been taken to proceed with a study. The guidance identifies the potential outcomes for a market study. The consultation guidance also contains a chapter that explains how the OFT evaluates its market studies work, an area not covered in the 2004 guidance.

¹ *Market Studies: Guidance on the OFT approach* (OFT519).

www.of.gov.uk/shared_of/business_leaflets/enterprise_act/oft519.pdf

- 1.4 The content of the guidance presented in this consultation document reflects the OFT's current approach to market studies. However, it does not introduce new policies or procedures. The guidance consolidates recent changes in the OFT's general policies and procedures that affect market studies. For example, in Chapter 3, which describes how the OFT selects markets for study, reference is made to the OFT's prioritisation principles. Following a public consultation, the OFT introduced these principles in October 2008. The principles are used to inform decisions about which projects and programmes the OFT undertakes across all areas of its responsibility.
- 1.5 The purpose of this consultation is to obtain feedback on how the guidance is presented and how clear the content is so that we can ensure its usefulness to its audience. To this end, the consultation questions are as follows:
- Does the guidance cover all aspects of the OFT's market studies work that you think it should? If not, what aspects are missing?
 - Does the guidance contain the right level of detail?
 - Does the guidance use the appropriate language?
 - Are there better ways, for example through the use of flowcharts, we can use to describe our approach to market studies?
 - Will you use this guidance? If not, why not?
- 1.6 The format of the final guidance may be different from that of this consultation document. For example, footnotes that appear at the bottom of pages in this document may be placed in the side margins, and headings and sub-headings will appear in a different colour. If you have any formatting suggestions that will improve how we present the guidance, please provide them in your response to this consultation.

2 INTRODUCTION TO THE GUIDANCE

2.1 This guidance is designed to inform businesses and their advisers and other interested parties how the OFT conducts market studies. The guidance is divided into five sections answering the following questions:

- Why does the OFT conduct market studies?
- How does the OFT choose markets to study?
- How does the OFT manage market studies?
- What are the outcomes of market studies?
- How does the OFT evaluate market studies?

2.2 This guidance is not intended to be comprehensive in that it cannot cover every possible set of circumstances. It aims to set out the general framework the OFT uses to conduct market studies so that businesses that have an interest in the markets we study, and other stakeholders including consumer bodies and the Government, will be aware of the processes and principles that will be followed.

2.3 This guidance should not be regarded as a legal authority. While it does set out certain legal requirements that must be adhered to, many of the processes described are not subject to detailed regulations. The OFT's approach is to be proportionate and, wherever possible, open. However, where the law allows 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.

2.4 This guidance is part of a series of guidance on the Enterprise Act 2002. This series includes guidance on market investigation references and super-complaints.

2.5 Information about the OFT's current and completed market studies can be found on the OFT website:

www.oft.gov.uk/advice_and_resources/resource_base/market-studies/

2.6 The OFT welcomes ideas for market studies from stakeholders. You can provide your ideas by completing and sending us a form that can be downloaded from our website:

www.oft.gov.uk/advice_and_resources/resource_base/market-studies/

3 WHY DOES THE OFT CONDUCT MARKET STUDIES?

The purpose of market studies

- 3.1 The OFT aims to make markets work well for consumers. It achieves this by promoting and protecting consumer interests throughout the UK, while ensuring that businesses are fair and competitive.
- 3.2 Typically, market studies are examinations into the causes of why particular markets are not working well for consumers, leading to proposals as to how they might be made to work better. They take an overview of regulatory and other economic drivers in a market and patterns of consumer and business behaviour.
- 3.3 As well as taking a look at particular economic markets, market studies can relate to practices across a range of goods and services, for example, doorstep selling. The term 'market studies' is therefore not limited to markets in the economic sense. The OFT may also conduct market studies to improve its knowledge of markets or practices, or to look at developing markets, for example where the potential risks to consumers may be high, or where there may be potential barriers to entry.
- 3.4 The geographic scope of many market studies will be the United Kingdom. However, there may be some cases where a market study focuses on a particular part of the UK.
- 3.5 When markets are working well, firms compete to win business by achieving the lowest level of cost and prices, developing better products and services or exploiting their strengths, skills, and other advantages to meet consumers' needs more effectively than their rivals. This process encourages innovation and provides consumers with increased choice. Competition is enhanced when consumers are empowered to shop around through access to readily available and accurate information about products and services.

- 3.6 Markets that are not working well can result in serious negative effects for consumers, businesses and the economy. For example, consumers may be unable to make informed choices about prospective purchases, businesses may be deterred from improving their products or entering the market and productivity in the sector may be undermined.
- 3.7 Through gathering intelligence from a range of sources, the OFT can identify markets which appear not to be working well. A market study can then examine whether there is a problem, and if it finds there is, look at its effects, and the causes of those effects, and consider how those causes may be best addressed by the most proportionate means.
- 3.8 As well as investigating adverse effects on competition caused by business and consumer behaviour, market studies can also examine restrictions on competition that can arise through Government regulation or public policy. Whether intentionally or not, public sector restrictions may create barriers to entry into markets, distort the conditions under which market players compete, prevent competitive markets from developing, and even take markets or sectors outside the scope of competition scrutiny altogether.
- 3.9 Market studies can also be used to examine issues in markets in which public sector bodies operate as suppliers. Market studies can also investigate markets where the public sector acts as a customer, where greater competition can lead to better value for money for the taxpayer.
- 3.10 In the White Paper *Productivity and Enterprise: a world class competition regime*, 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 by promoting competition.² The Government saw

² *Productivity and Enterprise: a world class competition regime* (White Paper) Department of Trade and Industry, 2001. Available from the UK Government Official Document website: www.archive.official-documents.co.uk

strong competition contributing to long-run national economic benefits by improving productivity as well as delivering more direct consumer benefits.

- 3.11 By identifying ways of making markets more competitive and improving consumer welfare, market studies not only benefit consumers, they can also have positive effects on productivity. Competition is a driver of productivity. By encouraging markets to be more competitive, market studies can enhance markets' long-run efficiency.³
- 3.12 Market studies lead to a range of outcomes. They may conclude that, at the time of the study, a market can be given a clean bill of health in that the initial concerns about the consumer detriment are not substantiated by the information collected over the course of the study. Where the market is found not to be working well, there are a number of options the OFT will consider to address the causes. These may include improving the quality and accessibility of information for consumers, encouraging businesses in the market to self-regulate, making recommendations to Government to change regulations or public policy, taking competition or consumer enforcement action, or making a market investigation reference to the Competition Commission. These outcomes are discussed in Chapter 6.

Market studies and the OFT's other tools

- 3.13 Market studies are conducted under the OFT's general function in section 5 of the Enterprise Act 2002, which includes the functions of obtaining information and conducting research. Market studies are one of a number of tools at the OFT's disposal to address competition or

³ The OFT paper *Productivity and Competition* provides a detailed examination of the relationship between productivity and competition.

www.offt.gov.uk/shared_offt/economic_research/oft887.pdf

consumer protection problems, alongside its enforcement and advocacy activities. The OFT may also use its functions under section 5 to carry out research into markets-related issues which is not covered by this guidance, because its outcomes do not directly affect stakeholders, so that the same level of transparency and stakeholder engagement are not appropriate.⁴

- 3.14 Where there is a clear case of a breach of competition or consumer protection law by an individual business, taking enforcement action will usually be preferred over commencing a market study. In many cases it will be evident from the outset of the OFT's work that enforcement action is the most appropriate way of dealing with conduct that comes to the attention of the OFT, provided that the issue is sufficiently serious to warrant OFT intervention. However, in some cases market studies may uncover evidence that leads to enforcement action being taken.
- 3.15 Enforcement action may, however, not address all of the root causes of any problem, or behaviour across a whole market or markets. Market studies can look beyond individual abuses of dominance, agreements that reduce competition, or breaches of specific consumer protection legislation, and consider all aspects of market structure and conduct. This holistic perspective allows for the examination of whole markets to assess the best basis and means to remedy problems. Looking at the whole market also provides the opportunity to address factors that may affect productivity which are beyond the scope of enforcement tools.
- 3.16 Market studies are also the tool that best links the OFT's competition and consumer protection responsibilities. Market studies consider the relationship between consumer behaviour in a market, the behaviour of firms in that market and the market's structure. By looking at these

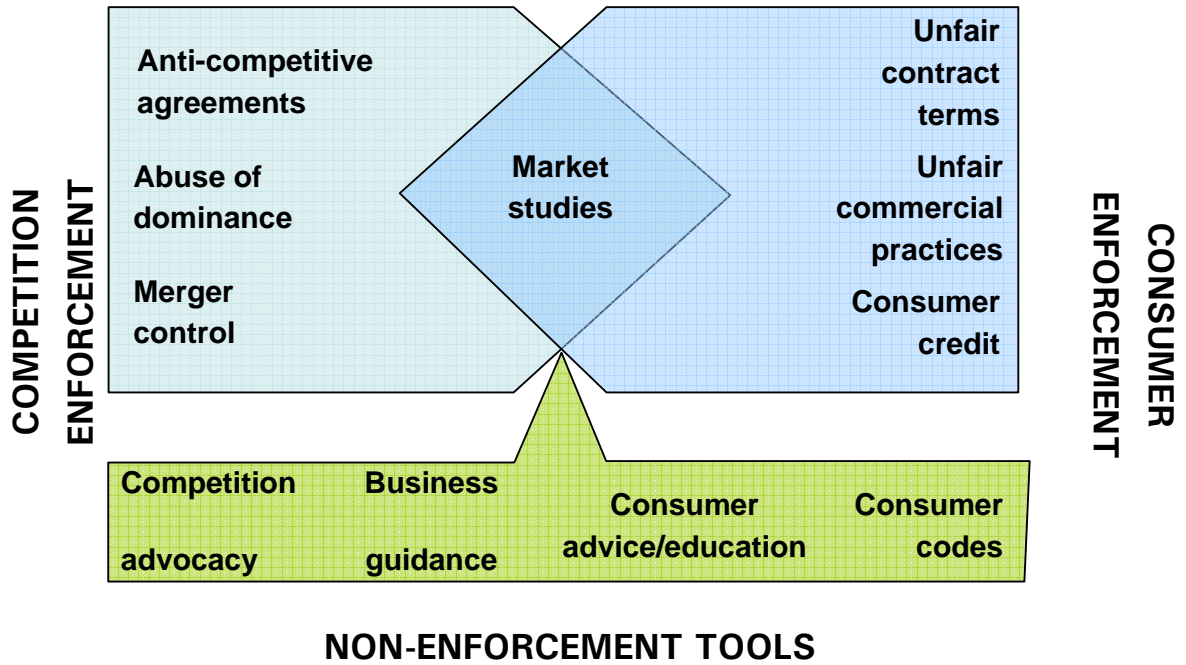
⁴ See, for example, the economic and other research reports at: www.offt.gov.uk/advice_and_resources/publications/reports/

relationships, the OFT can determine whether action that will encourage changes to consumer behaviour, business behaviour or both will best address market problems.

- 3.17 As Government regulation or policy are not typically susceptible to enforcement action, market studies can be the best response to concerns regarding markets where public restrictions may be distorting a market or chilling competition. The Government welcomes advice from the OFT on the impact of laws and regulations on competition. It has made a commitment to consider the advice presented in the OFT's market study reports and to respond to that advice within 90 days.⁵
- 3.18 Diagram 3.1 shows the central role that market studies play in the work of the OFT. Market studies complement the OFT's enforcement and non-enforcement work and occupy the interface between competition and consumer protection policy.
- 3.19 The OFT's aim is for market studies work to drive a virtuous circle, in which on the one side informed consumers have the confidence to engage more proactively in markets, helping to drive competition between firms, and on the other vigorous competition drives firms to deliver higher quality, increased choice, greater innovation and lower prices, to the benefit of consumers.

⁵ *Productivity and Enterprise: a world class competition regime* (White Paper) Department of Trade and Industry, 2001.

Diagram 3.1 Market studies and the work of the OFT



4 HOW DOES THE OFT CHOOSE MARKETS TO STUDY?

4.1 The OFT makes use of a range of sources to identify possible markets to study. These may include:

- complaints from businesses and trade associations
- consumer complaints data from Consumer Direct⁶
- suggestions from organisations representing consumer interests
- super-complaints from designated consumer bodies⁷
- suggestions made by other Government departments, local authority Trading Standards Services and regulatory bodies
- OFT concerns based on information acquired in the course of enforcement and advocacy work
- intelligence gathering from publicly available sources, and
- OFT research.

4.2 The leads provided by stakeholders, the monitoring of complaints from businesses and consumers and the OFT's concerns will typically be cross-checked against other information about the market in question. The OFT may carry out an initial assessment of the market by, for example, researching productivity levels, concentration or the numbers of businesses entering and exiting the market. It may review the

⁶ Consumer Direct is the Government-funded telephone and online service offering information and advice on consumer issues: www.consumerdirect.gov.uk.

⁷ For more information on super-complaints please refer to our guidance, *Super-complaints: Guidance for designated consumer bodies*
www.oft.gov.uk/advice_and_resources/publications/guidance/enterprise_act/oft514

market's history of consumer complaints using information from its local authority Trading Standards Services partners and Consumer Direct. It may also assess information about the market from other Government departments and public bodies and review relevant past OFT research.

- 4.3 Following this initial research phase, market study proposals are prepared. A market study proposal typically includes a description of the market and a theory of harm (an identification of the possible problems in the market and an explanation of their possible causes). A proposal typically considers possible remedies, assesses the potential impact the market study may have on consumer welfare and estimates the OFT resources required to carry out the study.
- 4.4 As well as estimating the cost of the study for the OFT, in selecting studies the OFT takes into account the fact that market study outcomes may involve costs to business. As these costs to business will, in all likelihood, be passed on to consumers, the OFT takes into account whether the net effect on consumer welfare of a market study is likely to be positive.⁸
- 4.5 Market study proposals are then considered against the OFT's prioritisation principles. These principles ensure that the OFT's resources are used to produce the greatest benefits for consumers. The principles can be summarised as:
- Impact
 - What is the likely direct or indirect impact on consumers?
 - What are the wider economic benefits?

⁸ The OFT will bear in mind that many of the costs are 'one-offs' whereas the benefits will be felt on an ongoing basis following implementation of any remedies, and may have knock-on effects on other markets. Even market studies that lead to a 'clean bill of health' can bring about benefits to the market in question, for example by removing regulatory uncertainty or promoting consumer confidence.

- Strategic significance
 - Does the work tie in with OFT's strategy and objectives?
 - Is the OFT best placed to act?
 - How would the balance of the OFT's portfolio be affected?
- Risks
 - What is the likelihood of a successful outcome?
- Resources
 - What are the resource implications of doing the work?⁹

4.6 Where appropriate, the OFT may also take into account other relevant factors before making a decision to commence a market study. However, in general, market study proposals are tested against the prioritisation principles and a decision is taken on whether to prioritise a market study proposal for action.¹⁰

4.7 The OFT recognises that markets are dynamic. Market studies will be reassessed against the prioritisation principles if there is a significant change in the market's structure, or conduct in the market, after the study has been launched, where it appears that such changes may affect the original rationale for the study. If such developments significantly alter the priority given to a market study, the OFT may decide to curtail or stop the study. A study may also need to be stopped or suspended if OFT resources need to be diverted urgently to

⁹ The OFT has published a document that provides a detailed description of each of the OFT's prioritisation principles and how they are used:

www.offt.gov.uk/advice_and_resources/publications/corporate/general/oft953

¹⁰ Applying relevant OFT governance rules, including the OFT Board's Rules of Procedure www.offt.gov.uk/shared_offt/board/rules.pdf and authorisations under Schedule 1, paragraph 12 of the Enterprise Act 2002.

other higher priority work.¹¹The OFT would expect to publish a statement of its reasons for not completing any study.

¹¹ Such decisions would be taken according to relevant OFT governance rules (see footnote 10).

5 HOW DOES THE OFT MANAGE MARKET STUDIES?

Project management, transparency and stakeholder engagement

- 5.1 Although market studies differ greatly in terms of subject matter, they are all managed according to the same set of project management principles. The OFT's project management framework is informed by the OFT's public service objectives and project management best practice. Key aspects of the framework are robust planning, clear roles and responsibilities for project team members, a structured project lifecycle and a system for monitoring progress.
- 5.2 The OFT is committed to the principle of transparency. In the context of market studies, transparency means providing timely and useful information to stakeholders. Transparency also means being clear about why a market is being studied, how we intend to study the market and providing accessible explanations about our findings and recommendations to stakeholders and the general public.
- 5.3 Stakeholder engagement means actively consulting, and taking into account the views of, interested parties such as businesses, organisations representing business, consumer groups or Government departments, over the course of the market study. In most cases this will be done informally rather than consulting formally on findings and recommendations. Engagement gives the OFT the opportunity to be clear about the issues we are considering, allowing for more focussed submissions from stakeholders. It also helps the project team gain a better understanding of the market, and increases the likelihood that any recommendations will be accepted by stakeholders.

Stages of market study projects

- 5.4 In general, once a market study has been prioritised for action, there are four project stages that lead to the publication of the market study report. These stages are:
- pre-launch

- launch
- data collection and analysis, and
- informal consultation on findings and recommendations.

The duration of a study depends on many factors including the scale and complexity of the market. The average length of OFT market studies from launch to publication of the report has been around 12 months, but some studies have been as short as five months.

Pre-launch

- 5.5 Having decided to prioritise a market study proposal for action, a project team is formed. Market study project teams vary in size depending on the size and scope of the study. A typical team might consist of three to five staff. This team typically includes input from OFT's legal and economic staff, although the size and composition of the team will vary according to the scale of the project and the specific skills required.
- 5.6 In the pre-launch period, the project team will generally work on the following:
- refining the scope of the project by describing the goods and services that make up the market, and developing the theory of harm and possible remedies
 - reviewing the project proposal assumptions concerning the potential impact the project will have on reducing consumer detriment, and making an impact estimation plan¹²
 - producing a project plan
 - developing a stakeholder management and communication strategy

¹² Chapter 7 gives more information on impact estimation.

- identifying and assessing the risks affecting the study and agreeing the actions required to mitigate those risks, and
- depending on the significance of the study, forming an internal consultative steering committee to offer high level advice to the project team.

Launch

5.7 To launch a market study, the OFT will usually publish a press notice. The press notice will often be accompanied by a short document describing the study in more detail. This may include information on one or more of the following:

- the scope of what the project team intends to study and questions it is considering
- an invitation to make submissions
- contact details of the project team, and
- a timetable and high level milestones for the project.

This material is published on the OFT website.

Data collection and analysis

- 5.8 During this phase of the market study, the project team gathers detailed information about the market in order to test the theory of harm and possible remedies.¹³
- 5.9 Project teams collect data from businesses, consumers and organisations through a variety of means. Questionnaires, surveys and focus groups for businesses and consumers are used when appropriate. Teams may also hold meetings with individual stakeholders either in person or by telephone. Site visits to businesses may also be arranged. To find out about consumers' experience in the market, project teams may conduct 'mystery shopping' exercises.
- 5.10 Project teams may undertake further literature reviews to obtain additional information. They may also obtain information about similar markets in other sectors or countries. This comparative work can help inform analysis and provide ideas for how to address any problems which may be identified.
- 5.11 Quantitative data about the market is used in most market studies. This may be supplemented by qualitative data. Qualitative data can provide insights into the market and therefore lead to better analysis on the part of the project team. Anecdotal comments may also be published in

¹³ Section 5 of the Enterprise Act 2002 provides the legal basis for requests for information during the course of a market study. Section 5(1) 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 the functions in sections 6 to 8 of the Enterprise Act 2002, namely the functions of providing information to the public, of providing information and advice to Ministers, and of promoting good consumer practice. Section 174 of the Enterprise Act also gives the OFT certain investigatory powers that it may use when it believes it has the power to make a market investigation reference, that is when it has reasonable grounds for suspecting that any feature of a market prevents, restricts or distorts competition. These powers are: to require the attendance of parties to give evidence, to require the production of specified documents and to require the supply of specified information (including estimates and forecasts).

market study reports where these will promote a better understanding for readers.

- 5.12 For market studies dealing with public bodies acting as suppliers or customers, or projects focusing on the impact of regulations on competition, the project team will usually collect information from the relevant public bodies by questionnaires and through meetings.
- 5.13 Project teams aim to gather information in a way that imposes the minimum cost to business, and welcome early discussions with parties on alternative ways of collecting necessary data. Where a market study interacts with related work by other regulators and public bodies, the OFT will seek, as far as possible, to work with them to avoid overlaps and duplication, and, where possible, to coordinate information requests.
- 5.14 Market studies may require external consultants to provide additional resource for particular project activities, for example, conducting a survey. External consultants may also be used if specialist skills are required. In selecting consultants, the project team will have regard to potential conflicts of interest, and will also ensure that consultants who are awarded contracts are required to deal with sensitive information in accordance with the Official Secrets Act 1989, Data Protection Act 1998 and the Enterprise Act 2002.
- 5.15 Project teams analyse the results of their data collection and test their theory of harm against the information. Based on this analysis, the team will begin to determine what measures might be most appropriate to address any competition and consumer issues in the market.

Informal consultation on findings and outcomes

- 5.16 In most market studies, the project team will informally discuss its findings and proposed outcomes with stakeholders who will be affected by them. If a large number of stakeholders have been involved, only key stakeholders may be approached to ensure an efficient consultation, although any representations received at this

stage will be considered. This informal consultation process provides an opportunity for the project team to test its analysis of the market and the recommendations it plans to make. Feedback can help the project team refine its recommendations so that they are effective and appropriately targeted.

- 5.17 For projects focussed on the impact of regulations, team members will meet with the relevant Government department or public body to discuss proposed recommendations and how they might best be implemented.
- 5.18 At this stage, the project team may approach those who have provided information to discuss the need for exclusion of potentially sensitive information prior to publication.¹⁴

Publication

- 5.19 Generally, market study reports give a description of the market or practice under consideration and the reasons for carrying out the study, describe the methodologies used to collect and analyse the data, set out the OFT's conclusions on the issues considered, and propose remedies to address any problems which may be identified. The research supporting the report will usually be published in the form of annexes.

¹⁴ In particular commercial information or information relating to the private affairs of an individual which, if disclosed, the OFT thinks might significantly harm the legitimate business interests of a business or the interests an individual (section 244(3) of the Enterprise Action 2002).

- 5.20 The report is published on the OFT website. Publication will usually be accompanied by a press notice. Project team members and OFT officials may give media interviews about the study.¹⁵

Disclosure of information obtained during a market study

- 5.21 In terms of disclosing information the OFT acquires during a market study, 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. The Enterprise Act 2002 provides¹⁶ a general restriction on disclosure of information relating to the affairs of an individual or the business of an undertaking if it has come to the OFT in the exercise of listed functions¹⁷ unless disclosure is otherwise permitted under Part 9. Part 9 sets out a number of permitted gateways for disclosure, including, for example, disclosure for the purpose of facilitating the exercise of a statutory function.

¹⁵ The legal basis on which the OFT published its market study reports is section 4(4) of the Enterprise Act 2002. This section states that the OFT 'may: prepare other reports in respect of matters relating to any of its functions, and arrange for any such report to be published'. In addition, the OFT can also rely on its functions of providing information and advice for the benefit of the public and of promoting good consumer practice (sections 6 and 8 of the Enterprise Act 2002). When market study reports relate to markets involving Government regulations or public bodies, the OFT relies on its function of making proposals or giving other information or advice to Ministers or other public authorities (section 7 of the Enterprise Act 2002).

¹⁶ Section 237 of the Enterprise Act 2002.

¹⁷ Including functions under the Enterprise Act 2002.

5.22 Prior to making any disclosure, the OFT must have regard to the considerations in section 244 of the Enterprise Act 2002.¹⁸ Where necessary, in order to reach an informed view on the application of section 244, the OFT will consult relevant individuals and businesses prior to publication of its report to seek their views on the level and nature of harm that might result from publication of certain information that they have supplied.

¹⁸ The considerations the OFT must have regard to are as follows: the first consideration is the need to exclude from disclosure (so far as practicable) any information whose disclosure the OFT thinks is contrary to the public interest (section 244(2)). The second consideration is the need to exclude from disclosure (so far as practicable) (a) commercial information whose disclosure the OFT thinks might significantly harm the legitimate business interests of the undertaking to which it relates, or (b) information relating to the private affairs of an individual whose disclosure the OFT thinks might significantly harm the individual's interests (section 244(3)). The third consideration is the extent to which the disclosure of information subject to the second consideration is necessary for the purpose for which the OFT is permitted to make the disclosure (section 244(4)).

6 WHAT ARE THE OUTCOMES OF MARKET STUDIES?

6.1 The principal outcomes of a market study are one or more of the following:

- a clean bill of health for the market
- consumer focussed action
- recommendations to business
- recommendations to Government
- investigation and enforcement action, and
- a market investigation reference to the Competition Commission.

6.2 Except in the event of a clean bill of health, the outcomes of market studies generally require follow-up work, either to implement actions which are for the OFT to pursue, or to monitor the implementation of recommendations addressed to others, such as business or Government. This work may be carried out by the original project team, or passed to another team in the OFT.

A clean bill of health

6.3 A market study may conclude that on balance, at the time of the report, the market, or aspects of the way it functions, can be given a clean bill of health. A clean bill of health will mean that some or all of the potential consumer detriment identified during the project proposal stage is not substantiated by the information obtained, or that intervention would not be proportionate to the detriment. Giving a clean bill of health can address public interest or concerns about a market. However, it does not preclude the OFT from revisiting the market at a later date should new information, or a change in market circumstances, suggest that there are concerns about the functioning of the market, and the OFT's prioritisation principles are met.

Consumer focussed action

- 6.4 Consumer focussed action may take the form of an OFT-led information campaign. The objective of such campaigns is to raise consumer awareness so that consumers are able to make better purchasing decisions. The campaign may stress factors that consumers should consider when making a purchase or inform consumers of their rights when transacting with businesses.
- 6.5 Consumer focussed action may involve the OFT working in partnership with organisations that assist consumers and other Government bodies. If the market involves a particular group of consumers, the OFT may work with the most appropriate group to help ensure that the campaign is successful.

Recommendations to business

- 6.6 Where market problems can be addressed through changes to business behaviour, the OFT may make recommendations to business. Recommendations may address a range of issues. Examples include improving how, when and what information on after-sales services is made available to consumers, changes to the standard terms and conditions of consumer contracts and improving avenues for consumer redress in the event of problems or disputes.
- 6.7 The OFT can recommend that businesses in the market develop a code of conduct or improve an existing one. Codes of conduct may be appropriate if the market study finds a significant number of consumer complaints and problems having those complaints resolved. As codes are voluntary, the OFT will be more likely to recommend a code if the businesses concerned want to make improvements for consumers. The OFT may follow up recommendations on codes of conduct by providing support to trade bodies to ensure their codes address the issues identified in the market study report. Where appropriate, the OFT may

work with relevant trade bodies to give OFT approval to a code of practice under its Consumer Codes Approval Scheme.¹⁹

Recommendations to Government

- 6.8 When the OFT concludes that changes in the law, policy and/or regulatory practice are necessary to remedy any problems which may be identified in the market, it will make recommendations to Government departments and/or other public agencies or regulators.
- 6.9 Recommendations to Government are the likely outcome of market studies that examine the effect of regulations in a market, or markets where a public sector agency is a supplier or major customer. Recommendations to Government may also be made when a market study concludes that consumers will benefit from additional protection, especially in markets where the risks of consumer harm are significant.
- 6.10 To promote its recommendations to Government, the OFT will meet with relevant agencies and departments to present findings and answer questions. The Government has committed to responding to the OFT's recommendations within 90 days of the market study report being published.²⁰
- 6.11 The Department for Business, Enterprise and Regulatory Reform (BERR) is responsible for coordinating Government responses where market studies make regulatory recommendations.²¹ The OFT liaises closely

¹⁹ For information on OFT's code approval scheme, please refer to our website: www.offt.gov.uk/oft_at_work/consumer_initiatives/codes

²⁰ The 90 day response time to market studies is a Government commitment made in the White Paper, *Productivity and Enterprise: a world class competition regime*, Department of Trade and Industry, 2001.

²¹ The Department for Business, Enterprise and Regulatory Reform's responses to market studies can be found on the Department's website: www.berr.gov.uk/whatwedo/businesslaw/competition/market-studies/page17610.html

with BERR²² and, where appropriate, other interested Government departments, to monitor how actions on recommendations are progressing.

Investigation and enforcement action

6.12 Since the likelihood of enforcement action being the most appropriate means of addressing the harm identified is considered at the selection stage, such action would not normally be expected to be an outcome of market studies. The possibility of such action cannot, however, be ruled out should data obtained during the course of a study indicate possible breaches of competition law or consumer protection legislation, or if it is concluded that enforcement action is in fact necessary to address the issues identified.²³

Market investigation reference to the Competition Commission

6.13 When the findings of a market study by the OFT give rise to reasonable grounds to suspect that a feature or combination of features of a market in the UK prevents, restricts or distorts competition,²⁴ and a market investigation reference appears to be an appropriate and proportionate response, the OFT is able to make a market investigation reference to the Competition Commission.²⁵ Decisions to make market

²² Where recommendations are to the devolved administrations, the OFT work with the relevant officials to promote the recommendations and monitor how they are acted upon.

²³ Guidance and policy statements describing how the OFT uses its powers to enforce consumer protection and competition law are available on the OFT website: www.offt.gov.uk/oft_at_work.

²⁴ The legal test for making a reference is set out in section 131 of the Enterprise Act 2002.

²⁵ OFT guidance *Market Investigation References* describes the legal test applied by the OFT when making a decision to refer a market, the process for making that decision and how we apply the test: www.offt.gov.uk/advice_and_resources/publications/guidance/enterprise_act/oft511

investigation references are made in accordance with relevant OFT governance rules.²⁶ The OFT has a duty to consult on making a market investigation reference.²⁷ Generally, the OFT will aim to consult within six months from launch of the study when a market investigation reference is an outcome that is being considered at the time of the launch. In some cases the OFT will need less than six months to reach this consultation stage.

The Competition Commission's guidelines describe how it conducts its market investigations once a reference has been made. These guidelines can be found on the Competition Commission's website: www.competition-commission.org.uk

²⁶ See footnote 10.

²⁷ Section 169 of the Enterprise Act 2002.

7 HOW DOES THE OFT EVALUATE ITS MARKET STUDIES?

Individual market studies

- 7.1 Impact estimation measures the effect which interventions by the OFT are envisaged to have on reducing consumer detriment, and is a component of all market studies.²⁸ By estimating the impact of market studies, the OFT can assess if they are providing value for money.
- 7.2 As impact is an OFT prioritisation principle, an initial assessment of impact is presented in the market study project proposal.
- 7.3 In its annual reports, the OFT publishes estimates of consumer savings from completed market studies whose recommendations were implemented in the year.

Market studies in general

- 7.4 The OFT also runs a more in-depth evaluation programme for its work including market studies.²⁹ This programme commits the OFT to evaluating at least one market study a year. A key objective of the evaluation programme is to improve the effectiveness of the OFT by providing learning points that will inform how it prioritises its work and its choice of intervention methods. Comprehensive evaluations on past market studies provide information that will:
- Help the OFT focus on markets where a market study is likely to make the most impact.

²⁸ Further details of the principles and processes used to estimate impact can be found in OFT publication *Approach to calculating direct benefits to consumers*, www.of.gov.uk/advice_and_resources/publications/reports/Evaluating/oft955

²⁹ Further details on how we evaluate market studies can be found in OFT publication, *Evaluation strategy for market studies*: www.of.gov.uk/shared_of/about_of/oft862.pdf

- Help the OFT maximise the impact of each market study.
- Help the OFT decide if further action should be taken in markets the OFT has studied.

ANNEXE(S)

A LIST OF CONSULTEES

The following organisations and individuals have been consulted. We would welcome suggestions of others who may wish to be involved in this consultation process.

Addleshaw Goddard LLP

Advertising Standards Association

Allen & Overy LLP

Ashurst LLP

Association of British Insurers

Association of the British Pharmaceutical Industry

Attorney General's Office

Baker and McKenzie LLP

Better Regulation Executive

British Chambers of Commerce

British Bankers Association

British Retail Consortium

British Vehicle and Rental Leasing Association

Cabinet Office

Cardiff Pinnacle

Chair of the Business Enterprise and Regulatory Reform Committee

Civil Aviation Authority

Confederation of British Industry

Consumer Council For Northern Ireland

Consumer Credit Counselling Service

Consumer Focus

Consumer Focus Scotland

Consumer Focus Wales

Citizens Advice

Citizens Advice Scotland

Clifford Chance LLP

Competition Commission

Charles Rivers Associates International

Department for Communities and Local Government

Department for Business Enterprise and Regulatory Reform

Denton Wilde Sapte LLP

Dundas & Wilson LLP

easyJet

European Commission, Directorate General Competition

Federation of Small Business

Finance and Leasing Association

Financial Ombudsman Service

Financial Services Authority

Freshfields Bruckhaus Deringer LLP

Frontier Economics Limited

Group Corporate Healthcare Ltd

Herbert Smith LLP

HM Treasury

Home Office

Information Commissioner's Office

Institute of Directors

Intelligent Addressing Ltd

ITV plc

Local Better Regulation Office

Local Authority Coordinators of Regulatory Services

Macfarlanes LLP

Mayer Brown International LLP

Ministry of Justice

Monckton Chambers

National Consumer Council

National Housing and Planning Advice Unit

NERA Economic Consulting

Northern Ireland Assembly

Norton Rose LLP

Office for Economic Co-operation and Development

Office of Communications

Office of Rail Regulation

Office of Gas and Electricity Markets

Office of Water Services

Oxera

Ridyard, Bishop and Baker Economics

Royal Institute of British Architects

Serious Fraud Office

Scottish Government

Shearman & Sterling LLP

Shepherd and Wedderburn LLP

Simmons & Simmons

The Competition Law Forum

The Postal Services Commission

The Law Society

The Law Society of England and Wales

The Law Society of Northern Ireland

The Law Society of Scotland

Trade Associations Forum

Trading Standards Institute

University of East Anglia

Water Industry Commission for Scotland

Welsh Assembly Government

Which?

Wilmer Cutler Pickering Hale and Dorr LLP

B CONSULTATION CRITERIA

Public bodies are required to perform consultations in accordance with the following criteria wherever possible:

- B.1 **When to consult** – formal consultation should take place at a stage when there is scope to influence the policy outcome.
- B.2 **Duration of consultation exercises** – consultations should normally last for at least 12 weeks with consideration given to longer timescales where feasible and sensible.
- B.3 **Clarity of scope and impact** – consultation documents should be clear about the consultation process, what is being proposed, the scope to influence and the expected costs and benefits of the proposals.
- B.4 **Accessibility of consultation exercises** – consultation exercises should be designed to be accessible to, and clearly targeted at, those people the exercise is intended to reach.
- B.5 **The burden of consultation** – keeping the burden of consultation to a minimum is essential if consultations are to be effective and if consultees' buy-in to the process is to be obtained.
- B.6 **Responsiveness of consultation exercises** – consultation responses should be analysed carefully and clear feedback should be provided to participants following the consultation.
- B.7 **Capacity to consult** – officials running consultations should seek guidance in how to run effective consultation exercises and share what they have learned from the experience.
- B.8 The full *Code of Practice on Consultation* can be found on the website of the Department for Business, Enterprise and Regulatory Reform:
www.berr.gov.uk/files/file47158.pdf