

# OFT Prioritisation Principles

## Consultation

September 2007

OFT953con

## **Responding to this consultation**

This consultation follows the criteria set out in the Cabinet Office's Code of Practice on Consultation (available at [www.cabinetoffice.gov.uk/regulation/consultation/consultation\\_guidance/the\\_code\\_and\\_consultation/index.asp](http://www.cabinetoffice.gov.uk/regulation/consultation/consultation_guidance/the_code_and_consultation/index.asp)). The criteria set out in that code are attached at Annexe A.

We welcome comments on the documents from all sources. Consultees responding to this consultation are asked to supply a brief summary of the interests or organisations they represent, where appropriate.

We ask that any suggested changes or comments on the documents be submitted in writing (by email, or alternatively by letter or fax, as indicated below).

## **The consultation period**

The consultation period began on 25 September 2007 and will run until 22 January 2008. This period of seventeen weeks is in accordance with the criteria set out in the Cabinet Office's Code of Practice which recommends a minimum of twelve weeks.

## **Next steps**

We will collate responses to the consultation and publish a formal summary of these in early spring 2008, along with a final version of the prioritisation principles, taking into consideration comments made in response to the consultation. All responses and comments should be sent to:

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Room 3E/012  
Office of Fair Trading  
Fleetbank House  
2-6 Salisbury Square  
London  
EC4Y 8JX

Fax: 020 7211 8809

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

## **Data use statement for responses**

Please note that 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 ('confidential information'). 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. All information received is subject to 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

- 1.1 The OFT's mission is to make markets work well for consumers. Markets work well for consumers when companies compete vigorously and fairly to win customers' business. In well functioning markets consumers have confidence that market processes deliver excellent outcomes for them in terms of price, quality, variety, innovation and service. When markets work well for consumers, efficient companies are rewarded and productivity growth is higher.
- 1.2 Markets usually work well for consumers and the economy without any need for intervention. The OFT only intervenes when public action can improve how markets work. Our interventions thus seek to challenge and remove anti-competitive private and disproportionate public barriers to entry, prevent unlawful competitive practices, and ensure that consumers are appropriately protected and informed when making purchases. We thus focus our efforts and resources on deterring and influencing behaviour that poses the greatest threat to consumer welfare and intervene in order to increase consumer welfare, and in the process, drive higher productivity growth.
- 1.3 In order to make the best use of our resources in terms of real outcomes for UK consumers, we need to ensure that we make the appropriate decisions about which projects and programmes of work we undertake across all areas of our responsibility. The OFT has agreed with the Treasury that we will deliver measured benefits to consumers of five times our annual budget over the 2008-11 period.<sup>1</sup>
- 1.4 In seeking to target both our resources and proactive enforcement to best effect, the OFT needs to consider a range of factors, including impact on consumers, strategic significance and capacity. We also need to take account of the activity, capacity and interests of our partners.

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<sup>1</sup> This agreement is part of the OFT's settlement in the Comprehensive Spending Review 2007 (CSR07) which sets out OFT's funding over the period April 2008 to March 2011.

We therefore set out our draft prioritisation principles, and invite comments from partners and other interested parties.

1.5 We propose eight prioritisation principles under the four headings of Impact, Strategic Significance, Risks and Resources. We will pilot them following the publication of this document and intend to review them in 2008 in the light of comments from interested parties, and our own experience of how they work in practice. The examples given in the principles below are not intended to be exhaustive. The OFT reserves the right to depart from these prioritisation principles whenever it deems appropriate.

1.6 In this document we set out:

- how we use the principles
- detail of the principles with explanatory notes
- their relationship with CA98 criteria and market studies guidance, and
- practical information about responding to the consultation.

1.7 We would welcome your comments in particular on the following:

- have we left out something that should be included?
- is there anything included which is not useful or necessary?

Any other points you wish to submit on the issues set out here will also be taken into consideration.

1.8 Please send comments in writing by 22 January 2008 to Naja Felter, Planning and Strategy, Office of Fair Trading, Fleetbank House, 2-6 Salisbury Square, London EC4Y 8JX, or to [Naja.Felter@oft.gsi.gov.uk](mailto:Naja.Felter@oft.gsi.gov.uk)

1.9 On 25 September 2007, the OFT also sent out a consultation on how we will estimate and measure our direct impact. For any comments on this, please contact Neil Smart, Strategy and Planning, Office of Fair

Trading, Fleetbank House, 2-6 Salisbury Square, London EC4Y 8JX, or  
[Neil.Smart@oft.gsi.gov.uk](mailto:Neil.Smart@oft.gsi.gov.uk)

## 2 HOW WE USE THE PRINCIPLES

- 2.1 We will generally prioritise according to the impact of work on consumers and according to the work's strategic significance. We will balance this against the risks and resources involved. Our annual plan<sup>2</sup> sets out the high level strategy that guides our actions.
- 2.2 The list of factors to consider under different principles is illustrative and not exhaustive. We will not apply the principles in a mechanical way: judgement and a reasoned balancing exercise are required for each case which necessitates that we consider the principles in the round and on a case-by-case basis. Where appropriate, we may also consider other relevant factors. In other words, prioritisation will not take place in isolation but will always be a relative question which necessitates considerations of the OFT's overall portfolio and resources. It is therefore not possible to give guidance such as to allow an advance external assessment of whether a particular case would or would not be taken on by the OFT.
- 2.3 When deciding which new projects and programmes of work to take on, we will consider the timing and resource requirements of projects and other work going on across the OFT at that time. As part of this we will assess the resources required going forward to deliver the projects considered as well as their potential impact. At certain milestones of a project we may consider whether the project warrants the continued commitment of the necessary resources before proceeding to make a decision.
- 2.4 In some cases we have a legal duty to act once certain relevant circumstances have materialised. For instance:

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<sup>2</sup> The OFT's long term vision is presented in the Annual Plan 2007-08, which is available at [http://www.oft.gov.uk/shared\\_oft/about\\_oft/349517/ap08.pdf](http://www.oft.gov.uk/shared_oft/about_oft/349517/ap08.pdf)  
See also paragraph 4.11 of this document.

- once we have received a 'super-complaint'<sup>3</sup> from a designated consumer body we must respond to this within 90 days
- we have an express administrative duty to respond appropriately to applications for consumer credit licences. We therefore have a duty to operate a consumer credit licensing system
- we have a duty to actively assist the European Commission in carrying out its inspections if we receive a request for assistance from the Commission.

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<sup>3</sup> Receipt of a complaint from a designated consumer body that any feature or combination of features of a market in the UK for goods or services is or appears to be significantly harming the interests of consumers.

### 3 THE PRIORITISATION PRINCIPLES

The OFT generally prioritises its work according to the principles set out below. Where appropriate, the OFT may also take account of other relevant factors. All relevant principles will be balanced in the round.

Account will also be taken of whether we have a legal duty to act once certain circumstances have materialised. During prioritisation the OFT will consider the timing and resource requirements of its work and ensure that these requirements are appropriately met within the confines of the resources available to the OFT.

#### Impact

1. What would be the likely **direct effect** on consumer welfare in the market or sector where the intervention takes place? Consumer welfare includes better value for consumers in terms of price, quality, range or service, both static and dynamic and may also include non-financial detriment such as the avoidance of physical harm or emotional distress. We may prioritise work because the direct effects would specifically benefit disadvantaged consumers.
2. What would be the likely **indirect effect** on consumer welfare? This principles captures further improvement to consumer welfare and consumer confidence that result from changes in consumer, business and or government behaviour which is prompted by the OFT's action. It thus captures deterrence and improved awareness for consumers, business and government.
3. What would be the expected additional economic impact on efficiency/productivity? This captures whether, as a result of our actions, efficiency would be expected to increase.

#### Strategic significance

4. Does the work tie in with OFT strategy as set out in the annual plan and/or with other OFT objectives? This will include whether there are

elements of strategic significance of the work that are additional to impact, including:

- i. innovation: establishing or testing new legal and economic approaches
- ii. capacity building that enhances the ability of the OFT and the consumer and competition policy system as a whole to target intervention and deliver better outcomes
- iii. building the credibility of our competition and consumer regime by leading nationally and internationally on issues.

5. Is the OFT best placed to act? Alternatives to OFT action could include:

- i. private enforcement
- ii. action by other bodies such as Trading Standards Services, UK regulators or DG Competition, or
- iii. market developments, self-regulation or new UK or EU regulatory or legislative developments.

6. What would be the impact of the new work on the balance of the OFT's portfolio of work?

## **Risks**

7. What is the likelihood of a successful outcome?

## **Resources**

8. What are the resource implications of doing the work? This includes:

- i. whether the resource requirements of the work are proportionate to the benefits from doing the work
- ii. the period over which the resources will be needed, and

- iii. any savings created for the OFT by enabling it to meet its objectives more efficiently.

## 4 EXPLANATORY NOTES

### Direct effect on consumer welfare (Impact)

- 4.1 This is the benefit arising to consumers as a result of the OFT intervention. It will most likely arise from an OFT action that leads to preventing or terminating activity that would have negatively affected consumers for some time into the future. We will generally have regard to the potential effect if action is taken, regardless of whether it is due to direct action by others (for example courts, government, Competition Commission) pursuant to an OFT intervention.
- 4.2 In many situations, businesses act as consumers. Where the problem is in an upstream market and benefit arises in the first instance to business customers, we assume that benefits will be passed on to final consumers as a direct effect unless there is evidence to the contrary. Accordingly, for example, an increase in manufacturer competition that resulted in a reduction in wholesale prices that were passed on to final consumers in terms of lower retail prices would be treated as a direct effect. Similarly increased competition in a market serving small or medium-sized business consumers would also be considered as a positive direct impact.
- 4.3 Disadvantaged consumers may be particularly vulnerable to exploitation within markets, or may simply not share, in the benefits of greater competition. For example, some consumers may have a higher propensity to be misled by rogue traders. Disadvantaged consumers may be served less well by markets because, for example, they may be more expensive to serve, they have less market access, they are more indebted, and they can less well afford the higher risk that often accompanies better value. While the OFT has no legal or other mandate to redistribute wealth or power to intervene in individual disputes, we may sometimes favour projects that would benefit disadvantaged consumers, in order to build overall consumer confidence in markets.
- 4.4 Examples of direct benefits to consumers from recent OFT work include:

- The new car warranties market study<sup>4</sup> is estimated to have delivered a direct consumer benefit of about £30 million. Additionally, fleet operators saved about £90 million that we assume would be passed on to consumers.
- Ten businesses were found to have fixed the price of Umbro replica football kit. We estimate that the OFT action to break up the cartel directly saved consumers £5.5 million.
- We estimate that OFT merger control interventions save consumers in the region of £52 million per year.<sup>5</sup>
- Long Life Consumer, a US-based company advertising slimming capsules, made false and misleading claims on weight loss. More than fifty-six thousand consumers had responded, each spending an average of £7.50. OFT action is estimated to have prevented further consumer losses of £450,000.

### **Indirect effect on consumer welfare (Impact)**

4.5 The indirect effect measures exactly the same things as direct effect, but arises from changes to the behaviour of firms that are not the direct subject of the OFT's intervention. While the deterrence effect of civil or criminal enforcement is the most obvious example, the principle captures likely changes in consumer, business or government behaviour in markets sectors or across the economy as a whole that would result in additional benefits over and above those in the market or sector in question.

4.6 Whether a specific action will be likely to lead to wider behavioural changes can be difficult to gauge. Our work will be informed by the

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<sup>4</sup> [http://www.offt.gov.uk/shared\\_offt/about\\_offt/oft852.pdf](http://www.offt.gov.uk/shared_offt/about_offt/oft852.pdf)

<sup>5</sup> [http://www.offt.gov.uk/shared\\_offt/reports/401801/oft917.pdf](http://www.offt.gov.uk/shared_offt/reports/401801/oft917.pdf) and [http://www.offt.gov.uk/shared\\_offt/reports/401801/oft928.pdf](http://www.offt.gov.uk/shared_offt/reports/401801/oft928.pdf)

evidence available. For example, evidence suggests that personal criminal sanctions have a stronger deterrent effect than corporate fines for cartels.<sup>6</sup> Evaluation of the impact of our own work and that of others will be a source of evidence: for example, recent OFT work on civil competition cases and mergers show deterrence effects of at least between four and seven times the direct effects depending on the behaviour in question.<sup>7</sup>

#### 4.7 Examples of where indirect effects might exist include:

- the deterrent effect of taking action in a market where similar issues exist in other markets; we consider that there could be a deterrence effect from the OFT's action on the Umbro replica football kit (mentioned in 4.4) not only in the immediate football shirts market, but also in the wider market for team-specific sports clothing. We cannot put an exact number of the size of the deterrent effect but the market is worth £500 million per year in the UK.
- action that clarifies the law in a way that enables other businesses to engage in pro-competitive practices that were previously considered potentially illegal
- action that demonstrates to national or local government the benefits from removing disproportionate public restrictions on competition, or
- action that leads to consumers being more informed or empowered.
- publication of guidance which affect policy and practice across all sectors.

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<sup>6</sup> See for example A. Beckenstein and H. Gabel, *Antitrust Law Journal*, 1982, Vol. 51: '*Antitrust compliance: results of a survey of legal opinion*'.

<sup>7</sup> The OFT will publish research on the deterrent effect of competition enforcement in autumn 2007.

## **Effect on efficiency/productivity (Impact)**

- 4.8 We will look at whether there is the potential for additional economic impact on efficiency or productivity in the market in question or other markets. In markets where competition is weak or absent, substantial inefficiency may arise. This could take the form of poor cost control, weak internal managerial or strategic incentives, lack of innovation, or high levels of rent-seeking to prevent increased competition.
- 4.9 An initial action that increases competition in the market may deliver further consumer benefits over time resulting from the improved competitive process. For example, liberalisation of air markets had initial direct effects on consumer welfare, and also longer term productivity effects as new entrants drove cost reduction and innovation in areas ranging from online booking to airport competition.
- 4.10 Evidence of such inefficiency could take many forms, including lack of responsiveness to customer demand, high costs or low innovation relative to comparable industries, or high levels of anti-competitive lobbying.

## **Fit with OFT strategy and objectives (Strategic significance)**

- 4.11 We will consider whether the proposed new project or piece of work would help further our key strategic objectives as set out in our annual plan.<sup>8</sup> Our broad themes are:
- deliver high impact outcomes that benefit consumers
  - be a centre of intelligence and excellence

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<sup>8</sup> For more information see our annual plan

[http://www.of.gov.uk/shared\\_of/about\\_of/349517/ap08.pdf](http://www.of.gov.uk/shared_of/about_of/349517/ap08.pdf) and our annual report [http://www.of.gov.uk/shared\\_of/annual\\_report/2005/annualreport0506.pdf](http://www.of.gov.uk/shared_of/annual_report/2005/annualreport0506.pdf)

- work well with partners, and
- develop the talent and skills of OFT staff.

4.12 We will favour projects or programmes of work that enhance our capacity, in terms of the skills and talent of our staff, the quality of our intelligence, our leadership ability and excellence on consumer and competition issues, our ability to work in partnership, or the capacity of our partners in areas where they work with us to achieve our objectives. These will enhance the longer term ability of both the OFT and the consumer and competition policy system as a whole to target intervention and deliver better outcomes.

4.13 Examples here include:

- innovation: establishing or testing new legal and economic approaches (for example intervening in private actions involving alleged CA98 infringements<sup>9</sup>)
- policy work that leads to improvement in the consumer and competition policy framework (for example new legislation)
- work that results in greater international quality or consistency in approach
- work that coordinates our activities with those of partners in a way that promotes and reinforces consistency and increases impact
- work that enhances our ability to deal with complex cases where deterrence considerations play a role in our decision to pursue.

### **Is the OFT best placed? (Strategic Significance)**

4.14 We always examine whether any work is best carried out by the OFT, having regard to whether there are alternative ways of achieving the

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<sup>9</sup> Article 15 of Council Regulation (EC) No 1/2003

desired or similar result. For instance, the OFT and Local Authority Trading Standards Services (TSS) work in partnership and it is our practice to agree with TSS which cases should be most appropriately be handled by the OFT and which by TSS. We have a similar process in place in relation to sector regulators, known as concurrency. Other bodies that might in some cases be better placed to take particular pieces of work forward include the OFT's European counterparts, DG Sanco, the Financial Services Authority, the Financial Ombudsman Service, the Serious Fraud Office, the Lord Advocate in Scotland, and overseas consumer bodies such as the US Federal Trade Commission and the Canadian Competition Bureau.

### **Potential impact on OFT's portfolio (Strategic Significance)**

4.15 As well as considering individual projects, we would also consider the impact on OFT's ongoing portfolio of work. We are committed, as set out in our Annual Plan and our long-term strategy, to meeting the performance targets we have agreed with HM Treasury.<sup>10</sup> This requires, among other things, that we can demonstrate evaluated benefits across our portfolio of work of five times our annual budget of the three years of the spending review.<sup>11</sup> We will therefore also consider work in terms of its contribution to the portfolio as well as its individual impact.

4.16 Important features of a balanced portfolio will include an appropriate balance:

- between tackling both public and private restrictions on competition
- across the full range of instruments varying from education and awareness at one end to criminal enforcement at the other

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<sup>10</sup> The OFT's settlement in the Comprehensive Spending Review 2007 (CSR07) sets out OFT's funding over the period April 2008 to March 2011.

<sup>11</sup> Where we prioritise around impact, eventual outcomes can never be anticipated exactly and will vary in terms of sector focus, timing and overall success.

- between established approaches and more innovative work
- between work which builds capacity (investment) and work that uses that capacity (output), and
- across sectors of the economy
- of delivery over time
- between risk and return in terms of outcomes for consumers.

### **Likelihood of successful outcome (Risks)**

- 4.17 We take into account how likely the new project or programme of work is to achieve its desired impact. In some cases, recognition of there being only a small likelihood of success could be a reason not to proceed with the project. In other cases, the likely scale of the detriment may be such that a project should be pursued despite there being a small likelihood of success. We also consider the overall balance of risk in our portfolio in our prioritisation decisions.
- 4.18 In some cases the desired impact may be to establish consistent standards, create legal certainty and send clear long-term messages rather than 'win' a case. We will balance the risk of short-term failure with the chances of longer term success. We are obviously also subject to appeal to the Competition Appeal Tribunal and take account of this in our decisions.
- 4.19 Risk is inherent in everything that an organisation does. Consequently, good risk management at all levels is a critical success factor for any organisation. The OFT is required by section 1 of the Enterprise Act 2002 to implement good standards of corporate governance. A core component of good corporate governance is good quality risk management. The OFT will therefore carefully manage the risks throughout the decision making over its work programme.

## **Resource implications of doing the work (Resources)**

- 4.20 When considering the resource implications of a proposed new project or programme of work we will take into account all resources required to undertake the work. Over the course of a piece of work the resource allocated to it may change, depending on its requirements and the requirements of other projects, so that for the OFT overall, resources are allocated in the most efficient way to cover all of our work.
- 4.21 We will take into account the resource usage of other parties, including our enforcement partners.

## **5 RELATIONSHIP WITH CA98 CRITERIA AND MARKET STUDIES GUIDANCE**

- 5.1 In October 2006, we published a framework of criteria for thinking about prioritisation decisions in relation to our Competition Act work. The principles, as set out in this document, replace the criteria from 2006. They are broader in scope in order to capture the breadth of OFT's work but they are entirely consistent with those criteria.
- 5.2 In November 2004, we published guidance for companies and their advisers and other interested parties on the procedures that the OFT usually follows when selecting and conducting market studies. The guidance is specific to market studies and advises on a range of aspects of this tool, including how ideas for studies are selected and progressed.
- 5.3 The market studies guidance sets out the process for identifying likely areas where we might apply this specific OFT tool. In comparison, the prioritisation principles support us in reaching a final decision on the work we will take forward. The prioritisation principles, as set out in this document, are broader in scope in order to capture the breadth of OFT's work but are entirely consistent with our approach to market studies.

## 6 RESPONSES TO THE CONSULTATION

6.1 Please send responses in writing by 22 January 2008 to Naja Felter, Planning and Strategy, Office of Fair Trading, Fleetbank House, 2-6 Salisbury Square, London EC4Y 8JX, or to [Naja.Felter@oft.gsi.gov.uk](mailto:Naja.Felter@oft.gsi.gov.uk)

6.2 We would welcome your comments in particular on the following:

- have we left out something that should be included?
- is there anything included which is not useful or necessary?

Any other points you wish to submit on the issues set out here will also be taken into consideration.

## **7 ANNEXE A: CABINET OFFICE CODE OF PRACTICE ON CONSULTATION - CRITERIA**

- 7.1 Consult widely throughout the process, allowing a minimum of 12 weeks for written consultation at least once during the development of the policy.
- 7.2 Be clear about what your proposals are, who may be affected, what questions are being asked and the timescale for responses.
- 7.3 Ensure that your consultation is clear, concise and widely accessible.
- 7.4 Give feedback regarding the responses received and how the consultation process influenced the policy.
- 7.5 Monitor your Department's effectiveness at consultation, including through the use of a designated Consultation Co-ordinator.
- 7.6 Ensure your consultation follows better regulation best practice, including carrying out a Regulatory Impact Assessment if appropriate.