
OFT response to the report by DTI and HMT on concurrency competition powers in sectoral regulation¹

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OFT900a

1. This paper sets out the response of the Office of Fair Trading (OFT) to the HMT/DTI report on concurrency (the Concurrency Report). It is in addition to the joint response of the Concurrency Working Party (CWP). The OFT is a member of the CWP and endorses the CWP joint response.
2. The OFT's response is structured as follows:
 - a summary of the recommendations that are relevant to OFT in the Concurrency Report (section A)
 - comments in response to the recommendations (section B)
 - additional possibility for change section C), and
 - conclusion (section D).

House of Lords review

3. The OFT notes that on 14 December 2006 the House of Lords Select Committee on Regulators published a public call for evidence to assist its investigation on the role of regulators (including the Office of Fair Trading, the Competition Commission and the major economic regulators) in the UK.² The deadline for the call for written evidence is 9 February 2007.

¹ URN 06/1244, May 2006.

² PN141206ER.

4. The OFT intends to make a written submission to the Committee, in which it will address, among other things, the concurrency process and some of the concerns that may have arisen with regard to its operation, and will enable us to put these concerns in their broader context.

A. Summary of recommendations in the Concurrency Report

5. The Concurrency Report makes the following recommendations with respect to the CWP:

Recommendation 1: Under the direction of the Joint Regulators Group, the Concurrency Working Party should:

- (a) undertake a programme of work to determine the precise differences in the practical approaches taken by sectoral regulators and the OFT in competition investigations; and
- (b) set out the steps necessary to ensure that best practice and expertise is shared between regulators and the OFT and that a consistent approach is followed.

Recommendation 2: The regulators are currently working well together in allocating responsibility for dealing with particular complaints. The CWP should, however, coordinate all concurrent functions of the regulators and the OFT with a view to ensuring that the application of all of these functions is consistent and reflects best practice.

6. The Concurrency Report also makes the following recommendation with respect to the OFT in particular:

Recommendation 3: The OFT should take an overall view about whether competition law is being applied consistently and proactively across all sectors of the economy and report to the Joint Regulators Group.

7. The OFT does not propose to deal with recommendations addressed specifically to the regulators in this response.

B. Comments in response to the recommendations

Recommendation 1

8. The OFT notes and agrees with the recommendation 1 that CWP should undertake a programme of work to determine the precise differences in the practical approaches taken by the sectoral regulators and the OFT in competition investigations and set out the steps necessary to ensure that best practice and expertise is shared between regulators and the OFT and that a consistent approach is followed.
9. The OFT suggests that such a programme of work can be taken forward by the CWP working group on procedural issues.

Recommendation 3

10. The OFT welcomes Recommendation 3. To take this recommendation forward, the OFT (having consulted CWP) will report to the JRG on an annual basis, providing an overall view about whether competition law is being applied consistently and pro-actively across all sectors. The OFT considers that this will also be an effective way of enhancing the relationship between CWP and JRG. It proposes to present its first report to JRG in Summer 2007 for the period March 2006 – March 2007. This will include reporting on whether the CWP members have published case selection criteria (see para. 13 below).
11. In order to assist the OFT in this task, the OFT will encourage the concurrent regulators to provide the CWP with information about how they have used their competition law powers in the reporting year. Similarly, to facilitate the OFT's annual report and to increase transparency generally, the OFT recommends that all CWP members should alert each other at the time when they send statements of objections and also when they send summaries of competition concerns in commitments cases.

C. Possibilities for Change Complementing CWP recommendations

Publication of assessment criteria/statement of intention

12. The OFT notes paragraph 9 of the Concurrency Report and that '[i]t is for regulators to judge when it is best to use particular powers but where they have a choice, regulators should carefully consider the grounds for their selection of particular powers and give clear explanations for their decisions.'
13. Some regulators have published the assessment criteria employed when deciding whether to use competition enforcement or regulatory powers.³ Also, the OFT on 12 October 2006 published its current assessment criteria for dealing with competition cases.⁴ Doing so has helped to create transparency in case selection and progression. Whatever changes are implemented in response to the concurrency report, OFT recommends that all regulators should be encouraged to publish similar assessment criteria. This will be an additional step to ensuring consistency and transparency in competition enforcement across the UK economy. As noted above the OFT proposes in its annual report to JRG to comment upon whether regulators have published such criteria and on their use.

Role of the Secretary of State

14. The OFT also notes that under Regulation 5 of the Concurrency Regulations, the Secretary of State must resolve a case allocation dispute under those regulations (in other words, where agreement cannot be reached under the Regulation 4). This seems to sit uneasily with the Government's intention to remove Ministers from direct involvement in competition law decision making. The OFT would welcome DTI considering whether Regulation 5 might be

³ See, for example, paras 10.4 – 10.10 in Ofcom's draft enforcement guidelines (published for consultation on 6 July 2006). See also more generally paras 2.6 and 2.7 of Ofwat's 'Report on competition complaints' for 1 April 2005 to 31 March 2005 published in April 2006. These publications are available on Ofcom's and Ofwat's websites respectively.

⁴ See also para 4.45 of Ofcom's draft enforcement guidelines in which Ofcom lists the factors among which it will consider when deciding whether to conduct an investigation.

amended in order to appoint a non-Ministerial arbiter for such disputes. The OFT adds that such a task would be unlikely to be onerous, since to date there has been never been a case allocation dispute under the Concurrency Regulations and it seems unlikely that there will be many in the future. Nevertheless, addressing this issue might be appropriate as a matter of policy consistency.

D. Conclusion

15. The OFT considers that its response to Recommendation 3 will add to the existing strengths of the concurrency system. The OFT also is of the view that the regulator's approach to how they deploy their respective competition and regulatory powers will be enhanced if each regulator ensures that it publishes case selection criteria. Finally, the OFT would welcome DTI considering whether it was appropriate to amend Regulation 5 of the Concurrency Regulations so as to remove the Secretary of State from a decision making role in case allocation under the Regulations