

# OFT Prioritisation Principles

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OFT953

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# CONTENTS

<i>Chapter/Annexe</i>	<i>Page</i>
1 Introduction	4
2 How we use the principles	6
3 OFT prioritisation principles	8
4 Explanatory notes	11
5 CA98 criteria and market studies guidance	19

# 1 INTRODUCTION

- 1.1 The OFT's mission is to make markets work well for UK consumers. Markets work well for consumers when businesses 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 businesses 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 it can improve the way in which markets work. The OFT's interventions therefore seek to promote open competition, and to encourage the unrestricted availability of products and services and the provision of accurate, non-deceptive information between businesses and consumers.
- 1.3 We therefore focus our efforts and resources on deterring and influencing behaviour that poses the greatest threat to consumer welfare, and intervene in order to protect consumer welfare and, in the process, drive higher productivity growth. We also recognise the need to avoid imposing unnecessary burdens on business.
- 1.4 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 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>
- 1.5 In seeking to target both our resources and enforcement strategy, the OFT needs to consider a range of factors including impact on consumers, strategic significance, risks and resources. We also need to

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<sup>1</sup> Annexe A of the OFT Annual Plan 2008-09 sets out OFT's performance framework agreed under Comprehensive Spending Review 2007 (CSR07) (April 2008 to March 2011) [www.of.gov.uk/shared\\_of/about\\_of/ap09/ap09.pdf](http://www.of.gov.uk/shared_of/about_of/ap09/ap09.pdf)

take account of the activity, capacity and interests of our partners. In September 2007 we set out eight draft principles for prioritising our work under the four headings of Impact, Strategic Significance, Risks and Resources.

- 1.6 We consulted stakeholders on these draft principles over the course of autumn and winter 2007-8 and have reviewed the principles in the light of their comments.
- 1.7 In this document we set out:
- how we use the principles
  - detail of the principles with explanatory notes, and
  - their relationship with CA98 criteria and market studies guidance.
- 1.8 The factors listed in the principles below are not intended to be exhaustive. As well as consideration of the principles, it may be necessary for the OFT to take other factors into account where appropriate. We will continue to keep the principles under review.

## 2 HOW WE USE THE PRINCIPLES

- 2.1 We generally prioritise according to the impact of work on consumers and according to the work's strategic significance. We balance this against the risks and resources involved. Our annual plans<sup>2</sup> set 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 available at that time. 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 particular points in the lifecycle of a project we may consider whether it warrants the continued commitment of resources.
- 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 2008-09, which is available at [www.of.gov.uk/news/press/2008/43-08](http://www.of.gov.uk/news/press/2008/43-08)  
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
- where we apply national competition law we are obliged to apply Articles 81 and 82 of the EC Treaty as appropriate and applicable
- Under the Enterprise Act 2002, the OFT has a function to obtain and review information relating to merger situations, and a duty to refer to the CC for further investigation any relevant mergers where it believes that it is or may be the case they have resulted or may be expected to result in a substantial lessening of competition in a UK market, and
- we have a duty to consider complaints under Unfair Terms in Consumer Contracts Regulations 1999, Distance Selling Regulations 2000, and Financial Services (Distance Marketing) Regulations 2004.

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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 OFT 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 our duties are appropriately met within the confines of the resources available to the OFT.

#### A. 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 principle captures further improvement to consumer welfare and consumer confidence that results from changes in consumer, business 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.



## **B. Strategic significance**

4. Does the work fit with the OFT's strategy as set out in the current 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, and
  - 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 Local Authority Trading Standards Services, other UK regulators or the European Commission, 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 current portfolio of work?

## **C. Risks**

7. What is the likelihood of a successful outcome?

## **D. 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 us to meet our 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 change in behaviour of those that are the subject of 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 have regard to the potential effect if an action is taken, regardless of whether it is due to direct action by others (for example, the courts, the government, or the Competition Commission) pursuant to an OFT intervention.
- 4.2 Where the problem is in an upstream market and benefit arises in the first instance to businesses, 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. The effects of increased competition in a market serving businesses would therefore 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 in debt, and they cannot 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 the OFT's work in previous years 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 the OFT's 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 about weight loss regarding their product. More than 56,000 consumers responded, each spending an average of £7.50. The 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 those other than the direct subject of the OFT's intervention. While the deterrent effect of civil or criminal enforcement is the most obvious example, another example may be the increased consumer and business confidence in the correct functioning of the markets.

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 evidence available. For example, evidence suggests that personal

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<sup>4</sup> [www.offt.gov.uk/shared\\_offt/about\\_offt852.pdf](http://www.offt.gov.uk/shared_offt/about_offt852.pdf)

<sup>5</sup> [www.offt.gov.uk/shared\\_offt/reports/401801/offt917.pdf](http://www.offt.gov.uk/shared_offt/reports/401801/offt917.pdf) and [www.offt.gov.uk/shared\\_offt/reports/401801/offt928.pdf](http://www.offt.gov.uk/shared_offt/reports/401801/offt928.pdf)

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
- 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
- action that leads to consumers being more informed or empowered, and
- publication of guidance which affects 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 research on the deterrent effect of competition enforcement can be found at [www.ofc.gov.uk/advice\\_and\\_resources/resource\\_base/evaluation/publications](http://www.ofc.gov.uk/advice_and_resources/resource_base/evaluation/publications).

## **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 the air passenger transport market had initial direct effects on consumer welfare, and also long 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 the OFT's 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. The broad themes set out in our current annual plan<sup>8</sup> are:
- deliver high impact outcomes that benefit consumers
  - be a centre of intelligence and excellence
  - work well with partners, and

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<sup>8</sup> For more information see our annual plan and our annual report  
[www.offt.gov.uk/shared\\_offt/about\\_offt/ap09/ap09.pdf](http://www.offt.gov.uk/shared_offt/about_offt/ap09/ap09.pdf)  
[www.offt.gov.uk/advice\\_and\\_resources/publications/corporate/annual-report/](http://www.offt.gov.uk/advice_and_resources/publications/corporate/annual-report/)

- 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. Taking forward work of this type will enhance the long term ability of both the OFT and the UK consumer and competition policy framework as a whole to target intervention and deliver better outcomes.

4.13 Examples of the types of work that could enhance capacity include:

- innovation: establishing or testing new legal and economic approaches (for example intervening in private actions involving alleged CA98 infringements<sup>9</sup>)
- work that clarifies the law in areas of practical commercial importance, therefore facilitating compliance and potentially promoting productivity
- 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, and
- work that enhances our ability to deal with complex cases where deterrence considerations play a role in our decision to pursue.

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

## **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 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 (such as Ofcom), 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 the OFT's portfolio (Strategic significance)**

4.15 As well as considering individual projects, we will also consider the impact on the OFT's ongoing portfolio of work. We are committed, as set out in our Annual Plan, 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 when taken as a whole<sup>11</sup> of five times our annual budget for each of the three years of the spending review period.<sup>12</sup> We will therefore also consider work in terms of its contribution to our portfolio as well as its individual impact.

4.16 Important portfolio considerations will include an appropriate balance:

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<sup>10</sup> Annexe A of the OFT Annual Plan 2008-09 sets out OFT's performance framework agreed under Comprehensive Spending Review 2007 (CSR07) (April 2008 to March 2011) [www.of.gov.uk/shared\\_of/about\\_of/ap09/ap09.pdf](http://www.of.gov.uk/shared_of/about_of/ap09/ap09.pdf)

<sup>11</sup> Consumer Direct has a separate target under CSR07 of generating benefits of at least three and a half times its operating costs.

<sup>12</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 tackling both public and private restrictions on competition
- across the full range of available instruments varying from education and awareness at one end to criminal enforcement at the other;
- between established approaches and more innovative work;
- between work which builds capacity (investment) and work that uses that capacity (output)
- across sectors of the economy
- of delivery over time, and
- 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 because it will nevertheless provide clarity on the law. We also consider the overall balance of risk across the whole of the OFT's work portfolio.
- 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 long-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 risk management. The OFT will therefore carefully manage risk throughout the process of making decisions on 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 the OFT's resources are allocated in the most efficient way to cover all of our work.
- 4.21 We will take into account the resource availability of other parties, including our enforcement partners.

## **5 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 potential 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, as set out in this document, are broader in scope in order to capture the breadth of the OFT's work, but are entirely consistent with our approach to market studies.