

# Involving third parties in Competition Act investigations

Incorporating guidance on the submission of complaints

The background of the page is a detailed marbled paper pattern. It features intricate, swirling designs in shades of blue, grey, and white, set against a dark blue background. The patterns are organic and fluid, resembling natural stone or watercolor blends.

Competition  
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Articles 81 and 82 of the EC Treaty and the Competition Act 1998 are applied and enforced in the United Kingdom by the Office of Fair Trading (the OFT). In relation to the regulated sectors these provisions are applied and enforced, concurrently with the OFT, by the regulators for communications matters, gas, electricity, water and sewerage, railway and air traffic services (under section 54 and schedule 10 of the Competition Act 1998) (the Regulators).

The following are Regulators:

- the Office of Communications (OFCOM)
- the Gas and Electricity Markets Authority (OFGEM)
- the Northern Ireland Authority for Energy Regulation (OFREG NI)
- the Director General of Water Services (OFWAT)
- the Office of Rail Regulation (ORR), and
- the Civil Aviation Authority (CAA).

This guideline is issued by the OFT under section 52 of the Competition Act 1998 and provides general advice and information about the application and enforcement by the OFT of Articles 81 and 82 of the EC Treaty and the Chapter I and Chapter II prohibitions contained in the Competition Act 1998. It is intended to explain the OFT's practice on consulting with complainants and other third parties during its investigations to those likely to be affected by it. The OFT has consulted the Regulators on this guideline in accordance with section 52(7) of the Competition Act 1998. However, references in this guideline to the OFT do not include the Regulators, unless otherwise stated.

**This guideline is not a substitute for the EC Treaty nor for the regulations made and notices provided under it. Neither is this guideline a substitute for the Competition Act 1998 and the regulations and orders made under it. It should be read in conjunction with these legal instruments, Community case law and United Kingdom case law. Anyone in doubt about how they may be affected by the EC Treaty and the Competition Act 1998 should seek legal advice.**

In addition to its obligations under Community law, when dealing with questions in relation to competition within the United Kingdom arising under Part I of the Competition Act 1998, the OFT will act in accordance with section 60 of that Act.

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# 1 Introduction

<sup>1</sup> References in this guideline to agreement(s) should, unless otherwise stated or the context requires, be taken to include decisions by associations of undertakings and concerted practices.

<sup>2</sup> The Treaty establishing The European Community.

<sup>3</sup> For the purposes of this guideline, the term 'third party' refers to anyone who is not a party to a particular investigation under the Act, which may include (but is not limited to) competitors, suppliers, customers and consumers.

<sup>4</sup> This guideline does not cover the regime for the acceptance of binding commitments, which is governed by its own statutory consultation procedure under the Act.

**1.1** The OFT is responsible for applying the Chapter I and II prohibitions of the Competition Act 1998 (the Act), which prohibit agreements<sup>1</sup> preventing, restricting or distorting competition in the UK as well as certain anti-competitive conduct by undertakings holding a dominant position. Since 1 May 2004, the OFT has also had powers for applying and enforcing Articles 81 and 82 of the EC Treaty,<sup>2</sup> which are similar to the Chapter I and II prohibitions but which apply to agreements or conduct which may affect trade between Member States of the European Union.

**1.2** The OFT's experience in assessing and investigating cases under the Act since its entry into force in March 2000 has confirmed that seeking input from well-informed complainants and other third parties<sup>3</sup> at various stages during an investigation can often significantly assist it in the effective exercise of its functions under the Act.

**1.3** The OFT's experience suggests in particular that the adoption of a policy providing such third parties with an opportunity to comment on the OFT's provisional findings in a formal and structured manner is likely to contribute to robust decision-making at the administrative stage, by ensuring that their views are fully taken into account before a definitive conclusion is reached.

**1.4** This guideline sets out the circumstances in which the OFT will provide complainants and other third parties with a formal and structured opportunity to comment on its provisional findings before the conclusion of an investigation. It also explains how the OFT will conduct this consultation process.<sup>4</sup>

**1.5** Part 2 sets out the circumstances in which the OFT will formally consult complainants in cases relating to complaints which it has provisionally decided not to take forward to a Statement of Objections. Part 3 sets out the circumstances in which the OFT will formally consult complainants and other third parties in cases where it has issued a Statement of Objections. Part 4 sets out the circumstances in which the OFT will formally consult complainants who have applied for interim measures in cases where it has provisionally decided to reject an application for interim measures,

and in cases where it has provisionally decided to adopt an interim measures decision. The nature of the consultation process in each case is also explained. The annexe sets out the mandatory and optional information to be included in a written, reasoned complaint and provides guidance on how to complain to the OFT about anti-competitive behaviour.

- 1.6** This guideline will be kept under review and amended as appropriate in the light of further experience and developing law and practice.

### Scope of guideline

- 1.7** The approach to consultation set out in this guideline takes into account the need to ensure that the OFT reaches its decisions in a manner which is procedurally fair according to the standards of administrative law.<sup>5</sup> There may nevertheless be circumstances where an obligation to consult third parties over and above those set out in this guideline may arise.
- 1.8** The policy set out in this guideline does not affect the OFT's ability to consult with any complainant or other third party, or otherwise to communicate with them, whether formally or informally, at any stage of an investigation where it is appropriate or necessary to do so.

<sup>5</sup> See in particular *Pernod Ricard SA and Campbell Distillers Limited v Office of Fair Trading* [2004] CAT 10.

## 2 File closures

### Summary

- 2.1** When the OFT provisionally decides that an investigation will not be taken forward to a Statement of Objections, it will give Formal Complainants an opportunity to comment on the OFT's provisional view before the file is closed. It will do this by sending a Provisional Closure Letter.
- 2.2** The OFT will consult Formal Complainants prior to closure in all cases other than closures under Article 13(1) of Regulation 1/2003 (another EC competition authority is dealing with the case).

### Introduction

- 2.3** In exercising its powers under the Act, the OFT places significant reliance on third parties drawing to its attention suspected competition law infringements through the submission of well-informed complaints.
- 2.4** A policy of formal consultation of well-informed complainants during the administrative process is likely to facilitate robust decision-making as well as providing guidance to complainants as to the extent of their likely involvement in this process.
- 2.5** Accordingly, the OFT will generally consult **Formal Complainants** when it has provisionally decided that an investigation will not be taken forward to a Statement of Objections.<sup>6</sup>

<sup>6</sup> The policy set out in this guideline applies to all file closures by the OFT, whether or not a formal investigation has been opened in accordance with section 25 of the Act.

## Formal Complainants

**2.6** Formal Complainant status will be granted to any person:

- who has submitted a written, reasoned complaint to the OFT, containing the information set out in Part B of the annexe to this guideline<sup>7</sup>
- who has requested Formal Complainant status, and
- whose interests are, or are likely to be, materially affected by the agreement(s) or conduct which is the subject-matter of the complaint.

<sup>7</sup> Subject to paragraph 2.10.

**2.7** There may be more than one Formal Complainant in respect of an investigation.

## Written, reasoned complaint

**2.8** Guidance on the type and extent of information which must be provided to constitute a written, reasoned complaint is set out in the annexe to this guideline.

**2.9** The submission to the OFT of a written, reasoned complaint which contains the information set out in Part B of the annexe will give rise to a presumption that the complainant is in a position materially to assist the OFT in its investigation.<sup>8</sup>

**2.10** Generally, where a written, reasoned complaint is not submitted, a complainant will not be given Formal Complainant status. The OFT recognises, however, that some complainants may be able materially to assist the OFT in its investigation even where they are not in a position to provide all of the information which is required in a written, reasoned complaint. It may be possible for such complainants to be given Formal Complainant status. The circumstances in which this situation may arise are explained further at paragraphs 2.17 to 2.19 below.

<sup>8</sup> The OFT considers that disclosure of specified information relating to the affairs of an individual or any business of an undertaking to a complainant who is in a position materially to assist the OFT's assessment of a case is likely to facilitate the exercise by the OFT of its functions in accordance with Part 9 of the Enterprise Act 2002.

### Materially affected

**2.11** Formal Complainant status will be given only to those complainants whose interests are, or are likely to be, materially affected by the agreement or conduct which is the subject-matter of the complaint.

**2.12** Examples<sup>9</sup> of complainants which the OFT would be likely to regard as being 'materially affected' include:

- actual or potential competitors denied access to a market by another party or parties
- a competitor who is unable to compete effectively because of the predatory behaviour of a dominant undertaking
- a customer who has had its choice of supplier restricted by an upstream market sharing agreement
- a retailer who is refused supply because it has priced below a recommended price
- a consumers' association, where some or all of the consumers it represents are, or are likely to be, materially affected by the subject-matter of the complaint, and
- a trade association, where some or all of the members it represents are, or are likely to be, materially affected by the subject-matter of the complaint.

**2.13** The OFT will decide whether a complainant is materially affected on the basis of the information provided in the written, reasoned complaint.

### Submission of non-confidential version of complaint

**2.14** To the extent that a written, reasoned complaint and any supporting evidence contain confidential information,<sup>10</sup> the complainant must submit at the same time a separate, non-confidential version, which may be provided to the undertaking(s) whose behaviour is alleged to be anti-competitive (the complaine(s)) if the OFT considers it appropriate.

<sup>9</sup> The examples given are intended to provide guidance only on whether a complainant is likely to be regarded as being 'materially affected'; they do not give an indication of the OFT's position on whether such agreements or behaviour would contravene the Act, Article 81, or Article 82.

<sup>10</sup> References in this guideline to confidential information are to the definition set out in Rule 1(1) of the Competition Act 1998 (Office of Fair Trading's Rules) Order 2004, SI 2000/293 (OFT's Rules).



**2.15** A complainant who is concerned about the disclosure of its identity to the complainee should explain to the OFT why this is the case. If the OFT is satisfied that the complainant's identity is confidential and should be withheld, it will seek to maintain the complainant's anonymity, to the extent that this is consistent with the OFT's statutory obligations.

### Confirmation of Formal Complainant status

**2.16** When the OFT has received a written, reasoned complaint requesting Formal Complainant status, it will notify the complainant within a reasonable time as to whether the conditions have been satisfied and Formal Complainant status granted.<sup>11</sup>

<sup>11</sup> The OFT will endeavour to do this within four weeks of the request for Formal Complainant status, although this may not be possible in all cases (for example, if further information is required).

### Waiving requirements for a written, reasoned complaint

**2.17** Generally, only those materially affected persons who have submitted a written, reasoned complaint which contains the information set out in Part B of the annexe will be given Formal Complainant status.

**2.18** There may however be circumstances where the OFT considers that a complainant is able materially to assist the OFT's investigation even though the complainant is not in a position to provide all of the requested information. This may be the case, for example:

- where an individual consumer has provided relevant and detailed information in relation to a particular agreement, but is not in a position to provide information on the markets affected by the behaviour in question, or
- where a consumers' association has provided relevant and detailed market information in relation to a complaint but is not in a position to provide detailed information on the alleged anti-competitive behaviour.

**2.19** In such circumstances, the OFT may waive certain of the requirements for a written, reasoned complaint, such that a complainant may be given Formal Complainant status provided the OFT is satisfied that it is, or is likely to be, materially affected by the agreement or conduct in question.

### Super-complaints by designated consumer bodies

<sup>12</sup> Further information on the super-complaints process is contained in the OFT's published booklet *Super-complaints: Guidance for designated consumer bodies* (OFT514).

**2.20** This guidance does not apply to the super-complaints process under section 11 of the Enterprise Act 2002. In some cases, a super-complaint may raise issues that are better dealt with under the Act. If they are taken forward by the OFT on that basis, the designated consumer body that originally submitted the super-complaint will be granted Formal Complainant status, and will be informed of this.<sup>12</sup>

### Cases where the OFT will not consult Formal Complainants

**2.21** The OFT will not consult Formal Complainants on case closures under Article 13(1) of Regulation 1/2003. These are procedural file closures on the basis that a competition authority of another Member State is dealing with the case. In such cases, the OFT will, as far as practicable, inform the complainant of the identity of the competition authority in question.

### Provisional Closure Letters

<sup>13</sup> Provisional Closure Letters containing information as set out in section 237(1) of the Enterprise Act 2002 are subject to restrictions on further disclosure in accordance with Part 9 of that Act, and recipients will be notified of this when the Provisional Closure Letter is sent to them. Disclosure in contravention of Part 9 may be a criminal offence.

**2.22** Formal Complainants will be informed of the OFT's provisional intention to close its file by way of a Provisional Closure Letter.<sup>13</sup>

**2.23** Provisional Closure Letters will set out the OFT's principal reasons for not taking the investigation forward. The OFT will not necessarily address every issue raised by the Formal Complainant.

**2.24** The level of detail necessary to achieve this aim will differ depending on the nature of the complaint and the stage of the OFT's investigation. Provisional Closure Letters in investigations which are at an advanced stage are likely to contain more detailed reasoning than those issued in cases which have not been the subject of extensive investigation.

**2.25** If the OFT is intending to publish a fully reasoned non-infringement decision in a case, it will, in place of a Provisional Closure Letter, provide a non-confidential version of the proposed decision to the Formal Complainant. The consultation procedure will be the same for

both Provisional Closure Letters and proposed non-infringement decisions.

- 2.26** Formal Complainants will be required to submit any comments and further evidence to the OFT within a time limit specified in the Provisional Closure Letter. The period allowed will generally be between two and four weeks, although this will depend on the case. In complex cases, for example those which have been extensively investigated, a longer period may be allowed.
- 2.27** Provisional Closure Letters and proposed non-infringement decisions will normally<sup>14</sup> be sent to the complainee, who will be given an opportunity to comment within the same time frame.
- 2.28** To the extent that a Formal Complainant's response to a Provisional Closure Letter contains confidential information, the complainant must submit at the same time a separate, non-confidential version, which may be provided to the complainee if the OFT considers it appropriate.<sup>15</sup>
- 2.29** The OFT will consider any comments and further evidence which have been submitted by a Formal Complainant within the time limit specified by the Provisional Closure Letter, before reaching a final view on whether the file will be closed.
- 2.30** Where information provided in response to a Provisional Closure Letter does not lead the OFT to take a different view of the complaint, the case file will be closed, and a Final Closure Letter issued to the Formal Complainant and the complainee, recording the OFT's decision. In such cases the Final Closure Letter will explain why the additional information provided by the Formal Complainant has not led the OFT to change its view. The level of detail given will depend on the case and the nature of the additional information provided.
- 2.31** Where information provided in response to a Provisional Closure Letter does lead the OFT to change its preliminary view and decide that the investigation should be taken forward, the Formal

<sup>14</sup> There may be exceptional cases where this would not be appropriate, for example, if the OFT would be likely to consider the use of its powers under section 28 of the Act if the investigation were to continue.

<sup>15</sup> For example, if the response appears to be likely to change the OFT's preliminary view.

<sup>16</sup> Provided the complainee has been sent a copy of the Provisional Closure Letter.

<sup>17</sup> If the complainee has not previously seen the Provisional Closure Letter, it may be necessary to provide it with a copy at this point, together with the Final Closure Letter.

<sup>18</sup> See paragraph 2.36 on the OFT's assessment of complaints generally.

Complainant and the complainee<sup>16</sup> will be informed of this, and the investigation will continue in the normal way.

**2.32** If a Formal Complainant does not respond to a Provisional Closure Letter within the specified time limit, the OFT will close the case file and issue a Final Closure Letter to the Formal Complainant and the complainee, recording its decision. In such cases the Final Closure Letter is likely simply to refer to the Provisional Closure Letter, and will not set out any further reasons for closing the file.<sup>17</sup>

**2.33** Any additional information or comments sent by a Formal Complainant subsequent to case closure will be treated as a new complaint.<sup>18</sup>

### Access to additional documents or information

**2.34** Formal Complainants will generally not be given access to documents or information in addition to the Provisional Closure Letter. There may be exceptional instances where the OFT considers it necessary to disclose additional information or documents to a Formal Complainant in order to enable it to assist the OFT's assessment of a case. Any such disclosure must be permitted under Part 9 of the Enterprise Act 2002. The OFT will consider whether further disclosure is appropriate in the circumstances of each case.

### Other complainants

**2.35** The OFT will continue to acknowledge receipt in writing of all complaints, and to inform all complainants in writing, regardless of whether or not they are Formal Complainants, of decisions to close the file.

## **OFT assessment of complaints**

**2.36** The submission of a complaint to the OFT, whether or not made by a Formal Complainant, does not guarantee that a formal investigation will be opened. To the extent that any complaint leads the OFT to have reasonable grounds to suspect that a relevant prohibition has been infringed, the OFT may conduct an investigation, if to do so fits with its administrative priorities.

## 3 Statements of Objections

### Summary

- 3.1** When the OFT issues a Statement of Objections, it will publish a Notice on its website giving a brief summary of the case and noting that a Statement of Objections has been issued. It will normally provide non-confidential versions of the Statement of Objections to Formal Complainants, and also to certain other interested third parties who request a copy, in order to give them an opportunity to comment on the OFT's provisional findings.
- 3.2** The OFT may decide to consult Formal Complainants and other third parties to a more limited extent, or not at all, in cartels cases where there is a risk of prejudice to a related criminal investigation.

### Introduction

- 3.3** Well-informed third parties will frequently have been involved in OFT investigations prior to the issue of a Statement of Objections.<sup>19</sup> They may, for example, have submitted a complaint, or have responded to a section 26 notice requesting specified documents and information.
- 3.4** There are potentially significant benefits to be derived from offering well-informed third parties a formal opportunity to comment on the OFT's case as set out in a Statement of Objections in the light of their knowledge and experience.

### Formal Complainants

- 3.5** If an investigation which was begun as a result of a complaint made by a Formal Complainant proceeds to the stage where the OFT issues a Statement of Objections, the OFT will normally consult the Formal Complainant at that stage. Formal Complainants<sup>20</sup> are generally as likely to be in a position materially to assist the OFT's assessment of a case when a Statement of Objections is issued as they are at file closure stage.
- 3.6** There may be instances where the OFT considers that consultation with a Formal Complainant at Statement of Objections stage is not likely materially to assist its assessment. In such cases, the OFT will

<sup>19</sup> In accordance with the OFT's Rules 4 and 5, if the OFT proposes to make an infringement decision, it must give notice (a 'Statement of Objections') to each person which it considers is engaged in the agreement(s) or conduct in question, stating the facts on which the OFT relies, the objections raised, its proposed action and the reasons for its proposed action. Recipients must be permitted to make written representations on the notice.

<sup>20</sup> Within the meaning of paragraph 2.6 above.

inform the Formal Complainant in writing of its reasons for taking this view.

## Other third parties

**3.7** The OFT may broaden the scope of consultation at Statement of Objections stage to include certain other third parties in addition to the Formal Complainant (if there is one). When it has issued a Statement of Objections, the OFT will consult third parties who:

- are, or are likely to be, materially affected<sup>21</sup> by the alleged infringement
- request to be consulted, and
- are likely materially to assist the OFT in its investigation.

<sup>21</sup> See paragraphs 2.11 to 2.13 above on the meaning of 'materially affected' and examples of third parties who are likely to fall into this category. At Statement of Objections stage this category may also encompass third parties who are positively affected by the agreement/behaviour in question.

## Materially assist

**3.8** A third party may be able materially to assist the OFT's assessment of a case at Statement of Objections stage if it is in a position materially to assist the OFT in testing its factual, legal or economic arguments.

**3.9** In assessing whether this condition is satisfied, the OFT will take into account the extent to which a third party has been involved in the OFT's investigation prior to the issue of the Statement of Objections, including the nature of the information it has provided. In general, third parties who have been extensively involved in the investigation and have provided significant information to the OFT prior to the issue of the Statement of Objections are more likely to satisfy this condition.

**3.10** Where a third party requesting consultation at Statement of Objections stage has not previously been involved in the investigation, it must submit representations to the OFT explaining why it considers that this condition is satisfied.

### Limitation of consultation in cartels cases

**3.11** As a general rule the OFT will consult Formal Complainants and other third parties as set out above in all cases where a Statement of Objections has been issued.

**3.12** It may however be necessary to limit the extent of consultation of Formal Complainants and other third parties, or not to consult them at all, in cartels cases<sup>22</sup> where consultation could give rise to a risk of prejudice to a related criminal investigation or proceedings in respect of the cartel offence.<sup>23</sup>

### Supplementary Statements of Objections

**3.13** When the OFT issues a Supplementary Statement of Objections, it will generally adopt the same consultation process as is set out in this guideline for Statements of Objections.

**3.14** There may be occasions where consultation of Formal Complainants and other third parties on a Supplementary Statement of Objections is unlikely materially to assist the OFT in its assessment. This may be the case, for example, where a Supplementary Statement of Objections is very narrow in scope. In such instances, the OFT may decide to consult to a more limited extent, or not at all, on a Supplementary Statement of Objections.

### Consultation process

#### Formal Complainants

**3.15** When a Statement of Objections has been issued in a case, the OFT will (subject to the exception outlined above for cartels cases in certain circumstances) normally provide a non-confidential version of it to Formal Complainants.

<sup>22</sup> That is, those cases which involve horizontal 'cartel activities' as defined in footnote 8 of *OFT's guidance as to the appropriate amount of a penalty* (OFT423), namely agreements which infringe Article 81 and/or the Chapter I prohibition and involve price-fixing, bid-rigging (collusive tendering), the establishment of output restrictions or quotas and/or market-sharing or market-dividing.

<sup>23</sup> As set out in section 188 of the Enterprise Act 2002. The cartel offence applies to horizontal agreements only. An explanation of the interaction between criminal and civil investigations in cartels cases is contained in *Powers for investigating criminal cartels* (OFT515).



### Publication of Notice

- 3.16** The OFT will (subject to the exception outlined above for cartels cases in certain circumstances) publish on its website a Notice giving a brief summary of the case, noting that a Statement of Objections has been issued, and inviting third parties who may wish to comment on the OFT's provisional findings to submit a written request for a non-confidential copy by a specified date.
- 3.17** A non-confidential version of the Statement of Objections will be provided to third parties who satisfy the requirements set out at paragraph 3.7 above.<sup>24</sup>

### Third party comments

- 3.18** Formal Complainants and other third parties who have been provided with a non-confidential version of a Statement of Objections will be required to submit any comments and/or additional information within a specified time limit. The period allowed will generally be four to six weeks, although this will depend on the case.
- 3.19** To the extent that responses contain confidential information, separate, non-confidential versions must be provided within the same period. The OFT will send these to the addressees of the Statement of Objections for their consideration. Addressees will be given a reasonable opportunity to consider and comment on responses in writing or at the oral hearing.
- 3.20** The OFT will not generally allow Formal Complainants and other third parties a further opportunity to comment by providing them with a copy of the addressees' written representations, although this may be appropriate in certain circumstances.<sup>25</sup>

### Access to further documents

- 3.21** It is expected that the provision of a non-confidential version of a Statement of Objections will be sufficient to enable third parties to provide the OFT with informed comments on it. Such disclosure will not generally include any annexed documents.

<sup>24</sup> Non-confidential versions of Statements of Objections containing information as set out in section 237(1) of the Enterprise Act 2002 are subject to restrictions on further disclosure in accordance with Part 9 of that Act, and recipients will be notified of this when copies are provided to them. Disclosure in contravention of Part 9 may be a criminal offence.

<sup>25</sup> For example, when the addressee and a third party put forward different versions of the same facts and it is necessary to decide which version is more credible.

**3.22** Formal Complainants and other third parties will generally not be given access to documents or information in addition to the Statement of Objections. There may be exceptional instances where the OFT considers it necessary to disclose additional information or documents to a Formal Complainant or other third party in order to assist the OFT's assessment of a case. Such disclosure must be permitted under Part 9 of the Enterprise Act 2002. The OFT will consider whether further disclosure is appropriate in the circumstances of each case.

### **Oral representations**

**3.23** Formal Complainants and other third parties will generally not be invited to attend the parties' oral representations. The OFT will continue its current practice of meeting with third parties if it is considered appropriate to do so in the circumstances of the case.

# 4 Interim measures

## Summary

- 4.1** If the OFT provisionally decides to reject an application for interim measures, it will consult applicants who are Formal Complainants before doing so. It will do this by sending a Provisional Closure Letter or a Provisional Dismissal Letter.
- 4.2** If the OFT provisionally decides to adopt an interim measures decision, it will consult applicants for interim measures who are Formal Complainants. It will do this by providing a non-confidential version of the Interim Measures Notice.
- 4.3** It may be necessary to limit the extent of involvement of Formal Complainants in certain interim measures cases.

## Introduction

- 4.4** Informed applicants for interim measures<sup>26</sup> are likely to be in a position materially to assist the OFT's assessment of a case. The OFT will adopt a broadly similar procedure for consulting third parties in interim measures cases as that set out earlier in this guideline in relation to decisions to close the investigation file.
- 4.5** Given the particularly time-critical nature of the interim measures process, it may be necessary to limit the involvement of applicants, or to request comments to very short time scales, in certain interim measures cases.

## Rejections of interim measures applications

- 4.6** When the OFT decides to reject an interim measures application made by a complainant, and at the same time proposes to close the investigation file, it will consult applicants for interim measures who are Formal Complainants<sup>27</sup> before doing so. They will receive a Provisional Closure Letter setting out the OFT's principal reasons both for rejecting the application for interim measures and for closing the file. The OFT will follow the same consultation procedure as set out in paragraphs 2.22 to 2.33.

<sup>26</sup> In accordance with section 35 of the Act, the OFT may give interim measures directions provided an investigation has begun under section 25 and has not been completed, and the OFT considers it necessary to act urgently either to prevent serious, irreparable damage to a person or category of persons, or to protect the public interest.

<sup>27</sup> Within the meaning of paragraph 2.6 above. It is expected that informed applicants for interim measures will generally be in a position to provide the information set out in Part B of the annex and to demonstrate that they are materially affected by the agreements or behaviour in question. The OFT will also retain the discretion to consult applicants for interim measures who are not Formal Complainants in appropriate cases.

<sup>28</sup> Provisional Dismissal Letters containing information as set out in section 237(1) of the Enterprise Act 2002 are subject to restrictions on further disclosure in accordance with Part 9 of that Act, and recipients will be notified of this when the Provisional Dismissal Letter is sent to them. Disclosure in contravention of Part 9 may be a criminal offence.

<sup>29</sup> There may be exceptional cases where this would not be appropriate, for example, if the OFT would be likely to consider the use of its powers under section 28 of the Act if the investigation were to continue.

<sup>30</sup> This will depend on whether the complainee has received a copy of the Provisional Dismissal Letter.

<sup>31</sup> Section 35(3) and (4) of the Act provides that before giving an interim measures direction, the OFT must give written notice to the addressee and allow it to make representations. The notice must indicate the nature of the direction proposed and the OFT's reasons for wishing to give it.

- 4.7** When the OFT decides to reject an interim measures application made by a complainant, but at the same time to continue the investigation, it will consult applicants for interim measures who are Formal Complainants, who will receive a Provisional Dismissal Letter. This letter will set out the OFT's principal reasons for rejecting the application, and will give the Formal Complainant an opportunity to submit comments and/or additional information within a specified period, the length of which will depend on the case.<sup>28</sup>
- 4.8** Provisional Dismissal Letters will normally be provided to the complainee,<sup>29</sup> who will be given an opportunity to comment within the same time frame.
- 4.9** To the extent that complainants' responses contain confidential information, separate, non-confidential versions must be provided within the same period, which may be provided to the complainee if the OFT considers it appropriate.
- 4.10** Where information provided in response to a Provisional Dismissal Letter does not lead the OFT to take a different view of the application, a letter will be issued to the Formal Complainant and normally the complainee,<sup>30</sup> recording the OFT's decision. The letter will explain why the additional information provided by the Formal Complainant has not led the OFT to change its view. The level of detail given will depend on the case and the nature of the additional information provided.
- 4.11** Where this additional information does lead the OFT to change its preliminary view and decide that an interim measures decision should be adopted, the Formal Complainant and the complainee will be informed of this, and the investigation will continue in the normal way.

### Adoption of interim measures decisions

- 4.12** When the OFT proposes to adopt an interim measures decision, it will consult applicants for interim measures who are Formal Complainants. A non-confidential version of the Interim Measures Notice<sup>31</sup> will be provided to them, giving them an opportunity to

submit written comments within a specified period, the length of which will depend on the case.

- 4.13** To the extent that responses contain confidential information, a non-confidential version of any comments submitted must also be provided, for transmission to the addressee of the Interim Measures Notice. The addressees will be given a reasonable opportunity to comment on the responses in writing or at the oral hearing.

### **Access to additional documents**

- 4.14** The OFT will not generally disclose any additional information to applicants for interim measures who are Formal Complainants. The reasoning set out in Provisional Closure Letters, Provisional Dismissal Letters, and non-confidential versions of Interim Measures Notices should be sufficient to enable Formal Complainants to understand the principal reasons for the OFT's proposed decisions. Further disclosure is also likely to be inappropriate due to the particularly time critical nature of the interim measures process.

# Annexes:

## **A Guidance on the submission of complaints to the OFT about anti-competitive behaviour**

### **Introduction**

**A.1** In order to exercise its powers under the Act effectively, the OFT places significant reliance on third parties drawing to its attention suspected competition law infringements through the submission of well-informed complaints.

### **The OFT's general practice in relation to complaints**

**A.2** The OFT considers all complaints about anti-competitive behaviour which it receives. Receipt of all complaints will be acknowledged in writing and all complainants will be informed in writing of the OFT's decisions on their complaints. However, it should be borne in mind that strength of evidence is one of the OFT's key criteria for taking an investigation forward.

**A.3** Parts B and C of this annexe set out the mandatory (Part B) and optional (Part C) information to be included in a written, reasoned complaint, the submission of which may lead to a complainant being granted Formal Complainant status. This gives complainants an opportunity to be formally involved in the OFT's administrative procedure.

**A.4** Even where complainants do not wish to have such involvement, both Parts B and C may be used as a checklist of the information which the OFT would generally regard as being particularly useful when included in a complaint.

### **Formal Complainant status**

**A.5** Complainants who submit a written, reasoned complaint to the OFT and are (or are likely to be) materially affected by the agreement or conduct which is the subject-matter of the complaint will be granted Formal Complainant status, if they so request. This means that, in addition to receiving a written acknowledgement of their complaint and written notification of a decision to close the file, they will be

given a formal and structured opportunity to comment on the OFT's provisional findings before a definitive decision is made to close the file.

- A.6** Part 2 of this guideline gives further details as to the circumstances in which Formal Complainant status will be granted, and explains the consultation process.

### **Written, reasoned complaints**

- A.7** Part B of this annexe sets out the information which must be provided for a complaint to constitute a written, reasoned complaint.
- A.8** In certain circumstances, it may be possible for complainants to be granted Formal Complainant status even if they are not in a position to provide all of the required information. Further details are set out at paragraphs 2.17 to 2.19 of this guideline. Complainants who fall into this category, but nevertheless wish to be granted Formal Complainant status, should provide written reasons to the OFT in support of their case.

### **Optional information**

- A.9** Part C of this annexe contains a checklist of additional information which is likely to assist the OFT in considering the merits of a complaint at an early stage. Provision of this information is not mandatory for a complaint to be considered a written, reasoned complaint.
- A.10** There is no guarantee that an investigation will be taken forward even if all the information described in this annexe has been provided.

### **Initial informal approaches to the OFT**

- A.11** The requirement for a written, reasoned complaint does not preclude complainants from approaching the OFT informally in the first instance. An informal approach may subsequently be supplemented by the submission of a written, reasoned complaint requesting Formal Complainant status, or information which the complainant has agreed

in initial discussions with the OFT that it will provide. In such cases, the complainant will be given Formal Complainant status from the time the complaint is submitted or the information received (provided that the complainant is, or is likely to be, materially affected by the agreement or conduct in question).

**A.12** The OFT will not give Formal Complainant status to complainants who decline to provide the required information relating to their complaint in writing.

### Confidential information

**A.13** To the extent that a written, reasoned complaint and any supporting evidence contain confidential information, the complainant must at the same time submit a separate, non-confidential version to the OFT, which may be provided to the complaine.

### Further guidance

**A.14** The OFT has published a set of competition law guidelines which provide further guidance on the OFT's policy and practice, and which may be of assistance to persons who are considering making a complaint to the OFT. They can be ordered or downloaded from the OFT website at: [www.of.gov.uk](http://www.of.gov.uk)

**A.15** It is open to prospective complainants to discuss the situation informally with OFT officials before a complaint is made. Requests should be made in the first place by calling the OFT enquiries line at 08457 22 44 99 or emailing [enquiries@of.gsi.gov.uk](mailto:enquiries@of.gsi.gov.uk)

**A.16** For any other information on how to complain to the OFT, please contact the OFT enquiries line at 08457 22 44 99 or email [enquiries@of.gsi.gov.uk](mailto:enquiries@of.gsi.gov.uk)



## **B Information required in a written, reasoned complaint**

**B.1** In order to be treated as a written, reasoned complaint, a written submission to the OFT **must** contain the information set out in this Part.

### **Information on the complainant and complainee**

**B.2** A written submission to the OFT must contain the following information on the complainant and complainee:

- **Complainant** – Name, legal form (for example, sole trader, partnership, private or public company, part of a corporate group) and contact details (address, phone/fax number, and/or email address) of the complainant. This should include contact details of a person authorised to discuss the detail of the complaint
- **Complainee** – Name, legal form (for example, sole trader, partnership, private or public company, part of a corporate group) and contact details (address, phone/fax number, and/or email address) of the undertaking(s) whose behaviour is alleged to be anti-competitive (the complainee(s)), and
- **Material effect** – An explanation of why the complainant is (or is likely to be) materially affected by the alleged anti-competitive behaviour. This should include a description of the relationship between the complainant and the complainee (for example, is the complainant a customer or a competitor?) and an explanation of how the complainant has been (or is likely to be) affected by the behaviour complained of.

### **Details of the complaint**

**B.3 Reasons for the complaint:** The complainant must set out the reasons for making the complaint, including a detailed description of the behaviour it believes to be anti-competitive. In particular, the following information must be provided:

- a description of the business operated by the complainee and an indication of its geographic scale (for example, local, national, or international)

- a summary of events with relevant dates, including details of any relevant contact between the complainant and the complaine (for example, meetings, phone calls, emails)
- the complainant's view of the market(s) affected by the behaviour complained of, including:
  - a description of the products<sup>32</sup> concerned by the complaint
  - the market position of the complaine (for example, approximate turnover and/or market share)
  - a description of the complaine's typical customers (for example manufacturers using the products as an input, wholesalers, retailers, end-consumers)
  - if the complaint concerns abuse of a dominant position, an explanation of why the complainant believes that the complaine is in a dominant position<sup>33</sup>
  - how competition for the products in question is (or is likely to be) affected by the alleged anti-competitive behaviour
- an explanation of how consumers are (or are likely to be) adversely affected by the alleged anti-competitive behaviour.

**B.4 Action sought:** Details of any action which the complainant wishes the OFT to take. This should include an explanation of whether (and if so, why) the complaint is urgent.

### Factual evidence supporting the complaint

**B.5** The complainant must provide all available evidence (that is, information which the complainant already possesses, or which is readily accessible<sup>34</sup> to it) supporting the complaint.

**B.6** This may include copies of relevant documentation (for example, contracts, notes of phone conversations, emails, minutes of meetings, board papers), any relevant industry reports/consumer surveys, and details of any person who can testify to the facts set out in the complaint.

<sup>32</sup> In this annexe the term 'product' includes 'service' and the term 'products' includes 'services' unless otherwise stated or the context requires.

<sup>33</sup> Further information on the assessment of dominance can be found in the competition law guidelines *Abuse of a dominant position* (OFT402) and *Assessment of market power* (OFT415).

<sup>34</sup> For example, the information is available from public sources.

## Other information

**B.7** The following information must be provided if the complainant already possesses it, or it is readily accessible:

### Litigation

- information about whether the same (or similar) subject-matter as that of the complaint is or has been the subject of litigation (in the UK or anywhere else), and
- if so, details of the litigation (for example, which court(s), stage of the proceedings) and any resulting order/judgment.

### Other competition investigations

- information about whether the same (or similar) subject-matter as that of the complaint is or has been the subject of a complaint to, and/or an investigation by, another competition authority (for example, the DG Competition of the European Commission or another national competition authority in the European Union), and
- if so, details of the complaint and/or investigation (for example, the investigating authority and the stage of the proceedings) and any resulting decision and/or judicial proceedings and judgments.

### Other public bodies

- information about whether the same (or similar) subject-matter as that of the complaint is or has been investigated by another public body in the UK, and
- if so, details of the investigation(s) (for example, which body conducted the investigation and stage/result of the investigation).

### C Optional information

**C.1** This Part sets out the types of information which the OFT is likely to find particularly useful in assessing whether a complaint merits investigation.<sup>35</sup> The information described is non-exhaustive, and may not all be relevant to every case.<sup>36</sup>

**C.2** The OFT recognises that complainants may not be in a position to provide all of the information set out below. As such, the provision of this information is optional. However, it should be borne in mind that strength of evidence is one of the OFT's key criteria for taking a complaint forward.

### Information about the complainant

**C.3** If the complainant is an undertaking, the following information will be of assistance:

- a description of the complainant's business (for example, products supplied, geographical scope, size)
- a description of the complainant's typical customers (for example, manufacturers using the products as an input, wholesalers, retailers, end-consumers) and an indication of their importance to the complainant's business (for example, does any customer purchase a large share of the complainant's products?)
- whether the complainant purchases the products concerned by the complaint
- if so, the importance of the products in question to the complainant's business (for example, whether the products in question are an indispensable input), and
- a description of the industry, particularly in terms of what upstream and downstream undertakings supply in relation to the products in question.

<sup>35</sup> Nothing should be inferred from these checklists as to how the OFT will assess whether any agreement or conduct infringes a relevant prohibition (that is, the Chapter I prohibition, the Chapter II prohibition, Article 81 and/or Article 82).

<sup>36</sup> There may be some overlap between the optional information set out in this Part and the mandatory information set out in Part B. This reflects the fact that complainants who are in a position to provide the information set out in Part C are likely to be able to provide a greater level of detail. Complainants will not however be expected to submit the same information twice.

## Relevant product and geographic markets

**C.4 Product market:** The complainant's view of the relevant product market(s).<sup>37</sup> Relevant information may include the following:

- the extent to which the products in question are substitutable with other products, including actual and potential alternatives
- information on the history of the market (for example, how customers have previously reacted to substantial price increases, or attempts to increase prices, for the products in question), and
- independent market research and other market information (for example, market reports, trade publications). If possible copies of such information should be provided.

<sup>37</sup> Complainants may wish to refer to the competition law guideline *Market Definition* (OFT403), which follows a similar approach to the European Commission's *Notice on the definition of the relevant market for the purposes of Community competition law* (OJ C372, 9.12.97, p 5).

**C.5 Geographical market:** The complainant's view of the relevant geographical market (for example, regional, national, European, global).<sup>38</sup> Relevant information may include the following:

- whether there are cross border sales of the products in question and if so an indication of the value and volume of imports and exports to and from the UK
- an indication of the commercially viable distance for the delivery of the products in question, and
- a description of the logistics/service arrangements used to supply the products in question.

<sup>38</sup> Complainants may wish to refer to the competition law guideline *Market Definition* (OFT403), which follows a similar approach to the European Commission's *Notice on the definition of the relevant market for the purposes of Community competition law* (OJ C372, 9.12.97, p 5).

## Competitive conditions in the relevant markets

**C.6** A description of the competitive conditions in the relevant markets, including details of:

- the approximate total size of the market by value and volume and how (or whether) it has changed in recent years
- the key market participants and their approximate market shares by value and volume
- how (or whether) market shares have changed in the last 2-5 years, including the extent of entry, exit and consolidation

- the extent of vertical integration in the market
- the manner in which undertakings compete (for example, mainly on price or on quality/service) and how competition takes place (for example, are there formal tendering processes? Are there long-term contracts?)
- how prices differ between competitors and the price history of the market (for example, upward or downward trends)
- whether undertakings use specific/different technologies to supply the same products
- the extent to which there is any unused capacity on the market
- the characteristics of buyers of the products in question
- the extent (if any) of regulation of the industry
- an estimate of the capital expenditure which would be required to enter the market on a commercially viable scale, both as a completely new entrant, and as an undertaking which already has the necessary technology and expertise (for example, a company located overseas), and an estimate of the extent to which this cost would be recoverable should the undertaking decide to exit the market
- details of any other factors affecting entry (for example, planning restrictions or other regulatory impediments, expenditure on advertising/promotion, technology or R & D requirements, availability of raw materials, length of contracts), including, where possible, an estimate of the time and resources necessary to overcome these factors
- the importance of economies of scale or scope, and
- the extent (if any) of first mover advantages.

### Legal basis for the complaint

- C.7** The purpose of this section is to provide the OFT with the complainant's view on how the relevant EU and/or UK law provisions, EU<sup>39</sup> and/or UK precedents,<sup>40</sup> and published guidance<sup>41</sup> apply to the

<sup>39</sup> EU precedents include, for instance, judgments of the Court of Justice or the Court of First Instance of the European Communities and any decisions by the European Commission.

<sup>40</sup> UK precedents include, for instance, judgments of UK courts or tribunals and any decisions by the OFT or the Regulators.

<sup>41</sup> Published guidance includes, for instance, notices and guidelines published by the European Commission, the OFT, or the Regulators within the sectors for which they have concurrent powers.

behaviour complained of. To this end, it would be helpful if the complainant is able to indicate:

- which competition law provisions have allegedly been breached (the Chapter I or the Chapter II prohibition of the Act, and/or Article 81 or Article 82 of the EC Treaty) and why, and
- if it is believed that Article 81 or 82 has been breached, an explanation of why the behaviour of the complainee affects trade between EU Member States.<sup>42</sup>

<sup>42</sup> Complainants are referred to the Commission *Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty* (OJ C101, 27.4.2004, p 81).

<sup>43</sup> That is, those cases which involve 'cartel activities' as defined in footnote 8 of *OFT's guidance as to the appropriate amount of a penalty* (OFT423), namely agreements which infringe Article 81 and/or the Chapter I prohibition and involve price-fixing (including resale price maintenance), bid-rigging (collusive tendering), the establishment of output restrictions or quotas and/or market-sharing or market-dividing.

<sup>44</sup> That is, any other agreement that may be prohibited under the Chapter I prohibition or Article 81 and which is not a cartel agreement as defined in footnote 8 of *OFT's guidance as to the appropriate amount of a penalty* (OFT423).

## Information likely to be relevant to particular types of agreement or conduct

**C.8** Different types of information may be particularly useful to the OFT, depending on whether a complaint relates to a cartel,<sup>43</sup> to horizontal or vertical agreements other than cartels,<sup>44</sup> or to an abuse of a dominant position. The following sections give an indication of information likely to be most useful in relation to particular categories of behaviour.

### Cartel activity

**C.9** If the complaint relates to a cartel:

- what behaviour did the complainee engage in (for example, price-fixing, market-sharing, bid-rigging, vertical price restraints)?
- details (for example, name, address, position) of the individuals who are alleged to have taken part in the cartel
- details of when the alleged cartel commenced and when it ended, or whether it is still ongoing
- an explanation of the extent to which (and how) competition in is (or could be) distorted by the alleged cartel
- an estimate of the amount of turnover involved in the alleged cartel, and
- details of any evidence as to whether the alleged anti-competitive agreement has been implemented.

### Other agreements

**C.10** If the complaint relates to horizontal or vertical agreements other than cartels:

- an explanation of whether the parties to the agreement are actual or potential competitors on any of the relevant markets (that is, agreement between competitors) or not (that is, agreement between non-competitors)
- the market shares of each of the parties to the agreement on any of the markets affected by them for the last three calendar years
- an explanation of whether competition on any of the markets affected by the agreement in question is restricted by the cumulative effect of other, similar agreements entered into by different suppliers or distributors. If this is the case, specify what share of the relevant market(s) is covered by parallel networks of agreements having similar effects
- an explanation of why the agreement complained of has an actual or likely negative effect on prices, output, innovation or the variety or quality of goods or services on any relevant market(s), and an explanation of why any such effect is appreciable,<sup>45</sup> and
- the complainant's view as to whether the agreement in question:
  - contributes to improving the production or distribution of products or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit
  - does not impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives
  - does not afford the undertakings concerned the possibility of eliminating competition in respect of a substantial part of the products in question.

<sup>45</sup> The fact that parties' market shares exceed the thresholds set out in the European Commission's *Notice on Agreements of Minor Importance*, or the competition law guideline *Agreements and concerted practices* (OFT401) does not necessarily mean that the effect of an agreement on competition is appreciable.



## Abuse of dominance

### C.11 If the complaint relates to abuse of a dominant position:

- an explanation of whether and if so, to what extent, the alleged anti-competitive behaviour:
  - forecloses access to the market to actual or potential competitors, and if so, whether such competitors are (or are likely to be) more or less efficient than the complainee
  - harms consumers by raising prices, restricting output, slowing down the rate of innovation, preventing the development of new products/markets, or causing products of lower quality to be supplied
  - is not a legitimate way for the complainee to compete on the market or to perform more efficiently to the benefit of consumers
- any indication of whether the behaviour in question is intentionally anti-competitive (and all relevant evidence supporting this view), and
- any further evidence of the effect of the behaviour on the market (for example, change in prices and exit of firms).



## **Competition law guidelines**

The OFT has issued a series of competition law guidelines. New guidance may be published and the existing guidance revised from time to time. For an up-to-date list of guidance booklets check the OFT website at [www.of.gov.uk](http://www.of.gov.uk)

All guidance booklets can be ordered or downloaded from the OFT website at [www.of.gov.uk](http://www.of.gov.uk) Or you can request them by:

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