

Market investigation references

**Guidance about the making of
references under Part 4 of the Enterprise
Act**

**A summary of responses to the public consultation
paper on proposed amendment**

February 2006

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1 INTRODUCTION AND BACKGROUND

- 1.1 This document sets out a summary of responses to the public consultation on modification to the OFT's market investigation reference (MIR) guidance.¹ It also sets out the consideration the OFT has given to each of the responses, the reasons why it has (or has not) agreed with them and any further changes made to the guidance as a result.
- 1.2 The revised guidance will be published on the OFT website shortly. Paper copies of that guidance will also be available from the OFT.
- 1.3 The consultation² arose because we concluded that it would be desirable to make a modification to the policies described in paragraphs 2.30-2.32 of the existing guidance concerning the making of references involving regulatory matters.
- 1.4 The change will harmonise the text of the guidance with relevant paragraphs of our market studies guidance so as to make clearer our thinking on making references concerning adverse effects on competition arising from regulations, which we believe to be a potentially important area of pro-competitive reform (and consistent with the Government's deregulation agenda). The text of the existing market investigation reference guidance, when read in isolation, could be seen as more restrictive than Parliament intended and we have already set out our thinking more fully in our market studies guidance³ (OFT519; paragraphs

¹ Market investigation references: Guidance about the making of references under Part 4 of the Enterprise Act (OFT 511). Available at <http://www.offt.gov.uk/NR/rdonlyres/57C2BA34-81E8-4560-93CC-4BC4BBFC6DAF/0/oft511.pdf>

² <http://www.offt.gov.uk/NR/rdonlyres/692DF3E2-32CE-427F-A45C-806744CD727F/0/OFT511cons.pdf>

³ <http://www.offt.gov.uk/NR/rdonlyres/03AD31EC-3533-40BE-AE79-2A83424E9C9B/0/OFT519.pdf>

3.34-3.41). The new text has been drafted to follow more closely the language used in that guidance.

- 1.5 The OFT has consulted with the Competition Commission about the proposed changes, in accordance with statutory requirements. It has also consulted the regulators with concurrent powers (listed at Annex B to the consultation document).

2 SUMMARY OF RESPONSES AND OFT CONSIDERATION

- 2.1 We received two responses to the consultation. One was from 4C Electronics Ltd and the other from the National Consumer Council (NCC). A detailed summary and OFT consideration of each now follows.

4C Electronics Ltd

- 2.2 *This respondent says the following words should be added to MIR Guidance paragraph 2.31: "These recommendations would be posted on the OFT website - together with the Government's response, if and when received."*
- 2.3 *Its reasoning is that "It is important that a regulatory watchdog set up by the government is not ignored when it does not suit the Government. The publishing of the recommendations would enable interested parties to make representations to the government department involved. The government might then realize that its policies are overall having a detrimental effect on the market place and revise them. Without such an open approach the government may only have reason to listen to one vocal party or section of the market."*
- 2.4 Our view is that this point is adequately covered elsewhere and need not be in the MIR guidance, which is concerned specifically with the circumstances in which a MIR might be made. We say in our market studies guidance (paragraph 3.11) that we will publish reports of our study findings and the Competition Commission (CC) has a statutory obligation to do so (s136 Enterprise Act [EA02]). The Government has undertaken to give a public response to OFT and CC recommendations within 90 days. In addition it is our normal practice to provide links from the OFT website to CC reports which follow a MIR or to Government responses to market study recommendations.
- 2.5 Accordingly, we will not be including in paragraph 2.31 the additional wording suggested.

National Consumer Council

- 2.6 *Whilst broadly welcoming the proposed changes' broadening of the scope to make MIRs in regulatory matters, the NCC makes three critical comments, namely that the proposed changes to the MIR Guidance:*
- (1) *lack a mechanism for the OFT to take forward any CC conclusions on adverse competition effects where the CC is not competent to devise direct remedies;*
 - (2) *generally "... introduce ambiguity and would fail to establish clearly for the public the criteria the OFT will apply when making a reference decision," by loosening the criteria, "... to a degree that makes any reference decision a matter for the OFT's discretion;" and*
 - (3) *in relation to paragraph 2.31, remove the clarity as to whether the OFT would refer an investigation to the CC where the OFT identifies adverse competition effects arising primarily from laws, regulations, or government policies and create the possibility the OFT may do nothing (neither make a MIR nor conduct a study) even where it has identified such adverse competition effects.*

2.7 On the first of these points, we take the view that it is unnecessary to refer to some such mechanism. There will not be situations where the CC identifies adverse competition effects, but does nothing about them because it cannot devise direct remedies and the OFT has to take forward the question of remedies; because in these circumstances it is for the CC to recommend and the Government to respond. S134(4) EA02 makes clear that the CC must decide whether to recommend that others take action to remedy such effects and what that action should be. Under s134(6) EA02 it has a duty to "... have regard to the need to achieve as comprehensive a solution as is reasonable and practicable." The CC

acknowledges in its MIR Guidance⁴ that its duties in relation to remedies may include recommendations to Government (see paragraphs 4.3 – 4.5 and 4.18(c) – 4.21). The Government’s pledge to respond to recommendations within 90 days is also again relevant. In the exceptional circumstances that the CC decides there are adverse effects on competition but there is no case for remedial action (see paragraphs 4.7 and 4.8 of its MIR Guidance), it would not be for the OFT to take forward the question of remedies. None of this, of course, necessarily precludes OFT action at some later time, if, for example, circumstances in a market change.

2.8 On the second point, we have considered the NCC’s comments and make a further amendment to paragraph 2.30 of the MIR Guidance in light of them. As a result, paragraph 2.30 makes it clear that it is possible that we will not make a MIR if we have sufficient information and understanding of the market to reach a view that the CC will not be able directly to take action to remedy any adverse effects on competition. But, it also makes clear that, even then, we will consider whether a CC investigation and report with recommendations for action by others will make a useful contribution to addressing problems in a market and may make a MIR if we believe it would. This reflects the reality of the situation, to facilitate the most effective application of the rules relating to market studies and CC investigations. It does not, in the OFT’s view, leave the position unclear.

2.9 The OFT has considered the NCC’s final point and takes the view that the proposed changes to paragraph 2.31 are appropriate. The OFT has no wish to let adverse effects on competition go unresolved where it considers that action should be taken that would remedy them. If it identifies an adverse effect on competition arising primarily from laws, regulations or government policies, it will consider whether action should be taken to remedy it. In doing so, it may, for example, take into account

⁴ http://www.competition-commission.org.uk/rep_pub/rules_and_guide/pdf/15073compcommguidance3final.pdf

any arguments on public policy grounds and any consumer benefits relating to the relevant laws, regulations or government policies, and the prospects that recommendations to government from a market study or CC investigation would lead to changes that remove or reduce the adverse effect, which may weigh against the taking of further action. The revised paragraph sets out the factors the OFT will take into account, where it considers further action appropriate, when deciding whether to conduct a market study and submit a report to the government or to make a MIR to the CC.

- 2.10 The changes to paragraph 2.31 (and 2.30), therefore, reflect the circumstances in which the OFT will consider whether, and what, action to take, and in which the OFT must necessarily retain an element of discretion in order to ensure its resources are appropriately employed. This is in addition to the other criteria relating to the exercise of the OFT's discretion set out in Chapter 2 of the MIR guidance.

3 AMENDMENT TO GUIDANCE

- 3.1 In the light of the above consideration, the amended text of paragraphs 2.30 – 2.32 of the guidance will be as follows (main changes to existing guidance underlined):

Availability of remedies and value of CC reports

2.30 *The OFT will also take into account the likely availability of appropriate remedies in the event that the suspected adverse effects on competition were found by the CC to exist. Where the OFT has not investigated a market in sufficient depth to be confident that it is in a position to identify the possible remedies it will not give this factor much weight. However, where the OFT has a reasonably good understanding of a market, perhaps because it has already **performed a market study**, or because a reference is being considered following an investigation under CA98, **it may decide not to** make a reference when it believes that no appropriate remedies **by means of direct action by the CC** are likely to be available. For example, it may have established that a particular market is global in scope, or at least goes much wider than the UK, and that any remedy for the UK (which would be all that was available under the Act) would have no discernible impact on the way the market operated even in the UK. **The OFT will have regard, however, to situations in which a CC investigation and report with recommendations for action (including recommendations for action by the European Commission or other bodies) is likely to make a useful contribution.***

2.31 *Similarly, where the OFT is satisfied that adverse effects on competition arise primarily from laws, regulations, or government policies it will **have regard to the fact** that the CC will not be able directly to remedy such adverse effects. **In such circumstances, the OFT itself may submit a report to the government as an outcome of a market study** (see paragraph 2.19 and note 6) **or it may make a reference when it considers a CC investigation and report would be***

more appropriate, for example because the CC has greater resources, stronger legal powers to require information, or more formal evidence gathering procedures. In either case, in the event of an adverse finding, the reporting body would make reasoned recommendations for changes to the relevant laws or regulations, and advise on policy options as appropriate.

2.32 *Although the availability of remedies and the prospective value of CC investigations and reports will be the most important practical issues taken into account by the OFT when considering a reference, it will also consider others where relevant. In particular, it may take into account whether the evidence that would enable the CC to reach a conclusion is likely to be available.*

3.2 The new edition of the guidance will also incorporate the factual changes set out at paragraphs 1.4 and 1.5 of the consultation document.