



## THE OFT's NEW APPROACH TO CASE SELECTION: HOW TO TELL IF THE OFT WILL PROCEED WITH A COMPLAINT

On 12 October 2006, the UK's competition authority — the Office of Fair Trading ("OFT") — published the new criteria that it will use to select competition cases in the future. This is likely to result in fewer cases being taken up by the OFT, so that the Office can concentrate its resources on the cases that have the highest impact on consumers. It will also enable the OFT to look more systematically at particular markets and cross-industry issues. Some existing investigations may now be dropped if they do not satisfy the new criteria.

The new framework sets out six steps that the OFT will take before deciding whether it should investigate a matter. The OFT will only apply the test once it has decided that it is the body that is best placed to tackle the case. The OFT will base that initial decision on the following factors, as well as on its overall objectives set out in its current annual plan:

- whether action based on other legislation might be as effective, or more effective, than competition law;
- whether enforcement action will be effective in reducing or stopping the detriment;
- whether the problem might be better tackled by another regulator, such as a sector regulator; and
- whether there are opportunities for private enforcement instead

Once the OFT has decided that it is best placed to pursue the case, it will consider the following six questions in order to decide whether to pursue the matter to an investigation. Complainants should take heed of these in seeking to persuade the OFT to take up a complaint:

### STEP ONE: WILL CONSUMERS BENEFIT?

The OFT will make an estimation of the direct consumer benefit that would arise from its intervention. Unless better information is available, it will use the following shortcuts as a means of calculating the benefit to consumers:

- cartels: intervention will benefit consumers by an amount equal to 10% of the parties' turnover in the affected market or sector.
- all other cases: the benefit will equal 5% of the parties' turnover in the affected market or sector.

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## STEP TWO: WILL FURTHER CONSUMER DETRIMENT BE AVOIDED?

The OFT will consider the likely consumer detriment prevented as a result of deterrence. In doing so, it will take account of the following factors:

- whether the parties are likely to be party to similar arrangements
- whether the issue being considered affects the whole sector or just the parties concerned
- whether it is a wider issue affecting other sectors
- whether recent cases have covered the same sectors or issues

## STEP THREE: WHAT ARE AGGRAVATING AND MITIGATING FEATURES?

Step three involves a consideration of any relevant aggravating or mitigating factors.

Examples of aggravating factors are:

- the parties are repeat offenders.
- the conduct affects particularly vulnerable consumers.
- the infringement is blatant.
- the infringement is of a long duration.

Examples of mitigating factors are:

- the conduct has ceased (otherwise than as a result of the OFT action).
- the infringement is of a very short duration.
- the party is a new entrant or a small-medium sized enterprise.

## STEP FOUR: DOES THE CASE FIT IN WITH POLICY PRIORITIES?

The OFT will take account of its general enforcement policy issues, whether there is already a precedent to rely on and whether the case will raise the awareness of the OFT. In doing, so it will consider the following issues:

- does the case involve a new or priority sector, or one in which the sector is of particular importance for the UK economy?
- does the case involve a novel infringement or is there a need for policy clarification?
- does the case involve a criminal cartel?
- is the case high-profile, of key interest to stakeholders or commentators, or are similar issues being considered by the European Commission?

## STEP FIVE: ARE THERE SUFFICIENT RESOURCES?

The OFT will have regard to its available resources and to the level of resources that would be required to achieve the desired outcome.

## STEP SIX: WILL THE CASE SUCCEED?

Finally, the OFT will take account of the likelihood that the investigation will lead to the desired result.

The publication of this framework is a welcome development by the OFT and will enable complainants and potential defendants to take a more informed view on the likelihood of a complaint or other case being taken up by the OFT.

*If you have any questions about the OFT's policy, please do not hesitate to contact either:*

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