



House of Commons  
Business, Enterprise and  
Regulatory Reform Committee

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**The work of the Office  
of Fair Trading:  
Government Response  
to the Trade and  
Industry Committee's  
Twelfth Report of  
Session 2006–07**

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**Second Special Report of Session  
2007–08**

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## The Business, Enterprise & Regulatory Reform Committee

The Business, Enterprise & Regulatory Reform Committee is appointed by the House of Commons to examine the expenditure, administration, and policy of the Department of Business, Enterprise & Regulatory Reform.

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### Committee staff

The current staff of the Committee are Eve Samson (Clerk), David Slater (Second Clerk), Robert Cope (Committee Specialist), Ian Townsend (Inquiry Manager), Anita Fuki (Committee Assistant), Lorna Horton (Committee Secretary) and Jim Hudson (Senior Office Clerk).

### Contacts

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## Second Special Report

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The Trade and Industry Committee published its Twelfth Report of Session 2006–07 on 24 October 2007. The Government's response was received by its successor, the Business, Enterprise and Regulatory Reform Committee, on 29 January 2008. It is published as an Appendix to this Report.

## Government response

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1. The Government welcomes the Committee's report which highlights some of the key issues facing the Office of Fair Trading over the coming few years. The Committee's views will inform the strategic planning for the OFT as we strive to maintain a world-class competition regime and strong and effective consumer policy in the UK.

### Response to Conclusions and Recommendations:

We have set out below our response to conclusions and recommendations.

#### *The OFT's response to the 2005 NAO report*

**2. Paragraph 6: We commend the OFT for its response so far to the NAO's criticisms. As witnesses noted, it is too soon to make a balanced assessment of whether these criticisms have been fully addressed, but we are encouraged by the evidence of progress we have seen. Therefore we also welcome the fact that the NAO will be revisiting the work of the OFT after April 2008.**

3. The Government and the OFT welcomes the Committee's commendation of its response to the 2005 NAO report on the OFT's competition enforcement work. The NAO report recognised the OFT's achievements during a period of dramatic change in the legal environment.

4. The OFT has accepted all of the NAO recommendations<sup>1</sup>, and in conjunction with its internal change programme, has worked on implementing them. The NAO recommendations, where efficient to do so, have been implemented across the OFT, rather than just in the area of competition enforcement. For example, in line with the NAO recommendation that the OFT increase transparency on its selection of competition cases for investigation, the OFT is currently consulting on criteria explaining how it prioritises all its work, including consumer and markets.

5. The OFT made radical changes to its structure in order to meet the challenges it faces more effectively and ensure it is a more focused, strategic and coherent organisation. A key aspect of this new structure is that project and enforcement work are now grouped

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<sup>1</sup> The NAO report made several recommendations on prioritisation and resourcing of OFT's casework; case management in terms of timescales, cost and quality control; and measurement and communication of the OFT's achievements.

together in three sector-focused market groupings covering goods, services, and infrastructure & knowledge economies.

6. The OFT has an objective to achieve direct financial benefits for consumers of five times its cost to the taxpayer over the next three years. The OFT has drawn up a series of aims to help meet this: delivering high impact outcomes, being a centre of excellence and intelligence, working in partnership, and building its internal capability.

### ***Salary and other constraints:***

**7. Paragraph 7: We share the concerns of OFT management over the lack of flexibility available to it in rewards packages. As the UK's principal competition authority, the OFT needs to employ talented individuals to do its job. We recommend that the Department of Business, Enterprise and Regulatory Reform undertakes a review of the effect that the greater market power of Ofcom in attracting staff could be having on the effectiveness and balance of the overall UK competition regime.**

8. The OFT, like many other Government institutions, competes with other Government institutions and the private and third sector to attract highly qualified staff in a competitive market.

9. While the Government imposes necessary restrictions around the rewards package that the OFT can offer their staff, there is some flexibility available for the OFT to target pay increases to areas or specialities where they most need to retain or attract staff.

### ***Merger referral threshold***

**10. Paragraph 9: While the broad thrust of this new approach appears sensible, we have some concerns that smaller markets or competition in local areas could be neglected under the merger referral proposals. Although there is provision for referrals below the £10 million level in some circumstances, it will be necessary to ensure that this does indeed happen, and we recommend that the OFT continue to keep this matter under review once new guidelines have been adopted.**

11. The OFT's Guidance describes those circumstances where it may decide not to refer a merger below a certain size (the 'de minimis' threshold) to the Competition Commission (CC) because the costs involved in such a reference would be disproportionate to the likely anti-competitive effects arising from it.

12. However, the Guidance does not provide a 'carte blanche' for anti competitive mergers below a certain size. The Guidance describes certain circumstances whereby the exception to the duty to refer may not be appropriate notwithstanding that the merger falls below the 'de minimis' threshold.

13. For example, the OFT will not consider the exception to the duty to refer to be appropriate where the total impact of the merger in terms of consumer harm is likely to be particularly significant, such as mergers to monopoly in markets without prospects for new entry, or mergers that increase the risk of cartel behaviour where there is already evidence of collusion.

14. In addition, the exception may be less appropriate where a reference would have important precedent value, and/or a substantial portion of the likely detriment is suffered by vulnerable consumers.

15. In cases where the exception to the duty to refer may be applicable, the OFT will consider whether any of these 'clawback' provisions should apply, and therefore whether - notwithstanding the size of the merger - the merger's potential adverse effects outweigh the costs and burden to the parties of a reference to the CC such that a reference is justified.

16. The Guidance is intended to strike a careful balance by protecting UK consumers from the risk of harm posed by anti-competitive mergers without imposing disproportionate costs on taxpayers and business, especially in relation to small-scale issues.

17. The approach reconciles the OFT's broader goals of making smaller markets work well for consumers and avoiding undue burdens on taxpayers and business. The OFT wants the merger regime to encourage efficient merger activity while discouraging the acquisition of market power even in smaller markets that, in aggregate, contribute a great deal to UK productivity and consumer welfare.

**18. Paragraph 10: Set against the need to maintain the right to make merger referrals where needed, it is important to ensure that the OFT bears in mind the costs to companies of a full referral. Wherever possible the OFT should seek to resolve smaller and less strategically significant merger proposals itself, using, where necessary, its powers to seek undertakings. From the evidence given to us, we are confident that the OFT understands this difficult balancing act, but we believe it is an issue the organisation must keep at the forefront of its thinking.**

19. The OFT will seek to resolve smaller mergers through the application of its exception to the duty to refer markets of insufficient importance.

20. The OFT will, where appropriate, seek to accept undertakings in lieu of reference to the CC, and will adopt this approach in all cases, small or large.

21. The OFT's remedy policy allows it to accept undertakings in lieu of reference where the competition concerns raised by the merger and the remedies proposed to address them are clear-cut, and those remedies are capable of ready implementation.

22. It is for this reason that undertakings in lieu of reference have typically been used in merger cases where a substantial lessening of competition arises from an overlap that is relatively small in the context of the merger, for example a few local markets affected by a national merger. It is worth noting, however, that some mergers raise substantial competition concerns for which there are no clear-cut remedies, and so the OFT has no option but to refer the merger to the CC, and this applies to mergers of all sizes, small or large.

### **Codes of practice:**

**23. Paragraph 12: We see codes of practice as potentially beneficial to the consumer, but are concerned about the apparent lack of incentive for companies to take part. As codes are voluntary while being intended to go beyond legal minima, the successful operation of a code will largely rely on goodwill within an industry, and good working relationships between that industry and the OFT. The case of the ABTA code has denied consumers in the travel market the extra confidence that an approved code could give and is an unfortunate precedent for the Codes of Practice system as a whole, but there appears to be no obvious solution to the difficulties.**

24. The OFT agrees that because the Consumer Codes Approval Scheme (CCAS) is a voluntary scheme it can promote the benefits of CCAS participation but it cannot force code sponsors to join.

25. However, the benefits of participation are clear. The incentives for business participation are that the scheme: assists customers to identify trustworthy businesses to buy from; provides a powerful marketing tool for participating businesses; provides businesses with a competitive edge by developing best practice; and assists businesses to attain and retain customers.

26. The OFT published an independent report entitled 'Review of impact on business of the Consumer Codes Approval Scheme' (October 2006<sup>2</sup>). The report concluded that over half of current members of an OFT approved code reported the benefits outweighed the costs with only three per cent saying the burden was greater than the value added.

27. The OFT have six fully approved codes. A further six codes are at Stage Two (evidence gathering phase) with the potential to double the number of approved codes within a year. A further 12 codes are at Stage One (core criteria approval phase) with the potential to again double the number of approved codes within two years.

28. The sectors the fully approved codes are in are very important areas of consumer spending: homes; new cars; car servicing and repair; energy; credit; and healthcare.

29. The OFT recognises the Committee's disappointment expressed in relation to ABTA's withdrawal from CCAS and hope that in time a solution can be found.

30. The OFT is currently exploring ways to demonstrate the added consumer benefits of CCAS that other non-CCAS codes lack. However, if a code does not meet the CCAS core criteria, it will not qualify for approval under CCAS.

31. The success of CCAS is founded on the challenging and rigorous criteria and evidence gathering processes that CCAS requires. While progress to expand the number of codes within CCAS may appear slow, the number of approved codes is growing and all the approved codes are proving to be robust and effective in protecting and promoting consumer interests.

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<sup>2</sup>

[http://www.offt.gov.uk/shared\\_offt/Approvedcodesofpractice/oft870.pdf](http://www.offt.gov.uk/shared_offt/Approvedcodesofpractice/oft870.pdf)

### **Consumer Direct:**

**32. Paragraph 13: We believe the delivery mechanism chosen, with eleven different contractors, will take careful management to ensure consistency. We therefore call on the OFT to work with consumer groups to assess whether there are significant inconsistencies of service, and if so, to address them.**

33. Each Consumer Direct (CD) centre adheres to a strict performance and quality regime which is tied to standards set by the central OFT team. The OFT operations team – who closely monitor the quality of CD service – includes three performance and quality officers who visit each of the centres every six weeks to ensure key performance indicators are being adhered to and that the quality of the service is maintained. Recently an additional three people have been appointed to monitor the quality of calls through a call and data entry review.

34. The OFT is currently compiling a membership list and terms of reference for a Stakeholder Forum which will bring together trading standards and consumer representatives to input into important decisions.

35. The Forum will assist in improving overall CD service by raising issues and offering solutions to the CD team and referring items that cannot be resolved by the Forum to the National Strategy Group.

36. The Forum will provide feedback on areas of interest or concern to the OFT CD team in order to further the service's objectives and to ensure that stakeholders' needs and expectations are met where possible.

**37. Paragraphs 15 and 16: In a previous Report we noted the unwelcome uncertainty caused by the proposals to abolish Postwatch in the middle of a major series of local consultations on the future of the post office network. This uncertainty is unhelpful both for the staff of Postwatch and for the efficacy of the consultation process.**

**38. In the longer term, we share the concerns raised by the OFT and consumer groups regarding the risk that an over-ambitious timetable and potential under-resourcing could lead to a poorer service for customers under the new arrangements. The Government must ensure that the OFT is provided with sufficient resources to enable Consumer Direct to handle the increase in consumer contact (600,000 to 1 million calls, in addition to the 1.7 million existing contacts in 2006-07), and the Government must ensure that a 'second-tier' service comparable with the existing one continues to be available, either through the new National Consumer Council or by enhancing the Consumer Direct service. In either case it is vital that new NCC and Consumer Direct work effectively together; other consumer organisations should not find themselves being called on to take the strain unless this is the stated aim of the Government and proper planning is made for such a change.**

39. The Government notes the committee's concerns about the timetable for the establishment of the new National Consumer Council. The Council will now be fully established on October 1st 2008 which allows sufficient time for effective preparation for the new body itself, for Consumer Direct, for industry and the sector regulators, Ofgem and Postcomm who have duties under the CEAR Act 2007. The timing also ensures that

Postwatch's principle role in the public consultation to support the Postal Network Restructuring Programme can be discharged. Ministers gave assurances during the passage of the CEAR Bill that steps would be taken to ensure the integrity of this aspect of Postwatch's work when considering timing of implementation. Detailed planning will ensure the programme can be fully completed.

40. The Government is in discussion with Consumer Direct about all aspects of the work to deliver advice to consumers in the energy and postal services markets including resources. It is intended that the new National Consumer Council will be established in shadow form in January 2008 and will work closely with Consumer Direct to ensure that consumers, especially the most vulnerable, receive appropriate help and advice. The Regulators are also working closely with industry to ensure that their customer complaints handling is improved. Ofgem and Postcomm will consult on the standards they will set for consumer complaints handling. In addition, under the new system, consumers will, for the first time, be able to seek redress from industry Ombudsman schemes.

29 January 2008