

Super-complaint concurrent duties

Terms of reference of the Concurrency Working Party

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OFT 548

A INTRODUCTION

- 1 Super-complaints are made by designated consumer bodies under section 11 of the Enterprise Act 2002 (EA02). Section 11 of the EA02 is applied by the Office of Fair Trading (OFT) concurrently with the Director General of Telecommunications,¹ the Gas and Electricity Markets Authority, the Northern Ireland Authority for Energy Regulation, the Director General of Water Services, the Rail Regulator and the Civil Aviation Authority (the Regulators).² These are the same Regulators as those who have concurrent powers under the Competition Act 1998 (CA98).
- 2 The Concurrency Working Party (CWP) was formed in 1997 to co-ordinate concurrent functions of its members in relation to the CA98. In 2003 the remit of the CWP was extended to include the co-ordination of super-complaint duties. The CWP is chaired by a representative of the OFT. Membership currently consists of the OFT and the Regulators with concurrent CA98 and EA02 powers, and includes the Independent Television Commission (ITC), Postcomm and OFCOM who sit as observers but do not have concurrent powers.
- 3 The aims of the CWP in relation to section 11 of the EA02 are:
 - to facilitate, to the greatest extent possible, a consistent approach by the OFT and the Regulators to the requirement to publish a response to a super-complaint made under section 11 of the EA02
 - to consider practical working arrangements between them

¹ The text reflects the situation now. The role currently fulfilled by OFTEL in relation to super-complaints will be undertaken by OFCOM once the Communications Act commences although it will be in relation to activities connected with communications matters.

² The various Regulators are given their concurrent powers to deal with super-complaints by virtue of section 205 EA02 and the 2003 Regulations (see below).

- to provide a vehicle for the discussion of matters of common interest, and the sharing of information where appropriate and where legally permitted
- to co-ordinate the provision of guidance on section 11 of the EA02 to the public, and
- to agree and implement procedures for joint working on super-complaints.

B LEGAL REQUIREMENTS

- 4 It is desirable that duties under section 11 should be exercised so as to ensure consistency of approach in relation to super-complaint handling and outcomes. This document represents a commitment by the members of CWP to work together to achieve this goal.

Section 11: the OFT's duty to respond to super-complaints

- 5 A super-complaint is a complaint made by a designated consumer body that any feature, or combination of features, of a market in the United Kingdom for goods or services is or appears to be significantly harming the interests of consumers.
- 6 Sections 11(2) & (3) impose a duty on the OFT to publish a response to any super-complaint received, stating how it proposes that the complaint be dealt with. This response must be published within 90 days from the day after the complaint is received by the OFT.

The Enterprise Act 2002 (Super-complaints to regulators) Order 2003 (the Regulations)

- 7 Regulation 2 of the Regulations imposes on the Regulators a duty to respond to super-complaints made to them in the same manner as the OFT under section 11(2) & (3) of the EA02 if the complaint concerns a market in relation to which that Regulator has functions.

Section 11: issuing of guidance

- 8 The OFT is required by section 11(7) of the EA02 to issue guidance as to the presentation by the complainant of a reasoned case for the complaint. The Regulators do not have this duty but to facilitate a consistent approach this guidance has been published by the OFT after consultation with (and endorsement by) the Regulators through the CWP as *Guidance for designated consumer bodies making super-complaints*.
- 9 The OFT and the Regulators may also issue such other guidance as appears to be appropriate for the purpose of section 11.

C AREAS OF CO-OPERATION

- 10 The Regulations do not make provision for the co-ordination of the performance of the duty to respond to super-complaints under section 11. Therefore the co-ordination of super-complaint duties will be based on policies agreed and applied through the CWP.
- 11 The OFT and the Regulators believe that the CWP is a means by which concurrent application of section 11 can be delivered, to meet the objective of achieving, as far as possible, a consistent approach to handling super-complaints. The OFT and the Regulators recognise that there are benefits to be derived from co-operation and consistency of approach, where possible, in administering a new legal framework.
- 12 Any CWP member receiving a super-complaint has the responsibility for identifying that it meets the legal criteria of a super-complaint under section 11 and identifying areas of concurrent jurisdiction. All members of the CWP will be informed of the receipt, substance (as permitted)³ and proposed response of any super-complaint. Any CWP member who may have an interest in a super-complaint that has been received by another CWP member will inform the recipient of their interest as soon as possible. Only CWP members who declare an interest will have the option to be kept informed either of the day to day administrative matters or just the significant developments of each complaint.
- 13 Appropriate procedures will be agreed to ensure application of section 11 by CWP members and to facilitate efficient case handling.

Where a super-complaint is made either to one Regulator or the OFT

- 14 In many cases where a super-complaint is made to either one Regulator or the OFT the cause for complaint will only concern the authority who must respond to it. The complaint can then be progressed with little if any input required from other CWP members.
- 15 However it is possible that a super-complaint made to either one Regulator or the OFT could span the jurisdiction of other CWP members. It is envisaged that normally in such cases the relevant authorities will agree areas of concurrent jurisdiction and will work together to produce a joint response, but recognising that only the authority to which the super-complaint was made has the duty to respond.
- 16 Other possible outcomes include:⁴
- advising the complainant to make the same super-complaint to another more appropriate CWP member with a duty to respond to super-complaints⁵

³ The level of detail that can be shared with any CWP members including those without concurrent jurisdiction is subject to legal restrictions on the disclosure of information.

⁴ This list is not exhaustive and other outcomes may be identified.

⁵ The complaint remains a super-complaint and the new recipient must respond accordingly.

- advising the complainant that the super-complaint has been transferred to another CWP member or other (non CWP member) authority better placed to investigate the complaint.⁶

17 The recipient of the super-complaint will acknowledge the contributions made by other actively involved CWP members in its public response.

Where a super-complaint is made simultaneously to more than one CWP member

18 Such super-complaints must be responded to by each CWP member because each will have a duty to respond in this situation. In these cases it is envisaged that the relevant authorities will agree areas of concurrent jurisdiction and where necessary establish which part of the complaint each recipient will focus on.

19 It is desirable that when the same super-complaint is sent simultaneously to more than one CWP member that the published responses from those in receipt of the complaint are consistent with each other or that a joint response is made. To achieve this it will be necessary for the authorities to consult with one another to identify main issues and agree working arrangements, and to share knowledge and expertise where appropriate.

20 Possible outcomes include:⁷

- only the better placed CWP member in receipt of the super-complaint publishes a full response, and any other member in receipt of the same complaint advises the complainant that this will be the case
- those in receipt of the super-complaint publish a joint response
- advising the complainant to make the same super-complaint to another more appropriate CWP member with a duty to respond to super-complaints⁸
- advising the complainant that the super-complaint has been transferred to another CWP member or other (non CWP member) authority better placed to investigate the complaint.⁹

21 Where a joint response is not possible or preferable, each individual response will refer to any additional responses made by other CWP recipients of the super-complaint.

Information sharing

22 The CWP will share information with regard to general policy and precedent relating to the application and interpretation of section 11 in order to facilitate a

⁶ At this point the complaint will cease to be a super-complaint.

⁷ This list is not exhaustive and other outcomes may be identified.

⁸ The complaint remains a super-complaint and the new recipient must respond accordingly.

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consistency of approach. At CWP meetings the OFT and each Regulator will provide where possible and in an appropriate form, having regard to any legal restrictions on disclosure, a brief summary of policy issues arising from current super-complaints. Where a complaint raises new issues of general policy or of precedent in respect of the application or interpretation of section 11, the CWP member who received the complaint will endeavour to bring these issues to the attention of the CWP for discussion before publicly responding to the super-complaint. Where a super-complaint has been responded to, the CWP may wish to discuss any issues of common interest arising from the complaint.

- 23 CWP members may use their discretion (subject to legal restrictions on the disclosure of information) in identifying issues within a super-complaint that could be usefully shared with any other members of the CWP.
- 24 The OFT and the Regulators between them have considerable knowledge, experience and expertise across a wide range of sectors and this should be shared where appropriate and possible. The particular sectoral knowledge of the ITC, Postcomm and OFCOM are noted.

Working arrangements

- 25 The CWP will normally meet every two months but super-complaints need not be discussed at every meeting. To aid efficient handling of business attendance will generally be limited to one or two persons from each authority. There will be flexibility to ensure that additional meetings to deal with specific issues can be called at short notice where necessary. Ad hoc groups may be formed where appropriate and where there is a need for the discussion of super-complaint issues to take place separately from the main CWP meetings.
- 26 It may be necessary for staff of the OFT and the Regulators to work together on a particular super-complaint. In particular this may be required when one authority is the recipient of a super-complaint that in part spans the jurisdiction of another. It is desirable in these situations that the relevant authorities share their knowledge and expertise so that the outcome identified in a published response is based on the most appropriate use of available resources.
- 27 Best practice for joint working procedures, information sharing and providing guidance will be agreed. Any proposed changes will be discussed and agreed by the CWP.

Dispute resolution

- 28 If CWP members with joint jurisdiction are not able to agree over areas of responsibility on a super-complaint, the matter will be put before the CWP forum for further guidance and resolution.
- 29 In the unlikely event that the CWP is evenly split and agreement cannot be reached the OFT will have the casting vote. (However, it will only be used as a last resort.)