

Super-complaints

Guidance for designated consumer bodies



The Enterprise Act 2002 received Royal Assent in November 2002. It came into force during the course of 2003.

The Act makes a number of significant reforms to competition law and consumer law enforcement in the UK. The new provisions work alongside the Competition Act 1998 and various pieces of consumer legislation, largely replacing the Fair Trading Act 1973.

The Act established the Office of Fair Trading (the OFT), replacing the former statutory office of the Director General of Fair Trading. The OFT will apply and enforce the new competition and consumer measures alongside the Competition Commission, the sectoral regulators, the Competition Appeal Tribunal, Trading Standards Departments and others.

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1 Introduction

This guidance

¹ The text reflects the situation at July 2003. It is likely that the roles currently fulfilled by OFTEL, ITC and other bodies will be transferred to OFCOM in the future.

² See chapter 3 for further details on concurrency.

- 1.1** This guidance is designed to help those making super-complaints to the Office of Fair Trading (the OFT), the Director General of Telecommunications¹, 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 It explains what activates the super-complaint process, confirms who can make super-complaints, who can accept them and how they will be dealt with.
- 1.2** This guidance is indicative rather than definitive. The super-complaints process is new and the guidance will be amended in the light of further experience in handling super-complaints.

Who is this guidance for?

- 1.3** It has been written for those consumer bodies who will be designated by the Department of Trade and Industry (the DTI) and thus be entitled to make super-complaints. In addition others, such as businesses or trade associations, may find it useful to know what is expected from a super-complainant and how the complaint is then managed.

Why issue guidance?

- 1.4** We want the new provision for super-complaints to work successfully and contribute to our aim of making markets work well for consumers.
- 1.5** The OFT has a commitment to transparency. We want to explain clearly our procedures and the reasons behind them. Section 11(7) of the Enterprise Act 2002 (the Act) also places upon the OFT a duty to issue guidance as to the presentation by the complainant of a reasoned case for the complaint.

What is in the guidance?

- 1.6** This guidance seeks to guide complainants on the presentation of a reasoned case for complaint. It also describes the processes and procedures the OFT and Regulators will apply in dealing with any super-complaint.
- 1.7** The guidance is organised as follows:
- **Chapter 2** sets out the super-complaint process in more detail. It provides a general explanation of what a super-complaint is and who will be able to make one. It also describes the factors the OFT and the Regulators will take into account when considering a super-complaint and sets out how super-complaints will be dealt with.
 - **Chapter 3** explains the role of the OFT and the Regulators.
 - **Chapter 4** lists contacts for further advice and information.
 - The annexe provides guidance as to the kind of evidence that should be provided by super-complainants.

2 Super-complaints

What is a super-complaint?

³ Section 11(9)(a) of the Act says that 'references to a feature of a market in the United Kingdom for goods or services have the same meaning as if contained in Part 4. A feature of a market is defined in section 131(2).

⁴ See section 11(9)(b).

- 2.1** A super-complaint, as defined in section 11(1) of the Act, is a complaint submitted by a designated consumer body that 'any feature, or combination of features, of a market in the UK for goods or services is or appears to be significantly harming the interests of consumers'.³
- 2.2** For the purposes of making a super-complaint a consumer is an individual who is supplied, or sought to be supplied, goods or services in the course of a business carried on by the person supplying or seeking to supply them. In other words the end consumer.⁴
- 2.3** A feature of a market has the same meaning as in section 131(2) of the Act. It may be:
- the structure of the market concerned or any aspect of that structure
 - any conduct (whether or not in the market concerned) of one or more than one person who supplies or acquires goods or services in the market concerned, or
 - any conduct relating to the market concerned of customers of any person who supplies or acquires goods or services.

The market in question may be regional, national or supranational (where the UK forms part of the market) although the authority can only consider the effects within the UK.

- 2.4** The super-complaint process is intended to be a fast-track system for designated consumer bodies to bring to the attention of the OFT and the Regulators, market features that appear to be significantly harming the interests of consumers. When deciding whether or not to make a super-complaint, careful thought should be given as to whether the super-complaint process is the most effective route. It may be that specific competition or consumer legislation would provide a more immediate and/or effective means of satisfying and addressing the issue. For example when the feature of a market that is, or appears to be, significantly harming the interests of consumers

relates to single firm conduct. Given the definition of consumer outlined at 2.2, super-complainants assessing the impact of a market feature should focus on the effect on end consumers and not business intermediaries.

Who can make a super-complaint?

- 2.5** Only designated consumer bodies can make a super-complaint. Under section 11(5) of the Act it is specified that a consumer body has to be designated by the Secretary of State for Trade and Industry by order. The Secretary of State can make any organisation a designated consumer body provided it appears to her to represent the interests of consumers of any description and also meets any other criteria published by the Secretary of State which are applied when determining whether to make or revoke a designation. It is expected that those designated will be informed bodies who are in a strong position to represent the interests of groups of consumers and able to provide solid analysis and evidence in support of any super-complaint they may make.
- 2.6** The DTI has issued separate guidance for consumer bodies wishing to apply for designated status to make super-complaints. This guidance sets out the criteria for achieving designated status and the application process. The full text of the guidance is available at www.dti.gov.uk/enterpriseact/pdfs/superguide.pdf
- 2.7** Consumer bodies wishing to apply for designated status or those with general enquiries on the designation process should contact the DTI for further information. Contact details are given in chapter 4 of this guidance.

To whom should a super-complaint be made?

- 2.8** A super-complaint should be made in writing to any authority with the duty to respond to super-complaints.⁵ Information on these authorities is set out at chapter 3 and current contact details are at chapter 4.
- 2.9** Prior to submission, designated consumer bodies should ascertain the most appropriate recipient for each complaint. This will depend on the

⁵ At the time of writing these authorities are those listed in paragraph 1.1.

market that the complaint is concerned with. Complaints about markets regulated by the Regulators listed in chapter 3 should be sent to the Regulator responsible for that market. All other complaints should be sent to the OFT. In some circumstances it may not be clear who should receive a particular complaint. In these cases the complainant should contact the authorities most likely to be concerned for further advice.

- 2.10** Sending a complaint to the wrong authority or simultaneously to several authorities with concurrent duties could delay consideration of the complaint.

What needs to be in a super-complaint?

- 2.11** When making a complaint the super-complainant should provide a paper setting out the reasons why in its view a UK market for goods or services has a feature or combination of features which is or appears to be significantly harming the interests of consumers and should therefore be investigated. This paper should be supported, wherever possible, by documented facts and evidence.
- 2.12** The objective of presenting the case is to help the receiving authority undertake a full appraisal of whether any feature or combination of features of a UK market is or appears to be significantly harming consumer interests and what action, if any, should be taken. Super-complainants are not expected to provide the level of evidence necessary for the OFT or a Regulator to decide that immediate action is appropriate. However, they should present a reasoned case for further investigation. Complaints that are, or that appear to be, frivolous or vexatious will be rejected.
- 2.13** The annexe sets out the kind of evidence that designated consumer bodies should consider providing when deciding whether to make a super-complaint.
- 2.14** Complaints raised by individuals or bodies about specific instances of anti-competitive behaviour or infringements of consumer protection legislation will continue to be considered under other legislation as at present. Procedural safeguards that ensure fairness for those who may be the subject of enforcement action are unaffected by super-complaints.

How will super-complaints be handled?

- 2.15** Super-complaints will be given fast-track consideration. Those with the duty to respond to super-complaints are required to publish a reasoned response within 90 calendar days from the day after a complaint is received.⁶
- 2.16** On receipt of a complaint the super-complainant will be contacted within five working days to acknowledge receipt and let them know who within the OFT or relevant Regulator will be the main contact during the 90 day period.
- 2.17** The assigned official and supporting team will examine the contents of the complaint in more detail to see if it meets the criteria set out in section 11. All the criteria contained in section 11(1) must be satisfied for the complaint to receive super-complaint status.
- 2.18** If the complaint satisfies the criteria contained in section 11(1) the team will assess the quality of information and evidence supplied. They will decide whether it is possible to proceed on the basis of the information provided or if further evidence or clarification is required. In parallel the team will also form a view as to whether the super-complaint is frivolous or vexatious, in which case it will reject the complaint.
- 2.19** The team will also consider whether the complaint raises issues that may fall within the remit of another authority with concurrent duties. If this is the case the team will liaise with the relevant authority so an early decision can be made on how to progress the complaint.
- 2.20** Where the team finds that a reasoned case for complaint has not been made or that it requires clarification of the super-complaint, they will contact the super-complainant as soon as possible, setting out the further information or clarification that is required. The team will only request further information at this stage where it considers that the super-complainant is the best placed person to provide it. If the OFT or the relevant Regulator is better placed to obtain this information itself, it will do so. Where a request for clarification or further information is made, the super-complainant will be given a set

⁶ By virtue of section 11(2) of the Act.

time in which to respond to such a request. If it fails to do so, the team may consider making a formal response that no action will be taken with regard to the complaint. It is not possible to extend the 90 day response time if the complainant is not able to respond within the set time.

- 2.21** If appropriate, a meeting will be arranged between the team and the super-complainant to discuss any immediate questions about the evidence submitted and to indicate the broad lines of enquiry that will be taken to establish whether the super-complaint is well founded.
- 2.22** The team will then carry out wider enquiries with a view to testing the evidence provided and obtaining any further information it considers necessary in order to form a reasoned view on whether the super-complaint justifies further action. Exactly how it does this will be determined on a case by case basis but may involve:
- internal research
 - public requests for information
 - approaching any relevant businesses or trade associations for information
 - approaching consumer organisations, trading standards departments, government departments and/or other public bodies for information, or
 - any other necessary action.
- 2.23** The super-complainant will be kept informed of progress and may be contacted for clarification of issues or for further information as appropriate.
- 2.24** Within 90 days after the day on which it received the super-complaint, the OFT or the Regulator concerned has a duty to publish a public response stating what action, if any, it intends to take in response to the complaint. This 90 day period is the maximum time allowed for a response. Clearly, for some of the outcomes listed below a swifter decision may be made. The published response must also state the reasons for the decision taken.

What action will result from a super-complaint?

2.25 The possible outcomes of a super-complaint include:

- enforcement action by the OFT's competition or consumer regulation divisions
- finding that another authority with concurrent duties is better placed to deal with the complaint
- launching a market study into the issue
- making a market investigation reference to the Competition Commission (CC) if there is a competition problem
- action by a sectoral regulator with concurrent duties
- referring the complaint to a sectoral regulator without concurrent duties
- referring the complaint to the OFT for action (if the complaint was sent to a regulator with concurrent duties)
- referring the complaint to another consumer enforcement body
- finding the complaint requires no action
- finding the complaint to be unfounded
- dismissing the complaint as frivolous or vexatious.

2.26 The above list is not exhaustive. It should also be noted that a super-complaint could generate more than one outcome depending on the issues raised.

Market studies

2.27 The market studies referred to above are distinct from market investigations, also referred to above, that are undertaken by the CC under Part 4 of the Act. Further details on when an issue is considered suitable by the OFT for reference to the CC can be found in the OFT's published guidance *Market Investigation References*.⁷

Publicity for super-complaints

2.28 It is for a super-complainant to decide whether or not to issue a press notice recording that it has made a super-complaint. However, super-complainants should consult with the authority they intend to receive the complaint to avoid jeopardising investigations that could be hampered by prior disclosure of the complaint. In such circumstances, the agreement of the super-complainant may be sought to keep the existence of the super-complaint confidential for a period.

2.29 In some circumstances the receiving authority will take the view that it would be appropriate to issue a press notice itself, for example if the announcement of the complaint was to be combined with a public request for information. This will be decided on a case by case basis.

2.30 Super-complainants may be encouraged to create a public summary of their complaint, where not already in the public domain, to assist the submission of relevant information from interested parties.

Formal responses to super-complaints

2.31 When making its decision on a super-complaint, the receiving authority is required by the Act to publish its decision on further action, if any, giving reasons for that decision.⁸ As a minimum, this will be to place a copy of the response on its website to achieve publication. If considered appropriate, a press notice may also accompany the response.

⁷ OFT 511, March 2003

⁸ Section 11(2) and 11(3) of the Act

3 Concurrent super-complaint duties

3.1 Under section 205 of the Act the Secretary of State for Trade and Industry has the power to provide by order for specified sectoral regulators to have concurrent duties in relation to super-complaints.⁹ By virtue of The Enterprise Act 2002 (super-complaints to regulators) Order 2003 (SI 1368) super-complaint duties have been given to: the Director General of Telecommunications¹⁰, 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.

⁹ Section 205(3) specifies that regulators have the meaning given in section 54(1) of the Competition Act 1998 (CA98). Only regulators listed in that section may be specified.

¹⁰ The text reflects the situation at July 2003. It is likely that the roles currently fulfilled by OFTEL and other bodies will be transferred to OFCOM in the future.

Areas of responsibility

3.2 The following is a brief overview of the scope of the OFT and each Regulator to receive super-complaints. These authorities are able to respond to super-complaints using any of their competition enforcement and consumer protection powers, unless otherwise stated. This section is not exhaustive and further information can be obtained from the contact points listed in chapter 4.

- **The OFT:** The OFT's role is to make markets work well for consumers. It is responsible for promoting and protecting consumer interests throughout the UK, while ensuring that businesses are fair and competitive. It must respond to super-complaints made to it concerning any UK market.
- **The Civil Aviation Authority (the CAA):** The CAA is the regulator for the UK aviation industry. It must respond to super-complaints made to it on air traffic services in relation to its functions under the Transport Act 2000.
- **The Office of Gas and Electricity Markets (OFGEM):** OFGEM is the regulator for Britain's gas and electricity industries. It must respond to super-complaints made to it in relation to its functions provided under the Gas Act 1986 and the Electricity Act 1989, as amended by the Utilities Act 2000.
- **The Office of Telecommunications (OFTEL):** OFTEL is the regulator for the UK telecommunications industry. It must respond to super-complaints made to it in relation to its functions under the Telecommunications Act 1984.

- **The Office of Communications (OFCOM):** OFCOM will consider super-complaints in relation to communications markets after the enactment of the Communications Bill. Until then super-complaints on current telecommunications issues should be made to OFTEL.
- **The Northern Ireland Authority for Energy Regulation (OFREG-NI):** OFREG-NI is the regulator the Northern Ireland electricity and natural gas industries. It must respond to super-complaints made in relation to its functions provided under the Energy (Northern Ireland) Order 2003.
- **The Office of Water Services (OFWAT):** OFWAT is the regulator for the water and sewerage industry in England and Wales. It must respond to super-complaints made to it in relation to its functions under the Water Industry Act 1991.
- **The Office of the Rail Regulator (ORR):** The Rail Regulator is the economic regulator of the monopoly and dominant elements of the rail industry in Great Britain and must respond to super-complaints made to him in relation to his functions under the Railways Act 1993 as amended by the Transport Act 2000.

How will concurrency work?

- 3.3** Before making a super-complaint, a designated consumer body should first consider carefully which authority is best placed to deal with the complaint. The factors considered in determining which of the OFT or the Regulators deals with the issue include such matters as the sectoral knowledge of a Regulator and any previous contacts between the designated body and a Regulator, or with the OFT. In cases of uncertainty, further information can be obtained from the contact points listed at chapter 4.
- 3.4** It is recognised that there may be circumstances where it is not easy to decide the most appropriate recipient of a complaint; for example where the super-complaint raises issues with potentially overlapping responsibilities between Regulators and/or the OFT. The OFT and the Regulators have put in place suitable coordination procedures to ensure that complaints are addressed by the most appropriate authority and to ensure consistency of approach. These procedures

are operated through the Concurrency Working Party (CWP). The CWP was set up to coordinate concurrent functions of the OFT and the Regulators under the Competition Act 1998. Its work has been extended to include the coordination of concurrent super-complaint duties. The procedures for coordinating concurrent super-complaints are completely separate from the concurrency provisions under the Competition Act 1998. Super-complaint Terms of Reference for the CWP are currently being finalised. A copy will be placed on the OFT's website in the near future.

4 Contact points

4.1 Anyone with any queries regarding super-complaints, or designated consumer bodies considering making a complaint, should contact, in the first instance¹¹:

¹¹ This list will be revised from time to time and an up to date version placed on the OFT's website

OFT

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Telephone: 020 7211 8558
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CAA

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Civil Aviation Authority
45-49 Kingsway
London WC2B 6TE
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Fax: 020 7453 6244
Email: paul.taylor@caaerg.org.uk
Website: www.caa.co.uk

OFGEM

Andrew MacFaul
Office of Gas and Energy Markets
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Fax: 020 7901 7066
Email: andrew.macfaul@ofgem.gov.uk
Website: www.ofgem.gov.uk

OFTEL

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OFCOM

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OFREG-NI

Gerry Donnelly
Northern Ireland Authority for Energy
Regulation
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Telephone: 028 90 311 575
Fax: 028 90 311 740
Email: gerry.donnelly@OFREGNI.gov.uk
Website: www.ofreg.nics.gov.uk

OFWAT

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Office of Water Services
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Telephone: 0121 325 3612
Fax: 0121 625 1359
Email: paul.hope@ofwat.gsi.gov.uk
Website: www.ofwat.gov.uk

ORR

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Fax: 020 7282 2043
Email: contact.cct@orr.gsi.gov.uk
Website: www.rail-reg.gov.uk

4.2 Anyone interested in applying for designation status to make super-complaints or with general queries on the designation process should contact:

DTI

Marie Cawley
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Consumer and Competition Policy Directorate
Bay 417
1 Victoria Street
London, SW1H 0ET
Telephone: 020 7215 6771
Fax: 020 7215 0339
Email: marie.cawley@dti.gsi.gov.uk
Website: www.dti.gov.uk

Annexe: Guidance as to evidence to be provided by super-complainants

¹² This section is not exhaustive and complainants may wish to consider other factors when making a reasoned case for the complaint.

Complainants should consider whether any of the types of information listed below might be relevant to asserting that a feature or combination of features of the UK market in question is or appears to be harming the interests of consumers.¹²

Only some might be relevant in any given complaint but the list gives an indication of the kind of information the recipient might expect a super-complaint to contain depending on the nature of the problem identified by the complainant.

- 1** Details of the market (nature of the good or service) to which the complaint relates and whether there are particular aspects of the good or service relevant to potential problems for consumers such as infrequency or high cost of purchase.
- 2** Details of the nature of the complaint.
- 3** Whether the complaint relates to the market as a whole or only to certain suppliers or parts of the market.
- 4** How consumers' interests are harmed and an indication of the scale of detriment.
- 5** Whether all or only certain consumers of the relevant good or service are affected by the aspect(s) of the market to which the complaint relates.
- 6** Whether there is disproportionate purchase of the good or service by particular vulnerable groups of consumers such as the elderly or those on low incomes.
- 7** Available information on market shares by volume and value of suppliers in the relevant market for the good or service. Any information on changes in market shares over the past few years.
- 8** Evidence of barriers to entry to the market by existing or new suppliers.
- 9** Information on the level and impact of buying power in the relevant market and whether any benefits from exercising buyer power are passed onto consumers.

- 10** Details or information on:
- current retail/wholesale prices (as relevant) for the good or service
 - discounts to some or all customers
 - different prices charged to different classes or categories of customer
 - levels of price dispersion in the market more generally
 - price trends over the past few years
 - comparative information on different suppliers' prices and the timing of price changes.
- 11** Information (if available) on the general level of profitability of suppliers in the relevant sector for the good or service.
- 12** Any evidence of practices by suppliers in the sector that may be restricting or distorting competition.
- 13** Any evidence of high-pressure selling techniques or other sales practices that could be having detrimental effects on consumers.
- 14** Whether there are complex contractual terms for the good or service.
- 15** Whether the relevant good or service is only supplied together with other goods or services (rather than separately).
- 16** Details of any costs incurred by consumers as a direct result of switching to alternative suppliers of the relevant good or service. Evidence of the degree of switching.
- 17** Any available indicators of the general level of quality of goods or services in the relevant sector.
- 18** Any available indicators showing how well informed consumers in the sector are relative to suppliers about the quality and prices of goods and services offered by different suppliers.
- 19** Information relating to whether complex aspects of the good or service, the way in which it is supplied, or difficulties in assessing quality, presents particular problems for consumers.

- 20** Details of means of redress available to consumers of the good or service who have complaints, and their effectiveness.
- 21** Details of any codes of practice, whether or not approved by the OFT, that apply to the good or service.
- 22** Details of relevant policies and legislation undertaken by local or central government, EU or other public bodies.
- 23** Details of organisations, such as governing bodies, interest and lobby groups that may affect and/or be affected by the market in question.

Enterprise Act publications

Throughout 2003 the OFT is issuing a series of guidance booklets on various aspects of the Act. New guidance may be published and the existing guidance revised from time to time. For an up-to-date list of guidance booklets:

check www.offt.gov.uk/enterpriseact.htm
email enterpriseact.enquiries@oft.gsi.gov.uk
or telephone Enterprise Act enquiries on 020 7211 8181

All guidance booklets can be ordered or downloaded from the OFT's website <http://www.offt.gov.uk/enterpriseact.htm>. Or you can request them by:

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Published by the Office of Fair Trading
Printed in the UK on paper comprising 75% post-consumer waste and 25% ECF pulp
Product code OFT514
Edition 07/03 PUB 145/3,000
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