

A GUIDE TO COMPLAINING TO OFWAT UNDER THE COMPETITION ACT 1998

This leaflet is not a substitute for the Act and the regulations and orders made under it, nor is it a definitive interpretation of the law. If you are unsure about how the law applies to your particular complaint, you can seek legal advice. You will find more information on the Act listed at the end of this guide.

INTRODUCTION

This leaflet provides a guide to making a complaint to Ofwat under the Competition Act 1998 ('the Act'). It explains what to do if you think the Act has been breached in relation to the water and sewerage sectors in England and Wales.

THE COMPETITION ACT 1998 AND ARTICLES 81 AND 82

The Water Services Regulation Authority (Ofwat) has concurrent powers with the Office of Fair Trading ('the OFT') to apply the Competition Act 1998 ('The Act') in relation to the water and sewerage sectors in England and Wales. We have been designated as a National Competition Authority ('NCA'), for the purpose of applying European competition law (Articles 81 and 82 of the EC Treaty), where there may be an effect on trade between Member States.

The Act prohibits agreements, practices and/or conduct that have a negative effect on competition in the United Kingdom (or any part of it). Under the Act, there are two prohibitions, the Chapter I prohibition and the Chapter II prohibition. These are modelled on Articles 81 and 82 respectively.

- The Chapter I prohibition covers agreements between undertakings, decisions by associations of undertakings and concerted practices which prevent, restrict or distort competition in the United Kingdom, or are intended to do so.
- The Chapter II prohibition covers the abuse of a dominant position in a market in the United Kingdom.

HOW TO MAKE A COMPLAINT

Investigations into allegations of anti-competitive behaviour impose significant costs on all parties involved, including the company complained about and often on you and other businesses that might be required to provide us with information. Our required format for submitting complaints is designed to enable us to identify complaints that raise significant concerns about anti-competitive behaviour and to help us decide where to focus our resources.

We expect to receive properly argued complaints and may reject complaints that do not meet our criteria. However, we will take account of the resources available to you when reviewing the information provided.

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We have set out in the sections below the information we require from you if you wish to make a complaint. In order to constitute a valid complaint that we will consider investigating, your complaint should fulfil each requirement. We may decide not to consider complaints that fall short of our criteria. If you have grounds to complain, please write to: **Competition Policy Team, Ofwat, Centre City Tower, 7 Hill Street, Birmingham B5 4UA.**

1. BACKGROUND INFORMATION REQUIRED FOR A COMPLAINT

In order to consider your complaint, you should provide us with certain basic information:

- Summary of the complaint (what the complaint is about, background, the companies concerned, products/services, key dates, alleged infringement, harm done (to you, other businesses and consumers), relief sought).
- Details of the relationship between you and the company you are complaining about, such as whether you are a customer or a competitor.
- An explanation of the nature of your business and its scale (local, national, international, approximate turnover).
- An explanation of the nature of the business of the company complained about and its scale.
- Your contact details, including a point of contact.
- The contact details of the company complained about and, if possible, a point of contact (see also section 7 on confidentiality).
- We are happy to speak to complainants before they make a complaint.

2. LEGAL BASIS FOR THE COMPLAINT

Please explain precisely why you feel the Act has been infringed, including an explanation of any regulatory legislation you think might have been infringed, where applicable. When making your complaint you should:

- check whether there is water and sewerage industry legislation that might address your complaint¹;
- cite the relevant prohibitions or sections of the laws; and
- give a detailed explanation of why, where possible referring to case law, you feel an infringement has occurred.

In limited circumstances, we have powers to stop any apparently offending activity before we have completed our investigation. Such action is known as an interim measure. If you wish us to exercise these powers you must specify this in your complaint. If you believe the alleged infringing behaviour will cause imminent, serious, irreparable damage to you or others, or is against the public interest, you should set out your reasoning clearly and fully, and apply to us for interim measures as quickly as possible. Please note: these powers can only be used when we have opened an investigation but not

¹ Further information on water and sewerage industry legislation can be found on our website www.ofwat.gov.uk

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completed it and where we consider that it is necessary to act as a matter of urgency to prevent such harm, so you must provide compelling evidence to support your argument that such exceptional circumstances exist.

3. DETAILS OF COMPLAINT AND SUPPORTING EVIDENCE

To be effective detailed evidence and information, rather than mere suspicion of wrongdoing should support your complaint. In making your complaint you should include as much relevant information as possible to support your complaint. For example, allegations concerning predatory or excessively high pricing should be backed up by substantive and reasoned analysis of costs and prices. If the factual evidence submitted by you is incorrect, or based on a misunderstanding, we may close the complaint. You should also be as precise as possible in specifying what your complaint is. We can handle a focussed complaint more efficiently than a complaint containing general accusations.

4. DESCRIPTION OF THE RELEVANT MARKET(S)

Information about the markets involved is fundamental to any investigation of alleged anti-competitive behaviour. We recognise that smaller companies or individuals may not be able to provide a full analysis of the market, but the more information that can be provided, the sooner we will be able to assess the complaint.

We will require the following information:

- A detailed description of the product(s) in question, including its use.
- A detailed description of the relevant market(s) and the position of your business (if you have one) and the company complained about in the market(s). This should include the characteristics of the market, such as the number of businesses and their market shares. Analysis of how and why the market has changed recently would be helpful, where relevant.
- A description and explanation of all barriers to enter the market, for example, high costs of entering the market, which cannot be recovered.
- A detailed description of the customers, including number and type.
- A comment on the likelihood of customers reducing their consumption or switching to substitute products if prices were increased and what features of the product(s) are important to customers.
- A comprehensive list of possible substitute products, including comment on their suitability.
- A detailed explanation of the means of purchasing the product, including contractual arrangements.
- A reasoned description of the geographic market, for example, the area(s) where the product is sold or used.

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5. SUPPLEMENTARY DOCUMENTATION

All assertions should be reasoned, balanced and supported by documentary evidence. We may refuse to consider complaints that have no accompanying evidence or explanation. Relevant documentation should be provided with a chronological catalogue and may include, for example:

- Copies of correspondence and notes of communications, with accompanying explanation of precisely how, if at all, you believe each document shows an infringement of the Act.
- An explanation, supported by specific examples and documentation, of the alleged infringement and of its effect on your business and on the market.
- Copies of any relevant industry reports, economic papers or consumer surveys.
- A statement about whether you are happy for us to copy your correspondence to the company you are complaining about. Information that you wish to remain confidential should be separated and clearly marked as confidential. (See section below on confidentiality.)

6. HOW WE WILL DEAL WITH YOUR COMPLAINT

We will tell you whether we will consider your complaint under the Act. We will also let you know if it is more appropriate for us to handle it under other legislation or for another public body to pursue it. We will give you an explanation of whatever action we decide to take.

We will normally handle potential breaches of the Act in the water and sewerage sectors in England and Wales. However, Ofwat and the OFT always consult each other before investigating a case in the water and sewerage industry and, where appropriate, during the course of an investigation.

When we receive your complaint, we will assign a Case Manager to it who will be your main point of contact. The Case Manager will oversee the handling of your complaint and keep you informed of progress. The Case Manager may ask you for further information to process your complaint.

7. CONFIDENTIALITY

Can my identity be protected?

In order to consider a complaint fully, we may need to disclose your identity, to the company being complained about. If you are concerned about the disclosure of your identity then you should say this in your complaint, clearly explaining the reasons why. You should be aware that not disclosing your identity could hinder our ability to take forward your complaint, as it is likely to affect our communication with the company complained about. We will not make public your identity without your consent unless legally required to do so.

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How we will treat confidential information

You should send a non-confidential version of your complaint, as well as the confidential version. Clearly mark in the confidential version, any information that you consider to be confidential and explain why you think it should be treated as such. If we consider it necessary to disclose any of the confidential material you have provided we will, where practicable, give you written notice of our intention and allow you to comment.

You may be aware that we have a responsibility under the Freedom of Information Act 2000 ('FOIA') to provide information in response to a written request. Although the FOIA provides a number of absolute and public interest exemptions, which we will apply as appropriate to protect the public interest, we will consider any request that we receive on its merits. Further information on our approach to requests under the FOIA is set out in RD22/04².

8. WHAT EFFECT WILL MY COMPLAINT HAVE?

If we find a breach of one of the prohibitions of the Act, we can use our powers to stop the offending action and impose appropriate financial penalties.

In cases that do not concern criminal cartels, we must have regard to the civil standard of proof, which is on the "balance of probabilities"¹. However, the evidence must be "strong and compelling"¹ to find a breach of the Act, given the seriousness of such a finding. In particular, the more serious the allegations against a company, the more convincing the supporting information should be.

We may accept binding assurances from the infringing parties before reaching the point of publishing an infringement decision (these are called commitments). The commitments would ensure that the parties involved take appropriate action to remedy the situation. We would publish the commitments. Such remedies may be structural, behavioural or both.

Published decisions, commitments and interim measures directions are among the matters that may be appealed to the Competition Appeal Tribunal (the 'Tribunal') by any sufficiently interested party. The Tribunal has various powers, including upholding what we have done, making its own decision or remitting part or all of the matter back to us for further consideration.

² RD22/04 'Freedom Of Information Act 2000' is available on our website at www.ofwat.gov.uk or from our library.

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9. WHAT OTHER INFORMATION IS AVAILABLE?

- The guideline 'The Competition Act 1998 - the Application in the Water and Sewerage Sectors'.
- Other competition law guidelines published by the OFT provide further information on the Act.
- Information about the Tribunal can be found at www.catribunal.org.uk.
- Our information note 45: 'Competition law in the Water and Sewerage Industry'.
- Our information note 10: 'Market competition in the water and sewerage industry.'

You can obtain these and other publications by contacting the OFT on 0800 389 3158 or the Ofwat library on 0121 625 1373 or you can visit the websites for OFT at www.of.gov.uk or Ofwat at www.ofwat.gov.uk

FOR MORE INFORMATION

**Please contact us at:
Competition Policy Team
Office of Water Services
Centre City Tower
7 Hill Street
Birmingham B4 5UA**

**Telephone: 0121 625 1300
Textphone (minicom): 0121 625 1422
Fax: 0121 625 1400**

**Website:
www.ofwat.gov.uk
Enquiries:
Enquiries@ofwat.gsi.gov.uk**