

Prioritisation principles: application to the Competition Act 1998

About this document

The purpose of this document is to explain the principles that we will use in deciding whether to open or continue investigations under the Competition Act 1998 (CA98) and in deciding whether and what enforcement action we should take under the CA98.

In March 2010, alongside a revised version of our 'Guidance on the application of the Competition Act 1998 in the water and sewerage sectors' (published jointly with the OFT as [OFT 422](#)), we published our consultation '[Prioritisation principles: application to the Competition Act 1998 \(draft\)](#)'.

We have used the consultation responses to revise and finalise this document in the light of the comments made. Alongside this document, we have published both the [responses](#) to the consultation and a separate [summary](#) of consultation responses, which explains how we have taken those comments into account in arriving at a final version of this document.

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1. Introduction

- 1.1 The Water Services Regulation Authority (Ofwat), concurrently with the Office of Fair Trading (OFT), has powers under Section 31(3) of the Water Industry Act 1991 (as amended) to enforce the provisions of the Competition Act 1998 (CA98) in respect of agreements or conduct relating to “commercial activities connected with the supply of water or securing a supply of water or with the provision or securing of sewerage services”. Further details on concurrency arrangements, including how complaints are dealt with under concurrent powers and how the concurrent regulators work with each other, are set out in [‘Concurrent application to regulated industries’](#) (OFT 405).
- 1.2 The CA98 has an important part to play in ensuring the effective use of market forces. At the same time, we need to make the best use of our resources in order to achieve our aims. To do this, we need to take appropriate decisions about the work programmes and projects we undertake, looking across all our areas of work.
- 1.3 This document sets out the principles we will use in deciding whether to open or continue investigations under the CA98 and in deciding whether and what enforcement action we should take under the CA98. We also set out how we will use these principles.
- 1.4 These principles sit alongside, and should be read in conjunction with, our revised [‘Guidance on the application of the Competition Act 1998 in the water and sewerage sectors’](#) (OFT 422).
- 1.5 The factors set out in the principles below are not intended to be an exhaustive list of everything we will take into account when deciding whether to open or continue investigations under the CA98 or whether and what enforcement action we should take under the CA98. We may consider other factors as necessary or appropriate.
- 1.6 We will keep these principles under review and may revise them from time to time as appropriate.

2. How we will use the principles

- 2.1 Under section 25 of the CA98, we may open an investigation into a possible breach of Article 101, Article 102, the Chapter I and/or Chapter II prohibitions if we have reasonable grounds for suspecting a breach.
- 2.2 We take exploitative or exclusionary behaviour very seriously, and we will use our CA98 powers if it is appropriate for us to do so. We decide whether we will open or continue a CA98 investigation, or whether or what enforcement action we should take, by balancing the impact the investigation is having or is expected to have on our strategic goals with the risks and resources it will involve. We will also compare the opening or continuation of a CA98 investigation or the taking of particular CA98 enforcement action with other courses of action open to us. Other powers available to us may provide the most appropriate way of addressing a particular issue.
- 2.3 We will exercise our judgement on a case-by-case basis, considering the principles and the facts of the case. We will also consider other relevant factors. A decision whether to open or continue a CA98 investigation or whether or what enforcement action we should take will always involve an assessment of the best use of our resources, taking into account their alternative uses. Thus, we will not take such decisions in isolation, but will always consider our portfolio of work and the resources available.
- 2.4 The question of whether to open or continue a CA98 investigation or whether or what enforcement action we should take will in part depend on the priority we attach to the possible investigation or action relative to other uses for our resources. It is therefore not possible to give guidance in advance on whether we would open or continue an investigation in a given set of circumstances.
- 2.5 In line with our commitment to delivering better regulation set out in our strategy ‘[Delivering sustainable water](#)’, we will seek to apply these prioritisation principles in line with the principles of better regulation. These are that our actions should be transparent, accountable, proportionate, consistent and targeted.

3. Our prioritisation principles: application to the Competition Act 1998

- 3.1 We enforce the CA98 concurrently with the OFT, and have therefore adopted the broad prioritisation principles¹ used by the OFT. They are:
- impact;
 - strategic significance;
 - risks; and
 - resources.
- 3.2 As a sectoral regulator, we are different in nature to the OFT – we have different tools available to us and a different portfolio of work. We may therefore use our principles in a different way to that in which the OFT uses its principles.
- 3.3 The OFT applies its prioritisation principles across its portfolio of work and across its tool-kit. In contrast, this guidance deals only with our decisions on whether to open or continue investigations under the CA98 and on whether or what enforcement action we should take under the CA98. We have therefore adopted an additional principle:
- interaction with our other powers.
- 3.4 In this section, we set out the way we will use each of these principles in deciding whether to open or continue a CA98 investigation or whether or what enforcement action we should take under the CA98. We discuss interaction with our other powers first, because in general we consider that this is likely to be a significant consideration in many cases. However, the order of the principles has no legal significance.
- 3.5 As noted, the principles and factors set out below are not exhaustive. We take decisions on a case-by-case basis and we will exercise our judgement, considering the principles and the facts of the case. Where other factors are relevant, we will also consider them.

a. Interaction with our other powers

- 3.6 When considering whether to open or continue with an investigation or take enforcement action under the CA98, we will consider whether our other powers are a more appropriate means of addressing an issue.

¹ 'OFT Prioritisation Principles' (OFT 953) – see http://www.offt.gov.uk/shared_offt/about_offt/oft953.pdf

- 3.7 It will not always be possible for us to address an issue using our other powers. If it is possible to do so, we will assess the impact, strategic significance, risk and resources that would be involved in using our other powers. We will then compare that with the impact, strategic significance, risk and resources involved in using our CA98 powers.
- 3.8 We will take account of possible different outcomes that might arise when using different powers, including the possibility of differing impacts on affected parties.
- 3.9 Balancing all these factors, we will choose the most appropriate route to address the particular issue.

b. Impact

- 3.10 The greater the positive impact on consumers from the decision, the more likely we are to open or continue an investigation or to take a particular course of enforcement action. Consumers may be positively affected if an investigation results in lower prices, better quality products or services, more choice and/or more innovation. Such impacts may be felt in the short term or over time.
- 3.11 When assessing the impact on consumers, we will consider direct and indirect effects. Consumers benefit directly from changes in the behaviour of those subject to the investigation or enforcement action. Consumers may benefit directly, for example, if we prevent or terminate activity that negatively affects them. Where an investigation concerns a related market or intermediate market (where customers may be suppliers in other markets), we will assume that benefits will be passed on to final consumers.
- 3.12 Consumers benefit indirectly through changes in the behaviour of others than those who were subject to the investigation or enforcement action. Such indirect effects may occur, for example, through deterrence and awareness effects. Consumers will benefit if our investigation or enforcement action results in changed behaviour and improved awareness by consumers, other customers, companies and the government. Indirect effects include effects in markets other than those under investigation or subject to enforcement action.
- 3.13 In considering the impact of an investigation or enforcement action, we will also consider any positive effects it may have on efficiency. We may consider effects on:
- productive efficiency (whether goods and services are provided at lowest cost);

- allocative efficiency (whether resources are used to produce goods and services that customers value sufficiently to pay their costs of production); and
- dynamic efficiency (the development of more efficient production methods over time by means of innovation and technological progress).

Improvements in efficiency may benefit consumers directly, if they occur in the market that is the subject of the investigation, or indirectly, if they occur in other markets.

3.14 Consumers may also benefit indirectly where an investigation has the effect of safeguarding or facilitating the competitive process, as the proper functioning of competitive process may help secure the efficiencies, lower prices, better quality products or services, more choice and/or more innovation.

3.15 In assessing the likely impact on consumers, we will consider these factors in the round (and as appropriate) to arrive at a reasonable overall assessment of the likely impact of an investigation in the particular case under consideration.

3.16 It is also possible that an investigation may have differential impacts on different groups of consumers. Where this is the case, we will consider those differential impacts as part of our overall assessment.

c. Strategic significance

3.17 In our strategy, we set out a number of goals. They are:

- ensuring a fair deal for customers;
- keeping companies accountable;
- making monopolies improve;
- harnessing market forces;
- contributing to sustainable developments; and
- delivering better regulation.

3.18 We will not open or continue with CA98 investigations that, overall, are not consistent with our strategic goals. The more an investigation or enforcement action will contribute to one or more of our strategic goals, the more likely we are to open or continue it.

3.19 In some cases, it may be more appropriate for a body other than us to investigate or take action. We enforce the CA98 concurrently with the OFT (and other sectoral regulators). In line with the Competition Act 1998 (Concurrency) Regulations 2004 (SI 2004, No. 1077) and the OFT guidance 'Concurrent

application to regulated industries' (OFT 405), we will consider whether the OFT or another regulator might be best placed to deal with a particular case.

d. Risks

3.20 The higher the likelihood of a successful outcome, the more likely we are to open or continue an investigation or to take a particular enforcement action. A successful outcome is one that helps us to achieve one or more of our strategic goals.

3.21 In relation to CA98 investigations, we note that an infringement decision is not the only successful outcome. It is possible for an investigation to have a significant impact and generate significant strategic benefits, without resulting in an infringement decision (for example if it resolves an issue by means of undertakings, or clarifies an important issue).

e. Resources

3.22 We will only decide to open or continue an investigation or to take particular enforcement action if we are satisfied that the resources required are proportionate to the expected benefits (taking into account any risk that they may not be achieved). We may decide to open or continue an investigation or to take enforcement action that is resource-intensive because we consider that, having regard to its impact, strategic significance and risk, it is a good use of our resources. Conversely, we may decide to terminate or not to open an investigation or not to take enforcement action that is relatively resource-light because it is still a poor use of our resources.

3.23 In considering our resources, we will have regard to:

- the level of resource that will be required;
- the period over which the resource will be required; and
- the alternative uses to which that resource could be put.

We will consider not only our internal resource requirement, but also what external resource we may need (such as counsel or consultancy advice).



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