



Competition Law Association

British Group of the
Ligue Internationale du Droit de la Concurrence
(International League for Competition Law)

www.competitionlawassociation.org.uk

Our reference GET/BJP

7 February 2006

BY EMAIL AND POST

Sue Jones
The Office of Fair Trading
Fleetbank House
2-6 Salisbury Square
London
EC4Y 8JX

Dear Ms. Jones

Consultation – Draft Annual Plan 2006-2007

The Competition Law Association has the following observations on the OFT's draft Annual Plan for the period 2006 to 2007, and the related consultation.

It is our understanding that the Annual Plan is intended to be a forward-looking document. Its purpose is to outline the OFT's aims and objectives for the coming year, within the framework of the three year plan established by the Board in 2004. The following statement by the Chairman and Chief Executive is in keeping with this understanding:

"This Annual Plan sets out a framework that links our high level mission and goals to our functions and capabilities." (Paragraph 1.17, draft Annual Plan)

In contrast to the Annual Plan, the OFT's Annual Report is the medium through which the OFT reviews its activities over the previous year.

However, the draft Annual Plan for 2006 to 2007 also seeks to summarise the OFT's past successes under the headlines "What we do well" and "Building on achievements: challenges and changes". We see no objection to the

CHAIRMAN:	Peter Roth QC	Monckton Chambers; Telephone: 020 7405 7211; Email: proth@monckton.com
VICE-CHAIRMAN:	Geraldine Tickle	Martineau Johnson; Telephone: 0870 763 2000; Email: geraldine.tickle@martjohn.com
NATIONAL REPORTER GENERAL:	Anna Carboni	Wilberforce Chambers; Telephone: 020 7306 0102; Email: carboni@wilberforce.co.uk
TREASURER:	Richard Shaw	Berwin Leighton Paisner; Telephone: 020 7760 1000; Email: richard.shaw@blplaw.com
SECRETARY:	Jenny Block	Simmons & Simmons; Telephone: 020 7628 2020; Email: jenny.block@simmons-simmons.com
PUBLICITY SECRETARY:	Ashley Roughton	Hogarth Chambers; Telephone: 020 7404 0404; Email: ashleyroughton@hogarthchambers.com
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inclusion of such past information in the Annual Plan but it should surely be presented in a balanced way, referring to setbacks as well as successes, not least since the setbacks help to identify the challenges for the future.

The section of the Annual Plan in question is the "Overview by the Chairman and Chief Executive". It lists the following successes in the OFT's competition enforcement activities:

- the decision against Mastercard in respect of the collective setting of its domestic UK interchange fee;
- the issuing of a statement of objections against Visa in respect of the same;
- the issuing of a statement of objections against fifty schools in respect of their information sharing agreement; and
- the successful defence in the Competition Appeals Tribunal (CAT) of appeals against OFT decisions in the Genzyme and Replica Football Kit cases,

all of which present a rosy picture of the past year.

In the interests of balance, if the above successes are to be highlighted in the Annual Plan, CAT reversals of OFT decisions should also be mentioned. These include the following cases:

- JJ Burgess & Sons v. OFT and W Austin & Sons;
- The Racecourse Association and others v. OFT and The British Horseracing Board v OFT;
- Claymore Diaries Ltd and another v. OFT; and
- The Association of Convenience Stores v. Office of Fair Trading,

all cases in which the CAT criticised the OFT. As it stands, this lack of balance in the introductory section gives the unfortunate impression of complacency, not least since this section is presented as the Overview by the new Chairman and Chief Executive. We are sure that is not the OFT's intention. It would therefore be appropriate to make some reference in the Overview to the shortcomings identified by the National Audit Office and how the OFT is concerned to address them in the body of the Plan. In that regard, the reference to the NAO report in para. 1.11 presents a somewhat distorted picture of what was a very critical report.

The successes outlined in the draft Annual Plan are not limited to decisions upheld by the CAT. The OFT also commends itself for the enforcement of competition law more broadly, its protection of the consumer, the implementation of new legislation and policy initiatives, and the publication of investigations and reports into specific market areas. Parallel shortcomings, including the following, are overlooked:

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- the failure to dispose of cases expeditiously – at April 2005, 20 of 37 cases had been open for 2 to 3 years; and
- the limited number of formal investigations to arise from complaints – for the period 2004/2005 only 17 formal investigations arose out of 1,173 complaints.

In contrast with the Overview, we recognise the references in the main body of the Plan to the criticisms by the National Audit Office and its recommendations, particularly at paras. 3.17, 3.21 and 3.45-3.46. We strongly endorse the proposal to improve casework management and to adopt KPIs as regards competition complaints: paras. 3.17-3.19.

Many of the commitments in the Plan are of a general nature. To some extent that is inevitable in a document of this kind. Indeed, some of the more specific commitments appear to us questionable. Specifically, as regards para. 3.23 we do not see how the OFT can properly state as a KPI that it will refer to the Competition Commission or accept undertakings in lieu of a reference for 20-25 mergers. The number of mergers that will come within this category depends entirely on the number of mergers or anticipated mergers arising in the year that satisfy the statutory test for reference, since in all those cases a reference (or undertaking in lieu) is a matter of obligation on the OFT not of aspirational performance.

We make two specific and practical suggestions that we invite the OFT to consider in seeking to meet its goals:

- (a) to make more use of outside Counsel and/or outside Solicitors, as appropriate in the light of the particular case, *before* taking decisions. The OFT's staff, for all their abilities, necessarily have very little litigation experience. Greater involvement of Counsel and/or Solicitors to advise and review at the administrative stage would be at limited cost compared to the vastly greater expense of contesting a decision before the CAT, or the embarrassment of having to withdraw a decision as in the case of the Association of Convenience Stores. No system of internal review, including the proposals at para. 3.45, are an adequate substitute for such independent outside review.
- (b) to consider in the case of a complaint whether the complainant is well-funded such that, if the case does not raise a matter of real public interest or involve a hard-core cartel, the complainant should be left to pursue his remedy by a private action. It may be that this is envisaged by the general wording of the last bullet under para. 3.19, but if so, we suggest it should be spelt out.

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We hope that these comments will be taken into account in producing the final version of the Plan.

Yours sincerely

Geraldine Tickle
Competition Law Association

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