OFFICE OF FAIR TRADING

Private Healthcare - A Scoping Paper

December 2010

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CONTENTS

Chapters

1 INTRODUCTION

1.1 This paper accompanies the Office of Fair Trading's (OFT) press release dated 14 December 2010, announcing the OFT's proposal to conduct a market study into the market for the provision of Private Healthcare (PH) treatment/services in the United Kingdom (UK).[1] It sets out the relevant background information and the OFT's proposed Statement of Scope of the market study.

1.2 Before commencing the market study, however, the OFT wishes to consult interested parties on the proposed scope of its study to ensure that the correct issues are being considered, and whether any key issues, in your opinion, are missing or are not represented fully. Please note, at this stage, we are not seeking substantive views on issues that fall within the proposed scope. We would welcome any such views after we have launched with a finalised scope, which is planned for Spring 2011.

1.3 The remainder of this paper provides information on the following:

- the role and possible outcomes of a market study
- an overview of competition in the provision of Private Healthcare
- what prompted the OFT to propose a market study into the provision of Private Healthcare
- the proposed scope of the market study
- information on how to respond to this scoping paper.

1.4 The OFT is committed to working constructively and transparently with interested parties during the market study. The OFT's website page[2] will be updated as the market study progresses and will include, amongst other things, further information on timing and contact details for key team members. If you would like to be notified when the website is updated the OFT recommends that you register on the OFT website (www.oft.gov.uk/subscribe).

[1] For ease, referred to as the 'market for PH' in this document.

[2] Available at: www.oft.gov.uk/private-healthcare

1.5 Parties wishing to obtain further information on this proposed market study should contact:

- Senior Responsible Officer: Sonya Branch on 020 7211 8707, sonya.branch@oft.gsi.gov.uk
- Project Director: Alastair Mordaunt on 020 7211 5819, alastair.mordaunt@oft.gsi.gov.uk, or
- Team Leader: Sue Aspinall on 020 7211 8788, sue.aspinall@oft.gsi.gov.uk.

1.6 This document uses the terms 'PH consumer' to mean any patient accessing PH treatment provided by a medical professional in a private capacity. It encompasses patients with Private Medical Insurance (PMI) cover (directly bought or via their employer), patients who pay directly (self-pay) and NHS patients obtaining private treatment via the NHS.

2 THE ROLE AND POSSIBLE OUTCOMES OF A MARKET STUDY

Role of a market study

2.1 The OFT aims to make markets work well for consumers. It achieves this by promoting and protecting consumer interests throughout the UK, while ensuring that businesses are fair and competitive.

2.2 Typically, market studies are examinations into the causes of why particular markets may not be working well for consumers, leading to proposals as to how they might be made to work better. They take an overview of regulatory and other economic drivers in a market and patterns of consumer and business behaviour.[3]

Possible outcomes of a market study

2.3 Market studies can lead to a range of outcomes. They may conclude that a market can be given a clean bill of health and that the initial concerns about consumer detriment are not substantiated by the information collected over the course of the study.

2.4 Where the market is found not to be working well, there are several options that OFT will consider to address the causes. These may include one or more of the following:

- recommendations to the industry, including for example consultants, GPs, PH providers and PMI providers
- improving the quality of information available to patients regarding, for example, their decisions over choice of consultant and/or private hospitals
- investigations and enforcement action against businesses suspected of breaching consumer or competition law
- making a market investigation reference to the Competition Commission

[3] Further details about the OFT's approach to market studies can be found in the OFT's publication *Market Studies: Guidance on the OFT approach* (June 2010) www.oft.gov.uk/shared_oft/business_leaflets/enterprise_act/oft519.pdf.

- recommendations to Government
- an OFT-led consumer campaign.

2.5 The above is merely an illustrative list of possible outcomes. The OFT retains an open mind as to which outcomes, or combination of outcomes, may be appropriate to address any concerns that it may identify during the course of this proposed market study.

3 OVERVIEW OF COMPETITION IN THE PROVISION OF PRIVATE HEALTHCARE

3.1 The market for PH encompasses a range of medical treatments, which are mainly privately funded,[4] and provided to patients via private hospitals/clinics[5] through the services of consultants and other medical professionals who work within these facilities. Our definition of PH primarily will focus on the provision of acute medical treatment[6] and not on the treatment of longer term conditions.[7]

3.2 In 2008 the total value of the market for PH in the UK was estimated at just over £5.5 billion. Private hospitals and clinics account for the largest part of the overall PH market, generating an estimated £3.4 billion revenue in 2008. Fees to surgeons, anaesthetists and physicians generated an estimated £1.6 billion in 2008.[8]

3.3 PMI,[9] which is often provided by employers, is the main funding source for the provision of PH by private hospitals and clinics (61 per cent), followed by NHS-funded patients (23 per cent) and then self-pay patients (15 per cent).[10]

3.4 The market for PH is likely to be an area of growing importance to the UK economy given, in particular, an ageing population, improved medical outcomes and higher life expectancy. It may also be increasingly important to the delivery of NHS services as a result of ongoing

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[4] See paragraph 3.3 for details of funding mix.

[5] Including private patient units (PPUs) of NHS hospitals.

[6] Short-term medical treatment, usually in a hospital or out-patient facility, for patients having a brief but severe illness or injury or recovering from surgery.

[7] We do not propose focusing on longer term treatments such as mental health treatment and long-term care of the elderly.

[8] All data provided from Laing's Healthcare Market Review 2009-2010, Laing & Buisson, 22nd edition 2009 (L&B Review), Table 1.2, page 35. Note, the £5.6bn total market figure does not include revenue from mental health hospitals or long-term care of the elderly.

[9] Whereby, in exchange for an annual premium, an insurer will indemnify the policy holder for the costs of medical treatment for certain defined conditions.

[10] Self-pay patients includes overseas patients.

Government initiatives which are aimed at enabling NHS patients to obtain medical treatment from PH providers.[11]

3.5 The OFT considers that the market for PH may be atypical in several respects from the way in which markets generally operate. Health is an emotive, complex and sensitive issue and as such, consumers will make choices and take decisions differently such that the normal market conditions influencing demand and supply may not fully apply. GPs and consultants play a central role in assisting how patients make choices in healthcare. The information available to GPs and consultants, as well as the way they use it is therefore potentially important in driving competition.[12]

3.6 In general, the OFT believes that markets work well when firms compete to win business by, among other matters, achieving the lowest level of cost and prices and developing and offering services which meet consumers' needs more effectively than their competitors. This competitive process, when it works well, encourages innovation and provides consumers with increased choice.

3.7 Competition can also be enhanced when consumers have access to readily available and accurate information about the services they are seeking and the various offerings available in the market.

3.8 While this competitive process is usually the manner in which markets work best for consumers we consider that additional considerations should be factored into any examination of the manner in which the market for PH could work best for consumers.

3.9 We believe that these additional aspects of the market include:

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[11] For example, see the Department of Health's *NHS White Paper, Equity and excellence: Liberating the NHS*, published on 12 July 2010 and available at: www.dh.gov.uk/prod_consum_dh/groups/dh_digitalassets/@dh/@en/@ps/documents/digitalasset/dh_117794.pdf.

[12] The OFT is aware that there has been a great deal of research conducted on how patients make choices. For example, work on this subject has been recently been completed by the King's Fund (*Patient Choice: How patients choose and how providers respond,* June 2010).

- the apparent greater importance placed on the quality (rather than the price) of the medical treatment/services provided to PH consumers than in other markets

- the potential informational asymmetries present between PH consumers and the medical professionals providing the service. Patients lack the training, knowledge and experience possibly to make fully informed choices regarding medical treatment and/or choice of medical provider. Typically patients appear to resolve these information constraints by relying on GPs and consultants to assist them

- the separation of payment for the treatment/service from the use of the treatment/service as most PH consumers access PH via private medical insurance (61 per cent[13]) where (subject to the payment of an annual fee and claims excess) the PMI provider will pay for the costs of hospital treatment and consultant services for an insured condition.

[13] Figure obtained from L&B Review, section 2.2 page 45.

4 WHAT PROMPTED THE OFT TO PROPOSE A MARKET STUDY INTO THE PROVISION OF PRIVATE HEALTHCARE?

4.1 Our preliminary research in this market, which was initially prompted by submissions made by a number of participants across the sector, calls into question whether the market for PH is working well for PH consumers. The OFT considers that this suggests that consumers of PH may not be receiving the full benefits of a competitive market.

4.2 We believe that there may have been a number of changes in the market for PH over the last decade, in particular consolidation amongst private hospital providers and a move by PMI providers away from vertical integration and towards a greater reliance on network agreements with PH providers. There is also a greater usage of the PH sector by the NHS. The NHS is the second largest funder of PH and this has more than doubled in the last four years.[14]

4.3 The OFT therefore proposes to conduct a market study into the market for PH to examine whether the market is working well for consumers and, if not, whether there is potential for improving how it functions.[15]

4.4 We have identified four broad areas of possible concern, namely:

- **concentration of PH provision:** concerns that market concentration amongst providers of private healthcare at the national, regional and/or local levels is high, and that this might be limiting the extent of competition in the market

- **barriers to entry:** concerns about potential restrictions on the ability of PH providers - in particular, private hospitals - to enter (or expand into) the market for PH

- **supply-side constraints on consultants:** concerns about potential restrictions on the ability of consultants and other medical professionals to practice, and

[14] See paragraph 4.10 below.

[15] See footnote 3.

- **constraints on consumers:** concerns about how consumers access and assess information, and how they exercise choice in the provision of PH.

4.5 Further details of these concerns are set out at paragraphs 5.1-5.21 below where the proposed scope of our market study is outlined.

Previous work in this area

4.6 Issues relating to the provision of PH and PMI have been looked at in the past by the OFT and the Monopolies and Mergers Commission (the predecessor to the Competition Commission) although the last formal review was more than a decade ago, in 1999.[16]

4.7 In its 1999 review, the OFT voiced concerns over whether PMI policy holders were being provided with sufficient, quality information regarding their policies. However, it otherwise found no major competition problems in the PH and PMI sectors. In coming to its conclusions, the OFT did not find concerns in relation to certain hospital network agreements between PMI and PH providers that were being developed at that time.[17] These network agreements were judged to be ultimately beneficial to PH consumers in providing for lower premiums through the efficiencies they created.

Possible market changes since 1999

4.8 Since the late 1990s, the market for PH has undergone a degree of consolidation as the large hospital groups have expanded their portfolio of hospitals, primarily through acquisition, leading to increased levels of concentration at both the national, regional and local levels.[18] It has been suggested by some market participants that these market developments have resulted in more limited competition amongst PH providers, and that this limited competition is being sustained by various barriers to entry and expansion.

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[16] OFT inquiry into private medical insurance and services, November 1999, No 40/99

[17] Network agreements are arrangements whereby PMI insurers approve only certain PH providers for the treatment of their policyholders.

[18] L&B Review, section 2.4.2, pages 29-37.

4.9 In conducting this study, the OFT will seek to assess how the market for PH has evolved since 1999. In doing so, we will be mindful both of the potential efficiencies and potential harm which may derive from certain market practices.

Role of NHS in the market for PH

4.10 As noted above, the NHS is the second largest purchaser of PH, generating £781 million or an estimated 23 per cent of the £3.4 billion revenues for private hospitals and clinics. The NHS's share has more than doubled in four years from just over 10 per cent in 2004,[19] initially driven by a wave of central procurement in 2005, and then an increase in local contracting following the universal introduction of patient choice from 2007 onwards, including the current Government's 'any willing provider' initiative.[20]

4.11 As part of its proposed market study, the OFT intends to pay due attention to (i) developments in public healthcare regarding recent NHS patient choice initiatives, and (ii) the NHS in its role as a provider of PH (through NHS hospital PPU's), in so far as these relate to and impact on the market for PH. It is possible that any findings we make in this proposed study may also have relevance to the NHS and any forthcoming reforms. We intend to continue to work closely with the Department of Health and other regulators, such as Monitor, in these areas.

[19] Data provided by L&B Review, section 2.2.2, page 13.

[20] See the Department of Health's *NHS White Paper, Equity and excellence: Liberating the NHS*, published on 12 July 2010 and available at: www.dh.gov.uk/prod_consum_dh/groups/dh_digitalassets/@dh/@en/@ps/documents/digitalasset/dh_117794.pdf.

5 PROPOSED SCOPE OF THE MARKET STUDY

5.1 The OFT is now consulting on the scope of its proposed market study. At this stage, the OFT proposes to examine the issues set out in paragraphs 5.2 to 5.17. These issues are posed as a series of questions that we will seek to answer during the market study.

Nature of competition in the provision of PH

5.2 What is the nature of competition in the provision of PH, in particular between private hospital providers? Key issues and questions we propose to include are the following:

5.3 What are the main parameters on which providers of PH compete? For example, to what extent do providers compete on price and quality of treatment/service?

5.4 To what extent does competition between providers of PH take place at a national, regional and local level?

5.5 How does the NHS feed into the competition for the provision of PH, both as a potential supplier (for example, through NHS hospital PPUs) and a funding source for PH (for example, where NHS patients receive medical treatment from private providers)?

Concentration levels of PH provision

5.6 What is the level of market concentration amongst PH providers at the national, regional and local level, and what impact does this concentration have on the extent of competition in the market? Key issues and questions we propose to include are the following:

5.7 What is the level of concentration amongst PH providers at the national, regional and local level, and how have these concentration levels changed over time?

5.8 What impact, if any, do concentration levels (at national, regional and local levels) have on the provision of PH, for example in terms of price and quality of treatment/service?

5.9 What impact, if any, does size (for example, in terms of number of facilities) and/or market coverage (for example, in terms of number of locations across the UK) have for PH providers when negotiating with PMI providers? In particular, what impact (if any) is derived from PH providers operating the only PH facility in a particular location (sometimes referred to as a 'solus area')?

Structural barriers to entry

5.10 Are there structural barriers to entering or expanding into the market for PH which could deter potential entrants, or hamper the ability of recent entrants or smaller providers to compete effectively in the market to the detriment of consumers? Key issues and questions we propose to include are the following:

- What has been the recent experience of expansion, entry and exit in the provision of PH, in particular by private hospitals?
- What is the level of capital needed in setting up a new PH facility? What are the other material fixed costs?
- Are there economies of scale and scope which mean that a PH provider needs to be of a certain scale before becoming profitable?
- Are there issues specific to the provision of PH regarding access to suitable land and the planning process for new facilities?
- What are the costs involved in developing and maintaining a brand? How important is a brand for a PH provider?
- What are the start-up and ongoing regulatory requirements for a PH provider?
- Is there excess capacity in the provision of PH by private hospitals, and what impact does this have on the market?
- Are there other structural barriers to entry and/or expansion which have a material impact on the provision of PH?
- Do any of these structural barriers result in or sustain higher levels of concentration at the national, regional or local level?

Non-structural barriers to entry

5.11 In addition to any possible structural barriers, are there any non-structural barriers to entry and expansion? For example, are arrangements between certain PH and PMI providers in the form of hospital 'network agreements' making entry and expansion difficult for those PH providers not listed under these agreements? Key issues and questions may include:

- What is the importance, exact nature and length of these network agreements?
- What is the relative bargaining power of PH providers versus PMI providers in making these agreements? Has this balance of power changed over time?
- What are the benefits of these agreements from the perspective of the PMI and PH provider respectively and ultimately to consumers?
- What (if any) are the opportunities and costs of private hospitals joining or switching membership of a hospital-insurer network?
- Does the existence of network agreements affect the ability of PH providers who are not listed under these arrangements to attract and retain consultants? Do the agreements have any other impact on non-listed PH providers?
- Are there other non-structural barriers to entry and/or expansion which have a material impact on the provision of PH?
- Do any of these non-structural barriers result in or sustain higher levels of concentration at the national, regional or local level?

Supply-side constraints on consultants

5.12 Do the actions of PH and/or PMI providers produce constraints on the freedom of consultants to practice to the detriment of consumers? Key issues and questions may include:

- How do PH providers manage their admission policy for consultants?

- What is the ability of consultants to split their patient lists between the facilities of different (and potentially competing) PH providers?

- What are PMI providers' policies regarding allowing their policy holders to 'top up' fees paid to consultants above the benefit maxima?

- What are the benefits to not allowing policyholders to top up fees?

- Do restrictions on top up fees have any adverse impacts, for example on innovation and quality of treatment?

- How do PMI providers choose which consultants and other medical professionals to include on their approved lists?

Constraints on consumers

5.13 What are the factors and incentives in the market for PH which influence how consumers make decisions regarding, for example, choice of consultant and/or PH provider?

5.14 Our study would seek to examine how and when the consumers of PH are provided with choices during the patient journey from the moment a consumer first consults a GP to receiving the PH treatment. In particular, we envisage examining the role of GPs, consultants and PMI providers in advising consumers of their healthcare choices. Receiving private healthcare can involve complex decisions – for medical professionals as well as patients. Key issues and questions may include:

- What choices of PH provider and consultant are available to PH consumers?

- What information is provided to patients by PH providers, PMI providers, medical professionals and other sources in making their choice? At what point in the patient's journey is this information provided? Is this information accessible, and does it aid or limit informed decision making for PH consumers?

- What information is available to 'self-help' patients (that is, those patients wishing to make their own medical decision rather than

relying on the advice/recommendation of others), and is this information accessible and useful?

- What information is available or provided to patients on medical outcomes or other quality indicators?

- If patients delegate decision-making to their GP, how does the GP make this decision? In particular, what information does a GP take into account when choosing between PH providers and/or consultants on behalf of a patient? What are the incentives facing GPs to allocate a patient to the PH provider and/or consultant that is most suited to their needs?

- Whether certain terms and conditions in PMI policies, (or lack thereof) result in consumer decisions which are likely to have adverse effects on competition in the market for PH?[21]

- Do certain aspects of PMI cover make switching policies difficult such as the fact that known medical conditions may be excluded from any new policy?

- Given the role of PMI providers in seeking value for money from PH providers, what additional role (if any) do consultant choice and patient choice have in driving competition?

- How are the incentives faced by PH and PMI providers affected by consumers' ability, or otherwise, to choose?

5.15 The OFT recognises that considerable research has been carried out assessing how patients use information to make choice in healthcare. As part of this market study, the OFT also plans to review existing work in this area.

[21] Some of these issues may be relevant to the remit of the FSA (which regulates the sale and administration of PMI in the UK) and to a lesser extent, the Financial Ombudsman Service (or FOS) (which is responsible for considering consumer complaints arising from PMI policies). We will consult with FSA and FOS in the course of this study, to ensure there is clear allocation of responsibilities between the OFT and these bodies, and avoid any unnecessary duplication of roles/work.

Geographical scope

5.16 On the basis of our preliminary research, we have no reason to assume that the concerns outlined above are not applicable to the whole of the UK. As a result, we intend to examine the market(s) for PH in England, Scotland, Wales and Northern Ireland.

5.17 In addition, a potential benefit to this UK-wide approach is the ability to compare the relative influence of the NHS on private healthcare. As outlined in the OFT's recent Choice and Competition in Public Services paper,[22] the NHS has developed differently in each of the four jurisdictions, and these differences provide an opportunity for deeper analysis on how the market for PH in contrasting circumstances works. We also plan to consider how PH markets function in the US, where network agreements also exist, and in Sweden and Holland where there have been recent initiatives around patient choice.

What we plan to exclude from scope

5.18 Our study focus is on the provision of PH treatment/services although we recognise that PMI is a critical input into PH, and where relevant, the relationship between PMI providers with PH providers will be examined within the proposed scope as detailed above.

5.19 The market for the provision of PMI is relatively concentrated (the top five PMI account for 80 per cent of the PMI market[23]), as a result of some recent consolidation in the last three years. However, prior to this point there have been new entrants,[24] and we currently have no cause to believe that barriers to entry are particularly high.[25]

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[22] OFT, *Choice and Competition in Public Services*, March 2010 (OFT1214). Paper available at: www.oft.gov.uk/shared_oft/business_leaflets/general/oft1214.pdf

[23] Data provided by L&B Review, Table 3.12, page 208.

[24] Pru Health and Simply Health.

[25] See L&B Review, page 178, 'Barriers to entry for a non-full service PMI provider remain low, beyond FSA's initial regulatory compliance costs. Any general insurance company with a licence to sell general insurance can become a PMI carrier. A 'look-alike' product can be copied from another insurer, a third party administrator can be used to handle claims administration and the product can be sold through existing distribution channels. Joint venture involving a separate

5.20 Our preliminary research has not identified significant concerns other than those which relate to the issues identified at paragraph 5.1 onwards above. The OFT does not, therefore, propose to include the following at the PMI provider level within the scope of its market study:

- data or information relating to entry or expansion in the provision of PMI
- a consideration of whether the market for the provision of PMI is competitive
- innovation and diversity of PMI products
- how consumers select their PMI product, for example on the basis of reputation of the provider, or branding of the product.

5.21 In addition, in determining the scope of the study, we are aiming to focus on areas most likely to give rise to concerns that consumers of PH may not be receiving the full benefits of a competitive market so that we can concentrate our resources most efficiently.

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seller, underwriter and administrator, which have been the norm in recent years, are likely to be typical of further new entrants which require both underwriting experience and marketing/administration expertise'.

6 INFORMATION ON HOW TO RESPOND TO THIS SCOPING PAPER

Invitation to comment and next steps

6.1 The OFT would welcome written comments on the proposed scope of the market study from a wide range of interested parties by 1 February 2011.

6.2 We plan to launch our study with a finalised scope in the Spring 2011. Thereafter, the first phase of the project is expected to last until early summer, during which time we will meet with, and gather and assess evidence from interested parties. The final duration and scope of the project will depend on the outcome of this first phase, and we plan to issue a progress statement in the Summer. The market study is expected to be completed by the end of 2011.

6.3 Additional information about this study, including information on next steps and timing will be added to the Private Healthcare Market Study webpage[26] on the OFT's website on a regular basis.

6.4 In addition to the issues raised in this document, we would welcome comments on:

- whether there are any additional issues which should be addressed in this market study, and
- whether there are certain issues, products, or geographic areas to which the market study should give more or less attention than others. In particular, whether the OFT should seek to consider the experiences of other jurisdictions, other than those identified in paragraph 5.16-5.17 above.

[26] www.oft.gov.uk/private-healthcare

6.5 Interested parties can submit their comments by email by 1 February 2011 to privatehealthcare@oft.gsi.gov.uk, or write to us at:

Private Healthcare Team
Services Group
Office of Fair Trading
Fleetbank House
2-6 Salisbury Square
London EC4Y 8JX

6.6 Respondents are asked to supply a brief summary of the interests or organisations they represent, where appropriate.

6.7 Interested parties would include firms, trade bodies, individual patients, consumer groups, charities in this sector, academics with an interest in this sector, and other government bodies.

Disclosure of information provided to the OFT

6.8 The OFT would like to make interested parties aware that it may choose to disclose information that it obtains during the course of this review, including as a result of this invitation to comment. It may also publish it in any document we produce at the end of this review. In deciding whether to do so the OFT will have regard, in accordance with its statutory duties under Part 9 of the Enterprise Act 2002, to the need for excluding, so far as that is practicable, any commercial information relating to a business or any information relating to the private affairs of an individual which, if published, the OFT thinks might significantly harm the legitimate business interests of that business or, as the case may be, the individual's interests (referred to individually and collectively as 'confidential information').

6.9 If you should consider that the information that you will provide contains such confidential information, you should identify each separate item (for example, individual data) or category of information (for example, a row or column of data in a spreadsheet) and explain in each case why you consider it is confidential by reference to the above test - blanket requests for confidential treatment (for example, the entire submission) will not be sufficient. In the event that the OFT proposes to include any

sensitive commercial or personal information in a document that will be published it will, save in exceptional circumstances, contact the relevant persons prior to publication to give them the opportunity to explain why disclosure would cause significant harm and to request excision (or aggregation or generalisation) of any material that will still be sensitive at the time of publication.

6.10 The OFT is also bound by the Freedom of Information Act 2000 (the 'FoIA'). Where a person makes a request in accordance with the FoIA the OFT may have to disclose whether it holds the information sought and the information itself (including confidential information). The FoIA contains exemptions (including one which may exempt confidential information) and the OFT will not have to make those disclosures if an exemption applies. If you consider that any information you provide may be exempt from such disclosures you should say so and explain why. Similarly, to the extent that information you provide constitutes personal data under the Data Protection Act 1998, the OFT will process such data in accordance with that Act

6.11 The OFT reserves the right to disclose any information it obtains (including confidential information) as may be permitted or required by the Enterprise Act 2002 or any other enactment.