

# The OFT market study into the equity underwriting market

Jun 15 2010 [Niamh Grogan and Gordon Christian](#)

The Office of Fair Trading has announced its intention to launch an investigation into equity underwriting and associated services later this summer. The investigation will relate to how equity underwriting and associated services are procured, provided, charged and paid for. The OFT is inviting comments on the scope of the investigation (e.g., whether it should include equity raising by AIM-listed companies and IPO-related issues) by July 9.

There is a broad range of possible outcomes, with everything from a clean bill of health to a reference to the Competition Commission for a two-year market investigation (and the possibly wide-ranging remedies that could follow such a market investigation, including price control, codes of conduct/ombudsman or further regulation).

Main steps for companies likely to be affected by the market study include: (i) responding to the invitation to comment and seeking a subsequent meeting with the OFT to understand its concerns and to help shape the investigation; (ii) providing the other side of the story to the OFT (as, so far, it has only heard from users of equity underwriting services); and (iii) putting a team in place, with external advisers as appropriate, to deal with the OFT's inevitable information requests which will be formulated once the initial comment stage is finished.



Niamh Grogan

## Introduction

Philip Collins, the OFT's chairman, first hinted at an investigation of investment banks in a speech to the Future of Banking Commission on March 18, 2010. In its announcement on June 10, the OFT has confirmed its intention to launch a market study into equity underwriting and has begun a consultation process into the proposed scope of the study. It is understood that the OFT has been in an informal dialogue with users of equity underwriting services over the last few months. The level of negative feedback from many users about the cost of such services, which are generally charged on a percentage basis and which, according to recent press reports, are the highest in Europe, led the OFT to the conclusion that a market study is an appropriate next step to investigate whether there is an issue and, if so, what the scale of the problem is. For ease of reference we have set out below next steps, main features and possible outcomes of the market study in a Q&A format.



Gordon Christian

## Equity underwriting market study

### What is an OFT market study?

A market study enables the OFT to analyse the competitive conditions in an entire market rather than being restricted to the activities of specific companies.

### What specifically is the OFT intending to analyse?

The first issue the OFT is intending to look at is the level of competition for the appointment of advisers and underwriters and how the remuneration structure works. Secondly, the OFT intends to analyse the market from the customers' perspective, i.e., do companies have an adequate choice of advisers/underwriters and on what basis do they decide on appointments? Thirdly, the OFT intends to analyse the regulatory environment to determine whether equity underwriting rules restrict competition.

### What are the next steps in the OFT's analysis of equity underwriting?

It is important to note that the OFT has not yet formally commenced the market study. Between now and July 9, 2010, it is consulting major stakeholders on the scope of the proposed market study. At the moment, the OFT intends to focus on the issues referred to above in relation to rights issues and other forms of equity raising by the 350 largest UK public companies. Depending on feedback received, however, the OFT may also consider equity raisings by AIM-listed companies and/or underwriting in the context of IPOs.

### What are the possible outcomes of the OFT's market study?

In theory, possible outcomes include everything from a clean bill of health, OFT recommendations for changes in laws or regulation, OFT enforcement action or a reference to the Competition Commission for an in-depth two-year market investigation.

In practice, an analysis of the outcomes of recent OFT market study paints a mixed picture of possible outcomes. For example, the 2004 ticket agents market study essentially resulted in a clean bill of health for the industry, subject to certain recommendations relating to the transparency of pricing in advertising and compliance with consumer legislation. In contrast, the 2006 groceries investigation led (after a successful court challenge to a previous decision not to refer) to a reference to the Competition Commission for a market investigation. The Competition Commission has wide-ranging remedy powers in market investigations, including divestment of businesses and enforcing significant changes in business practices, including price or fee control. The Competition Commission's groceries inquiry has led to extensive remedies that have transformed the grocery sector into a regulated industry. Similarly, the 2006 UK airports market study led to a reference to the Competition Commission for a market investigation and, as a result of that investigation, the Competition Commission, for the first time, ordered a divestment remedy to break up BAA.

### **What are the main practical points to consider at this stage?**

The OFT is at the beginning of its consideration of the issue and has only heard one side of the story, i.e., from the users of the equity underwriting services. We should, therefore, not prejudge the outcome. This is the time to seek to influence and educate the OFT to ensure that there is full understanding of the nature and structure of competition in the market. It is generally advisable to approach the OFT early on (usually by seeking a meeting) to discuss its preliminary concerns and to shape the scope of the investigation as much as possible.

Secondly, it is not advisable to seek to "defend" certain conduct before it is even clear what the OFT is focusing on, as the risk is that that strategy backfires by simply giving the OFT another point to add to its list of possible concerns. Thirdly, once the initial contact with the OFT has been established and the scope of the market study has become clearer, it is advisable to start setting up an internal team, with external advisers as appropriate, to deal with the OFT's requests for information. The internal team should be headed up by a senior person from the business and complemented by staff with detailed knowledge of, and access to, the data that is likely to be requested. Once those preparatory steps have been taken, stakeholders will be in a good position to have a positive relationship with the OFT team and seek to reach the best possible outcome of the market study.



***Niamh Grogan** is a partner in SJ Berwin's EU & Competition Department in London where she advises on both EU and UK competition law matters. Her experience ranges across many industry sectors, in particular retail, telecommunications and financial services. **Gordon Christian** is a senior associate in the same practice and is experienced in both EU and UK competition law matters in a diverse range of sectors.*