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Dear Derek,

## MORRIS REVIEW OF THE ACTUARIAL PROFESION

Thank you for your invitation to the Office of Fair Trading (the OFT) to submit views on the issues identified in the consultation document issued in June 2004. We have read it with considerable interest.

2. The actuarial profession is not a profession that the OFT has had direct dealings with, at least not in recent years. However, as you may be aware, we have been conducting an ongoing review of competition in professions since 2000. In 2001 we published our report "*Competition in professions*"<sup>1</sup> (the 2001 report) in which we looked at the professions of law, accountancy and architecture and highlighted restrictions on competition affecting these professions in professional rules and in custom or in statute. In 2002, we followed this with a progress statement<sup>2</sup>, indicating what had been achieved since the 2001 report and what remained to be done; we indicated a number of continuing competition concerns particularly, but not exclusively, in relation to the legal profession.

3. That work was one of a number of reasons for the current Review of the Regulatory Framework for Legal Services in England and Wales, led by David Clementi, to which you make reference in your consultation document. In June 2004 we published our response to that consultation<sup>3</sup> in which we focussed on proposed options relating to a new regulatory structure for the profession and proposed options relating to alternative business structures for the provision of services.

4. While we do not have any detailed profession-specific information or insights into the actuarial profession, it may be that some of the competition-related themes that have emerged in our other work has relevance to the work that you are currently undertaking (Q1.36 and 37 of the consultation paper). At this preliminary stage, we thought that it may be

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<sup>1</sup> OFT 328 available on the OFT website at [www.oft.gov.uk](http://www.oft.gov.uk)

<sup>2</sup> OFT 385 available on the OFT website at [www.oft.gov.uk](http://www.oft.gov.uk)

<sup>3</sup> OFT 722 available on the OFT website at [www.oft.gov.uk](http://www.oft.gov.uk)



useful to indicate possible read-across on the issues of how changes to the regulatory structure may affect subsequent competition scrutiny of professions rules and regulations, and of the separation of the regulatory and representative functions of a professional body. We also thought it might be helpful to draw your attention to the recent report by the European Commission on competition in professions<sup>4</sup> and, in particular, the recommendation in that report of an ex-ante proportionality test to guide rule-making, whether by regulators or professional bodies, in order to help ensure that professional rules do not restrict competition more than is necessary.

### **Regulatory frameworks and competition**

5. The OFT believes that one of the main objectives of a regulatory framework for the actuarial profession (Q2.1 of the consultation document) should be to facilitate and promote competition among those providing actuarial services. A healthy competitive environment is likely to provide more protection for the interests of consumers of these services than any other single feature. Competition is most likely to flourish under the following conditions:

- a) Entry barriers should be no higher than is necessary to ensure a satisfactory level of professional standards. In particular, the qualification requirements for actuaries should be proportional to the needs of the work. However, we do not have the evidence to assess whether the current qualification period of five or six years meets this test (Q1.17).
- b) Work should be reserved for actuaries by statute only if and when there is a clear public interest need for it which cannot be met in any less restrictive way (Q1.3).
- c) Switching from one provider of actuarial services to another should be easy as possible (Q1.24).
- d) Information about the availability and quality of alternative sources of actuarial services is an essential feature of consumer choice. Any information restrictions, for example restrictions on advertising, should only be permitted in exceptional circumstances. On the positive side, regulatory arrangements should assist the dissemination of information about service quality.

### **Regulatory frameworks and competition scrutiny**

6. In our response to the Clementi Review we highlighted the fact that the choice of regulatory model will impact critically upon competition scrutiny. We consider it important in the context of any change to regulatory structures to ensure that whatever model is selected guarantees proper competition scrutiny of professional rules. In particular, the scope for enforcement action by OFT under the Competition Act 1998 (CA98) and Articles 81 and 82 EC may be limited by regulatory arrangements. Where this is the case we consider it important that other means of competition scrutiny are made available.

7. Although in principle both Articles 81 and 82 and, since the repeal of CA98 Schedule 4, the provisions of the CA98, apply in the context of professional services in the same way as they do in other sectors of the economy, they have to be interpreted and applied in the light of EC and national case law. Developments before EC courts suggest that, in practice, it is not always clear that rules that govern the provision of professional services, which may

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<sup>4</sup> European Commission's Report on Competition in Professional Services published on 9 February 2004 (Com (2004) 83 Final).

restrict competition, will always fall within the scope of these competition law provisions. Examples of factors that may be relevant to assessing the scope of competition law with respect to the rules of professional bodies governing the provision of services include the following:

- the nature and extent of oversight of the decision-making process by government or regulators (in general the greater the oversight the less the scope for enforcing the prohibitions of Articles 81 and 82/CA98)<sup>5</sup>;
- the composition of the decision-making body and the extent of its independence<sup>6</sup>;
- whether there are public interest considerations which must be taken into account in the decision making process (in general the greater the requirement to take into account public interest considerations the less the scope for enforcing the prohibitions of Articles 81 and 82/CA98)<sup>7</sup>.

8. Thus the choice of regulatory model may significantly affect the subsequent scope for applying competition prohibitions with respect to rules governing the provision of professional services. Where possible, regulatory design should ensure that competition rules do apply. Where the model chosen is such as to make doubtful the application of the competition prohibitions, then it will be important to put in place an alternative mechanism for ensuring effective competition scrutiny.

9. The key point, which we feel is equally applicable to regulation of actuarial services, legal services or any other professional services is that, where enforcement action is not available as a means to ensure that rules are not anti-competitive, an effective alternative should be put in place.

### **Separating regulation and representation**

10. This issue emerges at a number of points throughout your consultation and most specifically at Question 2.3. The Clementi consultation also tackled this issue in the context of the regulatory framework for legal professional bodies. The OFT has a clear preference for separation. Whatever the merits of self-regulation, they risk being seriously undermined by either the reality or the appearance of the regulator's judgement being swayed by its wish to represent the interests of its members when these may differ from the interests of users of the relevant professional services.

### **A proportionality test**

11. The European Commission's Report on Competition in Professional Services recommends<sup>9</sup> that in assessing whether any restrictions in rules and decisions of professional bodies infringe the Chapter I prohibition and/or Article 81, and in order to ensure that any new rules are compatible with these provisions, regulators and professional bodies should adopt the proportionality test set out in the report, i.e. they should consider whether the existing restrictions pursue a clearly articulated and legitimate public interest objective,

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<sup>5</sup>See for example, Case C-35/59 *Arduino*.

<sup>6</sup>See for example, Case C-35/59 *Arduino*, and Case C-185/9 *Reiff*

<sup>7</sup>See for example, Case C-35/59 *Arduino*, and Case C-309/99 *Wouters*. For a more detailed account of the scope for enforcement action against professional bodies under Articles 81 and 82 EC, see paragraphs 65-89 of the European Commission's Report on Competition in Professional Services (Com(2004) 83 final).

<sup>8</sup> COM (2004) 83 Final, at paragraphs 93 and 94.

whether they are necessary to achieve that objective and whether there are no less restrictive means to achieve it. We believe that this is a useful means of ensuring that rules that govern the provision of professional services are compatible with competition objectives.

12. We hope that these thoughts are helpful to you at this stage of the review's work. Please let us know if you would like further clarification on any of the points raised here or if you consider that further input from OFT in the later stages would assist the review.

Yours sincerely

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