



National Audit Office

THE OFFICE OF FAIR TRADING

Progress Report on Maintaining Competition in Markets

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Progress Report on Maintaining
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SUMMARY

1 Competition enforcement is a core part of the government's strategy for raising productivity and improving outcomes for consumers. As the UK's main competition and consumer authority, the Office of Fair Trading (OFT) plays a central role in enforcing competition law. Recent high profile cases have involved airlines, large retailers, and construction companies among others.

2 The Committee of Public Accounts (PAC) reported in 2006 on the OFT's competition enforcement work. The Committee found scope for the OFT to raise its effectiveness on an operational level and to achieve greater practical results.

3 The Committee made recommendations for improving the OFT's competition enforcement work by making better use of the OFT's resources; strengthening its management and staffing of investigations; and improving the measurement of its achievements and communication of its work. The OFT accepted these recommendations. This report evaluates its progress in responding to the Committee's recommendations. We also evaluated the OFT's management of its market studies, because many of the recommendations are equally applicable to this work. Appendix 3 gives a summarised account of the progress made against each of the PAC recommendations, the OFT's response to those, and its response to recommendations made in a National Audit Office (NAO) report on this subject in 2005.

4 Competition enforcement and market studies are only one element of the OFT's overall responsibilities, which also include consumer protection, consumer credit licensing and 'Consumer Direct' (a consumer advice service). The OFT spent approximately £26 million (around 33 per cent) of its £78 million expenditure in 2007-08 on its competition enforcement work (£18 million) and market studies (£8 million). Some 240 of its 737 staff are involved in its competition and markets-related work.

Main Findings

Prioritisation

5 **The OFT has created a system of prioritisation to direct its resources to areas where it can have the most impact.** To this end, and following a review of the load and likely impact of its open cases, it closed 23 lower priority competition cases since the Committee's report on grounds of lack of priority or a lack of evidence, and the number of open investigations has decreased from 37 to 14. Closing these cases, some long running, has freed up resources for work that will have potentially greater impacts. The OFT is increasingly coordinating sources of intelligence and its encouragement of whistle-blowing is delivering high quality intelligence. The prioritisation criteria have created a perception amongst a number of practitioners that we interviewed that the OFT is less interested in smaller markets. The OFT has taken a number of steps to correct this impression.

Case management

6 **The OFT has improved the quality of its project management, enabling it to deliver higher impact cases more quickly.** Compared to earlier high profile cases (dairy products and tobacco) which took over four years to progress to an advanced stage of the investigation (the issuing of the Statement of Objections), the OFT has progressed two of its most recent high profile cases (airline fuel surcharges and marine hoses) to a similarly advanced stage (or beyond) in approximately 18 months. The OFT has also used early resolution to expedite some of its cases, including some of its older longer-running cases. In three such cases (airline fuel surcharges, dairy products and tobacco) parties have agreed to pay fines totalling up to £373 million. It has also brought the first ever criminal prosecution case for the criminal cartel offence under the Enterprise Act (marine hoses), and is bringing criminal charges in a second case. The OFT is using more flexible ways of working including bigger teams and use of temporary legal staff, and has defined more clearly the scope of its information requests on its competition cases. The OFT has not published the indicative timescales for competition cases that it intended

to publish by April 2007, but it is looking at the options for doing so in a wider transparency project that is due to be completed in 2009.

7 **Staff continuity continues to be a problem on some longer running cases.** Staff continuity was raised as a problem by the majority of practitioners that we interviewed. A lack of continuity means that expertise is lost as staff in both the OFT and the investigated parties move on, which increases both the cost and length of investigations. This problem is being addressed by programmes to recruit, retain and develop staff, which are being undertaken against the background of challenging pay and grading issues and what has been a tight employment market for the skill sets required.

Staffing of its competition work

8 **The OFT has increased the number of its most senior posts from three to ten and recruited people into its senior management who are highly regarded by legal practitioners and businesses.** As a business-facing organisation that employs staff with highly desirable and transferable skills who can move to higher paying jobs in the private sector, the OFT operates in a highly competitive labour market, particularly for competition lawyers in London. Constraints from its Civil Service status which limit pay and conditions have contributed to problems in recruitment and retention at key grades. The OFT has not pursued the review of its salary structures that it intended to complete in 2006, but it has made some adjustments to pay scales at key grades. It still faces challenges in its staffing, in particular on its competition enforcement work, in terms of achieving its wish of increasing the ratio of more experienced staff to less experienced ones. Its vacancies are currently around three per cent for competition and market studies staff.

9 **The middle management levels are where the OFT considers it needs to invest, as these grades are key to the delivery of competition enforcement cases.** Support for staff has improved with the rolling out of leadership and project management training to several hundred OFT staff. The OFT recognises that it needs to sustain and increase this work in order to continue to retain and recruit at these grades.

Measuring, evaluating and communicating achievements

10 The OFT conservatively estimates that direct consumer savings resulting from its enforcement of competition law are worth £77 million a year. The OFT has agreed a target with the Treasury that it should deliver direct benefits to consumers of at least five times its cost to the taxpayer. Estimates by OFT-commissioned consultants of the deterrent effect of its competition enforcement work indicate that it amounts to at least five times its direct impact. The OFT's evaluation programme has improved its understanding of the benefits and outcomes from its work, including lessons learnt. It is one of only a few competition authorities worldwide that have attempted to measure the deterrent effect from its work to combat anti-competitive behaviour. This work indicates that, in the view of businesses and lawyers, individual sanctions (such as criminal penalties) fines and adverse publicity are particularly important in driving compliance. When asked what might increase the deterrent effect of the OFT's competition enforcement work, businesses suggested: increased publicity and education; larger fines and tougher penalties; more decisions and enforcement activity by the OFT; and faster decision taking. Lawyers also mentioned the importance of criminal prosecutions, and encouraging private damages actions.

Conclusion on value for money

11 The OFT has made a determined effort to address the weaknesses found in the previous report from the Committee of Public Accounts. It has focussed its resources on where it will have the most impact in improving the effectiveness of competition, become more proactive, and raised its profile by taking strong, high profile action against cases of anti-competitive behaviour. In its response to the Committee's report the OFT undertook to take action to address all ten of the Committee's recommendations and has fully implemented its response to seven. It has not fully implemented its proposed response to two others, on establishing a database of intelligence and reducing high staff turnover, but it has addressed the problems identified by the Committee in different ways. On one recommendation it has made less progress. It has not yet published information on the timescales for its competition investigations, as recommended by the Committee. It continues to look at how to publish this information without constraining its ability to undertake complex cases. The OFT continues to find it difficult to attract and retain talented staff and recognises that it is not yet completing some cases as quickly as it would wish. So whilst the OFT has improved the value for money it provides, there remains scope for further improvement.

Recommendations

12 The OFT should continue to improve value for money by taking further action; it should focus particularly on strengthening the skills and experience of its staff at key grades on its competition work, and on getting its message across to its various audiences. It also has more to do to set indicative timescales and report its performance against them, and it has work in hand to do so as part of a wider transparency project that is due to be completed in 2009. The following four high level recommendations are designed to assist the OFT in fully meeting its aim of being a strong, proactive and independent competition authority. Appendix 2 has further detailed recommendations.

Prioritisation

In the last year or two the OFT has raised its enforcement profile with some high impact cases, including a number involving small firms and small markets. A perception has however developed that it is less interested in smaller markets, with a risk that its deterrent effect will be reduced in these markets.

- a** As recognised in the OFT's recently-published prioritisation principles, maximising the overall impact of its work requires a portfolio which is appropriately balanced between interventions of different types in markets of different sizes. Accordingly:
 - To reach a greater number of smaller firms and markets, the OFT should send stronger signals to smaller markets that it is not ignoring them. For example, to complement the steps already taken to correct this impression, it should make more frequent use of briefings on complying with competition law for trade associations and their members in sectors of the economy where small businesses are common.
 - The OFT should publish guidance for companies considering taking a private action to help them understand what this course of action entails.

Case management

To increase its deterrent effect, the OFT needs to keep competition enforcement in the public eye and avoid extended periods between announcements on enforcement activity.

- b** The OFT should use its new project management processes to:
 - manage the flow of work on competition enforcement to allow it to increase its effectiveness and impact;
 - expedite its larger cases, as they can otherwise lead to long gaps between public announcements, tie up significant resources for an overly long period, create uncertainty for parties and give rise to staff continuity problems for both the OFT and parties to the investigations.

Staffing

The OFT operates in a competitive marketplace and continues to face challenges in attracting and retaining talented staff.

- c** The OFT already has in place a programme of activities to address staff retention and capability development, to increase levels of quality and experience. It should supplement this programme with recruitment of more experienced individuals at middle to senior grades to increase further its effectiveness at delivering high impact outcomes. In doing so it should take advantage of the opportunities provided by the current economic situation to recruit high calibre people who might not otherwise have considered working in the public sector.

Measuring and evaluating achievements

The OFT's work has often had a deterrent effect beyond the individual cases. It is important that businesses understand what they need to do to comply with the law.

- d** The OFT should increase its deterrent effect by developing further its expertise in, and use of, sanctions that have an impact at the individual level, such as criminal powers. The OFT should commission periodic surveys of its deterrent effect, ascertain what businesses have done differently as a result of its actions, and use the results to inform decisions on prioritisation and case selection. They should publicise both case outcomes and relevant good practice to promote understanding by businesses of how to keep within their legal obligations.

PART ONE

Introduction

Introduction

1.1 The OFT is the UK's competition and consumer authority. Its aim is to make markets work well for consumers. Its approach is founded on the principle that consumer welfare is optimised through strong competition in open and well-functioning markets. In pursuing this approach, it strives through enforcement when necessary, and focussed advocacy and education, to promote open competition and to protect consumers.

1.2 The OFT has a wide range of tools at its disposal, the main ones being:

- **Competition enforcement.** Investigations into possible anti-competitive behaviour, such as cartels and abuse of dominance, potentially leading to fines or imprisonment if the law has been infringed.
- **Market studies.** Investigations under the Enterprise Act into the operation of markets. One of the possible outcomes of a market study is a market investigation reference to the Competition Commission.
- **Mergers.** Scrutiny of proposed mergers to assess whether they should be referred to the Competition Commission for further investigation.
- **Consumer enforcement.** Investigations into potential sources of detriment for consumers, such as the operation of unfair contract terms.

1.3 In 2005 we examined the Office of Fair Trading's competition enforcement work¹. Our report looked at the OFT's approach to competition enforcement, its recruitment and retention of staff, its management of cases and the measurement and communication of the OFT's achievements. It was followed in 2006 by an examination and report by the House of Commons Committee of Public Accounts, which made further recommendations on these matters². The Treasury Minute accepted the Committee's recommendations.

1.4 This report evaluates the OFT's progress in responding to the recommendations made by the Committee for improving the OFT's work on competition enforcement, and the associated Treasury Minute commitments. It also assesses the OFT's response to recommendations made in a 2005 NAO Report on this subject. We also evaluated the OFT's management of market studies because many of the recommendations are equally applicable to this work. We examined:

- whether the OFT is prioritising its resources effectively to maximise its overall impact (Part 2);
- whether the OFT is managing its caseload to achieve effective outcomes (Part 3);
- whether the OFT is addressing the staffing challenges it faces in this work (Part 4);
- the OFT's achievements and the measurement of its impact (Part 5).

¹ Report by the Comptroller and Auditor General *Enforcing competition in markets*, HC 593, Session 2005-06.

² Committee of Public Accounts *Enforcing competition in markets*, HC 841, 2005-06.

1.5 We use the recommendations from the Committee's earlier report to structure the findings within each part of this report. Appendix 1 describes the scope and methodology of our examination. A summarised version of the OFT's progress made against each of the Committee's recommendations and Treasury Minute commitments, and NAO recommendations is at Appendix 3.

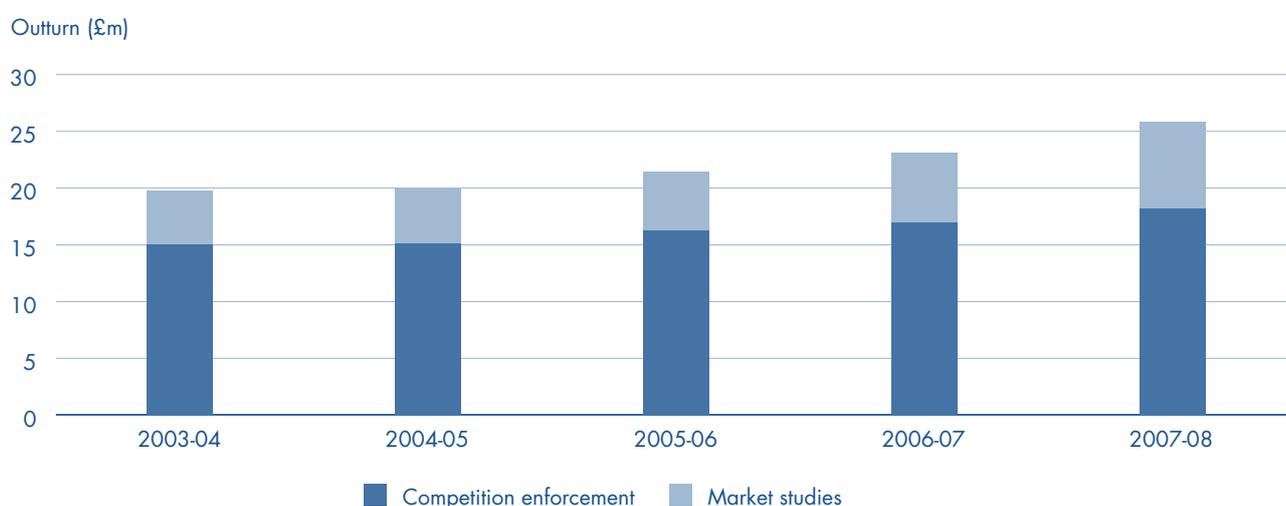
1.6 Since 2005 the OFT has carried through a wide-ranging change programme, going significantly beyond the changes envisaged at the time of the Committee's last report. The principles for the change programme included:

- focusing on outcomes rather than outputs;
- carrying out fewer but more high impact cases;
- re-structuring the office with the aim of integrating competition and consumer work;
- putting in place more rigorous project management; and
- carrying out a 'clean sweep' of competition cases to free up resources to focus on fewer, higher impact projects.

1.7 The OFT's re-structuring was a significant reorganisation aimed at drawing its competition and consumer work closer together which it considers is important to making markets work well for consumers, and translating lessons from the Committee's 2005 report across all of its work. The new structure now groups together its work in three sector-focused market groupings (goods, services, and infrastructure) to replace the previous structure, which separated out competition, consumer and markets work. This new structure offers scope for staff to work on a more varied selection of projects, and a more joined-up approach to competition and consumer issues.

1.8 Out of the OFT's total expenditure in 2007-08 of £78 million, approximately £26 million (33 per cent) was made up of its work on competition enforcement work (£18 million) and market studies (£8 million) (Figure 1). For the period 2008-09 to 2010-11, the OFT is facing a decreasing budget, as its budget is reducing by five per cent a year in real terms, in common with many other government departments. This reduction will require the OFT to continue to prioritise and focus its activities, in order to maximise its impact.

1 The OFT's expenditure on competition enforcement and on market studies 2003-04 to 2007-08



Source: OFT

NOTE

These figures include an estimated apportionment of overheads. In addition, from 2007-08, the OFT no longer separately monitors the costs of the competition enforcement and market studies teams, following their amalgamation with each other and with OFT's consumer teams. The figures shown for 2007-08 are estimates of the proportion of the costs of the amalgamated teams that are attributable to competition enforcement and market studies.

PART TWO

Prioritisation

2.1 The OFT has a broad remit and finite resources. It must therefore decide on the optimal use of its resources across both its competition and its consumer work, and within these two areas. The Committee of Public Accounts found that the OFT's overall priorities were not reflected in its day to day competition work, principally because the pattern of complaints received, from which its investigations were largely drawn, did not match its chosen priorities. In addition, ongoing investigations and appeals consumed significant resources, and the OFT needed to re-appraise the balance of its work to achieve greater impact, for example between its enforcement and advocacy work.

2.2 This part examines how OFT now prioritises potential projects across its competition (and non-competition) work, its use of discretion in pursuing its competition enforcement work and the use it makes of intelligence and other data. It finds that:

- The OFT has a framework to prioritise its work programmes according to a range of principles, including the direct and indirect impact of its work. The OFT reviewed its existing portfolio of cases against its principles and used its discretion to close a high proportion of its cases that were open at the time of the NAO's previous report.
- The OFT is developing a range of approaches to gathering complaints data and intelligence to inform its prioritisation and selection of projects.

Prioritisation principles

2.3 In allocating resources the OFT must choose investigations and projects that maximise its impact in promoting consumer welfare. A range of possible types of intervention is open to the OFT, from strong enforcement action at one end, to advocacy and education at the other.

2.4 Since the Committee's previous report, the OFT has updated the prioritisation principles formerly applied only to its competition enforcement work, and extended their application to its consumer work and the selection of market studies. The principles (**Box 1**) have helped clarify the OFT's priorities to the outside world and show that the OFT aims to achieve a balanced portfolio in its selection of work.

2.5 The OFT's decision to prioritise high impact cases has improved OFT's potential value for money for the taxpayer. However, the decision has unintentionally created the impression amongst a number of practitioners we interviewed that the OFT is mainly interested in large businesses and big markets where there is more potential

BOX 1

The OFT's prioritisation principles

The principles are:

Impact: the likely direct and indirect effect (including deterrence) on consumer welfare, and the expected economic impact on efficiency and productivity.

Strategic significance: whether the work ties in with the OFT's strategy and objectives; whether it has further value in terms of, for example, capacity building or enhancing the OFT's reputation; whether enforcement by the OFT is the best solution; and whether it would contribute to a balanced portfolio of work.

Risks: the likelihood of a successful outcome, balanced against any potential negative effects.

Resources: whether the resource requirements are proportionate to the impact; and the likely impact on other OFT work. This includes taking into account the resource availability of other parties, including OFT's enforcement partners (for example, the Competition Commission).

Source: OFT Prioritisation Principles ('OFT Prioritisation Principles', October 2008, OFT 953)

for such impacts. The OFT has taken a number of steps to correct this impression. For example, a number of its recent cases have involved smaller markets, including marine hoses, and ongoing cases in the construction and bus sectors. It has also followed up a recent case on the construction industry through education activity with the trade association, mainly targeting small businesses in the industry.

2.6 Since the previous report, the OFT has also published a discussion paper on private actions in competition law, which was welcomed by a wide variety of interested parties. A private action is where a party takes action to enforce its rights under the Competition Act or the European Community Treaty. An effective private actions system is a key element of the competition regime. Currently, barriers to private redress mean that consumers and businesses are often not getting the compensation they are entitled to. As a result of feedback and a public hearing in September 2007, the OFT published recommendations to Government on the steps it believes should be taken to make private actions in competition law more effective.

Use of discretion

OFT should be ready to stop cases if they are not strong enough to continue. (PAC 2006 Recommendation)

2.7 In mid-2005 the OFT started refocusing its competition enforcement work to address significant consumer detriment. The OFT reviewed its existing portfolio of cases against a range of criteria including the consumer detriment, the wider benefit in terms of its deterrent effect, precedent value, the resource requirements and the chances of success. This review helped the OFT to identify the cases that were stronger and likely to have the desired impact. It has subsequently discontinued most of the cases that were on-going at the end of 2005, when the NAO's previous investigation was concluded.

2.8 The largest category of closures (17 of the 32 cases) was on the grounds that the case was no longer considered a priority (known as administrative priority grounds) (**Figure 2**). The next largest category (six cases) were closed on grounds of a lack of evidence. The OFT closed cases by reaching a formal infringement decision in cases involving four products/markets: independent schools, aluminium spacer bars, flat roofing, and stock check pads. The remaining five cases were resolved with the parties either through informal remedies (four cases) or in one case by the OFT accepting commitments.

2.9 Seven of the 17 cases (41 per cent) closed on administrative priority had been open for four to five years or longer (**Figure 3 overleaf**). Closing these cases involved a significant commitment of resources in the short term because of the risk of litigation from interested parties, but has freed up resources for the OFT to focus on cases judged to have a greater potential for impact, such as the OFT's cases on tobacco and dairy products. The OFT also consolidated into one case a series of investigations looking at firms in the construction sector. In all, five cases that were on-going at the cut-off point of our previous report remain open.

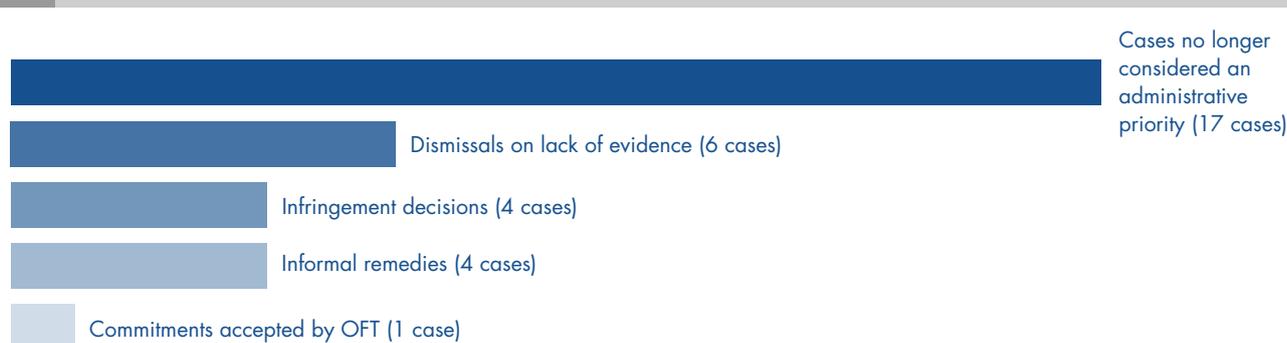
Complaints and intelligence

The OFT has been too reliant on complaints as a source of its competition enforcement work. The OFT should start a greater proportion of investigations on its own initiative, rather than waiting for a relevant complaint. (PAC 2006 Recommendation)

The OFT has no database of intelligence to support its investigations. The OFT needs to supplement information from competition complaints with data from other sources such as the new Consumer Direct helpline and the work of Trading Standards officers across the UK. A database would help it to do so efficiently. (PAC 2006 Recommendation)

2

Action taken to close cases that were open at time of NAO's previous investigation and have been subsequently closed



Source: National Audit Office analysis of OFT data

2.10 The OFT’s remit covers the entire economy except for the sectors covered by the sectoral regulators. Its field of potential activity is vast and it has to make difficult judgements both in terms of deciding which markets to prioritise and the type of project that will deliver the best outcomes for consumers. To inform its decisions it draws on analysis and intelligence from a range of sources, for example:

- it commissioned top-down research of market and sectoral data in 2004 to use as a screening tool for potential problem markets;³
- it has analysed trends in complaints from Consumer Direct and assessed the degree to which the data is representative of known consumer detriment problems in the economy.

2.11 It also uses a range of other approaches to gather intelligence, including: intelligence from the mergers branch; and cross-office sectoral roundtables. In addition, a horizon scanning team was established in 2006 to coordinate the generation of new ideas along with a project ideas group to bring together intelligence.

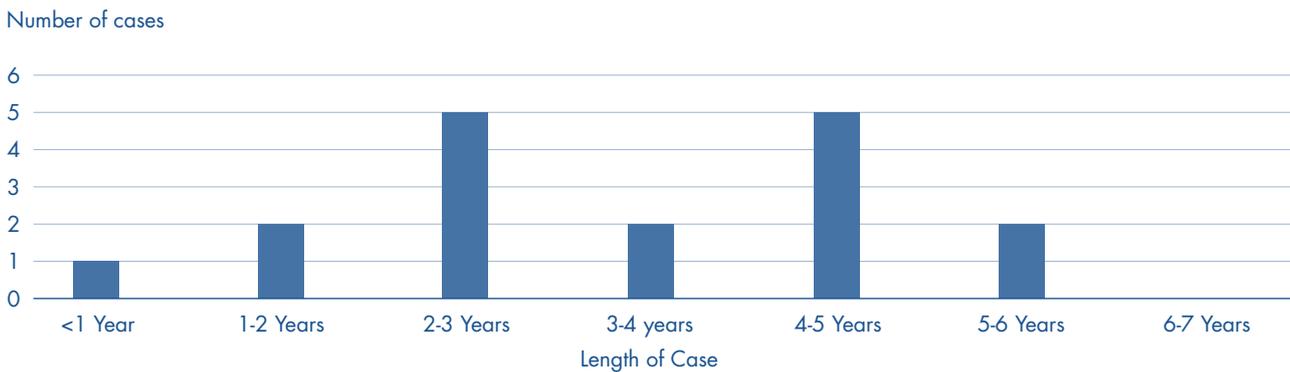
2.12 Another way in which the OFT has sought to reduce its reliance on complaints is to increase its use of informants (also known as ‘whistle-blowers’), to provide intelligence and details of parties that are involved in illicit cartel activity in return for immunity from prosecution or reduced

finances. This information can be an important source of high quality intelligence of alleged cartel activity. For example, intelligence from commercial rivals has been the source of three of the OFT’s most high profile early resolution cases – airline fuel surcharges; dairy products; and tobacco – in which the OFT has agreed fines amounting to up to £373 million with the parties concerned.

2.13 In 2007, the OFT received 13 applications from whistle-blowers under its ‘leniency’ policy⁴, the fifth highest of any competition authority.⁵ Under this policy, a company which has been involved in cartel conduct and which is the first to give full details about it to the OFT will qualify for immunity from penalties in relation to that conduct. In March 2008 the OFT launched a new informant reward scheme offering rewards of up to £100,000 to individuals providing information about illegal activity by their employers.

2.14 To further improve the management of its intelligence, the OFT commissioned a comprehensive knowledge management strategy in 2007 from consultants. The OFT is considering long-term investment to develop its intelligence systems but has limited spare funds with which to pursue its strategy. The OFT is shortly to go out to tender for an intelligence database for cartels and consumer enforcement work.

3 Duration of cases that were open at time of NAO’s previous report and subsequently closed on administrative priority grounds



Source: National Audit Office analysis of OFT data

3 *Empirical indicators for market investigations*, Prepared for the OFT by NERA, September 2004.
 4 *The OFT’s guidance as to the appropriate amount of a penalty (OFT423)* and *The cartel offence: Guidance on the issue of no-action letters for individuals (OFT513)*. The OFT has also published a separate draft guidance note on the handling of leniency and no-action applications, *Leniency and no-action: OFT’s draft final guidance on the handling of applications*, OFT 803.
 5 *Global Competition Review’s annual rating enforcement survey of the world’s leading competition authorities*, 2007-08.

PART THREE

Case management

3.1 The OFT needs to deliver quality decisions expeditiously in order to maximise its impact. The previous reports found that the OFT's investigations often took several years, and that there was a need for the OFT to strengthen its case management and help staff develop project management skills. Furthermore, the OFT needed to increase the transparency of investigations to help reduce some of the costs incurred by businesses.

3.2 This part examines the OFT's progress in reducing timescales for investigations, engaging with parties to its investigations and strengthening its quality review procedures. It finds that:

- The OFT's strengthening of its project management of cases has enabled newer cases to progress on substantially reduced timescales. It still has a number of earlier cases that have been running for several years.
- The OFT has improved its procedures for improving its transparency and engagement with parties, although scope still exists for greater consistency in its communication and engagement and the OFT has a project in hand to this end.
- There is evidence that OFT has improved its information gathering procedures and that it is more tailored in the information it requests.

Timescales

At present, the OFT does not work to any deadlines. The target timescales on its website are completely unrealistic and are never met. The OFT should have amended these deadlines as soon as it realised they were not achievable. It should now set clear and realistic timetables for each case. (PAC 2006 Recommendation)

Small case teams are a cause of the OFT's long timescales on cases. The OFT should employ larger teams on its investigations. In small teams, the

loss of important members of staff endangers the investigation's progress. Larger teams will reduce this risk and bring a broader range of skills and experience to the investigation. (PAC 2006 Recommendation)

The OFT does not publish information about performance against timescales. This lack of transparency limits effective scrutiny, making it difficult for Parliament to assess the OFT's operation against expectations. The OFT should publish its performance against its timescales. (PAC 2006 Recommendation)

Competition enforcement

3.3 Since the previous report the OFT has developed a project management framework. It was introduced in April 2008 for all new projects, alongside a training programme. In addition, the OFT has set up a management information system for active tracking of projects against milestones and delivery deadlines, and monthly reports are made to the Executive Committee and the OFT's Board. The OFT has also introduced more flexible ways of working to deal with peaks in its workload, for example through greater use of temporary legal staff. These improvements are still bedding in, but in our staff focus groups we found that the OFT's staff were aware of senior management's emphasis on meeting deadlines.

3.4 In the NAO's 2005 Report, we recommended that OFT should publish expected timescales for its investigations that are realistic but challenging, and use these to drive case management. Through the Treasury Minute, the OFT said that it intended to publish indicative case timescales by April 2007, but restructuring within the OFT has delayed progress on implementation.

3.5 Publishing performance information such as average case timescales is becoming more common. The European Commission and French competition authority have published annual average case durations on their websites.

3.6 The OFT launched a project in the summer of 2008 to increase the transparency of its work.⁶ As part of this project the OFT is looking in further detail at the options for publishing timescales for its work. Before implementing any changes the OFT would consult more widely with interested parties and OFT expects to undertake a formal public consultation later in 2008-09.

3.7 At the time of our previous report we found that the OFT had 37 competition enforcement cases that were open as at April 2005 (excluding appeals). A similar analysis of the number of cases open as at September 2008 shows that the OFT had 14 open cases. The average length of time that these cases had been open had not greatly changed. In both 2005 and 2008 we found that the median period for cases to have been open was two to three years, and in 2008 four cases had been open for at least four to five years (including one that has been running for seven to eight years⁷), compared to two in 2005 (**Figure 4**). However, compared to its earlier high

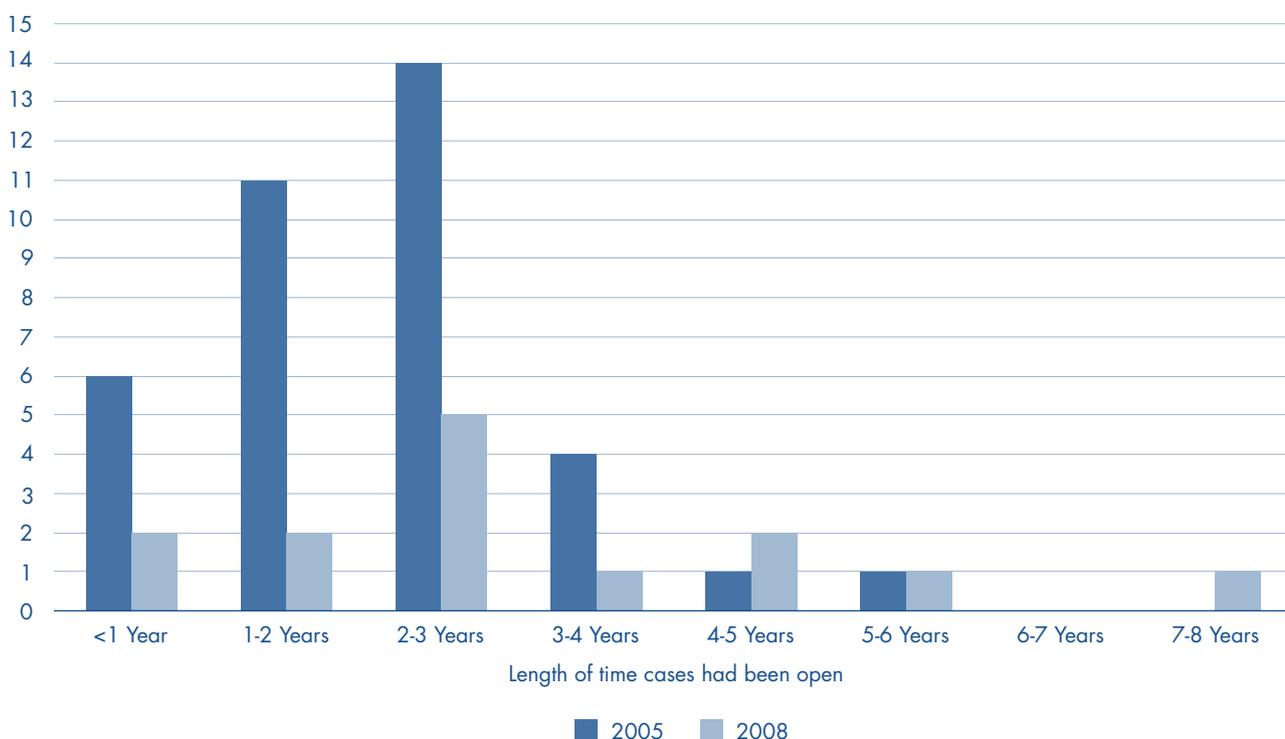
profile cases (dairy products and tobacco), which took over four years to progress to an advanced stage (known as the Statement of Objections⁸), the OFT has progressed two of its most recent high profile cases (airline fuel surcharges and marine hoses) to a similarly advanced stage (or beyond) in a timescale of approximately 18 months. In the civil airline fuel surcharges case, the OFT announced an early resolution of the case after 16 months. In the marine hoses case, the OFT issued criminal proceedings within 12 months and the prosecution was completed within a further seven months.

3.8 Nevertheless, legal practitioners and business stakeholders (e.g. businesses we consulted and groups representing businesses) continue to express concerns at the length of some of the OFT's cases. Such cases tie up resources for an overly long period of time, and can result in a lack of staff continuity and a loss of expertise as considerable staff turnover is not uncommon during such long-running cases.

4 Analysis of the OFT's open competition investigations and their durations in 2005 and 2008

The OFT has fewer cases open in 2008 than in 2005 but they are now generally more high profile than in 2005.

Number of open cases



Source: National Audit Office analysis of OFT data

6 Further details of the OFT's Transparency Project are available on its website at: www.of.gov.uk/about/transparency/.

7 This case was subsequently closed in October 2008, (www.of.gov.uk/news/press/2008/119-08).

8 A Statement of Objections is issued when the OFT proposes to make an infringement decision under the Competition Act 1998. It is used to notify the parties involved, and gives the parties an opportunity to make written and oral representations before any final decision is made.

3.9 Since the previous report the OFT has expanded the options it considers to resolve cases. It now seeks, in appropriate cases, to use early resolution (sometimes known as ‘settlement’) to try to bring about early resolution on some investigations, where it considers that it may save resources for the OFT (and also for the parties involved), whilst not undermining the deterrent effect and/or the OFT’s leniency policy. Early resolution is also likely to reduce the number of appeals to the Competition Appeal Tribunal because it is inherent in achieving an early resolution that parties have often agreed to make admissions and pay a financial penalty.

3.10 The OFT has reached early resolution agreements in three of its 14 on-going cases. Parties have agreed to admit liability for competition infringements in return for reduced financial penalties, and the OFT expects to reach infringement decisions in these cases in due course (Figure 5).

3.11 The OFT’s civil investigation into airline fuel surcharges is a case where OFT reached agreement on the financial penalty with parties some 16 months into the investigation (Box 2). Subsequently the OFT has brought criminal charges against a number of individuals in connection with this case. The dairy products case was a longer case, opened in July 2003, and took nearly 4½ years to reach the stage where a financial penalty has been agreed. The tobacco case involves retail practices in the sale of tobacco products which in the OFT’s view were unlawful (Boxes 3 and 4 overleaf).

BOX 2

The OFT’s price-fixing investigation into airline fuel surcharges

The OFT’s investigation into price coordination in relation to long haul passenger fuel surcharges was prompted after Virgin Atlantic (Virgin) came forward with information about its price fixing arrangements with BA. During the period of the price fixing, the surcharges rose from £5 to £60 per ticket for a typical BA or Virgin long-haul return flight. Virgin is not expected to pay any penalty as it qualifies in principle for full immunity under the OFT’s “leniency” policy. The investigation was conducted in parallel with a similar case brought by the United States Department of Justice (DoJ). The investigations by the OFT and DoJ were separate but the two agencies liaised with each other throughout.

After only 16 months (in August 2007) BA had admitted collusion and agreed to pay a fine of £121.5 million. The fine will be payable following the issue of a Statement of Objections and infringement decision, the timing of which will depend on the OFT’s parallel criminal proceedings under the Enterprise Act. The reduced level of penalty reflects the cooperation BA provided to enable the case to be resolved more speedily and effectively.

In addition to the investigation into BA’s corporate conduct under civil competition law, the OFT is also conducting a criminal investigation into whether any individuals dishonestly fixed the levels of the surcharges. In August 2008, four men were charged with cartel offences under the Enterprise Act. Any individuals convicted of the cartel offence under the Enterprise Act may be sentenced to up to five years’ imprisonment and/or an unlimited fine.

5 Penalties agreed with parties since August 2007

Case name	Duration of case up to penalty announcement	Date penalty announced	Penalty provisionally agreed (£m)
Airline fuel surcharges	16 months	August 2007	121 ¹
Dairy products	4 years and 4 months	December 2007 and February 2008	Up to 120 ²
Tobacco	5 years and 3 months	July 2008	132 ¹
Total			Up to 373

Source: National Audit Office analysis of OFT data

NOTES

- 1 After discount for early resolution.
- 2 Before taking into account any reduction for early resolution.

3.12 Early resolution can represent an efficient approach to concluding a case. It also has the benefit of reducing the potential cost of pursuing the case for both the OFT and the businesses involved. This view was shared by most legal practitioners and business stakeholders we interviewed, but they considered that there was a lack of clarity about the OFT's early resolution process. In their view the OFT should develop and issue guidelines on early resolution to improve transparency and consistency, as the European Commission has done in June 2008 on its settlements policy (equivalent to early resolution in the UK).⁹

3.13 The OFT considers that engaging in the process of developing early resolution guidelines would not at this stage be appropriate. The European Commission has adopted a relatively formal settlement procedure, with all its settlements taking place early in the process, restricted

access to documents for the parties, and a fixed discount level to apply in all cases. The OFT considers that its approach to early resolution is more flexible, and depends significantly on the circumstances of the case. As a result, it considers it would be inappropriate to set down detailed guidelines until further experience of the process has been gained over a wider range of issues, cases and parties.

3.14 In a further case, one of the OFT's largest ever Competition Act investigations, the OFT has issued a Statement of Objections against over 100 firms in the construction sector. These cases have raised the profile of the OFT's competition enforcement work. For example on the day that the OFT announced the alleged infringements in the construction case, its website received its highest ever number of 'hits' in one day.

BOX 3

The OFT's Statement of Objections against supermarkets and dairies

In September 2007, the OFT issued a Statement of Objections setting out its provisional findings that certain large supermarkets and dairy processors had colluded to increase the retail prices of one or more of liquid milk, value butter and UK produced cheese in 2002 and/or 2003. The OFT's provisional findings are that the collusion took place through the sharing of commercially sensitive information. The OFT has provisionally imposed a financial penalty of up to £120 million (before taking into account any reduction for early resolution). The OFT's investigation was opened in July 2003.

BOX 4

The OFT's proposed decision against certain tobacco manufacturers and retailers over retail price practices

The OFT issued a Statement of Objections in April 2008 alleging that two tobacco manufacturers and eleven retailers had, in its view, engaged in unlawful practices in relation to retail prices for tobacco products in the UK. The alleged practices comprised:

1. arrangements between each manufacturer and each retailer that restricted the ability of each retailer to determine its selling prices independently, by linking the retail price of a manufacturer's brand to the retail price of a competing brand of another manufacturer; and
2. the indirect exchange of proposed future retail prices between competitors.

The OFT has provisionally agreed a fine of £132 million. The OFT's investigation was opened in March 2003.

Market studies

3.15 The cost and duration of market studies varies considerably, but on average they last just over 12 months (Figure 6), and cost some £380,000. The OFT conducted a review of its market studies in 2007. The review examined durations, costs and response to the studies' recommendations. It found that in around three fifths of studies all or some of the recommendations were implemented, or where no recommendations were made that the report was well received and appeared from the Government's response to have been influential. In around a fifth of cases the OFT judged them to have been unsuccessful, and in the remaining fifth of cases, it was considered too early to tell.

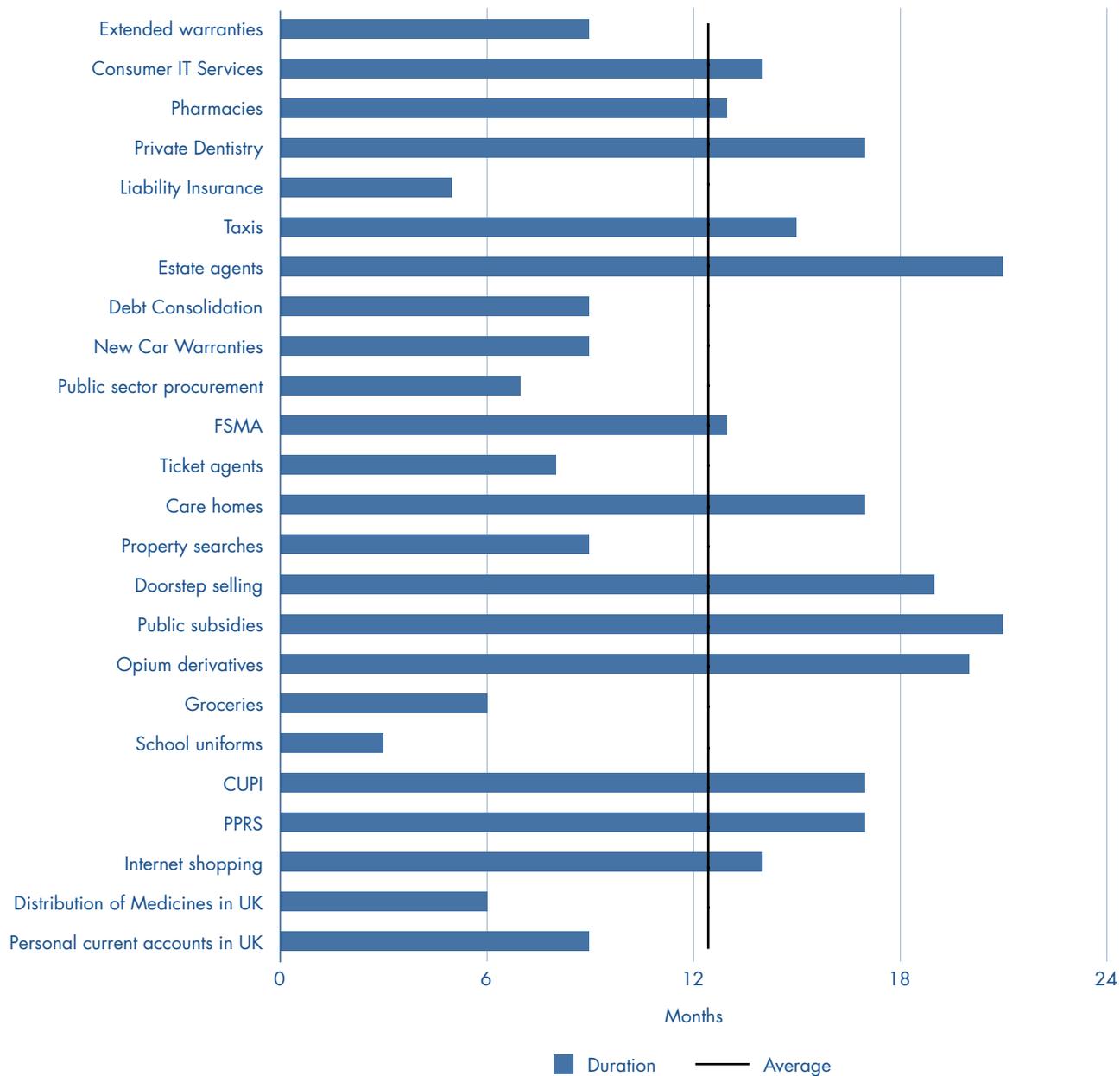
3.16 The Department of Business Enterprise and Regulatory Reform (BERR) commissions a periodic international peer review of the UK's competition regime. The most recent, in 2007, concluded that the UK competition regime (including the OFT, the Competition Commission and the role of BERR) compared favourably with the peers, and was seen as being in the forefront on quality of analysis and keeping to a timetable.

Transparency and engagement with parties

The OFT's investigations create uncertainty for the companies involved. There is scope for different interpretations of competition law, and companies face uncertainty over how the OFT will analyse a market. The OFT should reduce this uncertainty by sharing its analysis with companies earlier in an investigation. (PAC 2006 Recommendation)

⁹ The European Commission website contains links to these documents at: <http://ec.europa.eu/comm/competition/cartels/legislation/settlements.html>.

6 Durations of OFT's market studies



Source: National Audit Office analysis of OFT data

Competition enforcement

3.17 The OFT recognises the importance of engaging with parties to investigations, which is reflected in its Procedures Manual for competition casework. The NAO recommended in its 2005 Report that the OFT should engage more openly with parties to the investigation, both in terms of indicating its concerns and keeping them updated on progress. Legal practitioners and business stakeholders' views varied as to whether the OFT had improved in its transparency and engagement with parties. Some had noticed an improvement in case teams' willingness to engage more openly with them. For example the OFT's nomination of a senior responsible officer on each case was welcomed as a clear line of accountability. But others had noticed little or no improvement in the period since our previous report. The OFT's Transparency Project is considering these issues in detail and consulting interested parties. A key concern is the need to balance transparency with its potential impact on cost and timescales, whilst maintaining the OFT's ability to investigate cases properly, and protecting legally privileged or market sensitive information.

Market studies

3.18 The OFT held a conference in June 2008 which gave Government, business, consumer bodies and international agencies an opportunity to comment on OFT's approach to market studies. A number of speakers considered there had been improvements in the OFT's approach in the last few years. For example OFT's website now gives an indicative timescale for each market study. Business stakeholders, however, commented that OFT should improve the transparency of its market studies processes, in particular on studies that do not lead to references to the Competition Commission.

3.19 The OFT's 2007 review of its market studies considered possible ways of making its interactions with parties more transparent. The review recommended a stakeholder engagement phase in all studies to test emerging thinking and recommendations, and a six month target for working up a 'minded to refer' document for market investigation references in those cases where it is clear from the outset that a reference to the Competition Commission may be the most appropriate and proportionate outcome. The OFT Board accepted these recommendations and the OFT plans to implement them in the first half of 2009.

Information gathering

The OFT does not use its powers to compel companies to provide information. The OFT can impose criminal penalties if companies do not provide information. It has not used the penalties as it considers them heavy-handed. It should use them where companies wilfully obstruct an investigation and should explore with the DTI whether it can raise civil penalties against companies in less serious circumstances. (PAC 2006 Recommendation)

Competition enforcement

3.20 Guidance to case teams on information gathering is now available in the OFT's Procedures Manual. The OFT has generally been able to gather the data it requires without using its criminal powers on its investigations.

3.21 Some legal practitioners and business stakeholders commented positively on having been aware of a greater willingness on the part of OFT staff to define more clearly the scope of the information requested, than had sometimes been evident in the past. In appropriate cases, the OFT has distributed draft information requests to the parties to allow them to comment.

Market studies

3.22 In the course of a market study, the OFT may request information from interested parties and representative groups in the sector or market concerned. The OFT does not have mandatory information gathering powers for market studies. The lack of such powers has not, to date, caused the OFT significant problems in collecting information. When it is considering making a market investigation reference, the OFT has mandatory information gathering powers in limited circumstances, if it considers the statutory test for making a reference has already been met. It has used these powers only once in the history of market investigation references, but it considers their existence is a useful support to the process of making a market investigation reference.

3.23 The OFT refers some markets to the Competition Commission for investigation following market studies. Some legal practitioners and business stakeholders perceive there is duplication and overlap in the information requested by the two bodies in such cases. The Commission told the NAO that it tries to take account of the information collected by the OFT.

It also gives business the opportunity to point out potentially duplicated requests. In the Commission's experience, it was rare for the OFT in its market study to have collected all the information that the Commission required. The Commission's market investigation is a more in-depth and detailed investigation. It is therefore to be expected that the Commission will need to gather additional information which goes significantly beyond that which the OFT has collected. In addition the OFT's information often needed updating by the time the Commission conducted its investigation.

Internal review

3.24 The NAO's 2005 Report recommended that the OFT should encourage internal economic and legal challenge of potential cases as they progress to formal investigation, as well as ensure constructive senior input at an earlier stage.

3.25 Prioritising a smaller number of cases, and reviewing and re-prioritising cases if necessary, has strengthened the OFT's case selection, by increasing the internal quality threshold which projects must reach before they receive approval to proceed. At key stages, under the new project management framework, all investigations and market studies are subject to review by a project steering group. This review adds senior level expertise and experience to the consideration of each project at its scoping stage and through its life-cycle.

PART FOUR

Staffing

4.1 The OFT needs high-calibre staff able to make complex legal and economic decisions in a highly litigious environment. At the time of our previous report, the OFT had a significant level of unfilled vacancies on its competition enforcement work, and practitioners perceived an experience gap amongst some of its staff. Both were factors which reduced the effectiveness of its work. This part examines the progress the OFT has made in addressing its staff recruitment and retention problems and providing support for its competition staff. It finds that:

- The OFT has made some progress in recruiting experienced staff, including a few senior individuals who are highly regarded by legal practitioners and business stakeholders.
- As a business-facing organisation that employs staff with highly desirable and transferable skills who can move to higher paying jobs in the private sector, the OFT continues to face some challenges in recruiting and retaining staff while subject to constraints resulting from its status as a body to whom Civil Service pay and conditions apply.
- Support for staff has improved with the completion of the OFT's competition casework procedures manual, and training has been provided to a large number of staff in project management and leadership.

Staff turnover

The OFT suffers from high staff turnover, and many employees do not have sufficient experience to deal with complicated cases. (PAC 2006 Recommendation)

4.2 The OFT's staff turnover rates over the last three years across all grades who work on competition has been in the range of 19 to 23 per cent. Comparisons are not straight-forward as following the OFT's reorganisation, the separate competition divisions were merged with consumer staff into market groupings. Nonetheless, the staff turnover rate is broadly comparable to the rate of 19-20 per cent at the time of our last report.

4.3 A breakdown of turnover in the key middle to senior management grades (Grade 7 to Grade 2) shows it reached 15-18 per cent in 2007-08 (**Figure 7**), and up to 20 per cent on an annualised basis in the first eight months of 2008-09. Turnover in these grades (except for Grade 6) increased in the period 2005-06 to 2007-08 which coincided with the upheaval and bedding in of the changes from the OFT's change management programme. The OFT's current turnover rates for these grades are at a similar level to what legal practitioners considered, in their experience, to be the normal range of around 20 per cent a year for competition lawyers.

4.4 Lawyers and economists with post-qualification experience of three to four years or more (middle manager level) are widely regarded as the most crucial to driving forward and delivering cases. The equivalent middle management levels at the OFT (Grades 6 and 7) are where it frequently faces challenges in recruiting and retaining staff of the right calibre, as professionals can often significantly increase their salary by joining private practice. The results of OFT's focus group with lawyers and economists who had recently joined the organisation confirmed that the OFT was seen as a good place to come to gain experience of complex and high profile cases. Some felt that once they had been at the OFT for two to three years it might be time to look elsewhere.

4.5 Nevertheless, staff turnover can have positive effects, both in terms of bringing in fresh perspectives and approach, and with experienced OFT staff going into the rest of government and the private sector.

4.6 At the time of our previous report, the OFT's level of unfilled vacancies on competition work was around 12 per cent. The current vacancy rate is around three per cent.

4.7 The OFT's most recent staff survey in March 2008 indicates that across the OFT as a whole the proportion of staff that are satisfied with opportunities to progress has increased over the period 2005-08 from around 20 to 30 per cent. It now lies only slightly below the benchmark for central government bodies.¹⁰ Analysis of the reasons staff left the OFT given in exit interviews during 2007 indicated that the most common reason for departure appeared to be related to career progression. A little under half (44 per cent) of leavers cited better progression opportunities as the incentive most likely to encourage them to stay.

Closing the perceived experience gap

4.8 Competition investigations vary in their analytical content and complexity and therefore in the type of staffing they require. For example, a case that investigates a business for the potential abuse of a dominant position can be highly complex, and require mainly highly-qualified and experienced staff. On some price-fixing cases a higher proportion of less experienced or more junior staff may be feasible. The preferred staffing ratio can also depend on how a case proceeds. If the OFT decides to try and resolve a case early by settlement, it is likely to need a higher input from senior and experienced staff for that stage of the case.

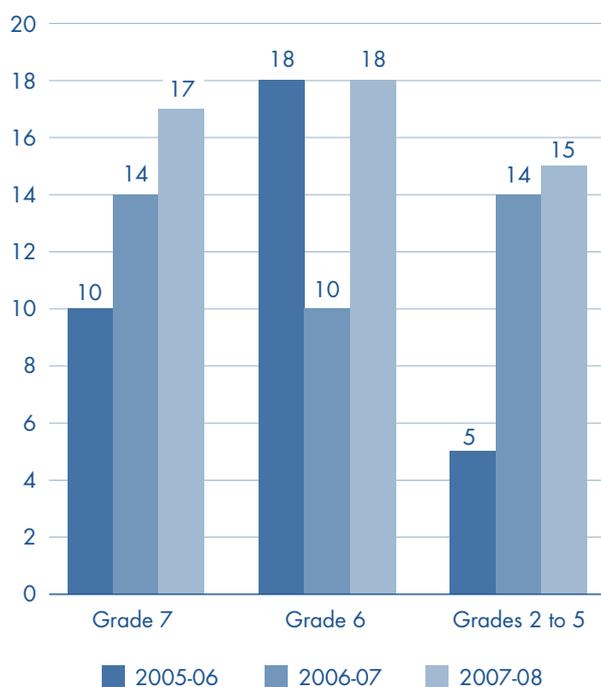
4.9 The NAO's 2005 Report recommended that the OFT should address the experience gap amongst some of its competition staff by increasing the input of senior case officers to investigations and helping more junior staff develop the necessary expertise to manage cases.

Increasing the capacity at senior levels

4.10 Since the previous reports, the OFT has expanded the number of its most senior posts on its competition work by agreement with the Cabinet Office, representing a significant increase in senior weighting. **Figure 8** shows that the proportion of senior managers on competition work has increased from just over one per cent to four per cent since 2005.

7 The OFT's staff turnover in key grades in the period 2005-06 to 2007-08

Leaving rate during the year (%)



Source: National Audit Office analysis of OFT data

NOTE

The OFT's data prior to 2005-06 is not readily comparable.

8 The increased senior weighting on the OFT's competition work

	2005	2008
Grades 2 and 3 (senior management)	3 (1%)	10 (4%)
Total grades 2 to 5 (Senior Civil Service)	21 (8.9%)	24 (10%)
All Grades	242	240

Source: National Audit Office analysis of OFT data

¹⁰ The OFT survey analysis sets each result in a wider context and shows how the OFT's result compares with a benchmark of central government bodies.

4.11 Legal practitioners and business stakeholders considered that the increased number of senior management, in particular the small number of new recruits from outside, has had a positive impact on the conduct of the OFT's competition work. They are perceived to be more 'hands-on' and to have credibility in their dealings with parties. However, stakeholders considered that an 'experience gap' was still apparent in some OFT staff. Some had found meetings with OFT to be less effective where OFT had fronted staff that were too junior to make decisions. Results from the NAO's staff focus group also support this observation.

4.12 Since the previous report, the number of Senior Civil Service staff with direct competition enforcement experience has increased by five staff (representing around two per cent of the OFT's competition staff). Some legal practitioners and business stakeholders considered that those with experience of competition enforcement at senior levels were still spread too thinly across this type of work. They consider the disparity in the level of experience can count against the OFT in the conduct of its investigations. They considered that a staffing model that had fewer, but more experienced staff (in particular, experience of competition enforcement) would be significantly more effective. The OFT told us that comparisons with private sector law firms are not necessarily straightforward and need to be treated with caution as the type of work can vary. The OFT has also chosen to work within the constraints of the Cabinet Office Job Evaluation system. However, it broadly agrees that the ratio of experienced staff to less experienced staff should be higher for its more challenging work.

OFT action to address pay and grading issues

4.13 The OFT recognises that it needs to recruit a stream of high-calibre staff to replace those who leave. Its senior directors are now actively involved in recruitment but the OFT still faces challenges in attracting a regular flow of high-calibre competition lawyers and economists. It has also lost several highly regarded staff to other regulators and competition authorities including Ofcom and the Competition Commission.

4.14 The Treasury Minute reflected the OFT's intention at the time to implement a new system of pay and grading by October 2006. Changes to the pay and grading system were deferred, however, because the change management programme took precedence. The OFT has also previously struggled, in a competitive marketplace for HR professionals, to appoint a permanent HR director of the right calibre.

4.15 In April 2008 the OFT upgraded and strengthened the HR director role. It also appointed a senior director whose role includes sorting out the pay and grading and staff development issues the OFT faces. The OFT is now revising its pay scales with the aim of making rates for some specialist roles more competitive, particularly Grade 6 and Grade 7 lawyers and economists. The OFT is also exploring with the Treasury how greater flexibility in pay and grading might be put into practice.

4.16 The OFT has also set up a secondees scheme to loan staff from law firms to the OFT, and to date five staff, typically at junior/middle manager level, have been seconded for periods of six months or more. The OFT has also been exploring since mid-2008 the scope for more flexible use of staff with the Competition Commission. It has recently carried out a review of its employer reputation and reasons why people join, which recognises for example that high profile projects will potentially attract recruits from outside.

Support for staff

The OFT should focus on supporting staff better, with broader training including project management and investigation skills, and a complete, up-to-date guidance manual. (PAC 2006 Recommendation)

4.17 The NAO's 2005 Report recommended that the OFT needed to deliver on its commitment to producing a complete set of guidance for staff. The OFT's casework procedures manual was finalised in July 2007 and provides guidance to staff on the key stages of an investigation. Our focus group with competition staff found that the new manual has been positively received. The OFT is also currently preparing a criminal enforcement manual. Stakeholders, in particular legal practitioners, would like the OFT to make its manual publicly available to aid transparency for interested parties, as for example the US Department of Justice does. The OFT considers however that it is important to balance the benefits of disclosure of internal guidance against the potential for such disclosure to prejudice the effectiveness of the OFT's investigation and enforcement activities.

4.18 Against a background of budgetary constraints on recruitment, the OFT has established a strategy for systematically gathering information on reasons for staff leaving and is instituting a series of measures to address them. These include:

- training needs analysis to enable better targeting of training interventions;
- enhancing staff capability through leadership and project management training (paragraph 4.19);
- in line with Investors in People recommendations, it has established a prescribed management/staff meeting framework to promote effective direction and coaching on tasks;
- it has established standard principles for organisational design to promote appropriate levels of autonomy and accountability; and
- it is piloting approaches to project and work management to support improved work-life balance.

4.19 The OFT has invested in training many of its staff in leadership development (434 staff attended its Leadership Development Program Phase 1 between July 2006 and November 2007). The OFT has also trained 98 staff in project management to accompany the roll out of its effective project delivery framework in 2008.

PART FIVE

Measuring, evaluating and communicating achievements

5.1 A competition enforcement body must understand the outcomes of its actions and communicate its achievements if it is to maximise its impact on markets and competition. Our previous report found that the OFT monitored its competition activity but did not quantify the benefits it achieves for consumers. And although it was developing more targeted communication on competition issues, it could improve the availability of case information.

5.2 This part examines the OFT's progress in developing impact measurement and evaluation of its work, in assessing its deterrent effects, and in communicating its messages to external audiences. It finds that:

- The OFT has made significant progress in embedding impact estimation and evaluation of outcomes into its work.
- Research commissioned by the OFT indicates that the OFT is already having a significant deterrent effect from its competition enforcement work.
- It faces on-going challenges in communicating its message to external audiences.

Deterrence

The OFT can make an important contribution to increasing productivity and deterring anti-competitive behaviour. Its preliminary estimate of consumer benefit from investigations (£110 million over five years) does not include wider economic effects. The OFT should consider further research to gain a clearer understanding of these broader deterrent and productivity effects and how they might be enhanced. (PAC 2006 Recommendation)

5.3 The Government set out what it expected of the OFT in its Competition White Paper 2001.¹¹ It stated that competition decisions should be taken by strong, pro-active and independent competition authorities, and that there should be a strong deterrent effect to reflect the fact that hard-core cartels are highly damaging to consumers and to the economy in general.

5.4 The OFT is one of only a few competition authorities to attempt to measure the deterrent effect from its work to combat anti-competitive behaviour.¹² The OFT commissioned Deloitte to attempt to measure the deterrent effect from its competition work by surveying lawyers and businesses.¹³ The results, published in 2007, indicated that the ratio of potentially anti-competitive behaviour deterred for each OFT decision was significant. For example on cartels it ranged from a ratio of 5:1 in the lawyers' survey (that is, five potentially anti-competitive agreements had been abandoned or significantly modified for every one Competition Act decision), to 16:1 in the survey of businesses.

5.5 The research asked businesses and lawyers for suggestions to increase the deterrent effect of the OFT's competition enforcement work. The most frequent suggestions were: increasing publicity and education (so that companies and their sales teams can understand what the law prohibits); encouraging private damages actions; faster decision making; more criminal prosecutions; and more decisions and greater enforcement activity.

11 Department of Trade and Industry White Paper, *Productivity and Enterprise: A World Class Competition Regime*, July 2001.

12 Other competition authorities to attempt to measure the deterrent effect of their work are the Netherlands Competition Authority (NMa) and the US Department of Justice.

13 *The deterrent effect of competition enforcement by the OFT*, A report prepared for the OFT by Deloitte, November 2007, OFT 962.

5.6 The deterrence study also indicated that decisions of competition authorities, where their meaning and significance are not clarified to business can sometimes deter pro-competitive behaviour. The most common example is where a supplier wishes to implement a promotion (or meet competition from a new entrant) by requiring retailers to cut their retail prices, but refrains because such behaviour may be seen as price fixing, though where firms can provide evidence that such behaviour is beneficial to consumers, the law allows for an exemption. The OFT is alive to these risks, and has contributed to the debate on this issue with other international competition authorities.¹⁴

5.7 The deterrence research also highlighted the importance of sanctions against individuals, rather than companies, especially imprisonment. When asked to rank the most significant factors for achieving deterrence, respondents ranked personal sanctions (including criminal enforcement) fines and adverse publicity ahead of other factors. The OFT has pursued criminal charges for breaches of competition law, culminating in June 2008 with the first ever convictions for hard-core cartel activity in the UK (in the market for marine hoses). The OFT brought charges in a further case in August 2008. The OFT is also developing the use of criminal powers on the consumer side of its work.

5.8 Research into productivity has helped the OFT to identify the drivers and to add to its understanding of how a competition authority can build productivity analysis into the prioritisation of its work.¹⁵

Impact estimation and evaluation of the OFT's work

5.9 Since the previous reports the OFT has significantly developed its impact estimation and evaluation work across the main areas of its work. It has agreed with the Treasury an objective of delivering direct financial benefits to consumers of at least five times its cost to the taxpayer, per year, on average, over the period 2008-11.¹⁶ The OFT reports annually on its estimation of impacts from its work and regularly commissions evaluation reports from external consultants and publishes the results.

5.10 The 'five times' target relates to direct benefits to consumers. The OFT also has a separate objective with the Treasury to estimate the additional wider benefits of the OFT's work, for example in increasing consumer and business confidence in markets and deterring future anti-competitive behaviour.

Evaluation

5.11 The OFT has developed an evaluation programme to provide evidence of the direct and indirect impacts of its work. It also seeks to identify lessons for future projects. The OFT's evaluation programme is regarded as one of the most extensive of its kind amongst competition authorities.¹⁷

5.12 Since 2006, the OFT has commissioned evaluations of three of its market studies (of the car warranties market, the taxis market and the extended warranties market). The evaluations not only quantify the impacts but also draw attention to lessons for its future work. For example, the car warranties evaluation¹⁸ found that the removal of the existing restrictions in some car warranties which required owners to have their cars serviced at the garages of franchised dealers, had saved private customers £30 million and had saved fleet and business customers in the range £90 million to £140 million. It also drew attention to the importance of taking account of consumer behaviour that might potentially reduce the impact of the study, such as consumers' reluctance to trust unfamiliar servicing outlets had meant that potential opportunities from the opening up of the car servicing market had not been fully exploited.

5.13 The evaluation of extended warranties on domestic electrical goods published in October 2008 found the study had led to a reduction in consumer detriment, so far estimated to be £51 million. However, the evaluation concluded that whilst the study had led to changes that had benefited some consumers, it appeared that it had only offset a small proportion of the estimated annual consumer detriment of £366 million. This evaluation suggested that the OFT and the Competition Commission 'road test' their remedies in future to verify that they are likely to achieve the anticipated goals. The OFT and the Competition Commission have jointly-commissioned and funded London Economics to carry out research on road testing methods. The project is due to be completed in 2009.

¹⁴ *Stimulating or chilling competition: Speech to the Fordham Annual Conference on International Antitrust Law* by John Fingleton, Chief Executive, Office of Fair Trading, 25 September 2008. http://www.offt.gov.uk/shared_offt/speeches/sp008.pdf.

¹⁵ *Productivity and competition, An OFT perspective on the productivity debate*, January 2007, OFT 887.

¹⁶ The Treasury Performance Framework Agreement is set out in Annex A of the 2008-09 OFT Annual Plan, HC 374.

¹⁷ Annex to the Summary Record of the 100th meeting of the OECD's Competition Committee held on 6-7 June 2007, *Evaluation of the effectiveness of competition agency actions*.

¹⁸ *Evaluating the impact of the car warranties market*, A Report for the OFT by Europe Economics, June 2006, OFT 852.

Impact estimation

5.14 In 2007-08, the OFT estimated the savings for consumers from both its competition enforcement work and its markets studies.¹⁹

- Based on prudent assumptions developed using academic evidence and international best practice, and case officers' knowledge, the OFT estimated the average saving from its competition enforcement work is £77 million each year.
- Based on assumptions of what is likely to happen following the implementation of the OFT's recommendations, it estimated that market studies work had saved consumers £98 million in 2007-08.²⁰

The OFT intends to continue to improve the impact estimation, monitoring, and evaluation of its project work, so that estimates will increasingly be based on data from monitoring and evidence from actual evaluations.

5.15 The OFT has also improved the information it has available on the costs of its competition investigations. The OFT undertook a costing exercise to calculate the size and cost of a cross-section of its past and on-going competition cases. These showed cases ranged significantly in the size of team and the costs involved from £150,000 for a relatively small case, to £3.5 million for a very large one. Its investigation into alleged price-fixing in the construction sector comprised over 40 staff, involved many parties, and has been running since 2004.

5.16 We also developed a range of indicators that could be used to monitor and review the performance and potential value for money of a competition authority, like the OFT, building on the list of performance measurement indicators in our previous report. The list of indicators is at Appendix 4, and takes into account views of stakeholders and the views of the OFT.

5.17 The OFT adopts a conservative approach to reporting the impacts from its evaluation work against the objective agreed with the Treasury for direct financial benefits for consumers. It only includes estimates from its ex-post evaluations when they apply to work completed (or, for market studies, recommendations implemented) in the rolling three year assessment period. Impacts from evaluations conducted more than three years after project completion have, so far, not been counted towards the target.

¹⁹ *OFT's Positive Impact 2007-08*, July 2008, OFT 1007, paragraphs 1.10, 5.11 and Table 6.1.

²⁰ This figure does not include consumer savings that result from Market Investigation References to the Competition Commission.

Communicating the OFT's message

Communications

5.18 Effective communications are also a key factor in deterrence. The 2007 Deloitte research found that companies considered adverse publicity the third most important factor in deterring competition infringements (after criminal penalties and disqualification of directors, but before fines or private damages actions). The OFT's announcements attract significant media interest and business stakeholders and legal practitioners perceive that the OFT has, through its focus on higher impact cases, raised its profile since our previous report.

5.19 Some business stakeholders expressed concern about the tone of some of OFT's public announcements at the Statement of Objections and early resolution stages on its high profile cases. Separately, an apology and the payment of £100,000 that the OFT made to Morrisons over incorrect allegations of price fixing in September 2007 damaged the OFT's credibility in the eyes of some stakeholders. The OFT has sought to learn lessons from the Morrisons episode and has overhauled its processes for external announcements. Separately it has moved to a more professional, and more senior-graded Communications team structure than at the time of our previous report.

5.20 The OFT is working to ensure a broad understanding of the rationale behind its activity, and the importance of a strong, independent competition authority, emphasising the benefits to businesses from strong, competitive and vibrant markets. The OFT is engaging in dialogue with CEOs of companies and a range of business groups and trade associations.

Accessibility of information

5.21 The OFT's website was re-designed in 2006-07 following consultation and an on-line survey of users. Legal practitioners we interviewed found information on competition cases to be less accessible now than it used to be, however, and less accessible in comparison with the websites of some other leading competition authorities, such as the European Commission's DG Competition website. Unlike some competition authorities, the OFT is not solely a competition authority, and has to balance the needs of practitioners with those of other users, in particular consumers. The re-design of the website tried to balance these considerations. The OFT is intending to carry out qualitative research amongst specific user groups to ascertain what further changes might be needed.

APPENDIX ONE

Study scope and methodology

Scope

This report looks at the progress the OFT has made in responding to the recommendations in the NAO's Report "Enforcing competition in markets"²¹ in 2005 and the subsequent PAC report.²²

The OFT has a diverse range of duties and functions. Competition enforcement and market studies are only one element of its overall responsibilities. Since the OFT's re-organisation, competition and consumer staff are organised into market groupings (goods, services and infrastructure). The OFT's budget is no longer formally divided into competition enforcement and other types of competition work; instead it allocates its available resources to competition or consumer-related work according to its prioritisation principles. The OFT spent approximately £31 million²³ (around 40 per cent) of its £78 million budget in 2007-08²⁴ on its competition work which includes: competition enforcement work (£18 million), market studies (£8 million), and mergers (£5 million). **Figure 9 overleaf** summarises these main types of competition work. The number of the OFT's staff that work on competition and markets-related work is around 240.

The OFT's budget for non-competition work is spread across a wide range of activities including consumer protection work, and its regulatory role in relation to consumer credit licensing. The OFT has also acquired significant new responsibilities since our previous report, including the Consumer Direct service (the consumer protection advice service inherited from DBERR with an annual budget of around £19 million), and as a supervisory authority for anti-money laundering.²⁵ From April 2008, the OFT's consumer credit work has for the first time been put on a self-funding basis and the intention is that anti-money laundering supervision will also be self-funding in due course.

This report follows up on the recommendations from the previous report and uses them as the underlying structure for each Part. It also takes into account the changes that the OFT has made as a result of its change management programme where these have influenced its approach to areas covered in the previous report. Appendix 3 gives a summarised account of the progress made against each of the NAO and PAC recommendations.

21 NAO Report *Enforcing competition in markets*, HC 593, Session 2005-06.

22 PAC Report *Enforcing competition in markets*, HC 841, 2005-06.

23 This figure includes all direct and indirect costs of competition and markets-related work. See Table 8.1 of Positive Impact 07/08.

24 The OFT's *Annual Report and Accounts 2007-08*.

25 The OFT took over responsibility for Consumer Direct in 2006 and became the supervisory authority for anti-money laundering for consumer credit lenders and estate agents from 15 December 2007.

Methodology

The key elements of our study methodology are set out below.

Seeking the views of practitioners that use the system and other stakeholders

We sought the views of a range of legal practitioners by holding a series of round-table discussions at a number of leading law firms including members of the Joint Working Party of the UK Bars and Law Societies on Competition Law. To enable practitioners not to feel reticent about expressing their views, we conducted interviews on a non-attributable basis and we have taken care in presenting the views expressed to minimise any risk that the specific source of any comment might be identified. The law firms we consulted included:

- Ashurst.
- Berwin Leighton Paisner.
- Freshfields.
- Linklaters.

9 The main strands of the OFT's competition work

The OFT's competition work

Competition enforcement: The OFT is the primary body within the UK competition regime for enforcing the law. Competition investigations can be complex, absorb significant time and resources, and require fine legal and economic judgements. Competition law empowers the OFT to conduct formal investigations where it has reasonable grounds to suspect an infringement of the law. The two main types of offence are:

Chapter 1 (and Article 81): which "prohibits agreements which affect trade ...and which have as their object or effect the prevention, restriction, or distortion of competition".

Chapter 2 (and Article 82): which "prohibits conduct which amounts to an abuse of a dominant position".

Market studies: the OFT carries out its market studies under the Enterprise Act 2002. It uses them as a means of identifying and addressing all aspects of market failure, from competition issues to consumer detriment and the effect of government regulations. Where necessary, it refers markets to the Competition Commission (the Commission) for further investigation. OFT's market studies work differs from its competition enforcement in that parties are not facing individual enforcement action.

Mergers: The OFT reviews information relating to merger situations and, where necessary, refers any relevant mergers to the Commission for further investigation. Mergers are excluded from the scope of this report.

- Monckton Chambers.
- Peters & Peters.
- Reed Smith Richards Butler.

Other stakeholders we consulted included:

- The CBI competition panel.
- FIPRA – Finsbury International Policy & Regulatory Advisers.

We also received a submission from the Construction Confederation.

We held interviews with other institutions in the UK competition regime including:

- The Competition Commission.
- Ofcom (the Communications Regulator).
- The Department for Business Enterprise and Regulatory Reform.

We also drew on the views expressed by a range of stakeholders at the OFT's conference on its Market Studies work in June 2008. These included:

- national consumer bodies;
- business stakeholders;
- trade bodies;
- academics; and
- officials from overseas competition authorities.

Data analysis

We analysed data on the OFT's casework including competition investigations and drew on the OFT's analysis of its market studies.

We benchmarked the OFT against other competition authorities and law firms to assess the OFT's staff turnover.

OFT surveys

We analysed the results and time series trends in the OFT's regular surveys of staff views (2005, 2006 and 2008) to assess trends on key indicators over this period. The topics covered in the surveys include: leadership, performance management, benefits, morale, stress, future plans.

We also drew on the benchmarking results in the OFT's survey contractor's report which compared the OFT's ratings on specific issues against the results from a cross-section of central government bodies.

Focus groups

We commissioned KPMG LLP to conduct two focus groups with OFT officials in June 2008. One was composed of staff experienced in competition enforcement, and the other was made up of staff with experience of market studies work. The topic guide included: use of resources, case management, cultural issues and suggestions for improvement.

We also drew on the results of a focus group run by the OFT in May 2008 with a group of lawyers and economists who had recently joined the OFT.

Interviews with OFT board members and staff

The NAO held meetings with four members of the OFT's board and members of the executive committee including the Chairman and the Chief Executive. In addition we conducted interviews with a broad range of OFT officials from across the organisation.

Peer reviews of competition regimes

We drew on 'peer review' rating assessments: the DTI's peer review of competition policy 2007, and the latest annual rating enforcement assessment of competition authorities by Global Competition Review.

Web research

We examined websites of leading overseas competition authorities to identify the information they provide to users of the competition system and the performance information they publish in their annual reporting documents.

APPENDIX TWO

Additional NAO recommendations for the OFT

Case management

- 1** The OFT should consider developing and issuing guidelines on its early resolution approach when it has built up sufficient experience of cases, to improve transparency of the process. The OFT should also keep under review the balance between the use of early resolution in some cases and those cases where the full administrative procedure is appropriate.
- 2** Whilst accepting different cases may require different approaches, in particular in a criminal cartel case there are very good reasons for not engaging with parties at an early stage, the OFT should ensure that improvements in transparency and good practice in engagement with parties that some stakeholders have experienced since the previous report, are consistently observed by staff in the course of its investigations so these become the norm.
- 3** The OFT should publish outcomes from its Transparency Guide project in 2009 to provide better information on how it will engage with stakeholders. Whilst recognising that a 'one size fits all' approach is inappropriate, the OFT should aim to provide indicative timescales for key stages of each case, or project, sufficient to allow the parties involved to plan their inputs to the OFT's work, and it should issue updates to its timetables as appropriate. As a publicly accountable body, the OFT should publish an account of its performance in terms of the time it takes to complete different types of investigations and market studies.
- 4** In the OFT's consideration of changes to its approach and guidance on market studies, it should implement the recommendations from its internal review which are designed to improve the transparency, clarity and predictability of the process for the parties involved.

Staffing

- 5** Career progression is a major factor in decisions to leave the organisation. The OFT needs to address this issue effectively if it is to help tackle one of the major reasons for staff leaving the organisation.
- 6** As the pace and profile of the OFT's competition work has increased significantly, it is important that the OFT makes its offer very clear to potential recruits so that their expectations are managed, and that it continues to monitor the perceptions and experiences of new joiners and what the market offers.
- 7** The OFT should draft external guidance for its website that sets out the key elements of how it expects to run its projects to help improve transparency of its internal procedures and processes.

Measuring and evaluating achievements

- 8** The OFT should seek to have its impact estimation methodologies externally reviewed before the end of the first three year period of its consumer savings target (i.e. by 2011).
- 9** In communicating the results of its work to external audiences, the OFT should be clear about its reasons for intervention, in order to clarify for businesses what is and what is not anti-competitive behaviour.
- 10** The OFT should continue to keep the tone and tenor of its communications with external audiences under review.

APPENDIX THREE

A summary of progress against recommendations from the PAC (and NAO) reports and Treasury Minute commitments

PAC 2006 Recommendation (i)

The OFT has been too reliant on complaints as a source for its competition enforcement work. The OFT should start a greater proportion of investigations on its own initiative, rather than waiting for a relevant complaint. It should also be ready to stop cases if they are not strong enough to continue.

Treasury Minute 2006 commitment

TM commitments

OFT accepts the Committee's findings and recognises that prioritisation will help OFT maximise its impact given finite resources. In response to the Committee's conclusion and OFT changes already being implemented OFT has undertaken a number of actions, and is developing others.

– OFT is currently developing proposals for strengthening its use of market intelligence in addition to seeking to maximise its use of internal intelligence and sectoral expertise.

– OFT is consolidating its work on establishing a Preliminary Investigation Unit (PIU) to ensure that intelligence from complaints and other parts of the OFT is used effectively to focus its competition enforcement activity. It expects this work to be showing benefits from September 2006 (subject to any refinements from the transformation programme).

– OFT is reviewing its policies on opening and closing cases to ensure that resources are utilised as efficiently and effectively as possible. It expects this review to be completed shortly. Senior staff are now involved at a much earlier stage of the investigation to ensure the investigation of cases is stopped where the evidence is weak.

Assessment whether recommendation and commitments implemented

The OFT undertakes market studies based on its own initiative; typically they arise from the OFT's analysis of the problems in a market supported by use of intelligence and data.

Another way of not relying on complaints is the OFT's increasing use of whistle-blowing by companies on their rivals which provides the OFT with an important source of high quality intelligence on cartels activity.

The OFT has taken decisive action to close down cases that did not sufficiently meet its prioritisation principles going forward to free up resources to focus on higher impact work.

Its approach to market intelligence is based on a range of different sources and analyses. OFT's restructuring has brought together sectoral knowledge and expertise across competition, markets and consumer work. As a result, in October 2006, three market area groupings (Services, Goods and Infrastructure) were established to carry out competition and market study projects. This has resulted in greater development of sectoral expertise across areas of work. Other initiatives include a horizon scanning function to coordinate idea generation, and a project ideas group bringing together ideas from across the office for new projects.

The OFT's Preliminary Investigation team provides a central point for considering all complaints to the OFT, and developing initial project ideas which can then be taken forward by the OFT's project teams. This ensures that intelligence from complaints and other sources is used effectively to inform new enforcement and market study projects.

The OFT reviewed its policies and took action to close down cases that did not sufficiently meet its prioritisation principles. Senior staff are closely involved in prioritisation judgements.

PAC 2006 Recommendation (ii)

The OFT has no database of intelligence to support its investigations. The OFT needs to supplement information from competition complaints with data from other sources such as the new Consumer Direct helpline and the work of Trading Standards officers across the UK. A database would help it to do so efficiently.

Treasury Minute 2006 commitment**TM commitments**

- The OFT accepts the Committee’s conclusion. It agrees that a database or databases of intelligence are likely to allow it to access intelligence more efficiently.
- A working group has been set up specifically to consider market intelligence, including competition and other complaints and the information available from Consumer Direct.
- OFT will also be looking at how it records and monitors key data from its competition casework. This will include ensuring that it makes the most of incoming data and ensuring that key information informs own initiative work.
- Additionally, OFT is developing a knowledge management strategy whose aim is to build excellent knowledge management behaviours and support systems within OFT. The OFT aims to have developed a comprehensive market intelligence strategy and developed an implementation plan for delivering that strategy in close collaboration with the knowledge management work-strand by March 2007.

Assessment whether recommendation and commitments implemented

The OFT uses a range of approaches and sources for gathering intelligence including data on consumer complaints. The information is analysed and helps to support prioritisation of high impact work. The Preliminary Investigations team has been developed to coordinate responses to competition and markets-related complaints, and ensure that intelligence from complaints information is used to inform project selection. Monthly information is produced on trends in complaints made to the OFT, and is used, for example, by the Project Ideas Group and Horizon Scanning teams.

The OFT commissioned a comprehensive knowledge management strategy in 2007 from consultants to further improve the management of its intelligence. The OFT is considering long-term investment to develop its intelligence systems but has limited spare funds with which to pursue its strategy. The OFT is shortly to go out to tender for an intelligence database for cartels and consumer enforcement work.

PAC 2006 Recommendation (iii)

The OFT suffers from high staff turnover, and many employees do not have sufficient experience to deal with complicated cases. The OFT should focus on supporting staff better, with broader training including project management and investigation skills, and a complete, up-to-date guidance manual.

Treasury Minute 2006 commitment

– The OFT accepts the Committee’s finding that it should focus on supporting staff better and is undertaking a number of actions, set out below to address the Committee’s recommendations.

– The OFT intends to address the current inflexibilities of pay and grading by reviewing its salary structures. It aims to have implemented a new system by October 2006.

– Flexible ways of working based on project teams are being introduced. Specifically, case teams are being assembled to combine the right mix of experience and skills.

– The OFT is implementing a skills training programme for competition case handlers. The majority of the division’s staff have now attended the first part of that programme, case specific project management training. The OFT intends to commence delivery of the next phase of its skills training strategy for competition case handlers by the end of financial year 2006-07.

– The OFT continues to prepare guidance on a range of other issues and expects to have completed its revision of the Manual by the end of 2006.

Assessment whether recommendation and commitments implemented

The OFT finalised its procedures manual for staff in 2007, and has invested heavily in staff training in project management, leadership and competition law. However, some stakeholders still perceived that the OFT had only made partial progress in addressing the experience gap so far. Staff turnover rates at key grades for competition work are not dissimilar from those found in private practice.

The Treasury Minute reflected the OFT’s intention at the time, to implement a new system of pay and grading by October 2006. Changes to the pay and grading system were deferred, however, because the change management programme took precedence. The OFT has also struggled, in a competitive marketplace for HR professionals, to appoint a permanent HR director of the right calibre. In April 2008 the OFT upgraded and strengthened the HR director role. It also appointed a senior director whose role includes sorting out the pay and grading and staff development issues the OFT faces. The OFT is now revising its pay scales with the aim of making rates for some specialist roles more competitive, particularly Grade 6 and Grade 7 lawyers and economists. The OFT is also exploring with the Treasury how greater flexibility in pay and grading might be put into practice.

The OFT is using more flexible ways of working including bigger teams and use of temporary legal staff. OFT has introduced greater flexibility in how it allocates staff to projects with greater scope for staff to work on projects across different areas of the Office according to principles of availability, skills and experience, and career and personal development needs.

The OFT has invested in training many of its staff in leadership development (434 staff attended its Leadership Development Program Phase 1 between July 2006 and November 2007). The OFT has also trained 98 staff in project management to accompany the roll out of its effective project delivery framework in 2008.

The procedures manual was finalised in July 2007.

PAC 2006 Recommendation (iv)

Small case teams are a cause of the OFT's long timescales on cases. The OFT should employ larger teams on its investigations. In small teams, the loss of important members of staff endangers the investigation's progress. Larger teams will reduce this risk and bring a broader range of skills and experience to the investigation.

Treasury Minute 2006 commitment

– The OFT accepts the Committee's conclusion and is implementing fundamental changes to its approach to all case management. A number of steps have been put in place to ensure more effective delivery of cases, better succession planning within teams and cost effectiveness in handling competition cases.

– Three projects have been initiated which will help us improve, covering:

- a) case timetables;
- b) case management framework; and
- c) case team composition.

All projects are due to be completed by April 2007. Effective project delivery is a key workstrand in OFT's transformation programme.

– As part of project c), case team composition, OFT intends to build on emerging practices and make proposals on how it can make better (and more frequent) use of counsel, paralegal (temporary legal staff) and consultancy staff at appropriate moments in the casework process in order to improve both quality and timeliness. These proposals will also ensure that more junior staff receive greater support from more experienced case handlers.

Assessment whether recommendation and commitments implemented

The OFT has used larger teams on a number of its investigations, and uses temporary legal staff (paralegals) to overcome peak workloads on cases.

The OFT has overhauled its approach to project management since 2005. Among the key changes have been:

- Development of a management information system for active tracking of projects against milestones and delivery deadlines, and monthly reports are made to the Executive Committee and the OFT's Board.
- An Effective Project Delivery (EPD) project has been completed and rolled out across the Office, providing a single framework for project management across competition, markets and consumer cases. It was introduced in April 2008 for all new projects.
- As part of the EPD process, clearer allocation of responsibility and accountability between team members, with differentiation between Senior Responsible Officer, Project Director and Team Leader roles.
- More use of project steering groups to gain cross-office perspectives and expertise particularly on large projects.

The three specific projects outlined in the Treasury Minute due to be completed by April 2007 have been superseded following the OFT restructuring. The issues of project management frameworks and team composition and project reporting are central to the Effective Project Delivery framework, and the management information system for active tracking of projects, which have both been rolled out across the Office (referred to in the text earlier in this section).

There is now a higher number and proportion of senior staff working on competition cases, and OFT makes use of counsel, temporary legal and consultancy staff on several of its larger cases.

PAC 2006 Recommendation (v)

At present, the OFT does not work to any deadlines. The target timescales on its website are completely unrealistic and are never met. The OFT should have amended these deadlines as soon as it realised they were not achievable. It should now set clear and realistic timetables for each case.

PAC 2006 Recommendation (vi)

The OFT does not publish information about performance against timescales. This lack of transparency limits effective scrutiny, making it difficult for Parliament to assess the OFT's operation against expectations. The OFT should publish its performance against its timescales.

Treasury Minute 2006 commitment

- The OFT accepts the Committee's findings to both conclusions subject to clarifying that it has internal deadlines. In light of the NAO and Committee's findings OFT is committed to improving the timeliness of its investigations and communicating timescales more systematically.
- The out of date timescales have been removed from the OFT's website. Work on alternatives has started and OFT intends to publish revised indicative timescales by April 2007. However, the different characteristics of each competition case mean that it would be impractical for OFT to publish a timescale which could be met in all cases. As the NAO recognised, the time within which OFT can complete cases can be affected by a number of external factors which are outside OFT's control. The OFT will consider how it can improve communication of its performance against those timescales in a more systematic and accessible fashion.
- In the interim to provide greater transparency, OFT intends to publish historic average timescales for specific stages of an investigation for competition cases and to repeat this annually.

Assessment whether recommendation and commitments implemented

The OFT sets internal deadlines and uses them to drive cases. The OFT's unrealistic target timescales have been removed from its website. It has not met its target of publishing revised indicative timescales by April 2007, and has more to do to set indicative timescales and report its performance against them. As part of a wider transparency project that is due to be completed in 2009, the OFT is looking in further detail at the options for publishing timescales for its work. Before implementing any changes the OFT would consult more widely with interested stakeholders and it is expected that a formal stakeholder consultation will take place later in 2008-09.

This commitment was put on hold as a result of the office restructuring. As part of the Transparency project, OFT is exploring how it might publish historic performance information on an ongoing basis.

PAC 2006 Recommendation (vii)

The OFT's investigations create uncertainty for the companies involved. There is scope for different interpretations of competition law, and companies face uncertainty over how the OFT will analyse a market. The OFT should reduce this uncertainty by sharing its analysis with companies earlier in an investigation.

Treasury Minute 2006 commitment

- The OFT agrees with the Committee's findings, subject to comments below. Although, in a number of cases OFT has communicated openly with the parties involved, it accepts that there is scope for greater consistency in the frequency and standard of communication across all cases. However, with regard to sharing its analysis of the market with parties earlier in an investigation, (and although this may be appropriate in some instances), it does not believe that it can commit to do this in all cases, in particular cartels. It also does not expect to be able to disclose information which might put (individual) witnesses at risk. It is also bound by a duty of non-disclosure under part 9 of the Enterprise Act 2002 which, although it has a number of exceptions, limits the extent to which OFT can share its analysis with parties.
- Within these constraints however, OFT is committed to engaging with parties more openly and transparently to the extent this is possible. As part of this process it has recently issued guidance on 'Involving third parties in Competition Act investigations' – incorporating guidance on the submission of complaints 75/06 published 12 April 2006.

Assessment whether recommendation and commitments implemented

The OFT recognises the importance of engaging with parties to investigations which is reflected in its Procedures Manual for competition casework. For example, some stakeholders commented positively on having been aware of a greater willingness on the part of OFT staff to engage more openly with them, and to define more clearly the scope of the information requested than had sometimes been evident in the past. In appropriate cases, such as an Article 82 case, the OFT has distributed draft information requests to the parties to allow them to comment.

The OFT has work in hand in its Transparency Guide project, and it expects a formal stakeholder consultation on its proposals will take place later in 2008-09.

PAC 2006 Recommendation (viii)

The OFT does not use its powers to compel companies to provide information. The OFT can impose criminal penalties if companies do not provide information. It has not used the penalties as it considers them heavy-handed. It should use them where companies wilfully obstruct an investigation and should explore with the DTI whether it can raise civil penalties against companies in less serious circumstances.

Treasury Minute 2006 commitment

- The OFT accepts the Committee’s findings. So far, in general, powers short of criminal charges have proved adequate but OFT will consider bringing criminal proceedings in the most serious cases of non-compliance. For less serious cases it will explore with the DTI the potential for raising civil penalties against companies.
- The OFT is currently conducting a thorough review of its practice in relation to formal requests for information with a view to establishing best practice for future information requests. It is aiming to have completed this review by March 2007. OFT will take on board the Committee’s findings during the review. The OFT will consider a variety of approaches to improving its practice in this area.

Assessment whether recommendation and commitments implemented

Since 2005 powers short of criminal charges have proved adequate for the OFT. Changes to information gathering powers have not therefore been a priority issue for the OFT, and so it has not considered it necessary to raise this issue with the Department.

This commitment was superseded by the OFT’s restructuring. More detailed guidance on information requests has been put in place via the OFT’s competition intranet guidance, ‘Guidance relating to preparing formal requests for information (section 26 notices) – under the Competition Act 1998.’

PAC 2006 Recommendation (ix)

The OFT can make an important contribution to increasing productivity and deterring anti-competitive behaviour. Its preliminary estimate of consumer benefit from investigations (£110 million over five years) does not include wider economic effects. The OFT should consider further research to gain a clearer understanding of these broader deterrent and productivity effects and how they might be enhanced.

Treasury Minute 2006 commitment

– The OFT accepts the Committee’s findings. OFT is however, currently developing an improved evaluation methodology which it hopes will be released across the Office so that it can be incorporated in its casework and published by the end of 2006-07. OFT expects that this new evaluation methodology will be used to look at a representative cross-section of its cases to give an overall value for money indicator.

– In co-operation with the Department of Trade and Industry and the Competition Commission, OFT has, since the Committee hearing, awarded a research project into the deterrent effect of action it has taken under the Competition Act 1998. This research will also include some analysis of the costs of interacting with OFT during Competition Act 1998 investigations which will assist it in assessing the burden on business. The results of this project will be delivered at the end of October 2006 and OFT aims to publish by the end of 2006.

– The OFT is however, currently reviewing generally the link between competition and productivity and examining how it can further use productivity measures to help inform the prioritisation and evaluation of OFT work. Although this work (which includes carrying out a literature review) is still at an early stage OFT hopes to have completed it by the end of 2006.

Assessment whether recommendation and commitments implemented

The OFT’s impact estimation and evaluation work has been extended across its competition and markets-related work. Key developments since 2005 include:

– In September 2006, the OFT published a document outlining the strategy for evaluating OFT market studies work. In September 2007 it published a consultation document on its approach to calculating direct benefits to consumers and published the final document in March 2008.

– Publishing annual estimates of the impact of its work.

– Development of impact estimation plans for all current and recently-completed projects.

– A series of ex-post evaluations completed including: market studies on car warranties, taxis, and extended warranties.

The OFT published the deterrence research in 2007, developing for the first time a measure of the deterrent effect of competition enforcement in the UK. The OFT intends repeating the deterrence research in the future, to try and assess how the deterrent effect changes over time with changes in competition enforcement activities. An analysis of the costs (to parties) of interacting with the OFT during its investigations could not be undertaken in the deterrence research. However, the ex-post evaluation of Extended Warranties published in October 2008 looked at whether businesses incurred substantial costs as a result of the Order.

The OFT published its productivity project in early 2007. It established a strong evidence base for the relationship between productivity and competition. A large scale data exercise also allowed it to identify sectors of the economy in which indicators of productivity growth and competition were low compared to the EU. The feasibility of using this resource as a basis for initiating further work was tested. It was established that for methodological reasons it should not be used as a source of primary intelligence in this way. However, it remains an extremely useful source of secondary evidence about the performance of markets. The OFT has also explored how to evaluate the impact on productivity of interventions into markets, through a case study of the productivity impacts of the end of the Net Book Agreement.

PAC 2006 Recommendation (x)

The OFT is an organisation in transition, which has yet to demonstrate that it can make effective use of the substantial extra resources it has been given. The Committee will wish to return to these issues in due course to see what progress has been made and how well the OFT has implemented the Committee’s recommendations.

Treasury Minute 2006 commitment

– The OFT accepts the Committee’s findings. OFT is committed to expending considerable effort, over the next two years, into more objective and comprehensive evaluation of its direct impact and what it has achieved through influencing others to ensure that its work continues to represent excellent value for money.

Assessment whether recommendation and commitments implemented

The OFT has delivered on this commitment to measure and report annually on its outcomes for consumers, against its target of delivering direct benefits to consumers of at least five times its cost to the taxpayer.

Its ongoing external evaluation programme also provides useful information on its impact. To ensure objectivity and transparency, ex-post evaluation studies are carried out by independent external consultants and subsequently published on OFT’s website.

NAO recommendation**On its use of resources**

1. The OFT should address the experience gap amongst some of its competition staff by increasing the input of senior case officers to investigations and helping more junior staff develop the necessary expertise to manage cases.
2. The OFT needs to deliver on its commitment to producing a complete set of guidance for staff.
3. The OFT should publish expected timescales for its investigations, which are realistic but challenging, and use these to drive case management.
4. The OFT should explore options for making business and practitioners observe deadlines for providing information requested in the course of investigations.
5. The OFT should engage more openly with parties to the investigation, both in terms of indicating its concerns and keeping them updated on progress. This would help reduce the uncertainty for parties.

On case management

6. The OFT should encourage internal economic and legal challenge of potential cases as they progress to formal investigation, as well as ensure constructive senior input at an earlier stage. This will ensure that resources are only committed to cases that continue to merit investigation.

The OFT should also review how cases were selected and commission an analysis of the effects of its intervention.

On measuring and communicating achievements

7. The OFT should develop a group of indicators to help it monitor and review the results of its activities.

With the recent creation of an evaluation unit, the OFT should follow the lead of some competition authorities who have attempted to quantify the benefits they achieve for consumers.

Assessment whether recommendation implemented

Partially met. (More input from senior staff and enhanced training for staff but experience gap still perceived to be an issue by stakeholders).

Fully met.

Not met. (However, this will be addressed by the OFT's Transparency Project in 2009).

This does not appear to be an issue to the extent it was at the time of the last report. Therefore the OFT has not needed to explore options to address this.

Partially met. (Whilst accepting that in some cases it is not appropriate for the OFT to reveal too much information to parties, stakeholders still perceived that the OFT needed to be more consistent in its level of engagement, and in updating them on the likely timescale of each stage as a case progresses).

Fully met.

Fully met. (The OFT measures the benefits from its competition work and has commissioned research into the effects of its cartels work. Case selection is now driven by the OFT's prioritising of high impact work, which takes into account lessons from previous case work).

Partially met. (The OFT has agreed with government a range of high-level performance indicators (set out in Annexe A of the OFT Annual Plan 2008-09) against which the OFT measures its success. These include a target to deliver direct benefits to consumers of at least five times that of the OFT's cost to the taxpayer and a commitment to estimate the wider benefits of the OFT's work, including deterrent effects, in each annual report. In addition, its work on the Transparency Project, will provide information on its performance against timescales but the OFT is yet to develop a group of indicators to report against annually like those in NAO's suggested VFM indicators in Appendix 4).

Fully met.

NAO recommendation**On measuring and communicating achievements (continued)**

8. The OFT should evaluate the success of education campaigns to ensure the resources in this area are being effectively targeted, in particular on its priority sectors and on its target audiences (smaller businesses and government).

For example, the OFT could carry out further research to ascertain the reasons why nearly a quarter of small and medium sized firms believe they are harmed by unfair practices but only a minority would report this to the OFT.

9. The OFT needs to develop a more comprehensive database of information on cases and improve the accessibility of this information to external users who have an interest in competition enforcement matters.

The OFT should consider surveying website users to gain a better understanding of their needs.

Assessment whether recommendation implemented

Largely met. (The research the OFT has commissioned into its deterrent effect gives an indication of the OFT's effectiveness at getting its message across on anti-competitive behaviour to different sizes of business. The research found that the degree to which the UK competition regime impinges on firms' commercial behaviour is strongly related to their size).

Partially met. The accessibility of case information is currently being reviewed internally by the OFT's Transparency Project. Changes to the OFT website will be taken forward in conjunction with the recommendations of this project.

The OFT undertook user research during 2006 which informed the design and architecture of the new OFT website, which was introduced in 2006. Annual online user surveys are now commissioned to assess users' needs – providing success indicators and areas for further development to meet evolving user requirements.

APPENDIX FOUR

Performance and value for money indicators

A range of indicators that could be used to monitor and review the performance and value for money of the OFT's competition enforcement work on a periodic basis.

Potential VFM indicator	Comment	Performance
Percentage of competition investigation delivered within the indicative timescales	Awaiting the OFT's Transparency Project scheduled to be completed in 2009, which will set out the OFT's position in relation to timescales for different types of cases and projects.	No published information on performance available.
Percentage of cases won at appeal (excluding test cases)	This indicator could act as a proxy for a quality measure; however, stakeholders consider the target should be set at a level below 100 per cent to avoid the danger of OFT taking an overly risk-averse approach. This is particularly so on so-called 'test cases', where the outcome is more uncertain and it is the clarification of the law that is important.	The last appeal of an OFT decision to the Competition Appeals Tribunal was in 2006.
A range of cases that seek to clarify the law	This would give an indication of whether the OFT is balancing its need for achieving impacts with the role of establishing legal precedent.	The OFT is developing the law in a number of cases, including on information exchanges and pricing practices as well as in its use of criminal charges under the Enterprise Act.
Measured deterrent effects	A periodic review of the deterrent effect would be adequate as it is not practical to measure the deterrent effects on a case by case basis, and would be expensive to do so.	The OFT's research commissioned on the deterrent effect found that the ratio of potentially anti-competitive behaviour deterred for each OFT intervention was significant, for example on cartels it ranged from 1:5 to 1:16.
Savings for consumers from market studies and competition enforcement	As the OFT continues to embed impact estimation, monitoring, and evaluation in its project work, these estimates will increasingly be based on data from monitoring and evidence from actual evaluations and be more robust.	The OFT's latest estimation of the impacts of its competition enforcement work and market studies work amounts to £77 million per year and £98 million, (the latter estimated figure which is imputed only when OFT recommendations have been accepted is nevertheless based on assumptions of what is likely to happen following the OFT's intervention rather than measures of actual benefits. The OFT is seeking to improve its validity by monitoring impacts and to have its methodology reviewed externally. The market studies estimates may therefore be modified upwards or downwards over time as new evidence from monitoring becomes available).

Potential VFM indicator	Comment	Performance
Views of stakeholders (including peer review and OECD country reviews)	The 'peer review' studies are based on surveying the views of legal practitioners with experience of dealing with competition authorities in various countries.	<p>The most recent DTI (now DBERR) sponsored Peer Review of competition policy in 2007 shows that the UK competition bodies (including the OFT) still continue to be perceived as one of the best regimes in the world. It was ranked behind the US and nearly equal with Germany. It was rated ahead of the European Union's DG Competition and a selection of other countries.</p> <p>Global Competition Review's survey published in June 2008 showed that the OFT's ranking remains 'Very Good' and higher than most overseas' competition authorities. Its ranking places it behind four other competition authorities.</p>