

Countering Anti-competitive Behaviour in the Telecommunications Industry



This report has been prepared under Section 6 of the National Audit Act 1983 for presentation to the House of Commons in accordance with Section 9 of the Act.

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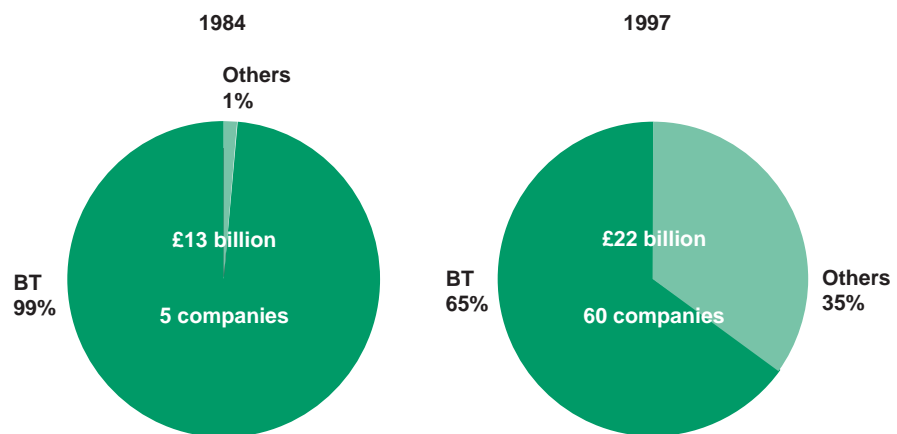
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Executive summary

1 In the United Kingdom virtually every business and 93 per cent of households have a telephone. In 1984, when British Telecommunications (BT) were privatised, the industry had annual revenues of £13 billion (at 1997 prices) and only five companies were licensed to provide telecommunications services. By 1997, as Figure 1 shows, there were 60 companies licensed to provide these services and annual revenues had risen to £22 billion. Over the same period BT's share of telecommunications revenues fell from nearly 100 per cent in 1984 to around 65 per cent in 1997.

The growth of the telecommunications market since BT's privatisation in 1984

Figure 1



This figure shows that between 1984 and 1997 the number of companies licensed to provide telecommunications services rose from 5 to 60 and their annual revenues from £13 billion to £22 billion (at 1997 prices). Over the same period BT's share of the market fell from nearly 100 per cent to around 65 per cent.

Source: OFTEL

2 The Office of Telecommunications (OFTEL) are the principal regulator of the telecommunications industry in the United Kingdom. OFTEL's key objective is to provide the best possible deal for the consumer in the telecommunications market in terms of quality, choice and value for money. They consider that the most effective way of achieving this objective is not through rigid price regulation but by encouraging competition within the industry. In order to develop and maintain effective competition OFTEL increasingly see one of their main roles as countering anti-competitive behaviour.

3 Whilst facing more competition than ever before, BT still retain a significant market share in many parts of the market. For example, BT supply 80 per cent of telephone services to homes.

4 Where a supplier has a very strong position in any given market there is always a risk that it may act anti-competitively. Such an abuse of market power might involve establishing barriers to entry into the market or seeking to drive out any new entrants who are trying to get a foothold. Were such anti-competitive behaviour to go unchecked, consumers would be exposed to higher charges, and would receive a lower quality of service and less choice as well. It is therefore crucial, for businesses and consumers alike, that anti-competitive behaviour is deterred and stopped.

5 Competition in the telecommunications market grew significantly only from 1992 onwards following the ending of the BT/Mercury Communications duopoly. OFTEL's consultation with the industry in 1994 revealed widespread dissatisfaction in the industry with their effectiveness in countering anti-competitive behaviour. In particular the industry was concerned about the time it took OFTEL to take remedial action once they had been notified of an alleged abuse. In view of the potentially serious impact of such delays on businesses and consumers, we examined OFTEL's efforts since 1995 to strengthen their arrangements for deterring and stopping anti-competitive behaviour in the market.

What types of anti-competitive behaviour exist in the telecommunications market?

6 We commissioned a survey by NOP to obtain the industry's views on the extent of anti-competitive behaviour in the telecommunications market and OFTEL's effectiveness in dealing with it. Out of 42 public telecommunications operators interviewed, 36 claimed that they had experienced some form of anti-competitive behaviour in the telecommunications market. The different types of anti-competitive behaviour identified fall into four main categories, illustrated by the Case Examples on pages 9 to 12:

- **Undue preference or undue discrimination** - a telecommunications operator abusing its market power by showing undue preference to its own business or applying undue discrimination against a competitor's business, for example, by denigrating a competitor (see Case Examples 1 to 7). Undue

preference and undue discrimination are particularly important issues because BT have considerable market power in national and local networks in the United Kingdom and compete with other companies in the provision of services over these networks.

- **Linked sales** - a telecommunications operator abusing its market power by making the sale of one product conditional on the purchase of another (Case Examples 8 to 10).
- **Unfair subsidies or cross-subsidies and predatory pricing** - a telecommunications operator abusing its market power by subsidising or cross-subsidising a part of its business with profits made elsewhere or providing products or services at prices which do not cover costs (Case Example 11).
- **Withholding of technical information** - a telecommunications operator abusing its market power by withholding technical information from a competitor who requires it for its operations (Case Example 12).

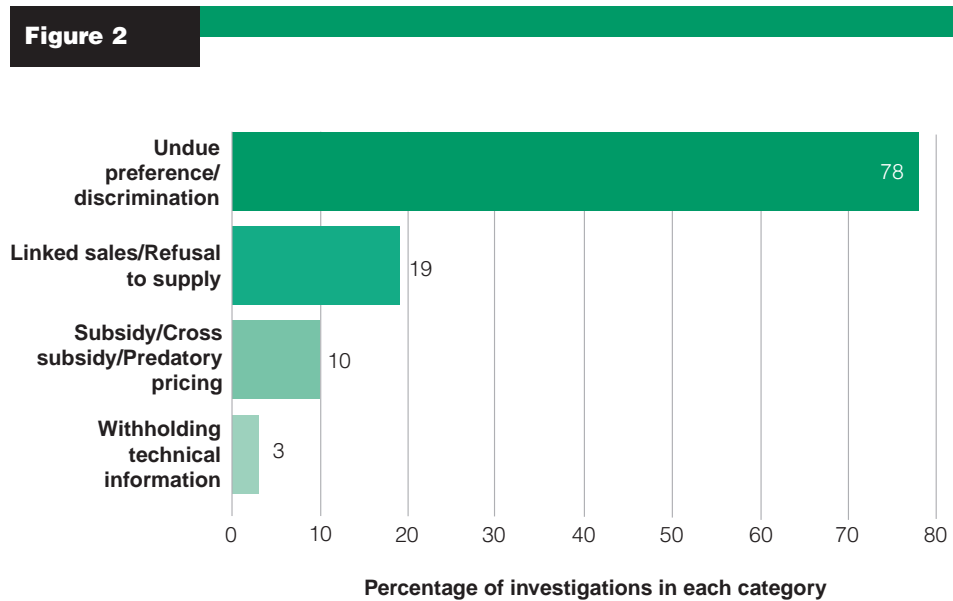
What potentially anti-competitive practices have OFTEL investigated?

7 Under the 1984 Telecommunications Act, the Director General of Telecommunications - the head of OFTEL - has a duty to investigate all complaints, including those involving anti-competitive behaviour. OFTEL also carry out investigations on their own initiative.

8 Between January 1995 and December 1997, OFTEL opened and completed 217 investigations into particular practices which were allegedly having an anti-competitive effect on the market. Our examination showed that 90 per cent of these arose following complaints received from companies in the industry; the remainder were conducted on OFTEL's own initiative (for example, Case Example 5). The proportion of own initiative investigations grew over the period.

9 Over three-quarters of the cases ultimately concerned undue preference or undue discrimination (Figure 2 overleaf). In 84 per cent of the investigations, BT were the company complained about. The remaining cases involved other operators in the industry (for example, Case Examples 3 and 9).

Categories of anti-competitive behaviour investigated by OFTEL, 1995-97



Note: Some investigations focused on more than one category of behaviour and therefore the total for the categories add up to more than 100%

This figure shows that, between 1995 and 1997 over three-quarters of OFTEL's investigations into anti-competitive behaviour ultimately concerned allegations of undue preference or undue discrimination.

Source: National Audit Office

What action have OFTEL taken as a result of their investigations of anti-competitive behaviour?

10 Figure 3 shows the outcomes of OFTEL's investigations into alleged anti-competitive behaviour. Ten per cent of investigations were terminated because the complainant did not provide the information required to pursue the case, or because the matter fell within the jurisdiction of another competent authority. In 53 per cent of cases OFTEL concluded that there had been no breach of the operator's licence nor was it a matter to be dealt with under general competition law. And 37 per cent of cases resulted in the parties reaching agreement between themselves or the operator stopping the alleged anti-competitive behaviour, as a result of OFTEL's investigation.

Figure 3 The outcome of OFTEL’s investigations into anti-competitive behaviour, 1995-97

Outcome of investigation	Number of investigations	Percentage of investigations	Case examples
Complainant unwilling or unable to provide information required to pursue complaint with OFTEL	15	10%	8
Investigation revealed that the matter fell within the jurisdiction of another competent authority	7		3
No breach of licence nor a matter to be dealt with under general competition law	116	53%	1, 2, 9, 11
Parties reached agreement between themselves prompted by OFTEL’s investigation	21	37%	4
Acceptable change of behaviour without the need for enforcement action	41		5, 10
Formal enforcement action taken by OFTEL	17		6, 7, 12

This figure shows that 37 per cent of the cases investigated by OFTEL resulted in the parties reaching agreement between themselves or the operator stopping the alleged anti-competitive behaviour, as a result of OFTEL’s investigation.

Source: National Audit Office

11 We also analysed outcomes for each of the different categories of anti-competitive behaviour in Figure 2. We found no significant variations in outcomes between the categories.

What effect has OFTEL’s action against anti-competitive behaviour had on the telecommunications market?

12 We found that the industry is now more confident in the fairness of competition in the telecommunications market. Three-quarters of public telecommunications operators said that their confidence had increased as a result of action taken by OFTEL to deal with anti-competitive behaviour. Two-thirds said that OFTEL’s performance in this area had improved between 1996 and 1997. Many companies told us that OFTEL had become more effective in countering anti-competitive behaviour, although a few said that OFTEL were still not doing enough to deter and stop such behaviour (paragraphs 2.35 to 2.36).

What more could OFTEL do to improve their effectiveness in countering anti-competitive behaviour in the telecommunications market?

13 OFTEL's effectiveness in deterring and stopping anti-competitive behaviour is dependent on the following practical factors:

- how quickly they investigate and act on allegations of anti-competitive behaviour;
- the quality of the decisions they make on individual cases and the expertise of their staff; and,
- how well they consult and communicate with the industry.

14 Since 1995 OFTEL have taken a number of significant and innovative steps to improve the way they counter anti-competitive behaviour (Figure 4). As a result they are acting more quickly, their staff have better skills and expertise and they are more open with the industry. But there are a number of areas that OFTEL could address to improve their effectiveness still further, as set out opposite.

Measures taken by OFTEL since 1995 to improve the way they deal with anti-competitive behaviour

Figure 4

- setting up a specialist directorate to focus on anti-competitive behaviour and to develop a co-ordinated approach to handling investigations;
- recruiting more staff with relevant skills and improving their training and support;
- improving the arrangements for assessing their own performance by setting quality standards and performance targets;
- taking measures to communicate better with the industry;
- introducing a general fair trading condition into operators' licences to enable new forms of anti-competitive behaviour to be addressed more effectively.

This figure shows that since 1995 OFTEL have taken a number of significant and innovative steps to improve the way they deal with anti-competitive behaviour.

Source: National Audit Office

Recommendations

15 We make the following recommendations:

- a) The turnover of staff on secondments and short term contracts has resulted in the regular loss of skilled and knowledgeable staff. Since 1995, OFTEL have taken a number of steps to address this problem (paragraphs 2.7 to 2.10). **We recommend that OFTEL should continue to examine ways in which they might recruit and retain for longer periods staff with skills which are relevant to their work on anti-competitive behaviour.**
- b) The industry has a high regard for OFTEL's legal and technical expertise but is less positive about their commercial awareness (paragraphs 2.11 to 2.12). **We recommend that OFTEL should continue to recruit staff with relevant practical legal, technical and commercial experience and support them with targeted training.**
- c) OFTEL have set up an Advisory Body to provide an independent assessment of their decisions, but this applies only to cases pursued under the new fair trading condition (paragraphs 2.25 and 3.11). **We recommend that OFTEL should consider using a similar external review to assess from time to time how the quality of their investigation work is developing.**
- d) Since June 1996 OFTEL have had published performance targets which have helped them to reduce the length of time they take to deal with complaints of anti-competitive behaviour (paragraphs 2.27 to 2.34). To enable them fully to assess their own performance, **we recommend that OFTEL should also report:**
 - **the time taken to complete an investigation from the date the complaint was received; and,**
 - **the average time taken to handle all complaints.**
- e) While public telecommunications operators are generally very positive about OFTEL's role in dealing with anti-competitive behaviour, other groups in the industry with whom OFTEL have less routine contact on competition issues are less aware of and less positive about this aspect of OFTEL's work (paragraphs 2.35 to 2.46). **We recommend that OFTEL should continue to develop their contacts with independent service providers. They should explore the benefits of further developing their communications with consultants and manufacturers.**

- f) From December 1996 OFTEL began to introduce into operators' licences a fair trading condition which has given OFTEL a more effective deterrent against anti-competitive behaviour. The provisions of the fair trading condition are likely to be superseded by those of a new Competition Bill, introduced in October 1997, which if enacted, will provide OFTEL and other regulators with more powers. Like the fair trading condition, the Bill is based closely on Articles 85 and 86 of the Treaty of Rome (paragraphs 3.6 to 3.18). **We therefore recommend that OFTEL should review their experience of using the fair trading condition in preparing themselves for the new powers they will have if the Competition Bill is enacted.**

The Director General of Telecommunications has indicated that he will accept these recommendations.

16 Action along these lines would help OFTEL to improve further their speed and effectiveness in countering anti-competitive behaviour and further boost the industry's confidence in the fairness of the telecommunications market. This should assist OFTEL in their objective to maintain and promote effective competition, thereby leading to a higher quality of service, greater choice and better value for money for consumers.

Case examples of trade practices investigated by OFTEL as being potentially anti-competitive

Case Example 1. Alleged denigration - No breach of licence found

Trade practice complained about: It was alleged that a BT salesperson was denigrating a competitor's services by quoting to a customer incorrect information relating to the prices and the minimum length of a competitor's contract.

Alleged effect on market: By making denigratory remarks to customers about competitors an operator could undermine the credibility of alternative suppliers and so reduce the demand for competitors' products and services.

Potential effect on customers: By eroding the market share of competitors alternative suppliers would eventually be forced to leave the market leaving the dominant operator free to charge higher prices than would be the case in a competitive market.

What OFTEL did: OFTEL found no evidence of BT sales staff providing incorrect price information to the customer on a systematic basis nor of denigrating competitors. OFTEL continue to monitor the systems set up by BT to prevent such incidents recurring. BT's monitoring systems derive from a previous OFTEL investigation into denigration by BT which led to a provisional order being issued.

Case Example 2. Alleged undue preference - No breach of licence found

Trade practice complained about: It was alleged by a complainant that BT had put promotional material about one of their own services on their web-site and were therefore unduly preferring part of their own business.

Alleged effect on market: By unduly preferring part of their own business BT could attract customers who might otherwise take services from alternative suppliers and place competitors at an unfair disadvantage.

Potential effect on customers: There would be a lack of choice for the consumer and the dominant operator would be free to charge higher prices than would be the case in a competitive market.

What OFTEL did: OFTEL's view was that BT should be allowed to promote this service on their own web-site and were not showing undue preference by doing so.

Case Example 3. Alleged denigration - Matter better dealt with by another competent authority

Trade practice complained about: In January 1997 Energis complained about a promotional leaflet distributed by NORWEB Communications which compared the prices of telephone calls from selected competitors over specific routes. Energis alleged that some of the information was incorrect and that the comparisons gave a misleading representation of the general level of prices.

Alleged effect on market: Competition in the market could be reduced as suppliers of telecommunications services began to lose customers unfairly.

Potential effect on customers: Customers might make decisions about telecommunications suppliers based on misleading information.

What OFTEL did: OFTEL concluded that the incorrect information was actually favourable to Energis. They considered that a comparison between BT and NORWEB Communications prices over selected routes which did not include comparable Energis prices was unlikely to lead to a distortion in competition. OFTEL considered that this type of complaint was better dealt with by the Advertising Standards Authority. Energis contacted the Advertising Standards Authority for advice but they did not submit a formal complaint to them.

Case Example 4. Alleged undue discrimination - Relevant parties reach agreement between themselves

Trade practice complained about: In certain conservation areas local authorities will not allow any payphone kiosk other than the traditional red telephone box. A competitor to BT sought OFTEL's view on the fact that they were unable to provide payphone services in such areas unless they used the traditional red telephone box. BT had also taken legal steps to prevent the competitor from re-using old red telephone boxes on the grounds that customers would think they were buying a BT service.

Alleged effect on market: BT were showing undue discrimination against a competitor and were trying to reduce the amount of effective competition in the market.

Potential effect on customers: Customers are not able to take advantage of lower prices in the payphone market which would result from effective competition.

What OFTEL did: The complainant and BT reached an agreement between themselves on the use of the telephone boxes. BT made available to the competitor those sites where BT's modern payphone kiosks were already installed in exchange for those conservation area sites for which the competitor had gained planning permission but which required them to install the traditional red telephone box.

Case Example 5. Alleged undue preference - Behaviour modified without the need for enforcement action

Trade practice complained about: On their own initiative OFTEL investigated how BT informed the industry of the tariffs they would charge for calls made by schools and colleges to education services, including those offered by part of BT's own business.

Alleged effect on market: By not giving sufficient notice or detail of the tariffs to other businesses BT were unduly preferring their own business and placing competitors at an unfair disadvantage.

Potential effect on customers: As they were unable to launch competing services in time other companies could not offer an alternative choice of supplier for the consumer.

What OFTEL did: OFTEL found that BT gave competitors insufficient notice and details regarding the terms on which the tariff was available compared to the information they gave to that part of their own business which provided the education service. BT established procedures to ensure that in future information was not disclosed to part of their own business before it was disclosed to competitors in a way which was detrimental to fair competition. BT modified their behaviour in a way judged to be acceptable by OFTEL without the need for enforcement action.

Case Example 6. Alleged undue discrimination and undue preference - Enforcement action taken

Trade practice complained about: It was alleged that BT gave insufficient notice between announcing the promotion of certain telephone equipment and the proposed date of its introduction. The short notice gave competitors insufficient time to obtain stock to meet the increased demand for the equipment which would result from the promotion thereby giving an unfair advantage to BT's own equipment business. BT were alleged to be showing undue discrimination against competitors and undue preference towards their own business.

Alleged effect on market: Without sufficient notice of the promotion, potential competitors would not be in a position to supply the market.

Potential effect on customers: BT would not face any effective competition in this particular market. They would be able to charge higher prices for the equipment than would be the case in a competitive market.

What OFTEL did: OFTEL opened the case in June 1996 following complaints they received from equipment suppliers. As a result of information gathered by OFTEL from BT and other suppliers it appeared to OFTEL that BT had indeed failed to give sufficient notice to competitors of their intended promotion and they were therefore in breach of their licence obligations relating to undue preference and undue discrimination. The Director General made a provisional order against BT in June 1996 stipulating particular conditions for promotions. This was subsequently confirmed as a final order.

Case Example 7. Alleged undue discrimination - Enforcement action taken

Trade practice complained about: It was alleged that BT were attempting to win back customers they had lost to competitors by offering discriminatory discounts to them if they signed up for connection to their network within a stated period.

Alleged effect on market: Competitors would eventually be removed from the market if BT were allowed to erode their customer base in this way.

Potential effect on customers: By removing effective competition BT would eventually be in a position to take advantage of their market dominance and charge customers higher prices.

What OFTEL did: BT approached OFTEL with their marketing plans to run an advertising and sales campaign designed primarily to encourage people without telephones to sign up to BT. OFTEL examined and approved the plans but the campaign which was launched appeared to OFTEL to be very different from the original proposal. The campaign placed a strong emphasis on winning back customers from other operators. OFTEL concluded that the tariff offered was discriminatory in that it was available only to customers without a BT phone and BT had discriminated unduly against competitors by targeting other operators' customers. In March 1997 the Director General issued a provisional order requiring BT to halt the campaign. This was subsequently confirmed as a final order.

Case Example 8. Alleged linked sales - Complainant fails to supply further information when asked

Trade practice complained about: BT were engaging allegedly in linked sales by waiving the connection charge and rental charge of telecommunications apparatus provided that customers also purchased other equipment.

Alleged effect on market: Alternative suppliers of the telecommunications apparatus could not get a foothold in the market because they would be unable to match the free offer.

Potential effect on customers: The customer could take advantage of the free apparatus in the short term but by reducing competition in this way the dominant operator would eventually be in a position to charge higher prices than would be the case in a competitive market.

What OFTEL did: OFTEL opened an investigation into the allegation but the complainant declined to provide further details when OFTEL requested more information. OFTEL were therefore unable to pursue the complaint any further.

Case Example 9. Alleged linked sales - No breach of licence found

Trade practice complained about: In May 1996 Kingston Communications informed OFTEL that they would be increasing their line rental tariff by £1 per quarter. Certain enhanced services provided by Kingston, for example one which tells the telephone user that another caller is trying to get through, would now be included in the line rental.

Alleged effect on market: Because customers are already receiving the enhanced services as a matter of course it is difficult for other companies who provide similar services to enter the market in order to provide effective competition.

Potential effect on customers: Customers are not given sufficient alternatives when they choose who should provide them with enhanced services.

What OFTEL did: Linked sales are prohibited under the terms of Kingston's licence in order to preserve customer choice. Kingston explained to OFTEL that the inclusion of the enhanced services was the result of a general upgrade of their network and the increase in line rental tariff reflected the increased costs of the network. As a result OFTEL did not consider there had been a licence breach.

Case Example 10. Alleged linked sales - Behaviour modified without the need for enforcement action

Trade practice complained about: It was alleged that BT increased significantly the line rental for a particular service but largely offset this increase by introducing an inclusive call allowance of £150 per year which could be offset against the cost of calls. It was alleged that this linking of sales was anti-competitive.

Alleged effect on market: Competition in the market for the provision of calls could have been reduced because competitors could not attract customers by offering call services at a competitive price.

Potential effect on customers: Customers could take advantage of lower calls in the short term but by reducing competition in this way the dominant operator would eventually be free to charge higher prices than would be the case in a competitive market.

What OFTEL did: The case was opened in February 1997 and OFTEL asked BT for their justification for introducing the new linked tariff. After assessing BT's reasons for the introduction of the inclusive credit allowance OFTEL asked BT to introduce an alternative tariff which removed the anti-competitive effect. OFTEL's view is that the structure of the alternative tariffs which are now available are not anti-competitive and are therefore compatible with the conditions in BT's licence.

Case Example 11. Alleged cross-subsidy - No breach of licence found

Trade practice complained about: It was alleged that BT were cross-subsidising a service from another part of their business so that they could charge unfairly low predatory prices.

Alleged effect on market: Competitors could be driven from the market as they cannot compete with such unfairly low prices.

Potential effect on customers: Although in the short term customers could take advantage of the lower prices on offer, in the longer term, with no effective competition, BT would have been able to charge higher prices for the service.

What OFTEL did: OFTEL's investigations into the complaint found no cross-subsidy of the BT service as the revenues and costs were correctly apportioned.

Case Example 12. Alleged withholding of technical information - Enforcement action taken

Trade practice complained about: BT launched a service which offered the customer extra services using ordinary telephone lines but they unfairly withheld certain information from competitors about the service.

Alleged effect on market: Without having access to information they could reasonably expect, potential competitors would be unable to set up an alternative service.

Potential effect on customers: Customers would be denied choice and without effective competition the dominant operator would be free to charge higher prices than would be the case in a competitive market.

What OFTEL did: The Director General determined that BT had unfairly favoured their own business over competitors' businesses and required BT to give certain undertakings, including introducing a comprehensive communications programme to raise awareness of the service within the industry.

Part 1: OFTEL do important work to counter anti-competitive behaviour in the telecommunications industry

Telecommunications play a vital role in all economically developed societies

1.1 The telecommunications industry makes an important contribution to the United Kingdom economy, having annual revenues of some £22 billion. In the United Kingdom virtually all businesses and 93 per cent of households have a telephone.

Since 1992 the number of companies providing telecommunications services in the United Kingdom has grown rapidly

1.2 The Telecommunications Act, 1984, which provided for British Telecommunications (BT) to be privatised, requires any person running a telecommunications system to be licensed. The licences are granted by the Secretary of State for Trade and Industry.

1.3 At privatisation in 1984, three companies - BT and Mercury Communications throughout the United Kingdom and Kingston Communications in Hull - were licensed to operate traditional public telephone networks. Two companies - Cellnet and Vodafone - were licensed to operate mobile networks. In 1991, the Government opened up the domestic market to competition and the Department of Trade and Industry began to issue more licences to operators to run telecommunications systems. In 1996, international services from the United Kingdom - which had remained in the hands of BT and Mercury - were also opened up to competition. Today, over 60 companies between them have more than 200 licences to operate national and local networks in the United Kingdom and to provide gateways to the international telephone markets. Figure 5 overleaf shows the annual income of the five largest companies.

Annual revenues of the five largest companies in the United Kingdom telecommunications market

Figure 5

Company	Annual revenue from the United Kingdom telecommunications market ¹
	£ millions
BT	14,600
Cable and Wireless ²	2,000
Vodafone	1,700
Orange	475
Telewest	300

Notes: 1. Revenues are for the year 1996 or 1996-97

2. Mercury Communications are part of Cable and Wireless

This figure shows that BT remain by far the largest provider of telecommunications services in the United Kingdom.

Source: OFTEL

1.4 The telecommunications industry is not a single market but has several separate components with different sets of companies operating in each part. The market can be broadly divided into:

- **network services:** the provision of telephony services direct to residential or business customers via the operators' own national or local networks;
- **value added services:** the provision of additional services over the network, such as data transmission, on-line information services and electronic mail; and,
- **telecommunications equipment:** the manufacture and sale of equipment, such as telephones, answerphones and fax machines.

1.5 Whilst facing more competition than ever before, BT still retain a significant market share in many parts of the telecommunications market. For example, BT continue to supply 80 per cent of telephone services to homes. BT are still the only national operator competing throughout the entire telecommunications market.

OFTEL are the principal regulator of the telecommunications industry in the United Kingdom

1.6 The Telecommunications Act 1984 established OFTEL as the regulator for the telecommunications industry. Under the Act, the Director General of Telecommunications - who is the head of OFTEL - has a duty to maintain and promote effective competition in the telecommunications industry and to promote the interests of consumers in respect of the prices charged for and the quality and choice of telecommunications services and apparatus.

1.7 Anti-competitive behaviour is dealt with in the United Kingdom under the Fair Trading Act 1973 and the Competition Act 1980. The Director General of Fair Trading is responsible for administering the relevant provisions of these Acts. The Telecommunications Act 1984 gives the Director General of Telecommunications concurrent powers with the Director General of Fair Trading under the Fair Trading Act and the Competition Act in relation to telecommunications services and the supply of telecommunications equipment.

1.8 OFTEL have 160 staff costing £6 million a year and their total annual running costs are £10 million. They are organised into 10 separate directorates and branches (Appendix 1). The core of competition casework and policy is led by the competition and fair trading directorate, accounting for some 20 staff. Several other directorates and branches have also increasingly focused on competition issues, under the guidance of the competition and fair trading directorate.

1.9 OFTEL regulate the industry through monitoring and enforcing conditions in the licences of telecommunications operators. The licences set out what a company can and cannot do. They are broadly similar, although BT's licence is the most extensive and, since BT have considerable market power across a range of markets, is the only one to include controls over the prices which domestic consumers may be charged. The Act includes provisions for OFTEL to modify licence conditions where they consider this necessary.

OFTEL are seeking to move away from detailed price control to become a competition authority for the telecommunications industry

1.10 BT continue to have considerable market power in national and local networks in the United Kingdom. Their networks are used at some stage to deliver most calls and connection to BT's networks represents a very significant proportion of the cost of most calls. Regulation of charges between BT and other telecommunications operators has therefore been a major area of OFTEL's work.

1.11 Up to October 1997, OFTEL determined such charges for all BT's standard network services. To support this measure OFTEL secured a modification to BT's licence requiring them to produce separate accounts for their network and non-network businesses. This shows the necessary payments between the two businesses in order to demonstrate that BT are not favouring their own business. From October 1997, a new framework of controls for such charges between BT and other telecommunications operators has been introduced to reflect the increasing competition in the market for network services. The new framework enables BT to set their own charges subject to controls which vary according to the competitiveness of the market.

1.12 In 1995 OFTEL completed a review to determine the nature of their price controls over BT's business. They concluded that competition in some parts of the telecommunications market was so strong that price controls were no longer necessary in those areas, provided that anti-competitive behaviour was adequately controlled. OFTEL therefore proposed to move away from regulating the industry through price controls and licence conditions to become a competition authority which monitors the market and acts to deter and stop anti-competitive behaviour.

1.13 Since August 1997, price controls have covered only BT's smaller business and domestic customers, representing around 24 per cent of BT's turnover. Previously price controls covered 64 per cent of BT's turnover. Provided that anti-competitive behaviour is under control, OFTEL intend to withdraw all the remaining price controls by 2001.

Where a supplier has considerable market power in any given market there is a risk that it may act anti-competitively

1.14 Having considerable market power in itself does not indicate that a supplier is behaving anti-competitively. It is the abuse of such a position and the effects that it has on distorting the market that may be anti-competitive. Such an abuse of market power might, for example, take the form of a supplier seeking to establish barriers to entry into the market, such as exclusive dealing arrangements with manufacturers, or to drive out those who are trying to get a foothold in the market. Typically, a supplier with considerable market power and the resources to withstand a period of loss-making might lower prices in the short run, at or below cost, in those parts of the market where it faced competition for services. The supplier would then raise prices again when the threat of competition had receded, thereby recouping its losses. Were such anti-competitive behaviour to go unchecked, consumers would eventually have to pay higher prices, would receive a lower quality of service and would have less choice.

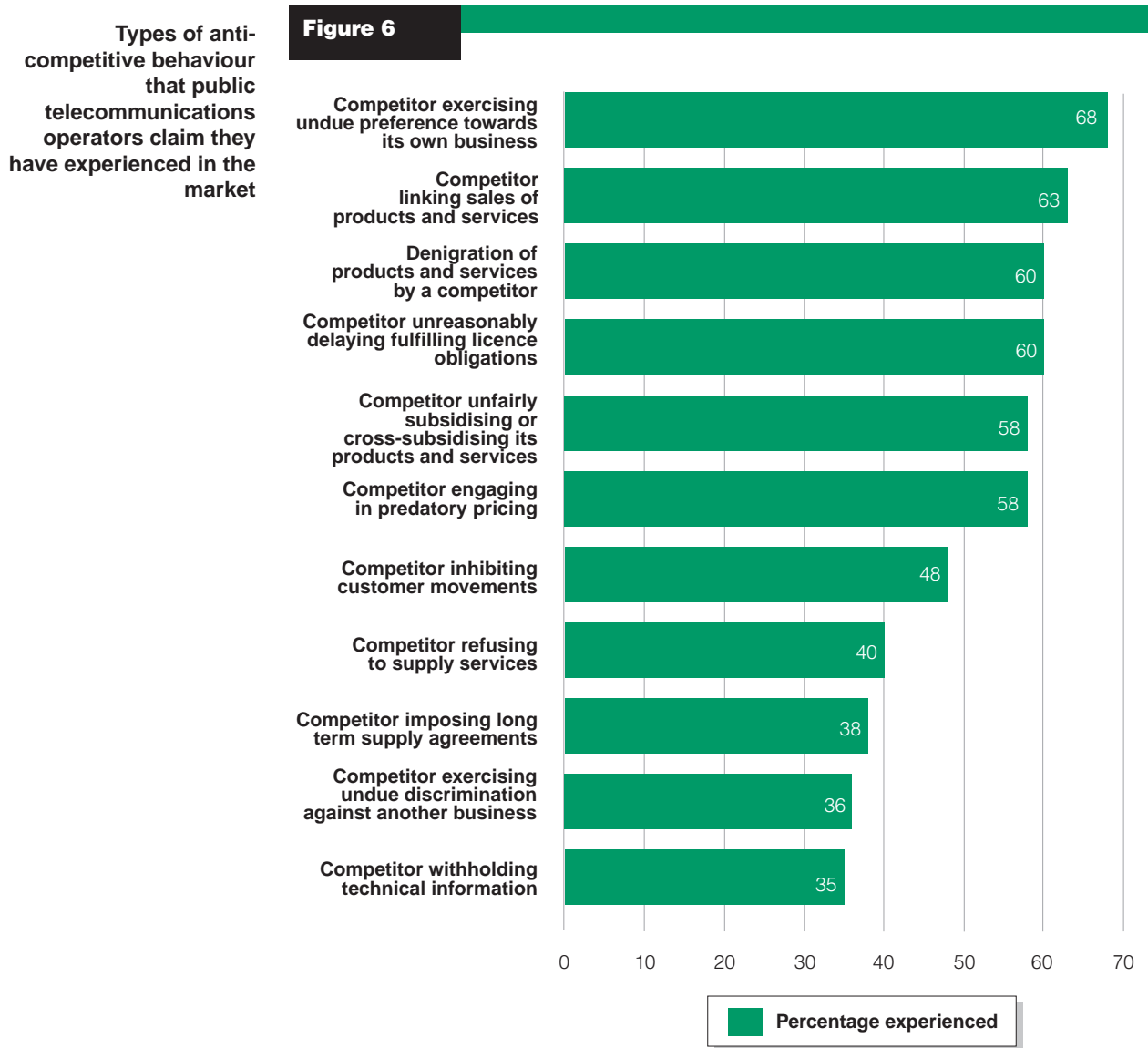
1.15 On our behalf NOP contacted 42 public telecommunications operators who are licensed to operate national and local networks in the United Kingdom or provide international gateways to networks in other countries. Respondents were asked if they had experienced any of the 11 types of anti-competitive behaviour listed in Figure 6 (overleaf). All but six claimed that they had experienced some form of anti-competitive behaviour. Appendix 2 explains the different types of anti-competitive behaviour that operators claimed they had experienced.

1.16 Having discussed our results with OFTEL, we classified the types of anti-competitive behaviour identified in the survey into four main categories (Figure 7 overleaf):

- **Undue preference or undue discrimination** - a telecommunications operator abusing its market power by showing undue preference to its own business or applying undue discrimination against a competitor's business. Undue preference and undue discrimination are particularly important issues because BT have considerable market power in national and local networks in the United Kingdom and compete with other companies in the provision of services over these networks.
- **Linked sales** - a telecommunications operator abusing its market power by making the sale of one product conditional on the purchase of another.

- **Unfair subsidies or cross-subsidies and predatory pricing** - a telecommunications operator abusing its market power by subsidising or cross-subsidising a part of its business with profits made elsewhere or providing goods or services at prices which do not cover costs.
- **Withholding of technical information** - a telecommunications operator abusing its market power by withholding technical information from a competitor who requires it for its operations.

Examples of cases in each category are shown on pages 9 to 12.



Source: NOP survey for the National Audit Office

This figure shows that public telecommunications operators claim that they have experienced a wide range of anti-competitive behaviour.

Figure 7

Categorisation of the types of anti-competitive behaviour identified in our survey

Undue preference or undue discrimination	Linked sales	Unfair subsidies or cross-subsidies and predatory pricing	Withholding of technical information
Exercising undue preference towards own business	Engagement in linked sales of products and services	Subsidisation or cross-subsidisation of products or services	Withholding of technical information
Denigration of a competitor's products or services	Refusal to supply services	Predatory pricing	
Inhibiting customer movements			
Undue discrimination against a competitor's business			
Unreasonable delays in fulfilling licence obligations			
Imposing long term supply agreements			

This figure shows how we categorised the types of anti-competitive behaviour identified in our survey of the telecommunications industry.

Source: National Audit Office and OFTEL

OFTEL have a duty to investigate complaints of anti-competitive behaviour

1.17 The 1984 Telecommunications Act gives the Director General of Telecommunications powers to deal with anti-competitive behaviour by enforcing specific conditions in the licences of telecommunications operators. For example, condition 17 of BT's licence prohibits BT from showing undue preference or undue discrimination, for instance in setting prices, towards particular customers or classes of customers. Condition 18 of BT's licence prohibits them from unfairly cross-subsidising different parts of their business, for example, the supply and production of telecommunications apparatus.

1.18 OFTEL have a duty under the 1984 Act to investigate all complaints. They also seek to counter anti-competitive behaviour on their own initiative by investigating their own concerns about features and practices in the market. Most of this investigative work is carried out by OFTEL's competition and fair trading directorate (see Appendix 1).

1.19 Between January 1995 and December 1997, OFTEL opened and completed 217 investigations into particular practices which were allegedly having an anti-competitive effect on the market. Some 195 (90 per cent) of OFTEL's investigations were initiated following complaints received from companies in the industry. The remaining 22 investigations were conducted on OFTEL's own initiative (for example, Case Example 5). The proportion of own initiative investigations grew over the period.

1.20 In 183 (84 per cent) of the investigations, BT were the company complained about. The other 34 cases involved other companies in the industry (for example, Case Examples 3 and 9). Given BT's considerable market power in this period, it is not surprising that most of the investigations arose from complaints by other companies against BT. Where a company has considerable market power, there is also a risk that some competitors may blame their own lack of commercial success on the abuse of such power by that company. As the market is developing, however, to include other large companies, complaints are not exclusively about BT. In evidence to the Trade and Industry Select Committee in January 1997, the Director General of Telecommunications stressed that complaints about anti-competitive behaviour were not "BT's fault or the industry structure's fault" but arose out of the normal interplay of companies in a market that is in transition from a monopoly to full competitiveness.

1.21 Figure 8 shows the outcome of OFTEL's investigations of alleged anti-competitive behaviour. Only 17 investigations (8 per cent) led to OFTEL taking formal enforcement action against the company being complained about. However, in 41 cases (19 per cent) the company investigated changed its behaviour without the need for enforcement action. In 21 cases (10 per cent) the parties reached agreement between themselves prompted by OFTEL's investigation. And in 116 cases (53 per cent) OFTEL found no licence breach, nor was it a matter to be dealt with under general competition law. The remaining 22 cases (10 per cent) were terminated because the complainant did not provide the information required to pursue the case, or because the matter fell within the jurisdiction of another competent authority.

1.22 We also analysed outcomes for each of the different categories of anti-competitive behaviour in paragraph 1.16. We found that there was no significant difference in outcomes between the categories.

Figure 8

The outcome of OFTEL's investigations into anti-competitive behaviour, 1995 - 97, by category of anti-competitive behaviour

Outcome of investigation	Number of investigations	Category of anti-competitive behaviour investigated			
		Undue preference or undue discrimination	Linked sales	Unfair subsidies and predatory pricing	Withholding of technical information
		% of cases	% of cases	% of cases	% of cases
Complainant unwilling or unable to provide information required to pursue complaint with OFTEL	15	73	7	13	7
Investigation revealed that the matter fell within the jurisdiction of another competent authority	7	72	14	0	14
No breach of licence nor a matter to be dealt with under general competition law	116	77	22	15	2
Parties reached agreement between themselves prompted by OFTEL's investigation	21	82	14	0	4
Acceptable change of behaviour without the need for enforcement action	41	69	22	7	2
Formal enforcement action taken by OFTEL	17	89	5	6	0
Total	217	78	19	10	3

Note: Some investigations focused on more than one category of behaviour and therefore some of the figures add up to more than 100%.

This figure shows that there is no significant variation in outcomes between the different categories of anti-competitive behaviour investigated.

Source: National Audit Office

1.23 If, as a result of an investigation by OFTEL, the Director General is satisfied that a licence condition has been breached, he has a duty to take enforcement action against the offending licensee. The Director General can make orders, directions and determinations requiring a licensee to take or refrain from taking a particular action (Figure 9 overleaf). However, he has no direct sanctions, such as financial penalties or injunctions.

The Director General's powers to deal with anti-competitive behaviour

Figure 9

Orders

- A *provisional order* can be made if it appears to the Director General that the licensee is contravening and is likely again to contravene a condition of its licence. A provisional order will lapse after two months unless confirmed.
- A *final order* is issued if the Director General is satisfied that there has been a contravention which is likely to recur or continue. He must give 28 days' notice before issuing a final order.

A third party who is harmed by breach of a provisional or final order may enforce it directly through the courts, either by application for an injunction or by seeking damages to recover the loss caused.

Directions

The Director General directs the licensee to take, or refrain from taking, certain action.

Determinations

The Director General can make determinations to resolve disagreements between licence holders. They usually relate to disagreements about charges made by one operator against another, typically over interconnection. Determinations may be made after an investigation by OFTEL following a complaint by one of the operators.

Source: OFTEL

This figure shows that the Director General of Telecommunications can make orders, directions and determinations requiring licensees to take or refrain from taking a particular action.

1.24 Although the Director General has powers to deal with anti-competitive behaviour using general competition legislation, in practice OFTEL have regarded it as being more appropriate to enforce licence conditions designed specifically for this purpose. This is because the use of general competition legislation usually requires OFTEL to refer cases to the Monopolies and Mergers Commission, which is likely to be a much lengthier and more expensive process than enforcing licence conditions.

This Report examines how well OFTEL counter anti-competitive behaviour in the telecommunications industry

1.25 Our investigation covered:

- the steps OFTEL have taken to strengthen their existing arrangements for identifying and dealing with anti-competitive behaviour (Part 2); and,
- the more effective ways of regulating anti-competitive behaviour sought by OFTEL (Part 3).

Details of our previous reports on OFTEL and the regulators of privatised utilities are at Appendix 3.

1.26 Our approach was to:

■ **review the arrangements for handling investigations**

We examined all investigations that OFTEL commenced in 1995 and 1996. We were supported by an advisory panel made up of Mr Zoltan Biro (London Economics), Dr Martin Howe (formerly Director of Competition Policy at the Office of Fair Trading) and Mr Christopher Watson (Simmons and Simmons). The panel reviewed 18 cases selected from cases started in 1995 and 1996 which exhibited complex features. The advisory panel provided an independent qualitative assessment of how well OFTEL handled these investigations. We followed up the expert panel's review with an examination of a sample of 20 cases opened in 1997 to determine to what extent OFTEL had already taken action on the problems identified in the 1995 and 1996 cases.

The main findings from our examination of 1995 and 1996 cases are at Appendix 4; the results of the expert panel's review are at Appendix 5; and, the main findings from our examination of 1997 cases are at Appendix 6.

■ **commission a survey of companies in the telecommunications market**

We commissioned NOP to conduct a survey of four groups:

- **Public Telecommunications Operators:** This group consists of 60 companies that between them hold some 200 licences to operate national, local and international networks in the United Kingdom.
- **Independent Service Providers:** This group comprises companies who provide advanced telecommunications services to customers but are not themselves public telecommunications operators. They provide specialist services that complement and compete with the services provided by the public telecommunications operators over the operators' networks. Examples are companies who offer internet services, data transmission and enhancement, and electronic mail, and companies who buy excess capacity from public telecommunications operators so as to resell international calls.

This area of the market is hard to define and contains many small companies which are at the forefront of developing telecommunications and broadcasting technology. OFTEL regard this part of the market as an important area for future growth in competition.

- ❑ **Telecommunications consultants:** These companies or individuals seek to provide independent specialist advice to business users who want to purchase telecommunications goods and services.

- ❑ **Manufacturers of telecommunications equipment:** These companies manufacture telecommunications equipment, such as telephone handsets, fax machines and switching gear.

The main findings of the NOP survey are at Appendix 7.

1.27 We supported this work by interviewing OFTEL staff. A summary of our main findings from these interviews is at Appendix 8. We also met companies in the telecommunications market, industry associations and other interested parties (Figure 10).

**Organisations contacted
by the National Audit
Office**

Figure 10



British Telecommunications
Cable and Wireless Communications
The Cable Communications Association
IBM
Ionica
Merrill
Lynch
Office of Fair Trading
Other Licensed Operators Group
Telecommunications Industry Association
The Telecommunications Managers Association
Telecommunications Users' Association
Union Bank of Switzerland
Vodafone

1.28 In the examination we looked for evidence to assess the effectiveness of how OFTEL counter anti-competitive behaviour. To do this, we assessed OFTEL's arrangements for dealing with complaints from the industry about anti-competitive behaviour and sought the views of companies within the telecommunications industry about OFTEL's effectiveness.

Part 2: OFTEL have developed better arrangements for applying their existing powers in identifying and dealing with anti-competitive behaviour

Consultation with the telecommunications industry in 1994 revealed dissatisfaction with OFTEL's effectiveness in countering anti-competitive behaviour

2.1 In December 1994 OFTEL published the document, "A Framework for Effective Competition". This asked for comments on their proposal to move away from controls on prices and prescriptive licence conditions towards becoming an industry specific competition authority which would monitor the market and act to deter and stop anti-competitive behaviour. OFTEL felt that such a change would be beneficial provided that the growth in competition continued and effective powers were in place to control anti-competitive behaviour. However, responses to the consultation document showed widespread dissatisfaction with the effectiveness of OFTEL's performance in dealing with anti-competitive behaviour. In particular, respondents were concerned about the time it took OFTEL to take remedial action once they had been notified of an alleged abuse.

Since 1995 OFTEL have sought to strengthen their arrangements for countering anti-competitive behaviour

2.2 OFTEL agreed that their performance in dealing with anti-competitive behaviour could be improved. Since 1995 they have sought to increase the resources allocated to dealing with anti-competitive behaviour, strengthen their internal procedures and analysis, and establish and maintain more effective communication with the industry.

OFTEL have established a specialist directorate to focus attention on anti-competitive behaviour and to develop a co-ordinated approach to handling investigations

2.3 In March 1995 OFTEL established a specialist branch, now the competition and fair trading directorate, which was given the specific role of handling OFTEL's investigations into anti-competitive behaviour (see Appendix 1). The directorate was also given the remit to develop and make more effective use of OFTEL's powers to act against anti-competitive behaviour.

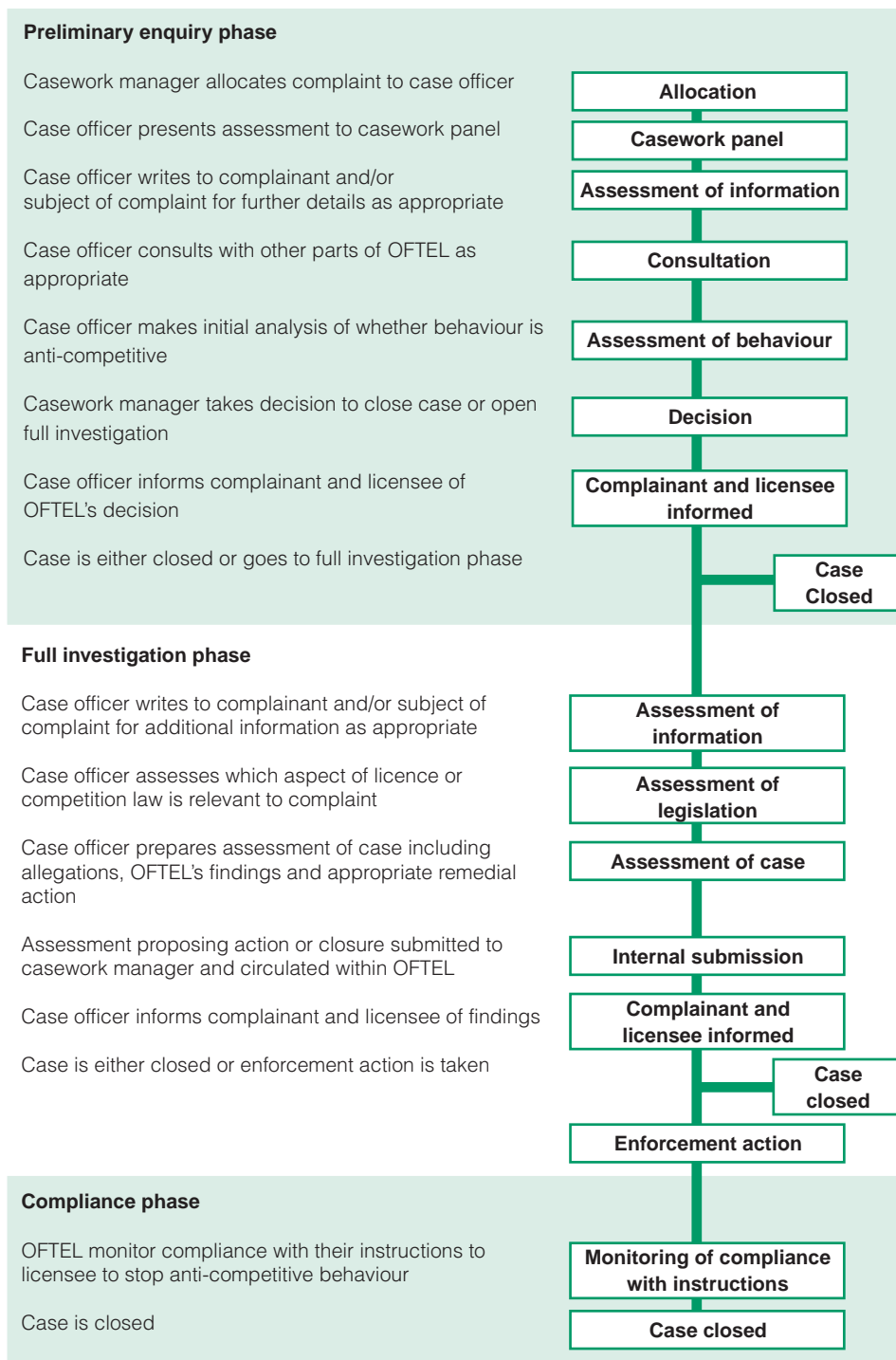
2.4 Until recently, the competition and fair trading directorate drew in all complaints received by OFTEL about anti-competitive behaviour and took the lead in progressing them. OFTEL see the directorate continuing to handle most complaints. But since June 1997 other directorates and branches within OFTEL with particular expertise in areas such as interconnection, broadcasting, cable and satellite, have, under the guidance of the competition and fair trading directorate, dealt with complaints which relate to those particular subjects. The competition and fair trading directorate will continue to have responsibility for monitoring and reporting progress in all cases.

2.5 Figure 11 overleaf shows the different stages of an OFTEL investigation. Each complaint goes through a preliminary enquiry phase to determine whether it is worth investigating further. If merited, a full investigation then follows to determine whether enforcement action is necessary and what form this should take. Finally, if enforcement action is deemed necessary, there is a compliance phase in which OFTEL monitor the licensee's compliance with their instructions to stop behaving anti-competitively.

2.6 Investigations into allegations of anti-competitive behaviour are normally given to case officers to progress. The case officers are responsible for overseeing an investigation from start to finish, including handling most of the discussion and correspondence with any complainants. Each case has an assigned case manager who supports the case officer and provides guidance. With this support and guidance, the case officer makes an initial analysis of the issues relating to a case and proposes how the complaint should be handled.

Stages in the handling of complaints

Figure 11



This figure shows that there are three main phases in the handling by OFTEL of complaints of anti-competitive behaviour.

Source: OFTEL

OFTEL have recruited more staff with relevant skills to work on countering anti-competitive behaviour but turnover of staff has been a problem

2.7 Between April 1997 and March 1998 OFTEL increased from 11 to 18 the number of staff working on anti-competitive behaviour in the competition and fair trading directorate. In addition 23 staff working within OFTEL's other directorates and branches now deal with competition issues.

2.8 In line with their wider recruitment policy, OFTEL have since 1995 moved away from appointing typically generalist civil servants on two or three year secondments to the competition and fair trading directorate and now issue open invitations to fill posts so as to appoint staff who have relevant skills in telecommunications, competition law, market analysis or show an aptitude for conducting investigative work.

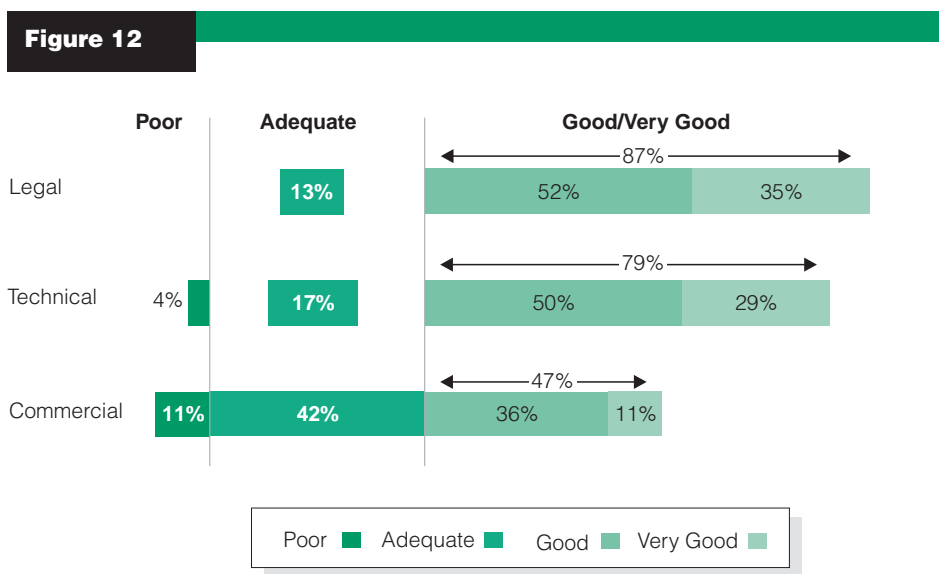
2.9 Because most OFTEL staff have been on two or three year secondments or contracts there has been a regular turnover of staff in the competition and fair trading directorate. The changes in staff created a risk to the effectiveness of the directorate through the periodic loss of specialist skills, knowledge and experience. Changes in staff also created a risk to the continuity of handling cases and contributed to delay in investigating some complaints of anti-competitive behaviour. In two out of the eighteen cases from 1995 and 1996 put to our advisory panel, the panel considered that the turnover in case officers had contributed to the delay in progressing cases.

2.10 OFTEL have examined ways of retaining staff and they have from 1997 begun to introduce fixed term contracts of longer than the maximum three years previously offered, and permanent contracts. This should provide a better defined career structure for staff and help to maintain skills, knowledge and experience within OFTEL. To minimise the impact of changes in staff on the progress of individual cases the competition and fair trading directorate have now introduced a system whereby each member of staff is paired with another who is fully aware of their workload and can therefore provide reliable cover.

The industry has a high regard for OFTEL’s legal and technical expertise but is less positive about their commercial awareness

2.11 NOP asked public telecommunications operators about OFTEL’s legal, technical and commercial expertise (Figure 12). Over three-quarters of those interviewed who said they had dealt with OFTEL regarded OFTEL’s legal and technical expertise as either good or very good. However, the industry were less positive about OFTEL’s commercial skills. A number of telecommunications companies we spoke to during our examination commented on what they perceived as the lack of practical experience that OFTEL staff have had within the commercial sector of the industry. They felt that OFTEL staff did not always appreciate the commercial pressures that businesses were under and the consequent need for complaints to be resolved as quickly as possible.

Views of public telecommunications operators on OFTEL’s expertise in handling complaints of anti-competitive behaviour



Note: Excludes 'don't knows' (1 respondent on legal expertise question, 4 on technical expertise question and 4 on commercial expertise question).

Source: NOP survey for the National Audit Office

This figure shows that over three-quarters of public telecommunications operators regard OFTEL’s legal and technical expertise as either good or very good but less than half rate OFTEL’s commercial skills this highly.

2.12 OFTEL told us that they recognise the need for their staff to understand the commercial pressures experienced by businesses in the industry. They consider that the companies’ perception that they do not always act speedily enough is due to the conflict between complainants’ demands for swift action and OFTEL’s need

to conduct a thorough investigation into the issues and, if necessary, justify taking enforcement action which is subject to judicial review. OFTEL have introduced arrangements whereby senior staff judge the urgency required for an investigation by assessing the impact the behaviour will have on companies and customers.

OFTEL have developed an improved training programme for staff working on countering anti-competitive behaviour

2.13 The work of the competition and fair trading directorate is demanding and complex. Case officers told us that it can take up to a year before they have the appropriate skills and knowledge to handle cases. OFTEL sought to analyse the training needs of the directorate and appointed the management consultants, Ashridge, to support them. During 1996 OFTEL introduced a new programme of training, which, together with a new induction programme, focused on the legal, economic and technical aspects of the work as well as the procedures for handling cases. OFTEL staff considered that the training they received was well focused.

Staff investigating anti-competitive behaviour are given good support from senior management in OFTEL

2.14 The Director General places great importance on OFTEL's regulation of anti-competitive behaviour. He holds a monthly meeting with case officers, directorate and branch managers and representatives from the specialist and technical areas to discuss progress on cases. OFTEL staff told us that these meetings brought home to them the importance the Director General gives to OFTEL's work in this area.

2.15 The meetings were on the whole well received by those OFTEL staff attending them. The Director General was able to provide valuable input about competition issues generally and guidance on how to deal with complex issues which had arisen in particular investigations. The meetings are not the only channel open to secure the views of senior management in OFTEL. Where appropriate, reference to the Director General and the Deputy Director General can be made at any time within the course of an investigation.

OFTEL are taking action to ensure that specialist economics and legal input to cases is more timely

2.16 Case officers are supported by a supervisor, specialists within the directorate, and specialists in other directorates and branches within OFTEL. In the course of an investigation case officers usually consult OFTEL's economics and legal branches and these two branches have dedicated members of staff who specialise in competition issues. Depending on the nature of the investigation other technical and specialist directorates and branches may also be consulted.

2.17 Our advisory panel considered that it was important for OFTEL to secure as early as possible a detailed analysis of the potential economic effects of the behaviour which was the subject of a complaint. From their review of a sample of cases in 1995 and 1996 which exhibited complex features, they found that the advice from the economics and legal branches, either through internal memorandums or meetings with case officers, was typically sound and significant in steering investigations of complaints. However, they considered that in twelve of the eighteen cases they examined OFTEL should have undertaken at an earlier stage a more detailed analysis of the potential economic effects of the actions being complained of. Such an approach would have allowed OFTEL to be more specific when making requests for documentation from the complainant and the company which had been the subject of the complaint.

2.18 OFTEL have taken a number of steps since 1996 to improve the guidance given to case officers to ensure that they analyse competition issues at an early stage. OFTEL have also introduced new arrangements from June 1997 under which new cases are put to a weekly casework panel made up of case officers, casework supervisors and representatives from the legal and economics branches to provide an early steer on the handling of investigations. Casework panel meetings were previously held only monthly and only selected, often complex, cases were discussed. Our review of investigations into complaints opened in 1997 confirmed that more recent investigations have been supported by a detailed early analysis of the issues and that requests for information have been more focused.

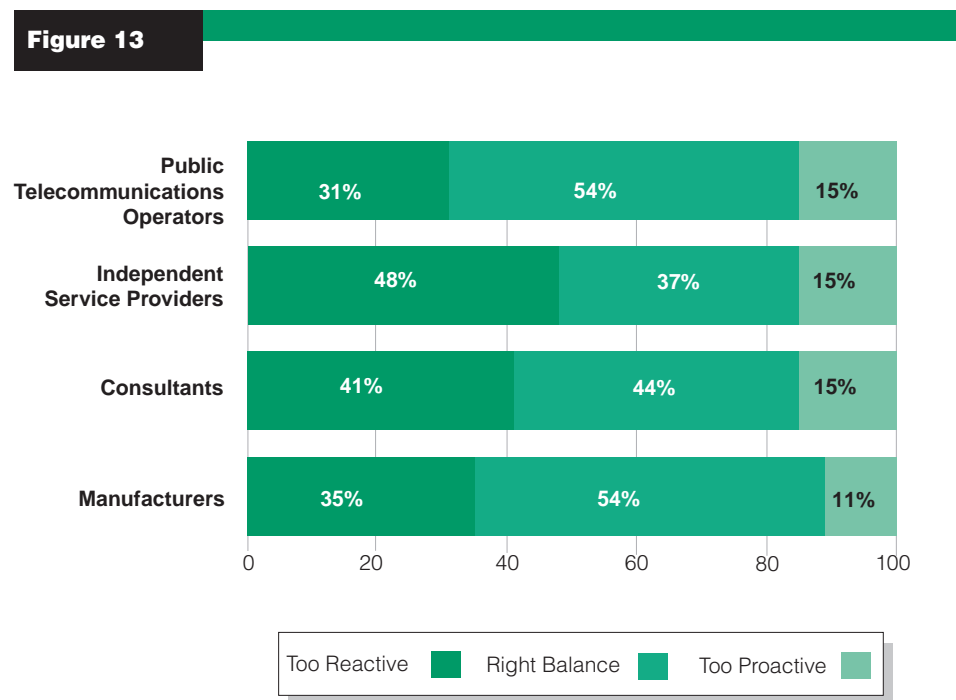
2.19 Our advisory panel also found evidence of delays in case officers receiving advice and guidance from other directorates and branches in OFTEL. This view was confirmed by our own examination of investigations opened in 1995 and 1996. OFTEL are addressing this problem in a number of ways. Case officers are

now required to set firm deadlines when requesting information from other directorates and branches, a lawyer and an economist are now dedicated to dealing with competition casework, and since 1995 the size of the legal branch has been increased from five to nine staff.

OFTEL now undertake more investigations on their own initiative and monitor the compliance of the industry with the directions and orders they issue

2.20 NOP asked the industry whether OFTEL had got the balance right between being reactive and proactive in countering anti-competitive behaviour (Figure 13). Around half of all respondents considered that OFTEL had got this balance right but a significant minority, including 48 per cent of independent service providers, regarded OFTEL as being too reactive.

Industry views on the balance of OFTEL's approach in dealing with anti-competitive behaviour



Note: Excludes 'don't knows' (3 public telecommunications operators, 15 independent service providers, 15 consultants and 17 manufacturers).

Source: NOP survey for the National Audit Office

This figure shows that around half of all respondents consider that OFTEL have got the balance right in their approach to anti-competitive behaviour. But a significant minority regarded OFTEL as being too reactive.

2.21 Since 1995 OFTEL have increased their proactive work against anti-competitive behaviour. This takes the form of:

- scrutiny of tariff notifications and monitoring of marketing and product trials to address any problems before they become the subject of complaints;
- investigations into potential policy and generic competition issues that have been identified from other related complaints, formal and informal contacts with the industry and OFTEL's own monitoring of the market; and,
- OFTEL-wide projects that examine competition issues more generally, for example, interconnection between networks and the convergence of the broadcasting and telecommunications markets.

Between 1995 and 1997 around 10 per cent of investigations dealt with by the competition and fair trading directorate were commenced on OFTEL's own initiative. Such investigations currently make up around 20 per cent of their workload.

2.22 Case officers also analyse information produced by telecommunications companies who are required to comply with the instructions contained in directions or orders issued by OFTEL. Where appropriate this includes the examination of financial information, business and marketing plans and contracts. The competition and fair trading directorate have assigned members of staff, including qualified accountants, to provide support to case officers who are monitoring cases for compliance. At December 1997 OFTEL were monitoring 14 cases for compliance.

OFTEL have improved their arrangements for assessing their own performance

OFTEL have set themselves standards on how investigations should be handled

2.23 In April 1997 OFTEL introduced a manual of procedures for competition casework. The manual provides detailed guidance on how cases should be handled and codifies many of the practices that have been developed by the competition and fair trading directorate for use across OFTEL. The Office of Fair

Trading's internal audit branch, who provide an internal audit service for OFTEL, have reviewed the manual and approved it as a basis for assessing OFTEL's performance. The internal auditors will also test periodically the compliance of cases with the guidance.

2.24 The manual of procedures requires case officers generally to make formal demands for information using the relevant licence condition designed for that purpose. It also requires case officers to set deadlines for the receipt of information from all parties. The need for OFTEL to establish such procedures was confirmed by our examination of investigations undertaken by OFTEL in 1995 and 1996 and our advisory panel's examination of 18 cases from the same period. We found that the company which had been complained about was frequently slow to submit information to OFTEL and often provided only the bare minimum of information requested. We also noted that some complainants were slow in providing further information when requested by OFTEL. Our advisory panel believed that OFTEL could make more use of their formal powers when requesting information from the company complained about. Our review of a sample of investigations undertaken by OFTEL in 1997 confirmed that OFTEL were using their formal information gathering powers as set out in telecommunications licences in almost every case and were setting deadlines for the receipt of the information. We found no examples in our sample of the company which was the subject of the complaint missing deadlines for the provision of information to OFTEL.

2.25 While OFTEL have set up an arrangement for internal auditors to test periodically the compliance of cases with their manual of procedures, there is no independent system of review to assess the quality of OFTEL's decisions. We consider that there is scope for more regular external scrutiny of OFTEL's investigations into anti-competitive behaviour and we recommend that OFTEL consider using for this purpose the Advisory Body on Fair Trading in Telecommunications, which was set up to provide an independent assessment of cases brought under the new fair trading condition (see paragraph 3.11), or a similar external review.

2.26 In late 1996, OFTEL introduced a satisfaction survey which they send to complainants when the investigation of their complaint has been closed. Whilst the survey has so far provided generally positive feedback, the response rate, at eighteen per cent, is low and it is difficult to determine any trends from it.

OFTEL have improved their performance in meeting targets for case handling

2.27 From June 1996 OFTEL introduced performance targets against which to report their performance in completing casework. A key feature of these targets is a maximum 6 week preliminary enquiry stage in which case officers gather the necessary information to make a decision as to whether or not to proceed to a full investigation. If there are no competition issues the case is closed. OFTEL's target is to complete 90 per cent of preliminary enquiries within the 6 week period. If a decision is made to go on to a full investigation a further minimum performance target is set for the completion of the full investigation. This was initially set at completing 75 per cent of full investigations within 6 months (26 weeks) and all within one year, but from July 1997 this target was stiffened to completing 75 per cent of full investigations within 3 months (13 weeks) and all within 6 months (26 weeks).

2.28 Complaints are not all of the same complexity or urgency. To address the different needs of investigations OFTEL have since June 1996 also introduced specific targets for each case. These internal targets are usually more demanding and detailed than the published targets.

2.29 There will be circumstances where an investigation into a complaint may legitimately take much longer than the minimum performance targets set. For example, certain types of anti-competitive behaviour such as cross-subsidies may involve complex issues which require data to be collected and analysed over time. There will also be some complaints that need a quick response from OFTEL. OFTEL have fast track arrangements for dealing with such complaints and we noted good examples of complaints received in 1997 being urgently investigated and concluded.

2.30 Figure 14 shows OFTEL's performance in 1997 against their targets. For the six months to the end of June 1997, OFTEL completed 73 per cent of preliminary enquiries within 6 weeks, against a target of 90 per cent, and 78 per cent of full investigations within 26 weeks, compared with their target of 75 per cent. For the final 6 months of 1997, OFTEL completed 95 per cent of preliminary enquiries within 6 weeks, thus beating their 90 per cent target.

2.31 To determine whether the introduction of targets in June 1996 resulted in an improvement in OFTEL's speed of handling complaints, we compared OFTEL's performance before and after this date (Figure 15). Because those cases which did not proceed to a full investigation were not separately identified before June 1996

Figure 14

OFTEL's performance against their targets for the speed of handling cases

	Target	Outturn	
		Cases opened between	
		1 January and 30 June 1997	1 July and 31 December 1997
Preliminary enquiries completed within 6 weeks	90	73	95
Full investigations completed within 26 weeks	75	78	not yet known
Full investigations completed within 52 weeks	100	100	not yet known

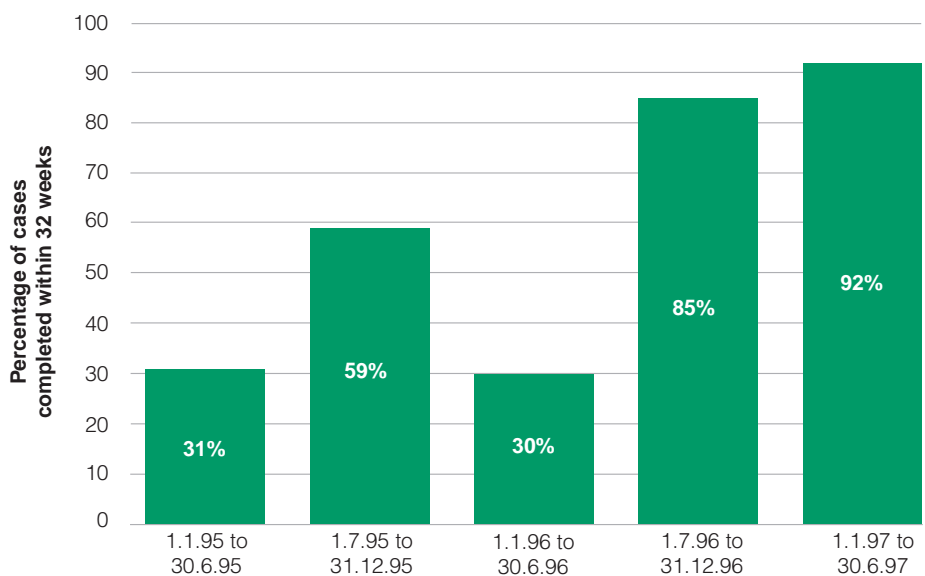
Note: Information on outturn is not available before 1 January 1997.

This figure shows that in the six months to 30 June 1997 OFTEL met their target to complete 75 per cent of full investigations within 26 weeks. Although in the first six months of 1997 they missed their target to complete 90 per cent of preliminary enquiries within six weeks, they met this target in the final six months.

Source: National Audit Office analysis of OFTEL data.

OFTEL's speed in handling cases before and after June 1996

Figure 15



Note: The above data cover all investigations, including preliminary enquiries which did not proceed to a full investigation, and are not therefore comparable with the data in Figure 14.

Source: National Audit Office analysis of OFTEL data

This figure shows that OFTEL's speed in handling complaints improved considerably after the introduction of performance targets in June 1996.

they could not be removed from the data. The analysis therefore covered all investigations - preliminary enquiries closed before a full investigation as well as full investigations, and the results are not therefore comparable with those in Figure 14. Our analysis of cases opened between 1 January 1995 and 30 June 1997 showed that OFTEL's speed in handling complaints improved considerably following the introduction of performance targets in June 1996. Before this date, OFTEL were completing between 30 and 59 per cent of cases within 32 weeks (6 weeks for the preliminary enquiry plus 26 weeks for the full investigation), compared with between 85 and 92 per cent afterwards.

2.32 While a target for completing both stages of a case can be inferred by adding the targets for the preliminary and full investigation stages, OFTEL do not explicitly measure their performance in completing both stages. Nor do they report the average time taken to complete cases. We consider that reporting outturn against these measures would be valuable as indicators of OFTEL's performance and would also provide a more practical guide for complainants, particularly new complainants, about how long the process is likely to take. We therefore recommend that OFTEL should also report:

- the time taken to complete an investigation from the date the complaint was received; and,
- the average time taken to handle all complaints.

2.33 Our suggested additional performance measures for the average time taken to deal with complaints are set out in Figure 16. These show that, over the year from July 1996 to June 1997, OFTEL have reduced the average time taken to complete a preliminary enquiry from 10 weeks in the first 6 months to 5 weeks in the second 6 months and have reduced the average time taken to complete the preliminary enquiry and full investigation from 32 weeks to 23 weeks.

2.34 Figure 17 charts the completion times for individual cases opened in the first 6 months of 1997 and combines OFTEL's existing performance measures with our suggested additional measures. The figure shows that, of the 32 cases opened in this period which went on to full investigations, OFTEL completed 12 (38 per cent) within 19 weeks of the case being received and 27 (84 per cent) within 32 weeks. The average time taken was 23 weeks.

Suggested additional performance measures for the average time taken to deal with complaints

Figure 16

Performance measure	Outturn	
	Cases opened between	
	1 July 1996 and 31 December 1996	1 January 1997 and 30 June 1997
	weeks	weeks
Average number of weeks to complete preliminary enquiry	10 (see note)	5
Average number of weeks to complete full investigation	information not available	18
Average number of weeks to complete preliminary enquiry and full investigation	32	23

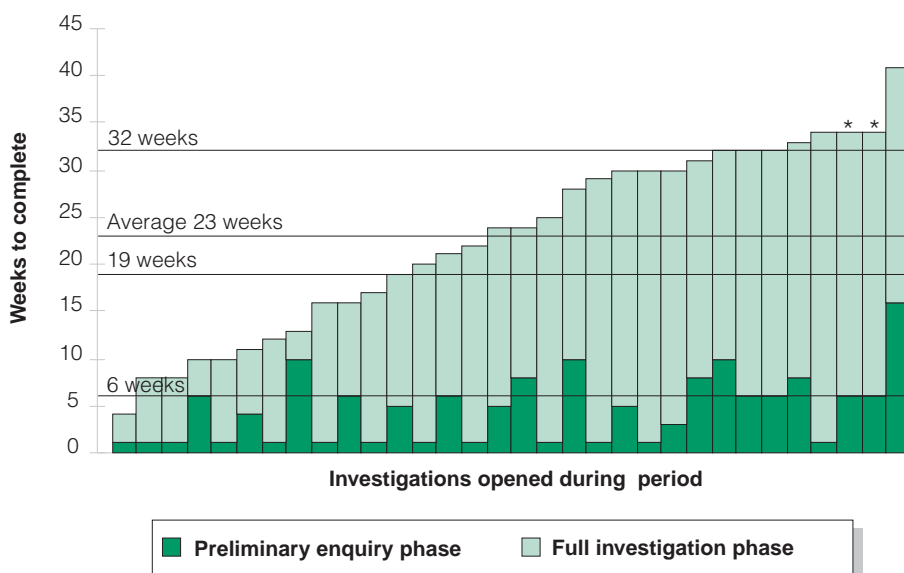
Note: Estimate based on cases which did not progress to full investigations.

This figure shows that, over the year from July 1996 to June 1997, OFTEL have reduced the average time taken to complete a preliminary enquiry from 10 weeks to 5 weeks and have reduced the average time taken to complete the preliminary enquiry and full investigation from 32 weeks to 23 weeks.

Source: National Audit Office analysis of OFTEL data.

Completion times for individual cases opened between January and June 1997

Figure 17



* Two investigations opened in the period had not been completed by 31 January 1998. Both had been open for 34 weeks.

Note: Includes only cases which proceeded to full investigations.

This figure shows that, of the 32 cases opened in the first six months of 1997, OFTEL completed 12 within 19 weeks and 27 within 32 weeks. The average time taken was 23 weeks.

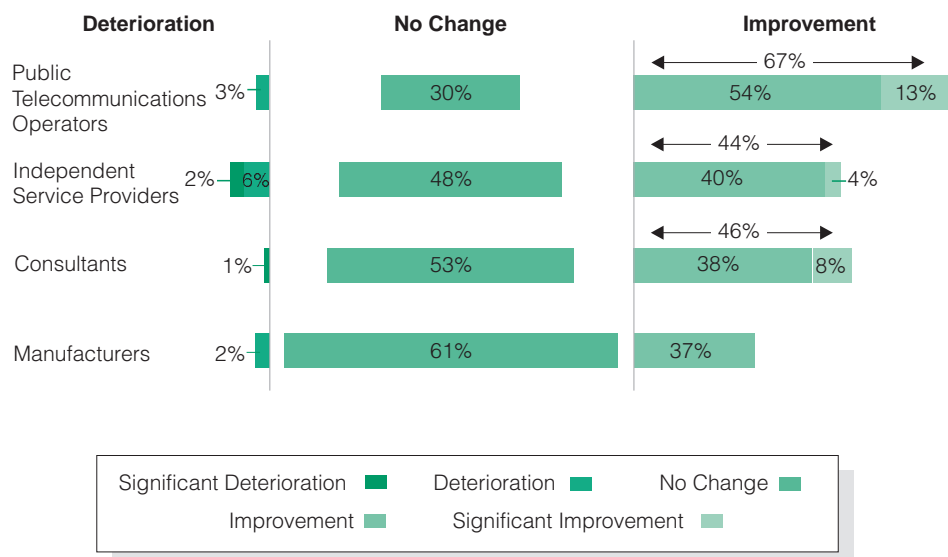
Source: OFTEL

Our survey of the industry confirmed that OFTEL's performance in dealing with anti-competitive behaviour has improved

2.35 The NOP survey found that the industry was fairly positive about OFTEL's performance in dealing with anti-competitive behaviour (Figure 18). This was most strongly felt by public telecommunications operators, with 67 per cent saying that OFTEL's performance had improved over the last year. Whilst the other business groups in the survey gave less positive responses, nearly half considered that OFTEL's performance had improved and very few said that it had deteriorated.

Industry views on OFTEL's performance in dealing with anti-competitive behaviour over the last year

Figure 18



Note: Excludes 'don't knows' (5 public telecommunications operators, 21 independent service providers, 17 consultants and 31 manufacturers).

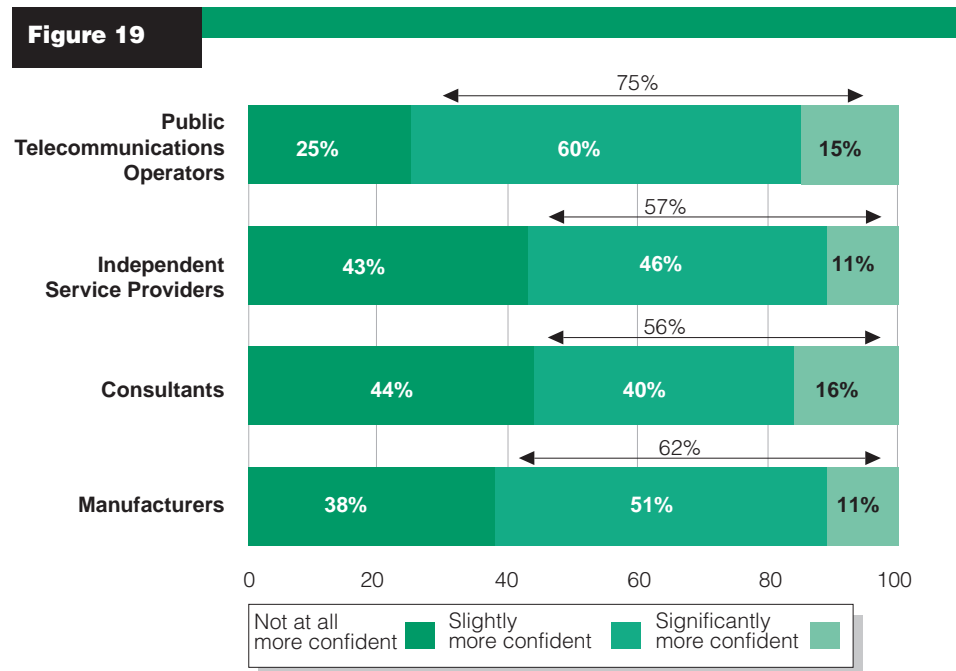
Source: NOP survey for the National Audit Office

This figure shows that 67 per cent of public telecommunications operators and between 37 and 46 per cent of the other business groups in the industry consider that OFTEL's performance has improved over the last year.

Businesses are now more confident in the fairness of competition in the market

2.36 NOP asked respondents to what extent action by OFTEL to deal with anti-competitive behaviour had increased their confidence in the fairness of competition in the telecommunications market (Figure 19). Three-quarters of public telecommunications operators said that their confidence had increased as a result of OFTEL's work in this area. The results from the other three business groups were not so positive but nevertheless more than half in each group considered that their confidence had increased.

Extent to which action taken by OFTEL has increased the industry's confidence in fair competition in the telecommunications market



Note: Excludes 'don't knows' (2 public telecommunications operators, 2 independent service providers, 7 consultants and 14 manufacturers).

Source: NOP survey for the National Audit Office

This figure shows that 75 per cent of public telecommunications operators and over 50 per cent of other respondents are more confident of the fairness of competition in the telecommunications industry as a result of action taken by OFTEL.

OFTEL have developed good lines of communication with public telecommunications operators but less so with other groups in the industry

2.37 OFTEL regard public telecommunications operators as their main clients and under the 1984 Telecommunications Act they are obliged to maintain a register of companies' licences in this group. OFTEL have established very good contacts with this group and are in regular communication with them.

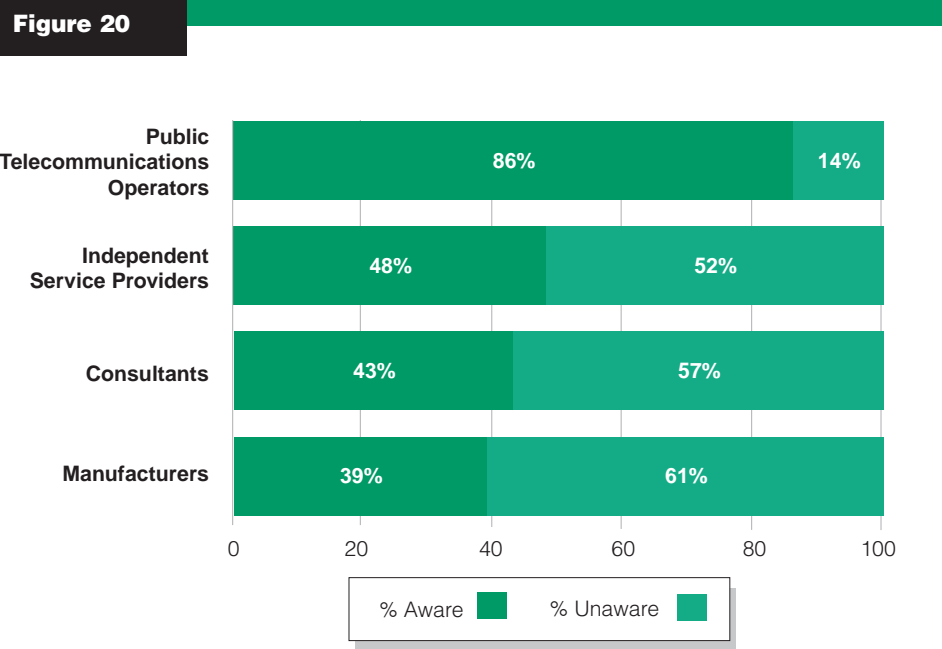
2.38 As competition between networks has increased, OFTEL have also begun to focus more attention on the growth of competition in services over the networks. An important feature in this part of the market is the growing number of independent service providers. These companies do not operate their own networks but rely on selling specialist services, such as data transmission, enhanced data processing, internet services and advanced telephony services, over existing networks. Most independent service providers do not need licences to provide their services. It is therefore more difficult for OFTEL to determine how many companies are operating in this part of the market and it is more difficult for OFTEL to communicate with them.

2.39 OFTEL do not often come across consultants or manufacturers in their investigations of complaints of anti-competitive behaviour, although they have contact with them in other parts of their work. OFTEL have not therefore sought to develop special lines of communication with these groups in relation to competition issues.

Nearly all public telecommunications operators - but less than half of other groups - are aware that OFTEL are placing greater emphasis on countering anti-competitive behaviour

2.40 NOP asked respondents whether they were aware that OFTEL were placing greater emphasis on enforcement work against anti-competitive behaviour (Figure 20). The most positive responses came from public telecommunications operators, with 86 per cent saying they were aware. By comparison, less than 50 per cent of other businesses were aware of the change in emphasis by OFTEL.

Industry awareness of OFTEL placing greater emphasis on preventing anti-competitive behaviour



Source: NOP survey for the National Audit Office

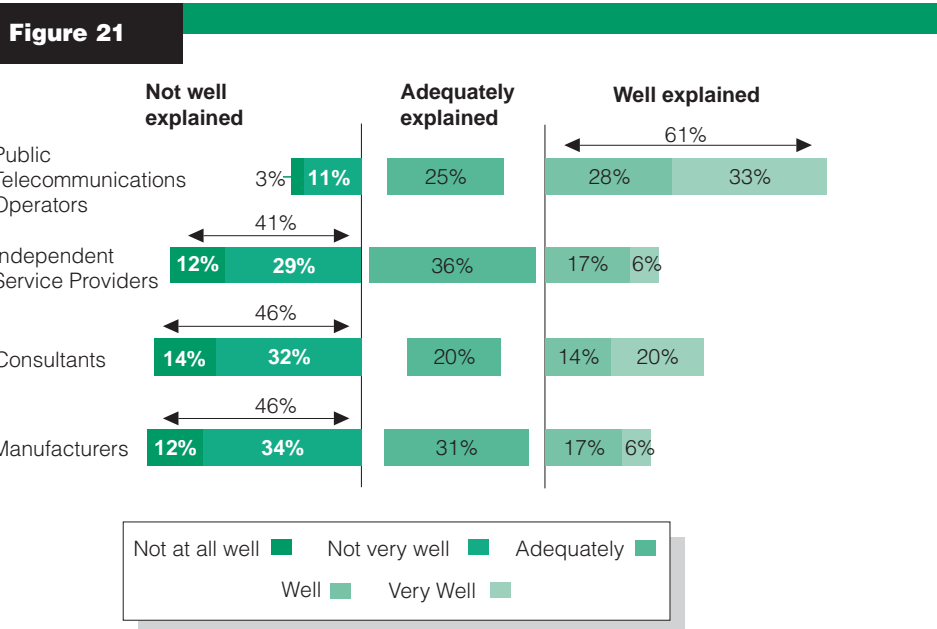
This figure shows 86 per cent of public telecommunications operators but less than half of other groups are aware that OFTEL are placing greater emphasis on their enforcement work against anti-competitive behaviour.

2.41 NOP asked those respondents who said they were aware of OFTEL’s increased emphasis on deterring and stopping anti-competitive behaviour how well OFTEL had explained the reasons for the change (Figure 21 overleaf). The responses from public telecommunications operators, 61 per cent of whom felt that the change had been explained well or very well, were much more positive than those from the other groups, where nearly half considered that OFTEL had not explained the change well.

OFTEL could improve their contacts with independent service providers, consultants and manufacturers

2.42 The responses to questions in the NOP survey consistently show that while public telecommunications operators are aware and generally very positive about OFTEL’s role and the way that OFTEL deal with anti-competitive behaviour, independent service providers, telecommunications consultants and manufacturers of telephone equipment are much less aware and therefore less positive about OFTEL.

Industry views of how well OFTEL have explained the reasons for the change in the way they counter anti-competitive behaviour



This figure shows that 61 per cent of public telecommunications operators consider that OFTEL have explained well or very well their change in emphasis in countering anti-competitive behaviour. However, nearly half of the companies in the other groups feel that the change has not been explained well.

Source: NOP survey for the National Audit Office

2.43 OFTEL have been endeavouring to set up better links with independent service providers. However, they are a relatively new group for OFTEL to deal with and are often difficult to identify because many are small businesses. OFTEL have established a bi-monthly independent service providers forum to draw in their views. OFTEL also maintain a record of contacts they have had with independent service providers who are not part of the forum and their mailing list includes the trade associations who represent this group.

2.44 OFTEL expect complaints about anti-competitive behaviour to come directly from the businesses being affected by such behaviour and therefore question the value of setting up arrangements to communicate directly with consultants. As a group, consultants include many small businesses, many of whom are former employees of BT, that specialise in particular parts of the telecommunications market. Whilst our survey and discussions with industry representatives indicated scope for OFTEL to widen their audience to include consultants, we note that OFTEL secured a poor response to an initiative in January 1998 to determine whether they should draw consultants more closely into their processes of countering anti-competitive behaviour.

2.45 As for manufacturers of telecommunications equipment, OFTEL regard the various parts of this market to be subject to a good degree of competition. Since 1985, BT customers have been free to purchase and install their own equipment and since 1996 all restrictions on those able to maintain and service equipment linked to the BT network have been lifted. Although BT remain quite strong in the domestic equipment market, there are a number of alternative suppliers. This is supported by the findings of the NOP survey. Only 3 out of 10 manufacturers of telecommunications equipment considered that OFTEL had any relevance to their business.

2.46 Nevertheless, there appears to be a difference in expectation between the desire of some consultants and manufacturers to have closer contacts with OFTEL and the existing level of communication with OFTEL. We recommend that OFTEL should continue to explore the benefits of further developing their communications with consultants and manufacturers.

OFTEL are seeking to be more open about the way in which they counter anti-competitive behaviour

2.47 Following their 1995 statement, “Effective Competition: Framework for Action”, OFTEL are seeking to be more open in their enforcement and fair trading work. Until 1995, OFTEL had not generally published information relating to their investigations. In effect the nature of an investigation and its outcome were often known only to OFTEL and the parties involved in the complaint.

2.48 OFTEL considered that greater openness would:

- promote better understanding of OFTEL’s policies, their interpretation of licence conditions and legislative provisions, and the types of behaviour which OFTEL consider require enforcement or remedial action;
- create a deterrent effect whereby companies would adapt their behaviour if faced with the certainty of the publication of adverse findings relating to them; and,
- provide an opportunity for those affected by OFTEL’s actions to give their views to OFTEL.

2.49 OFTEL's web site on the Internet contains all OFTEL documents and press releases and is updated regularly. Since January 1997 the site has been visited 90,000 times.

OFTEL's Competition Bulletin publicises all cases but its existence could be promoted more widely in the industry

2.50 Since June 1996 OFTEL have produced a quarterly Competition Bulletin, which aims to:

- make OFTEL's competition policy and casework more visible to the industry by publicising the results of cases;
- establish improved routes of communication with the industry in order to obtain information on market developments; and,
- obtain from the industry input into specific cases and comments on reviews, investigations and any proposed enforcement measures.

2.51 The Competition Bulletin contains summaries of all new complaints received and investigations closed in the last three months and is used to publicise particular issues and investigations where OFTEL would like to draw on the experiences of the industry generally. The Bulletin provides information on all OFTEL's enforcement actions and the arrangements that OFTEL have set up to ensure compliance. It also gives more general information about other fair trading issues and OFTEL initiatives and provides the names of contacts in OFTEL with whom the matters covered can be discussed.

2.52 The Bulletin is distributed to all public telecommunications operators, independent service providers whom OFTEL have identified as being active within the telecommunications industry, and any other companies contacted by OFTEL in the course of handling new complaints about anti-competitive behaviour. As at July 1997 there were 425 contacts on OFTEL's circulation list for the Bulletin. The Bulletin is also available on OFTEL's web site on the Internet.

2.53 We found that the Competition Bulletin was well received within the industry. It has opened OFTEL's arrangements to much greater scrutiny and as a result adds to the pressure on OFTEL, and individual case officers, to complete investigations promptly and to maintain a public record of their decisions. Those independent service providers, consultants and manufacturers who did not receive the Bulletin were generally very keen to do so.

OFTEL have set up competition surgeries and a telephone “hotline” to complement the Competition Bulletin but awareness of these two services is low

2.54 Competition surgeries and the telephone “hotline” were set up in June 1996 to provide easier access to OFTEL about competition issues. Competition surgeries are held monthly at OFTEL. Two senior members of the competition and fair trading directorate are available for consultation either in person or by telephone. OFTEL’s intention is that the surgeries should focus on new or potential cases rather than progressing investigations that are already underway. The “hotline” is a dedicated number at OFTEL which is open every day during working hours for anyone who needs to contact OFTEL to discuss urgent competition issues. The number is advertised in the Competition Bulletin.

2.55 NOP asked respondents whether they were aware of these two services (Figures 22 and 23 overleaf). Almost half the public telecommunications operators said that they were aware of both services. The results from independent service providers were again less positive, with only 31 per cent being aware of the competition surgeries and 35 per cent being aware of the “hotline”.

2.56 The low awareness of these two services, even by public telecommunications operators, raises questions about the effectiveness of OFTEL’s arrangements for publicising them. At the time of the survey these services were almost entirely being promoted through the Competition Bulletin. We note that OFTEL have now made efforts to promote the services more widely through other OFTEL publications, at conferences and forums for the industry and on their web site.

Guidance to the industry on dealing with OFTEL has been well received

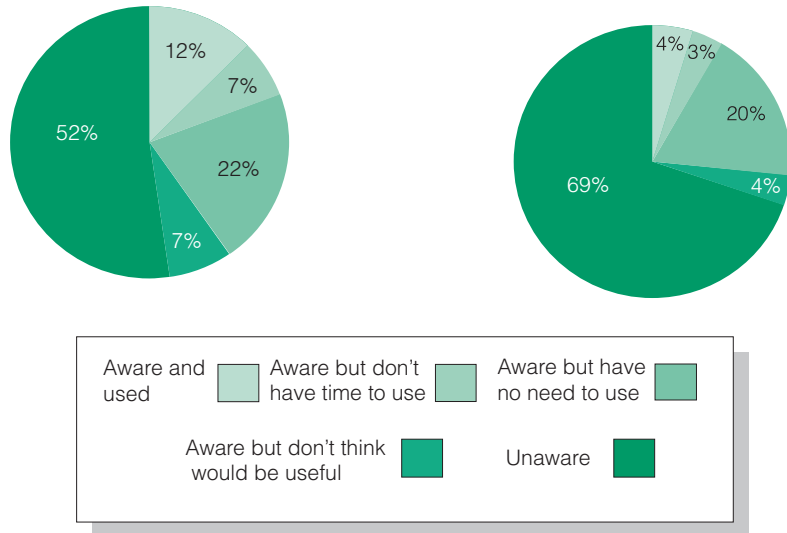
2.57 In November 1997, OFTEL published a document, “Dealing with Anti-competitive Behaviour in Telecoms” which sets out the general framework within which OFTEL operate and regulate. It specifically covers the arrangements for companies to submit complaints about anti-competitive behaviour and how OFTEL handle investigations. The new document is available on OFTEL’s web site and updates information contained in the booklet “Doing Business with OFTEL”, which OFTEL found to be popular with the industry.

Industry awareness and experience of OFTEL's competition surgeries

Figure 22

(a) public telecommunications operators

(b) independent service providers



Source: NOP survey for the National Audit Office

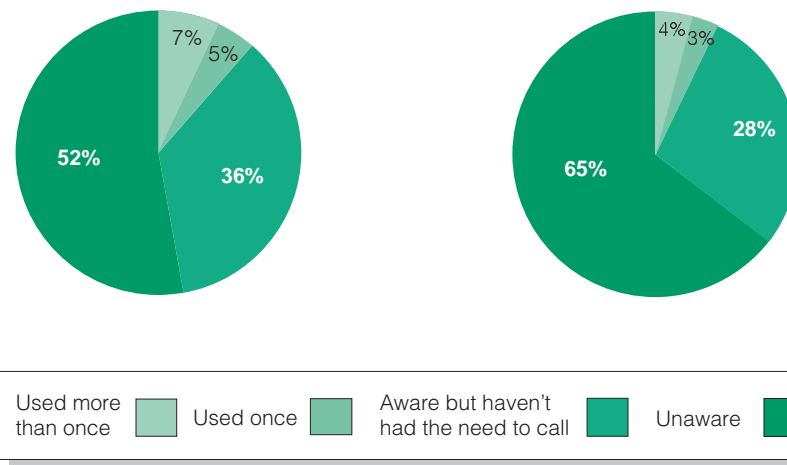
This figure shows that 48 per cent of public telecommunications operators but only 31 per cent of independent service providers are aware of OFTEL's competition surgeries.

Industry awareness and experience of OFTEL's competition "hotline"

Figure 23

(a) public telecommunications operators

(b) independent service providers



Source: NOP survey for the National Audit Office

This figure shows that 48 per cent of public telecommunications operators but only 35 per cent of independent service providers are aware of OFTEL's competition "hotline".

2.58 OFTEL have also published guidelines on how they handle certain competition issues. They consider these guidelines will promote better understanding of their policies, their interpretation of licence conditions and legislative provisions and will provide more certainty about their likely position on different issues. OFTEL consider that the guidelines also have a deterrent effect because companies are less able to claim ignorance that certain behaviour has anti-competitive effects. For example, the guidelines on the fair trading condition deal with a wide range of issues from predatory pricing to refusal to supply.

2.59 The guidelines mark a trend towards OFTEL relying more on general competition principles and less on prescriptive licence conditions in line with the developments of competition in the market and of the legislative background, including the Competition Bill as outlined in Part 3 of this report. Seven guidelines have been published so far and two more are being prepared. The guidelines are available on OFTEL's web site on the Internet.

2.60 We found that there was general support in the industry for these measures.

Part 3: OFTEL have sought more effective ways to counter anti-competitive behaviour

Consultation with the industry in 1994 revealed concern about OFTEL's limited powers and sanctions for countering anti-competitive behaviour

3.1 Responses to the consultation document, "A Framework for Effective Competition", in December 1994 showed industry dissatisfaction with OFTEL's powers to counter anti-competitive behaviour. In particular there was concern about:

- the lack of powers to stop anti-competitive behaviour quickly; and,
- the lack of penalties and damages against those found to be acting anti-competitively.

3.2 The suggestions from the industry for strengthening the powers available to OFTEL went beyond the existing framework set out in the 1984 Telecommunications Act and in general competition law. However, OFTEL did agree with the industry that it was no longer possible to counter effectively all forms of anti-competitive behaviour using existing licence conditions.

Since 1995 OFTEL have deployed their existing enforcement powers more extensively and more effectively

3.3 As well as recognising the need to pursue changes to licences and competition law, OFTEL have sought to make more effective use of their existing powers. This is evident not only from the increasing number of enforcement actions taken between 1995 and 1997 (Figure 24) but also in the variety of circumstances to which particular licence conditions have been applied. In addition, as noted in Part 1 of the report, many investigations led to the alleged anti-competitive behaviour being stopped without the need for formal enforcement action. OFTEL believe that these outcomes are owed in good part to their having demonstrated their readiness to use their formal enforcement powers.

OFTEL's use of their enforcement powers to deal with anti-competitive behaviour

Figure 24

	1993	1994	1995	1996	1997	Total
Orders	0	0	1	3	5	9
Directions	0	0	1	1	0	2
Determinations	1	0	0	1	1	3
Total	1	0	2	5	6	14

Source: OFTEL
 Since 1993 OFTEL have used their enforcement powers to address anti-competitive behaviour on 14 occasions.

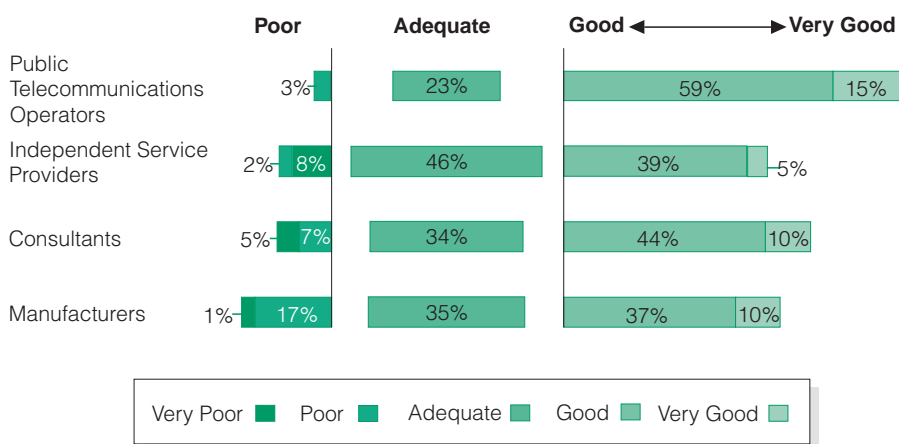
OFTEL have pursued changes to licence conditions to deal with new forms of anti-competitive behaviour

3.4 The licence conditions which covered anti-competitive behaviour in BT's licence had been drafted for the privatisation of BT. However, competition and anti-competitive behaviour in the telecommunications market developed in ways that had not been foreseen. Although OFTEL were able to obtain licence modifications by agreement with BT this process was rarely quick, complex licence modifications taking up to twelve months to complete. These modifications also resulted in BT's licence becoming increasingly long and complicated. Between 1984 and 1996 there were 15 sets of modifications to BT's licence.

3.5 The NOP survey found that the industry were positive about the way in which OFTEL had pursued licence changes (Figure 25 overleaf). Three-quarters of public telecommunications operators and around half of all other respondents rated OFTEL's performance in pursuing licence changes as either good or very good.

Industry views on OFTEL's performance in dealing with anti-competitive behaviour by pursuing changes to licences

Figure 25



Note: Excludes 'don't knows' (8 public telecommunications operators, 16 independent service providers, 15 consultants and 18 manufacturers).

Source: NOP survey for the National Audit Office

This figure shows that three-quarters of public telecommunications operators and around half of other respondents rate OFTEL's performance in pursuing licence changes as good or very good.

OFTEL have introduced a general fair trading condition into BT's licence so as to deal with new forms of anti-competitive behaviour more effectively

3.6 A general fair trading condition has been introduced into BT's licence for five years from December 1996. The condition is based closely on European competition law (Articles 85 and 86 of the Treaty of Rome). It gives greater flexibility to OFTEL's control of anti-competitive behaviour by allowing them to take action against a particular activity based on the effects the activity is having on the market. Previously they could only take action against an anti-competitive practice if it breached a specific licence condition. The condition prohibits any abuse of a dominant position by an operator in the telecommunications market, and any agreements between undertakings which have a materially adverse effect on competition in the United Kingdom. OFTEL are therefore now able to control a particular activity which has, or is likely to have, the object or effect of preventing, restricting or distorting competition in the market.

3.7 The fair trading condition is intended to address concerns raised by the industry and OFTEL about the overly prescriptive nature of the licence conditions originally designed to prohibit particular types of anti-competitive behaviour. OFTEL saw these conditions as being too precise in the way they defined anti-competitive behaviour and as a result it was more difficult for them to counter effectively those types of behaviour which were not already addressed in licence conditions.

3.8 Under the previous arrangements, where OFTEL considered a company's behaviour was anti-competitive but not specifically covered by the licence conditions, OFTEL had to agree with the licensee modifications to the licence to cover the types of anti-competitive behaviour identified. Such negotiations could be quite protracted. The fair trading condition allows OFTEL to tackle any new form of anti-competitive behaviour falling within the condition without having to go through the process of seeking further amendments to licence conditions.

3.9 The scope of the condition gives OFTEL a more effective deterrent against anti-competitive behaviour by enabling them to take action more readily. However, it will not necessarily lead to a speedier resolution of investigations. If they use the condition they will have to examine whether the behaviour is having a detrimental effect on competition in the market instead of demonstrating that a licence condition has been breached.

3.10 The change to BT's licence followed consultation with the industry and a legal challenge from BT as a result of which the High Court ruled that the introduction of the fair trading condition by OFTEL was legal. As a result of the fair trading condition being introduced, 14 conditions, some of which were designed to deal with specific types of anti-competitive behaviour, were deleted from BT's licence. The same general fair trading condition is being introduced into all operators' licences.

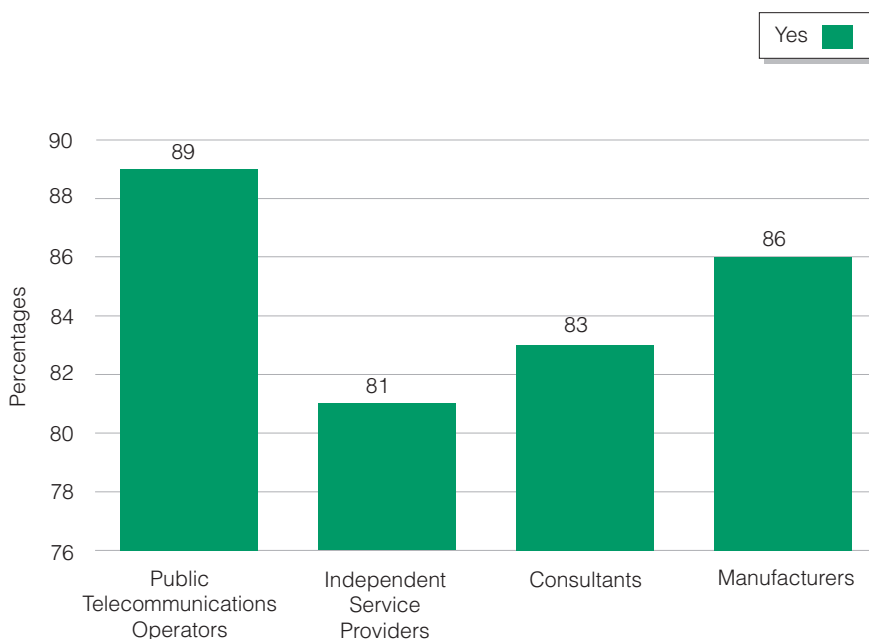
3.11 OFTEL have issued guidelines to the industry as to how they will implement the fair trading condition to enable companies to assess the likelihood of any practice being found to be in breach of the condition. OFTEL have also set up an Advisory Body on Fair Trading in Telecommunications to advise the Director General on cases brought under the condition. Either OFTEL or the company being complained about can call for the Advisory Body to provide an independent assessment of the case and OFTEL's analysis of the issues. The Director General is obliged to consider the Advisory Body's report when deciding whether to issue a final order using the fair trading condition.

3.12 From their review of cases our advisory panel confirmed OFTEL’s concerns about the very specific nature of licence conditions before the introduction of the general fair trading condition. Our advisory panel considered that the general fair trading condition would provide more certainty that behaviour being investigated by OFTEL could be countered under the licence and minimise the risk that it would not be covered by other licence conditions. Although our advisory panel saw that this was likely to act as a greater deterrent against anti-competitive behaviour, they considered that it would not, on its own, necessarily speed up an investigation into the effects of such behaviour.

3.13 The NOP survey found that the industry was generally very positive about the likely impact of the fair trading condition (Figure 26). Over 80 per cent of all respondents considered that the fair trading condition would enable OFTEL to be more effective in countering anti-competitive behaviour.

Industry views on whether the fair trading condition will enable OFTEL to deal with anti-competitive behaviour more effectively

Figure 26



Note: Excludes 'don't knows' (5 public telecommunications operators, 28 independent service providers, 20 consultants and 27 manufacturers).

Source: NOP survey for the National Audit Office

This figure shows that over 80 per cent of all respondents consider that the fair trading condition will enable OFTEL to deal with anti-competitive behaviour more effectively.

3.14 Having introduced the general fair trading condition, OFTEL have used it only once to issue an order. However, the possibility of conducting an investigation under the fair trading condition is considered by OFTEL in all suitable cases. The introduction of the condition may have had a general deterrent effect because it places the burden of compliance on the licensee. BT have amended their compliance procedures and appointed a Director of Compliance in response to the introduction of the condition.

The Government have introduced a Competition Bill which, if enacted, would give OFTEL and other regulators greater powers to deal with anti-competitive behaviour

3.15 A Bill to strengthen competition law was introduced in October 1997. Like the fair trading condition, the Bill is based closely on Articles 85 and 86 of the Treaty of Rome and seeks to prohibit:

- anti-competitive agreements; and,
- the abuse of a dominant position in a market.

3.16 If enacted, the Bill as proposed would provide OFTEL and other regulators with more effective powers. In their particular sectors, the Director General of Telecommunications and other sector regulators would continue to have concurrent powers with the Director General of Fair Trading. Anti-competitive agreements and the abuse of a dominant position in a market would be prohibited and liable to fines. Such fines would be up to ten per cent of the offending company's turnover. Third parties affected by anti-competitive behaviour would be entitled to seek damages from the point at which they first suffered damage. Appeals against the regulator's decision and the level of fines would be heard by a new Appeals Tribunal which would form part of a new body, the Competition Commission, which would also retain the current functions of the Monopolies and Mergers Commission.

3.17 The Bill would also provide OFTEL with the power to take interim action so that anti-competitive behaviour can be stopped pending detailed investigation where:

- there is reasonable suspicion that a breach of the Bill's prohibitions has occurred;

- it is necessary for the Director General to act as a matter of urgency to prevent serious or irreparable damage to third parties or to protect the public interest.

3.18 The fair trading condition will automatically cease to have effect to the extent that its provisions are superseded by those of the Competition Bill. We recommend that OFTEL should review their experience of using the fair trading condition in preparing themselves for the new powers they will have if the Competition Bill is enacted.

More effective countering of anti-competitive behaviour will be important as the industry continues to expand and diversify

OFTEL have an important role in the regulation of digital broadcasting

3.19 Since 1990 there has been a rapid expansion in the number of cable operators and telecommunications companies and an increase in the amount of satellite broadcasting. At the same time, the delivery of telecommunications services and the delivery of broadcast services have become increasingly difficult to distinguish from one another: digital technology can be used to transmit voice telephony and data services; and new interactive services bring together the marketing of telecommunications and broadcasting.

3.20 OFTEL have an important part to play in the regulation of digital broadcasting. In 1996 the Department of Trade and Industry and OFTEL introduced a conditional access licence for terrestrial and satellite digital transmissions in the United Kingdom. The term conditional access is used to describe the system by which subscription television companies control viewers' access to different programmes and channels so that only those who have paid the appropriate charge can receive the service. The key provisions of the licence are aimed at ensuring that control over conditional access technology is not used to distort, restrict or prevent competition in television and other digital services.

3.21 The conditions of the licence require licence holders to offer conditional access services on a fair, reasonable and non-discriminatory basis. In many ways the ground rules are similar to those that OFTEL use to promote access to telecommunications networks. Using the model established in the telecommunications market, OFTEL intend to use their powers under the licence to investigate and deal with anti-competitive behaviour. When enforcing the

licence OFTEL would have regard to the market position of the operator. As in the telecommunications industry, market power is not itself a problem but anti-competitive behaviour as a result of an abuse of market power would lead to action by OFTEL.

OFTEL are closely monitoring national and international developments in the industry

3.22 In evidence to the Committee of Public Accounts in December 1996, the Director General of Telecommunications said that his work had an increasingly international dimension. The creation of new international alliances and mergers presented new concerns for regulation, which would require a harmonised international framework, in addition to effective domestic licensing and competition regimes, for anti-competitive behaviour to be successfully contained. He would be closely monitoring the competitive situation of international operators to ensure that anti-competitive behaviour did not occur in the United Kingdom market.

3.23 Since 1996 there has been a rapid rise in merger activity in the telecommunications industry. For example, the new company, Cable and Wireless Communications, has brought together Mercury Communications and three cable companies Nynex, Bell Cable Media and Videotron. Most of the mergers have also had an international dimension.

3.24 OFTEL offer advice on the likely competition and regulatory effects of mergers to the Office of Fair Trading and other relevant authorities, such as the European Commission who are responsible for the application and enforcement of European Union competition law in the telecommunications sector. The work is managed by OFTEL's competition and fair trading directorate who draw on advice and analysis from OFTEL's economics, legal and other specialist directorates and branches.

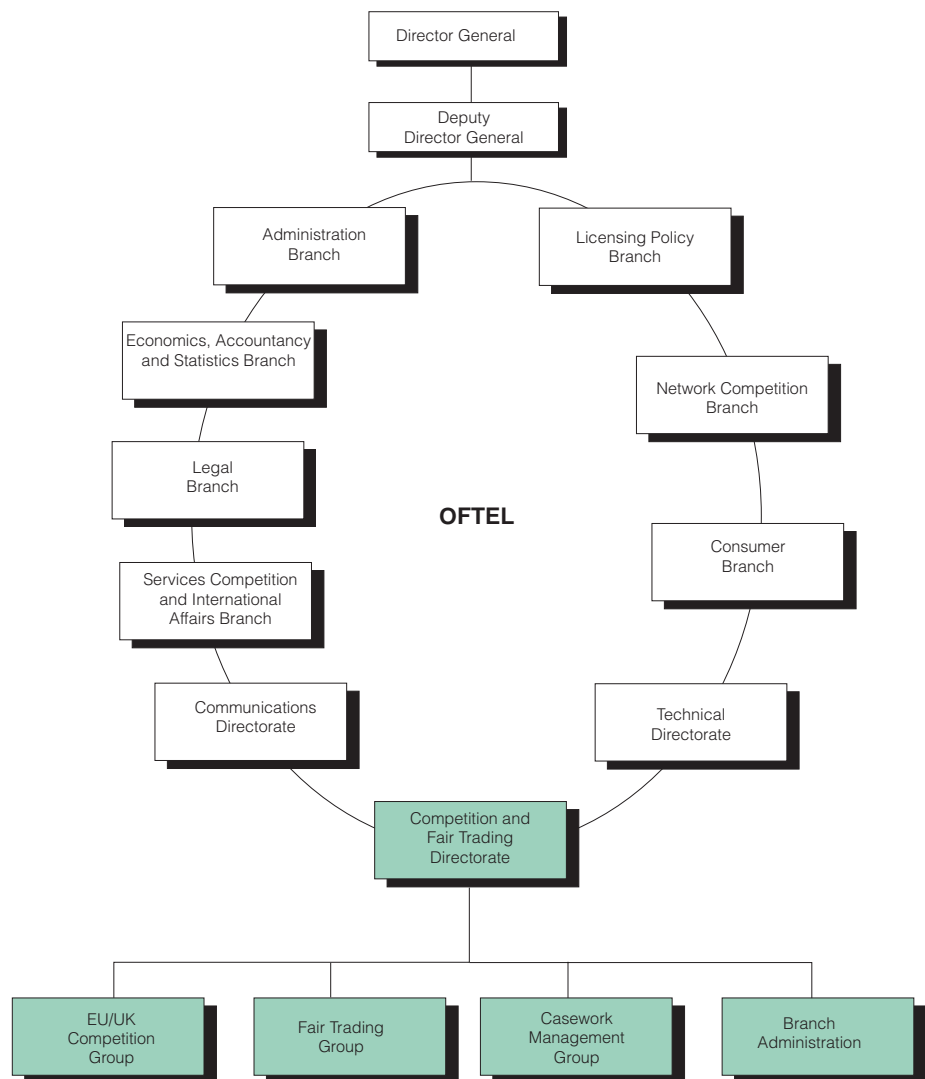
3.25 OFTEL have also supported the Department of Trade and Industry in their negotiations on telecommunications matters under the General Agreement on Trade and Services which governs world trade in services. The negotiations were concluded in an accord signed by 69 countries in 1997. The accord on telecommunications seeks to open national and international markets to competition along United Kingdom lines and sets targets for countries to achieve

lower international tariffs. The rules commit signatories to establish independent, regulatory bodies (like OFTEL), to guarantee interconnection with existing networks at fair prices, to forbid anti-competitive practices, and to ensure transparency in regulation.

3.26 OFTEL have regulated the United Kingdom telecommunications industry for 14 years. They have practical experience in applying the principles that underlie a liberalised market. Such experience is much valued by other countries and OFTEL can look forward to taking a key role in the future development of a liberalised international telecommunications market. The liberalisation of telecommunications markets across European Union member states from 1 January 1998, which was effected through a number of Directives, also illustrates the increase in the relevance and application of European Union competition and telecommunications law to the United Kingdom market. This is likely to intensify if the Competition Bill, based on Articles 85 and 86 of the Treaty of Rome, is enacted.

Appendix 1

OFTEL organisation chart



This figure shows OFTEL'S Competition and Fair Trading Directorate.

Source: OFTEL

Appendix 2:

Types of anti-competitive behaviour that companies in the telecommunications industry claim they have experienced

Undue preference - a company unfairly favours a part of its own business in a way that gives it a significant competitive advantage over a competitor by, for example, giving its own business early notice of the technical details of a new product.

Linked sales - a company supplies goods or services to the customer on condition that certain other goods or services are also purchased.

Denigration - a company makes inaccurate or misleading statements about the goods or services provided by a competitor.

Unreasonable delays in fulfilling licence obligations - a company places a competitor at a disadvantage by delaying unreasonably, for example, the interconnection of the competitor's network to its own.

Unfair subsidy/cross-subsidy - a company subsidises or cross-subsidises a part of its business with profits made elsewhere in the business to place a competitor at a disadvantage.

Predatory pricing - a pricing strategy which initially involves a company lowering its prices so that it makes losses for a period of time with the intention of driving competitors out of the market. The company is then able to increase its prices so as to recoup the losses once competitors have been forced out of the market.

Inhibiting customer movements - a company discourages customers from changing to an alternative supplier of goods or services by, for example, demanding an unreasonable period of notice during which time it tries to persuade the customer to stay with it, or refusing to allow the customer's telephone number to be transferred.

Refusal to supply - a company refuses to supply goods or services required by a competitor who makes a reasonable demand for them.

Long term supply agreements - a company excludes competitors from supplying goods or services by setting up contracts with customers which last for an unreasonable length of time.

Undue discrimination - a company unfairly discriminates against a competitor's business in a way that gives it a significant advantage over the competitor by, for example, selling two products together.

Withholding of technical information - a company withholds technical information from a competitor who requires it, for example, to interconnect the competitor's system to the existing network.

Appendix 3: Our previous reports into the work of the regulators

We have, to date, presented to the House of Commons the following reports on the regulation of the telecommunications, gas, water and electricity industries:

The Office of Telecommunications: Licence Compliance and Consumer Protection (HC 529, March 1993)

We examined OFTEL's arrangements for ensuring that public telecommunications operators provide services of an acceptable quality and price, and that customers are able to make informed choices about the services on offer.

The Committee of Public Accounts took evidence from OFTEL on the basis of our report and published their own report in December 1993 (6th Report, 1992-93). The Committee noted that residential customers had derived fewer benefits than business users from the price controls which had been in place since 1984 and the Committee looked to OFTEL to identify what scope there might be for further measures, apart from competition, designed to benefit residential customers. The Committee considered that it had taken too long a time to provide accounting separation between BT's various business activities, with a view, in particular to validating interconnection charges. The Committee endorsed OFTEL's plans to introduce more extensive consultation with customers about standards of service in view of OFTEL's acceptance that service standards should be defined by the customer.

The Regulation of Gas Tariffs: The Gas Cost Index (HC 287, March 1996)

We examined the reasons why the Office of Gas Supply had replaced part of their control over prices charged by British Gas and introduced in 1992 a gas cost index which changed the way in which the price paid by some 18 million customers reflected the costs to British Gas of buying gas. The Committee of Public Accounts subsequently took evidence from the Office of Gas Supply and reported in October 1996 (1st Report, 1995-96).

The Work of the Directors General of Telecommunications, Gas Supply, Water Services and Electricity Supply (HC 645, July 1996)

We undertook a survey of the regulatory framework within which the four industries operate. Our report provided information about the regulators' powers and duties, their priorities and how they have tackled their work, and described the conduct by each regulator of a review of prices in the regulated industries.

The Committee of Public Accounts subsequently took evidence from all four regulators and reported in March 1997 (16th Report, 1996-97). The Committee welcomed the fact that the progress made in developing competition in the telecommunications industry had allowed OFTEL to plan a substantial reduction in the scope of their regulation of BT's prices.

Office of Water Services: Regulating and Monitoring the Quality of Service Provided to Customers by the Water Industry in England and Wales (HC 388, December 1997)

We examined the Office of Water Services' regulation of the quality of service received by customers from water companies. The Committee of Public Accounts took evidence in January 1998 from the Office of Water Services on the basis of our report.

Appendix 4:

Our review of cases opened by OFTEL in 1995 and 1996

We examined the papers contained on file for every investigation which OFTEL's casework logs recorded as being opened in 1995 and 1996. We reviewed the procedures employed by OFTEL for handling these cases. Our general conclusions were that:

- OFTEL usually acknowledged the complainant and contacted the company which had been the subject of the complaint promptly;
- OFTEL explained to the complainant how the complaint would be handled;
- although OFTEL set clear deadlines for responses to requests for information from the complainant and the company which was the subject of the complaint, these were not always met;
- OFTEL produced good assessments of the facts in cases in order to obtain advice from other directorates and branches;
- there were delays in other OFTEL directorates and branches providing advice to the competition and fair trading directorate;
- there were few complaints on file relating to the time OFTEL were taking to investigate allegations of anti-competitive behaviour;
- although the referencing of cases is meant to show what type of complaint has been made against which company the system could be simplified;
- the casework logs which show the particular stage of investigation a case has reached could be simplified; and,
- it was difficult to identify the point at which a preliminary enquiry becomes a full investigation and this may impact on OFTEL's ability to identify whether they have met their internal targets for the two stages of the investigation.

Appendix 5: The conclusions and recommendations of our advisory panel and OFTEL's response

1 During the course of our examination of the investigations opened by OFTEL in 1995 and 1996 we selected 18 cases for further examination by our advisory panel. The cases were chosen to show:

- that OFTEL handle a wide variety of complaints and also regulate trials of new services and price notifications and undertake work on their own initiative;
- the difficulties OFTEL have in countering anti-competitive behaviour by using prescriptive licence conditions;
- how the competition and fair trading directorate obtain advice and guidance from the legal and economics branches within OFTEL;
- the length of time taken by OFTEL to resolve certain complaints;
- the problems OFTEL have in obtaining information from the company which is the subject of the complaint; and,
- that some complaints are formulated in a way which does not allow an effective investigation.

The cases were not therefore statistically representative.

The advisory panel's overall conclusions

2 The panel recognised that OFTEL's work on anti-competitive behaviour is technically demanding and in a dynamic and developing market. The panel noted that invariably issues are complicated and may involve complex policy questions. The panel commented positively on OFTEL's policy of openness in the way they carry out their duties.

3 The panel's examination of cases was based on OFTEL's case papers. Whilst the panel noted periods of apparent inactivity in the handling of cases and delays in meeting internal deadlines, other pressures of work, changing priorities and resource constraints, which would not have been shown on the case papers, would have had some bearing on the length of time taken to resolve a case. The panel recognised that a certain amount of delay might arise in any such operation and that while it is important to have targeted deadlines it may not be possible to adhere to them in every case.

4 The panel considered from their case examination that OFTEL generally performed well with the resources at their disposal.

The advisory panel's main findings and OFTEL's response

Conclusions and recommendations of the advisory panel

(a) The case officers appeared keen and made good contributions to eliciting the issues.

(b) Where a complaint is poorly expressed or unclear, OFTEL should seek clarification from the complainant before proceeding in order to obtain as much information from the complainant as possible.

(c) There were some delays in the competition and fair trading directorate receiving advice and guidance from other directorates and branches in OFTEL.

OFTEL's response

OFTEL have introduced improved training and increased personal responsibility and links to higher grades through pairing and mentoring which have done much to reinforce commitment among case officers.

Case officers are now encouraged to hold initial meetings with the complainant before proceeding with the case and they are given the opportunity to seek guidance from weekly competition casework panel meetings.

There is a clear presumption that if, at the end of the preliminary enquiry phase, OFTEL do not have enough information from the complainant the case will be closed.

Although this may have been a problem in the past case officers are now required to set firm deadlines when requesting information from other directorates and branches.

During the period in question the specialist directorates and branches were heavily involved in other priority work relating to, for example, price control, the fair trading condition and the proposed merger between BT and MCI.

The legal branch has doubled in size since the end of 1995. There are now dedicated economists and lawyers dealing with competition casework. Case officers are encouraged to undertake the initial economic and legal analysis themselves and then seek advice and the qualifications and experience of case officers are changing accordingly.

continued...

The advisory panel's main findings and OFTEL's response continued...

Conclusions and recommendations of the advisory panel

OFTEL's response

(c) Continued...

Competition casework is now handled across other directorates and branches of OFTEL rather than just the competition and fair trading directorate and so the specific expertise of the investigating officer is applied. Consequently, the advice sought from the legal and economic branches is more focused.

(d) The advice received from the economics and legal branches in OFTEL was typically sound and significant in steering cases and should be secured as soon as possible.

The competition casework panel, comprising representatives of the competition and fair trading directorate and the economics, legal and technical branches, now meet on a weekly basis. One new and one problematical case are discussed each week with a view to moving the cases forward quickly.

Once a month this meeting also involves an assessment of the position of all current cases with a view to presenting suitable cases for a decision to be made by the Director General at his monthly casework meeting.

(e) OFTEL should undertake as detailed an analysis as possible of the potential economic effects of the action being complained about to enable them to make more focused requests for information, particularly primary documentation, from the company which is the subject of the complaint.

OFTEL have taken this approach since March 1996 to all new complaints of anti-competitive behaviour. Case officers are now required to undertake competition analysis including defining the relevant market at an early stage with the assistance of the economics branch.

The manual of procedures used by case officers contains information relating to economic analysis.

Case officers are now encouraged to take a more direct hypothesis testing mode of approach to competition casework, for example, by asking the company which is the subject of the complaint to produce specific documents.

(f) The company which is the subject of the complaint can be slow in providing information and when they do it is often the minimum to be expected.

Case officers are required to set a deadline and, since March 1996, to make formal demands under condition 52 of BT's licence or its equivalent for other operators.

The quality of information provided by the company which is the subject of the complaint is often dependent on asking the right questions. This has improved as a result of the emphasis on identifying the competition issues as early as possible and the hypothesis testing mode of approach to competition casework.

There are cases where, regardless of the quality of the information or the speed with which it is produced, OFTEL have acted swiftly against anti-competitive behaviour.

A project called "Raising the Heat" is aimed at identifying specific examples of where the operator's systems had failed to produce timely and relevant information.

continued...

The advisory panel's main findings and OFTEL's response continued...

Conclusions and recommendations of the advisory panel

OFTEL's response

(g) OFTEL could place more pressure on the company which is the subject of the complaint to provide the appropriate information and give more consideration to the use of their formal powers.

Since March 1996, it has been normal practice to use condition 52 of BT's licence (and the identical powers in other operators' licences) when demanding information.

(h) The complexity of some licence conditions contributes to the delay in progressing cases and although the fair trading condition may not speed up the progress of cases it may help OFTEL to deal with some cases more effectively.

In general, OFTEL have adopted a new approach in relation to all licence conditions - namely, that they are used to attack the *effect* of the behaviour on the market. The formal action taken by the Director General in recent cases reflects this.

It is not the complexity of the licence conditions but their specificity which causes problems. Many of the issues dealt with are very complex - OFTEL investigations frequently involve new products and new issues which may not have been addressed elsewhere before.

(i) OFTEL should co-ordinate more effectively their response to complaints which are similar to those which have arisen before or which relate to wider policy issues by, for example, the use of early case panel meetings or the development of a central database.

The casework management information system has been introduced. Search facilities now help to alert case officers to similar cases at the earliest possible stage.

The weekly meetings of the competition casework panel also provide an opportunity for experienced panel members to refer officers to any relevant work packages within the office.

A new priority project entitled "Competition Casework" has been set up to promote a uniform approach to casework throughout OFTEL.

(j) The turnover of case officers contributed to the delay in progressing some cases.

A number of initiatives have been set up to reduce staff turnover, including job evaluation gradings for all posts, a better defined career structure, offering case officers longer or even permanent contracts in addition to taking traditional secondees, and improved training opportunities.

(k) There were some long gaps between enquiries being concluded and cases being closed, the reasons for which were not apparent from the case file.

A valid criticism of the cases taken but, not necessarily, more generally. Case closure may have been neglected to some extent because of other pressures of work or changing priorities but this has improved since the introduction of performance targets for casework.

As the findings of investigations are published in the Competition Bulletin, case officers are required to close their cases promptly.

(l) Case closure summaries and complainant satisfaction questionnaires appeared to be useful management tools.

OFTEL are also giving consideration to introducing a "complainee" satisfaction questionnaire.

Appendix 6: Our review of cases opened by OFTEL in 1997

We selected at random from OFTEL's casework logs every third investigation which had been opened between January and July 1997. We examined the papers on each of the 20 cases in the sample to consider whether these cases addressed the more critical points raised by our advisory panel. We give below our conclusions on these cases by reference to eight key findings of the advisory panel in Appendix 5:

- **Complaint poorly expressed:** We noted that in one case the complainant submitted a complaint in a format which was agreed with OFTEL. This clearly showed the economic effect of the action being complained about, which OFTEL policy had been breached and what action was required. We did not find this method in use in any 1995 or 1996 case. We suggest that OFTEL might also use this approach when dealing with complaints from other operators. Other than this particular example we did not find that the complaints were better expressed than those we reviewed for 1995 and 1996. We identified one case where we felt that OFTEL should have secured more information from the complainant at an earlier stage. The document "Dealing with Anti-competitive Behaviour in Telecoms", which OFTEL published in November 1997, should also help complainants to understand how they can make a more effective complaint to OFTEL.
- **Delays in receiving advice and guidance from other directorates and branches:** We found that advice from other directorates and branches was generally secured in good time. In only one case did we identify delays in responses from other directorates and branches in OFTEL.
- **Earlier economic and legal advice required:** We found several examples to support OFTEL's view that earlier economic analysis and legal input into cases are now being secured. OFTEL had also introduced weekly casework panels where other directorates and branches provided advice on cases.
- **More focused requests for information needed:** We found evidence to support OFTEL's view that they now provide more focused requests for information, including primary documentation.

- **Delays in the provision of information:** We found evidence that OFTEL were setting tighter deadlines for the provision of information. We found no examples of the company which was the subject of the complaint missing deadlines for the provision of information to OFTEL.
- **OFTEL's formal request powers should be used more:** We found that OFTEL now routinely use their formal powers when requesting information from the company which is the subject of the complaint.
- **Cross-reference to similar complaints:** We noted that case logs increasingly make reference to similar, related cases and that the competition casework panel meetings provide a further opportunity for the sharing of knowledge. The database introduced by OFTEL should enable better cross-referencing to similar types of complaint.
- **Staff turnover:** Documents on only one case showed evidence of the case officer's departure affecting the amount of relevant knowledge and experience at the disposal of OFTEL.

Appendix 7: The main findings of the NOP survey

Objectives of the survey

We commissioned NOP to carry out a telephone survey of the telecommunications industry. The objectives of the survey were to:

- assess the industry's awareness of OFTEL's role in countering anti-competitive behaviour, how businesses should approach OFTEL if they wish to make a complaint, and how the complaint would then be processed; and,
- obtain the industry's views on OFTEL's effectiveness in dealing with anti-competitive behaviour.

Defining the survey population

A critical aspect of the survey was the definition of the target groups for the research. The main focus of OFTEL's activities is with public telecommunications operators and this is the group that OFTEL have received most complaints from. All have telecommunications licences and OFTEL were able to provide us with a full list of the names and addresses of the 60 companies in this group.

We also identified three other groups who might be affected by OFTEL's work: independent service providers, telecommunications consultants and manufacturers of telecommunications equipment (for definitions of all groups see paragraph 1.26). A pilot survey was conducted in April 1997: organisations in these three other groups confirmed that OFTEL had a direct or indirect effect on their businesses.

Screening and sampling the population

NOP sought to contact all public telecommunications operators based in the United Kingdom and a random sample of the three other target groups. Only those organisations which said that OFTEL had either a direct or indirect effect on their business were interviewed. All public telecommunications operators, almost all consultants and nearly three-quarters of independent service providers said that OFTEL had an effect. Manufacturers showed themselves to be the least affected by OFTEL, with only 30 per cent saying that OFTEL had an effect on their business.

Contact names and addresses for public telecommunications operators were verified to OFTEL's register of licence holders. No such comprehensive lists are available from OFTEL or other sources for independent service providers, consultants or manufacturers and there is no certainty about the number of businesses active in each field. For independent service providers, the samples were drawn from the telecommunications business databases of Dun and Bradstreet and a contact list of some 150 businesses provided by OFTEL. The samples for consultants and manufacturers were drawn entirely from the Dun and Bradstreet databases. Initial contacts with companies were based on their group classification. Companies were reclassified where the respondent told NOP that they belonged in another group.

NOP interviewed 42 public telecommunications operators, 108 independent service providers, 117 consultants and 90 manufacturers.

The results of the survey

The tables below show the number of respondents in each of the targeted groups giving a particular answer to the questions in the survey.

Table version of Figure 6 with additional data

Have you experienced the following types of anti-competitive behaviour?			
	Experienced	Not experienced	Don't know
<i>Competitor exercising undue preference towards its own business</i>			
Public telecommunications operators	27	13	2
Independent service providers	53	53	2
Consultants	50	65	2
Manufacturers	28	61	1
<i>Competitor linking sales of products and services</i>			
Public telecommunications operators	26	15	1
Independent service providers	53	51	4
Consultants	49	68	0
Manufacturers	34	55	1
<i>Denigration of products and services by a competitor</i>			
Public telecommunications operators	25	17	0
Independent service providers	32	75	1
Consultants	46	71	0
Manufacturers	31	58	1
<i>Competitor unreasonably delaying fulfilling licence obligations</i>			
Public telecommunications operators	25	17	0
Independent service providers	27	80	1
Consultants	32	84	1
Manufacturers	22	68	0
<i>Competitor unfairly subsidising or cross-subsidising products and services</i>			
Public telecommunications operators	23	17	2
Independent service providers	59	45	4
Consultants	50	65	2
Manufacturers	31	59	0
<i>Competitor engaging in predatory pricing</i>			
Public telecommunications operators	23	17	2
Independent service providers	50	55	3
Consultants	57	60	0
Manufacturers	39	49	2
<i>Competitor inhibiting customer movements</i>			
Public telecommunications operators	20	22	0
Independent service providers	39	69	0
Consultants	36	80	1
Manufacturers	15	70	5

continued..

Have you experienced the following types of anti-competitive behaviour? continued...

	Experienced	Not experienced	Don't know
<i>Competitor refusing to supply services</i>			
Public telecommunications operators	17	25	0
Independent service providers	32	74	2
Consultants	23	94	0
Manufacturers	14	74	2
<i>Competitor imposing long term supply agreements</i>			
Public telecommunications operators	15	24	3
Independent service providers	32	74	2
Consultants	42	73	2
Manufacturers	23	65	2
<i>Competitor exercising undue discrimination against another business</i>			
Public telecommunications operators	18	22	2
Independent service providers	29	75	4
Consultants	18	97	2
Manufacturers	15	75	0
<i>Competitor withholding technical information</i>			
Public telecommunications operators	14	26	2
Independent service providers	37	71	0
Consultants	54	63	0
Manufacturers	26	63	1

Table version of Figure 12 with additional data

(a) How do you rate the legal expertise of OFTEL's staff?

<i>Based on those who have had contact with OFTEL</i>	Very good	Good	Adequate	Poor	Very poor	Don't know
Public telecommunications operators	11	16	4	0	0	1
Independent service providers	10	26	19	2	2	17
Consultants	12	22	10	3	0	17
Manufacturers	5	8	7	1	1	19

(b) How do you rate the technical expertise of OFTEL's staff?

<i>Based on those who have had contact with OFTEL</i>	Very good	Good	Adequate	Poor	Very poor	Don't know
Public telecommunications operators	8	14	5	1	0	4
Independent service providers	8	25	13	8	5	17
Consultants	9	19	14	4	0	18
Manufacturers	7	13	9	1	1	10

continued...

(c) How do you rate the commercial expertise of OFTEL's staff?

Based on those who have had contact with OFTEL

	Very good	Good	Adequate	Poor	Very poor	Don't know
Public telecommunications operators	3	10	12	3	0	4
Independent service providers	3	14	25	15	13	6
Consultants	4	23	19	6	2	10
Manufacturers	0	12	13	3	3	10

Table version of Figure 13

How would you describe the balance OFTEL achieve when regulating anti-competitive behaviour?

	Too reactive	Right balance	Too pro-active	Don't know
Public telecommunications operators	12	21	6	3
Independent service providers	45	34	14	15
Consultants	35	38	13	15
Manufacturers	21	32	7	17

Table version of Figure 18

How do you rate the change in OFTEL's performance in dealing with anti-competitive behaviour over the last year?

	Significant improvement	Improvement	No change	Deterioration	Significant deterioration	Don't know
Public telecommunications operators	5	20	11	1	0	5
Independent service providers	3	35	42	5	2	21
Consultants	8	38	53	0	1	17
Manufacturers	0	22	36	1	0	31

Table version of Figure 19

To what extent has action taken by OFTEL to deal with anti-competitive behaviour increased your confidence that there is fair competition within the telecommunications market?

	Significantly	Slightly	Not at all	Don't know
Public telecommunications operators	6	24	10	2
Independent service providers	12	49	45	2
Consultants	17	44	49	7
Manufacturers	8	39	29	14

Table version of Figure 20

Are you aware that OFTEL are placing greater emphasis on their enforcement work against anti-competitive behaviour?

	Yes	No
Public telecommunications operators	36	6
Independent service providers	52	56
Consultants	50	67
Manufacturers	35	55

Table version of Figure 21

How well do you think OFTEL have explained the reasons for the change in the way they regulate anti-competitive behaviour?

Based on those who answered "Yes" to the previous question

	Very well	Well	Adequately	Not very well	Not at all well
Public telecommunications operators	12	10	9	4	1
Independent service providers	3	9	19	15	6
Consultants	10	7	10	16	7
Manufacturers	2	6	11	12	4

Table version of Figure 22 with additional data

OFTEL hold monthly 'competition surgeries' at which a senior member of OFTEL's staff is available for consultation on competition related issues. What do you think about OFTEL's 'competition surgeries'?

	Made use of service	Aware of service but don't have time to use	Aware of service but haven't had need to use	Aware but don't think it would be useful	Unaware of service
Public telecommunications operators	5	3	9	3	22
Independent service providers	4	3	22	4	75
Consultants	0	0	9	3	105
Manufacturers	0	0	4	1	85

Table version of Figure 23 with additional data

What experience have you had of OFTEL's 'hotline'?

	Called more than once	Called once	Aware but haven't had the need to call	Unaware
Public telecommunications operators	3	2	15	22
Independent service providers	5	3	30	70
Consultants	1	4	28	84
Manufacturers	0	1	11	78

Table version of Figure 25

How do you rate OFTEL's performance in dealing with anti-competitive behaviour by pursuing changes to licences?

	Very good	Good	Adequate	Poor	Very poor	Don't know
Public telecommunications operators	5	20	8	1	0	8
Independent service providers	5	36	42	7	2	16
Consultants	10	45	35	7	5	15
Manufacturers	7	27	25	12	1	18

Table version of Figure 26

Do you think the fair trading condition will enable OFTEL to deal with anti-competitive behaviour more effectively?

	Yes	No	Don't know
Public telecommunications operators	33	4	5
Independent service providers	65	15	28
Consultants	81	16	20
Manufacturers	54	9	27

Appendix 8: Summary of our meetings with OFTEL staff

During the course of our examination we conducted interviews with those members of OFTEL who work in the competition and fair trading directorate dealing with investigations into anti-competitive behaviour. The staff made the following observations:

The nature of their work

The staff regard their work in countering anti-competitive behaviour as complex, technically demanding and fairly pressurised and they consider themselves to be on a very steep learning curve because it usually takes at least a year for those case officers with little relevant experience to become familiar with the subject. The staff acknowledged that the complexity of some cases contributes to delays in reaching conclusions.

Staffing issues

The staff are specialists in certain areas, for example, policy related issues, mergers and dealing with those cases which are either complex or require a speedy resolution. The staff are either employed on secondment or on three year contracts and they expressed concern at the effect the relatively high level of staff turnover has had on the efficiency of the directorate. The staff regard OFTEL training as good or very good and they expected the directorate to grow in size because of the way competition is developing in the industry.

Managing case investigations

The staff diarised and used brought forward systems to bring deadlines to their attention and they consider that the new database of cases will improve the efficiency with which cases are handled. They believe the new weekly case panel meetings will be more focused and effective than the previous monthly meetings and they commented on their effective working relationships with other directorates and branches within OFTEL.

Senior Management

The staff regard the monthly meetings with the Director General as a useful discipline for focusing their thoughts on particular cases, although they can be resource intensive and divert attention from other tasks. They stated that the priority and steer given to some cases can change rapidly after the input of senior management.