



National Audit Office

THE OFFICE OF FAIR TRADING Enforcing competition in markets

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Enforcing competition in markets

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EXECUTIVE SUMMARY



1 In 2001, an England replica football shirt cost £40 in most high street stores. In August 2003, following an Office of Fair Trading (OFT) investigation, the same shirt could be bought for as little as £25, a saving of £15. The case led to the OFT imposing fines of over £18 million against ten businesses for fixing the prices of football kit.

2 This was one of the first high profile displays of the OFT's new competition powers. Since 2000, the OFT has opened 5,900 complaint cases. It has carried out over 170 formal investigations into allegations of anti-competitive activity, covering industries as diverse as toy retailing, horse racing, construction, newspaper distribution, insurance, crematoria, private schools, bus transportation and healthcare. Since 2003-04, five to ten OFT investigations have reached a formal decision each year whilst others are resolved informally.¹

3 Anti-competitive behaviour by companies is detrimental to consumers. It leads to increased prices, and reduced choice and quality. UK economic policy is focused on supporting competition in markets. The Competition Act 1998 transformed the competition laws

in the UK and brought them in line with those of the European Union. The Act gave the OFT statutory powers to investigate, enforce and punish anti-competitive behaviour.² The OFT's new powers were enhanced by the Enterprise Act 2002, which introduced criminal penalties for the worst cartels.

4 The OFT lies at the heart of the UK's modernised competition regime and is integral to the Government's commitment to competitive markets. Using its enhanced powers, the OFT plays a leading role in protecting consumer interests throughout the UK whilst ensuring that business practices are fair and competitive. Its over-arching goal is to make markets work well for consumers and fair-dealing businesses. This benefits the economy as a whole.

5 In recognition of its new responsibilities, the resources allocated to the OFT increased significantly. In 2005-06 the OFT's estimated annual expenditure is £56.8 million, an increase of over 70 per cent since 2000-01. The increase was spread across the consumer and competition functions of the OFT, with some £17 million of the total OFT budget dedicated to competition enforcement work in 2005-06.

¹ The OFT can reach a decision as to whether competition law has or has not been breached. If it finds that the law has been breached (infringement decision), the OFT generally fines the companies responsible. Since 2003-04 the OFT Annual Plan, Objective 3 has included a deliverable target to make between 5 and 10 reasoned, published infringement decisions each year.

² The Competition Act 1998, Chapter 3, Section 25 gives the Director (of the OFT) the power to conduct an investigation if there are reasonable grounds for suspecting anti-competitive agreements or conduct.

6 This increase in powers and resources has, in turn, raised the expectations of Government and other stakeholders. The Government set out clearly what is expected of the OFT. Its White Paper in 2001 states that competition decisions should be taken by strong, pro-active and independent competition authorities.³ The National Audit Office therefore examined the extent to which the OFT is operating as an effective competition enforcement authority. We considered the way the OFT:

- determines its approach to competition enforcement (Part 2);
- carries out its competition casework (Part 3); and
- measures and reports the results of its competition work (Part 4).

Our methodology is summarised in detail in Appendix 1.

Main conclusions

7 The UK's competition regime is still relatively young compared to those of many other major economies around the world. This presents a challenging context for the OFT, as highlighted by the Chair of the Competition Appeal Tribunal: *"In a system so young and so complicated there are bound to be problems and tensions."*⁴ Despite this, the OFT has established a growing reputation internationally⁵ since its powers were strengthened in 2000 and is recognised for leading the intellectual debate on substantive issues in competition analysis. There is, however, scope for the OFT to raise its effectiveness at an operational level. The OFT itself has identified many of these weaknesses in its approach, and is taking steps to address them. We believe that the OFT could translate its intellectual leadership into greater practical results by focusing on three areas:

- **making best use of its resources:** by addressing a perceived 'experience gap' in its staff; and developing further the expertise of staff to handle the rigours and pressures of investigations;
- **improving the management of investigations:** the OFT could improve the transparency of competition investigations by communicating more with the external parties involved, setting expected timescales and using them to drive the management of cases and help to maintain their momentum, where possible. The OFT also could build on its work to improve internal guidance and quality review to ensure consistency of casework; and

- **improving the measurement of its achievements and the communication of its work:** by developing a series of performance indicators which would help demonstrate more clearly the effectiveness of its competition enforcement work, including the benefits to consumers; and by improving accessibility to information on its enforcement work for external audiences.

Our findings in more detail

OFT's approach to competition enforcement (Part 2)

8 The OFT has identified its priorities for enforcement but faces a number of challenges in implementing them.

Although the OFT has developed plans to respond to its enhanced powers and increase in resources, in 2005-06 the OFT Board identified a need to refine this response in order to focus its resources more effectively. The OFT selected five priority sectors in which to channel its efforts: credit; construction and housing; healthcare; the public sector's interaction with markets, and mass-marketed scams. The OFT has not, however, been able to fully reflect these priorities in its day-to-day competition work, principally because the source of investigations is drawn largely from the complaints received, and on-going investigations and appeals consume significant resources. The OFT has exploited some areas of discretion but should continue to explore these options, such as the balance of resources allocated to hard enforcement activity and softer compliance mechanisms.

9 OFT faces an on-going challenge in recruiting and retaining suitably-qualified staff.

The OFT witnessed a peak in competition staff turnover of nearly 20 per cent in 2004-05. Losing experienced staff combined with the difficulties faced by the OFT in recruiting more senior case officers contribute to an experience gap. The current inflexibility in pay and grading is unhelpful in recruiting and retaining suitably experienced staff. The OFT could address this experience gap by strengthening the mentoring of junior staff and enhancing their training and personal development. The OFT has also identified a fundamental weakness in the investigation guidance available to staff. Although a new manual is being developed, with a staged introduction from mid 2005, staff continue to operate without full up-to-date guidance.

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

4 Sir Christopher Bellamy, Chairman of the Competition Appeal Tribunal, Beesley Lectures, 28 October 2004.

5 The peer review commissioned by the Department of Trade and Industry in 2004 places the UK competition regime, including the OFT, as the third best-regarded competition authority in the world.

OFT's case management (Part 3)

10 Investigations are time consuming. In 2004-05 the OFT completed 36 investigations and reached formal decisions on nine cases (the remainder were closed or resolved informally).⁶ Most full investigations take between one year and three years for the OFT to reach a decision. As at April 2005, six of the 37 on-going investigations had exceeded three years, including one very complex case which had been investigated for five years. Although other competition authorities also face difficulties with the timescales of cases, we believe there is a need for the OFT to strengthen its case management and set deadlines for resolving cases by helping staff to develop project management skills. The OFT has recognised these weaknesses and begun to address them.

11 Practitioners⁷ are concerned about a lack of transparency in competition investigations and the costs incurred by parties. There is a level of uncertainty that is unavoidable for businesses that are subject to an OFT investigation. Some practitioners, however, observed that the OFT approach can increase this burden if the case team does not engage constructively or regularly with the parties involved. Increasing the transparency of investigations, where appropriate, would help reduce some of the direct and indirect costs incurred by businesses (for example: legal fees; reputation costs; and management opportunity costs). There is also a responsibility on the parties involved in investigations themselves: they frequently miss deadlines for providing information. The OFT has criminal powers to enforce timely and accurate provision of information but finding the right balance between the proportionate and effective use of such powers is not straightforward, as bringing criminal charges against individuals may be disproportionate in many cases.

12 Quality controls have been introduced but need strengthening in some areas. Competition investigations are highly complex, requiring robust quality control measures throughout. In recognition of this, the OFT has introduced systematic case review meetings before its case findings are published. The OFT could enhance its internal quality control of cases by strengthening the internal challenge on each case before the decision is taken to proceed to full investigation and by developing the routine use of ex-post evaluation of its interventions.

Measurement and communication of the OFT's achievements (Part 4)

13 The OFT monitors its competition activity but does not quantify the benefits it achieves for consumers.

Measuring and quantifying the influence that competition authorities have on the economy is difficult, with some outcomes, such as deterrence effects, virtually impossible to measure. The OFT monitors its high-level activities but this is not part of a well-defined performance management system. Some other competition authorities measure the benefits they achieve for consumers, and the OFT is now beginning to do so.

14 The OFT is developing more targeted communication on competition issues. One of the most important roles of a competition authority is to educate business and consumers about the benefits of competition. The OFT's business surveys indicate that general awareness is growing in the UK, but there is still a significant lack of understanding about competition law. The OFT faces a challenge in educating business, particularly in assisting small business to complain when they are a victim of anti-competitive activity. The OFT undertakes a range of promotional and educational work on competition and in May 2005 embarked upon a campaign to help smaller businesses avoid anti-competitive practices.

15 OFT could improve the availability of case information. The OFT is one of the few competition authorities to publish its reasons for closing some cases. These summaries help indicate how the OFT might approach similar cases in future. The OFT does not, however, publish all case information and statistics on its website or in its annual report. Where information is provided, it can be hard to find or is provided in a format that is not readily of use to the public.

⁶ The OFT made eight decisions under the Competition Act in 2003-04, and 13 decisions in 2002-03. Appendix 2 lists the OFT's decisions in the three years to 2004-05.

⁷ 'Practitioners' include lawyers and economic consultants who act for companies involved in OFT investigations.



RECOMMENDATIONS

16 The OFT has made progress since the Competition Act came into force in March 2000, and is developing plans to raise standards across the board by making changes to improve its effectiveness and professionalism. There is scope for the OFT to build on its achievements and refine further its approach to competition enforcement. The following recommendations are designed to assist the OFT in this aim.

On the use of resources

- a** The OFT should address the experience gap amongst some of its competition staff by increasing the input of senior case officers to investigations and helping more junior staff develop the necessary expertise to manage cases.
- b** The OFT needs to deliver on its commitment to producing a complete set of guidance for staff.

On case management

- c** The OFT should publish expected timescales for its investigations, which are realistic but challenging, and use these to drive case management.
- d** The OFT should explore options for making business and practitioners observe deadlines for providing information requested in the course of investigations.
- e** The OFT should engage more openly with parties to the investigation, both in terms of indicating its concerns and keeping them updated on progress. This would help reduce the uncertainty for parties.
- f** The OFT should encourage internal economic and legal challenge of potential cases as they progress to formal investigation, as well as ensure constructive senior input at an earlier stage. This will ensure that resources are only committed to cases that continue to merit investigation. The OFT should also review how cases were selected and commission an analysis of the effects of its intervention.

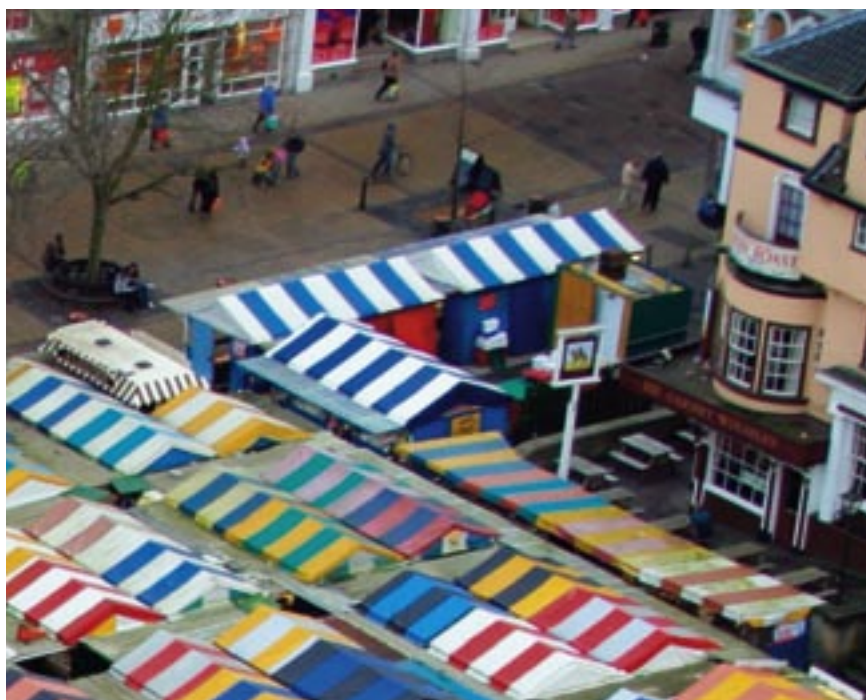
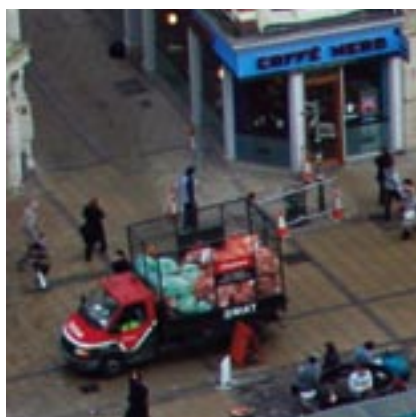


On measuring and communicating achievements

- g** The OFT should develop a group of indicators to help it monitor and review the results of its activities. With the recent creation of an evaluation unit, the OFT should follow the lead of some competition authorities who have attempted to quantify the benefits they achieve for consumers.
- h** The OFT should evaluate the success of education campaigns to ensure the resources in this area are being effectively targeted, in particular on its priority sectors and on its target audiences (smaller businesses and government). For example, the OFT could carry out further research to ascertain the reasons why nearly a quarter of small and medium sized firms believe they are harmed by unfair practices but only a minority would report this to the OFT.
- i** The OFT needs to develop a more comprehensive database of information on cases and improve the accessibility of this information to external users who have an interest in competition enforcement matters. The OFT should consider surveying website users to gain a better understanding of their needs.

PART ONE

The importance of an effective competition authority



Combating anti-competitive behaviour

1.1 Anti-competitive behaviour by companies is harmful to consumers. It can artificially increase prices, reduce choice and impact on quality. The behaviour can take the form of agreements between firms (to set prices or share markets) or one firm taking advantage of its dominant position in a market (to keep other firms out of the market or charge excessive prices).

Harm to UK consumers

1.2 Research shows that consumers suffer more in countries where there is little or no enforcement of competition law. One study reviewed international prices in the vitamins market, which suffered from significant price-fixing activity in the 1990s. It found that prices were lower in countries with an active competition regime, particularly after the illegal price-fixing was uncovered and the companies involved were prosecuted.⁸

1.3 The replica football kit case in the UK highlights the effects of combating anti-competitive behaviour. Before the OFT began its investigation, it was very difficult to buy an adult England shirt for less than £39.99. Following the OFT investigation the 2003 replica England football shirt could be bought for as little as £25, a saving of £15 from the price most retailers charged prior to the investigation. The case led to the OFT imposing fines against ten businesses of over £18 million for fixing the prices of replica football kits (**Figure 1**).

1 Case study – replica football kits

During the Euro 2000 football tournament and the Premier League seasons of 2000 and 2001, consumers were paying up to £40 in sports stores to buy certain replica football shirts. These included the England shirt and kit, as well as those of Manchester United, Chelsea, Celtic and Nottingham Forest.

One sports retailer that stocked these shirts, Sports Soccer, contacted the OFT in early 2001. They claimed that agreements had been established to fix prices at £39.99 for an adult shirt and £29.99 for a junior shirt. Retailers who tried to discount the shirts from these artificially high levels were threatened with having their stock orders cancelled.

The OFT decided to pursue the complaint from Sports Soccer, and raided the premises of five firms as part of its investigation of the market which is worth around £250 million each year. The OFT found evidence of three different sets of agreements to fix prices between JJB Sports, Umbro, Manchester United, Allsports, the FA, Blacks, Sports Soccer, JD Sports, Sports Connection and Sportsretail. The OFT fined these companies a total of £18.6 million for infringing competition law (some of the larger individual fines were subsequently reduced on appeal by the Competition Appeal Tribunal).

As a result of the decision, prices for replica football kit decreased significantly as retailers were now free to compete against each other. When the investigation was concluded, the OFT carried out a random survey of prices for England kit. It found that consumers could buy adult shirts for as little as £25 and junior shirts for £18 – a reduction of some 40 per cent.

Source: OFT

8 “The Deterrent Effects of National Anti-Cartel Laws: Evidence from the International Vitamins Cartel”, Clarke & Evenett, 2 September, 2002.

The goals of competition policy

1.4 The UK's economic policy is focused on supporting competition in markets. When companies compete, there are strong incentives for good performance. Vigorous competition encourages companies to be more efficient, reduce prices and innovate, which in turn helps consumers get a good deal.⁹ Governments around the world have come to rely on competitive markets to deliver economic benefits, as this can be less expensive and far more effective than regulation. Some markets operate freely, with numerous companies competing to provide products or services. Competition policy aims to set a clear framework within which competition can flourish and prevent market failure. Where prevention is not possible, competition policy empowers a competition agency to take action against business practices that restrict competition.

1.5 Penalties for infringement of competition law reflect the importance attached to competitive markets. In the UK, the OFT¹⁰ can impose penalties on businesses under civil law and prosecute individuals under the criminal law, including a fine of up to 10 per cent of turnover, criminal prosecution and the possibility of being sued for damages by those harmed by the unlawful behaviour.

UK competition regime

Recent legislative reform

1.6 Competition policy plays an important role across the world's major economies. The US, widely recognised as the birthplace of competition policy, passed its first competition legislation in 1890.¹¹ Legislation to protect competition across Europe was part of the Treaty of Rome in 1957 and Germany introduced its Act against Restraints of Competition in 1958.

1.7 The UK passed the Fair Trading Act in 1973, the Restrictive Trade Practices Acts in 1976 and 1977 and a Competition Act in 1980. During the 1990s the UK government recognised that reform of the UK competition regime was required for a number of reasons, including conformity with EU practice. This recognition led to a series of legislative changes: the Competition Act 1998 to strengthen UK competition law and to bring it into line

with EU competition law, the Enterprise Act 2002 which built on progress made, and most recently modernisation of the UK regime in 2004 to further align the UK with the EU system. These changes were designed to address the perception of the UK regime identified in the 2001 White Paper: "the UK regime was widely accepted as being much weaker than our industrial competitors".

1.8 The Competition Act 1998 outlines what kind of commercial activities constitute anti-competitive behaviour (**Figure 2**). Agreements prohibited under Chapter 1 include those which fix prices, limit production, carve up markets or unfairly discriminate between customers. Cartels, where businesses agree not to compete, are the most serious form of anti-competitive agreement. Abuse of a dominant market position, prohibited under Chapter II, may include charging excessively high prices, limiting production, refusing to supply without good reason, differential charging for the same goods or making contracts conditional on unrelated factors.¹² The legislation provides only a high-level classification for what constitutes anti-competitive behaviour. The OFT has to analyse markets and commercial behaviour to reach a judgement as to whether there has been an effect on competition in breach of either prohibition.

2

UK competition law relating to competition enforcement

Competition Act 1998 (came into force in March 2000)

Empowers the OFT to conduct a formal investigation if there are reasonable grounds for suspecting an infringement of either:

- *Chapter I*: "prohibits agreements which affect trade within the UK and which have as their object or effect the prevention, restriction or distortion of competition within the UK"
- *Chapter II*: "prohibits conduct which amounts to an abuse of a dominant position within the UK (or any part of it) and which affects trade within the UK"

Enterprise Act 2002¹³ (came into force in June 2003)

- Introduced criminal sanctions for dishonest involvement in serious, organised cartels
- Introduced director disqualifications for breaches of competition law

Source: The Competition Act 1998 and the Enterprise Act 2002

⁹ Department for Trade and Industry website (<http://www.dti.gov.uk/ccp/topics2/ukpolicy.htm>) and "Productivity and Enterprise: A World Class Competition Regime", July 2001.

¹⁰ Or the relevant sectoral regulator under concurrent powers that exist under the Competition Act 1998 for certain industries.

¹¹ The Sherman Act was passed in 1890, and was supplemented by the Clayton Act and Federal Trade Commission Act in 1914.

¹² The Competition Act 1998, Section 2 and Section 18.

¹³ The Enterprise Act 2002 also introduced changes to the UK merger regime as well as a new role for the OFT in reviewing markets.

1.9 This report examines the OFT's competition enforcement work under the Competition Act 1998. It does not examine the OFT's merger work, nor the OFT's work on market investigations or consumer regulation enforcement.

The UK competition regime

1.10 These new competition laws removed Ministers from decision-making on competition cases and placed the responsibility for enforcement of competition law primarily with the OFT and other independent competition authorities (**Figure 3**). The OFT is an independent non-ministerial government department which sits at the centre of the UK competition regime. The OFT's competition decisions (and those made by the sector regulators) may be appealed to the Competition Appeal Tribunal. The Competition Commission examines and (where appropriate) makes remedies for merger cases and market investigations that are referred to it by the OFT.

1.11 The OFT received substantial increases in funding to meet its enhanced powers under the Competition and Enterprise Acts. Since 2000, its annual expenditure

has increased by over 70 per cent from £33 million in 2000-01 to an estimated expenditure of £56.8 million in 2005-06. The increase was spread across both consumer and competition functions of the OFT, with some £17 million of the total OFT budget dedicated to competition work in 2005-06 (**Figure 4 overleaf**).

Distinct features of UK regime

1.12 Although the Competition Act was modelled substantially on European legislation, the UK regime has several distinctive features:

- **The appeals jurisdiction is wide-ranging:** the Competition Appeal Tribunal must determine an appeal on the merits of the case;¹⁴ in Europe decisions are subject to review;¹⁵
- **It is part of the EU framework but has elements of the US regime:** for example, the Enterprise Act 2002 introduced criminal penalties for individuals dishonestly involved in the worst types of cartel activity. This criminalisation is part of the US, but not EU laws;¹⁶

3 The OFT at the centre of the UK competition regime



Source: National Audit Office

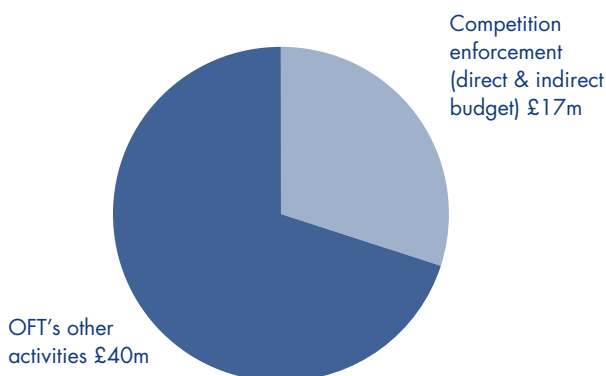
¹⁴ The Competition Act 1998, Schedule 8, paragraph 3(1).

¹⁵ Article 230 of the EC Treaty.

¹⁶ Unlike in the EU, individuals found guilty by a court in the UK can be imprisoned for up to five years and face an unlimited fine.

4

The OFT's projected expenditure 2005-06



Source: OFT Annual Plan 2005-06

NOTE

The competition enforcement budget includes merger control work.

- **Competition-consumer agency model:** the OFT, like its equivalent bodies in the US, Canada and Australia, combines the dual powers of competition enforcement and consumer protection. One of the advantages of the competition-consumer agency model is that it retains a strong focus on consumer welfare;¹⁷ and
- **Market investigations:** the OFT, and on reference the Competition Commission, has the ability to investigate markets where competition may not be working well, but there is not necessarily evidence of anti-competitive behaviour, for example, where there has been a high level of consumer complaints and a high level of market concentration.

Effectiveness of competition authorities

1.13 There is a growing consensus and discussion of the principles that underlie an effective competition authority. The Government's White Paper in 2001 states that competition decisions should be taken by strong, pro-active and independent competition authorities.

Government targets

1.14 The Department for Trade and Industry has defined one measure of effectiveness in its Public Service Agreement target for the UK competition regime. The target is,

"...Promote fair competitive markets by ensuring that the UK framework for competition and for consumer empowerment and support is at the level of the best by 2008".

The Department for Trade and Industry uses peer review to measure the performance of the UK competition regime against this target.¹⁸ This review is based on a survey of legal practitioners, economic consultants, academics and other commentators.

1.15 The first peer review in 2001 found that the UK competition regime was rated more highly than the European Commission, but below those of the US and Germany. The Department of Trade and Industry repeated the peer review in 2004. This review concluded that the UK still retained the third highest ranked competition regime by expert commentators.

Other measures of effectiveness

1.16 The peer review commissioned by the Department of Trade and Industry measures effectiveness by surveying expert perceptions. Effectiveness can also be measured against a set of good practice criteria. One leading expert established a series of behaviours or ideal characteristics for an effective competition authority:¹⁹

- commitment to critical self-assessment (such as periodic comprehensive review, evaluation of performance, assessment of human capital, comparative study with other authorities); and
- commitment to transparency (such as enhancement and disclosure of databases and explanation of actions taken and not taken).

A competition authority also has to strike a balance between competing concerns, such as delivering efficient investigations, whilst ensuring consistency and transparency of approach.

¹⁷ The Hampton Review proposed that a new consumer and trading standards agency is set up to take over the OFT's consumer protection responsibilities (*"Reducing Administrative Burdens: Effective Inspection and Enforcement"*, Philip Hampton, March 2005).

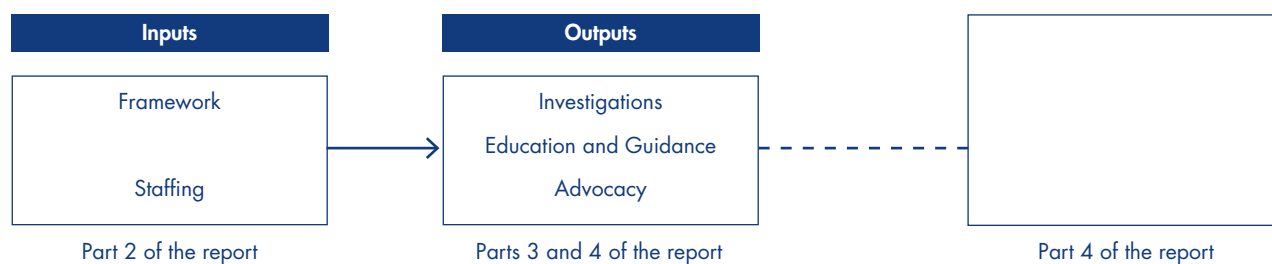
¹⁸ The review covered the role of the Department for Trade and Industry, the OFT and the Competition Commission.

¹⁹ *"Achieving Better Practices in the Design of Competition Policy Institutions"*, William E Kovacic, April 2004.

1.17 The National Audit Office focused on the OFT's competition enforcement responsibilities and did not analyse the effectiveness of the OFT's work on mergers. We reviewed a wide range of expert commentaries on effectiveness. We also interviewed the major stakeholders in the UK competition regime to determine what was expected of the OFT in its competition enforcement work. We consolidated the main themes into three areas for our review: planning (Part 2), case management (Part 3)

and performance measurement (Part 4). The report also includes appendices on the study methodology, the OFT's published decisions in the period 2002-03 to 2004-05, summaries of a selection of past cases, and good practice in public reporting. In addition, we developed a performance measurement model with the OFT for its competition enforcement work to describe the OFT's workflow (the inputs and outputs) which help produce the OFT's desired outcomes (**Figure 5**).

5 Performance model



Source: National Audit Office

NOTE

The OFT has varying levels of influence over its outcomes and aspirations of making markets work well for consumers and fair dealing businesses.

PART TWO

OFT's approach to competition enforcement



2.1 The OFT confronts a series of challenges in enforcing competition law, such as its broad remit, the complexity of investigations, and the level of control it has in reaching its aims (**Figure 6**). This part examines how the OFT is seeking to make the best use of its resources to achieve its aims and objectives given these challenges. In particular, we considered:

- the OFT's priority areas for 2005-06;
- the constraints faced by the OFT in applying these priorities to its competition enforcement work; and
- the OFT's development of resources for competition enforcement work.

Setting priorities

2.2 The OFT has developed and published plans since 2003-04 to respond to its enhanced powers and increase in resources.²⁰ In 2005-06, however, the Board and Chairman identified a need to refine this response in order to focus its resources more effectively across the OFT's broad remit. The Board selected five areas for priority attention (**Figure 7 overleaf**). These choices were based largely on the types of complaints most regularly received by the OFT. The priority areas were first published in the 2005-06 Annual Plan to explain the OFT's objectives for the next three years.

6 Competition law is difficult to enforce

- **Scale of the OFT's remit** – the OFT is responsible for examining an increasing number of complaints across the entire economy (except those industries within the remit of the sector regulators²¹). The OFT has developed sectoral expertise, but many investigations still require extensive research;
- **Complexity of each case** – Investigations absorb a significant amount of time and resources as they involve wide-ranging analysis of the economic facts or evidence. The markets examined, and the nature of commercial arrangements within them, also change over time; and
- **Influence over results** – the OFT cannot fully control whether it achieves all of its goals. For example, the OFT educates companies about competition law, suggests compliance programmes and provides a threat of penalty for non-compliance. It is, however, the responsibility of each individual company to understand and comply with the law.

Source: OFT and the National Audit Office

2.3 Those formally consulted by the OFT and interviewed by the National Audit Office generally accepted the selection of these five priority areas. Some concerns were raised in the National Audit Office survey of OFT staff, however, about the communication of this high-level plan to staff at the operational level, as well as confusion about how these priorities applied to competition enforcement work.

²⁰ The Enterprise Act 2002 requires the OFT to publish an annual plan, the first of which was published in 2003-04.

²¹ The sector regulators have concurrent powers to apply and enforce competition law in certain industries: communications, energy, water, railway and air traffic services.

7

The OFT's five priority areas

- credit markets;
- construction and housing;
- healthcare markets;
- markets where the public sector exerts significant influence; and
- mass-marketed scams.

Source: OFT Annual Plan 2005-06

2.4 The OFT established working groups for each priority area in March 2005 to identify possible activities. However, the OFT has not been able to fully reflect these priorities in its day-to-day competition work. This is because the priorities cannot fully take into account the nature and structure of competition enforcement work.

Constraints in applying priorities

2.5 The legislative framework for the OFT's competition enforcement powers is broad. The Competition Act empowers the OFT to conduct formal investigations where it has reasonable grounds to suspect an infringement of the law. The competition framework that has developed since 2000 has, however, reduced the degree of choice the OFT exercises in determining its programme of enforcement work because:

- **Cases selected for investigation are drawn largely from complaints received:** The OFT's investigations are drawn largely from complaints. The priority areas are one of six criteria used by case officers when assessing whether to take a complaint forward to full investigation. Even where the complaints received do match the priority areas, on-going cases can limit the resource commitment available for new investigations. Some of the OFT's on-going investigations fit well with the five priority areas; others may not.
- **Staff involved in defending appeals of the OFT's decisions means fewer resources are available for investigations:** Decisions made by the OFT may be appealed to the Competition Appeal Tribunal. Appeals can be time-consuming as they reopen

and review the entire OFT case. This requires a significant input of resources from the OFT and means fewer staff resources are available for undertaking other investigations. 13 cases have been appealed to the Tribunal since 2001-02.²²

- **Decisions and appeals on past cases create a framework which the OFT must bear in mind in applying its priorities:** Enforcing competition law requires the OFT to take into account expectations created by past decisions and appeals on those decisions. This is particularly important in deciding which cases to open and deciding how to close cases which it decides to pursue no further. Both have an influence over how the OFT applies its priorities.
- **The OFT has to operate within the European framework:** The OFT operates within the European Competition Network and has to work more closely with other European competition agencies and the European Commission. The OFT has to monitor and incorporate policy from the European Commission into its treatment of cases. The OFT is also bound by rulings from the European Court of First Instance.

Options available to the OFT in defining its work programme

2.6 Despite the constraints placed on the OFT, the authority still has some discretion in the way it determines its competition enforcement programme. The National Audit Office identified a range of areas where the OFT is able to exercise some choice (**Figure 8**).

2.7 The OFT is already making use of some of these options. However, it is yet to fully explore others such as the balance between hard enforcement (formal investigations leading to a decision), formal commitments²³, and compliance activity (providing advice and informal case resolution). The range of education, compliance and enforcement options available to a competition authority are outlined in **Figure 9**. The National Audit Office survey asked OFT staff to identify the main focus of its competition work. An overwhelming majority of respondents considered that the role of case officers was to ensure compliance (by a wider range of methods such as meetings with parties, giving advice and education) rather than to solely carry out investigations.

²² This excludes appeals originally made under Section 47 of the Competition Act. Under Section 47 of the Act (as amended by the Enterprise Act 2002) a third party with sufficient interest in a decision of the OFT falling within paragraphs (a) to (f) of section 46(3) of the 1998 Act may appeal directly to the Tribunal against that decision. Prior to 21 June 2003 it was necessary for such a third party to request the OFT to withdraw or vary the contested decision before any appeal could be brought, but that is no longer necessary. There have been four cases of this type.

²³ The use of informal assurances was discontinued in May 2004. In their place, the OFT uses binding commitments.

8 Areas where the OFT can exercise choice

OFT has already adopted

Divisional structure

The OFT is allocating staff more flexibly between teams and is creating a dedicated Preliminary Investigations Unit.

Case selection criteria

The OFT has developed 6 criteria for selecting investigations. It can also close investigations on grounds of administrative priority.

Encourage leniency applications

The OFT targets certain industries if it suspects cartel activity.

Source: National Audit Office

OFT is yet to fully explore

Soft versus hard enforcement

The OFT can achieve better outcomes by balancing enforcement and compliance tools. The OFT currently uses some alternative case resolutions.

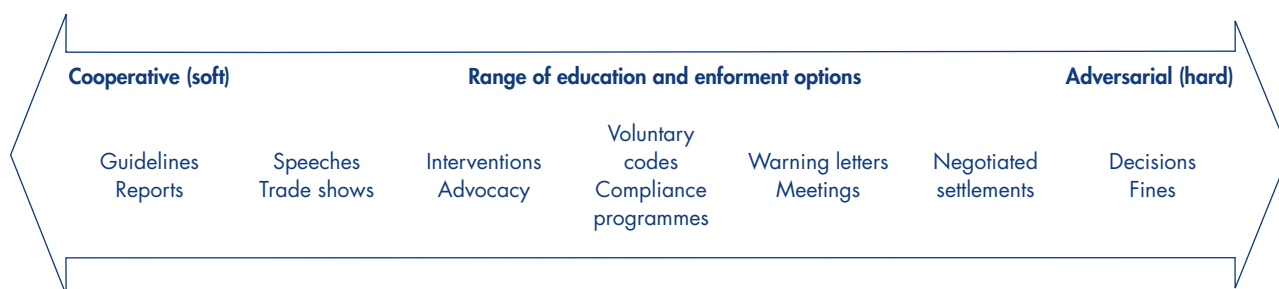
Make better use of complaints/intelligence

- a The OFT could use intelligence from several complaints to build evidence; and
- b Invest in a searchable database for intelligence to help develop own-initiative cases.

Encourage private enforcement

The OFT can encourage others to pursue civil damages, which reduces its investigation burden.

9 Options for securing business compliance



Source: National Audit Office (using information from "Securing Compliance", Karen Yeung (2004) and the Canadian Competition Bureau)

Organisational challenges facing the OFT

2.8 The OFT faces organisational challenges in carrying out its competition enforcement work. The National Audit Office examined how the OFT is responding to the challenges in each of these areas:

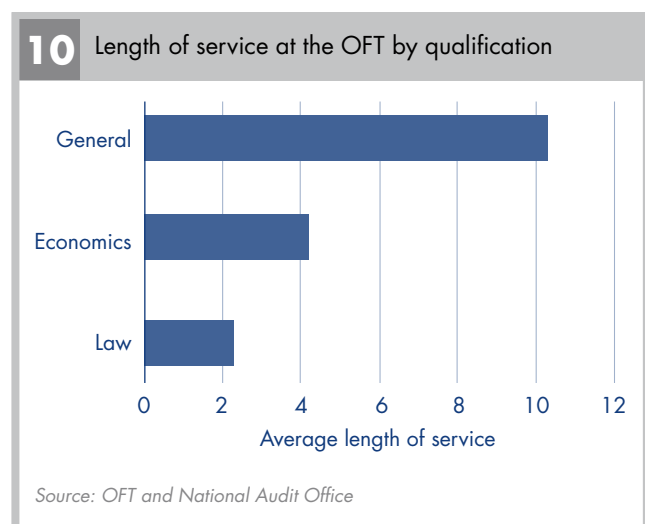
- the recruitment and retention of suitably experienced staff; and
- the training and development of staff.

Recruitment and retention of staff

2.9 In a young competition regime such as the UK, the OFT faces a challenge in recruiting suitably experienced staff, in part because there is a limited number of candidates with the requisite blend of legal, economic and case management expertise. It also faces a challenge in retaining those staff that it attracts or develops. High staff turnover impacts on the continuity of casework, as well as contributing to external perceptions of an experience gap amongst competition staff.

2.10 Staff retention has become an issue for the OFT, with the Competition Enforcement Division experiencing its highest level of staff turnover in 2004-05 of nearly 20 per cent. As at September 2005, there were 175 staff in post, with 12 per cent of posts unfilled.²⁴ When questioned about staff turnover in the National Audit Office survey, many respondents believed that pay differentials to the private sector and a lack of career progression opportunities, particularly for those that are not qualified lawyers or economists, were contributing factors.

2.11 The OFT's case teams consist of staff significantly less experienced than similar staff at other leading competition authorities such as in the US, the European Commission and Germany. **Figure 10** shows the average number of years of experience at the OFT by qualification. On average, staff with a legal qualification have worked in the Competition Enforcement Division for two years and economists for four years.



2.12 In their dealings with OFT case teams, practitioners have expressed concern about a lack of experience. This experience gap can manifest itself in the approach taken by staff to an investigation. First, it can affect the way staff draw conclusions about alleged anti-competitive behaviour. Some practitioners said they had experienced investigations in which case teams appeared to make up their minds too early in the investigation rather than taking a balanced view. Second, practitioners told the National Audit Office that case teams with less experience often lacked the confidence to hold meetings. When meetings were held, some sessions were unproductive because the case teams did not always feel confident to engage fully in a discussion of the issues.

2.13 The OFT faces particular difficulties in recruiting more senior case officers from law firms and economic consultancies, as financial rewards grow exponentially at this point in a private sector career and because of the skill mix the OFT requires. The current inflexibility in pay and grading is unhelpful in recruiting and retaining suitably experienced staff. In particular, the OFT is beginning to notice the pay differentials at more senior levels compared with other competing public sector bodies. The OFT has resolved to focus on 'growing' its own talent for senior case handling roles. This approach will require resources to be devoted to training and development of staff through mentoring by experienced directors. Another option that the OFT could explore is to devote fewer, more experienced staff to competition enforcement work.

Developing the necessary expertise to investigate cases

2.14 In the shorter term, the OFT can bridge this experience gap through training and development of its staff, as well as providing strong management support. Guidance, both written and oral, of what management expects from staff and on-the-job mentoring is important in providing less experienced case officers with the necessary direction to carry out competition work.

24 Based on budgeted full-time equivalent staff of 199.

2.15 Another fundamental tool to assist less experienced staff is a procedures manual, which is regularly updated. The OFT identified weaknesses in its previous guidance to staff and intended to revise the manual by April 2005. It realised, however, that a complete rewrite was necessary if the guidance was to improve the consistency and professionalism of competition work. The new guidance is still being developed, with a staged introduction from mid 2005. The absence of staff guidance creates a greater risk of inconsistency in the way that cases are managed.²⁵

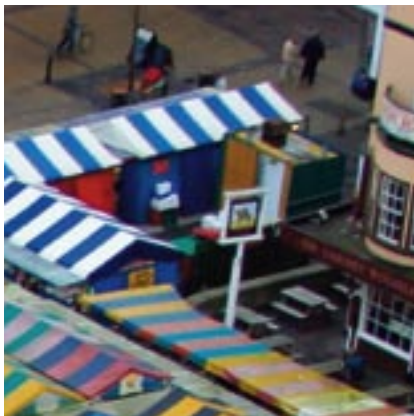
2.16 To date, training provided to competition enforcement staff has predominantly focused on competition law and economics. Results from the National Audit Office survey confirmed that staff consider current training insufficient. Less than half the respondents considered that they had “sufficient training to handle the rigours and pressures of case work”.

2.17 The OFT has recently dedicated time to identifying the particular skills and expertise required to successfully manage competition investigations. These tend to be practical skills rather than formal legal or economic knowledge, including project management, investigation techniques, file management, interviewing, taking witness statements, running a litigation case and people management. The OFT is developing more comprehensive on-the-job training to counter some of the identified gaps in expertise. The OFT could consider examples from other competition authorities as it remodels the competition enforcement training programme. For example, the US Department of Justice has developed a comprehensive training programme for its staff. One component involves a three-year programme for new case officers that focuses on various phases of an investigation, using the same mock case.

²⁵ The OFT could consider making the manual publicly available on its website, similar to the US Department of Justice, to provide additional clarity for external parties (http://www.usdoj.gov/atr/foia/divisionmanual/table_of_contents.htm.)

PART THREE

Case management



3.1 The OFT carries out investigations when it has reasonable grounds to suspect that a company has breached competition law. The OFT initiates most of its investigations after receiving a complaint from a competitor or consumer. The duration of an investigation depends on the complexity of a case. Case teams have to obtain and analyse market and company information to reach a decision on whether the law has been breached. In the last three years the OFT has completed 123 formal investigations and made 30 decisions. The OFT expects to investigate between 30 and 50 cases in 2005-06 (**Figure 11**).

3.2 All regulators, including competition authorities like the OFT, need to minimise the impact they have on businesses by reducing any unnecessary uncertainty involved in their activities. This part examines whether the OFT has managed its casework effectively and considers: how the OFT determines which cases to investigate; its quality review procedures; timescales for investigations; and how the OFT engages with parties to its investigations.

Deciding which cases to investigate

3.3 An investigation usually results from a complaint received by the OFT from a business or individual. The OFT has opened some 5,900 complaint cases about alleged anti-competitive behaviour since the Competition Act came into force in March 2000.

11 Expected and actual numbers of investigations since 2002

Year	Expected number of investigations	Actual number of investigations
2002-03	— ¹	39
2003-04	45-65	48
2004-05	45-65	36
2005-06	30-50	— ²

Source: OFT

NOTE

1 The Annual Report 2002-03 did not include the expected number of investigations.

2 The actual number of investigations in the year to 31 March 2006 is not yet available.

Prioritising complaints

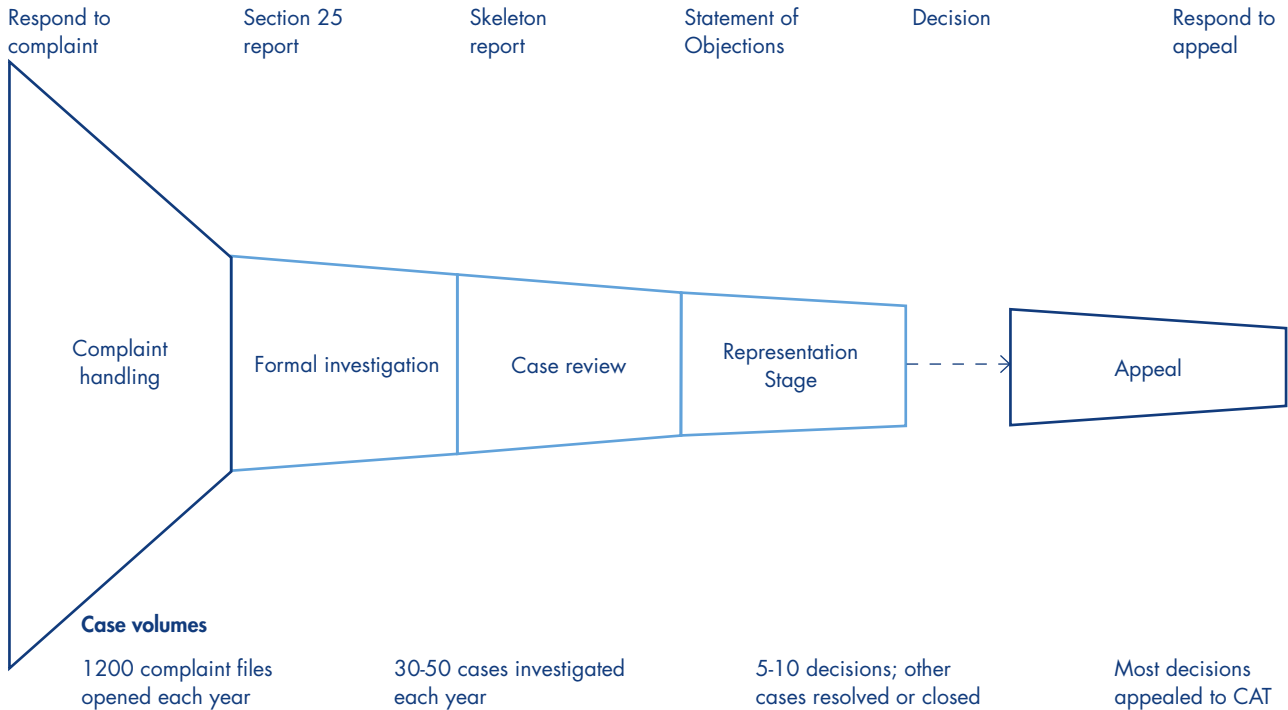
3.4 The OFT has finite resources and therefore has to evaluate the seriousness of each complaint to determine whether it raises sufficiently serious concerns of anti-competitive behaviour.²⁶ The large majority of complaints do not progress to formal investigation because they do not contain sufficient evidence or the complaint is found to fall outside competition law. The OFT sifts complaints to identify between 30 and 50 cases that merit a full investigation (**Figure 12 overleaf**) and has developed a set of criteria to guide decisions on which cases to take forward.²⁷ In future, the OFT will also consider whether the

²⁶ In addition, the OFT has opened formal investigations from time to time following an enquiry started on its own initiative.

²⁷ The OFT's criteria for determining whether to proceed with an investigation includes an estimate of the consumer detriment, the strength of the evidence and whether the OFT is best placed to take the case further.

12 The main stages of a full investigation

OFT processes



- **Section 25 report:** assesses whether there are “reasonable grounds” to open a formal investigation. Once approved the formal investigation will proceed.
- **Skeleton report:** sets out the main facts and argument against the target of the complaint, and is used to ensure the Chairman and the Board are content to proceed.
- **Statement of Objections:** prepared where the OFT reaches a preliminary finding that an infringement of the Competition Act has taken place. It is the OFT’s case against the target of the complaint and is in effect the proposed infringement decision.

- **Representations stage:** the target of the complaint and other parties to an investigation are given the opportunity to respond to the Statement of Objections and inspect the OFT’s file. Parties may make written and oral representations to the OFT.
- **Infringement/non-infringement Decision:** The OFT’s final decision is sent to parties and a non-confidential version is published.
- **Appeal:** The OFT’s decisions may be appealed to the Competition Appeal Tribunal, where the OFT has to defend its decision.

Source: OFT and National Audit Office

complaint falls within its five priority areas (paragraph 2.2). Minor breaches are sometimes dealt with by a telephone call or letter to the target of the complaint.

3.5 The OFT regularly assesses whether to continue an investigation on the basis of priorities and strength of available evidence. It aims to reach a formal decision in five to ten cases each year and cases that do not reach a decision may be resolved or closed in other ways:

- **informal resolution:** the OFT may decide that education/encouraging compliance is the most effective way to resolve the issue;

- **binding commitment:** the target of the complaint reaches agreement with the OFT on a set of binding commitments designed to end the anti-competitive behaviour; and
- **case closure:** cases may be closed for two reasons:
 - insufficient evidence: the evidence does not support further action; or
 - administrative priority: the case is no longer of sufficient priority or the OFT is unable to reach a definitive view without incurring disproportionate expense.

Improving complaint handling

3.6 In March 2005 the OFT reviewed the scope to improve the efficiency of complaints handling. The review also assessed the type of complaints received and whether this indicated a lack of understanding of the role of the OFT. It found a number of weaknesses in its approach (**Figure 13**). As a result, the OFT has decided to set up a separate team to process complaints, and is also considering issuing guidelines to assist complainants to make more informed complaints.

3.7 The review found that the OFT's ability to make efficient decisions on whether to proceed with a complaint is too often hampered by a lack of information provided by the complainant. The OFT does not intend to establish information requirements for complaints as this may create barriers to accessing public competition enforcement by small businesses and consumers. The OFT could, however, consider a model developed by the Office of Communications (Ofcom), which uses guidance to assist potential complainants provide information in their complaints that is useful to the case teams (**Figure 14**).

Quality review

3.8 Investigations of anti-competitive behaviour are complex and require specialist knowledge of economics and competition law. Case teams also need to develop an understanding of the product or market under investigation. There is no typical investigation. Case teams have to analyse large amounts of documentation and interview witnesses before they can ascertain whether the target of the complaint has breached competition law. The interpretation of competition law also involves a good deal of judgement and the OFT has to develop an argument backed up by evidence that will withstand legal challenge from the defendant. It may not always be clear whether a company has breached competition law or is merely seeking to win or retain market share legitimately.²⁸

13 Main findings from OFT's review of complaint handling

- The quality of complaints is generally perceived as being poor, containing very little information and requiring an exchange of correspondence simply to get basic facts;
- Two per cent of complaints made by individuals or small businesses were deemed appropriate for a formal investigation, whereas this figure was 10 per cent for complaints received from 'large enterprises'; and
- There are significant variations in complaints handling both within and across branches.

Source: OFT complaint handling review 2005

14 Extracts from Ofcom's guidelines to complainants

- Submissions should contain a certain level of evidence before it will open an investigation including: identifying the alleged breach of the Competition Act 1998, sufficient evidence to support the allegations, and a statement preferably from the chief executive of the company.
- Smaller companies and new entrants may require assistance in formulating complaints. Ofcom will provide guidance to less experienced complainants.
- In some circumstances, such as a complaint from an individual consumer that appears to raise serious issues, Ofcom may waive the submission requirements.

Source: Ofcom

Internal quality control

3.9 The complexity of competition casework requires a strong focus on quality control. In recognition of this need, the OFT introduced a case review mechanism in late 2004 to provide additional scrutiny before its findings (Statement of Objections) are published. The case team subjects their findings to a formal case review panel, usually comprised of a lawyer, experienced case officer and economist and chaired by a senior director. The US Department of Justice has used a similar practice in some of its investigations by requiring the case team to engage in a "mock trial" of certain aspects of the proposed case. A peer review mechanism has also been introduced by the OFT for the decision to take forward a complaint to formal investigation. The branch directors present the merits of the case to other directors. In June 2005, the OFT created a senior director post to oversee case scrutiny. These moves should help to improve the consistency and robustness of casework.

²⁸ These judgements may be particularly difficult where a company has become dominant in its market through organic growth.

External quality control

3.10 The Competition Appeal Tribunal hears appeals on the OFT's decisions. It therefore provides a form of external quality review. The Tribunal holds a full re-hearing of decisions made by the OFT.²⁹ Ten of the cases where the OFT reached an infringement decision have been appealed to the Tribunal since 2001-02,³⁰ including the majority of the OFT's infringement decisions where a fine has been imposed.³¹

Potential to strengthen quality control

3.11 The OFT has set in place the fundamental aspects of quality control. There are, however, several areas where this review of quality could be strengthened:

- earlier case challenge; and
- review of the approach taken after a case is concluded.

3.12 The current case review system involves internal challenge at quite a late stage of each investigation. It is important, however, that cases are considered from a variety of perspectives at an early stage so that they have a better chance of standing up to external scrutiny. Some practitioners told the National Audit Office that early challenge on cases would assist the OFT in selecting more robust cases, as the longer a case goes on, the harder it becomes to challenge it effectively. The US Federal Trade Commission considers this culture of internal challenge critical to selecting robust cases. It has established a system of independent advice to senior management from its Bureau of Economics, starting at an early point of each investigation. The OFT should initiate and co-ordinate early internal challenge of investigations, particularly by expert economists and lawyers who have experience of running OFT investigations and are independent of the case.

3.13 The US Federal Trade Commission has sponsored a number of expert evaluations over the past 25 years and have, in conjunction with the Department of Justice, recently conducted a retrospective analysis of the factors

that were behind its previous merger decisions. This kind of scrutiny was proposed by the Department of Trade and Industry's White Paper in 2001³² and in March 2005 the Competition Commission, the OFT and the Department of Trade and Industry published an ex-post evaluation of mergers. As the competition regime develops, the OFT could consider undertaking such evaluations of its Competition Act investigations.

Timescales for investigations

3.14 The OFT's investigations consist of a number of stages which often involve numerous internal and external parties. As each case is unique, there is no typical duration for a case. **Figure 15** shows the duration of six recent cases (Appendix 3 contains a brief summary of the OFT's decision in each case), and the time involved on two of the key stages.

3.15 The National Audit Office analysed the length of time taken by the OFT to conclude its investigations (**Figure 16**). This included 14 investigations that reached an infringement decision and 11 investigations in which the OFT decided that competition law had not been breached (a "non-infringement" decision). Six of the 14 infringement decisions have taken between two to three years from the date of opening the case to the date of decision. Non-infringement decisions are generally completed more quickly and in eight of the 11 cases, the investigation was concluded in less than two years. Cases can also be resolved informally, and most of these are resolved within one year.³³

3.16 In terms of cases in progress, as at April 2005, the OFT had 37 formal investigations at different stages and seven active appeal cases (**Figure 17 on page 24**).³⁴ There are a large number of cases that have been open for at least two to three years (20 out of 37 cases).³⁵ The OFT's forecast at April 2005 was that ten on-going cases would take more than three years to reach a decision, with two of these cases likely to take over four years, and a further two expected to last over five years.³⁶

29 The Tribunal, an independent judicial body, can confirm, set aside or vary a decision, remit the matter back to the OFT or make any other decision the OFT could have made.

30 The ten cases are: *Napp*; *Aberdeen Journals I*; *Aberdeen Journals II*; *Hasbro* (*Hasbro distributors*); *Argos/Littlewoods*; *Genzyme*; *Replica kit*; *West Midlands roofing felt*; *Attheraces*; and *Dessicant* (*Industrial Adhesives*).

31 In a number of decisions only a few of the parties have appealed.

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

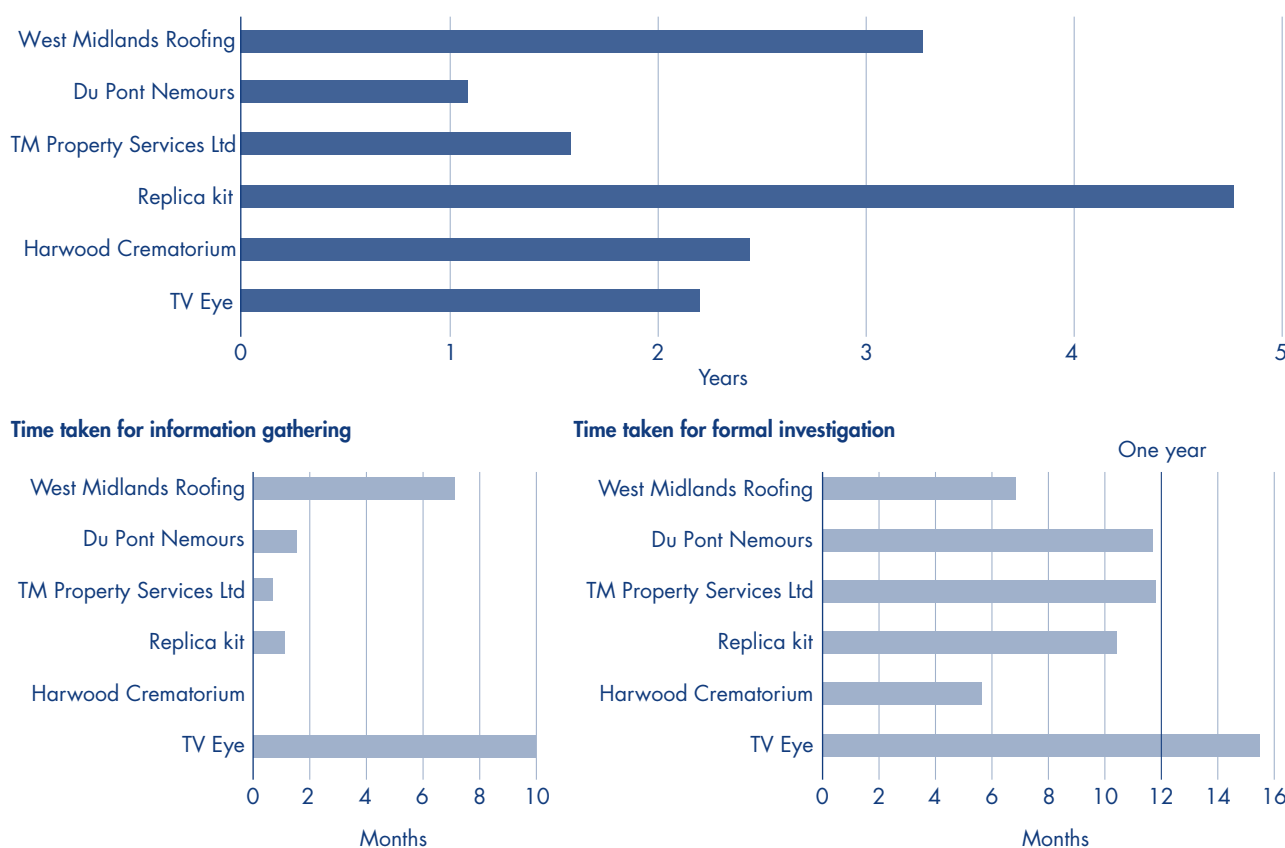
33 Cases that do not reach a decision are resolved informally, closed on grounds of insufficient evidence or administrative priority.

34 This excludes cases under Section 47 of the Competition Act of which there were three active appeals as at April 2005 (*Claymore/Express Chapter I*; *Claymore/Express Chapter II*; and *Pernod-Ricard* (*Bacardi*)).

35 These are cases that are still under investigation.

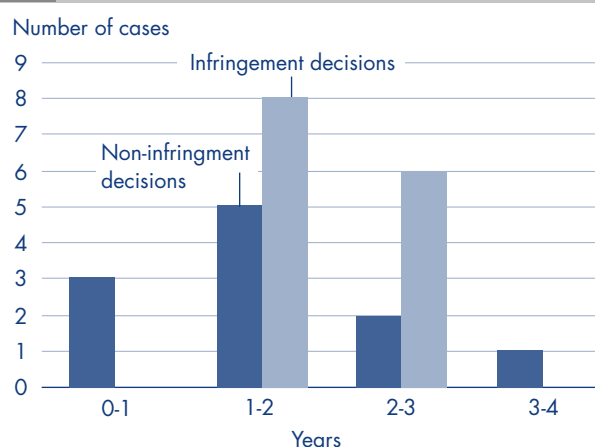
36 The OFT cautioned that a significant portion of cases fail to reach forecast dates, especially over six months ahead.

15 Timescales for an entire investigation and key stages of the investigation



Source: OFT and National Audit Office

16 Time taken for infringement and non-infringement decisions



Source: OFT and National Audit Office

NOTE

This figure includes all Competition Act 1998 cases on which an infringement or non-infringement decision was reached by the OFT up to 1 April 2005.

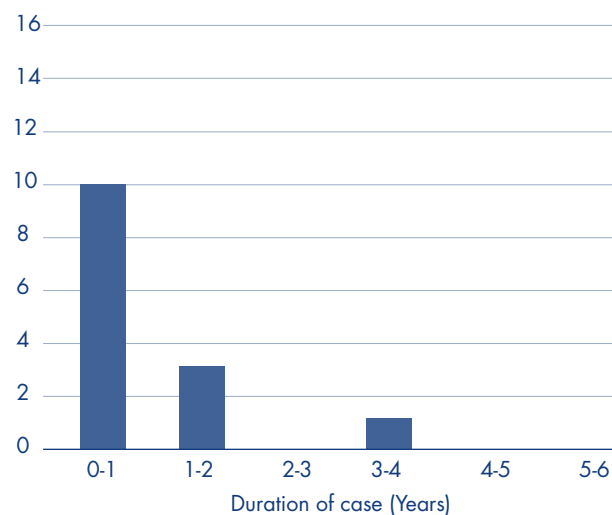
3.17 When asked about long timescales in the National Audit Office survey of OFT staff, many respondents identified reasons such as changing priorities, turnover in personnel, internal processes and delays in getting information back from third parties. Other competition authorities also face similar difficulties with long timescales in carrying out investigations. After the Competition Act came into force in March 2000, the OFT set performance standards for its investigation work³⁷ but experience has shown these standards to be unrealistic. However, the standards remain on the OFT's website and have not been revised.

³⁷ To complete investigations of suspected anti-competitive practices within six months of the start of the investigation in 75 per cent of cases; and to complete cartels cases within 12 months of an investigation being initiated in 75 per cent of cases.

17 OFT case timescales¹

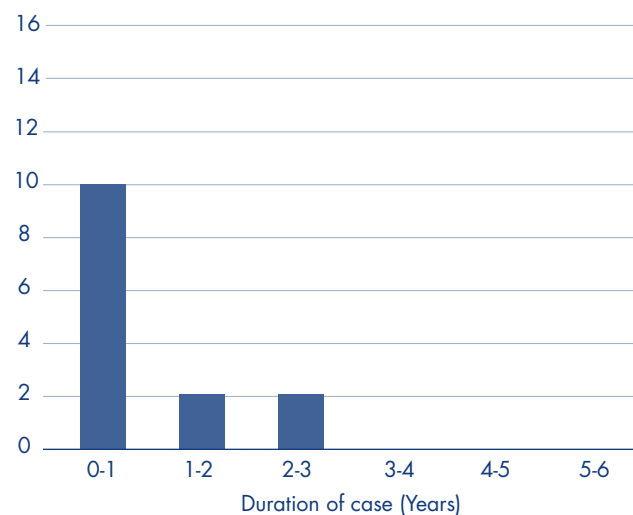
Closed because of insufficient grounds

Number of cases



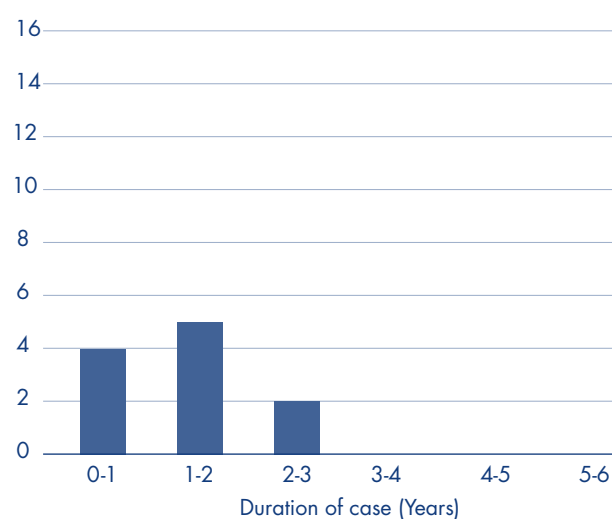
Closed by informal resolution

Number of cases



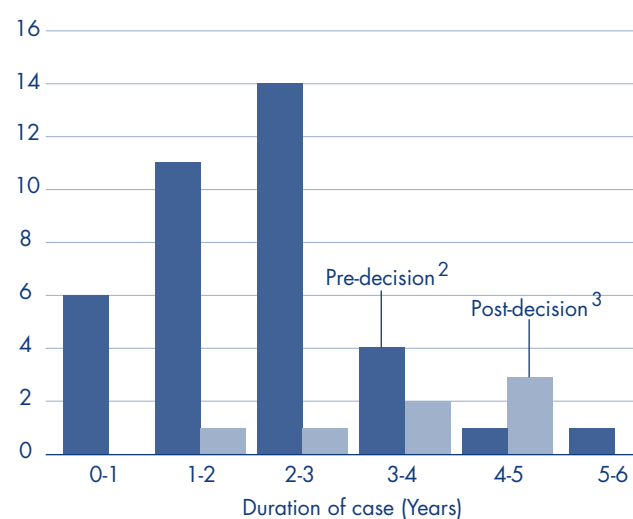
Closed on grounds of administrative priority

Number of cases



Still open

Number of cases



Source: OFT and National Audit Office

NOTES

¹ This dataset covers all cases that were open as at 1 April 2003 or that the OFT opened subsequently up to 1 April 2005.

² Pre-decision: cases that as at 1 April 2005 were open; on which the OFT had not yet reached a decision.

³ Post-decision: cases on which the OFT had made a decision and which were under appeal as at 1 April 2005.

3.18 Cases that are appealed to the Competition Appeal Tribunal can take even longer and this contributes to overall uncertainty about timescales of investigations. The National Audit Office analysed the time taken for six closed cases³⁸, from the OFT receiving the original complaint to the conclusion of the appeal; two of these cases took between three and four years to conclude (**Figure 18**). Seven cases remained open at April 2005³⁹ and three of these had been open for over four years. The OFT is not able to influence timescales of appeals.

Concern about the timescales of investigations

3.19 There is a consensus across the OFT that action needs to be taken to address the long timescales of investigations. The Chairman's Introduction to the 2005-06 Annual Plan outlined plans "to be more efficient and effective. Some cases... take too long". Around a third of respondents in the National Audit Office survey of OFT staff consider that investigations take too long.⁴⁰

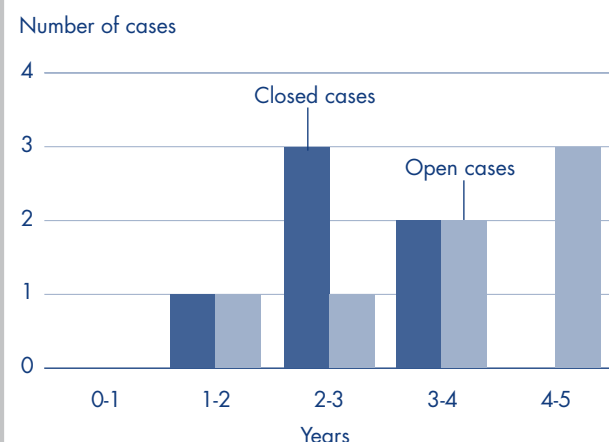
3.20 External stakeholders think timescales are a cause for considerable concern. Legal and economic practitioners noted that slippage of timetables and delays in promised deliveries, such as responses to letters, were common. The CBI reported that a common criticism from their members was the length of time involved in the OFT's investigations. The Competition Appeal Tribunal has also criticised timeframes in a recent case that took over three years to conclude. It suggested that the OFT review its procedures.⁴¹

Suggestions to improve timescales

3.21 There is significant scope for the OFT to improve the timeliness of its investigations as well as provide more certainty on timing to parties involved in investigations. The OFT could consider:

- strengthening case management skills;
- setting bespoke deadlines for each investigation; and
- publishing estimated timescales for investigations.

18 Time taken for cases that are appealed to the Tribunal



Source: OFT and National Audit Office

NOTE

These timescales include the OFT investigation.

3.22 Basic case management has been introduced to competition investigations. Once the OFT decides to take forward a complaint to formal investigation, the case team prepares a plan which sets out estimated dates for major milestones on the case. These plans usually project three to four months ahead. The target dates, however, are not considered definitive as slippage can occur due to factors outside the OFT's control. The OFT should encourage a culture of delivery on its competition work by increasing its focus on case management, helping staff to develop these project skills and providing the requisite IT tools to assist with this.

³⁸ This excludes an appeal under Section 47 of the Competition Act that was closed as at April 2005 (*Bettercare* case).

³⁹ This excludes appeals under Section 47 of the Competition Act that were open as at April 2005 (*Claymore/Express* Chapter I; *Claymore/Express* Chapter II; and *Pernod-Ricard (Bacardi)*).

⁴⁰ This is the stage from when the Section 25 threshold has been passed to the issuing of a Statement of Objections (Figure 12 refers).

⁴¹ Competition Appeal Tribunal judgement 6 July 2005: *ME Burgess JJ Burgess and SJ Burgess v OFT*; Case No: 1044/2/1/04.

3.23 Deadlines are important to drive internal delivery, as well as to provide certainty to external parties involved in an investigation. Many competition authorities face difficulties with timescales on competition investigations, but very few set deadlines or publish their expected timeframes. Practitioners generally perceive that in its work on mergers, the OFT demonstrates strong case management and meets tight statutory timetables. The National Audit Office identified two authorities in the UK and US that work to self-imposed timescales; Ofcom, and the US Department of Justice. Although the Competition Commission is not involved in competition investigations and so is not strictly comparable, it publishes expected timescales for their market investigations to inform external parties and stakeholders.

3.24 The OFT finds that delays to information gathering are a major barrier to estimating timeframes and improving delivery times. Companies frequently do not comply with deadlines for formal information requests, despite this being a criminal offence.⁴² The OFT reminds recipients of information requests that they risk enforcement action for not complying.⁴³ The OFT has not yet identified a case in which to apply these powers because it considers that finding the right balance between their effective use and proportionality is not straightforward. Despite these constraints, there is considerable support amongst OFT staff and external practitioners for the OFT to set targets for completing cases within a certain timeframe or to publish expected timescales for their investigations. Interviews with some of the OFT's branch directors noted that targets might also reduce uncertainty for staff.

3.25 The OFT is taking steps to address some of these concerns over timescales. In particular, it created a new senior competition director post in June 2005 to focus on casework delivery, with day-to-day oversight of how cases are prioritised, planned and resourced. It also plans to make changes to the structure of teams in the Competition Enforcement Division in order to improve the flexibility of staff across the division and ensure that priority work is properly resourced.

Engaging with parties to an investigation

3.26 The OFT, like other regulators, has a commitment to be as open as possible when engaging with parties involved in an investigation.⁴⁴ However, many OFT investigations, particularly those involving serious cartels, could be prejudiced if the OFT disclosed information about the case. The OFT also has to maintain the confidentiality of complainants on investigations.

Suggestions for achieving greater transparency

3.27 Some legal and economic practitioners have experienced investigations in which the OFT case team was reluctant to hold meetings or engage with them to discuss issues involved in the case.

"Companies have found themselves subject to an investigation by the OFT and have waited many months without knowing whether this would lead to further action." (CBI)

Early meetings with the case team where appropriate, as well as regular updates of progress would help reduce the uncertainty for parties involved. The OFT may need to consider increasing the input from senior case officers for this sort of engagement with companies and their legal representatives, in order to mentor less experienced staff (paragraph 2.13).

3.28 The OFT could also benefit from constructive engagement with parties involved in an investigation by testing out, where appropriate, the case team's understanding and definition of the market involved and the competition concerns at stake. When dealing with such a wide remit across the UK economy, this kind of engagement could help avoid unnecessary or incorrect analysis by the case team. This in turn would speed up the time taken for investigations.

3.29 Legal practitioners have also highlighted a lack of transparency and consistency in written requests for information issued by the OFT.⁴⁵ Requests can be too imprecise, broad or vague, making it more difficult and expensive for the company to respond. The OFT could consider whether engaging early with companies and their legal representatives could help refine the requests and allow them to target the information required more effectively.

⁴² Late filing or the provision of misleading information is a criminal offence (the Competition Act 1998, Section 42).

⁴³ Ofcom's guidelines emphasise that it expects parties to adhere to strict deadlines on information requests or risk enforcement action. Ofcom only departs from this when the nature of the information required means that a formal request is inappropriate.

⁴⁴ The OFT's "Aims and objectives – code and charter standard statement" on its website.

⁴⁵ Requests are made under Section 26 of the Competition Act 1998.

3.30 The OFT has recognised concerns about its engagement with parties to investigations, and has consulted with the Joint Working Party of the Bars and Law Societies of the UK on Competition Law. The OFT agrees that there is merit in seeking to be more open, both in terms of discussing issues and keeping parties updated on progress. Over the last two years, the CBI has proposed a code of practice on enforcement, including conducting interviews, meetings and investigations and specific timetables for investigations. The OFT is planning to respond to these concerns by:

- improving information requests by making sure senior staff are actively involved in formulating the request, as well as more frequent circulation of a draft letter in advance to allow discussion of scope, content and timing; and
- more structured involvement of complainants and other third parties in investigations to increase certainty as to how and when the OFT will interact with third parties (these proposals are currently under consultation).

3.31 The OFT could also look to incorporate some of the practices of other competition authorities into its approach. Ofcom's guidelines to complainants and parties indicate that they can expect regular contact with the team working on the investigation and regular updates on the progress of investigations. The US Department of Justice seeks to ensure consistency in its major information requests by requiring them to be approved by senior management.

Costs for companies involved in an investigation

3.32 The OFT's investigations can be costly to those businesses involved (whether as the target of the complaint or the complainant) as well as to the OFT itself.⁴⁶ Uncertainty over the timescales of an investigation⁴⁷ can create additional costs. The OFT should, like all regulators, ensure that it does not impose unintended additional costs on businesses that are under investigation. Costs are closely linked to the length of the investigation and include:

- **external professional advice** – for example, legal, consultancy and public relations;
- **internal staffing** – involved in defending the case;
- **information requests** – requests can be very broad and involve identifying, sorting and providing large amounts of data;
- **reputation and market valuation** – from adverse publicity during an investigation or when a decision is announced; and
- **opportunity costs** – senior staff time involved in responding to the investigation that otherwise could be spent developing their business.

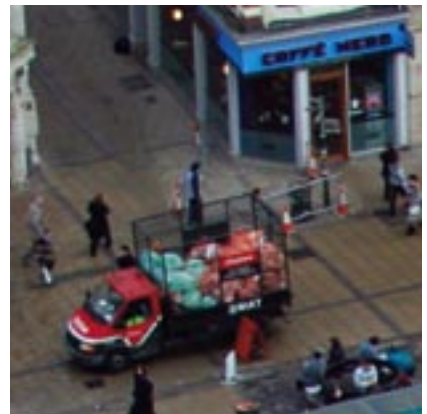
3.33 The CBI told us that in some major cases legal costs alone can be significant. Some of their members had incurred legal fees in excess of £200,000 on such cases, and sometimes these can be considerably higher. If a company chooses to appeal the OFT's decision, then costs escalate further. For example, one company whose case started in 2001 (including an appeal) has incurred legal fees of over £1.7 million.

⁴⁶ The OFT do not have accurate historic cost data on their investigations; however it introduced a time recording system in May 2004 which should be able to provide this data in future.

⁴⁷ Or even uncertainty as to whether the company is still under formal investigation.

PART FOUR

Measuring and communicating achievements



4.1 Publicly funded bodies are under significant and constant pressure to quantify their achievements and demonstrate their value. Performance measurement is also an important internal management tool, which the OFT should be using to develop strategic direction and evaluate the effectiveness of its choices. This part examines the current measures of performance used by the OFT on its competition enforcement activity, as well as the approach to communicating their role and achievements to businesses and consumers.

How the OFT measures its achievements

Benefits to consumers from competition enforcement

4.2 The work of a competition authority brings about three types of benefits to consumers:

- improved company compliance (through education);
- the deterrent effect of the competition regime which discourages companies from engaging in anti-competitive activity; and
- direct results in specific investigations (for example, lower prices).

4.3 The benefits from deterrence and increased compliance are generally considered to be hard to measure with any confidence; for example the US Department of Justice stated:

*“We firmly believe that deterrence is... the single most important outcome of the Division’s work. We are just as sure that it presents the most significant measurement challenges”.*⁴⁸

Benefits arising from the resolution of price-fixing cases are easier to quantify than investigations into the abuse of dominance by a firm. Research carried out for the OFT in 2002⁴⁹ suggested the following estimates could be applied to the volume of commerce involved in each investigation in order to calculate the consumer savings achieved by the OFT’s intervention:

- **Price-fixing:** Generally can lead to prices being artificially inflated by over 10 per cent, so this could be applied as a conservative estimate in such cases.
- **Abuse of dominance:** The US Department of Justice relies on a conservative 1 percent figure for the estimate of consumer savings, which attempts to measure direct consumer benefits and does not include deterrent effects.

⁴⁸ The US Department of Justice, Antitrust Division, Congressional Submission for Fiscal Year 2001.

⁴⁹ “Development of Targets for Consumer Savings Arising from Competition Policy”, Discussion Paper 4, Davies & Majumdar, June 2002 (p.8).

Current performance system used by the OFT

4.4 The OFT uses a range of performance indicators to measure success against its goal of “*making markets work well for consumers*”. The OFT has nine objectives for 2005-06 making up its Service Delivery Agreement with HM Treasury. The National Audit Office focused on the two objectives that concern competition enforcement (**Figure 19**). The OFT measures its success against these objectives on the delivery of a range of activities but does not seek to evaluate the benefits for consumer welfare and markets.

OFT’s other measures of performance

4.5 The OFT publicises the fines it imposes against companies that have been found to have infringed competition law (**Figure 20**). Levels of fines are set to reflect the size of the market and the gravity of the offence⁵⁰ and serve to deter future infringing behaviour. They can also give to a limited extent a crude indication of the harm to consumers. Since the introduction of the Competition Act in 2000, fines imposed have totalled £60 million (although many have later been reduced on

appeal). Fines are collected on behalf of Treasury but there is no compensation for consumers and firms that suffered as a result of the anti-competitive behaviour. Victims can seek redress through private law suits. The OFT has also on a few occasions given an indication in its press releases of the price reduction resulting from its intervention, where a price-fixing case has been resolved (**Figure 21**).

Evaluating consumer benefit

4.6 The OFT, like most other competition authorities, has struggled to find a satisfactory way of quantifying the benefits it achieves for consumers. Some competition authorities do calculate and publish estimates of the benefits they bring for consumers. These estimates are generally published with some caveats, but are calculated using very prudent assumptions to reflect the imprecision involved. This represents a step towards evaluating the outcomes of competition policy. **Figure 22** outlines some of the measures adopted by other competition authorities that could be considered by the OFT. In most cases, the conservative estimates of benefits are much greater than the cost of running the competition authority itself.

19 Relevant objectives in the 2005-06 Annual Plan

Objective

3 - We will use our powers actively under competition legislation to deal with anti-competitive practices.

6 - Inform consumers and business about their rights and responsibilities under competition laws, and give law-abiding businesses the opportunity to complain about the anti-competitive behaviour.

Activities

- Respond to 1,000 complaints and investigate between 30-50 cases. Secure outcomes from 10-20 investigations, and publish 5-10 decisions.
- Investigate potential criminal cartel offences.

- Run eight regional road shows across UK.
- Run specific, targeted campaigns to improve awareness of rights and responsibilities.
- Maintain the annual tracking research programme.
- Develop the website further.

Source: OFT Annual Plan 2005-06

⁵⁰ Penalties can be imposed up to ten per cent of the firm’s annual turnover in the relevant market.

20 High profile fines imposed by the OFT

Companies fined	Fine imposed at decision (£m)	Fine following appeal (£m)
Napp	3.21	2.20
Aberdeen Journals	1.33	1.00
Toys and games		
■ Argos ¹	17.28	15.00
■ Littlewoods	5.37	4.50
■ Hasbro (Distributors)	4.95	4.95
Genzyme	6.80	3.00
Replica football kits		
■ JJB Sports ²	8.37	6.70
■ Umbro Holdings	6.64	5.30
■ Manchester United	1.65	1.50
■ Allsports	1.35	1.42

Source: OFT

NOTES

- 1 Fines for Argos, Littlewoods & Hasbro are the result of one investigation.
- 2 Fines for JJB Sports, Umbro Holdings, Manchester United and Allsports are also all part of one investigation.

21 Extracts from OFT press releases

Toys and games

"During the period of the price-fixing agreements, a game of Monopoly, for example, cost £17.99 in the spring/summer catalogues of both companies. Following the OFT decision the game was sold by Argos for £13.99 and for £13.49 by Littlewoods. Argos has further lowered the price of the game and it is currently sold for £13.49".⁵¹

Replica football kits

"At the start of Euro 2000, before the OFT began its investigation, it was very difficult to buy an adult short-sleeved England shirt for less than £39.99. By the time of Euro 2004, England shirts were widely available for as little as £25. That's real savings for fans".⁵²

Source: OFT

22 Alternate measurement of outcomes

- **US Department of Justice:** Publish a comprehensive set of performance measures, including dollar volume of commerce affected (US\$44 billion for non cartels and US\$1.1 billion on cartels in 2004) and consumer savings (US\$115.7 million for all non-merger cases in 2004).
- **US Federal Trade Commission:** Work towards targets on dollar volume of commerce affected by the cases undertaken (US\$2.6 billion in 2004).
- **Dutch Competition Authority:** Started publishing estimates of the benefits to consumers and markets from merger and non-merger cases in 2004. Estimated that their impact was at least €900 million over three years.
- **UK Competition Commission:** Remedies imposed on the mobile call termination market are anticipated to result in gains to consumers of £325-700 million over four years. By comparison the Commission's annual budget is around £25 million.⁵³

Source: National Audit Office analysis of other competition authorities' publications

Performance measurement

4.7 The National Audit Office developed a performance measurement model with the OFT for its competition enforcement work (**Figure 23 overleaf**) and used this to review what type of performance information is being used by the OFT. The model uses a first principles approach, starting with the outcomes that the OFT wants to achieve, and then creates a framework to describe the OFT's workflow (the inputs and outputs) that help produce the desired outcomes, as well as the external factors that can influence the OFT's environment.

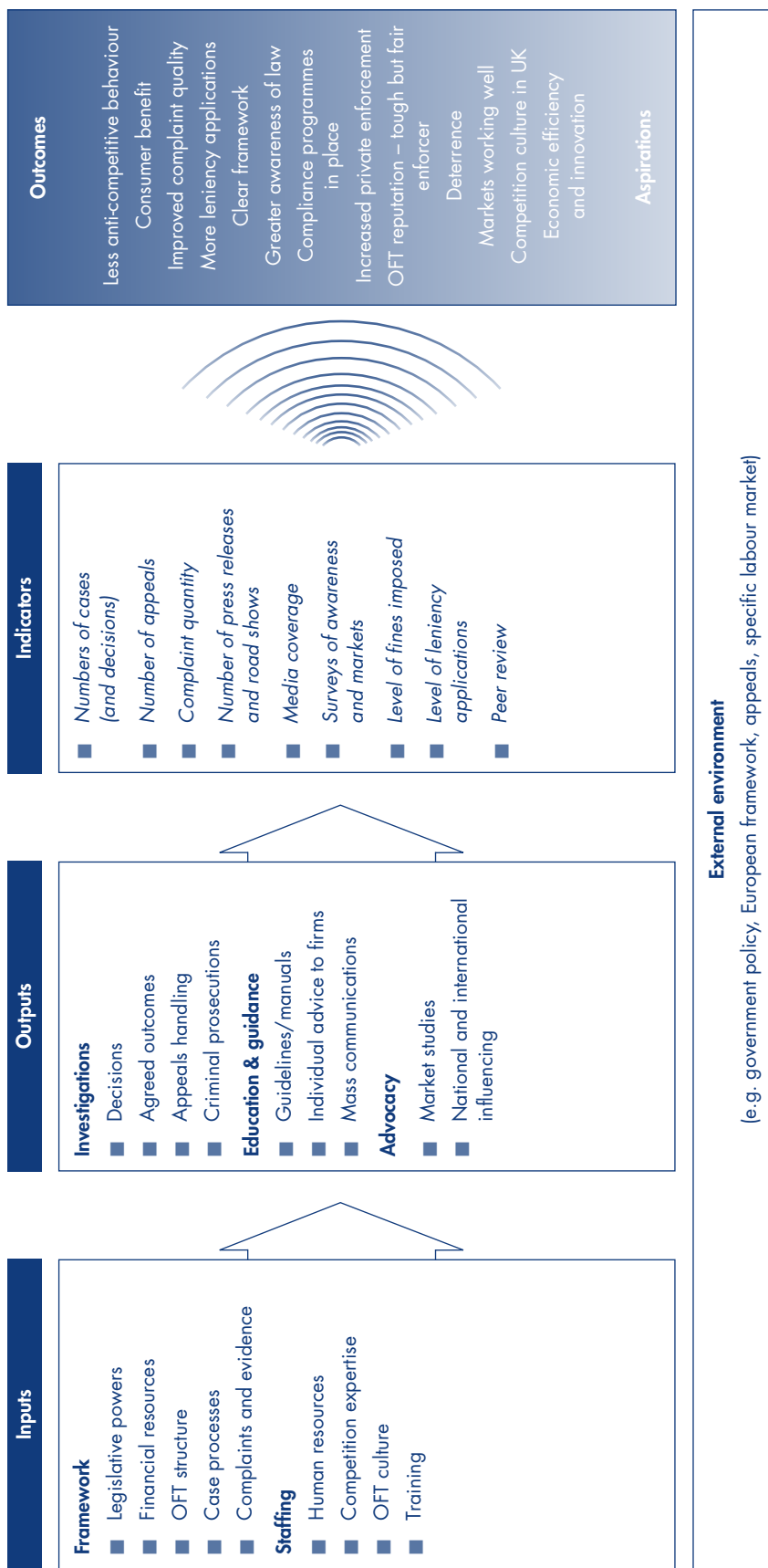
4.8 Measurement indicators help the OFT monitor progress and ascertain whether it is meeting its goals. The OFT predominantly uses indicators that relate to the objectives in its annual plan. The National Audit Office mapped the current indicators against the OFT's outputs and desired outcomes in the model, in order to identify any significant gaps in information. The OFT intends to develop this model further as its understanding of the linkages between the various facets of the model improves.

51 "Agreements between Hasbro U.K. Ltd, Argos Ltd and Littlewoods Ltd fixing the price of Hasbro toys and games". This extract is taken from one of the Notes to the OFT's Press Release dated 29 April 2005.

52 "Price Fixing of Replica Kit". This extract is taken from the OFT's Press Release dated 1 October 2004.

53 Professor Paul Geroski, former Chairman of the Competition Commission, speech – September 2004 at Centre for Competition Policy, University of East Anglia.

23 Performance measurement model



Source: National Audit Office and OFT

4.9 The OFT measures most of its outputs. It tracks the number of investigations and decisions it undertakes, as well as the number of surrounding activities such as appeals and criminal prosecutions. The OFT also monitors its education output carefully, measuring for example the number of speeches, press releases, road shows and guidance publications produced. However there are some outputs that are not measured, such as cases resolved other than by formal investigation. This involves a company agreeing to adhere to binding commitments or where early negotiated solutions such as informal letters or meetings address the matter in question.

4.10 The National Audit Office examined how the OFT measures progress against its goals (**Figure 24**). The OFT already uses some indirect or proxy measures to give an indication of progress against some of its goals. For example, it carries out surveys of business and consumers to ascertain their perceptions of anti-competitive activity and barriers to entry. The OFT relies heavily on these surveys for information about its influence on markets.⁵⁴ However there are other outcomes that the OFT does not or cannot measure. One major gap in information is some form of measurement of the benefits the OFT brings to consumers (or size of commerce affected) in each investigation.

24 Measuring the OFT's goals

Outcome/aspiration	Is it measured by OFT?	Examples of potential indicators
Less anti-competitive behaviour	Yes; OFT annual survey of business and consumer perceptions of markets and competition	
Consumer benefit	Partially; the level of fines is a crude indication of the harm to consumers	Quantify benefits to consumers on case by case basis (e.g. price reduction)
Improved complaint quality	Yes; ad hoc review looked at type of complainant that led to an investigation	
Informed stakeholder views	No, but OECD reviews, research for DTI's PSA target and survey ratings are available	
Encouraging leniency applications	Yes	
Awareness and knowledge of law	Yes; OFT annual survey of business and consumers	Number and type of complaints
Compliance	Yes; OFT survey asks about compliance programmes	
Positive media coverage	Yes	
OFT reputation (as a tough but fair enforcer)	Partially; OFT annual survey of business and consumer perceptions of markets and competition	Survey business awareness of important OFT cases
Deterrence	Yes; number of leniency applications	Survey business awareness of important OFT cases
Markets working well	Yes; OFT annual survey of business and consumer perceptions of markets and competition	
Competition culture	No	i) Number of private actions (currently very rare) ii) Quality/type of complaints
Increasing economic efficiency and innovation	No	

Source: National Audit Office and OFT

⁵⁴ The OFT carries out two surveys each year on awareness of competition law and perceptions of markets. The sample size in some sub-categories (such as business size) may not be sufficiently representative if the OFT seeks to place full reliance on them.

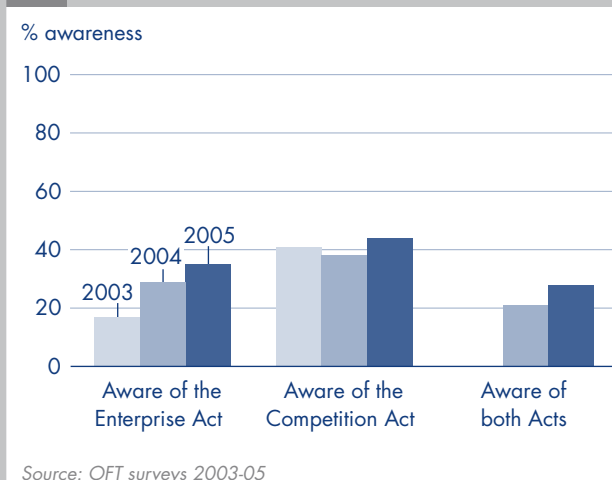
4.11 No one method can be used to measure the OFT's effectiveness and too much focus on one measure can be misleading. However a balanced range of indicators should help the OFT to monitor and keep under review its results and the effectiveness of its resourcing decisions. The National Audit Office has identified some potential indicators that the OFT could explore in developing this approach (Figure 24). The OFT has established a dedicated evaluation unit in July 2005 to produce more detailed and consistent assessment across the OFT.

How the OFT communicates with its audiences

4.12 One of the main roles of a competition authority is to increase compliance with competition law through education. The Department for Trade and Industry specified that the OFT looks "beyond enforcement to a role of advocacy and promotion", pointing to the US and Australian examples, where the authorities are more visible in promoting the competition and consumer cause.⁵⁵ The OFT therefore has a role to help business and consumers comply by publishing general and targeted material about their obligations under the law. Then if businesses choose to ignore their obligations and act unlawfully, the authority will enforce compliance with the law by carrying out an investigation.

4.13 The OFT surveys of business awareness of the competition regime have shown increasing awareness of competition legislation (Figure 25). Over half of the companies surveyed, however, are still not aware of the laws and there is a clear relationship between awareness and size of company. The 2005 survey found that awareness of the Enterprise Act in businesses with fewer than 10 employees was 24 per cent, compared to 63 per cent in companies with over 200 employees. The surveys also showed that awareness of the competition regime did not necessarily mean that companies understood their content. Nearly 40 per cent of respondents believed their knowledge of the legislation to be "nothing". This highlights a lack of understanding about competition matters, given that the interviews were conducted with the "person in the organisation responsible for legal matters relating to trading practices".

25 Trends in the level of awareness of competition legislation



The OFT's image as a tough but fair enforcer

4.14 Another vital element of communications is to promote an image of the competition authority as a 'tough but fair' enforcer.⁵⁶ This provides a strong deterrent effect to those businesses that may choose not to comply with the law. The image of a tough enforcer relies on the competition authority establishing credibility through its investigations and then promoting its successes. The OFT recognises the importance of having a high profile case with significant financial penalties in the public domain as frequently as possible. Some practitioners noted that the OFT's limited success to date in pursuing criminal cases may dilute its deterrent effect in the eyes of business. The OECD stated that "little visible enforcement activity" on cartels "may compromise credibility".⁵⁷

4.15 Research carried out by the OFT in May 2005 found that nearly a quarter of small and medium sized firms believed they were harmed by unfair practices such as cartel price-fixing and collusion to set tender prices. However, only a minority would report this to the OFT, particularly if a larger competitor was trying to push them out of the market by pricing below cost. This may be due to a lack of awareness. The OFT should, however, undertake further research to determine the reasons why small business appears reticent to contact them.

⁵⁵ This requirement to champion competition was legislated in the Enterprise Act, "Make the public aware of the ways in which competition may benefit consumers in, and the economy of, the UK" (the Enterprise Act 2002, Section 6).

⁵⁶ Department for Trade and Industry White Paper, "Productivity and Enterprise: A World Class Competition Regime", July 2001, page 9.

⁵⁷ "United Kingdom – Report on Competition Law and Institutions 2004", OECD, p. 9. However, the OFT can only apply its criminal investigation powers to cartels that are alleged to have taken place after the Enterprise Act came into force in June 2003.

Targeted communication

4.16 The OFT undertakes a wide range of promotional and educational work on competition. The major activities include briefing the press about investigations, educating business about competition at regional road shows, and providing mass communications through the website, quarterly magazine and annual report. The OFT also runs campaigns to promote the benefits of competition to consumers and small and medium sized businesses. The responsibility for this work sits with the OFT's dedicated Communications Division. Some of its activity involves staff from Competition Enforcement Division, such as providing speakers for road shows or industry events.

4.17 The OFT has recognised the need to tailor its communications approach to different audiences, in particular, business (by sector and size), government and consumers. It initiated a publicity campaign in mid-2005 to target small and medium sized firms amongst whom awareness of competition law remains low. The OFT has started to target sectors using specialist trade journals and attending industry seminars. This approach is being trialled for the priority sectors (paragraph 2.2), and the construction industry has been at the forefront of these efforts.

4.18 Several investigations carried out by the OFT indicate that local government is affected by anti-competitive activity.⁵⁸ These involved agreements between contracting firms to set prices artificially high or to rig the bid. The OFT considers that local authorities are not aware of the risks they face as potential victims of such practices. The National Audit Office noted that the OFT has not yet targeted this sector for specialist education, and identified the potential for the OFT to work with the National Audit Office in this area.

Public reporting

4.19 An important aspect of educating business and consumers about competition is to provide access to information about its cases. In its July 2001 White Paper, the Department for Trade and Industry emphasised that the OFT should ensure "businesses and the public understand their decisions, the reasoning behind them and the likely impact they will have".⁵⁹

4.20 The OFT, like most of the major competition authorities, publishes some but not all case statistics and information on its website. For each decision and the infringement involved there is a useful one page summary. The OFT is one of the few competition authorities that also publishes a selection of case closures.⁶⁰ They provide an indication of how the OFT might approach similar cases. Publishing information on past decisions and case closures represents a step towards greater transparency. However the OFT needs to ensure that this information is readily accessible. The OFT's website provides some barriers to the ease with which business and consumers find information. It can also be difficult and very time-consuming to find the OFT's decisions and case closures.⁶¹

4.21 The OFT's annual report is an important communications tool. It provides an overview of competition enforcement activity and summaries of major cases concluded. However, it does not contain a comprehensive list of all investigations concluded or closed during the year, nor any other case statistics. In contrast, its statistical annexes provide detailed information on other work such as consumer protection issues and merger work.

4.22 The National Audit Office reviewed annual reports produced by some of the major international competition authorities. This process identified several features that make these publications highly informative and user-friendly (**Figure 26 overleaf** and Appendix 4). The OFT could consider some of these options to improve the effectiveness of its annual report as a communication tool:

- a summary of all competition enforcement activity over several years;
- lists of all cases in clear and well-laid out format, with different groupings, such as the sector involved or the region affected;
- dates for the opening and conclusion of cases;
- lists and summaries of discontinued cases, as well as alternative case resolutions; and
- tables outlining success against service standards.

⁵⁸ Collusive tendering for roofing contracts in Western-Central Scotland (12/7/05), Collusive tendering for flat-roofing contracts in Scotland (8/4/05) and Collusive tendering for felt and single ply flat-roofing contracts in the North East of England (8/4/2005).

⁵⁹ Department for Trade and Industry White Paper, "Productivity and Enterprise: A World Class Competition Regime", July 2001, page 16.

⁶⁰ The Canadian Competition Bureau publishes all discontinued inquiries in its annual report.

⁶¹ The list of decisions is mixed in with all Competition Act decisions made, which includes those by the sector regulators, and there is no grouping or sign-posting. It is even more time-consuming to locate the case closures.

26 Australian Competition and Consumer Commission annual report publishes detailed and clear case information

All major case details provided in accessible format	<div> <div>Bray v F Hoffman-La Roche Enterprises Pty Ltd and others</div> <div> <div>alleged</div> <div> 6 May 2002 price fixing, market sharing intervention in class action regarding human and animal vitamins – global cartel</div> </div> <div> <div>result</div> <div> <div>Justices Carr, Branson and Finkelstein</div> <div>Full Federal Court</div> <div>Melbourne</div> <div>16 July 2003</div> </div> <div> <div>ACCC granted leave to intervene in appeal against orders concerned with service of process outside the Commonwealth and the extended application of the Trade Practices Act</div> <div>appeal dismissed.</div> </div> </div> </div>
Significance of case explained	<div> <div>significance</div> <div> test jurisdictional reach of the Act to international cartels</div> </div>
Sector clearly identified	<div> <div>Rural Press Ltd and others</div> <div> <div>alleged</div> <div> 19 July 1999 misuse of market power, anti-competitive agreement misuse of market power by Rural Press and subsidiary Bridge Printing Office Pty Ltd, resulting in anti-competitive agreement between them and Waikerie Printing House to withdraw The River News regional newspaper from the Mannum area of South Australia</div> </div> <div> <div>result</div> <div> <div>Justices Gleeson CJ, Gummow, Kirby, Hayne, Callinan and Heydon</div> <div>High Court</div> <div>11 December 2003</div> </div> <div> <div>found an arrangement between competitors that contained an exclusionary provision (overturned decision of the Full Federal Court), also found an anti-competitive agreement but no misuse of market power (affirmed decision of Full Federal Court)</div> </div> <div> <div>significance</div> <div> important guidance on interpretation of the Act</div> </div> </div> </div>

Source: Australian Competition and Consumer Commission Annual Report 2003-04 (p. 38-57) and National Audit Office

APPENDIX 1

Study methodology

The National Audit Office publishes 60 value for money reports each year, of which typically three focus on the work of the UK's regulators. The Office's value for money work on regulation covers competition regulation as well as sectoral regulation undertaken by regulators such as the Office of Gas and Electricity Markets and the Office of Communications. In recent years, studies have examined a broad range of topics, including a focus on initiatives to open markets to competition (for example *Directory Enquiries – From 192 to 118*) and issues relating to the consumer experience of regulated industries (for example *energywatch* and *Postwatch: Helping and protecting consumers*). This report on competition enforcement by the Office of Fair Trading reflects both the focus on competitive markets and on consumer welfare.

We designed our study to address three key issues:

- whether the OFT has developed a coherent approach to competition enforcement (Part 2);
- the extent to which the OFT's Competition Enforcement Division carries out its competition casework efficiently (Part 3); and
- how the OFT measures and reports the results of its competition enforcement (Part 4).

Scope

The National Audit Office focused on the OFT's competition enforcement responsibilities under the Competition Act 1998 and did not cover the OFT's work on mergers, as in our initial discussions with practitioners it was clear that their work on mergers was generally highly-regarded, and considered timely and effective. Our report also does not examine the other main areas of OFT's business: their work on market investigations or consumer regulation enforcement.

Methodology

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

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

We conducted three discussion groups with panels of leading legal practitioners. We also carried out interviews with users of the competition system who have experienced OFT investigations:

- economic consultants;
- companies;
- the CBI; and
- solicitors and barristers.

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

- the Competition Appeal Tribunal;
- the Competition Commission; and
- the Department for Trade and Industry.

Survey of OFT staff

We commissioned a survey of the OFT's staff that work on competition investigations. The survey was designed to obtain the views of staff about the OFT's communication of its strategic priorities, the management of its investigations, and recruitment and training issues. Of the 235 staff invited to take part in the survey, we received 130 responses which generated a response rate of 55 per cent.

We commissioned TNS to carry out the survey on our behalf. The survey was conducted using a web-based approach over a four week period in May 2005. Confidentiality was considered an important safeguard to encourage staff to respond so various controls were put in place to guarantee respondent confidentiality. Respondents were able to complete the questionnaire on-line and in confidence; individual responses were only seen by TNS and were not shown to the NAO or the OFT's management. TNS provided the NAO and OFT management with anonymised and summarised data on the survey responses. Respondents did not have to give their names.

We also commissioned TNS to undertake two focus groups in early June 2005 with individual respondents who had indicated on the survey that they were willing to attend a focus group discussion. The purpose of the focus group was to explore specific areas of interest that had arisen from looking at the aggregate responses to the survey. To encourage participation, it was made clear that the focus group report would not detail the views expressed with any individual.

Analysis of case work processes

We reviewed the OFT's case statistics to identify the time involved for each stage of an investigation, as well as the duration for different types of case resolution.

The analysis of timescales for infringement and non-infringement decisions was based on all decisions made by the OFT under the Competition Act 1998 (Figure 16). The analysis of timescales on appeals (Figure 18) includes all of the OFT's cases that have been appealed, except for four cases that were appealed under Section 47 of the Competition Act 1998 (appeals by third parties to the Director General of the OFT asking him to withdraw or vary a decision). The four cases were: *Bettercare*; *Claymore/Express Chapter I*; *Claymore/Express Chapter II*; and *Pernod-Ricard (Bacardi)*. Section 47 of the Act was subsequently repealed by the Enterprise Act 2002.

The analysis of the OFT's case timescales as at 1 April 2005 (Figure 17) includes investigations of all types that were open as at 1 April 2003 or that the OFT opened subsequently. Cases that were closed prior to 1 April 2003 and did not lead to an OFT decision were excluded from this dataset as the information was not readily available electronically and would have required a disproportionate use of the OFT's resources to compile.

We conducted ten interviews with managers across the OFT to discuss management of investigations, including issues such as project management, quality review and engaging with parties to investigations.

We did not examine individual cases in depth as we were not seeking to 'second-guess' the OFT's judgement on the outcome of their investigations. We were able to identify and analyse case management processes through interviews with branch heads, responses to our staff survey and analysis of case management data. In addition, because of the range of possible outcomes on appeals and their interpretation, we have also not sought to reach a judgement on whether the OFT have "won" or "lost" the appeals they have defended.

International and UK benchmarking

We visited some of the leading competition authorities abroad and interviewed competition enforcement staff. This allowed us to compare their processes with those of the OFT, in particular the management of investigations and performance measurement. The authorities we visited included:

- the US Department of Justice;
- the US Federal Trade Commission;
- Germany's Bundeskartellamt;
- the European Commission's Directorate General of Competition; and
- the Irish Competition Authority.

We also interviewed staff from the following authorities:

- the Canadian Competition Bureau; and
- the Australian Competition and Consumer Commission.

Whilst visiting the US we also interviewed US legal practitioners to ascertain their views on the strengths and strategies of the US competition enforcement authorities.

We also held discussions with the UK competition authorities where comparable, including the Office of Communications.

Analysis of performance measurement (and performance measurement model)

We developed a performance measurement model with the OFT for its competition enforcement work and used this to review what type of performance information is being used by the OFT. The model uses a first principles approach, starting with the outcomes that the OFT wants to achieve, and then creates a framework to describe the OFT's workflow (the inputs and outputs) that help produce the desired outcomes, as well as the external factors that can influence the OFT's environment. The National Audit Office mapped the current indicators against the OFT's outputs and desired outcomes in the model, in order to identify any significant gaps in information. The OFT intends to develop this model further as its understanding of the linkages between the various facets of the performance model improves.

Academic advice

We interviewed economic and legal academics with specialist knowledge of competition enforcement, compliance and performance measurement. In seeking to identify benchmarks and good practice in competition enforcement we gathered and analysed extensive literature on competition law and enforcement agencies, and attended specialist training on competition investigations used by the OFT for its staff.

APPENDIX 2

The OFT's published decisions under the Competition Act 1998 in the period 2002-03 to 2004-05

2002/2003

Name of decision	Date of decision
1 John Bruce (UK) Limited, Fleet Parts Limited and Truck and Trailer Components	13/5/2002
2 Aberdeen Journals Ltd	16/9/2002
3 Elite Greenhouses Limited	16/9/2002
4 Companies House	25/10/2002
5 General Insurance Standards Council	13/11/2002
6 Lucite International UK Limited (formerly Ineos Acrylics UK Limited) & BASF plc	29/11/2002
7 Agreements between Hasbro UK Ltd and distributors fixing the price of Hasbro toys and Games	28/11/2002
8 The Association of British Travel Agents and British Airways	11/12/2002
9 BSKyB investigation: alleged infringement of the Chapter II prohibition	17/12/2002
10 Northern Ireland Livestock and Auctioneers' Association: infringement decision	3/2/2003
11 Agreements between Hasbro UK Ltd, Argos Ltd and Littlewoods Ltd fixing the price of Hasbro toys and games: infringement decision	19/2/2003
12 Genzyme	27/3/2003
13 Lladró Commercial S.A.	31/3/2003

2003/2004

Name of decision	Date of decision
1 Harwood Park Crematorium Limited	9/4/2003
2 Anaesthetists' groups	15/4/2003
3 Price-fixing of replica football kit	1/8/2003
4 BSkyB decision dated 17 December 2002: rejection of applications under section 47 of the Competition Act 1998 by ITV Digital in Liquidation and NTL	12/8/2003
5 El du Pont de Nemours & Company and Op. Graphics (Holography) Limited	22/09/2003
6 Agreements between Hasbro UK Ltd, Argos Ltd and Littlewoods Ltd fixing the price of Hasbro toys and games	21/11/2003
7 BetterCare	18/12/2003
8 Collusive Tendering for flat roofing contracts in the West Midlands	17/3/2004

2004/2005

Name of decision	Date of decision
1 Pool Reinsurance Company Limited	15/4/2004
2 Association of British Insurers' General Terms of Agreement	22/4/2004
3 Attheraces	10/5/2004
4 First Edinburgh / Lothian	9/6/2004
5 Refusal to supply JJ Burgess & Sons Limited with access to Harwood Park Crematorium	12/8/2004
6 TM Property Services Limited / MacDonald Dettwiler (Hub) Limited / MacDonald Dettwiler (Channel) Ltd	29/9/2004
7 UOP Limited / UKae Limited / Thermoseal Supplies Ltd / Double Quick Supplyline Ltd / Double Glazing Supplies Ltd	9/11/2004
8 Collusive tendering for felt and single ply flat-roofing contracts in the North East of England	18/3/2005
9 Collusive tendering for mastic asphalt flat-roofing contracts in Scotland	18/3/2005

APPENDIX 3

Summaries of 6 past cases used for illustrative purposes on timescales

TV Eye case

TV Eye and its member broadcasters provisionally agreed to give commitments to amend certain arrangements governing the sale of advertising airtime after the OFT put competition concerns to them. As a result of the OFT's investigation, which was launched following a complaint by the Institute of Practitioners in Advertising, TV Eye proposed a number of formal commitments which were formally accepted by the OFT in May 2005. This is the first binding commitments decision by the OFT under the Competition Act 1998.

Du Pont case

The OFT investigated a complaint from Op. Graphics (Holography) Limited concerning El du Pont de Nemours & Company's refusal to continue to supply unprocessed holographic photopolymer film. On the basis of the material available to it the OFT did not consider that the prohibition imposed by section 18 of the Competition Act 1998 had been infringed by El du Pont de Nemours & Company. While on the basis of its investigation the OFT considered that it was likely that DuPont was dominant in the market for the manufacture and supply of the unprocessed holographic photopolymer film worldwide, the OFT did not consider that the conditions for abuse were met in this case.

TM Property Services case

The OFT concluded that MacDonald Dettwiler (Hub) Limited (MDHL) and MacDonald Dettwiler (Channel) Limited (trading as Transaction Online) (TOL), both wholly owned subsidiaries of MacDonald Dettwiler Ltd, did not infringe the prohibition imposed by section 18 of the Competition Act 1998. The OFT's investigation was initiated by a complaint made by TM Property Services Limited (TM), which alleged that MDHL and TOL were abusing a dominant position in the market for property searches by: adopting a pricing policy which results in a margin squeeze; pricing at predatory levels; and charging excessive prices. The relevant product market in this case was the market for the delivery of LLC1 and Con29 property searches. The OFT concluded that MDHL and TOL did not hold a dominant position in this market. The OFT therefore decided that MDHL and TOL had not infringed the prohibition imposed by section 18 of the Act.

Replica Kit case

Details provided in Figure 1.

Harwood Crematorium case

JJ Burgess & Sons Limited, a funeral directing business made a complaint to the OFT in January 2002. The company alleged that it had been refused access to Harwood Park Crematorium, a wholly owned subsidiary of W Austin and Sons, also a funeral directing business. The OFT reviewed the complaint but did not consider that the prohibition imposed by section 18 of the Competition Act 1998 had been infringed by Austins (for there to be an infringement of the Chapter II prohibition, an undertaking must be both dominant and abusing a dominant position). The OFT dismissed the complaint in February 2003. Further correspondence between JJ Burgess & Sons and the OFT took place, with a final decision released by the OFT in June 2004.

The OFT's decision was appealed to the Competition Appeal Tribunal by JJ Burgess & Sons in July 2004. In July 2005, the Tribunal set aside the OFT's decision. The Tribunal decided not to remit the matter to the OFT but decided to take its own decision that the Chapter II prohibition had been infringed.

West Midlands Roofing case

The OFT found that a number of roofing contractors in the West Midlands colluded in tendering bids for roofing contracts, thereby infringing the Chapter I prohibition of the Competition Act 1998. This involved the supply of repair, maintenance and improvement services ('RMI services') for flat roofs in the West Midlands area. The OFT imposed financial penalties totalling £280,000 on eight of the companies involved.

A firm came forward to expose the collusive activity in this investigation. The firm was granted total immunity under the OFT's leniency scheme. Another firm had their penalty reduced by 50 per cent.

APPENDIX 4

Good practice in public reporting

The National Audit Office reviewed the annual reports produced by some of the major international competition authorities, and identified several features that make these publications highly informative and user-friendly.

27 Netherlands Competition Authority annual report publishes key information over three years

	2004	2003	2002
Reports and fines			
Number of investigations in competition cases	22	53	27
Number of reports based on a reasonable suspicion that the Competition Act had been contravened	4 ¹	16	9
Number of cases concluded by means of alternative enforcement instruments	3	15	na
Number of cases in which investigations were discontinued due to a lack of evidence	15	22	na
Number of cases in which fines and/or injunctions were imposed	12	14	6
Total fines in € millions	78.7	135.5	99.6

Source: Netherlands Competition Authority 2004 (p. 2).

NOTE

1 In 2004 NMa issued four reports, three of which were in the construction industry. Two of these cases were very extensive; one case involved 379 companies.

28 Swiss Competition Commission annual report publishes case timelines

4. Investigations carried out in 2004

Investigation	Investigation opened due to indications of	Opened on	Conclusion	Result
Tariff agreement in the semi-private supplementary insurance with private clinics in the Canton of Aargau	Unlawful price-fixing agreements	12.05.2000	01.10.2004	Investigation terminated because contracts have been cancelled (following Appeals Commission decision dated 10.10.2003 that quashed the injunction dated 01.10.2001)
Sale of veterinary medicines	Unlawful exclusive sales agreements	25.05.2000	11.10.2004	Amicable settlement on the supply of pharmacies
Elektra Baselland	Unlawful refusal to transmit electricity	04.08.2000	Pending	
Feldschlössen/Coca Cola	Abuse of dominant position in beverages market	20.11.2000	06.12.2004	Finding of unlawful agreements on the restraint of trade in the relationships between Feldschlössen and the operators of hotels and restaurants
Coopforte	Abuse of dominant position	03.12.2001	08.11.2004	Amicable settlement on retrospective assessment and possible repayment of the CoopForte Bonus
Debit cards	Abuse of dominant position, prohibition of price differentiation depending on the method of payment	29.01.2002	Pending	
Complementary medicine "Alternative Medicine Register" (AMR)	Dominant position, restraint on the initiation or exercise of competition	31.01.2002	26.04.2004	Adaptation of conduct in the course of the investigation

Source: Swiss Competition Commission Annual Report 2004 (p.17)

29 Canadian Competition Bureau annual report publishes service standard achievement

Breakdown of Written Opinions 2003-2004

Section of the Competition Act	Fee	Service Standard	Complexity	Number of transactions	% Service Standard Met
55 (multi-level marketing)	\$1,000	2 weeks	Non-complex	22	59%
55.1 (pyramid selling)		6 weeks	Complex	1	100%
74.06 (promotional contests)					
45 to 51 (offences in relation to competition)	\$15,000	6 weeks	Non-complex	1	100%
79 (prohibition where abuse of dominant position)		10 weeks	Complex	1	100%

Source: Canadian Competition Bureau Annual Report 2003-04 (p.19)