



National Audit Office

THE OFFICE OF FAIR TRADING
Progress Report on Maintaining
Competition in Markets

LONDON: The Stationery Office
£14.35

Ordered by the
House of Commons
to be printed on 2 March 2009



SUMMARY

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

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

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

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

Main Findings

Prioritisation

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

Case management

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

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

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

Staffing of its competition work

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

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

Measuring, evaluating and communicating achievements

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

Conclusion on value for money

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

Recommendations

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

Prioritisation

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

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

Case management

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

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

Staffing

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

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

Measuring and evaluating achievements

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

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