



National Audit Office

**REVIEW BY THE  
COMPTROLLER AND  
AUDITOR GENERAL**

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# Review of the UK's Competition Landscape

# Summary

**1** Competitive markets are an essential component of the UK economy and are of vital importance in delivering goods and services cost-effectively to UK consumers. Where markets fail, consumers can suffer great detriment. The Office of Fair Trading estimates that, without its work on market studies, mergers, and competition enforcement, consumers would suffer some £340 million of detriment annually.<sup>1</sup> The Competition Commission has calculated a consumer benefit of £295 million for its Market Investigation References for 2008-09.<sup>2</sup>

**2** The UK's competition regime is largely the result of the Competition Act 1998 and the Enterprise Act 2002, which introduced a range of reforms aimed at protecting consumers and ensuring markets work well. The Government's expectations for the regime are set out in its 2001 White Paper *A World Class Competition Regime*. This stated that:

- competition decisions should be taken by strong, proactive and independent competition authorities;
- the regime should root out all forms of anti-competitive behaviour;
- there should be a strong deterrent effect; and
- harmed parties should be able to get real redress.

There is other legislation which impacts on the UK regime, such as the Communications Act 2003 and the underpinning EU framework. This report covers only those issues arising from the Competition Act 1998 and the Enterprise Act 2002.

**3** To meet these expectations the competition authorities were given a range of new competition powers, and the White Paper made clear the expected relationships between the authorities. For example, the Office of Fair Trading would keep markets under review, and where it considered they were not working well, refer them to the Competition Commission for a full investigation. The impact assessment for the White Paper did not comment on the expected use of the new legislative powers, but there were departmental planning assumptions covering both this and interactions between the authorities. In addition, the Regulators are committed to withdrawing from economic regulation of their markets where practicable, and replacing detailed sectoral rules with the operation of competition law.

<sup>1</sup> [www.offt.gov.uk/shared\\_offt/reports/Evaluating-OFTs-work/oft1102.pdf](http://www.offt.gov.uk/shared_offt/reports/Evaluating-OFTs-work/oft1102.pdf).

<sup>2</sup> Under the Enterprise Act, the Office of Fair Trading, certain economic regulators and the Secretary of State may refer a market to the Competition Commission for review if they suspect that any feature or features of the market prevents, restricts or distorts competition. This is known as a Market Investigation Reference.

**4** The responsibility for implementing the aims of the competition regime rests with a number of public authorities, principally the Office of Fair Trading, and the Competition Commission. The appellate body is the Competition Appeal Tribunal. As the competition regime complements, and often acts as an alternative to, wider economic regulation, it also includes the sector regulators, such as the Office of the Gas and Electricity Markets. For the purposes of this report we have defined the regime as the two main competition bodies (the Office of Fair Trading and the Competition Commission), the Competition Appeal Tribunal, and the sector regulators (henceforth referred to as the Regulators). We have calculated that the resources these organisations devote to their work on competition is about £27 million annually.

**5** It is now nine years since the Government's 2001 Competition White Paper and seven since the enactment of the Enterprise Act. The extent to which the regime is meeting its aims efficiently has come into question from the House of Lords Select Committee on Regulators, and also in the joint Department of Trade and Industry and HM Treasury concurrency review. There is no one body within government that has specific oversight of the competition regime as a whole although the Department for Business, Innovation and Skills has overall responsibility for competition policy. The National Audit Office, however, has audit responsibility for all of its constituent bodies (with the exception of the Civil Aviation Authority). Through our audit work, we have built up a body of evidence on the efficiency and effectiveness with which the system is operating, and the challenges it still faces in meeting its original expectations.

**6** This report brings together that evidence. Its purpose is to inform the debate on the future development of the competition regime, and it will therefore be of particular interest to policy makers and those who operate the regime. It is a systemic review, not a commentary on the performance of the separate organisations within the system. For the competition regime to operate well, it is necessary for each of its constituent organisations to function efficiently and effectively. But that alone is not sufficient to ensure that the performance of the system as a whole is optimal. Factors such as the level of coordination between organisations, the degree of tension between system-level and organisation-level objectives, and the way incentives for taking different courses of action are balanced across different parties affect the extent to which the system is able to meet its expectations. The evidence we have assembled in this report sheds light on some of the key areas that, in our view, should form part of any consideration of the scope for improving the overall operation of the regime.

**7** Our report covers the four main areas of reform introduced by the Competition and Enterprise Acts, and the resourcing of the system as a whole:

- Enforcement of the Competition Act (Part 2)
- Appeals (Part 3)
- Market Investigation References (Part 4)
- Mergers (Part 5)
- Resourcing of the system (Part 6)

## Findings

8 The system of competition and judicial oversight in the UK is generally effective in meeting its aims, and is well regarded by comparison with international equivalents. For example, ratings in the Global Competition Review (an international journal that annually ranks competition authorities around the world) show that the UK's Office of Fair Trading and Competition Commission are globally recognised as amongst the leading authorities.

9 However, while the performance of the separate bodies in the system is well regarded, our evidence suggests that the competition regime as a whole still faces a number of challenges to function as intended. Although the system is still relatively young compared to its peers in the US and the European Union and is still developing, it faces challenges in: building a richer body of case law; ensuring that decisions on use of competition powers are not being adversely affected by the length, and uncertainty of outcome; ensuring markets are referred where appropriate to the Competition Commission for independent examination; and allowing a greater flow of expertise and resources around a system that involves a number of different bodies that exercise similar powers but with no over-arching governance arrangements.

10 In particular, we found that:

- The competition system relies on a richness of case law and precedent setting. Regulators can usually choose to use either their regulatory powers or their competition powers to achieve the desired outcome<sup>3</sup>. However, to date Regulators have used their competition enforcement powers sparingly, with the risk that case law is not as rich as it needs to be. **The Government should evaluate whether the incentives within the system for Regulators to use their competition powers are appropriate to establish the body of case law required for an effective competition system.**
- It is vital that there is an effective system for appealing against decisions taken by the competition authorities and Regulators. The decision process itself is often lengthy; and following a decision, most Competition Act investigations are subsequently appealed. There is a risk that the length, and uncertainty of outcome, of the enforcement process in its entirety may reduce the appetite of the authorities for using their competition enforcement powers. These factors may also encourage greater use of either early resolution to expedite cases, or of regulatory rather than competition powers by the Regulators, than is desirable for the development of the application of competition law in the UK. **The Government should review whether progress in the development of the body of case law has been adversely impacted by these factors.**

3 There are some exceptions to this such as directions under European law and those given in the Communications Act 2003 requiring the Office of Communications to carry out its own regular market reviews.

- Regulators are not making Market Investigation References to the Competition Commission to the extent envisaged in planning assumptions. The disincentives in the system against referral are: the Regulators' perceived loss of control over the outcome, with any remedies being imposed by the Competition Commission; the length of the process; and the uncertainty created in the industry. **The Government should adopt a presumption that all Regulators actively consider using their powers to make Market Investigation References on a regular basis. The National Audit Office will periodically examine the evidence that they are doing so, and report to Parliament on the extent to which regulators are making use of this important mechanism.**
- The competition regime is overseen by several different government bodies and work flows unevenly round the system, but resources are not managed or funded at a system-wide level to avoid mis-matches between caseload and staffing. This risks suboptimal efficiency and effectiveness at a system level. For example, the Competition Commission's overall caseload reduced from a peak of 17 cases in mid-2007 to five cases in early 2009. **The Government should consider how resources and expertise in the competition regime can be used more flexibly and efficiently. This could, for example, entail the creation of a networked government service of competition experts, to build up public sector-wide expertise and enable more flexible allocation of resources.**

**11** At the end of each part of this report, we set out our more detailed conclusions on what we consider should be key concerns in considering the future development of the competition regime in relation to enforcing competition law, appeals, market studies and investigations, merger control, and the regime's use of resources.