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ANNUAL REPORT ON COMPETITION POLICY DEVELOPMENTS IN THE UNITED KINGDOM

-- 2010 --

This report is submitted by the United Kingdom to the Competition Committee FOR DISCUSSION at its forthcoming meeting to be held on 29-30 June 2011.

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1. Executive Summary

1. During a year of profound economic and fiscal challenges facing business, consumers and government in the UK, the Office of Fair Trading (OFT) and Competition Commission (CC) have once again made a vital contribution to the UK economy.

2. The UK authorities can again point to evidence of the real benefits of what they do for consumers. The CC and the OFT have estimated direct financial benefits to consumers of their work of £455 million for the market investigation regime and £127 million for mergers in 2010/11.¹

3. The UK Government has put forward a number of proposals for institutional change and reform around the competition regime (as well as the consumer protection and consumer credit regimes) and the OFT and CC welcome the opportunities that these proposals bring to strengthen these regimes at a time when they are of the utmost significance for consumers and to growth in the UK economy. Both the OFT and CC have engaged with Government to help develop these proposals through the benefit of our practical experience with the regimes, and will continue to do so as the proposals go forward. However, we remain fully committed to our respective missions in the interim, and the strong results we have achieved this year demonstrate that there will be no let-up in our work as the proposals evolve and changes are planned and implemented.

4. In the course of the year the OFT and the CC worked together to publish joint guidance on substantive merger assessment as well as a quick guide to mergers, guidelines on merger surveys and a commentary on retail mergers.

5. The OFT has further increased the transparency of its work, setting out what those involved and interested in its work can expect throughout the lives of cases and projects and publishing more information about the organisation. It introduced new guidance on procedures for Competition Act work to increase clarity for business, and announced a one-year trial of a Procedural Adjudicator role to resolve procedural disputes in competition cases more efficiently. It has also continued its important work to promote compliance and to help businesses to avoid inadvertently falling foul of the law. For example, it launched new guidance documents to help companies and directors to comply with their responsibilities and create a culture of compliance within their businesses.

6. The CC also published or consulted on revised guidance in relation to: conflicts of interest; disclosure; market investigations; merger procedural guidelines; and telecoms appeals.

7. The OFT has continued to prioritise high-impact enforcement for 2010-11 and has taken the strongest possible action against businesses that broke the law. For instance it took action, involving very substantial fines, against a group of tobacco retailers and manufacturers for engaging in unlawful practices in relation to retail prices for tobacco products. It has also worked to join up its enforcement even more closely with its market tools, using its deeper understanding of problems facing consumers in markets to target enforcement action for maximum effect: its market study of outdoor advertising has also led to a

¹ These are annual estimates averaged over the three year period 2008/09 to 2010/11 and include the work done by both the OFT and the CC. Note, they are different from the OFT's share of the benefits from mergers and markets work presented in the OFT's annual Positive Impact note. As in previous years, Positive Impact 2010-11 will present estimates of benefits (attributed to the OFT) resulting from its work on markets, merger control, competition enforcement, and consumer protection enforcement. In 2009-10, the OFT estimated direct benefits to consumers of £84m from its work on competition enforcement, £125m from its merger control work, £107m from its markets work, and £42m from consumer protection enforcement.

competition investigation. The OFT has continued to improve the speed of its enforcement work and has learned a number of valuable lessons which will benefit future investigations.

8. The OFT's markets work was particularly productive in 2010-11, with more studies launched and completed than in previous years. It looked at problems caused across markets by advertising practices as well as specific markets such as corporate insolvency and equity underwriting. It also delivered important reports into key areas for Government and the economy, such as its work on infrastructure ownership, barriers to entry in retail banking, and procurement of public services.

9. In June 2010 the Court of Appeal allowed the CC's appeal against the finding of the CAT that as a result of apparent bias in the BAA market investigation substantial parts of the CC report should be quashed. The Court of Appeal found that while there had been apparent bias on the part of a member of the Group at a late point in the inquiry it had not affected the decision of the inquiry group. The Court of Appeal ordered that the report be reinstated. On 17 February 2011 the Supreme Court refused BAA leave to appeal against the decision of the Court of Appeal.

10. On 6 May 2011 BIS announced that the Secretary of State had appointed Roger Witcomb as Chair of the CC on an interim basis for two years, to succeed Peter Freeman, the Chair of the CC whose term expired on 6 May 2011.

2. Changes to competition laws and policies, proposed or adopted

2.1 Summary of new legal provisions of competition law and related legislation

11. In February 2011 the Competition Act 1998 (Public Transport Ticketing Schemes Block Exemption) Order 2011 extended the duration of the Public Transport Ticketing Schemes Block Exemption by five years to 2016. The Secretary of State accepted OFT's recommendation (without any other variation and following a public consultation by the OFT) that the extension be justified as the ticketing schemes covered by the block exemption are likely to continue to meet the conditions for exemption from the Chapter I prohibition of the Competition Act 1998.

2.2 Government proposals for new legislation

12. The UK Government is currently consulting on proposals to reform the UK competition regime, to improve the robustness of decisions and strengthen the regime, to support the competition authorities in taking forward high impact cases and to improve the speed and predictability for business. The Government is consulting on a proposal to combine the competition functions of the OFT and the CC into a new single 'Competition and Markets Authority'.

13. Proposals for consultation include:

- Improving the robustness of decisions and strengthening the regime
 - considering ways to improve the voluntary merger notification scheme and the alternative of the mandatory pre-notification of mergers;
 - ways to strengthen the operation of concurrent competition powers, including joint working between the CMA and sector regulators on competition cases;
 - reforming the dishonesty requirement of the criminal cartel offence to make it easier to secure convictions in serious cases;

- achieving the right governance and decision-making structures for the CMA.
- Supporting the competition authority in taking forward high impact cases
 - enabling the CMA to carry out investigations into similar practices across different markets;
 - considering whether statutory objectives should underpin the competition focus of the CMA or whether the CMA should have a statutory duty to keep key sectors under review;
 - strengthening the voice of small business by extending the super-complaint powers to SME bodies.
- Improving the speed and predictability for business
 - introducing more (and tighter) statutory deadlines in merger and market cases, coupled with appropriate information powers;
 - introducing an exemption for small businesses from merger control;
 - streamlining the handling of antitrust cases.
 - The consultation opened in March 2011 and lasts until 13 June 2011.

<http://www.bis.gov.uk/Consultations/competition-regime-for-growth?cat=open>

2.3 Other relevant measures, including new guidelines

2.3.1 OFT procedural adjudicator trial and new Competition Act procedures guidance

14. In March 2011, the OFT announced the trial of a new adjudicator role to resolve disputes on procedural issues, as part of a continuing drive to speed up Competition Act investigations.

15. Under the one-year pilot, parties under investigation can ask the Procedural Adjudicator to review certain decisions on procedural issues taken during an investigation - for example deadlines imposed on companies or decisions on confidentiality redactions. The Adjudicator, Jackie Holland, is an OFT staff member, independent from the case team, reporting to the CEO.

16. The move is the latest in a series of measures to improve the speed, efficiency, transparency and accountability of investigations into potential breaches of competition law. Alongside the trial the OFT published its final guidance setting out the procedures it follows in Competition Act investigations, from the opening of cases through to their final resolution. Following consultation with lawyers and businesses, this includes a number of new measures, including:

- offering informal pre-complaint discussions to help potential complainants decide whether to commit the necessary time and effort to prepare a formal, reasoned complaint, based on whether the OFT would be likely to investigate
- a commitment to reach a decision on whether to formally open a case no later than four months after receiving a substantiated complaint, and

- sending a case initiation letter on opening a formal investigation setting out the details and key contacts of investigators including the Senior Responsible Officer and the case's Decision Maker.
- The OFT's guidance also further clarifies its existing approaches to decision-making, access to decision makers and quality assurance.

<http://www.offt.gov.uk/news-and-updates/press/2011/27-11>

2.3.2 *OFT Guideline on land agreements*

17. In March 2011, the OFT published a guideline for businesses about the types of land agreements that may infringe competition law.

18. Until now, agreements between businesses concerning land have benefited from special treatment and have been excluded from the UK competition law prohibition on anti-competitive agreements. Since 6 April 2011, this exclusion has been removed and restrictions that prevent, restrict or distort competition will be void and unenforceable. Companies involved in anti-competitive agreements can also face fines of up to 10 per cent of their annual worldwide turnover.

19. Having considered responses submitted in response to a consultation published in October 2010, the OFT's final guideline seeks to provide greater clarity about the types of agreement that are likely to infringe competition law and those that are not (<http://www.offt.gov.uk/news-and-updates/press/2011/42-11>).

2.3.3 *OFT Guidance on director disqualification orders*

20. In June 2010, the OFT published revised guidance on director disqualification orders in competition law cases, signalling its intent to use these sanctions to deter anti-competitive activity.

21. Following a widespread consultation the guidance sets out how and when the OFT and certain sectoral regulators will take action to disqualify directors where they uncover evidence a director was responsible for, or ought to have known of, competition law breaches at a company. Under the Company Directors Disqualification Act a director can be disqualified from acting as a director for up to 15 years if their company is involved in a breach of competition law and the court considers they are unfit to be concerned in the management of a company as a result (<http://www.offt.gov.uk/news-and-updates/press/2010/68-10>).

2.3.4 *OFT Consultation on competition compliance guidance*

22. In October 2010, the OFT published a consultation on two guidance documents that aim to help businesses and company directors comply with competition law.

23. One draft document, "How business can achieve compliance", has been developed for businesses and their advisers and includes a separate quick guide intended to meet the specific needs of small to medium sized enterprises. It sets out the OFT's recommended risk-based, four-step process for creating a culture of compliance within a business and explains in more detail the practical compliance measures that businesses might be able to take. The guidance has been developed as part of the OFT's Drivers of Compliance and Non-Compliance with Competition Law research.

24. The other draft guidance is specifically for executive and non-executive directors. "Company Directors and Competition Law" follows the recently revised guidance on Director Disqualification Orders in competition law cases and is intended to explain the level of understanding of competition law that

company directors are expected to have and steps they should be taking to detect and prevent breaches of the law.

25. The OFT expects to publish the final versions of both pieces of guidance in June 2011 (<http://www.offt.gov.uk/news-and-updates/press/2010/109-10>).

2.3.5 *Joint OFT/CC guidance on mergers*

26. During the last 12 months the OFT and CC have worked together to develop analysis on a number of issues relating to merger review. This has led to the joint publication of several guidance documents on aspects of the merger review process described below. The OFT and the CC will continue to work together on issues of common interest.

- Joint merger assessment guidelines

In September 2010, the OFT and CC published **joint merger assessment guidelines** which are designed to assist companies and their advisers by providing greater clarity on how the competitive impact of mergers is assessed. The guidelines revise and expand guidance previously contained in several publications issued separately by the OFT and CC after the introduction of the Enterprise Act 2002.

They set out the questions the CC and OFT will consider when reviewing mergers, how they define a 'relevant merger situation', what is meant by a 'substantial lessening of competition' (SLC) and the criteria and methodology used when assessing mergers. The guidelines also deal with public interest cases.

Legal firms, economic consultancies and other competition experts have been closely involved in the development of the guidelines as part of a public consultation exercise, and the CC and OFT have also worked closely with the US and EU competition bodies.

<http://www.offt.gov.uk/news-and-updates/press/2010/97-10>

http://www.competition-commission.org.uk/about_us/our_organisation/workstreams/analysis/cc2_review.htm

- Quick guide on merger assessment

In March 2011, the OFT and CC published “**A quick guide on merger assessment**” to help businesses understand what to expect from the competition authorities when they investigate a merger.

The quick guide, which complements the more detailed joint Merger Assessment Guidelines outlines what merging companies can expect, from the earliest stages of the process onwards. It covers issues such as whether to notify the authorities; the different roles of the OFT & CC; which mergers are reviewed and when they might be referred for a full investigation by the CC - before going on to cover briefly the merger assessment process and possible use of remedies later on.

<http://www.offt.gov.uk/news-and-updates/press/2011/44-11>

http://www.competition-commission.org.uk/press_rel/2011/march/pdf/14_11_Quick_guide_merger.pdf

- Guidelines on good practice in merger surveys

In April 2011, the OFT and CC published **guidelines on good practice in merger surveys**. Merger survey evidence submitted as part of merger inquiries is often used to help the authorities define markets or assess the closeness of competition between firms.

The guidance is designed to assist companies and their advisors wishing to submit research evidence to the two authorities during merger inquiries and sets out that, in order to be given the greatest evidential weight, consumer survey results should:

- test clearly-stated hypotheses
- be representative of the relevant consumer population
- deploy sound social research methods and
- be reported in full, with supporting data available to allow key results to be replicated and tested.

The guidance also includes detailed illustrations and examples of good and poor practice drawn from recent experience in OFT and CC investigations.

For further information please access the following links to the OFT and CC websites:

<http://www.oft.gov.uk/news-and-updates/press/2011/52-11>

http://www.competition-commission.org.uk/press_rel/2011/april/pdf/5211_merger_survey.pdf

- Joint commentary on retail mergers

In March 2011, the OFT and CC published a **joint commentary on retail mergers**. While not constituting guidance, the commentary draws together some of the common themes that have arisen in the various retail cases examined by the two authorities since the Enterprise Act 2002 came into force over seven years ago. It covers a broad and diverse range of cases and shows how the authorities have developed their approaches and techniques, focusing on three of the questions that have most often arisen in past cases, concerning:

- the local catchment area for retail outlets
- the extent to which competition takes place at the local and national levels and
- the techniques used to assess how mergers might affect retail prices.

<http://www.oft.gov.uk/news-and-updates/press/2011/38-11>

[http://www.competition-](http://www.competition-commission.org.uk/rep_pub/corporate_documents/other_guidance/38_11_mergers_retail_commentary.pdf)

[commission.org.uk/rep_pub/corporate_documents/other_guidance/38_11_mergers_retail_commentary.pdf](http://www.competition-commission.org.uk/rep_pub/corporate_documents/other_guidance/38_11_mergers_retail_commentary.pdf)

- In addition in December 2010, the OFT published **new mergers guidance on its application of the exemptions to the duty to refer a merger to the CC and its ability to take first phase remedies**.

The new guidance sets out the conditions under which the OFT may choose not to refer a merger to the CC for second phase review, even though it has been found to give rise to a realistic

prospect of a substantial lessening of competition. It sets out in detail how the OFT applies its 'de minimis' discretion not to refer a merger where the markets concerned are of insufficient importance and reflects developments in the OFT's decisional practice in this area over the last three years.

The publication also provides guidance on first phase remedies, including setting out how the OFT decides whether to require in whole or in part an 'upfront buyer' provision before accepting a divestment remedy (<http://www.of.gov.uk/news-and-updates/press/2010/138-10>).

2.3.6 *CC Consultation on revised Merger Procedural Guidelines*

27. In April 2011 the CC invited comments on the consultation draft of its **Merger Procedural Guidelines**. The guidance describes the main stages of a merger inquiry and outlines the key interactions which the CC has with parties and their advisers in the course of a typical inquiry (http://www.competition-commission.org.uk/rep_pub/consultations/current/pdf/110426_mergers_procedural_guidance_final_draft_publishing.pdf).

2.3.7 *CC Consultation on revised Market Investigation Guidelines*

28. The CC commenced a consultation on the revision of its market investigation guidance in March 2010. In April 2011 it published for consultation revised guidance concerning the role of market investigations, the use of theories of harm, remedies and market investigation procedures.

29. The detailed guidance on remedies covers choice and design of remedies as well as the assessment of proportionality. This builds on the remedies evaluation work done by the CC during the year (the CC published its first market investigation remedy evaluation in March 2011) and reflects the experience gained by the CC since the introduction of market investigations in 2003, including lessons learnt from legal challenges on the proportionality of the remedy (http://www.competition-commission.org.uk/about_us/our_organisation/workstreams/analysis/cc3_review.htm).

2.3.8 *CC revised policy on Conflicts of Interest*

30. In April 2011 the CC issued revised guidance on outside interests. The revised Guidance was adopted in response to an independent review on conflicts of interest published in December 2010. The guidance explains how the CC handles potential conflicts of interest arising from the outside interests of its members, staff and external advisers. The review was conducted by Brian Woods-Scawen, Dame Barbara Mills and Sir Francis Jacobs. The CC's Council accepted all the report's recommendations and they were immediately implemented. The CC also announced that its Chief Legal Adviser would be appointed as Compliance Officer with immediate effect.

http://www.competition-commission.org.uk/press_rel/2010/dec/pdf/43_10_conflicts_review_publication.pdf

http://www.competition-commission.org.uk/our_peop/members/conflicts_interest/110407_Conflicts_guidance_for_publication.pdf.

2.3.9 *CC Proposed revised Guidance on Disclosure*

31. The CC is working on updating its disclosure guidance, as part of its ongoing commitment to transparency in its work. It expects to publish draft guidance for consultation during 2011.

3. Enforcement of competition policy and enforcement

3.1 Summary of action against anticompetitive practices, including agreements and abuses of dominant positions

3.1.1 Bid-rigging in the construction industry in England

32. In September 2009 the OFT imposed fines totalling £129.2 million on 103 construction firms in England. The OFT found that the firms engaged in illegal anti-competitive bid-rigging activities on 199 tenders from 2000 to 2006, mostly in the form of “cover pricing”. 86 of the firms received reductions in their penalties because they admitted their involvement in cover pricing prior to the OFT’s decision.

33. In November 2009, 25 parties appealed the OFT’s decision to the Competition Appeal Tribunal (CAT). All 25 appeals challenged the level of penalty imposed by the OFT. Six of the 25 appellants also challenged liability.

34. The hearings took place in June and July 2010, and the CAT handed down judgments in March and April 2011. The penalty appeals resulted in reductions to the original penalties for the 25 parties concerned from approximately £80 million to approximately £13.5 million. The CAT overturned liability findings in relation to two parties, upheld liability findings in relation to two parties, and upheld some of the liability findings in relation to two parties.

35. On 27 May 2011, the OFT announced that it would not appeal the judgments. For further information, please access the following link to the OFT’s press notice: <http://www.of.gov.uk/news-and-updates/press/2011/61-11>.

36. The OFT considers cover pricing to be a serious infringement of competition law, requiring penalties sufficient to ensure deterrence. The CAT indicated that any future instances of cover pricing will be viewed as very serious and will be dealt with severely. The OFT has indicated it is likely to consider it appropriate to impose substantial financial penalties in future cases of cover pricing, and will also consider the use of individual sanctions.

37. For further information please access the following link to the OFT website: <http://www.of.gov.uk/news-and-updates/press/2011/34-11>.

- **Independent evaluation of OFT enforcement in construction sector**

In June 2010, the OFT published an independent evaluation of its recent competition enforcement activities in the construction sector. The report shows a significant rise in understanding of anti-competitive practices (including of the OFT’s bid-rigging decision and of fines as a penalty for cover pricing), and marked improvement in business behaviour, amongst construction firms.

The research was based on surveys of construction contractors and procurers. It also provides insights into a number of issues, such as the important role of media reports as sources of information about the OFT's work. Trade associations are also perceived as more important sources of information on competition issues than in 2008 (<http://www.of.gov.uk/news-and-updates/press/2010/60-10>).

3.1.2 *Construction recruitment forum cartel*

38. In September 2009, the OFT imposed fines totalling £39.27 million on six recruitment agencies for price-fixing and the collective boycott of another company in the supply of candidates to the construction industry.

39. Three parties appealed the OFT's decision to the Competition Appeal Tribunal (CAT). The appeals concerned the level of penalty only as no party pursued a challenge to the OFT's finding that they breached competition law.

40. In April 2011, the CAT handed down its judgment and reduced the level of penalties for the three parties from approximately £40 million to £8 million. The CAT upheld the OFT's view of the nature of the infringements, stating that this was 'a very serious violation of competition law'. The CAT also upheld the OFT's approach to penalty discounts in cases where compliance measures have been implemented, and the uplifts of fines by the OFT where senior management have been involved in infringements.

41. On 24 May 2011, the OFT announced it would not appeal this judgment.

42. For further information please access the following links to the OFT website: <http://www.offt.gov.uk/news-and-updates/press/2011/51-11> and <http://www.offt.gov.uk/news-and-updates/press/2011/61-11>.

3.1.3 *Retail pricing practices by certain tobacco manufacturers and retailers*

43. In April 2010, the OFT found that two tobacco manufacturers and ten retailers engaged in unlawful practices in relation to retail prices for tobacco products in the UK, and has imposed fines totalling £225m.

44. The tobacco manufacturers involved are Imperial Tobacco and Gallaher, and the retailers are Asda, The Co-operative Group, First Quench, Morrisons, One Stop Stores (formerly T&S Stores), Safeway, Sainsbury's, Shell, Somerfield and TM Retail.

45. The OFT concluded that each manufacturer had a series of individual arrangements with each retailer whereby the retail price of a tobacco brand was linked to that of a competing manufacturer's brand. These arrangements restricted the ability of these retailers to determine their selling prices independently and breached the Competition Act 1998.

46. The infringements span different periods between 2001 and 2003 for different parties, and related variously to the markets for UK duty paid cigarettes, hand rolling tobacco, pipe tobacco, and cigars and cigarillos. The current value of these markets is estimated at around £13 billion.

47. Asda, One Stop Stores, Sainsbury's and Somerfield have benefitted from discounts in their fines under the OFT's leniency programme. Sainsbury's had alerted the OFT to the infringements and as the first to apply to the OFT for leniency, it receives complete immunity from fines. In addition, Gallaher, Asda, First Quench, One Stop Stores, Somerfield and TM Retail received reductions in their fines because, following receipt of the OFT's Statement of Objections issued in April 2008, they each admitted liability in respect of the infringements alleged against them and agreed to a streamlined procedure enabling parts of the case to be resolved more quickly so reducing the costs of the investigation.

48. Having considered representations made by the parties, the OFT decided not to pursue allegations made in respect of the relationship between each of Imperial Tobacco and Gallaher with Tesco in its Statement of Objections as it considers it has insufficient evidence to proceed to an infringement finding.

For the same reason, the OFT decided not to pursue additional allegations relating to the indirect exchange of proposed future retail prices against Imperial Tobacco, Gallaher, Asda, Sainsbury's, Shell, Somerfield and Tesco.

49. Six parties, (Imperial Tobacco, Asda, The Co-operative Group, Morrisons, Safeway and Shell) have appealed the OFT's decision to the Competition Appeal Tribunal (<http://www.offt.gov.uk/news-and-updates/press/2010/39-10>).

3.1.4 Restrict competition in heartburn medicines by Reckitt Benckiser

50. In April 2011, the OFT issued a decision that Reckitt Benckiser had abused its dominant position in the market for the National Health Service (NHS) supply of alginate and antacid heartburn medicines by withdrawing and delisting NHS packs of its Gaviscon Original Liquid medicine with the intention of limiting pharmacy choice and hindering competition from suppliers of generic medicines.

51. The OFT imposed a fine of £10.2m on Reckitt Benckiser. The fine was the subject of an earlier agreement in October 2010 under which the company admitted its conduct infringed UK and European competition law and agreed to co-operate with the OFT.

52. Where a branded medicine's patent has expired and a 'generic name' has been assigned to it, GPs can use their prescribing software to search for the brand and then provide patients with an 'open' prescription that refers to its generic name. Pharmacies that receive these prescriptions can choose whether to dispense the relevant brand or equivalent generic medicines. This choice provides for strong price competition between pharmaceutical suppliers and can result in considerable savings to the NHS.

53. The OFT found that Reckitt Benckiser withdrew NHS packs of its profitable Gaviscon Original Liquid from the NHS prescription channel after the product's patent had expired but before the publication of the generic name for it, so that more prescriptions would be issued for its alternative product, Gaviscon Advance Liquid. Pharmacies that receive prescriptions for Gaviscon Advance Liquid must dispense it, as it is patent protected and there are no generic equivalent medicines (<http://www.offt.gov.uk/news-and-updates/press/2011/53-11>).

3.1.5 Disclosure of pricing information for loan products to professional services firms

54. On 20 January 2011, the OFT issued a decision that Royal Bank of Scotland (RBS) and Barclays had engaged in anti-competitive practices in relation to the pricing of loan products to large professional services firms.

55. The OFT imposed a fine of £28.59 million on RBS. The fine was the subject of an earlier agreement in March 2010 between the OFT and RBS, under which RBS admitted to certain breaches of competition law between October 2007 and February or March 2008 and agreed to co-operate with the OFT. Barclays brought the matter to the OFT's attention and, under the OFT's leniency policy, was not been fined.

56. The OFT concluded that between October 2007 and February or March 2008 individuals in RBS's Professional Practices Coverage Team disclosed generic as well as specific confidential and commercially sensitive future pricing information to their counterparts at Barclays. The disclosures by RBS took place through a number of contacts on the fringes of social, client or industry events or through telephone conversations (<http://www.offt.gov.uk/news-and-updates/press/2011/05-11>).

3.1.6 *No grounds for action over alleged predatory entry by Flybe*

57. In November 2010, the OFT concluded that it has no grounds to take action against Flybe over alleged predatory entry by the airline against Air Southwest.

58. In 2009 Air Southwest had called on the OFT to investigate whether Flybe's entry on to the Newquay to London Gatwick route in competition with Air Southwest amounted to predation, aimed at driving Air Southwest out of either the Plymouth to Newquay to London Gatwick route or at eliminating Air Southwest as a competitor at Plymouth Airport more widely.

59. Following careful assessment of the evidence, the OFT considered that it does not have sufficient evidence to proceed against Flybe and issued a No Grounds for Action decision to the parties. In particular:

- the OFT considered that Flybe is not dominant on a relevant market covering the Newquay to London Gatwick route, and is only dominant on two small scale, but arguably related, markets at Exeter Airport
- the links between these two small scale markets and the Newquay to London Gatwick market appear limited and may not be sufficiently close to support a finding of related-market abuse
- the absence of evidence that Flybe's entry on to the Newquay to London Gatwick route marked a departure from normal, albeit robust, competition in the particular circumstances of this case
- the absence of sufficient evidence that Flybe's intentions were predatory and not part of a normal, albeit robust, competitive strategy.

<http://www.offt.gov.uk/news-and-updates/press/2010/115-10>

3.1.7 *Motor insurers agree to limit data exchange*

60. In January 2011, seven insurance companies and two IT software and service providers provisionally agreed to limit the data that they exchange between them after the OFT raised competition law concerns.

61. Insurers Ageas Insurance Limited (formally Fortis Insurance Limited), Aviva plc, AXA Insurance UK plc, Liverpool Victoria Friendly Society, RBS Insurance Group Limited, Royal Sun Alliance and Zurich Insurance plc, and the IT software and service providers Experian Limited and SSP Limited have all offered formal commitments to the OFT. This follows an OFT investigation which identified an increased risk of price coordination among motor insurers using a specialist market analysis tool by Experian called Whatif? Private Motor.

62. The OFT limited the scope of its investigation to a small number of parties with a view to achieving a swift and effective outcome. However, the investigation potentially has wider implications as the Experian tool is just one of a number of similar products used throughout the insurance industry. The tool allowed insurers to access not only the pricing information they themselves provided to brokers but also pricing information supplied by other competing insurers.

63. The OFT warned the firms that the information exchanged through Whatif? Private Motor raised competition law concerns. The nine companies under investigation are proposing to address the OFT's concerns by giving formal commitments that will result in the insurers no longer being able to access each other's individual pricing information through Whatif? Private Motor. Instead, they propose to exchange pricing information through the analysis tool only if that information meets certain principles agreed with the OFT.

64. The OFT is consulting on a draft text of the formal commitments being offered by the parties.
<http://www.offt.gov.uk/news-and-updates/press/2011/04-11>

3.1.8 Alleged abuse of dominance by bunker fuel firm CH Jones

65. In February 2011, the OFT issued a Statement of Objections alleging that CH Jones abused a dominant position in the market for the provision of bunker fuel card services to direct bunkering customers, typically heavy goods vehicle (HGV) fleet operators.

66. The OFT also alleges that CH Jones used its dominant position in the above market to anti-competitive effect in the market for the provision of pay as you go (PAYG) fuel card services to customers with HGV fleets.

67. CH Jones operates bunker fuel cards under its 'Keyfuels' brand. These are payment cards for diesel and are typically used by big truck fleets. Companies will purchase large quantities of fuel upfront, generally from a wholesaler or oil major. The bunker fuel card operator then arranges for this diesel to be delivered to refuelling sites. Drivers use the bunker fuel cards to access this fuel from the various sites on the bunker network, with the customer paying CH Jones a handling charge based on the amount of diesel drawn down. This process is known as direct bunkering.

68. Bunker card operators also buy diesel for resale to smaller customers who use cards on a PAYG basis when visiting sites or allow resellers to do the same using their networks.

69. The OFT's allegation is that from July 2009, to the present date, CH Jones has engaged in an exclusionary strategy. The main element of this is the use of exclusive agreements with bunker fuel sites with the objective of excluding a rival fuel card supplier, UK Fuels, from the markets for direct bunker and PAYG cards, and thus restricting competition. The OFT launched an investigation after being contacted by the complainant, UK Fuels, in April 2010 (<http://www.offt.gov.uk/news-and-updates/press/2011/25-11>).

3.1.9 Collusion on dairy retail prices

70. The OFT has continued its investigation into alleged collusion between certain large supermarkets and dairy processors over the retail prices of certain dairy products.

71. In April 2010, the OFT announced that detailed representations and new evidence received by it proved insufficient to support an infringement finding with regard to liquid milk in 2002 and value butter in 2003. As a result, the individual penalties that a number of early resolution parties had agreed to pay will be reduced. In addition, as the only allegation against one of the supermarkets under investigation, Morrisons, related to liquid milk in 2002, it is now no longer a party to the Dairy investigation.

72. The OFT expects to conclude its and issue its decision in the first half of 2011 (<http://www.offt.gov.uk/news-and-updates/press/2010/45-10>).

3.1.10 Alleged collusion between Cathay Pacific Airways and Virgin Atlantic

73. In April 2010, the OFT issued a Statement of Objections alleging that Cathay Pacific Airways and Virgin Atlantic had infringed competition law in relation to passenger services on the London to Hong Kong route.

74. The case concerns a number of alleged contacts between employees of the two airlines over a number of years which it is alleged had the object of coordinating the parties' respective pricing strategies regarding passenger fares through the exchange of commercially sensitive information on pricing and other

commercial matters. The matter was brought to the OFT's attention by Cathay Pacific under the OFT's leniency policy, where a company which is the first to report its participation in cartel conduct may qualify for immunity from penalties. Provided it continues to cooperate, Cathay will be immune from any penalty imposed in this case (<http://www.offt.gov.uk/news-and-updates/press/2010/41-10>).

3.1.11 Long haul passenger fuel surcharges

75. The OFT is conducting a civil investigation into alleged price fixing between two providers of airline passenger flights, in relation to passenger fuel surcharges for long-haul passenger flights to and from the UK.

76. In August 2007, the OFT announced that it had reached an early resolution agreement with one of the parties, British Airways, who had agreed to pay a penalty of £121.5m. The other party, Virgin Atlantic, is not expected to pay a penalty as it currently qualifies in principle for full immunity under the OFT's leniency policy. The penalty will not become payable until the OFT has issued a Statement of Objections and an infringement decision.

77. Parallel criminal proceedings under the Enterprise Act 2002, have now been concluded after the OFT decided to withdraw the proceedings against four current and former British Airways executives for price-fixing. The decision followed the discovery in May 2010 of a substantial volume of electronic material, which neither the OFT nor the defence had previously been able to review. Given that the trial had already begun and the volume of material involved and in light of the Judge's rulings about disclosure and the timing of witness hearings, the OFT accepted that to continue with the trial in light of this unforeseen development would have been potentially unfair to the defendants.

78. The issuing of a Statement of Objections in the civil proceedings had been delayed by the criminal proceedings. Work on this is ongoing (<http://www.offt.gov.uk/news-and-updates/press/2010/47-10>).

3.1.12 Investigation into media owner contracts for advertising on bus shelters and other street furniture

79. In February 2011, the OFT published a market study into the outdoor advertising industry.

80. While it found that the sector is broadly competitive amongst both specialist buyers and media agencies, the study looked at potential barriers to entry and expansion for media owners. As a result the OFT has opened an investigation into contracts entered into by each of two media owners, Clear Channel and JCDecaux, with some local authorities relating to advertising on street furniture such as bus shelters and information panels. In particular, the OFT will consider the long durations and potentially restrictive terms of these contracts.

81. The OFT has written to these two media owners to explain that there are reasonable grounds for suspecting that the agreements restrict competition, within the meaning of the Competition Act 1998 and/or Article 101 TFEU. The OFT's investigation is at a very early stage and no assumption should be made that any of the agreements infringes competition law (<http://www.offt.gov.uk/OFTwork/competition-act-and-cartels/ca98-current/outdoor-advertising/>).

3.1.13 Investigation into arrangements between certain publishers and retailers for the sale of e-books

82. Following a significant number of complaints, the OFT has opened an investigation into whether arrangements that certain publishers have put in place with some retailers for the sale of e-books may breach competition rules.

83. The investigation is at an early stage and it should **not** be assumed that the parties involved have breached competition law.

84. The OFT is fully aware of the European Commission's investigation into the sale of e-books. Both agencies are co-operating very closely to avoid any duplication between the two investigations (<http://www.offt.gov.uk/OFTwork/competition-act-and-cartels/ca98-current/e-books/>).

3.1.14 Hotel online booking

85. The OFT is conducting a formal investigation into suspected breaches of competition law in the hotel online booking sector and has written to a number of parties in the industry to request information.

86. The investigation is at a relatively early stage. However, after a preliminary review of the evidence gathered to date, the OFT continues to consider this matter as an administrative priority and is pursuing the investigation further.

87. The OFT though will not be in a position to conclude whether it considers the law has been infringed until it has progressed its investigation further, including obtaining and assessing additional evidence (<http://www.offt.gov.uk/OFTwork/competition-act-and-cartels/ca98-current/online-booking/>).

4. Mergers and acquisitions

88. A merger qualifies for investigation if the UK turnover of the business being acquired is over £70m, or if the merger will create or enhance a 25 per cent share of supply of a particular product or service in the UK, or a substantial part of the UK. The OFT investigates completed and anticipated mergers above a certain size to assess their anticompetitive effects; where the OFT believes they might result in a substantial lessening of competition (SLC), it refers mergers to the CC, or accepts undertakings instead of a reference. The CC conducts a more detailed investigation and decides whether a merger should be prohibited, allowed to proceed under conditions or cleared.

4.1 Statistics on number, size and type of mergers notified and/or controlled under competition laws

89. The OFT made 73 merger decisions under the Enterprise Act 2002 and referred eight mergers to the CC. The OFT reference test was met in a further eight cases. Of these, the OFT accepted undertakings in lieu of a reference to the CC in four cases. The OFT cleared four cases on the basis that the relevant markets were not of sufficient importance to justify a reference (the 'de minimis' exception). Negotiations for undertakings in lieu of a reference are still ongoing in two further cases.

90. The CC reported on two mergers during the year, neither of those mergers gave rise to an expectation of an SLC. The CC was referred four merger inquiries which are ongoing. The CC has published its provisional findings in two of those merger inquiries, Stena/DFDS and Ratcliff Palfinger/Ross & Bonnyman. Additionally, three mergers which were referred to the CC were subsequently cancelled.

4.2 Summary of key cases

- Live Nation/Ticketmaster

This inquiry concerned the anticipated merger of Ticketmaster Entertainment Inc (Ticketmaster), a ticket agent selling tickets for a range of live events, and Live Nation Inc (Live Nation), a live music promoter and venue operator. Both companies operate worldwide but have a significant presence in the UK.

The merger was originally referred to the CC on 10 June 2009, and the CC published its final decision clearing the acquisition on 22 December 2009. This decision was appealed by a third party to the inquiry, CTS Eventim (Eventim) and on 11 February 2010 the CAT ordered that the CC decision be quashed and reconsidered. In the meantime, in January 2010 the parties completed the merger. The CC published its revised final report on 7 May 2010.

The CC found that the merged entity was unlikely to have the incentive to change significantly its use of other live music promoters and venue operators. For example, the CC found that, if the merged entity sold fewer tickets for other promoters and venue operators it would suffer reduced revenues from foregone ticket sales, with only uncertain prospects for any benefits from increased business as a promoter or venue operator.

The CC concluded that the merger was unlikely to result in an SLC in any UK market (<http://www.competition-commission.org.uk/inquiries/ref2009/ticketmaster/index.htm>).

- Zipcar/Streetcar

In August 2010, the OFT referred the completed acquisition by Zipcar, Inc (Zipcar) of Streetcar Limited (Streetcar) to the CC for further investigation. The CC cleared the merger in December 2010.

Zipcar and Streetcar are, the two largest car clubs in London. Car clubs provide, for hourly or daily rental, vehicles located in on-street parking bays allocated by local authorities and off-street bays purchased or rented from private individuals or developers. Customers pay membership and usage fees, booking vehicles online, by telephone or mobile app and access vehicles using keyless technology.

The OFT's investigation highlighted that the merged firm would benefit from the scale of its combined network of members, cars and available parking spaces - all of which are important for successful future growth. It also indicated the difficulty of further entry and expansion in London in the next few years, to the degree necessary to replace the competitive constraint lost through the merger.

The CC used a product market of car club services in London as the framework for its analysis, but took into account potential substitution to alternative options such as taxis, public transport and traditional car hire in assessing the effect of the merger on competition.

The CC found that there would be a loss of competition for members as constraints on the parties from other car clubs and other transport options would be insufficient to prevent short term price rises by the merged entity for hire periods greater than a few hours but less than 8 to 10 hours.

However, this loss of competition would be replaced in the medium term by either new entry or expansion as the rapid growth of the market outweighed barriers to entry such as access to on-street parking. The CC found evidence of two entrants with well-developed entry plans, consideration of entry by large companies in adjacent markets and expansion plans by other car clubs.

The CC found that the merger was not expected to result in an SLC in the car club market in London.

The CC took the opportunity in its report to note that about half of the London boroughs allocating on-street parking to car club operators did so to a single operator, creating an artificial competitive distinction between clubs with on-street parking and those without. The CC's report highlighted that development of the market would be assisted by local authorities avoiding any such exclusivity, or limiting it to 12 months or less for initial piloting of car club schemes. (http://www.competition-commission.org.uk/inquiries/ref2010/zipcar_streetcar/index.htm).

- Ratcliff Palfinger Ltd / Ross & Bonnyman Ltd – Transfer of tail lift spare parts business

In February 2011, the OFT referred the anticipated acquisition by Ratcliff Palfinger Limited of the commercial vehicle tail lifts spare parts business of Ross & Bonnyman Limited to the CC.

Tail lifts are hydraulic platforms at the rear of vehicles which allow for goods and/or passengers to be lifted on and off a vehicle.

Ross & Bonnyman announced in November 2010 that it had decided to cease manufacturing commercial vehicle tail lifts. In considering the effects of the transfer of the spare parts business to Ratcliff Palfinger, the OFT was required to consider whether the deal influenced Ross & Bonnyman's decision to exit the commercial vehicle tail lifts business. On the basis of the evidence it received, the OFT believed that this might indeed be the case.

On this basis, the OFT was required to consider not only the impact of the deal on the directly affected spare parts business, but also its impact in the primary market for column tail lifts for commercial vehicles. Given its inquiry revealed that the parties are two of the three largest suppliers of such tail lifts in the UK and compete closely with one another, the OFT found that the merger would raise a realistic prospect of a substantial lessening of competition in the supply of column tail lifts in the UK.

On 18 May 2011 the CC published its provisional findings in which it provisionally cleared the merger.

The CC's final decision is expected by 4 August 2011 (http://www.competition-commission.org.uk/inquiries/ref2011/ratcliff_ross_bonnyman_merger_inquiry/index.htm).

- Stena/DFDS – Freight and passenger ferry services on the Irish Sea

In February 2011, the OFT referred Stena AB's completed acquisition of two Irish Sea ferry services from DFDS A/S to the CC.

The acquisition by Stena of assets and vessels on the Liverpool-Belfast and Heysham-Belfast routes was completed on 1 December 2010. Stena announced that it was closing its competing Fleetwood-Larne route the next day.

In its assessment of the acquisition the OFT did not find evidence which was compelling enough to dismiss its concerns that the closure of the Fleetwood-Larne route may have been influenced by the merger. For this reason, the OFT examined the acquisition as if Stena's Fleetwood-Larne service had continued to operate and concluded that the acquisition created a realistic prospect of a substantial lessening of competition in the supply of ferry services for freight from the north west of England to Northern Ireland.

The CC published its provisional findings in this inquiry on 25 May 2010. It provisionally found that the merger has not resulted in an SLC for the supply of freight and passenger ferry services between the North-West of England and Northern Ireland (the 'diagonal routes') or for Irish Sea ferry services in general.

The CC's final decision is expected by 25 July 2011 (<http://oft.gov.uk/news-and-updates/press/2011/13-11> and http://www.competition-commission.org.uk/inquiries/ref2011/stena_dfds_merger_inquiry/index.htm).

- Travis Perkins plc / Business Group plc - Retail sale of plumbing and heating equipment

In July 2010, Travis Perkins plc proposed to acquire the Business Group plc by way of a scheme of arrangement. The parties were both active in the supply of building materials. In particular, they overlapped in the supply of plumbing and heating (P&H) products for 'domestic' use.

To address concerns expressed by the OFT that the merger could result in a substantial lessening of competition on the basis of unilateral effects arising in the retail supply of P&H products in 20 local areas, Travis Perkins plc offered undertakings in lieu of reference (UILs) to divest a store or stores in the 20 local areas where the OFT identified competition concerns meeting its test for reference to the CC. These undertakings were accepted by the OFT in December 2010. They were further reviewed and varied in February and March 2011 (http://www.offt.gov.uk/OFTwork/mergers/Mergers_Cases/2010/Travis).

- Unilever/Alberto Culver – Personal Care products

On 27 September 2010, Unilever agreed to acquire Alberto Culver in a US\$3.7 billion deal, bringing together a portfolio of well known brands offering personal care products.

After considering undertakings offered by Unilever in relation to its proposed acquisition of the Alberto Culver Company, the OFT concluded that the acquisition would not give rise to competition concerns in relation to a number of categories of personal care products including hair care and hair styling but that it would give rise to a substantial lessening of competition in respect of bar soaps.

In order to address the competition concerns raised by the merger, Unilever offered to divest the bar soaps business of Alberto Culver, which includes the Cidal, Wright's and Simple brands.

The divestment undertaking will be the subject of an upfront buyer requirement, meaning that prior to the OFT deciding whether to accept these undertakings in lieu of a reference to the CC, it will consult publicly on the suitability of the proposed purchaser (<http://oft.gov.uk/news-and-updates/press/2011/40-11>).

- Asda/Netto groceries merger

In September 2010, the OFT announced that it would be considering undertakings offered by Asda in relation to its proposed acquisition of Netto's 194 groceries stores in the UK.

Asda had offered to sell 47 Netto stores across the UK to resolve local competition concerns raised by the merger.

The OFT concluded that the acquisition would not give rise to competition concerns at a national level because Netto's market share in the UK as a whole amounts to less than one per cent. However, the OFT had concerns that competition could be substantially reduced in around one in four of the local areas where there are overlapping stores.

As in previous grocery retailer merger cases, such as Co-Op/Somerfield (see UK Annual Report 2009-2010), the OFT's local analysis drew upon evidence of consumers' preferences from face-to-face surveys at Asda and Netto stores. It also accepted that there would be some efficiency savings from the merger, which would benefit consumers, but these were not in practice sufficient to negate the OFT's concerns in any local areas.

While the OFT was satisfied that many of the stores that Asda had offered to divest were likely to be of interest to multiple eligible buyers, the OFT remained concerned that this was not necessarily true for all stores. It had therefore asked Asda to find suitable up-front buyers for 25 stores.

On 9 March 2011, the OFT accepted the undertakings after Asda had offered assurances that it had found agreed purchasers for the 25 stores and that it would divest the stores in the remaining 22 areas (<http://www.oft.gov.uk/news-and-updates/press/2011/31-11>).

- Ryanair Holdings plc / Aer Lingus Group plc

In January 2011, the OFT wrote to Ryanair Holdings plc setting out that it believed it was 'in-time' to review the company's acquisition of a minority interest in Aer Lingus Group plc, which was acquired over the period September 2006 to August 2007.

The OFT opened its investigation into Ryanair's minority interest on 29 October 2010 following the conclusion of appeals of European Commission decisions relating to Ryanair's full bid for Aer Lingus and its retained minority shareholding.

The OFT believed that it was unable to act in this matter until these appeals concluded because there was a risk of inconsistent outcomes between any actions taken by the OFT under the Enterprise Act 2002 in relation to Ryanair's minority stake and any action that the European Courts might require of the European Commission in relation to the minority stake or Ryanair's full bid for Aer Lingus. The OFT considered that to have opened an investigation under the Enterprise Act 2002, and to have thereby created a risk of inconsistent outcomes, would have been contrary to the duty of sincere co-operation set out in Article 4 of the Treaty on European Union.

The OFT decided to set out its view on the discrete 'in time' aspect of this matter given the highly exceptional nature of the facts in this case and the procedural benefits in addressing this point upfront.

The OFT decision will be published on its website in due course

- News Corporation / British Sky Broadcasting plc – Report to Secretary of State

The Secretary of State for the Department for Business Innovation & Skills issued an European intervention notice in November 2010 requiring the OFT and Ofcom to investigate and report on this anticipated acquisition. The competition aspects of this transaction were cleared unconditionally on 22 December by the European Commission.

The OFT submitted its report (that the UK has jurisdiction to consider public interest matters) to the Secretary of State on 30 December 2010. Following the reports of the OFT and Ofcom, the Secretary of State for the Department of Culture, Olympics, Media and Sport announced that he was minded to refer the proposed acquisition by News Corporation of shares in British Sky Broadcasting Group plc to the CC for a detailed investigation. However, he requested assistance from OFT and Ofcom in reviewing the offer of Undertakings in Lieu of reference that had been made by News Corporation. The OFT subsequently reported on 11 February 2011 and 1 March 2011.

This case is ongoing and the final decision rests with the Secretary of State for the Department of Culture, Olympics, Media and Sport (http://www.oft.gov.uk/OFTwork/mergers/Mergers_Cases/2010/NewsCorp and <http://www.dcms.gov.uk/publications/7880.aspx>).

- Dorf Ketal Chemicals AG/ Johnson Matthey plc – chemicals

In November 2010, the OFT referred the anticipated acquisition by Dorf Ketal Chemicals AG (Dorf) of the titanate and zirconate business of Johnson Matthey plc (the JM Business) to the CC for further investigation.

Titanate and zirconate are chemicals used in various manufacturing and industrial processes, including in the production of certain inks, sealants and coatings. Dorf and the JM Business are the two largest suppliers of titanate and zirconate in the UK, as well as on a European and global basis. The OFT was concerned that the proposed merger would enable Dorf to increase prices and/or decrease quality, range and service to customers as a result of the loss of competition.

During its investigation, the OFT considered carefully whether there would be sufficient constraints on Dorf from existing rival suppliers and/or new entrants into the market. The evidence available indicated that barriers to entry in the UK are high and existing suppliers would have significant difficulty competing with the merged entity.

- Project Canvas outside UK merger control jurisdiction

In May 2010, the OFT concluded that Project Canvas, the proposed joint venture (JV) between the BBC, ITV, Channel 4, Five, BT, Talk Talk and Arqiva, did not qualify for investigation under the merger provisions of the Enterprise Act 2002.

Project Canvas involves a proposal to build an open internet-connected television platform with common technical standards. The BBC started the project, contributing existing research and development. The contributions of the other JV Partners are primarily financial.

The OFT decided that it had no jurisdiction to review Project Canvas under the merger provisions of the Enterprise Act 2002, in particular because none of the JV partners (including the BBC) were contributing a pre-existing business ('enterprise') to the Canvas JV (<http://www.offt.gov.uk/OFTwork/mergers/decisions/2010/project-canvas>).

- Getty Images/ Rex Features Limited

In July 2010, the OFT referred the anticipated acquisition by Getty Images, Inc. of Rex Features Limited to the CC for further investigation. Getty and Rex are two of the largest suppliers of photographic images for editorial use by publications in the UK. A number of publishers, the key customers in this market, were concerned about the potential impact of the acquisition.

After careful consideration, the OFT concluded that there would not be sufficient constraint on Getty from existing agencies and/or new entrants into the market and that therefore there remained a realistic prospect of a substantial lessening of competition (<http://www.offt.gov.uk/news-and-updates/press/2010/80-10>).

The anticipated acquisition was referred to the CC which cancelled the merger reference on 21 July 2010 after it had been notified by Getty Images, Inc that the proposed acquisition had been abandoned (http://www.competition-commission.org.uk/inquiries/ref2010/Getty_Rex/pdf/100721_cancellation_final%20notice.pdf).

- Thomas Cook/CGL/Midlands Co-operative Society travel business joint venture

On 2 March 2011, the OFT made a fast-track reference to the CC of the anticipated travel business joint venture between Thomas Cook, the Cooperative Group and the Midlands Co-operative Society.

The joint venture would bring together two of the three largest travel agents on the UK high street. The OFT was concerned that, if the joint venture went ahead, it could significantly affect competition in the supply of travel services via retail travel agency outlets in the UK, which remain an important distribution channel, in particular for package holidays and other holiday products. In addition the OFT was of the view that due to Thomas Cook's significant market

presence at the tour operator level in the supply and distribution of package holidays in the UK, independent tour operators may lose or have reduced access to distribution through the former CGL and Midlands stores.

This is the OFT's first use of its fast track reference procedure and followed a request from the parties on 14 February 2011. The procedure provides merging parties, in cases which may raise complex issues or which clearly meet the threshold test for reference to the CC, with an opportunity to streamline phase one of the merger process. The CC's final decision is expected by 16 August 2011 (<http://www.of.gov.uk/news-and-updates/press/2011/28-11> and http://www.competition-commission.org.uk/inquiries/ref2011/thomas_cook_co_op_travel_agency_joint_venture/index.htm).

4.3 *Judicial Review Challenges to CC Merger Decisions*

4.3.1 *Stagecoach v CC*

91. On 21 May 2010 the CAT gave judgment in *Stagecoach v Competition Commission*. The litigation followed the CC's investigation into the acquisition by Stagecoach of Preston Bus. The CAT allowed Stagecoach's appeal in part. The CAT agreed with the CC that the acquisition gave rise to an SLC, but found in favour of Stagecoach in relation to a number of findings of fact relevant to the CC's choice of counterfactual. Consequently the CAT upheld in part Stagecoach's challenge to the proportionality of the CC's remedy. The CC and Stagecoach subsequently agreed that it would nevertheless be appropriate to proceed with the divestment of Preston Bus in accordance with the CC's report and the terms of the Final Undertakings Stagecoach had given to the CC. In these circumstances the CC decided not to appeal against the CAT's decision. The CC's remedy has been put into effect (<http://www.competition-commission.org.uk/inquiries/ref2009/preston/index.htm>).

5. *Summaries / references to new reports, market investigations and studies on competition policy issues*

5.1 *Completed OFT market studies*

5.1.1 *Outdoor advertising*

92. In May 2010, the OFT published its market study into the outdoor advertising industry which has found that the sector is broadly competitive amongst both specialist buyers and media agencies. However, The market study raised potential concerns about the long duration of some contracts and potentially restrictive clauses contained within them, which might restrict entry by potential competitors and hinder investment or innovation. As a result, the OFT opened an investigation into whether certain undertakings have infringed Chapter 1 of the Competition Act 1998 and/or Article 101 of the Treaty on the Functioning of the European Union (<http://www.of.gov.uk/OFTwork/markets-work/completed/outdoor-advertising/>).

5.1.2 *Corporate insolvency*

93. In June 2010, the OFT published its market study into the corporate insolvency regime and recommended far-reaching reforms to build trust in the market and ensure that it works in the best interests of creditors and the wider economy. The market study found that while the market often works well, it may not work in the best interests of all creditors in over a third of administrations and creditors' voluntary liquidations, procedures which together account for 75 per cent of income earned by insolvency practitioners. To address the concerns, increase trust in the system, and deter practitioners from sharp practices, the OFT recommended fundamental changes to the regulatory system, including an industry-funded independent complaints handling body with broad powers to review IP fees and actions, impose fines, and return overcharged fees to creditors (<http://www.of.gov.uk/OFTwork/markets-work/completed/insolvency-practitioners/>).

5.1.3 *Equity underwriting fees*

94. The OFT's equity underwriting market study was published in January 2011 and found there had been a significant increase in the fees paid to investment banks since the onset of the financial crisis. The OFT urged companies and institutional shareholders to apply greater pressure on equity underwriting fees after finding that the market lacks effective competition on price. While institutional shareholders have expressed concerns about prices, they have yet to put sufficient pressure on companies to reduce the fees paid. The OFT considered that concerns around the level of fees can be tackled most effectively and efficiently by companies and institutional shareholders rather than further intervention by the competition authorities (<http://www.offt.gov.uk/OFTwork/markets-work/completed/equity-underwriting/>).

5.2 *OFT market studies in progress*

5.2.1 *Aggregates*

95. The OFT launched a market study into the UK aggregates sector in September 2010. The aggregates sector has high barriers to entry, increasing concentration at the local level and Government involvement in the form of a national system of control over outputs. The study is looking at all of these factors to determine how they influence competitive conditions and whether the market delivers good value for money to tax payers and end consumers as the cost of aggregates flows through to the construction of essential infrastructure. In February 2011, the scope of the study was widened to include cement and ready-mix concrete due to the close links between these three product markets (<http://www.offt.gov.uk/OFTwork/markets-work/current/aggregates/>).

5.2.2 *Mobility aids*

96. The OFT formally launched its market study into mobility aids into February 2011, following consultation on its scope. The study will cover wheelchairs, scooters, stair lifts, bath aids, hoists and adjustable beds and specialist seating. It will consider whether consumers are able to access, assess and act on the right information, whether consumers are being treated fairly by traders and suppliers and whether competition in the wheelchair sector is working well for consumers (<http://www.offt.gov.uk/OFTwork/markets-work/current/mobility-aids/>).

5.2.3 *Energy supply to off-grid customers*

97. In March 2011, the OFT announced that it was launching a market study into the supply of energy to consumers who are not connected to the main gas grid. The study will focus on those people who currently rely on either heating oil or LPG to heat their homes. As part of this, the OFT will look at the market's structure and the choice of suppliers, whether competition is working well for consumers, and contractual terms and fairness in supply agreements. The study will also examine alternative fuel sources, looking for example at the extent to which micro-generation technologies, including those based on renewable energy sources such as solar panels and wind turbines, are or will become effective alternatives to heating oil and LPG (<http://www.offt.gov.uk/OFTwork/markets-work/current/off-grid/>).

5.2.4 *Private healthcare*

98. The OFT formally launched a market study into private healthcare in March 2011. The study will focus on the nature of competition in private healthcare provision, in particular how private healthcare providers compete on the price and quality of treatment. This will include the NHS's role as a provider of privately-funded healthcare, for example through its private patient units. It will also consider the concentration of provision, barriers to entry, the role of consultants and constraints on consumer choice (<http://www.offt.gov.uk/OFTwork/markets-work/current/private-healthcare/>).

5.3 Other markets work

5.3.1 Online markets

99. In order to understand the interdependencies between small businesses and search engines, online marketplaces and payment service providers, the OFT commissioned a short piece of independent research, which was completed in September 2010. The overall findings were positive about online markets, suggesting that innovation, often by large players, has led to significant decreases in cost barriers to small businesses setting up online. Moreover, reputational barriers have also decreased due to the ability of small firms to shelter under the brand of larger players. However, the report recognises some of the difficulties that small businesses can encounter online, including the fact the levels of innovation and cost reductions that have taken place online, have not always been matched in those aspects of the valued chain that remain offline (such as supply of goods and delivery) (<http://www.of.gov.uk/OFTwork/markets-work/othermarketswork/onlinemarkets/>).

5.3.2 Campaign for Real Ale super-complaint

100. Subsequent an investigation launched after receiving a 'super-complaint' from the Campaign for Real Ale (CAMRA), the OFT concluded in October 2010 that the pub sector in the UK is competitive overall and has not found evidence of competition problems that are having a significant adverse impact on consumers. The OFT has therefore concluded that further OFT action by is not warranted. The OFT found that consumers are benefiting from considerable competition and choice between pubs. The OFT considers that in such market conditions, any strategy by a pub-owning company which compromises the competitive position of its lessees would not be sustainable, as this would be expected to result in sales and margin losses for the tied lessee and, in turn, for the pub company. The OFT also found that supply ties do not prevent pubs offering a wide choice to consumers, having found that pub-owning companies generally source beer from a considerable range of suppliers (<http://www.of.gov.uk/OFTwork/consultations/closed/2010/camra-super-complaint>).

5.3.3 Barriers to entry in retail banking

101. In November 2010, the OFT completed its review of barriers to entry, expansion and exit in retail banking. The review was launched in May 2010 to identify any obstacles blocking firms from entering the sector or from successfully competing against existing firms, as well as factors preventing inefficient firms from exiting the market and being replaced by more efficient ones. While the review found that most prospective entrants are able to meet regulatory requirements, and source the necessary inputs to offer retail banking services, new providers face difficulties in attracting customers and expanding market share. This is because of the reluctance of personal and small business customers to switch providers, their loyalty to established brands, and preference for banks with a local branch. This was most marked for personal and business current account customers, whereas personal customers were more likely to shop around for loan products (<http://www.of.gov.uk/OFTwork/markets-work/othermarketswork/review-barriers/>).

5.3.4 Domestic electrical goods

102. In November 2010, the OFT launched a review of competition regulation for the sale of Domestic Electrical goods. It plans to focus its work on 'white' goods such as washing machines and fridges, and 'brown' goods like TVs, but not 'grey' goods such as computers (<http://www.of.gov.uk/OFTwork/markets-work/othermarketswork/electrical-goods/>).

5.3.5 *Infrastructure ownership and control*

103. In December 2010, the OFT published a report into who owns what across the UK's economic infrastructure. It found that there is high diversity in infrastructure ownership and sources of capital, with UK and foreign public listed companies accounting for the largest share at 42 per cent. Moreover, there is a trend of ownership shifting towards specialist infrastructure funds, and also a trend for ownership to be increasingly internationalised, with many sectors drawing in global investment. The report also said that the potential for change of ownership through strong capital market competition can place an important discipline on firms and can put downward pressure on costs.

104. However, the OFT found that the potential for market power exists in many infrastructure sectors and that this can affect outcomes for consumers. Four case studies - into ports, waste, toll roads and car parks - highlight the importance of considering competition when awarding concessions and procuring infrastructure projects (<http://www.offt.gov.uk/OFTwork/markets-work/infrastructure-ownership/>).

5.3.6 *Public services procurement*

105. In March 2011, the OFT published a study into Commissioning and Competition in the Public Sector, which argued that having an open, transparent and competitive tender process is not enough on its own to ensure that public services markets are open and contestable, both over the short-term and long-term. Achieving effective competition in public services must also involve: reducing barriers to entry and exit, encouraging a diverse supplier base and ensuring suppliers have the right incentives to make efficiency savings, raise quality and innovate. Drawing on case study research and engagement with a range of public, private and third sector parties involved in public services delivery, the OFT identified key practical steps for commissioners and procurers in local, central and devolved government to consider when designing or implementing commissioning and procurement strategies (<http://www.offt.gov.uk/OFTwork/research/strategicresearch/commissioning-competition/>).

5.3.7 *Other current research*

106. The OFT has commissioned research into the following topics:

- Price Relationship Agreements
- Conjectural Variations
- Consumer behavioural biases in competition

<http://www.offt.gov.uk/OFTwork/research/economic-research/current-research/>

5.4 *CC Market Investigations*

107. Under the Enterprise Act 2002 (section 131), the OFT has the power to refer a market to the CC for further investigations where it has reasonable grounds for suspecting that any feature, or combination of features, of a market in the UK for goods or services prevents, restricts or distorts competition in connection with the supply or acquisition of goods or services in the UK or part of the UK. It is for the CC to decide if this is the case and, if so, whether action should be taken.

108. If it identifies adverse effects on competition (AEC), the CC has the duty to consider appropriate remedial action and has the power to impose remedies. When deciding upon the remedy, it may take into account the impact of the remedy on relevant customer benefits. As well as the ability to impose structural (including divestment) remedies, the CC may make recommendations to others of action they should take.

5.4.1 *Local bus services*

109. In January 2010 the OFT referred UK local bus services, excluding London and Northern Ireland, to the CC. The CC has examined both competition in the provision of local bus services and competition in the tendering of contracts to operate supported bus services.

110. On 6 May 2011 the CC notified its provisional findings, in which it found an adverse effect on competition. In the provision of local bus services, the CC provisionally found that market concentration, barriers to entry and expansion and customer conduct gave rise to a lack of competition between bus operators and weakened constraints from the threat of entry and expansion. It also provisionally found restrictions on competition in the tendering of supported bus services. The CC has published a notice of possible remedies and is consulting on both its provisional findings and the action, if any, which should be taken to remedy any adverse effect on competition it finds (<http://www.competition-commission.org.uk/inquiries/ref2010/localbus/index.htm>).

5.4.2 *Movies on Pay TV*

111. On 4 August 2010, the Office of Communications (Ofcom) referred the supply and acquisition of subscription pay TV movie rights and the wholesale supply and acquisition of packages including core premium movies channels (ie Sky Movies) to the CC for investigation. The reference followed a three year investigation into the pay TV industry by Ofcom.

112. The reference concerns ‘first window’ subscription pay TV movie rights – ie those rights licensed by the major Hollywood movie studios which permit the first showing of movies on subscription pay TV channels and / or subscription video on demand services in the UK.

113. During January and February 2011, the CC published numerous working papers, which included a working paper proposing a ‘theory of harm’. This theory of harm, which will form the framework for the CC’s analysis, asks whether the control by Sky of the acquisition and distribution of movie content on pay TV during the first subscription pay TV window, as a result of its market power in the pay TV retail market, adversely affects competition between pay TV retailers. If so, it asks whether this effect on competition may result in effects on consumers and/or on the suppliers of pay TV movie rights for the first subscription pay-TV window (FSPTW) (with possible consequential effects on competition between the suppliers of pay TV movie rights for the FSPTW) (http://www.competition-commission.org.uk/inquiries/ref2010/movies_on_pay_tv/index.htm).

5.4.3 *Payment protection insurance (PPI) Remittal*

114. The CC reconsidered its decision to impose the point of sale prohibition (POSP) as part of its package of remedies. In its report dated 14 October 2010 the CC concluded that the introduction of the remedy package, including the POSP, would be an effective and proportionate remedy to the competition problems identified for all PPI products, with the exception of retail PPI – where research suggested that customers would not use the time to consider alternative insurance options because the monthly premiums were regarded as being small.

115. Remedies were implemented by means of an Order which came into force on 6 April 2011. All elements of the remedy package will be implemented by 6 April 2012 with the exception of the provision of information to third parties and the provision of information in marketing material, which will be implemented no later than 1 October 2011 (http://www.competition-commission.org.uk/inquiries/ref2010/ppi_remittal/index.htm).

5.4.4 Remedies Progress on Investigation in the grocery market

116. During the year, the CC completed its work of implementing the remedies identified in its report into the UK groceries market (2008). Implementation of the CC's recommendation for a Grocery Ombudsman is being taken forward by the Department of Business, Innovation and Skills (see below).

117. In August 2010 the CC made the revised Groceries Market Investigation (Controlled Land) Order 2010 imposing obligations on certain large grocery retailers (requiring the release of certain restrictive covenants, prohibiting new restrictive covenants that may restrict grocery retailing, prohibiting enforcement of certain exclusivity arrangements and prohibiting new exclusivity arrangements for terms greater than five years; and imposing information requirements including a requirement to notify the OFT of the acquisition of Large Grocery Stores or land previously used for such purposes) <http://www.competition-commission.org.uk/inquiries/ref2006/grocery>.

118. In connection with the CC's recommendation for a Grocery Ombudsman, the CC has continued to work with the Department of Business, Innovation and Skills which has prepared a Draft Groceries Code Adjudicator Bill (<http://nds.coi.gov.uk/content/detail.aspx?NewsAreaId=2&ReleaseID=419637&SubjectId=2>).

5.5 Judicial Review Challenges to CC Market Investigation Decisions

5.5.1 CC v BAA

119. In June 2010 the Court of Appeal allowed the CC's appeal against the finding of the CAT, that as a result of apparent bias substantial parts of the CC's 2009 report should be quashed. The Court of Appeal found that while there had been apparent bias on the part of a member of the CC which arose at a late point in the inquiry it had not affected the decision of the CC Group as a whole. The Court confirmed that the test for apparent bias is "whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the [decision-maker] was biased". The Court of Appeal ordered that the CC's 2009 report be reinstated. On 17 February 2011 the Supreme Court refused BAA leave to appeal against the decision of the Court of Appeal.

120. The CC required BAA to sell both Gatwick and Stansted airports. As well as one of either Edinburgh or Glasgow airports. In relation to Heathrow, BAA was also required to improve consultation with airlines; and in relation to Aberdeen airport, BAA was required to improve consultation with airlines and publish certain financial and other information (<http://www.competition-commission.org.uk/inquiries/ref2007/airports/index.htm>).

6. Resources of competition authorities

6.1 Resources overall (current numbers and change over previous year)

6.1.1 Annual budget (in your currency and USD):²

121. At the OFT there is no formal split between the OFT's competition and consumer work, so there is no 'competition-related budget' as such. However, following an analysis of work carried out by relevant parts of the organisation, the OFT estimates the breakdown of the total settlements from HM Treasury for 2010-2011 as being £17.5m (approximately \$28.57m). This excludes market studies work.

122. 2010-2011 is the third year of a three-year HM Treasury funding cycle. The OFT's budget has decreased by 5 per cent in real terms on the previous year. Budgets have now been set for 2011-12 to 2014-

² Assuming an exchange rate of GB £1 = US \$1.6325

15 following the Spending Review 2010 and the OFT's budget will be reduced by 25% in real terms over the next 4 years of the funding cycle.

123. All the CC's budget is competition related, and the budget for 2011-12 is £17,738,000 (approximately 28,957,000).

6.1.2 Number of employees (person-years):

124. The OFT does not formally distinguish between its competition and consumer functions and instead exploits the extensive synergies between the two by adopting a flexible and innovative approach to finding solutions in markets.

125. However, the OFT estimates that its externally facing competition interventions (including casework, policy and advocacy, as well as strategic and other support functions) account for approximately 164 staff (full-time equivalent). This does not include staff involved in general markets work, which has competition and consumer dimensions.

126. Approximately 138 of the OFT's staff working on competition enforcement have non-administrative roles, of which 36 are economists and 43 are lawyers.

127. The OFT's Mergers team consists of 22 non-administrative staff.

128. The CC has 126 employees. Approximately 73 of those work on competition enforcement and have non-administrative roles – 14 are lawyers, 24 are economists and 35 are either financial and business advisers or other inquiry staff.

6.2 *Period covered by the above information*

- April 2010 – April 2011