



COUNTRY STUDIES

United Kingdom – Updated Report 2004

Introduction

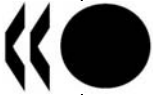
This Report examines the state of competition policy in the United Kingdom in 2004. It focuses particular attention on developments since the 2002 “Report on the Role of Competition Policy in Regulatory Reform”, prepared as part of a larger OECD study of regulatory reform in the United Kingdom.

Overview

Related Topics

Unclassified

DAF/COMP(2005)12



Organisation de Coopération et de Développement Economiques
Organisation for Economic Co-operation and Development

20-Jan-2005

English - Or. English

**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE**

DAF/COMP(2005)12
Unclassified

UNITED KINGDOM - REPORT ON COMPETITION LAW AND INSTITUTIONS (2004)

The attached report updates information on the current state of competition policy in United Kingdom. It was edited after the Competition Committee discussion (Item VII) in October 2004, which compared experiences in ten countries. It is circulated FOR INFORMATION.

JT00177223

Document complet disponible sur OLIS dans son format d'origine
Complete document available on OLIS in its original format

English - Or. English

**UPDATED REPORT ON COMPETITION LAW
AND INSTITUTIONS (2004)**

UNITED KINGDOM

1. The review of the United Kingdom in the regulatory reform program, published in 2002, described features of United Kingdom competition law and policy that were then being introduced under the Competition Act 1998. This report examines the situation after the further changes that were introduced by the Enterprise Act of 2002, most of which became effective in 2003. Many of them implement recommendations of the 2002 Report, largely because the legislation was already in process when the 2002 Report was being prepared, and the report thus deliberately focused on those current issues. (These issues were also examined in the special chapter on product market competition in the OECD EDRC *Annual Survey* of the United Kingdom published in 2004). The 2002 report advised that the most important next steps would be to strengthen institutional independence, update the processes for dealing with mergers and monopolies, and enlist the Office of Fair Trading (OFT) and the Competition Commission (Commission) in the process of assessing the competitive impact of other laws and regulations.

2. The overhaul of the United Kingdom's enforcement institutions is now virtually complete. Among the Enterprise Act's host of changes in substantive standards, procedures, and institutions, the most distinctive feature is the introduction of a criminal offence. Individuals in the United Kingdom now face the threat of prison terms for engaging in hard-core horizontal collusion. This legislation embodies the principal goals of the government's program about competition law (and it also introduced reforms in other areas, notably in bankruptcy). Further legislative changes were introduced to accommodate the modernisation of EU competition enforcement in May 2004.

3. After years of sustained attention to reforming the institutional structure, it is now time to see what was done with it. It has taken longer than expected for the Competition Act 1998 (which came into force in March 2000) to bear fruit in terms of infringement decisions, in large part because the processes are more time-consuming than originally envisaged. The OFT takes seriously its responsibilities as a "fining" organisation and wishes to make sure that its infringement decisions are detailed and carefully reasoned and not issued without substantial consideration. In 2004, the OFT issued an infringement decision and assessed fines totalling GBP 35,000 against bid rigging in the roofing industry. The OFT is investigating under civil powers approximately fifteen cases where there are reasonable grounds to suspect that hardcore cartel behaviour has occurred. The "attrition rate" cannot be predicted precisely, but about a third of these investigations are likely to result in formal infringement decision and imposition of penalties. Several completed investigations are likely to result in infringement decisions by mid 2005. And some other actions, notably the "Replica Kits" case of resale price maintenance that resulted in fines totalling about GBP 18,000,000, also had substantial horizontal elements and could be considered part of the anti-cartel enforcement effort. Equally important are the ambitious market studies and investigations undertaken by OFT and the Commission into areas ranging from banking and pharmacies to taxis and estate agents, and now to subsidies and public sector procurement.

Substantive law issues

4. Repeated rounds of reform have transformed the original 1947 law based on the “public interest” into competition-based rules that follow those of the EU. Most of this had been achieved in the Competition Act 1998. Its “Chapter 1” prohibition of anticompetitive restraints corresponds to the Art. 81 prohibition of the EU treaty (and had already been included in the United Kingdom’s law in substance since 1980). The “Chapter 2” prohibition of abuse of a dominant position introduced the EU approach to unilateral exclusion and exploitation. The final steps were taken in the Enterprise Act, so that now decisions in merger and market investigations at the Competition Commission will depend only on competition-based legal standards. The government might still invoke the public interest in these matters, but this may be done only in exceptional cases, there are new procedures for doing so, and that vague standard is no longer the basis for the basic decision. Applying standards like those used across Europe, together with guidance and rules from the competition authorities, should improve predictability.

5. The criminal offence is a pioneering variation. Targeting only horizontal practices, it links the prohibited conduct of individuals to the anti-competitive behaviour of companies: it is an offence for individuals “dishonestly” to agree with other persons that undertakings will engage in price-fixing, market-sharing, limiting production or supply, or bid-rigging. The offence does not depend on the actual implementation of the anti-competitive practice. The law appears to create a *per se* rule, one which can be applied without the need to examine actual or even possible economic effects. But evidence about the degree of actual economic impact is likely to be relevant to the length of any sentence imposed.

Box 1. Criminalising cartels

Consider individual sanctions for hard-core cartels.

The 2002 Report supported consideration of individual sanctions for hard-core cartels. The threat of personal liability and punishment is a powerful deterrent, if it is credible that a judge would actually impose the sentence. Even though there had been little experience yet to test the deterrent power of the sanctions available under the 1998 Act, the DTI-sponsored peer review suggested that the public would support imposing individual and even criminal penalties.

The Enterprise Act created the new offence, effective in 2003. The modifications of other laws and rules that were needed to implement it were complete by the beginning of 2004. There have been no prosecutions yet.

6. OFT has concentrated on the *per se* violations, of resale price maintenance and horizontal price fixing and market division. Its original guidelines for the application of the 1998 Competition Act prohibition announced a generally more lenient treatment of most vertical contract constraints. This was primarily done to bring the UK position into conformity with that in the EU.

Box 2. Vertical restraints

Maintain focus on horizontal issues.

Noting how the implementation of the 1998 Competition Act was concentrating on horizontal issues, the 1992 Report expressed some disappointment that the United Kingdom was planning to eliminate a well-crafted exclusion that limited the statutory prohibition against vertical restraints. The reason given then was to encourage more private suits. Yet many of those suits could be unnecessary or even counterproductive. Change might also be justified to make the treatment under United Kingdom law conform to treatment of similar agreements under the EC regulation on vertical restraints. After consultation, DTI has announced that the exclusion will be repealed, but effective in May 2005 to give industry a transition period.

7. Two approaches to market power issues are available. The Competition Act 1998 prohibits abuse of a dominant position, using terms that mirror EC law. In addition, the Commission can also address market power problems through a process of inquiry, which the Enterprise Act has substantially revised. The market investigations, which succeed the ‘monopolies’ investigations under the Fair Trading Act 1973 enable in depth investigation of a market, rather than an assessment of conduct against a clear prohibition. They may be referred to the Commission by the OFT and, in limited circumstances, by Ministers. Previously, the Commission assessed the monopoly situation against a public interest test and made recommendations to the Minister as to the action that should be taken. Under the new regime, the Commission applies a competition test (whether features of the market have an adverse effect on competition) and is determinative in respect of its decision on the test and the appropriateness of remedies. In exceptional cases (currently media, newspapers and public security), ministers may intervene and require the Commission to consider what action is appropriate in the light of particular public interest considerations; in these cases, the final decision on the action to be taken, though not the competition assessment, may be taken by Ministers.

Box 3. “Monopoly” procedures

Modernise the “monopoly” process.

The United Kingdom’s traditional process for dealing with market power problems needed updating. This general, formal process of open-ended study of market conditions and flexible, prospective remedies for problems found is a unique and valuable tool. It provides a degree of flexibility that is not found in the standard EU tool kit. The United Kingdom determined to retain and improve it, at least until the Ch. II prohibition has developed similar adaptability. The changes parallel changes to the merger process, described below.

The overall outline remains similar: officials may refer a matter to the Commission, which then investigates the problem and the market context in depth. The Enterprise Act changed many important details, including the terminology. These are no longer called “monopoly” references, for example, and the studies no longer depend on a primitive structural concept of what a “monopoly” is. Rather, “market” references to the Commission may be made where there are reasonable grounds to suspect that competition in a market is being prevented, restricted, or distorted by aspects of market structure or by the conduct of firms or their customers, yet there is no obvious breach of the Competition Act. Although OFT is likely to be the principal source of market investigation references, sectoral regulators with concurrent power under the Competition Act and even other ministers could also refer matters to the Commission. The Commission both investigates the issues and, if appropriate, develops and implements remedies. Previously, the Commission could only make recommendations about remedies, and the actual power to devise and apply remedies (or not) was in the hands of the Secretary of State for Trade and Industry. Market inquiries are underway concerning store credit cards and liquefied petroleum gas, both referred by OFT.

8. Merger control differs slightly from the EU model. The United Kingdom examines whether a merger will lead to a “substantial lessening of competition.” This standard, which recently replaced the United Kingdom’s traditional open-ended appeal to the “public interest,” has often been considered to be better suited for economically sensitive analysis of oligopoly than the old EU merger rule, which was based on dominance. The new EU rule, which reverses the terms and thus de-emphasises dominance (that is, it proscribes mergers that “significantly impede effective competition, ... in particular as a result of the creation or strengthening of a dominant position”), is not quite identical to the United Kingdom rule. Although parsing the terms suggests that the United Kingdom’s test depends on how much competition is lost, while the EC test depends on how much competition remains, the differences in phrasing are probably not significant and will make little difference to outcomes. A merger is only subject to possible control if the target has United Kingdom turnover above GBP 70 million or if the firms’ combined share of some product in the United Kingdom is 25%. The United Kingdom does not require pre-notification, having concluded that the increase in enforcement effectiveness would not justify the burden on reporting businesses.

Box 4. Merger procedures

Reform the merger process.

The merger process was due for reform, and substantial changes have been made since 2002. The principal goal of reform was to reduce the degree to which decisions appeared to be influenced by factors other than competition policy. Now, ministers are only involved in exceptional cases that raise previously-identified public interest issues identified in the Enterprise Act 2002. These issues are: media, newspapers, and national security. In general, merger decisions are taken solely by the OFT and the Competition Council, acting as specialist, independent competition authorities. (There remains a separate regime for mergers in the water sector).

The process begins with OFT, and it may conclude there. If OFT's initial investigation indicates that the merger may result in a substantial lessening of competition, OFT is to refer it to the Commission for detailed investigation and remedy. The referral may be obviated, though, if OFT can negotiate binding undertakings with the parties to cure the competition problems. And OFT believes that it need not refer a merger to the commission if it finds that the markets are too unimportant to justify making the referral or the benefits to consumers outweigh the threat to competition.

9. Treatment of claims about the public interest will test the government's resolve to make competition law enforcement independent of political considerations. The process for invoking public interests, and hence for potentially overriding the competition-based decision of the independent agency, is supposed to be transparent and subject to rules. For mergers, the Secretary of State for Trade and Industry can issue an intervention notice if there are public interest implications. The OFT advises about the jurisdictional and competition issues and may also advise about the public interest considerations. The Secretary of State decides whether to clear the merger, refer it to the Competition Commission, or deal with it by way of undertakings in lieu of a reference. If a reference is made on public interest grounds, the Secretary of State makes the decision on the merger following the Competition Commission's report. (That was essentially the process that was used for all mergers before the Enterprise Act reforms.¹) Originally the only public interest that could be invoked was national security. In 2003, media policies were added, and still more could be added in the future, by a parliamentary procedure. Although there have been several high-profile transactions in newspapers and media since 2003, the only intervention notices to date have concerned national defence. This lack of intervention is a sign of Ministers' willingness to adopt a deregulatory approach.

Institutions and enforcement

10. An unusually large number of institutions, most of them independent in some sense from the government, apply competition law in the United Kingdom. The recent legislation has adjusted the structure or the responsibilities of most of them. OFT is increasingly becoming the principal decision-maker. OFT is now formally constituted in law as a board rather than an individual. Before 2003, OFT was just the secretariat-support for the Director General for Fair Trading. The OFT board members are engaged more in strategic decisions than in actions about particular cases, though, and the chairman-chief executive, who exercises the decision power, is likely to be *primus inter pares*. In October 2005 the current chairman chief-executive will leave the OFT, and from that point the positions of chairman and chief executive will be separated.

11. The Serious Fraud Office (SFO) will have an important role in competition enforcement, as the prosecutor of the new criminal offence (except in Scotland, where that will be done by the Lord Advocate).

1. An unofficial element of the process had been the Mergers Panel, a group of officials including DTI, OFT, and others which co-ordinated the review process. Its role raised concerns about transparency, which were noted in the 2001 Report, and it has been disbanded.

In part to cement the new institutional relationship, the former Director of SFO is a member of the OFT board. SFO judgements will be important, but they will not necessarily determine policy priorities because OFT will have the power to prosecute itself if the SFO does not on a regular basis.

12. The Competition Commission, charged with investigating and reporting about mergers and market inquiries, has had no role in applying the basic “antitrust” prohibitions. Its responsibilities have increased, now that the “public interest” standard has been replaced by a clearer competition test and it has the power to make determinate decisions about remedies.

13. The Competition Appeal Tribunal (CAT), the specialised court for competition matters, is now formally separate from the Competition Commission. Reflecting its nature as both a court and an expert body, its president and the panel of chairmen are appointed by the Lord Chancellor, while the other members are appointed by the Secretary of State. The CAT has potentially important new powers to oversee merger and market investigations and to hear and decide actions seeking damages due to competition violations. Until corrected by the Court of Appeal in early 2004, the CAT had circumscribed closely the OFT’s powers to resolve competition problems in a merger without a reference to the Commission.

14. The Department of Trade and Industry (DTI) no longer has a direct role in enforcement decisions to the extent they involve competition law and policy. DTI appoints the members of the OFT Board and the Competition Commission, though, and it oversees their performance. Its formal role is limited to mergers raising public interest issues, co-ordinating responses to market studies, and monitoring and improving the legislative regime.

Box 5. OFT and Commission independence

Confirm OFT and Commission independence.

A DTI-sponsored peer-review study in 2001 found that a perceived lack of independence was considered a significant weakness in the United Kingdom competition policy structure. The 2002 Report noted the government’s undeniable intentions to change this situation and listed the then-pending proposals to do so. Many steps have now been taken. Those that affect matters of structure, transparency and accountability are welcome, but those that establish independent powers are probably more significant.

The formal steps include making the enforcement agency a legally-constituted board and requiring mission statements and annual reports to demonstrate accountability to the public and parliament. The government’s assurance that it would appoint only people with expertise relevant to competition to the Commission (and to the OFT Board) will reduce the appearance that decisions could represent the outcome of negotiations among interest group representatives.

More fundamentally, the government is moving out of the roles where its discretionary power was most evident, that is, of referral and relief in merger and “monopoly” investigations. Now, decisions of the OFT and Competition Commission, including decisions about remedies, are to be determinative. If the Competition Commission identifies a competition problem in a market investigation, it can prescribe a solution. The Commission may still consider public interest factors, though, and it may even find that those are determinative.

In addition, the Secretary of State may over-rule the competition assessment on a merger when the case raises one or more of the specified “public interest considerations”.

15. Sectoral regulators for communications, transport, energy, and water have concurrent enforcement powers with OFT, subject to oversight by the CAT. Their regulatory decisions may be reviewed by the Competition Commission. Competition enforcement matters at the regulators have not produced any formal decisions because the parties have generally negotiated resolutions. The Concurrency Working Party among OFT and the regulators keeps communications open. There have been no disputes about which agency should apply the competition law, although there have been some controversies

outside its remit about whether it would be better to deal with a problem by applying competition law or by modifying a regulatory licence.

Box 6. Resources

Provide the right resources for the new missions, especially at OFT.

The 2002 Report observed that the new emphasis on enforcement role would require more, or at least different, resources, especially at OFT. In recognition that establishing a new “culture” and adding new permanent staff would take time, measures then under consideration included short-term contracts and flexibility to offer higher pay. A major recruitment drive has brought in nearly 200 new staff, mostly for enforcement. Resources may still need to be bolstered in some important specialised areas. OFT recognises that it needs experienced litigators to deal with well-represented defendants in investigating and prosecuting cartel cases. Some SFO veterans have already come to OFT for this purpose, one as a member of the Board and another to direct cartel enforcement.

16. Resources for enforcement have increased substantially since 2000. There is no sign of lack of support from the Treasury. Of the total budget for 2003-2004 of GBP 55.0 million, about 70% is for enforcement. The enforcement budget is split about evenly between competition (GBP 20.7 million) and consumer protection (GBP 18.0 million). The budget for market studies is significant, at GBP 6.3 million (about 17% of the total). These studies can address both competition and consumer issues. In addition, the Competition Commission has a core staff of 137 and budget of GBP 26.3 million (2004 figures).

17. The new criminal penalty illustrates the wide array of sanctions and processes that can be applied under United Kingdom competition law. These even include a rarely-used power of divestiture to remedy structural monopoly. At the other end of the scale, of sanctions against individuals, the hardest-core cases could now lead to jail time, up to 5 years, as well as a potentially unlimited fine. Whether this threat will improve enforcement and deterrence against price-fixing will remain untested for several years. The sanction applies to conduct after the effective date of the law in mid 2003. To enable it to do criminal investigations competently, the OFT now has powers to compel answers and responses, to enter premises under warrant and to take possession of documents, as well as powers of surveillance. The new cartel offence will be tried either in a magistrate’s court or before a jury in the Crown Court. Even after individuals have had time to violate the law, preparing the prosecutions will be time-consuming. Until then, it is an open question whether judges will be willing to impose jail sentences. Perhaps as insurance against judicial reluctance to follow through with incarceration, the Enterprise Act also added a non-penal individual sanction, the Competition Disqualification Order. For any breach of the Competition Act prohibitions (or of the parallel prohibitions of the EU treaty), an individual can be disqualified from serving as a company director or manager for up to 15 years. Some in the private bar argued – unpersuasively – that the threat of disqualification alone would have been enough to deter their clients from misbehaviour.

18. Fines against enterprises, several of them in the range of GBP 20 million, are becoming high enough to get the attention of management. Although these are still small compared to the headline-grabbing international cartel cases in other jurisdictions, they are unprecedented in the United Kingdom. Before the 1998 reforms, a finding of infringement would lead only to an order not to do it again. OFT cases drawing big fines have involved resale price maintenance of toys and of athletic wear bearing team insignias, and pricing and marketing restraints on distribution of a patented drug. The threat of fine is evidently significant enough that the OFT’s leniency program is producing results, even before individuals have faced jeopardy. So far three infringement decisions have been the fruits of investigations prompted by leniency applications. The toys case resembled a “hub-and-spokes” price fixing scheme, and the “hub” was granted partial leniency for having come forward. No substantial fine has been imposed yet on a purely

horizontal price fixing scheme, although the OFT contends that resale price fixing, its principal enforcement target so far, also dampens horizontal competition.

Box 7. Sharing information

Encourage sharing information with foreign competition authorities.

The 2002 Report called attention to the increasing importance of sharing information with foreign competition authorities. Legislation was planned then to authorise wider co-operation with other enforcement agencies in both civil and criminal settings, except for merger filings. Modernisation of the EC enforcement system has brought the issue to the forefront.

The changes incorporated in the Enterprise Act were designed to allow increased sharing of competition and consumer information between the United Kingdom authorities, and between them and overseas authorities for the purpose of criminal and civil investigations and proceedings, where appropriate. Disclosure is discretionary and subject to safeguards about purpose and jurisdiction. The changes do not envision increased disclosure to overseas authorities of information obtained through a merger or markets investigation.

19. Recent reforms cautiously supplement public enforcement with private initiatives. One step is providing in law for so-called “super complaints.” Complaints about market problems (but not about the conduct of a particular firm) that are submitted by specially designated representatives of broader interests will get special attention. Those designated to date are the Consumer’s Association, the National Consumer Council and the Citizens Advice Bureau. This special treatment is simply a commitment by the enforcement agency to respond within 91 days. OFT has taken steps to encourage resort to this route, publishing guidance on how consumer bodies can make a reasoned case and holding seminars with them about the process. In response to a “super complaint,” OFT (or one of the sector regulators) may launch a market study or enforcement action, recommend changes to legislation or refer the market to the Competition Commission for a market investigation there. The enforcers retain complete control over this process. There is no provision for judicial review of decisions about what to do with super-complaints. Although the government supports empowering consumers in enforcement, it appears reluctant to give too much rein to private initiative over a potentially controversial matter. Provisions for recovering damages have also been expanded, but they are still narrowly tailored. The CAT can now award damages after an infringement has been established. And, in a small step towards class actions, the CAT can decide representative claims for damages, brought by specified bodies on behalf of groups of named individual consumers. Some private suits have also been brought before the ordinary courts, but mostly under EU substantive law. The United Kingdom is an attractive venue for such suits, because lawyers in the United Kingdom may offer a contingent fee arrangement, that is, they may agree not to be paid unless the suit succeeds.

Box 8. Third party access and redress

Widen the scope for third-party access and redress.

The 2002 Report observed that private relief is not just a supplement to the public enforcers’ resources. It can also be an important means of ensuring the independence of the enforcement institutions, which can be embarrassed if a private plaintiff prevails in a matter that the enforcers refused to pursue. Provisions already in place in the United Kingdom had not been used much, but that disuse may reflect their weaknesses, rather than the lack of any need or demand for them.

The government took several steps to expand the possibility of private initiative, including formalising the “super complaints” and providing for limited representative actions. But these stop short of creating a general, independent civil remedy. Permitting the CAT to award damages after an infringement has been established in an action brought by OFT still leaves the

initiative largely with OFT. The 2002 Report found that the most interesting and promising item under consideration then was to permit independent private actions to be heard by what were then called the Appeal Tribunals. That has not been done, so OFT retains substantial control over how the Competition Act is applied; however, complainants who are disappointed by OFT action, or inaction, can still petition the CAT.

20. OFT's apparent enforcement strategy aims to increase public awareness of the importance of competition and to establish a record of successful action. Prominent cases have involved products and markets that are familiar to consumers, such as toys, or issues that elicit consumer interest and sympathy, such as pricing of pharmaceuticals. OFT's important role in enforcing consumer protection regulation complements this attention to consumer-level issues in competition enforcement. At the interface, OFT is examining the implications for both of its missions of business codes of practice and quality marks. Consumer cases about toys and tee-shirts may create good publicity, but restraints in less media-friendly markets may be more important to the economy. DTI is working to identify business-to-business settings where enforcement might have a greater economic impact. Cases there might be more difficult to win, though. To develop a record of unbroken success and create precedents to encourage compliance, OFT has concentrated on relatively obvious violations such as resale price maintenance. Many, though not all, of its actions have involved smaller firms that have fewer resources for a vigorous defence. Most of OFT's formal decisions applying the competition act, and most of the matters that have been resolved without a formal decision, have been about restrictive agreements. The decisions about abuse of dominance have gotten a good deal of attention, in part because one of them led to the first fines under the new law. There has been frustratingly little visible enforcement activity about pure horizontal price fixing. To be sure, the rules and penalties are relatively new and the cases are difficult. Still, the long-anticipated stronger measures of the Competition Act 1998 have been fully effective since early 2000. Yet results from the much-anticipated and even stronger measures of the Enterprise Act cannot be expected for several more years. Repetition of these rationales for the lack of results from new legislation, though plausible, may compromise enforcers' credibility.

Sectoral regulation, special regimes and exemptions

21. The process of modernising the EC's enforcement system, with its attendant change in the procedure for applying the criteria for exemption, occasioned a review of the analogous rules under the United Kingdom Competition Act. This did not involve any significant changes in the substantive scope of exclusions or exemptions from the law, though. The most important item was the proposal to align the United Kingdom's treatment of vertical restraints with the corresponding EU exemption regulation. The United Kingdom approach to vertical restraints has been comparatively sophisticated and tolerant. At one time, the United Kingdom rationalised moving to the more formalistic EU rule on the grounds that it would stimulate private enforcement. That effect would be perverse, though, for much of that private litigation would have been frivolous. A sounder rationale is offered now, that following the familiar (and much improved) EU rules would simplify compliance for business.

Box 9. Exclusions

Reduce the scope of exclusions.

The 2002 Report called attention to the most significant formal exclusion from the Competition Act, which provided the possibility of exclusion for the rules of professional organisations, and endorsed the government's announced plan to eliminate it. The Enterprise Act repealed Schedule 4 of the Competition Act, which excluded designated professional rules from the Chapter 1 prohibition. (No such rules had actually been designated for this exclusion).

Despite the repeal of the schedule from the Competition Act, rules of professional organisations might be used to eliminate or to prevent efficient entry and competition, and they might be protected from Competition Act challenge by other legislative authority. A consultation process in 2004 about the reform of the legal profession is examining possible reform of the regulatory structure of the profession and the possibility of permitting new forms of doing business there that would allow greater choice for consumers and professionals.

22. Special sectoral enforcement arrangements are unusually important in the United Kingdom. Regulated monopoly sectors are not exempted from the competition law, but the law is typically applied there by the sector regulator. The system is complex. Competition issues may also arise in the terms of the licenses that the regulators administer. The United Kingdom believes that sector regulators are best placed to decide which instrument to use, and because of their experience in the sector, they are best placed to enforce the competition rules if that route is chosen. Controversies about whether to apply competition law or regulation have been kept under control, so far. The Commission has several functions relating to the gas, electricity, telecoms, airports, postal services, telecommunications, railways, financial services and water sectors. In all but the telecoms industry, references to the Commission are made by the sector regulator. The issues that may arise include appeals of periodic review decisions by the sector regulator and consideration of licence modifications proposed by the regulator. In the latter case these are judged against the public interest, taking the regulators' duties into account. The mechanisms following the completion of the Commission's report vary according to the nature of the reference. For example, in licence modification cases the Commission has the power to veto the regulator's proposed action and to take action itself, while in others the Commission is determinative.

Box 10. Regulatory statutes

Clarify relative roles of regulatory statutes and general competition law.

The 2002 Report noted that potential uncertainties about the relative roles of regulatory statutes and general competition law should be cleared up. There has been no formal change in that relationship; on the other hand, there have not been many controversies, either. The sector regulators have made only limited use of their concurrent powers. In several cases, sectoral regulators have considered claims that firms under their jurisdiction had violated the Competition Act, but none have actually found liability yet. This is unsurprising, if the regulators typically deal with problems for which the sectoral statutes are more appropriate, that is, with policy issues that are only secondarily about competition.

The processes that invoke the Commission's powers provide a natural and appropriate avenue for avoiding or resolving uncertainties about the relative scope of sectoral laws and competition policies. The regulators' guidelines for applying the Competition Act 1998 show how its general terms can be applied to the sectors' particular conditions. For the issues that seem to fall into the cracks, a "market reference" to the Commission, enlisting the experts on its utilities panel, may be the optimal approach. Not only could it resolve the sector's issue, but it could do so in a way that enriched the development of general competition policy.

23. Sector-specific treatment of mergers has expanded in the media sector, as a quid pro quo for relaxation of media ownership rules. Water industry mergers are subject to special scrutiny, as the Commission considers how a merger would affect the regulator's ability to compare the performance of different water companies. Defence industry mergers are also subject to special scrutiny, and the Secretary of State may intervene without regard to competition considerations. There has long been a distinct regime for newspaper mergers, subjecting them to control based on policies about content diversity as well as about economic competition. The regime was preserved under the Enterprise Act, but it has now been reformed by the Communications Bill, in part by putting newspapers into the context of other media

ownership rules. Special treatment will be accomplished by the designation of three factors – accurate presentation of news, freedom of expression, and plurality of views – as “exceptional public interest” factors that justify intervention by the Secretary of State. The new communications regulator, OFCOM, will advise about these public interest aspects of newspaper mergers. The government could intervene based on these public interest criteria where there is no competition issue at all. The legislation signals a major policy change in that newspaper mergers are now treated in the same way as any other merger, even though the special public-interest regime remains. The policy on intervention favours a non-interventionist stance. The legislation transposes an existing program into a new structure and process, and the policy at issue, protecting viewpoint diversity, is commonly supported in Member laws. The process that created this rule for a particular sector raises a warning flag about political intervention in enforcement, for it could readily be adopted to control a particular merger in any other sector through introduction of an *ad hoc* purpose-built “public interest” criterion.

Market studies

24. Both OFT and the Commission devote substantial attention to competition problems that are not directly about compliance with the law. The Commission’s market investigations, in response to references, can now produce tailored remedies. A Competition Commission market investigation allows for a detailed study of frequently highly profile issues involving substantial consumer and political interest such as supermarkets and banks. Its procedures facilitate public consideration and greater appreciation of the issues. The CC’s market investigations take on average 15 months, although they may take up to two years. The inquiries are presided over by a Group of five members supported by a team including economists, lawyers, business advisors and accountants.

25. OFT’s market studies are more focused and shorter-term projects than the Commission’s inquiries. These studies are supported by substantial resources. They produce extensive data and analysis about competition problems, which are often due to regulations, and challenge policy makers to take action about them. As of mid-2004, 12 have been published, concerning consumer IT services, debt consolidation, doorstep selling, estate agents, extended warranties for electrical goods, liability insurance, new car warranties, payment systems, pharmacies, private dentistry, store cards and taxi services. Studies in progress deal with care homes, ticket agents, public subsidies, public sector procurement, and financial services. The studies about door-to-door sales, private dentistry and care homes responded to “super complaints” from consumer groups.

26. The outcomes of these studies can vary. A study of payment systems laid a foundation for a potential regulatory role of OFT. The study of private dentistry called for information-based rules and self-government by the professional association to deal with marketing abuses. The study of doorstep selling proposed legislation to define new fraud-based offences and further study and consultation about more sweeping interventions about cold-calls for property maintenance and repairs, ranging from a 7 day cooling-off period to banning them completely. An OFT study might lead to a referral to Commission, as happened with the study of store cards. Perspectives and powers of the OFT studies differ somewhat from the Commission inquiries. Because of OFT’s consumer enforcement role, an OFT study might examine an issue about information or redress that is not strictly a competition problem. The Commission has more formal power to gather information, and the Commission can devise a remedy. OFT studies produce analysis and recommendations. Although these are only advisory, the government has committed to responding to those recommendations within 90 days and publishing an action plan where appropriate. The government’s responses will test its tolerance for independent advice and action.

27. The OFT’s 2003 report calling for more open entry into pharmacies caught the government off-guard. OFT produced a thorough, detailed analysis concentrating on the effects on competition, the costs of administration, and the potential benefits of freedom of entry in terms of better service and lower prices

(for the products not covered by NHS price rules). It concludes by calling for open entry, subject of course to demonstrated professional qualifications. The report is a state-of-the-art example of policy analysis and advocacy at its best. It explains how regulation of entry tried to correct for the effects of an inefficient reimbursement formula; however, the report does not estimate the costs of that formula or suggest a different one that would work better in a free-entry setting. The government did not accept the full OFT recommendation, to abolish entry controls, but instead announced other measures that move cautiously in that direction. The OFT report appeared when the terms of the NHS contract were under review, and the situation was complicated further by the fact that much of the power over this topic has been devolved. The situation of this industry presented several political sensitivities. Thus, although agreeing with the goals of lower prices, better service, and wider access, the government's initial statement stressed the importance of a "balanced" package and the role of community pharmacies, and the formal response, delivered as promised within 90 days, preserved most of the status quo. The local bodies that control entry will be able to consider consumer choice and the benefits of increased competition in deciding whether a new or relocated pharmacy is necessary. Pharmacies in large shopping areas, at primary care centres, or opening much longer hours would be favoured. But the structure of entry control based more on controlling competition than promoting it remains in place.

Box 11. Advocacy roles

Authorise stronger advocacy roles for OFT and Commission.

The 2002 Report supported the plans to raise OFT's advocacy profile substantially. At that time, a government White Paper promised to give OFT clear legal duties to promote competition generally, and the government committed to making a public response to its findings within 90 days.

The ubiquitous problem of controlling pharmacy locations illustrates how this process is working. Following the OFT's critical report, the Department of Health engaged in a year-long consultation about government proposals to change the 1992 regulations. The changes were modest, and the chair of OFT was quoted in the press in August 2004 expressing disappointment that this limited liberalisation was a missed opportunity. A similar controversy is coming about the liability of auditors. A recent OFT report contended that a regulatory cap on their liability would not have much effect on competition, but the accounting profession has attacked the findings and is reportedly lobbying the government vigorously.

28. Studies underway now about subsidies and procurement could also touch sensitive nerves. The study of public subsidies will look at how different kinds of public subsidy affect competition and consumers. In creating a framework for the analysis of subsidies, one goal is to find ways to minimise adverse impacts through subsidy design. The OFT expects the study to be completed and published by the autumn 2004. The study of public procurement, to be completed in July 2004, aims to develop an analysis for identifying markets that the OFT should look at more closely.