

objective 3: enforcing competition

Strong competition provides the best guarantee that markets will work well for consumers. Through our enforcement activity we aim to uproot and deter all forms of anti-competitive behaviour, including cartels and the abuse of market power. We also liaise with our European partners to ensure that EC competition law is applied effectively in cases affecting inter-state trade.

While most of our enforcement action is complaint-driven, we strive to prevent infringements by issuing guidelines on key legislation and explaining the benefits of sound competition policy to both consumers and businesses.

Performance against our annual plan

Objective	
We will use our powers actively under competition legislation to deal with anti-competitive practices.	
Our commitment	Our performance
Using the Competition Act powers we expect to:	
<ul style="list-style-type: none"> investigate between 45 and 65 cases where there are reasonable grounds to suspect an infringement of the prohibition(s). 	<ul style="list-style-type: none"> Completed 48 investigations.
<ul style="list-style-type: none"> make between five and 10 reasoned, published infringement decisions. 	<ul style="list-style-type: none"> Made eight decisions: two new infringement decisions, one infringement decision replacing an earlier decision and five non-infringement decisions.
<ul style="list-style-type: none"> publish between 20 and 30 other case closures of which five to 10 cases will involve informal resolution of potential competition issues by the parties. 	<ul style="list-style-type: none"> Published a further 28 case closures. Nine of these resulted in informal resolution.

<p>Investigate carefully – together with the Serious Fraud Office (and the Crown Office in Scotland) – potential criminal cartel offences.</p>	<ul style="list-style-type: none"> Introduced processes and procedures to deal with these cases as they arise.
<p>Use the OFT's powers under sector-specific competition regimes to investigate carefully those schemes, rules and practices that raise potential competition issues, and take prompt action where significant anti-competitive effects are found.</p>	<ul style="list-style-type: none"> Used these powers effectively in 2003-04 as illustrated by the London Stock Exchange case (see page 51).
<p>Develop sound procedures and guidance to implement the decentralisation of EC competition law working with members of the new European Competition Network. We will ensure, together with DTI, that the UK competition regime is fully convergent with the new European system.</p>	<ul style="list-style-type: none"> Regulations came into force on 1 May 2004. The UK competition regime was fully convergent by this date. Guidelines for business will be published in the summer.

During 2003-04, the OFT spent £10.78m on achieving this objective.

This money was allocated as follows:

Staff costs:	£9.33m
Administration costs:	£1.45m

Competition Act enforcement

The Competition Act 1998 is our chief weapon against agreements, business practices and behaviours that have, or are intended to have, a damaging effect on competition in the UK.

The Act contains two prohibitions: the Chapter I prohibition covering anti-competitive agreements and the Chapter II prohibition covering abuse of a dominant market position.

In 2003-04, we opened 1,140 complaint cases under the Act, of which 46 involved possible cartel activity. Formal investigations were launched into 41 cases where we had reasonable grounds to suspect an infringement had occurred. These resulted in eight decisions.

10 suppliers of football replica kit, including top-selling England and Manchester United shirts, were fined £18.6 million.

As part of our investigations, we conducted on-site inspections in 10 cases. Of these, five were under section 27 of the Act (where we have the power to enter premises without a warrant and require the production of documents); three were under section 28 (where we have the power to enter and search premises with a warrant) and two were under both sections.

We found that in many cases competition problems could be resolved most efficiently through informal negotiations with the parties concerned. In more harmful cases, we used our formal powers to stop an infringement, imposing financial penalties where appropriate.

Under our leniency programme, we can reduce fines for businesses which blow the whistle on cartels; and give total immunity to the first to come forward, subject to the requirements of the Act. We received applications for leniency in 16 cases during 2003-04.

During the financial year we imposed total penalties of £19.6m (£18.9m after leniency).



Replica kit

Ten suppliers of football replica kit, including top-selling England and Manchester United shirts, were fined a total of £18.6m in August 2003 for engaging in unlawful price-fixing.

An OFT investigation unearthed evidence of several agreements or concerted practices to set the price for certain kit manufactured under licence by Umbro. Intended to cover key selling periods such as the Euro 2000 tournament, these fixed the prices for short-sleeved shirts at just under £40 for adults and just under £30 for juniors. The agreements, which infringed the Chapter I prohibition of the Act, were policed through informal contacts and monitoring of Umbro's retail customers, some of whom were threatened with stock cancellations if they failed to stick to agreed prices. The longest of the agreements lasted from the early spring of 2000 until the late autumn of 2001.



The businesses fined were JJB Sports (£8.373m), Umbro (£6.641m), Manchester United (£1.652m), Allsports (£1.35m), the FA (£198,000 reduced to £158,000 by leniency), Blacks (£197,000), Sports Soccer (£123,000), Sports Connection (£27,000 reduced to £20,000 by leniency) and Sportsetail (£4,000 reduced to nil by leniency).

JJB and Allsports appealed to the Competition Appeal Tribunal (CAT) against both the decision and the imposition of a financial penalty. Umbro and Manchester United appealed only against the financial penalty. The appeal proceedings before the CAT are ongoing.

Association of British Insurers

The General Terms of Agreement (GTA) operated by the Association of British Insurers (ABI) has the effect of setting the rates at which replacement vehicles are supplied by credit hire organisations (CHOs) to innocent drivers involved in car accidents were provisionally concluded in January. However, we also concluded that the GTA should be exempted from the Competition Act, provided that certain changes are made to its wording and operation.

Credit hire is a business activity where replacement vehicles are loaned by a CHO to innocent drivers involved in road accidents while their damaged vehicle is being repaired. The CHO then seeks to recover the cost of the vehicle hire from the 'at-fault' driver's insurer. The GTA acts as a protocol between motor insurers and CHOs, and has the effect of setting the rates that CHOs can recover from the 'at-fault' driver's insurer.

Although the GTA has the essential feature of a price-fixing agreement, we felt that if certain changes were made to its wording and operation, the benefit to consumers of the GTA (including a reduction in disputes between CHOs and insurers, the cost of which would have been reflected in higher insurance premiums) would outweigh the anti-competitive effects.

We therefore found that the agreement would qualify for an exemption from the Chapter I prohibition, on the condition that changes were made to the GTA's wording and operation. In particular, an independent assessor should be appointed to conduct the review of acceptable rates.

These provisional conclusions were outlined in a Rule 12 Notice and a Rule 14(2) Notice issued in January 2004, and confirmed in a final decision in April 2004.



British Horseracing Board/Jockey Club

We reached a preliminary view that some of the rules and regulations governing British horseracing infringed the Competition Act.

The British Horseracing Board (BHB) and the Jockey Club had asked us to decide whether the Orders and Rules of Racing infringed the Chapter I prohibition relating to anti-competitive agreements.

We wrote to the BHB and Jockey Club in April 2003 setting out our preliminary view that, while most of the Orders and Rules raised no competition concerns, some infringed the Chapter I prohibition by:

- unduly limiting the freedom of racecourses to organise their racing, for example by fixing how often and at what times races could be staged;
- fixing the amounts that racecourses must offer owners to enter their horses into races; and
- monopolising the supply of race and runners data to bookmakers.

In light of the representations received from the BHB and Jockey Club, and BHB's commitment to make significant changes to the way in which it runs British horseracing, the OFT reached a preliminary agreement with the BHB in June 2004 to close its investigation. This will be subject to public consultation over the summer.



London Stock Exchange

As a result of an OFT investigation, the London Stock Exchange (LSE) agreed to reduce substantially the annual issuer fees charged to UK companies whose shares are traded on its main market. It also agreed to reduce fees charged to companies listed on its alternative investment market (AIM).

Some of the LSE's annual issuer fees had increased significantly during 2002-03. We investigated these increases under the competition scrutiny provisions of the Financial Services and Markets Act 2002.

During the course of our investigation, the LSE agreed to reduce its issuer fees for UK companies from 1 April 2004 and not to raise them significantly for a further two years. This reversed most of the effect of the increases imposed in 2002.

In view of this, we concluded that increases in the LSE's annual issuer fees did not have a significantly adverse effect on competition and therefore no further action was required. A full report on the investigation will be published in the summer 2004.

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DuPont

A decision by DuPont to stop supplying specialist film to a Leeds-based supplier of hologram products, OPG, did not, on the basis of information available to the OFT, constitute an abuse of dominant market position, we concluded.

In November 2001, OPG received a fax from DuPont giving 120 days' notice of the termination of an agreement to supply unprocessed holographic photopolymer film (HPF). DuPont stated that it would supply HPF under the terms of the terminated supply agreement between 1 April 2002 and 31 December 2002 provided that orders were received by 31 March 2002.

In May 2002, OPG complained to the OFT that DuPont had abused its dominant market position, as the sole worldwide manufacturer and supplier of unprocessed HPF for graphic arts applications, by refusing to continue to supply this product beyond 31 December 2002.

We took the view that competition law should only deprive an undertaking of the freedom to determine its trading partners in exceptional circumstances. These typically arise where the product concerned is an essential facility or where refusal to supply eliminates competition in a downstream or associated market.

We concluded that unprocessed HPF could not be regarded as an essential facility, and that a decision by DuPont to stop producing HPF holograms for graphic arts applications meant that its refusal to continue supplying OPG was unlikely to be aimed at eliminating competition in any market in which OPG was active.

For these reasons, we decided that DuPont's refusal to continue to supply unprocessed HPF to OPG did not infringe the Chapter II prohibition.

Attheraces

In April 2004, we found that 49 racecourses had infringed the Chapter I prohibition by collectively selling certain media rights to Attheraces, a joint venture between Arena Leisure, BSkyB and Channel 4.

Attheraces was set up to supply horseracing coverage, including through a basic-tier pay-TV channel. It also provided access to betting services via interactive TV and the internet.

A number of inter-related agreements establishing Attheraces were notified to the OFT in November 2001. These included Attheraces' acquisition of media rights to horseraces at 49 of Britain's 59 racecourses. We concluded that the 49 racecourses' collective sale of some of these rights harmed competition by increasing their price and dampening incentives for racecourses to make their racing more customer-friendly. We also found that the collective sale was not eligible for an individual exemption.

As the joint venture agreements had been notified to us, no financial penalty for the infringement was imposed.

School fees

An OFT investigation was launched into alleged anti-competitive practices in the independent school sector in June. As part of this inquiry, we issued section 26 notices to a number of independent schools requiring specified documents or information to be submitted. The OFT will examine all the evidence gathered in the course of the investigation to consider if the Chapter I prohibition has been infringed.

We also issued general advice to the Independent Schools Council on how their members might be affected by the Competition Act.

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Roofing contractors

Nine roofing contractors were fined a total of under £300,000 in March for collusive tendering in breach of the Chapter I prohibition.

We found that the parties were involved in a series of individual agreements or concerted practices in tendering for flat roofing contracts in the West Midlands. As a result, buyers were unable to obtain competitive prices when tendering for repair, maintenance and improvement services for flat roofing. Among the contracts affected were those for services at a number of schools, a community library, a shopping centre and a car park.

The businesses involved (with fines in brackets) were Apex Asphalt & Paving Co. Limited (£35,922), Briggs Cladding & Roofing Limited (£ nil), Brindley Asphalt Limited (£55,540), The General Asphalte Company Limited (£63,192), Howard Evans (Roofing) Limited (£35,510), Richard W Price (Roofing Contractors) Limited (£18,000), Redbrook Mastic Asphalt and Felt Roofing Limited (£17,802), Rio Asphalt & Paving Co. Limited (£45,049) and Solihull Roofing and Building Co. Limited (£26,606).

Briggs Cladding & Roofing Limited qualified for total immunity under our leniency programme, reducing its financial penalty to zero. The fine for Howard Evans (Roofing) Limited was reduced under the leniency programme by 50 per cent.

i *Details of all decisions under the Competition Act:*
www.ofc.gov.uk/business/competition+act

Competition Act appeals

Responding to appeals is a crucial element of our enforcement work. We spent approximately £1.4m on this activity in 2003-04.

On 1 April 2003, a new independent body for hearing appeals against Competition Act decisions was established under Part 2 of the Enterprise Act 2002. The Competition Appeal Tribunal (CAT) took over the function of the Competition Commission Appeal Tribunals (known as CCAT), with the powers to confirm, set aside, vary or remit an OFT decision.

Aberdeen Journals

The CAT upheld an OFT decision that Aberdeen Journals had engaged in predatory pricing in breach of the Chapter II prohibition of the Competition Act.

Following the CAT's judgment on an earlier appeal by Aberdeen Journals, which remitted the case back to the OFT for further consideration, we confirmed in September 2002 our original finding that the company had abused a dominant market position by selling advertising space in its free newspaper, the *Herald & Post*, at below cost price to remove its only rival, the *Aberdeen Independent*, from the market.

The Tribunal upheld the OFT's finding of abuse. However, given the short duration of the abuse, it reduced the penalty imposed from £1.328m to £1m.

Bettercare

In its judgment of 1 August 2002, the CAT remitted a decision by the OFT not to pursue a complaint by the private care home provider BetterCare Group Limited (Bettercare), that the North & West Belfast Health and Social Services Trust (N&W) had abused its position as a dominant purchaser by offering uneconomically low and discriminatory prices when purchasing residential and nursing home care from the company.

Our subsequent investigation of Bettercare's complaint found that:

- N&W did not set the prices paid to Bettercare for residential and nursing home care, and therefore could not have committed an abuse;
- in any event, there was insufficient evidence that the prices paid by N&W were excessively low.

We also concluded that public bodies involved in setting rates to be paid by Health & Social Services Trusts for residential and nursing care services, did not carry out economic activities in respect of the provision of residential and nursing home care, and hence were not undertakings for the purposes of competition law. We therefore had no jurisdiction to consider their behaviour under the Competition Act.

In the light of this decision, we published a policy note on the impact of competition law on public bodies. The note also takes account of a decision by the European Court of First Instance in the case of FENIN v the European Commission. This case established that where an organisation purchases goods or services for purposes other than economic activity, such as those of a purely social nature, it is not acting as an undertaking for the purposes of competition law simply because it is a purchaser in a given market.

Responding to appeals is a crucial element of our enforcement work.

We spent approximately £1.1m on this activity in 2003-04.



Genzyme

An OFT decision that the pharmaceutical company Genzyme Limited (Genzyme) abused a dominant position in the supply of drugs for the treatment of a rare inherited disorder called Gaucher disease, was substantially upheld by the CAT in March.

We found that the company had infringed the Chapter II Prohibition of the Competition Act by charging the NHS a price for the drug Cerezyme which included the price of home delivery and the provision of homecare services (the 'bundling issue'). This ensured that only Genzyme, or an undertaking acting under contract for Genzyme, could provide such services for patients being treated with Cerezyme.

We also found that, from May 2001, the company prevented viable competition by charging independent third-party homecare service providers a price for Cerezyme that allowed them no possible margin (the 'margin squeeze' issue).

The Tribunal upheld our finding on the margin squeeze issue, but ruled that we had not proved that the bundling issue had a sufficiently adverse effect on competition. The OFT's original fine of £6.8m was consequently reduced by the CAT to £3m.

Cartel criminalisation

We were given new powers to investigate individuals suspected of involvement in hard-core cartels when Part 6 of the Enterprise Act came into force in June 2003.

The Act makes it a criminal offence for an individual to dishonestly agree with one or more other persons that two or more undertakings will engage in the most serious cartel activities, namely price-fixing, market-sharing, bid-rigging or limiting production or supply.

The OFT will work with the Serious Fraud Office to investigate the offence, which carries a maximum penalty of five years' imprisonment and/or an unlimited fine.

Prosecutions will generally be undertaken by the Serious Fraud Office in England, Wales and Northern Ireland, and by the Crown Office in Scotland. Memoranda of Understanding with the two prosecuting bodies were signed in 2003.

Under the Act, the OFT can require individuals to answer questions and to provide relevant information and documents. We can also enter and search premises under warrant for any relevant documentation.

The Act amends the Regulation of Investigatory Powers Act (RIPA) 2000, allowing us to conduct intrusive surveillance for the purpose of investigating the cartel offence. We were granted additional powers under RIPA in January, including the right to use directed surveillance (such as watching a person's office) and informants in cartel investigations.

Following wide-ranging consultation we published guidance on how we would use our Enterprise Act powers. A code of practice on the use of our additional RIPA powers will be published later in the year.

Under the Enterprise Act, the OFT can require individuals to answer questions and to provide relevant information and documents.



EC modernisation

Throughout the year we prepared for a substantial change to the way EC competition law is enforced.

From 1 May 2004, the OFT applies and enforces Articles 81 and 82 of the EC Treaty, alongside the Chapter I and II prohibitions of the Competition Act, in cases affecting trade between EC member states.

In addition, Council Regulation (EC) 1/2003, known as the Modernisation Regulation, abolishes the system of notifying agreements. This is replaced by a legal exception regime, under which agreements, which satisfy the conditions of Article 81(3), are valid without the need for an exemption decision. Previously, the European Commission had sole power to grant exemptions under Article 81(3).

We worked closely with government on the changes to the Competition Act which give effect to modernisation in the UK. We also updated our existing guidelines, guidance and procedural rules. Sixteen new or revised documents have been issued for consultation.

To coordinate enforcement of Articles 81 and 82 in member states following modernisation, a network of National Competition Authorities (NCAs) called the European Competition Network (ECN) has been established.

We worked with the European Commission and our ECN partners to develop the detailed procedures for the day-to-day operation of the network. We also assisted other NCAs, particularly those from accession states, in drawing up plans for modernisation.

① *Further details on the implementation of the EC Regulation: OFT guidelines, 'Modernisation' (OFT442), www.of.gov.uk/business/legal+powers*



Review of professions

We responded to the Lord Chancellor's consultation on the future of Queen's Counsel by stating that the current system for appointing QCs does not serve the best interests of consumers.

By conferring a title on certain advocates – almost exclusively barristers – which dramatically increases their status and earnings power, we argued that the system distorts competition.

While accepting that 'quality mark' schemes can be helpful to consumers, we argued that the QC title is too generic to provide genuinely useful information or an assurance of excellence.

We also questioned whether the direct involvement of government in awarding the QC title is consistent with the public interest objective of lawyers being manifestly independent of government.

Supermarket code review

An OFT review of the Supermarkets Code of Practice uncovered a widespread belief among suppliers that the Code is not working effectively, but there was no hard evidence to support this.

Over 80 per cent of respondents to the review said that the Code, introduced after a Competition Commission report into the supply of groceries from multiple stores, had failed to change the behaviour of the big four supermarkets – Asda, Sainsbury's, Safeway and Tesco – on whom it is legally binding.

However, no cases have gone to mediation under the Code, nor has the OFT received any detailed information from suppliers or trade associations about alleged breaches.

The four supermarkets each expressed a commitment to the Code and claimed that relations with suppliers were generally good. However, the OFT has no evidence from the supermarkets that their relationship with suppliers had changed significantly since the Code was introduced.

The OFT has therefore commissioned a compliance audit to establish how each of the four supermarkets deals with suppliers under the Code.