OFFICE OF FAIR TRADING

The deterrent effect of competition enforcement by the OFT

A report prepared for the OFT by Deloitte

November 2007

OFT962

ABBREVIATIONS

CA98	Competition Act 1998
CAT	Competition Appeal Tribunal
CC	Competition Commission
DoJ	US Department of Justice
DTI	Department of Trade and Industry
EA02	Enterprise Act 2002
FTC	US Federal Trade Commission
UIL	Undertakings in lieu
NMa	Netherlands Competition Authority
OFT	Office of Fair Trading
SLC	Substantial lessening of competition

CONTENTS

1 EXECUTIVE SUMMARY

1.1 The Office of Fair Trading (OFT) commissioned Deloitte to address a number of questions about the deterrent effect of its enforcement activities in the areas of merger control and competition law. The central questions were:

- What is the scale of the deterrent effect of the OFT's activities?
- How does the impact of the UK competition regime on companies vary according to their sector and size?
- Which factors are most important in motivating compliance with competition law?
- Which individual merger and competition law decisions have had the greatest effect on companies' behaviour?
- How frequently do companies proceed with anti-competitive mergers or conduct of which the OFT is not aware?
- How frequently does the risk of OFT enforcement deter mergers or conduct which is not anti-competitive ('business chilling')?

1.2 This study reports the results of three exercises:

- 30 interviews with lawyers, economists and companies ('interviews') undertaken between May and November 2006.
- A telephone survey of 234 senior competition lawyers based in the UK and Brussels ('legal survey') undertaken between September and November 2006.
- A telephone survey of 202 UK companies ('company survey') undertaken in February and March 2007.

1.3 The names of the participants, or their firms, were not disclosed to the OFT and the results were not relayed in a way which would identify them. We relied on the data on respondents' answers provided to us by

ORC International (the market research firm which conducted the surveys).

Mergers

1.4 The legal survey suggests that over the period 2004-06, at least five proposed mergers were abandoned or modified on competition grounds before the OFT became aware of them for each merger blocked or modified following intervention by the UK competition authorities.

1.5 The five to one ratio should be interpreted as a lower bound for two reasons:

- The legal survey only captures mergers abandoned or modified following external legal advice, but the decision is often taken by companies without such advice. In the survey of companies, the decision to abandon or modify a merger on competition grounds was taken following external legal advice in only 25 per cent of cases.

- The ratio assumes that on average the same number of lawyers are consulted on proposed mergers which are abandoned or modified before the OFT became aware of them as on mergers blocked or modified following intervention by the UK competition authorities. If (as seems likely) the number of lawyers involved in cases which are blocked or modified following intervention is on average higher, then the ratio would be larger.

1.6 Moreover, examining proposed mergers which are abandoned or modified on competition grounds is likely to understate the extent of deterrence since the merger control regime also discourages mergers from being proposed in the first place.

1.7 The company survey suggested that a merger is more likely to be abandoned or modified if there has been a recent Competition Commission (CC) inquiry in the sector. While 12 per cent of all mergers considered by the companies surveyed in the period 2004-06 were abandoned or modified on competition grounds, this figure rose to 30

per cent for mergers in sectors in which there had been a CC inquiry since 2000[1].

1.8 The two decisions most frequently mentioned as deterring other mergers were *Lloyds/Abbey* and *Safeway*. In both cases we were provided with examples of specific transactions in the banking and supermarket sectors which had been abandoned as a result of those decisions.

1.9 The legal survey suggested that in the period 2004-06 the number of mergers completed without the OFT's knowledge which (in the lawyer's view) it would have been unlikely to clear unconditionally is at least as large as the number which were blocked or modified following intervention by the UK competition authorities.

1.10 This one to one ratio should be interpreted as a lower bound because:

- Companies may also have completed some mergers which they considered the OFT would not give unconditional clearance (and of which the OFT is not aware) without taking external legal advice.
- The ratio assumes that on average the same number of lawyers are consulted on mergers completed without the OFT's knowledge as on those which are modified or blocked following intervention. It appears likely that on average more lawyers are involved in the latter.

1.11 The evidence we have suggests that these 'under the radar' mergers are on average smaller (as measured by the turnover of the enterprise being taken over) than the mergers for which the OFT requires a remedy or refers to the CC. All the examples we were provided with would have qualified on the share of supply test, rather than the turnover test.

[1] The register of the CC's inquiries since 2000 is available at www.competition-commission.org.uk

1.12 Nevertheless, some of those we interviewed considered this to be a lacuna in the UK merger control regime. The most frequently suggested policy response was introducing a requirement to notify qualifying mergers. Other suggestions included increased monitoring by the OFT for qualifying mergers and the introduction of a penalty system for completing mergers subsequently found to be anti-competitive.

1.13 As regards business chilling (deterrence of mergers which are not anti-competitive) the complaint we heard most frequently was that the OFT's procedures made negotiating remedies unnecessarily difficult. Specifically, the OFT does not typically indicate what remedies would be sufficient to address their key competition concerns, and the parties are not given the opportunity to enter into dialogue with the ultimate decision taker within the OFT. This was said sometimes to lead to mergers which were not anti-competitive being referred and then, given the parties' unwillingness to go through the CC process, abandoned. There were a number of other suggestions for improvement put forward.

Competition law

1.14 Using the results of the legal survey, we calculated ratios of agreements and initiatives abandoned or significantly modified to those which resulted in a Competition Act 1998 (CA98) decision for the period 2000-06.These are:

- Cartels **Five to one**
- Commercial agreements **Seven to one**
- Abuses **Four to one**

1.15 These ratios should be interpreted as lower bounds for the same reasons as the merger ratios.

1.16 We calculated corresponding ratios from the company survey, using the conservative assumption that any company reporting more than one instance of deterrence in a particular category (for example, a potential

abuse) should be treated as having been deterred in only one instance in that category. These are as follows:

- Cartels **16 to one**
- Commercial agreements **29 to one**
- Abuses **10 to one**

1.17 Comparing these results with those of the legal survey, it is noticeable that the ranking is similar (with most instances of commercial agreements deterred and least of abuses) but that the ratios are significantly larger. One explanation for the higher ratios is the existence of deterred activity on which external advice is not taken.[2] Because of the assumption described in the previous paragraph, however, these ratios are still conservative.

1.18 There was somewhat conflicting evidence as to whether CA98 infringement decisions in a particular sector create a stronger deterrent effect in that sector than they do across the economy as a whole:

- A majority of lawyers in our sample considered that CA98 decisions have a greater deterrent effect against anti-competitive practices in the same sector than other sectors.
- In the relatively small number of instances where firms are able to identify a CA98 decision that had an effect on their commercial behaviour, they tended to be in the sector in question.
- However, there was little evidence that companies' abandoned or modified agreements or conduct more frequently in sectors with infringement decisions than in the economy as a whole.

[2] Another explanation is that more lawyers (on average per agreement or initiative) advise on published CA98 cases than on deterred agreement and initiatives, so that the ratios from the legal survey are underestimates.

1.19 Overall the evidence from the surveys that there is a strong sector-specific deterrent effect from CA98 decisions is weak. In particular, the evidence for such a sector-specific deterrent effect is weaker for CA98 decisions than for CC merger decisions.

1.20 In regard to individual decisions, it appears that the deterrent effect arising from competition law enforcement operates in a different way from merger control. In the interviews we were provided with several examples of proposed mergers which had been abandoned or modified specifically as a result of an earlier individual OFT or CC merger decision. By contrast, in the context of competition law, while there were many examples of agreements and initiatives that were abandoned or modified because of the risk of OFT enforcement action, none were said to have been abandoned or modified specifically as a result of an earlier individual decision.

1.21 The decisions most often mentioned in our interviews with advisers in the general context of raising the profile of competition enforcement were *Hasbro/Argos/Littlewoods, Replica Football Kit* and *Napp.*

1.22 Few companies in the survey said that there were any individual CA98 decisions which had had an effect on their company's commercial behaviour. The only one mentioned more than once was *Hasbro/Argos/Littlewoods.*

1.23 In terms of the sanctions which motivate compliance, the company results in particular highlight the importance of sanctions which operate at the individual, as opposed to corporate, level.[3]

1.24 We found quite widespread concern about business chilling (deterrence of neutral or pro-competitive conduct) both among advisers and

[3] Companies' average ranking of the factors which motivate compliance was: (1) criminal penalties (2) disqualification of directors (3) adverse publicity (4) fines and (5) private damages actions.

companies. While the academic literature on the topic emphasises the possibility of business chilling arising from the prohibition on abuse of dominance, we found that the most common form of business chilling in the UK context is where firms are concerned that their behaviour may be perceived as a cartel (including resale price maintenance and information exchange).

1.25 In particular, in the interviews, the most common type of business chilling we came across was that of a supplier who wishes to implement a promotion (or meet competition from a new entrant) by requiring retailers to cut their retail prices. They are concerned that this may be seen as vertical price fixing and so refrain even though the effect would be to benefit consumers. These concerns are understandable given that the most prominent cases taken by the OFT under CA98 have related to vertical price fixing.

1.26 At the end of the legal and company surveys, we asked whether respondents had any suggestions for what could be done to improve deterrence of competition law infringements in the UK. The most frequently made suggestions were: increased publicity and education, encouraging private damages actions, faster decision taking, more criminal prosecutions for cartels and more decisions/greater enforcement activity.

Limitations

1.27 Two limitations should be noted:

- The size of the company survey is relatively small, and results which rely on division of the sample (such as those on the effect of company size and sector) must be regarded with particular caution.

- We have not verified the information provided by respondents to the two surveys. It is possible that difficulties in estimating the relevant numbers of cases, or concerns about confidentiality or self-incrimination (despite the anonymity of the survey) led to some inaccuracy in the reports.

2 INTRODUCTION

Background

2.1 Increasingly, competition authorities' interventions are being evaluated.[4] In the UK, evaluation exercises using a very wide range of different methodologies have been conducted for specific mergers, competition law decisions and market investigations.[5]

2.2 There have also been investigations of the overall effectiveness of the Office of Fair Trading (OFT) and Competition Commission (CC). These include the National Audit Office's 2005 assessment of the OFT's competition enforcement activities, the periodic peer reviews of the performance of the UK competition regime relative to other OECD jurisdictions commissioned by the Department of Trade and Industry (DTI)[6] and the annual assessment of agencies conducted by the Global Competition Review.

2.3 Broadly, these studies have two goals. First, they can be used for external accountability, to assess the scale of the benefits of competition enforcement in relation to the costs, both to the taxpayer and also to businesses in compliance. Second, they can be used as an

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[4] The diverse approaches that have been taken to evaluation in 14 OECD jurisdictions are described in a recent OECD roundtable on competition policy (OECD (2005)).

[5] On mergers, see PwC's 2005 ex post evaluation of 10 mergers cleared unconditionally by the CC between 1996 and 2006 and the CC's own studies of the monetary savings to consumers from mergers against which it took action in 2005/06 and 2006/07. See also the OFT's 2007 study of the consumer savings from four anonymous undertakings in lieu decisions from the financial year 2006-07 using merger simulation techniques. Outside the field of mergers, Davies et al. (2004) describe six case studies including a CA98 decision (*Replica Football Kit*) and a CC investigation (*New Cars*).

[6] The first peer review was published in 2001 by PwC. The second (2004) and third (2007) were both conducted by KPMG. The former Department of Trade and Industry has now been replaced by the Department for Business, Enterprise and Regulatory Reform (BERR).

internal management tool to inform decisions as to how to allocate scarce agency resources to those activities which will deliver the greatest benefits.

2.4 One of the most ambitious recent evaluation studies is the report published by the OFT in 2005. This estimated that the consumer savings over the period April 2000 to March 2005 were at least £110m from Competition Act 1998 (CA98) infringement decisions and at least £640m as a result of mergers blocked or remedied by confidential guidance, undertakings in lieu of reference, or referrals to the CC following public investigation. [7]

2.5 This study was updated by the OFT in 2007. The later study estimated the average consumer savings from the UK merger regime at £92m per year over the financial years 2004 to 2007. The average consumer savings from CA98 infringement decisions over the same period was estimated at £64m per year.[8]

2.6 The OFT's studies (in common with most previous work on evaluation in the UK and elsewhere) only examined the direct effect of enforcement, that is to say, the mergers blocked or modified and the cartels and abuses disrupted following intervention. But there is also a deterrent effect: mergers and competition law infringements which do not occur because of the risk (rather than the reality) of investigation.

2.7 Many consider the deterrent effect of enforcement to be more important than the direct effect. However, there is limited evidence on the point: in

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[7] In recent work on evaluation in the UK, great emphasis had been placed on the consumer savings from competition policy. What weight, if any, should be placed on its impact on businesses and employees is controversial. Davies and Majumdar (2002) put the case for a consumerist welfare standard. Motta (2004) and Heyer (2006) argue that weight should also be placed on the monetary costs and benefits of enforcement to producers. See also Farrell and Katz (2006).

[8] OFT (2007c) at paragraph 1.4 and 1.5.

part because of the inherent difficulty of quantifying the scale of the deterrent effect. Thus the US Department of Justice (DoJ) has written: 'We firmly believe that deterrence is perhaps the single most important ultimate outcome of the [Antitrust] Division's work. We are just as sure that it presents the most significant measurement challenges…' (DoJ (2000) p. 49)

2.8 The difficulties of measuring deterrence effects have been widely recognised.[9]

2.9 The essence of the approach taken in this study is to examine proposed mergers, and proposed and implemented conduct, which was abandoned or modified because of the risk of OFT investigation. We asked both advisers and companies themselves about proposed mergers and conduct, in separate surveys, as well as in interviews.

Scope

2.10 A number of questions about the deterrent effect of the OFT's enforcement activities in the areas of merger control and competition law were addressed.[10] These were:

- What is the scale of the deterrent effect of the OFT's activities?
- How does the impact of the UK competition regime on companies vary according to their sector and size?

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[9] 'One of the joys of deterrence effects…is that they are very hard to measure with any confidence' Paul Geroski (2004). 'Measuring and quantifying the influence that competition authorities have on the economy is difficult, with some outcomes, such as deterrence effects, virtually impossible to measure' National Audit Office (2005).

[10] Throughout this report, competition law refers to the Competition Act 1998, Articles 81 and 82 of the EC Treaty and the criminal cartel offence of the Enterprise Act 2002. It does not include the statutory powers which underpin the OFT's work conducting market studies or assessing mergers.

- Which factors are most important in motivating compliance with competition law?
- Which individual merger and competition law decisions have had the greatest effect on companies' behaviour?
- How frequently do companies proceed with anti-competitive mergers or conduct of which the OFT is not aware?
- How frequently does the risk of OFT enforcement deter mergers or conduct which is not anti-competitive ('business chilling')?
- How predictable are the OFT's decisions?
- Why don't companies bring private damages actions more frequently?
- What steps do companies most commonly take to comply with competition law?
- How could the deterrence of competition law infringements in the UK be improved?

2.11 The primary objective was to provide an estimate of the scale of the deterrent effect. The measure of scale used is the ratio of the number of actions of a given type deterred to the number blocked or modified following competition authority intervention. Thus for mergers, we calculate the ratio of the number of mergers abandoned or modified on competition grounds before the OFT became aware of them to the mergers which resulted in a finding of substantial lessening of competition (SLC) by the CC or undertakings in lieu (UIL).

2.12 We calculate similar ratios for cartels, commercial agreements and abuses. For reasons to be discussed later, we interpret these ratios as lower bounds for the scale of activity that is deterred by the OFT's enforcement activity.

Methodological issues

Defining the 'direct' and 'deterrent' effects of enforcement

2.13 It is not as obvious as may first appear where to draw the boundary between the direct and deterrent effects of enforcement. A merger abandoned on competition grounds before the OFT is aware of it is clearly deterrence, while a merger blocked by the CC is clearly direct enforcement, but there are many intermediate possibilities. For example, many mergers have been abandoned following pre-merger contact with the OFT, or after it has decided to refer them to the CC for closer scrutiny.

2.14 For the purposes of our estimates of the scale of deterrence, these intermediate possibilities were ignored. The size of the deterrent effect was measured by the number of mergers abandoned or modified on competition grounds before the OFT became aware of them. The size of the direct effect was measured by the number of mergers in which the CC reached an SLC finding or undertakings in lieu were agreed.

2.15 The same definitional question arises in the context of competition law. Agreements and abuses which do not occur merely because of the risk of investigation are clearly deterred, while the cessation of agreements and abuses following a formal infringement decision should be classified as direct enforcement.

2.16 But there are many instruments that a competition authority can use short of reaching a formal infringement decision that may influence companies' behaviour. These include opening administrative proceedings, accepting commitments, informing companies that a complaint has been made, issuing warnings, conducting market studies, publishing codes of conduct or guidelines and advocacy (which may be directed particularly at those markets where a problem is believed to exist). When companies respond to these instruments, as they often do, it is not clear whether this should be categorised as a direct or deterrent effect of enforcement.

2.17 For the purposes of estimating the scale of deterrence, our definitions were narrow. The deterrent effect was measured by the number of instances in which agreements and conduct were abandoned or significantly modified because of the risk of OFT investigation, but of which the OFT was not aware. The direct effect was measured by the number of CA98 decisions (both infringement and non-infringement) published by the OFT.

Mergers and conduct not even proposed

2.18 The approach of examining proposals for mergers and conduct which are deterred is likely to underestimate the scale of the deterrent effect. The reason for this is that it is likely that there are many mergers, agreements and initiatives which are not even proposed because the attitude of the competition authorities would be clear.

2.19 For example, in countries with vigorous competition regimes, managers are likely to be discouraged from proposing mergers which would certainly not obtain clearance (for example, a Coke/Pepsi combination) or from proposing naked price fixing to their rivals. Moreover, it appears plausible that in these 'obvious' cases, the benefits of the deterrent effect of enforcement are large.

Isolating the effect of the OFT's enforcement

2.20 The aim was to isolate the deterrent effect of the enforcement activities of the OFT, as opposed to any deterrent effect which arises from overseas competition authorities (such as European Commission and DoJ), the sectoral regulators and the threat of private actions. However, in some cases infringements of competition law gives rise to the risk of action from several directions. Moreover, the allocation of jurisdiction is not mechanical. For these reasons, it may not be clear when a particular agreement or initiative is deterred, whether this can be attributed to the OFT, or some other factor.

2.21 To address this, in the legal and company surveys, we asked respondents to competition law questions to identify activity that had

been abandoned or modified 'primarily because of the risk of OFT investigation'.

2.22 In our survey questions about mergers, we asked about proposed qualifying mergers that had been abandoned or modified 'on competition grounds'. The deterrent effect of the UK merger control regime was considered as a whole: we did not attempt to distinguish in the survey whether the deterrent effect arose from the enforcement policies of the OFT or CC.

2.23 The problems in isolating the deterrent effect of the OFT from other agencies and third party actions, due to the lack of clarity over jurisdiction, are less severe in the context of merger control. For example, jurisdiction of proposed mergers as between the OFT and European Commission is determined, at least in the first instance, on the basis of turnover thresholds.[11]

Causation

2.24 An estimate of the size of the deterrent effect in relation to the direct effect does not imply a causal relationship between the two. Thus in the questions on competition law we asked about activity since CA98 came into force which was abandoned or modified primarily because of the risk of OFT investigation, and this was compared to the scale of direct enforcement in the same period. However, it is likely that the perceived risk of investigation was created in part by the OFT's enforcement activities before CA98 came into force and by the enforcement record of other competition authorities with similar legal powers (such as the European Commission).

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[11] Article 9 and 22 of the EC merger regulation (Council Regulation 139/2004/EC) allow mergers to be referred between the European Commission and national competition authorities, after the original jurisdictional position has been determined by applying the turnover thresholds of Article 1. But the numbers of mergers imported and exported are small and it is usually possible to anticipate which authority will take jurisdiction.

2.25 The same point applies in the context of merger control. We asked about mergers that had been abandoned or modified on competition grounds in the last three years, and this was compared to the scale of direct enforcement in the same period. However, it does not follow that the measured deterrent effect in the last three years is caused by enforcement activity in the last three years. The enforcement record of the OFT and CC before 2003 may be relevant, as may be the precedents set by other competition authorities.

Previous studies

2.26 A survey of the literature on deterrence can be found in Davies and Majumdar (2002)[12]. We do not attempt an extensive review here, but mention below some of the studies most comparable to the current investigation.

Surveys

2.27 Beckenstein and Gabel (1982) report the results of a survey of 859 members of the Antitrust Law Section of the American Bar Association. The questionnaire contains questions on compliance programmes, reasons for violations, factors which generate deterrence, the extent of undeterred infringements and how deterrence might be improved.

2.28 This US survey inspired a similar, although smaller, survey of competition lawyers in Europe. Feinberg (1985) analysed the responses of 24 Brussels-based lawyers to a questionnaire examining the European competition regime.

2.29 Beckenstein and Gabel's study was also influential in the design of a study examining the UK regime conducted by Tim Frazer (1995). The policy question addressed by Frazer's study was the desirability of introducing a prohibition system with fining powers in the UK, similar to

[12] Mergers are discussed at pp. 129-134 and cartels at pp.135-146.

the regime which already existed in Europe. He sent questionnaires to competition law practitioners in the UK and UK-registered companies with a turnover of at least £200 million to gauge their views about the deterrent effect of UK and EC competition law. The companies' responses in particular reflect the weaker competition regime which existed in 1995. Investigation or action by the OFT, the European Commission or third parties was seen as unlikely. The three factors most commonly cited as likely to enhance compliance at the UK level were the imposition of fines, more third party actions in UK courts and more investigations undertaken by the OFT.[13]

2.30 The Antitrust Division of the DoJ in their submission to Congress for the Fiscal Year 2001 report the findings of a survey of attorneys in private law firms in relation to the deterrent effect of enforcement of Section 1 of the Sherman Act (prohibiting cartels and other anti-competitive agreements). The survey was carried out by a master's student under the supervision of an (anonymous) antitrust scholar at an Ivy League university. The DoJ commented: 'While acknowledging a fairly low response rate, we nonetheless feel there is a great deal of general value to the specific results of the survey: primarily that if the Division stopped enforcing Section 1 of the Sherman Act, there would be an estimated 150 per cent increase in the number of conspiracies over the next five years, and an increase in the aggressiveness of those conspiracies (page 49A)'.

2.31 Undoubtedly most progress in quantifying the scale of the deterrent effect was made in the 2005 study by the consultancy Twynstra Gudde for the Netherlands Competition Authority (NMa). This examined the deterrent effect of the Dutch merger control regime based on interviews

[13] Frazer (1995), pp.854-55. A domestic competition regime modelled on the European system came to pass three years after Frazer's study with the approval by Parliament of CA98. The three factors rated as most likely to enhance competition compliance by the respondents in Frazer's study are among the six factors most mentioned as likely to improve deterrence by respondents in the current surveys (see Table 5.13).

with 16 competition lawyers from 14 law firms. It was estimated that in total across these law firms, 475 merger proposals in the period 2000-03 had been seriously researched by a competition lawyer. Of these, approximately 30 (six per cent) were abandoned and 60 (12 per cent) were modified.[14]

2.32 A number of surveys have been conducted to assess various aspects of the performance of the UK competition authorities more generally. Among these may be mentioned the DTI's periodic peer reviews benchmarking the UK relative to other major OECD regimes,[15] the Global Competition Review annual survey collating views of competition authorities' performance ('Rating Enforcement'), and Databuild's 2005 stakeholder survey of the Competition Commission's performance.

2.33 For the OFT, Synovate conducted regular surveys of consumer and business awareness of competition and consumer protection enforcement between 2003 and 2006. Some of the topics covered in that survey are also covered here.[16]

Other approaches to quantifying deterrence

2.34 There are a number of non-survey approaches to measuring the deterrent effect of enforcement. Two of the most interesting are to construct the 'no enforcement' counterfactual historically or by comparison with countries with less rigorous competition regimes. An example of the former is Symeonidis (2000) study of the impact of the introduction in the UK of the Restrictive Trade Practices Act 1956. An example of the

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[14] Twynstra Gudde (2005) pp.24-26.

[15] PwC (2001), KPMG (2004) and KPMG (2007).

[16] An important difference is that while Synovate's business surveys covered all firm sizes from 10 employees upwards, our survey focused on larger firms (200 employees upwards). As will be seen, the degree to which the UK competition regime impinges on firms' commercial behaviour is strongly related to their size.

latter is Clarke and Evenett's 2005 study of the international vitamins cartel which operated from 1989 to 1999.

3 METHODOLOGY

3.1 This study reports the results of three exercises:

- 30 interviews with lawyers, economists and companies ('interviews').
- A telephone survey of 234 senior competition lawyers based in the UK and Brussels ('legal survey').
- A telephone survey of 202 UK companies ('company survey').

3.2 The names of the participants, or their firms, were not disclosed to the OFT and the results were not relayed in a way which would identify them. We are very grateful to those who generously gave up their time to contribute.

3.3 We relied on the data on respondents' answers provided to us by ORC International (the market research firm which conducted the surveys).

Interviews

3.4 Between May and November 2006, we conducted 30 interviews with competition lawyers (12), economists (3) and companies (15).

3.5 The competition lawyers were partners in 12 of the leading private law firms handling competition matters in the UK. The economists were experienced practitioners in three of the main economic consultancy firms.

3.6 The company interviews were arranged with the manager or in-house adviser with overall responsibility for competition compliance. This was normally the company secretary, legal director, general counsel or head of competition. In many cases, those we interviewed also had other responsibilities than competition compliance.

3.7 We interviewed companies of a range of different sizes but found that for the purposes of the project the largest were most relevant, and focused on these. Ten of the companies we interviewed had more than 1000 UK employees, two had between 500 and 1000, and three had between 200 and 500.

3.8 The companies were active in the following sectors: energy, fast moving consumer goods, financial services, manufacturing, media, retailing and telecoms.

3.9 The purpose of the interviews was to obtain qualitative information about the deterrent effect of the regime not readily gathered in the context of a telephone survey, and also to test some of the questions subsequently used in the legal and company surveys.

Legal survey

3.10 The design of the telephone survey, and the script, was agreed between Deloitte and the OFT and the survey was conducted by the market research firm ORC International between September and November 2006. The sample contained 730 partners and barristers with competition experience based in the UK and Brussels. We tried to ensure that the sample was comprehensive. It was constructed from a number of sources including legal directories (*Legal 500* and *Chambers and Partners*), pre-existing databases of Deloitte and the OFT and web research. In all, there were 234 responses, a response rate of 32 per cent.[17]

[17] The response rate was 40 per cent among the 449 UK based lawyers and 19 per cent among the 281 Brussels based lawyers.

3.11 The lawyers who responded were experienced in advising on competition matters. The median number of qualifying mergers[18] on which they had been consulted in the last three years was six, and the median number of clients which they had personally advised on competition law matters over which the OFT would have jurisdiction since the Competition Act came into force was 20.[19]

3.12 The results are shown in Annexe A.

Company survey

3.13 Deterrence often operates at the company level without external legal advice being taken. In order to assess the scale and nature of the deterrent effect which operates at this level, we designed a telephone survey of companies in consultation with the OFT. The script was agreed between Deloitte and the OFT, and the survey was conducted by ORC International in February and March 2007. Responses were obtained from 202 companies.

3.14 As in the interviews, the survey was directed at the manager or in-house adviser with overall responsibility for competition compliance. The sample of companies was constructed from the database of businesses available from Dun & Bradstreet. The 202 companies were broken down into three size bands according to the number of UK employees (200-499, 500-999 and more than 1000) and were active in a wide range of sectors.

3.15 The results are shown in Annexe B.

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[18] That is to say, a merger over which the OFT could take jurisdiction. The jurisdictional test is described in the OFT's merger guideline *Mergers: Procedural Guidance*, paragraphs 4.7 and 4.8.

[19] Legal survey, Q1 and Q7.

Limitations

3.16 Two limitations should be noted:

- The size of the company survey is relatively small, and results which rely on division of the sample (such as those on the effect of company size and sector) must be regarded with particular caution.

- We have not verified the information provided by respondents to the two surveys. It is possible that difficulties in estimating the relevant numbers of cases, or concerns about confidentiality or self-incrimination (despite the anonymity of the survey), led to some inaccuracy in the reports.

4 MERGERS

Scale of deterrence

Legal survey

4.1 Respondents were asked how many qualifying mergers they had been consulted on in the last three years and how many of these had been abandoned or modified on competition grounds before the OFT became aware of them. They were also asked how many of these mergers resulted in an SLC finding or undertakings in lieu of reference. The total figures (added across respondents) are shown in Table 4.1.

4.2 It is not safe to interpret these figures as the absolute number of mergers (on which respondents were consulted) in each of these categories, because of double-counting: more than one lawyer may have been consulted on the same merger.[20]

4.3 However, if the number of lawyers which advise on a merger does not vary on average between the type of case (for example, on average the same number advise on a merger which is abandoned on competition grounds as one for which there is a finding of SLC or undertakings in lieu) then the ratios between the reported numbers in Table 4.1 will reflect the actual ratios of the number of mergers in these categories. This assumption is discussed later.

[20] The extent of double-counting within the survey is suggested by comparing the reported number of mergers on which advice was given which resulted in an SLC or UIL (92) with the actual number of SLC or UIL mergers for the period (31). Thus on average around three lawyers in the sample were consulted on each SLC or UIL merger.

Table 4.1: Qualifying mergers 2004-06 on which external legal advice was taken

	Reported number	Percentage of proposed mergers
Proposed qualifying mergers on which advisers were consulted	3304	100%
Abandoned on competition grounds before the OFT became aware of them	262	8%
Modified on competition grounds before the OFT became aware of them	223	7%
Finding of SLC by CC or undertakings in lieu	92	3%
Completed mergers of which the OFT is unaware which it would have been unlikely to give unconditional clearance	99	3%

Source: Legal survey, Q1-Q4 and Q6. Sample size 234.

4.4 The results of Table 4.1 are broadly consistent with those obtained in the interviews. Five law firms, which dealt with an average of 30 proposals for qualifying mergers per year, provided us with data which had been collated at a firm-wide level. The number of proposed mergers abandoned on competition grounds was estimated at around 10 per cent for each law firm. The number of mergers modified on competition grounds was lower, and several of the firms could not identify any deals which fell into this category.

4.5 The results of this survey may be compared with those of Twynstra Gudde, which found that of merger proposals that would have fallen under the jurisdiction of the Netherlands competition authority between 2000 and 2003, approximately six per cent were abandoned on

competition grounds and 12 per cent modified. The corresponding figures for the UK survey for 2004-06 were eight per cent abandoned and seven per cent modified.

Ratio of the deterrent to direct effect

4.6 The legal survey suggests that the ratio of the proposed mergers abandoned or modified on competition grounds (before the OFT becomes aware of them) to those in which there was a finding of SLC or undertakings in lieu is approximately five to one.[21] For reasons given below, we interpret this as a lower bound on the number of proposed mergers abandoned or modified on competition grounds and even more so for the number of mergers deterred by the UK competition regime.

Company survey

4.7 Clearly, the legal survey can only capture those proposed mergers abandoned or modified after external legal advice has been taken. However, many proposed mergers are abandoned or modified on competition grounds even before external legal advice is sought.

4.8 Accordingly, we asked a similar sequence of questions in the company survey in an attempt to estimate the extent of deterrence at the company level.

[21] The calculation is made from Table 4.1 by adding the reported mergers abandoned (262) and modified (223) and dividing by the reported number of SLC or UIL mergers (92).

Table 4.2: Qualifying mergers considered by companies 2004-06

	Reported number	Percentage of mergers considered
Qualifying mergers considered	130	100%
Abandoned on competition grounds before the OFT became aware of them	11	8%
Modified on competition grounds before the OFT became aware of them	5	4%
Cases in which decision to abandon or modify was taken following external legal advice	4	3%
Finding of SLC by CC or undertakings in lieu	6	5%

Source: Company survey, Q1-Q5. Sample size 202.

4.9 Of the 202 companies we surveyed, 12 had abandoned or modified 16 mergers on competition grounds before the OFT became aware of them. The decision to abandon or modify the merger was taken following external legal advice in only four cases out of 16 (25 per cent).

Conclusions from the company survey

4.10 Although the sample was small, it appears that many mergers are abandoned or modified without external legal advice. It follows that any estimate of the deterrent effect which considers only those mergers abandoned or modified after external advice has been taken will be incomplete.

4.11 It is also notable that the percentage of mergers considered which were abandoned (8 per cent) and modified (4 per cent) by the companies we surveyed are reasonably similar to the comparable percentages in the legal survey (8 per cent and 7 per cent). This provides some corroboration for the proportions derived from the legal survey.

4.12 However, given the relatively small number of mergers reported in Table 4.2 which were abandoned or modified before the OFT became aware of them, and which resulted in a finding of SLC by the CC or UIL, we do not think it is safe to draw more precise conclusions on the scale of deterrent effect from the company survey.

Robustness of the results

Measurement error

4.13 The results are based on estimates provided by respondents and clearly it is possible that this introduces a degree of measurement error. In the interviews, the point was made several times that it was difficult to provide precise estimates of the number of proposed mergers on which advisers had been consulted without going back over records in detail. Moreover, not all respondents kept records of the number of qualifying mergers that they had been consulted on, that were abandoned and modified and so on. For these reasons alone the results of the legal survey must be regarded as approximations.

Sensitivity of the results to exclusion of outliers

4.14 Given that the results are added across the sample, we were concerned that the results might be sensitive to the inclusion of any outlying responses. Inspecting the individual results, none of the responses on which the five to one ratio is based were evidently unreasonable.

4.15 Nevertheless, we conducted a sensitivity analysis by subtracting the two highest answers contributing to the numerator, leaving the denominator unchanged (this gives the 'Low' figure below) and then subtracting the

two highest answers contributing to the denominator, leaving the numerator unchanged (this gives the 'High' figure below).[22]

4.16 This analysis shows that the ratio is relatively robust to the removal of outliers.

Table 4.3: Sensitivity analysis of merger deterrence ratio

	Original	Low	High
Mergers	5.3	4.5	6.1

Source: Legal survey, Q2-Q4, Deloitte analysis

Statistical uncertainty

4.17 We also calculated a 95 per cent confidence interval for the deterrence ratio using one of the standard methodologies for estimating a ratio.[23] The result is shown in Table 4.4.

Table 4.4 Confidence interval for the merger deterrence ratio

	Original	Low	High
Mergers	5.3	3.5	7.0

Source: Legal survey, Q2-Q4, Deloitte analysis

Variation in the number of legal advisers depending on the type of case

4.18 The five to one ratio assumes that the number of lawyers is constant across the different types of case: for example that (on average) the

[22] It can be argued that when eliminating respondents' answers from the numerator one should also eliminate their responses from the denominator (and vice versa). If this procedure was followed the range given in Table 4.3 would be narrower.

[23] Cochran (1977), equation 2.47 (page 33).

same numbers of lawyers will have been consulted on a merger that is abandoned on competition grounds before the OFT was aware of it as one for which there is a finding of SLC or undertakings in lieu.

4.19 However, it seems likely that on average more lawyers are involved in complex cases which generate a finding of SLC or undertakings in lieu than would be involved in advising on mergers which are abandoned on competition grounds at an early stage. If so, the deterrence ratio would be larger.

Mergers abandoned or modified without external advice

4.20 The five to one ratio only covers mergers for which external advice is taken. The interviews and the company survey suggested that many mergers are abandoned and modified without external advice. Again this would suggest that the estimate is conservative.

Auctions

4.21 Businesses are often sold by means of an auction process in which several different potential purchasers participate. Whether purchaser or vendor bears the antitrust risk is a matter of commercial negotiation. If purchasers bear the risk, then they may reduce their offer or alternatively – if vendors bear the risk – they may not sell to the highest bidder. In these situations, while a merger typically proceeds, it could be a different merger from the one that would have taken place absent the merger regime.

4.22 This form of deterrence is not particularly well captured by the language of the surveys which refers to a proposed merger being abandoned or modified.[24] Again, this factor suggests that the methodology here understates the deterrent effect.

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[24] In principle, one could ask how many mergers proceeded where, absent the merger regime, a different merger would have proceeded. Sometimes advisers will be fairly sure that this is the case (for example, where a higher bid is rejected specifically on the grounds of antitrust risk)

Monetary savings from mergers deterred

4.23 Our metric for the size of the deterrent effect is in terms of the volume of mergers abandoned or modified before the OFT becomes aware of them, relative to the volume blocked or modified following intervention. Ideally one might want to estimate the monetary savings (to consumers and companies) resulting from the deterrence of these mergers.

4.24 As with estimating savings from direct enforcement, this would most accurately be done on a case by case basis, and it is likely that one would need an estimate of turnover in the relevant market. In principle, this exercise could be undertaken if this information was supplied by those with knowledge of the particular proposals, but would clearly be difficult in the context of a survey based exercise.

4.25 We have not attempted to estimate monetary savings from the deterred mergers. The monetary savings from the deterred mergers may be on average either smaller or larger than the monetary savings from the mergers blocked or modified directly.

4.26 However, there are grounds for believing that the monetary savings from deterred mergers are unlikely to be very small. The interviews suggested that few companies are deterred from taking mergers forward on competition grounds unless there is a significant perceived risk of reference to the CC[25]. The OFT can only refer if it has jurisdiction, and believes that there is prospect that the merger will result in an SLC.[26]

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however in other cases no adviser may be aware that a different merger would have proceeded absent the regime (for example, if a purchaser does not win the auction because of a reduction in the offer price made to reflect the antitrust risk).

[25] That is to say, the prospect of having to obtain clearance from the OFT in itself rarely deters companies.

[26] Moreover it has discretion not to refer if the markets concerned are not of sufficient importance or any relevant customer benefits outweigh the SLC. The interpretation of the tests for reference is elaborated in the OFT's guidelines *Mergers: Procedural Guidance* (May 2003)

These tests are unlikely to be passed if the monetary savings from blocking or modifying the proposed merger are very small. Accordingly, if companies and advisers generally correctly anticipate the OFT's reference policy, they are unlikely to be deterred from taking a merger forward if the monetary savings from blocking or modifying the proposed merger are very small.

Sectors

In which sectors are mergers deterred?

4.27 In the interviews we were provided with examples of proposed mergers which were deterred across a wide range of sectors.[27]

4.28 We asked what market evidence led to the conclusion that the UK competition authorities might consider those mergers anti-competitive. Information on concentration (market shares or the number of credible alternative suppliers) was normally the most important factor. Generally so-called '3 to 2' deals were seen as problematic, while '4 to 3' or even (exceptionally) '5 to 4' deals could also be difficult.

4.29 Whether there were likely to be complaints was also frequently seen as important as was internal documentary evidence as to who the merger parties' closest competitors were. Evidence on barriers to entry (such as

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and *Mergers: Substantive Assessment Guidance* (May 2003). The OFT has recently consulted on proposals intended to clarify when it might use this exception. Under these proposals a market is likely to be considered of sufficient importance if the affected market(s) have an annual value in the UK of more than £10 million. See the OFT's *Consultation on proposed revision to 'Mergers: Substantive Assessment Guidance'. Exception to the duty to refer: markets of insufficient importance* (June 2007).

[27] These were: advertising, banking, chemicals, construction, entertainment, food, information technology, insurance, manufacturing, media, pharmaceuticals, retailing, transport and water. The 'automatic referral' regime for water mergers was mentioned as having a major deterrent effect by four lawyers.

the history of entry and exit into the market) and buyer power were also sometimes taken into account.

4.30 We also asked if there were sectors in which, in their view, the UK competition authorities would be unlikely to permit further consolidation.

4.31 By far the most commonly cited sectors were banking (particularly following the *Lloyds/Abbey* decision) and supermarkets (in particular after *Safeway*). Other sectors mentioned were brewing, cement, energy, insurance, mobile telephony, roadside assistance, salt, sugar and water.

4.32 It was pointed out that there were certain sectors (such as banking, supermarkets and betting) in which a methodology had been developed by the OFT and CC which allowed quite precise predictability as to which mergers would be permitted.

Company survey

4.33 In the company survey we classified mergers sectorally by examining the SIC codes (at the four or five digit level) of the companies in the sample.[28] These were then compared with the sectors in which there had been a CC merger inquiry since 2000.[29]

[28] For reasons of confidentiality, these were not disclosed to the OFT.

[29] The register of the CC's inquiries since 2000 is available at www.competition-commission.org.uk

Table 4.5: Qualifying mergers considered 2004-06: sectoral analysis

	In sector with CC inquiry since 2000	In sector with adverse CC finding since 2000	Total
Qualifying mergers considered	30	18	130
Abandoned on competition grounds before the OFT became aware of them	6	3	11
Modified on competition grounds before the OFT became aware of them	3	2	5

Source: Company survey, Q1-Q4.

4.34 The results suggest that a merger is more likely to be abandoned or modified if there has been a recent CC inquiry in the sector. While 12 per cent of all mergers considered were abandoned or modified on competition grounds, this figure rises to 30 per cent for mergers in sectors in which there has been a CC inquiry.[30]

4.35 The figure for mergers in sectors in which there has been an adverse finding in a CC inquiry is 28 per cent. One interpretation of the fact that the figure is no higher for mergers in sectors in which there has been an inquiry (regardless of the outcome) is that a reference in itself is sufficient to create a deterrent.

4.36 The difficulty in determining the appropriate mapping between SIC codes and sectors in which there has been a CC inquiry imply that these results

[30] The finding that more mergers are abandoned or modified on competition grounds in sectors in which there has been a CC merger decision than in the economy at large is statistically significant at the 95 per cent level.

should be treated with some caution. Nevertheless, the finding is consistent with the suggestion repeatedly made in the interviews that the CC's merger decisions create a deterrent effect within the particular sector concerned.[31]

Size

4.37 As one might expect given the jurisdictional test in EA02, the UK merger regime impinges more on large companies than on small ones. Only 3 per cent of the companies in the 200-499 employee band had considered qualifying mergers. This rose to 11 per cent in the 500-999 band and 30 per cent in the 1000+ band. Within the sample, companies which had considered qualifying mergers were much larger on average (5346 employees) than the sample as a whole (2388 employees).

4.38 However, it was not the case that companies which abandoned or modified mergers were larger on average than those which merely considered mergers (see Table 4.6). Accordingly, the survey does not support the hypothesis that larger companies are more likely to abandon or modify qualifying mergers than small ones.

[31] The statistical association between sectors in which there have been CC inquiries and sectors in which mergers are deterred is not necessarily causal. An alternative interpretation is that there is a common cause: for example, that highly concentrated sectors are more likely to have both CC inquiries and deterred mergers. However, there is evidence that the link is causal in some cases: we were given a number of examples where merger abandonments were specifically said to be a result of previous CC decisions.

Table 4.6: Size analysis of companies in survey: mergers 2004-06

Percentage of companies in the relevant size band which had…	200-499	500-999	1000 +	Average number of employees
Considered qualifying mergers	3%	11%	30%	5346
Abandoned mergers on competition grounds	0%	0%	7%	3125
Modified mergers on competition grounds	0%	3%	3%	2077
Whole sample	n/a	n/a	n/a	2388

Source: Company survey Q1-3.

Individual decisions

4.39 In the interviews, we asked if there were particular OFT or CC decisions which had a major impact on the willingness of firms to merge (whether by discouraging or encouraging other mergers).

Discouraging decisions

4.40 The decision most frequently referred to was *Lloyds/Abbey,* which was consistently said to have had a discouraging impact in the banking sector. An adviser in a financial institution said a number of transactions which their company had considered had been abandoned on the basis of this precedent.

4.41 *Safeway* was also repeatedly mentioned as discouraging other retailing mergers. One company we spoke to in the sector identified a store acquisition that had been deterred on the basis of this precedent.

4.42 Another direct example we came across of a discouraging impact was *Heinz/HP.* One adviser said he was advising on a deal in food sector

which was abandoned immediately after *Heinz/HP* was referred, on the grounds that if that deal was going to be referred then the deal on which he was advising would surely also be.

4.43 Another said that *Grand Met/William Hill* and *Ladbroke/Coral* had established an analytical framework for analysing betting mergers, which had either deterred deals or at least caused them to be structured to fit.

4.44 More generally, OFT referrals said to be surprisingly 'tough' included *Blockbuster/Apollo, Bucher/Johnston, British Salt/New Cheshire, Waterstones/Ottakar* and *Macaw/Cott Beverages.*[32]

4.45 The precedential impact of OFT or CC decisions was generally said to be in the sector concerned rather than being felt across the economy.

Encouraging decisions

4.46 The evidence of a merger setting a precedent to encourage other transactions was less clear. Two advisers mentioned that they were surprised *Carlton/Granada* was not prohibited, but were unsure to what extent the decision had been a 'political fix' and therefore of limited precedential value.

IBA Health v OFT

4.47 It was universally said that uncertainty created by *IBA Health* led to more mergers being referred, an increase in advice being given that mergers would be referred, and greater deterrence of mergers. Some argued that more recently the OFT had been somewhat more confident in clearing deals, and referred to the *Celesio* decision.

[32] *Blockbuster/Apollo* was withdrawn by the parties. All the other cases were ultimately cleared unconditionally by the CC.

Under the radar mergers

4.48 The UK operates a system of voluntary notification. The parties to a merger may legally complete without informing the OFT even if they consider that the transaction would fall within the OFT's jurisdiction. Accordingly, it may be that some mergers are completed which the OFT would not clear unconditionally, but of which the OFT does not become aware in time to take action.[33]

4.49 To examine whether this is a problem in practice, in the legal survey we asked advisers in the last three years how many proposed mergers they had been consulted on that went ahead without the OFT becoming aware of them, and which in their view the OFT would have been unlikely to give unconditional clearance.

4.50 52 of the lawyers in the sample knew of mergers in this category, and in all reported 99 completed mergers to which, in their view, the OFT would have been unlikely to give unconditional clearance.[34]

4.51 The ratio of mergers which advisers considered would have been unlikely to obtain unconditional clearance by the OFT (but of which the OFT was unaware) to those which were found SLC or had undertakings in lieu was approximately one to one.[35] It should also be noted that some mergers which companies consider would be unlikely to obtain

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[33] The OFT can take jurisdiction up to four months after a merger has been completed, unless the merger took place without having been made public and without the OFT being informed (in which case the four month period starts from the announcement or the time the OFT is told). Typically the most serious risk companies face in completing a merger without informing the OFT is that if the transaction is detected and subsequently found to create an SLC, they could be required to reverse the merger (in part or in whole).

[34] Legal survey, Q6.

[35] This result is quite robust to the elimination of outlying answers. Only one individual gave a response which was more than 5 per cent of the total. If this is eliminated then the ratio falls from 1.1 to 0.86.

unconditional clearance may be completed without taking external advice.

4.52 These results are consistent with those of the interviews: around a quarter of the external advisers we interviewed were aware of completed mergers that, in their view, would have been unlikely to obtain unconditional clearance by the OFT. Of the fifteen companies we interviewed, one had completed a merger which it thought may not have been cleared unconditionally had it come to the OFT's attention. The decision not to inform the OFT was taken after obtaining external legal advice.

4.53 This is apparently a lacuna in the UK merger regime. How concerned should we be? We heard two arguments that this was not a serious problem.

The average size of under the radar mergers is smaller

4.54 The evidence we have suggests that under the radar mergers are on average smaller (as measured by the turnover of the enterprise being taken over) than the mergers for which the OFT either requires a remedy or refers. All the examples of such mergers that we were provided with would have qualified on the basis of the share of supply test, rather than the turnover test.

4.55 Nevertheless some of these acquisitions were of significant size (in one case the turnover of the acquired firm was estimated at between £35m and £50m).

Third parties can complain

4.56 The other argument we heard that under the radar mergers do not represent a serious failing in the regime is that, if the merger is anti-competitive, suppliers, customers or competitors could bring the merger to the attention of the OFT.

4.57 However, the results of our survey suggests that, while this may reduce the number of potentially anti-competitive mergers of which the OFT is not aware, the mechanism is not fully effective. Notwithstanding the ability of third parties to complain, many mergers are completed which, in the view of advisers and companies, would not obtain unconditional clearance from the OFT.

Remedies

4.58 We asked advisers how the number of under the radar mergers could be reduced.

4.59 By far the most common suggestion was to introduce mandatory notification of qualifying mergers. There was however little enthusiasm for this. It was pointed out that many inoffensive deals would be caught.[36]

4.60 Another suggestion was to maintain the voluntary regime but increase the resources devoted by the OFT to monitoring the economy for qualifying mergers.

4.61 Most radically, penalties could be introduced for completing mergers which are subsequently found by the OFT or CC to be anti-competitive. The treatment of mergers would in this case be rather similar to the current treatments of agreements under competition law, in which penalties are available for agreements found to be anti-competitive.

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[36] Conversely, even in jurisdictions with mandatory notification, whether by accident or design, not all transactions which fall within competition authorities' jurisdiction are notified. For example, Richard Whish has written in the context of the EC merger regime: 'There is little doubt that concentrations having a Community dimension have been consummated in breach of the ECMR, where the undertakings concerned have failed to appreciate the possibility that the Regulation might apply.' (Whish (2003), page 805).

Business chilling

4.62 It has long been appreciated that competition enforcement has the potential to deter mergers and conduct which are not anti-competitive ('business chilling').

4.63 In both the legal and company surveys, we asked respondents to indicate on a scale of 1 to 4 (where 1 is never and 4 is frequently) how often they thought that the UK regime deters mergers that would not be anti-competitive. The answers suggested that this is generally perceived as happening never or rarely. The mean response for lawyers was 1.80 and for companies 1.92.[37]

4.64 In the interviews, we explored in more detail the circumstances in which business chilling can occur. Broadly, there are three ways in which this can happen:

- The OFT and/or CC may 'incorrectly' assess mergers as being anti-competitive, and requiring prohibition or modification. If the OFT and/or CC's decisions are correctly predicted by companies or their advisers, then they may abandon or modify mergers which although not anti-competitive are expected to be assessed as anti-competitive.

- The OFT and/or CC 'correctly' assess mergers, but companies and advisers find it difficult to predict their decisions, and accordingly abandon or modify mergers which would in fact be cleared either unconditionally, or with less onerous conditions.

- The OFT and/or CC 'correctly' assess mergers, and companies and advisers predict their decisions with reasonable accuracy, but the costs and delay of obtaining clearance are so great that companies abandon or modify mergers rather than taking them through the clearance process.

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[37] Legal survey Q5, Company survey Q6.

4.65 We ignored the possibility that the OFT and/or CC may 'incorrectly' assess mergers.[38] The question of the predictability of the OFT and CC's decisions is dealt with in the next section. This section focuses on the third possibility: that costs and delay might deter mergers even if they were expected to gain clearance ultimately.

Costs and delay

4.66 The obvious costs imposed by the merger control process are merger fees levied by the OFT[39] and the advisory costs.[40] It was often pointed out that apart from the direct costs, there may be other negative impacts of a CC reference, such as management distraction, the damaging impact on its employees and relations with customers and suppliers while the business is 'in limbo'. These were often seen as affecting the business being purchased in particular.

4.67 A theme which emerged in many interviews was that while the costs and delay involved in obtaining OFT clearance would rarely deter transactions, the costs and delay involved in a CC reference were very important, and frequently led to transactions being abandoned even if it was expected that unconditional clearance would ultimately be given. Whether the OFT referred was therefore crucial to the viability of many transactions.

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[38] The notion that a particular agency's assessment of a competition case may be 'correct' or 'incorrect' (in a sense which transcends the findings of any particular agency or court) is problematic. It is well-known that different agencies and courts may, on the same evidence, disagree about the assessment of a particular merger, agreement or course of conduct. Whose assessment should be seen as 'correct' in these circumstances is very much open to debate.

[39] These are levied on a sliding scale which depends on the UK turnover of the enterprise being acquired. The fees are currently £15,000 if the target's turnover is £20m or less, £30,000 if the target's turnover is over £20m but not over £70m and £45,000 if the target's turnover is above £70m.

[40] Total advisory costs for a CC investigation were typically placed in the range £400,000 to £1m for each party involved.

4.68 Two advisers observed that it is 'not unusual' for powerful purchasers to be quite happy to drag a competitor through a protracted merger control process, as even if they are ultimately unable to buy the business, the competitor will be damaged by the process.

4.69 No one said that there were deals where there was certainty that there would be unconditional clearance that were deterred. However, some advisers and companies were able to provide examples of deals which they were 'confident' would be cleared (or which they gave a 75 per cent or 80 per cent chance of clearance) but which had been abandoned. More often the deals that were abandoned were in the 'grey' zone (40 to 60 per cent chance of referral).

4.70 Amongst those we interviewed, the problem of deterring mergers which were not anti-competitive was generally felt to be more significant than that of failing to detect those that were anti-competitive.

4.71 One adviser argued that comparing the number of deals which were abandoned immediately after reference by the OFT with the proportion of deals given unconditional clearance by the CC suggested that some deals that were not anti-competitive were being abandoned at that stage.

Reducing business chilling

4.72 We asked advisers how the UK merger control regime could be improved to reduce the number of mergers that are not anti-competitive but are nevertheless deterred.

4.73 One complaint which we heard repeatedly was that the OFT's procedures made negotiating remedies unnecessarily difficult. Specifically, the OFT does not typically indicate what remedies would be sufficient to address their key competition concerns, and the parties are not given the opportunity to enter into dialogue with the ultimate decision taker within the OFT. As a result, the parties are put in to the position of having to guess what remedies the OFT would accept.

4.74 A number of lawyers and companies with experience of the EC and US merger control regimes said that it was much more difficult in the UK to have a discussion with the OFT about its key competitive concerns and how they could be remedied. This was said sometimes to lead to mergers which were not anti-competitive being referred and then, given the parties' unwillingness to go through the CC process, abandoned.

4.75 Another commonly held view was that, particularly in the immediate aftermath of *IBA Health*, too many mergers were referred to the CC, and then cleared. This was said by one adviser to be an 'inefficiency in the system'.

4.76 The suggestions for improvement included:

- Reducing the readiness of the OFT to refer ('getting back to where we were before *IBA Health*')
- Reverting to a discretion to refer rather than a 'duty'
- Reducing the length of CC inquiries
- Extending OFT investigations by agreement with the parties
- Better resourcing at the OFT to deal with complex data/empirics to resolve more cases at phase one
- More proportionate merger fees (a factor said by some lawyers and companies to be relevant for smaller mergers)
- Improved pre-notification discussions and greater opportunity for meaningful dialogue about key concerns and potential remedies

Predictability

4.77 Nearly all the advisers we spoke to considered that the OFT's merger decisions were reasonably (or even very) predictable. In particular most

of those who expressed a view said that the OFT's merger decisions were more predictable than its CA98 decisions.

4.78 It was often said that predictability had been increased by the publication of decisions. It was also sometimes said that the removal of the role of the Secretary of State of the DTI, and the movement to an approach more based on economics and evidence, had helped.

4.79 On the other hand, each of the following views were expressed by more than one adviser:

- The complaints over the removal of confidential guidance suggested that predictability is not perfect.
- In the immediate aftermath of *IBA Health*, predictability declined dramatically.
- Advisers frequently offer different opinions about the prospect of clearance in regard to the same transaction.
- Merger decisions may depend on the identity of the case officer (or in the case of the CC, the identity of the Chairman of the panel).

4.80 In terms of the previous decisions that were helpful in making a prediction, recent OFT and CC decisions were universally considered of most utility. EC decisions were also sometimes said to be useful, but only occasionally merger decisions from other jurisdictions. The OFT and CC Guidelines were most often said to be too generic to be helpful (although this was said to be inevitable).

Confidential guidance

4.81 The OFT distinguishes two types of pre-merger contact: 'informal advice' and 'confidential guidance'. Informal advice – usually given orally at a meeting – is the view of the staff in the Mergers Branch of the prospective merger. Confidential guidance is a more formalised (and for the OFT, more resource-intensive) process in which the view of the OFT

itself is given, typically in writing. Both types of pre-merger contact were withdrawn in November 2005. Informal advice was re-instated (subject to certain conditions) in April 2006, while confidential guidance remains unavailable.[41]

4.82 Views on the value of confidential guidance varied noticeably as between the external advisers and the companies we interviewed. A very wide range of views were expressed by external advisers on the value of confidential guidance. Some considered it worthless, while others considered it an extremely valuable service.

4.83 By contrast, nearly all companies we spoke to considered that it had been a helpful feature of the regime, and regretted the fact that the OFT had chosen to limit its availability.

[41] OFT policy note, *Interim arrangements for informal advice and pre-notification contacts*, April 2006

5 COMPETITION LAW

Scale of deterrence

Legal survey

5.1 Respondents were asked in how many instances one of their clients had abandoned or significantly modified an existing or proposed agreement that may have been considered a cartel[42] because of the risk of OFT investigation. This was then compared with the number of cartel cases in which the OFT published a decision where they advised a client which was allegedly part of the cartel.

5.2 Similar pairs of questions quantifying the deterrent and direct effects of enforcement were asked for commercial agreements and abuses of dominance. It should be noted that the published decisions include both infringement and non-infringement decisions. The results are shown in Table 5.1.

5.3 As with the results on mergers, it is not safe to interpret these figures as the absolute number of agreements or potential abuses (on which respondents were consulted) in each of these categories, because of double-counting: more than one lawyer may have advised on a single agreement or potential abuse. Particularly in the case of agreements, it is common for each party to have its own legal advisers, and so (with many parties to a single agreement) the problem of double counting is more acute here than it is in the case of mergers.[43]

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[42] Throughout, the definition of a cartel includes vertical price fixing and information exchange.

[43] The extent of double counting resulting from multiple advisers for a single agreement is suggested by comparing the reported number of cartel cases (295) and commercial agreement cases (231) to the corresponding number of published CA98 cartel cases (18) and commercial agreement cases (10). This level of double counting is not surprising when one considers an example such as *Schools*, in which there were 50 parties involved in one CA98 decision, many of which took separate legal advice.

5.4 Nevertheless, so long as the number of lawyers on average per agreement or potential abuse is similar for deterred agreements or abuses as for the those in which the OFT published a decision, then the ratios between these categories will be meaningful. This assumption is discussed more below.

Table 5.1: Deterrence and direct enforcement 2000-06 as reported by competition lawyers

Cartels	**Total**
Instances in which a client abandoned or significantly modified an existing or proposed agreement that may have been considered a cartel because of the risk of OFT investigation	1361
Cartel cases in which the OFT published a decision where a client was allegedly part of the cartel	295
Commercial agreements	
Instances in which a client abandoned or significantly modified an existing or proposed agreement primarily because of the risk of OFT investigation under Chapter I or Article 81	1713
Number of those abandoned or significantly modified non-cartel commercial agreements which were horizontal	818
Non-cartel cases in which the OFT published a decision under Chapter I where a client was allegedly party to the agreement	231
Abuses	
Instances in which a client abandoned or significantly modified a commercial initiative that may have been considered an abuse of dominance because of the risk of OFT investigation	1228
Cases in which the OFT published a decision under Chapter II where an allegedly dominant client was advised	512

Source: Legal survey Q8-Q13, Q15

Ratios of the deterrent to direct effect

5.5 The results from Table 5.1 can be converted into the following ratios of the deterrent to direct effects of enforcement.

Table 5.2: Deterrence ratios calculated from the legal survey

	Ratio
Cartels	4.6
Commercial agreements	7.4
Abuses	3.9[1]

Source: Table 5.1. Note (1): The original ratio for abuses as calculated from Table 5.1 is 2.4 but there is a response from one respondent which we think it is appropriate to exclude (see below).

5.6 For reasons to be discussed below, we interpret these ratios as lower bounds of the ratio of the number of agreements and initiatives abandoned or significantly modified because of the risk of enforcement relative to the corresponding number dealt with in CA98 decisions.

Robustness of the results

Measurement error

5.7 Estimates of the number of instances in which clients have abandoned or significantly modified agreements or commercial initiatives (since March 2000) given in a telephone survey must be regarded as approximations.

5.8 Moreover, inevitably given the nature of the questions, there is scope for respondents to interpret questions in different ways. We asked whether agreements or commercial initiatives had been 'abandoned or significantly modified', but the qualifier 'significantly' was left undefined.

5.9 There are also problems in individuating 'agreements' and 'commercial initiatives'. For example, in the case where a broadly similar agreement is applied to ten regions in the UK and is modified (in similar ways in all

ten cases) because of concern over OFT enforcement, a question arises as to whether this counts as one agreement or ten.[44]

5.10 In the interviews, many lawyers said it was difficult to give meaningful answers relating to the number of instances in which agreements or commercial initiatives had been abandoned or modified (even when these questions were circulated in advance[45]). This contrasts with the position for mergers, where all those we spoke to were able to give estimates.

Sensitivity to the removal of outliers

5.11 To examine sensitivity to potentially outlying responses we examined the effect of subtracting the two highest responses contributing to the numerator, holding the denominator constant (the 'Low' ratios in Table 5.3) and subtracting the two highest responses from the denominator, holding the numerator constant (the 'High' ratios).

Table 5.3: Sensitivity analysis of deterrence ratios

	Original	Low	High
Cartels	4.6	3.9	5.3
Commercial agreements	7.4	5.6	9.5
Abuses	2.4	2.0	4.2

Source: Legal survey Q8-Q13, Q15; Deloitte analysis

[44] Exactly the same problem arises in the context of direct enforcement, where a competition authority may face the issue of whether to characterise a particular arrangement as several agreements or one. The issue is by no means academic: for example, the cap on fines of 10 per cent of turnover can be gerrymandered by characterising a particular arrangement as two agreements rather than one.

[45] In the two surveys, the questions were not circulated to participants in advance unless they requested it. In the 30 interviews we conducted, questions which required quantitative answers were provided in advance.

5.12 For cartels, the results are quite robust (range 3.9 to 5.3). For commercial agreements there was a wider range, with the ratio varying between 5.6 and 9.5. Inspecting the individual results for cartels and commercial agreements, there were no evidently unreasonable responses to these questions.

5.13 Least robust was the ratio for abuses. In this case there was an obvious outlier which we think it would be appropriate to exclude.[46] With this excluded, the ratio for abuses rises from 2.4 to 3.9.[47]

Statistical uncertainty

5.14 We calculated 95 per cent confidence intervals for the deterrence ratios using one of the standard methodologies for estimating a ratio.[48] The results are shown in Table 5.4. The narrowest interval is for cartels and the widest for commercial agreements.

[46] The response of 200 to question 15 appears to rest on a misinterpretation or transcription error since the OFT has only published 17 decisions under Chapter II since March 2000.

[47] This is calculated by removing this individual response from the denominator only. The same individual also gave the highest response to Q13 (namely 100) which contributes to the numerator. If the respondent's answers are subtracted from both numerator and denominator the relevant ratio would be 3.6.

[48] Cochran (1977), equation 2.47 (page 33).

5.4 Confidence intervals for competition law deterrence ratios

	Original	Low	High
Cartels	4.6	3.5	5.7
Commercial agreements	7.4	3.9	10.9
Abuses	3.9[1]	2.3	5.6

Source: Q8-Q13, Q15; Deloitte analysis. Note (1): The original ratio for abuses as calculated from Table 5.1 is 2.4 but there is a response from one respondent which we think it is appropriate to exclude (see above).

Variation in the number of legal advisers depending on the type of case

5.15 It is possible that the number of lawyers consulted on an agreement or initiative which is abandoned or modified at an early stage is on average lower than the number who become involved in cases in which the OFT publishes a decision. If so, the ratios are under-estimates.

Commercial agreements and initiatives structured to be compliant

5.16 The survey asked lawyers to estimate the number of instances in which one of their clients did 'abandon or significantly modify an existing or proposed commercial agreement primarily because of the risk of OFT investigation'.[49] The phrase 'proposed commercial agreement' was intended to be interpreted as including an unwritten proposal for an agreement. However, if the question is interpreted as referring to the written form of the agreement, then this would exclude the situation where there is an unwritten proposal which is significantly modified so as to be compliant with competition law in its written form. This may occur particularly if the lawyer is asked to write the agreement themselves, rather than reviewing a written agreement created by their client.

[49] Question 10.

5.17 Similarly, the survey asked lawyers to estimate the number of instances in which one of their clients did 'abandon or significantly modify a commercial initiative that may have been considered an abuse of dominance because of the risk of OFT investigation'.[50] The question was intended to refer to both proposed and implemented commercial initiatives, but can be interpreted narrowly as excluding proposed initiatives.

5.18 To the extent that these questions were interpreted narrowly (rather than having their intended broad interpretation) this would lead to an under-estimate of the measured deterrent effect.

Monetary savings from agreements and abuses deterred

5.19 We estimate the volume of deterred agreements and abuses relative to the volume of published decisions in these categories. This does not provide any information on the monetary savings (to consumers and companies) from these deterred agreements and abuses. As with the monetary savings from direct enforcement, estimating the savings from deterrence would most accurately be done on a case by case basis, which is not practical in a survey of this type.

5.20 Prioritisation of the OFT's caseload may imply that the OFT publishes decisions in the more economically important cases of which it is aware. This could imply a systematic tendency for published cases to generate greater monetary savings than deterred agreements and abuses.

5.21 The possible counter-argument to this is that in so far as advisers and companies are able to anticipate the OFT's prioritisation policy, this could lead to reduced deterrence of infringements in cases in which the monetary savings are small.[51] In general, with rational anticipation of the

[50] Question 13.

[51] The OFT in October 2006 published a competition prioritisation framework (available at www.oft.gov.uk). One of the six steps is to estimate the direct consumer benefit that would arise from intervention. The others are to consider the consumer benefit from deterrence,

OFT's enforcement policy, one would expect the universe of deterred infringements to mirror the universe of direct enforcement.

Company survey

5.22 To capture deterrence which operates at the company level, we asked a sequence of questions about agreements and initiatives which had been abandoned or significantly modified. The results are shown in Table 5.5.

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aggravating/mitigating factors, policy/precedent/profile, OFT resources that would be required to achieve the desired outcome and the likelihood of success. The OFT is currently consulting on the principles for prioritisation of the OFT's work (see Consultative Document published on 25 September 2007 also available at www.oft.gov.uk).

Table 5.5: Deterrence 2000-06 as reported by companies

Cartels	Total	Number of Companies
Instances in which companies abandoned or significantly modified arrangements, or proposed arrangements, with other firms because of the risk of OFT investigation	126	20
Of those, instances in which external legal advice was taken	77	17
Commercial agreements		
Instances in which companies abandoned or significantly modified an existing or proposed commercial agreement primarily because of the risk of OFT investigation	144	21
Of those, instances in which external legal advice was taken	55	17
Abuses		
Instances in which companies abandoned or significantly modified a commercial initiative that may have been considered an abuse of dominance because of the risk of OFT investigation	19	11
Of those, instances in which external legal advice was taken	18	10

Source: Company survey Q7-Q12.

5.23 Of the 202 companies in the sample, 20 said they had abandoned or significantly modified an arrangement, or proposed arrangement, which might be considered a cartel because of the risk of OFT investigation. 21 said they had abandoned or significantly modified a commercial agreement and 11 had abandoned or significantly abandoned a commercial initiative because it may have been considered an abuse.

5.24 The composition of the sample of 202 firms can be compared with the total number of VAT registered enterprises in the UK in the three size bands.

Table 5.6: Size composition of the sample of companies

	Employee numbers			Total
	200-499	500-999	1000+	
Sample	35	66	101	202
VAT registered enterprises in the UK	4400	1420	1330	7150
Percentages	0.8%	4.6%	7.5%	2.8%

Source: Company survey, Office of National Statistics data for March 2006

5.25 Given the size of the sample, we consider that it is safe to ignore the possibility of double counting in Table 5.5 (that is, that two of the companies in the sample may have been party to the same existing or proposed agreement). Accordingly, the numbers can be interpreted as absolute numbers of deterred agreements and potential abuses.

5.26 Table 5.7 shows the numbers of CA98 decisions published since the legislation came into force. The classification of decisions is shown in Annexe C.

Table 5.7: Published CA98 decisions taken by OFT since 2000

	Cartel	Commercial agreement	Abuse
Infringement	16	2	3
Non-infringement	2	8	14
Total	18	10	17

Source: OFT Competition Act register, Deloitte analysis. NB: The table includes decisions that have been withdrawn or overturned.

5.27 We initially estimated the scale of deterred activity by scaling up the results from Table 5.5 in proportion to the number of VAT registered enterprises in the UK. Ratios for each of the three types of infringement were then calculated by dividing by the total number of published decisions shown in Table 5.7. However, we found that the results were highly sensitive to the removal of one or two responses from the survey.

5.28 We were also concerned about the small number of responses in the 200-499 employee band, and the potential difficulties of individuating instances in which agreements and initiatives had been abandoned or modified.

5.29 Because the aim was to produce a lower bound of the scale of the deterrent effect, we have adopted the following conservative assumptions in calculating deterrence ratios on the basis of the company survey:

- The results in the 200-499 employee band have been ignored.
- Companies reporting more than one instance of agreements or conduct which is abandoned or significantly modified are treated as if they had reported only one instance ('one man, one vote').

5.30 Using these assumptions, the results from Table 5.5 (for firms with at least 500 employees) were scaled up in proportion to the number of VAT registered enterprises in the UK, and ratios calculated using the numbers of published CA98 decisions. These are shown in Table 5.8.

Table 5.8: Deterrence ratios calculated from company survey under the 'one man, one vote' assumption

	Ratio
Cartels	16
Commercial agreements	29
Abuses	10

Source: Table 5.5, 5.6 and 5.7. Only companies with more than 500 employees were considered.

5.31 These ratios include both cases in which external legal advice was taken and those in which it was not. Comparing these results with those of the legal survey, it is noticeable that the ranking is similar (with most instances of commercial agreements deterred and least of abuses) but that the ratios are significantly larger (even under the conservative 'one man, one vote' assumption). One explanation for the higher ratios is the existence of deterred activity on which external advice is not taken.[52] In this context we also note the results of Table 5.5 on the number of instances in which agreements and abuses were abandoned or modified without external legal advice.

[52] As discussed above, another explanation is that more lawyers (on average per agreement or initiative) advise on published CA98 cases than on deterred agreement and initiatives, so that the ratios from the legal survey are underestimates.

Robustness of results

Knowledge of deterred activity distributed around the company

5.32 While we contacted the manager or in-house adviser with overall responsibility for competition compliance, clearly this approach will only reflect the deterred activity of which the respondent is aware. To the extent that deterred activity is distributed around the company of which the respondent is not aware, the methodology will under-represent the level of deterred activity.

Concerns about self-incrimination

5.33 In the company survey, in relation to arrangements that may have been considered cartels, we asked 'Since March 2000, in how many instances has your company abandoned or significantly modified arrangements, or proposed arrangements, with other firms because of the risk of OFT investigation?' (Q7). Similar questions were asked for commercial agreements (Q9) and abuses (Q11).

5.34 A positive response to any of these questions does not amount to self-incrimination. The arrangements may have been proposed rather than implemented, and in any case it is possible for legal (as well as illegal) activity to be abandoned or modified because of the risk of investigation.

5.35 One concern we had at the outset was that (despite the assurance of anonymity that was given) companies' fears about self-incrimination might prevent informative answers to these questions. Both in the interviews and the company survey a significant proportion of companies were prepared to give positive answers to these questions.

5.36 Nevertheless it is still possible that there was a degree of under-reporting due to concerns about self-incrimination. If so, the estimates of the scale of the deterrent effect given here are too low.

Sensitivity analysis

5.37 Under the 'one man, one vote' assumption, the results are not significantly sensitive to the removal of one or two responses.

Statistical Uncertainty

5.38 We calculated 95 per cent confidence intervals for the deterrence ratios using a technique for sampling of proportions in a stratified sample.[53] As can be seen, given the small size of the sample, the confidence intervals for all three ratios are wide.

Table 5.9 Confidence intervals for competition law deterrence ratios from company survey

	Original	Low	High
Cartels	16	9	24
Commercial agreements	29	17	41
Abuses	10	4	16

Source: Table 5.5, 5.6 and 5.7, Deloitte analysis.

Legal Advice

5.39 A by-product of the survey was evidence on the extent to which firms seek external legal advice in competition matters. In relation to those cases where conduct or mergers were abandoned or modified, the companies surveyed took external legal advice in the following percentages of cases:[54]

[53] Cochran (1977), equation 5.53 (page 107). This approach assumes a normal approximation for the sample.

[54] These percentages are calculated from Table 5.5 and Table 4.2.

- Potential abuses (95 per cent)
- Cartels (61 per cent)
- Commercial agreements (38 per cent)
- Mergers (25 per cent)

5.40 External advice was taken more on competition law than on mergers, and nearly always for potential abuses.

Sectors

5.41 We were interested in whether CA98 infringement decisions in a particular sector create a stronger deterrent effect in that sector than they do across the economy as a whole. A number of different questions we asked in the two surveys and the interviews provided evidence on this point.

Legal survey

5.42 We asked if there were any sectors in which the UK competition law regime had had a particularly strong impact on commercial decisions, a question which covers both the direct and deterrent effects of enforcement. The commonest replies were construction (28 per cent), pharmaceuticals (13 per cent), telecoms (11 per cent), general retailers (10 per cent), electricity (9 per cent) and transport (8 per cent).[55]

5.43 These responses mirror well the proportion of CA98 infringement decisions found in these sectors, which are construction (29 per cent), pharmaceuticals (10 per cent), general retailers (14 per cent) and transport (5 per cent). The exceptions are telecommunications and electricity, which are dealt with by sectoral regulators, and in which there have been no CA98 infringement decisions.

[55] Legal survey, Q16.

5.44 We also asked whether CA98 decisions have a greater deterrent effect against anti-competitive practices in the same sector than other sectors. The commonest answers were to agree (43 per cent) or strongly agree (32 per cent).[56]

Individual decisions which had an impact on commercial decisions

5.45 Companies were asked whether there were any individual OFT decisions which had had an effect on their commercial behaviour. Relatively few companies were able to identify individual decisions: seven of the 202 companies (three per cent) were able to point to individual CA98 decisions which had affected their behaviour, and one company identified a group of decisions ('construction').

5.46 However, for those few companies which were able to mention a decision which had an effect on their commercial behaviour, inspection of the four or five digit UK SIC codes suggested a close link between the companies' sectors and the decisions in question.

Company survey

5.47 We classified the 21 CA98 infringement decisions sectorally using four or five digit UK 2003 SIC codes. These were then compared with the corresponding sectoral codes of companies which said they had abandoned or modified conduct because it might be considered a breach of competition law.

5.48 Two different tests were applied for whether the deterrent effect is stronger in the sector than in the economy as a whole:

- Is the proportion of companies which had modified or abandoned conduct of a particular type (for example, a cartel) higher than in the

[56] Legal survey, Q17D.

sample as a whole if there has been a decision of that type in the sector?

- Is the average number of instances of abandonment or modification of conduct of a particular type higher in sectors with a decision of that type than in the sample as a whole?

5.49 The results are shown in Table 5.9. Whichever of the two tests was applied, there was little evidence that the deterrent effect is any stronger in the sector in question than across the economy as a whole.[57] These results contrast with those for mergers, where the survey revealed a sectoral deterrent effect.

5.50 In terms of the two specific sectors highlighted by the legal survey (construction and pharmaceuticals), there was little evidence from the companies' reported behaviour of a sector-specific deterrent effect from CA98 decisions. None of the construction companies in the sample said they had abandoned or modified conduct of any type because of the risk of OFT investigation. While some of the pharmaceutical companies said they had done so, it was not in the area of abuse of dominance (both CA98 decisions in the sector were under Chapter II).

[57] The possible exception is for abuses, although the very small number of companies in the sample in sectors where there had been an abuse decision make it unsafe to draw general conclusions.

Table 5.9: Deterrence from OFT competition law enforcement: sectoral analysis of company survey

	Number of companies			Instances	
	Abandoned/ Modified conduct (A)	Total (B)	Per cent	Abandoned/ Modified (C)	Average (C ÷ B)
Cartels					
Sample	20	202	10%	126	0.62
In sector with cartel infringement decision	2	15	13%	5	0.33
Commercial agreements					
Sample	21	202	10%	144	0.71
In sector with commercial agreement infringement decision	1	9	11%	6	0.67
Abuses					
Sample	11	202	5%	19	0.09
In sector with abuse infringement decision	1	2	50%	1	0.50
Any type of CA decision					
Sample	36	202	18%	289	1.43
In sector with any type of CA infringement decision	6	26	23%	38	1.46

Source: Company survey Q7, Q9 and Q11.

Summary

5.51 There is somewhat conflicting evidence on whether CA98 infringement decisions in a particular sector create a stronger deterrent effect in that sector than they do across the economy as a whole:

- A majority of lawyers in our sample considered that CA98 decisions have a greater deterrent effect against anti-competitive practices in the same sector than other sectors.
- In the relatively small number of instances where firms are able to identify a decision that had an effect on their commercial behaviour, they tended to be in the sector in question.
- However, there was little evidence that companies' abandoned or modified agreements or conduct more frequently in sectors with infringement decisions than in the economy as a whole.

5.52 Overall the evidence from the surveys that there is a strong sector-specific deterrent effect from CA98 decisions appears weak. In particular, it is weaker than the evidence of sector-specific deterrence from CC merger decisions.

Size

5.53 The survey suggests that competition law impinges more on large firms than small ones: the percentage of companies who changed their conduct in some way because of the risk of OFT investigation increases through the size bands of firms.

Table 5.10: Size analysis of companies in survey: competition law

Percentage of companies in the relevant size band which had abandoned or modified…	200-499	500-999	1000+	Average number of employees
Arrangements which might be considered cartels	6%	11%	11%	3906
Commercial agreements	3%	5%	17%	2250
Possible abuses	0%	5%	8%	2088
Some type of behaviour	6%	12%	26%	3145
Whole sample	n/a	n/a	n/a	2388

Source: Company Survey Q7, Q9 and Q11.

5.54 The interviews we conducted with smaller companies (200-499 employees) suggested that the main area in which competition policy impinges on their day to day commercial life is in the area of agreements. The provisions on merger control and abuse dominance were seen as of little relevance. This is consistent with the results of the survey.[58]

Factors which create deterrence

5.55 Breaking competition law can lead to a range of consequences for the enterprises or individuals responsible. These include the financial penalties, the unenforceability of agreements, administrative and advisory costs, injunctions, third party damages actions, adverse publicity, director disqualification and, in the case of 'dishonest' cartels, imprisonment. We explored in our research which of these are

[58] See Company survey Q14 (d) to (f) broken down by company size.

considered the most important in deterring infringements of competition law.

5.56 The interviews suggested that the sanctions which are most relevant depended on the type of infringement. Fines, adverse publicity and director disqualification were seen as significant sanctions for cartels and abuses. Criminal prosecution for cartels was also seen as an important sanction.

5.57 By contrast, in the case of commercial agreements, unenforceability was typically seen as the main concern.

5.58 For the purposes of the surveys, in the interests of simplicity, we asked about the relative importance of five different factors in 'deterring infringements' (implicitly aggregating across all types of competition law infringement). The rankings of the importance of these five factors by competition lawyers and companies in the two surveys are shown in Table 5.11. Both lawyers and companies agreed that criminal penalties were the most important sanction and private damages actions the least. There was some difference in the ranking of fines: while companies considered director disqualification and adverse publicity more important than fines, lawyers did not.

5.59 These results highlight the importance of sanctions which operate at the individual, rather than corporate, level.[59]

[59] These tables may be compared with the corresponding table in Beckenstein and Gabel's US survey (page 467). By contrast with the results here, in the US the probability of a private suit was ranked as having a higher average deterrent value than the probability of a Federal Trading Commission suit.

Table 5.11: Perceived importance of sanctions

Lawyers	Companies
Criminal penalties (3.50)	Criminal penalties (3.51)
Fines (3.31)	Disqualification of directors (3.38)
Disqualification of directors (3.06)	Adverse publicity (3.25)
Adverse publicity (2.79)	Fines (3.13)
Private damages actions (2.49)	Private damages actions (2.93)

Source: Legal survey Q18, Company survey Q15. The bracketed numbers are the weighted average of responses of individuals on a scale from 1 (not at all important) to 4 (very important).

Individual decisions

5.60 The deterrence effect arising from CA98 decisions appears to operate in a different way from that for mergers. In our interviews we were provided with several examples of proposed mergers which had been abandoned or modified specifically as a result of earlier individual OFT or CC merger decisions.

5.61 By contrast, in the context of competition law, while we were provided with many examples of agreements and initiatives that were abandoned or modified because of the risk of OFT enforcement action, none were said to have been abandoned or modified specifically as a result of an earlier individual decision.

5.62 The decisions most often mentioned in our interviews with advisers in the general context of raising the profile of competition enforcement were *Hasbro/Argos/Littlewoods*, *Replica Football Kit* and *Napp*. On this basis, it would appear that prominence is closely related to the size of

the fine involved.[60] *Genzyme* and *Schools* were also both mentioned more than once.

5.63 We asked the companies in the survey whether there were any individual OFT decisions which had had an effect on their commercial behaviour. The only one mentioned more than once was *Hasbro/Argos/Littlewoods*.[61]

Effectiveness of regime and precedent

5.64 In principle it would be desirable to compare the scale of the deterred infringements to undeterred infringements: even if the deterrent effect is large in comparison with the direct effect, it can be argued that the regime is not effective if only a relatively small fraction of infringements are being deterred.

5.65 There are considerable difficulties in trying to assess the extent of undeterred infringements. For one thing, despite assurances of confidentiality, respondents may have concerns about self incrimination. We did not attempt any quantitative assessment of the scale of undeterred infringements, although the survey sheds some light on the question: for example, it was notable that 22 per cent of the companies in the sample considered that they had been harmed by a breach of competition law by someone else.[62]

5.66 Instead of asking specifically about the scale of undeterred infringements we asked a number of general questions about the effectiveness of the regime. By both lawyers and companies the UK regime was seen as

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[60] These cases also received quite widespread media attention which may also account for their prominence. However, the extent of media attention may in part be attributable to the size of the fine.

[61] Company survey, Q19.

[62] Company survey, Q16.

most effective in deterring cartels, less effective at deterring other forms of anti-competitive agreement and least effective at deterring abuses.[63]

Business chilling

5.67 In the interviews, we were provided with a large number of examples of alleged business chilling. In the area of dominance these included:

- not offering rebates
- not licensing one business partner because of the fear that they would have to license another to avoid the no-discrimination rule

5.68 More generally some advisers said that almost any attempt to compete could be seen as possibly exclusionary and so dominant firms were 'fighting with one arm tied behind their backs'.

5.69 We were also provided with examples of alleged business chilling from Chapter I. The most common was that of a supplier who wishes to implement a promotion (or meet competition from a new entrant) by requiring retailers to cut their retail prices. They are concerned that this may be seen as vertical price fixing and so refrain even though the effect would be to benefit consumers.

5.70 In this context, a number of lawyers said that following *Replica Football Kit* and *Argos/Hasbros/Littlewoods* (and the Competition Appeal Tribunal's judgements on these cases) there was uncertainty about the degree of communication on prices between suppliers and retailers that is legitimate.

5.71 Other examples of alleged business chilling under Chapter I included:

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[63] 74 per cent of lawyers and 65 per cent of companies agreed or strongly agreed that 'the UK regime is effective in deterring cartels'. The corresponding figures for other anti-competitive agreements are 57 per cent (lawyers) and 55 per cent (companies) and for abuses 46 per cent (lawyers) and 50 per cent (companies). Legal survey Q17 and company survey Q14.

- coordination of 'child fares' by transport operators
- an IT scheme which allowed price comparisons of financial products by consumers

5.72 These initiatives had been abandoned because of the competition law risk.

Frequency of business chilling

5.73 In the interviews, we found quite widespread concern about business chilling, both among advisers and companies. We used the legal and company surveys to collect views about the frequency with which it occurs.

5.74 In the legal survey, we asked respondents to indicate on a scale of one to four (where one is never and four is frequently) how often they thought that the UK competition regime deters agreements or conduct that would not be anti-competitive.[64] Business chilling was seen as occurring more frequently for competition law (mean response 2.05) than for mergers (mean response 1.80).

5.75 In the company survey, we asked how often the UK competition regime had deterred initiatives by their company even though, in their view, they would not have been anti-competitive.[65] 28 per cent of companies said that this had happened sometimes.

Types of behaviour which are deterred

5.76 We asked in both the legal and company surveys where behaviour is deterred that is not anti-competitive, what types of infringement

[64] Legal survey, Q19.

[65] Company survey, Q20.

companies are concerned that their behaviour would be seen as[66]. The responses by the lawyers and companies were broadly consistent.

5.77 It was striking that companies were more often concerned that their behaviour would be seen as a cartel than as any of the types of anti-competitive behaviour that could be caught by the provisions on abuse of dominance.

5.78 This pattern was particularly marked in the company survey. 21 companies had been deterred from initiatives that they considered were not anti-competitive because they were concerned that their behaviour would be seen as a cartel. This compares with nine companies which were concerned that their behaviour would be seen as an unspecified abuse of dominance, six companies for single branding/exclusivity, three companies for predatory pricing and two companies for rebates/discounts.[67]

5.79 The academic and policy literature on business chilling[68] emphasises the possible perverse effects of the prohibition on abuse of dominance. The surveys suggest that in the UK context the business chilling effects from the OFT's enforcement activity against cartels is equally, if not more, important.

5.80 This is understandable given that the most prominent cases taken by the OFT under CA98 have related to vertical price fixing.[69]

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[66] Legal survey, Q20 and Company survey, Q21.

[67] Company survey, Q21.

[68] See Lear (2006) and Bork (1978).

[69] In this context, we note the US Supreme Court's recent decision in *Leegin v PSKS* to reverse the long-standing rule that minimum resale price maintenance is per se illegal. The Department of Justice and the Federal Trade Commission both recommended that the per se rule against minimum resale prices should be abandoned, on the grounds that vertical price restraints, even those establishing minimum resale prices, can have pro-competitive effects.

Predictability

5.81 The predictability of the OFT's Competition Act work was generally considered to be lower than its merger work. However, publication of decisions was said to aid predictability.

5.82 Many lawyers said that cartel cases were by their nature more predictable than other types of infringement, particularly Chapter II.

5.83 Many lawyers also commented on the extended length of many CA98 investigations in comparison to their experience of other jurisdictions.

Damages actions

5.84 The surveys suggested that at present, the threat of private damages actions is seen as a relatively unimportant factor in creating a deterrent effect (see Table 5.11). The European Commission and the OFT have both stated that they wish to encourage private damages actions, and a much debated policy question is how the barriers to companies bringing actions can be reduced.

5.85 45 of the 202 companies in the sample (22 per cent) said that they thought that their company had been harmed by a breach of competition law by someone else. Large companies (those with more than 1000 employees) were somewhat more likely to say that they had been harmed than small ones (30 per cent of large companies, compared to17 per cent of small and 14 per cent of mid-sized companies).[70]

5.86 25 of the 45 companies who thought their company had been harmed by a breach of competition law (56 per cent) did not consider bringing a private action. Five of the companies finally decided to bring an action.[71]

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[70] Company survey, Q16.

[71] Company survey, Q17.

Reasons companies did not bring a damages action

5.87 We asked the companies who did not decide to bring an action why they did not do so.[72] The results suggest that the decision is typically approached as an (expected) cost-benefit calculation: the most commonly cited reason for not bringing an action was that the expected costs outweighed the benefits. This was mentioned by 17 companies.

5.88 Within this overall calculation, one can break down the reasons given into those that affect the costs of actions, the probability of success and the expected benefits.

5.89 In terms of costs, legal fees and time were seen as being extremely important factors. It was said that assembling the case is very time consuming, distracts management and that the litigation process itself can take years.

5.90 Apart from the explicit costs of the process, the possibility of damaging a commercial relationship with a supplier ('biting the hand that feeds') was cited as a reason for not bringing action by four respondents.

5.91 A number of factors were relevant to the probability of success. Nine of the companies cited the lack of evidence or difficulty in meeting the burden of proof. Two companies cited lack of clarity in the law.

5.92 Nine respondents saw their relatively small size compared to the counter-party as relevant ('it was a David and Goliath situation'). Larger companies were seen as being better able to bear the costs of litigation and also having the resources to employ better lawyers.

5.93 Two companies said that they had told the OFT of the potential infringement, but when it decided not to take action, they dropped the idea of bringing an action privately. Two other companies said that there was no OFT case on which to 'piggy back'.

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[72] Company survey, Q18. The answers were unprompted.

5.94 Finally, in terms of the benefits, one company said that even if they were successful, the damages award would not outweigh the costs. In another case, the company perceived that there was no prospect of securing its desired outcome (the reversal of the award of a contract to a rival) even if it won the case.

Conclusion

5.95 The questions of what are the main obstacles for companies bringing private actions, and how these can be reduced, are complex and multi-faceted.[73]

5.96 We make two observations based on the results of the survey:

- The results provide an indication of the scale of use of damages actions for competition infringements in the UK. Five of the 202 companies in the sample (just over two per cent) had brought an action.[74]

- Companies have many reasons why they do not bring a case even when they consider that they have been harmed by a breach of competition law by someone else. The most important are the cost and delay, concern about damage to commercial relationships, lack of evidence, lack of clarity in the law, the size of the counter-party and the limited perceived benefits in the event of success.

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[73] Much of the recent European policy debate was initiated by the European Commission's 2005 Green Paper on damages actions. See also the OFT's 2007 discussion paper on the topic (OFT2007a). The important prior question of the extent to which it is desirable to encourage private actions is not addressed in this report.

[74] Note that this figure includes cases which are settled out of court. A difficulty in determining the frequency of use of damages actions is that in addition to the cases brought to court, there are cases which are settled confidentially. Information on some of the cases brought to court can be found on the OFT's competition court case database (available on its website) and also the Competition Appeal Tribunal website.

Compliance programmes

5.97 One suggestion that was made as to how the scale of the deterrent effect might be captured was to examine compliance activities undertaken by companies. The method is of course indirect since the existence of a compliance programme is no guarantee that competition law will not be infringed.[75]

5.98 The commonest compliance measure was taking external legal advice (40 per cent of companies). Other relatively common measures were a policy code (34 per cent), seminars on competition law (26 per cent), employing a dedicated competition compliance officer (20 per cent), taking economic advice (16 per cent) and requiring employees to take an online training programme (9 per cent).[76]

5.99 Whether a firm undertakes compliance activities is strongly related to its size. The table below shows the percentage of companies which had undertaken at least one of the six compliance activities mentioned in the previous paragraph in the last year.

[75] See *Arriva/First Group* paragraphs 14-20.

[76] Company survey, Q22.

Table 5.12: Companies which had undertaken some compliance action in the last year by size

	Employee numbers				Total
	200-499	500 - 999	1000 - 4999	5000 +	
Sample	35	66	76	25	202
Companies which had taken some compliance action in the last year	9	35	50	23	117
Percentages	26%	53 %	66%	92%	58%

Source: Company survey, Q22

5.100 Companies were more likely to have abandoned or modified their conduct because of the risk of OFT investigation if they had taken some form of compliance action. While 18 per cent of companies in the whole sample had abandoned or modified their conduct in some way because of the risk of OFT investigation, this rose to 27 per cent among companies which had taken some compliance action in the last year.

Improving deterrence

5.101 At the end of the legal and company surveys, we asked whether respondents had any suggestions for what could be done to improve deterrence of competition law infringements in the UK. Table 5.13 shows the most commonly mentioned suggestions in the surveys.

Table 5.13: Most frequently made suggestions for improving deterrence of competition law infringements in the UK

	Legal ranking	Company ranking	Overall ranking
Increased publicity and education	3	1	1
Encourage private damages actions	1	8	2
Faster decision taking	4	3	3
More criminal prosecutions for cartels	2	9	4
More decisions/greater enforcement activity	5	2 =	5
Larger fines/tougher penalties	6	2 =	6
More resources and/or better trained staff at OFT	7	5	7
Greater clarity in the law	9	4	8
Greater use of director disqualification	8	14	9
Improved incentives for whistle-blowers through leniency programme	12	7	10
Focus on cases with major market impact	13	12	11

Source: Legal survey Q21 and Company survey Q24. The rankings are based on the number of times which the suggestion was made.

5.102 We deal with each suggestion in turn.

Publicity and education

5.103 Wider publicity of the OFT's role and decisions was the most common suggestion. It was said to be important that the OFT's enforcement work should obtain publicity through the mainstream media.

5.104 Two main reasons were given why greater publicity was said to be important. First, so that companies understood what the law prohibits, and that this knowledge was diffused throughout the sales teams of companies and not simply held by a few compliance officers. Second, the prospect of adverse publicity for the companies which had infringed competition law ('naming and shaming') in itself acted as a deterrent.

5.105 It was also suggested that if there was greater awareness of competition law among the general public, they could report potential infringements.

Encourage private damages actions

5.106 Our survey suggests that at present the threat of private actions is not seen as a serious deterrent in comparison to the possibility of public enforcement action. This is the reverse of the position in the United States where, as one commentator put it, US Government fines are 'mere paper cuts compared to the financial wounds that may be inflicted by plaintiffs in civil actions'.[77]

5.107 It is perhaps not surprising then that this is seen as an area where there is scope for an increase in the deterrent effect of enforcement. Indeed, among lawyers removing the obstacles to bringing private actions was the most frequently provided suggestion as to how the deterrence effect could be improved.[78] As already noted, the European Commission and the OFT have both stated that they wish to encourage private damages actions.

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[77] Connor (2004). Beckenstein and Gabel's 1982 survey also supports the proposition that private actions are a more significant deterrent than Government action in the US.

[78] By contrast, it was only the eighth most commonly made suggestion among companies. That an expansion of the use of private damages actions was recommended more frequently by lawyers than companies may reflect differing incentives among the two groups.

Faster decision taking

5.108 The speed of decision taking was also seen as important. It is not unusual for CA98 investigations to last more than two years. The *Replica Football Kit* investigation extended over more than four years, and *Mastercard* took more than five. The National Audit Office report of 2005 discussed the issue of the timescale for OFT competition law investigations,[79] and our survey shows that concern in this area persists.

More criminal prosecutions for cartels

5.109 There has not yet been a successful criminal prosecution for cartel behaviour in the UK, either under the Enterprise Act 2002 (EA02) or the common law provisions on conspiracy to defraud.

5.110 Many thought the deterrent effect of the criminal provisions on cartel behaviour would increase significantly after there had been a successful prosecution.

More decisions/greater enforcement activity

5.111 A relatively small number of infringement decisions have been taken under CA98, particularly in the areas of commercial agreements and abuse of dominance. A greater number and frequency of decisions was considered by many lawyers and companies to be important to establish a credible deterrent effect.

Larger fines/tougher penalties

5.112 Increasing the fines for infringements could be expected to generate a corresponding increase in deterrence. One recommendation made by a

[79] National Audit Office (2005), page 22-26.

number of companies in their comments was that the size of the fine should be proportional to the size of the infringing company.[80]

More resources and better trained staff

5.113 The deterrent effect achieved by the OFT's enforcement work must ultimately be assessed in relation to the resources which it has available, and many respondents commented on the very limited resources (both in terms of finance and staff) available to the OFT to carry out its work.

5.114 The OFT's Annual Plan 2006-07 shows the budget for merger control as £2.1 million. With this budget it expected to consider between 180 and 230 mergers, implying an approximate budget of £10,000 per merger.

5.115 Many respondents said that to improve deterrence, the OFT needs to have available a greater number of staff, and for those staff to be better trained. The difficulties faced by the OFT in recruiting and retaining suitably experienced staff have been discussed by 2005 National Audit Office report and more recently by the Public Accounts Committee.[81]

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[80] The OFT's starting point in determining fines for infringements of competition law is a fraction (less than 10%) of the turnover of the infringing company's turnover in the relevant market in the last business year. This starting point may be adjusted to achieve policy objectives such as deterrence, and one of the factors that may be taken into account is the size of the infringing company.(See *OFT's guidance as to the appropriate amount of the penalty* OFT 423 (December 2004) at Step 3). In the light of the survey responses, it is an interesting question whether (given the starting point is turnover in the affected market) the adjustments that have been made in practice sufficiently allow for the different size of enterprises in terms of deterrence. Quite a few respondents said that for a large listed company, fines of the size of those so far given under CA98 could be 'brushed aside'.

[81] National Audit Office (2005), page 15-17 and Public Accounts Committee (2006) at paragraphs 8-9.

Greater clarity in the law

5.116 Both lawyers and companies said that it was not clear in many cases what was prohibited and considered that greater clarity and simplicity of the law would aid deterrence. Lack of clarity in the law was mentioned as problematic both in relation to the provisions on abuse of dominance and anti-competitive agreements (for example, in regard to which types of vertical agreement would be prohibited).

Greater use of director disqualification

5.117 EA02 introduced the possibility of director disqualification for up to 15 years for infringements of competition law. The sanction is not limited to cartels, but can be imposed for any infringement of competition law.[82] While the sanction has not yet been used, the threat of director disqualification is seen as a serious one by both lawyers and companies, and many thought that a greater use of this sanction would improve deterrence.

Improved incentives for whistleblowers through leniency programme

5.118 It was suggested that there should be improved incentives for whistleblowers to come forward through the leniency programme. It was said to be important that there should be clear financial incentives for whistleblowers in terms of immunity from (or at least lower) fines. A specific suggestion made by one lawyer was that whistleblowers should have immunity from private damages actions as well as fines levied by public agencies.

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[82] Section 204 of EA02. The OFT has said that it will follow a five step process when deciding whether or not to apply for a competition disqualification order from the High Court. It has stated that it will only apply for a competition disqualification order if a fine has been imposed.*Competition disqualification orders*, OFT 510 (May 2003) at paragraph 4.10.

Focus on cases with a major market impact

5.119 Improved prioritisation of cases, focussing on those with a major market impact was also suggested by many.

6 REFERENCES

Beckenstein A R and Gabel H L (1982), 'Antitrust Compliance: Results of a Survey of Legal Opinion', 51, pp. 459-516

Block M K and Feinstein J S (1986), 'The Spillover Effect of Antitrust Enforcement', *Review of Economics and Statistics*, 68(1), pp.122-31

Block M K, Nold F C and Sidak J (1981), 'The Deterrent Effects of Antitrust Enforcement', *Journal of* Political *Economy*, 89(3), pp.429-445

Bork, R H (1978), The Antitrust Paradox: a policy at war with itself, Basic Books

Clarke, J L and Evenett, S J (2003), 'The Deterrent Effects of National Anticartel Laws: Evidence from the International Vitamins Cartel', *The Antitrust Bulletin,* Fall 2003, pp. 689-726, available at www.evenett.com

Cochran, William G (1977), Sampling Techniques, third edition, John Wiley & Sons

Competition Commission (2006), 'Estimated costs to consumers of the mergers against which the CC took action between March 2005 and March 2006', available at www.competition-commission.org.uk

Competition Commission (2007), 'Estimated costs to consumers of the mergers and market outcomes against which the CC took action between April 2006 and March 2007', available at www.competition-commission.org.uk

Connor, John M. (2004), 'Global Cartels Redux: The Amino Acid Lysine Antitrust Litigation', in Kwoka, J E and White, L G, *The Antitrust Revolution,* Oxford University Press

Databuild Limited (2005), 'CC Stakeholder Survey Final Report', a survey for the Department of Trade and Industry and Competition Commission, available at www.competition-commission.org.uk

Davies S, Coles H, Olczak M, Pike C and Wilson C (2004), 'The benefits of competition: some illustrative UK case studies', Department of Trade and Industry Economics Paper No. 9, available at www.dti.gov.uk

Davies S and Majumdar A (2002), 'The development of targets for consumer savings arising from competition policy', OFT386, available at www.oft.gov.uk

DoJ (2000), Antitrust Division Congressional Submission for Fiscal Year 2001, Washington DC: US Department of Justice

European Commission (2005), 'Damages Actions for breach of the EC antitrust rules', Commission Staff working paper, available at ec.europa.eu/comm/competition

Farrell J and Katz M L (2006), 'The Economics of Welfare Standards in Antitrust', *Competition Policy International*, 2 (2)

Feinberg R M (1985), 'The Enforcement and Effects of European Competition Policy: Results of a Survey of Legal Opinion', Journal of Common Market Studies, 23 (4), pp. 373-84

Frazer T (1995), 'Monopoly, Prohibition and Deterrence', The Modern Law Review, 58, pp. 846-59

Geroski P A (2004), 'Is Competition Policy Worth it?', speech on the opening of the Centre for Competition Policy at the University of East Anglia, available at www.competition-commission.org.uk

Global Competition Review (2007), 'Rating Enforcement 2006'

Heyer, K (2006), 'Welfare Standards and Merger analysis: Why not the best?', Discussion paper of the Economic Analysis Group of the Antitrust Division of the US Department of Justice, available at www.abanet.org

KPMG (2004), 'Peer Review of the UK Competition Policy Regime', a report to the Department of Trade and Industry, available at www.dti.gov.uk

KPMG (2007), 'Peer Review of Competition Policy', a report to the Department of Trade and Industry, available at www.dti.gov.uk

Lear (2006), 'The cost of inappropriate interventions/non interventions under Article 82', OFT 864, available at www.oft.gov.uk

Motta M (2004), Competition Policy: Theory and Practice, Cambridge University Press

National Audit Office (2005), 'The Office of Fair Trading: Enforcing Competition in Markets', available at www.nao.org.uk

OECD (2005), 'Evaluation of the Actions and Resources of Competition Authorities', OECD roundtable on competition policy, available at www.oecd.org

OFT (2005), 'Positive Impact: an initial evaluation of the effect of the competition enforcement work conducted by the OFT', OFT827, available at www.oft.gov.uk

OFT (2007a), 'Private Actions in competition law: effective redress for consumers and business', OFT916, available at www.oft.gov.uk

OFT (2007b), 'Consumer savings from merger control: merger simulation for impact estimation', OFT917, available from www.oft.gov.uk

OFT (2007c), 'Positive Impact 06/07', OFT 928, available at www.oft.gov.uk

Public Accounts Committee (2006), 'Enforcing competition in markets', HC 841 available at www.publications.parliament.uk

PwC (2001), 'Peer Review of the UK Competition Policy Regime', a report to the Department of Trade and Industry, available at www.dti.gov.uk

PwC (2005), 'Ex post Evaluation of Mergers', a report prepared for the OFT, Department of Trade and Industry and Competition Commission, available at www.competition-commission.org.uk

Symeonidis G (2000), 'Are cartel laws bad for business? Evidence from the UK', University of Essex Discussion Paper No. 511, available at www.essex.ac.uk

Synovate (2005) 'Perceptions of Markets and Competition: Business and Consumer Research Report', survey conducted annually for the OFT, available at www.oft.gov.uk

Twynstra Gudde (2005), 'Research into the Anticipation of Merger Control', a report prepared for the Netherlands Competition Authority (NMa), available at www.nmanet.nl

Whish R (2003), Competition Law, Fifth Edition, Lexis Nexis/Butterworths

A SURVEY OF UK AND BRUSSELS COMPETITION LAWYERS

Overview

A.1 The survey of 234 competition lawyers was designed by Deloitte in consultation with the OFT and carried out by the research agency, ORC International. The telephone survey took place between 13 and 29 September 2006 (UK) and between 18 October and 29 November 2006 (Brussels). This annexe presents the full text of the survey as well as tables summarising the final results for interview question.

Full text questionnaire and final results

Hello, my name is _____ from ORC International. I am calling regarding the OFT research project on the deterrent effect of UK competition enforcement. You should have received a letter about this project which Deloitte is undertaking on behalf of the Office of Fair Trading. We would like to ask you a number of questions about the deterrent effect of UK competition enforcement. The interview will take about 15 to 20 minutes.

Is now a good time to go ahead with the interview? *[If no, schedule another call at a more convenient time. If named sample is unwilling to participate of considers themself unsuitable, ask:]* Is there someone else in the company, with responsibility for compliance with competition law, who would be available for interview? *[If yes, take details and ask to be referred]*

Any information you provide, or views you express, will not be attributable to you by name or firm. Only grouped responses will be seen by the OFT and presented in the report prepared from this survey, which should be published later this year.

Section One: Mergers

We would like to start with some questions about proposed mergers.

Scale of deterrence

Q1. In the last three years, roughly how many proposed mergers have you personally been consulted on that qualified, or you believe would have qualified, for investigation under the UK merger control regime? Please include proposals on which you were consulted briefly or informally.

[If the answer to question 1 is 'none', go to section two (Competition Law), others to question 2]

Base for statistics: 234		Total Asked: 234	
Sum	3304	Standard Error	1.35
Minimum Value	0	Non-zero-respondents	193
Maximum Value	200		
Mean	14.12		
Mean (non-zero respondents)	17.12		
Median	6		

[Interviewer Note: If necessary, in regard to questions 2 and 3 tell participants that they should include all proposed mergers where they think that the most likely reason for abandonment or modification was the UK merger control regime. It is not necessary for participants to be certain that this was the reason for abandonment]

Q2. How many of those proposed mergers were abandoned on competition grounds before the OFT became aware of them?

Base for statistics: 189		Total Asked: 193	
Sum	262	Standard Error	0.19
Minimum Value	0	Non-zero respondents	80
Maximum Value	20		
Mean	1.39		
Mean (non-zero respondents)	3.28		
Median	0		

Q3. How many of those proposed mergers were modified on competition grounds before the OFT became aware of them, and were not subsequently modified or blocked?

[Interviewer Note: 'Subsequently modified or blocked' means that they were modified or blocked on competition grounds after being investigated by the OFT or Competition Commission]

Base for statistics: 185		Total Asked: 193	
Sum	223	Standard Error	0.22
Minimum Value	0	Non-zero respondents	65
Maximum Value	30		
Mean	1.21		
Mean (non-zero respondents)	3.43		
Median	0		

Q4. How many of those proposed mergers led to a finding of SLC [substantial lessening of competition] by the Competition Commission or undertakings in lieu of reference?

Base for statistics: 191		Total Asked: 193	
Sum	92	Standard Error	0.07
Minimum Value	0	Non-zero respondents	55
Maximum Value	7		
Mean	0.48		
Mean (non-zero respondents)	1.67		
Median	0		

Mergers deterred which are not anti-competitive ('business chilling')

Q5. On a scale of 1 to 4, where 1 is 'never' and 4 is 'frequently', how often do you think that the UK competition regime deters mergers that would not be anti-competitive?

Single response only		Total Asked: 193	
1	Never	62	32%
2	2	106	55%
3	3	17	9%
4	Frequently	4	2%
5	Don't know	4	2%
Non-zero respondents	189		
Mean (non-zero respondents)	1.80		

Undeterred anti-competitive mergers

Q6. In the last three years, how many proposed mergers on which you were consulted went ahead without the OFT becoming aware of them in time to take action, to which in your view the OFT would have been unlikely to give unconditional clearance?

Base for statistics: 186		Total Asked: 193	
Sum	99	Standard Error	0.12
Minimum Value	0	Non-zero respondents	52
Maximum Value	20		
Mean	0.53		
Mean (non-zero respondents)	1.90		
Median	0		

Section Two: Competition law

We would now like to ask a number of questions about the advice you have given on the competition law regime in the UK, specifically the Competition Act, Articles 81 and 82 and the cartel provisions of the Enterprise Act.

Scale of deterrence

Q7. Since the Competition Act came into force, roughly how many clients have you personally advised on competition law matters over which the OFT would have jurisdiction?

[If the answer to question 7 is 'none', go to 'thank and close' others go to question 8]

Base for statistics: 231		Total Asked: 234	
Sum	9971	Standard Error	4.59
Minimum Value	0	Non-zero respondents	214
Maximum Value	500		
Mean	43.16		
Mean (non-zero respondents)	46.59		
Median	20		

We would now like to ask about agreements that may have been considered cartels, including vertical price fixing and information exchange agreements.

Cartels

Q.8 Since the Competition Act came into force, in how many instances did one of your clients abandon or significantly modify an existing or proposed agreement that may have been considered a cartel because of the risk of OFT investigation? Please include only agreements of which the OFT is not aware.

[Interviewer note: The Competition Act came into force on 1 March 2000]

Base for statistics: 207		Total Asked: 214	
Sum	1361	Standard Error	1.06
Minimum Value	0	Non-zero respondents	138
Maximum Value	100		
Mean	6.57		
Mean (non-zero respondents)	9.86		
Median	2		

Q.9 And in the same period, in how many cartel cases in which the OFT published a decision have you advised a client who was allegedly part of the cartel?

Base for statistics: 212		Total Asked: 214	
Sum	295	Standard Error	0.20
Minimum Value	0	Non-zero respondents	93
Maximum Value	20		
Mean	1.39		
Mean (non-zero respondents)	3.17		
Median	0		

Commercial agreements

Turning now to commercial agreements other than cartels...

Q10. Since the Competition Act came into force, in how many instances did one of your clients abandon or significantly modify an existing or proposed commercial agreement primarily because of the risk of OFT investigation under Chapter I or Article 81, rather than concern that the agreement might not be enforceable? Please include only agreements of which the OFT is not aware.

[If the answer to question 10 is not zero, go to question 11, other to question 12]

Base for statistics: 201		Total Asked: 214	
Sum	1713	Standard Error	1.90
Minimum Value	0	Non-zero respondents	132
Maximum Value	300		
Mean	8.52		
Mean (non-zero respondents)	12.98		
Median	2		

Q11. How many of those abandoned or significantly modified non-cartel commercial agreements were horizontal?

Base for statistics: 130		Total Asked: 132	
Sum	818	Standard Error	1.78
Minimum Value	0	Non-zero respondents	102
Maximum Value	200		
Mean	6.29		
Mean (non-zero respondents)	8.02		
Median	2		

Q12. In the same period, in how many non-cartel cases in which the OFT published a decision under Chapter I have you advised a client who was party to the agreement?

[Interviewer Instruction: If necessary, this refers to both horizontal and vertical cases]

Base for statistics: 208		Total Asked: 214	
Sum	231	Standard Error	0.21
Minimum Value	0	Non-zero respondents	77
Maximum Value	30		
Mean	1.11		
Mean (non-zero respondents)	3.00		
Median	0		

Abuses

Turning now to potential abuses of dominance...

Q. 13 Since the Competition Act came into force, in how many instances did one of your clients abandon or significantly modify a commercial initiative that may have been considered an abuse of dominance because of the risk of OFT investigation? Please include only potential abuses of which the OFT is not aware.

[If the answer to question 13 is zero, go to question 15, others to question 14]

Base for statistics: 210		Total Asked: 214	
Sum	1228	Standard Error	0.94
Minimum Value	0	Non-zero respondents	139
Maximum Value	100		
Mean	5.85		
Mean (non-zero respondents)	8.83		
Median	2		

[If necessary prompt with: A commercial initiative is any change in commercial strategy that could potentially be caught by the abuse of dominance provisions, for example a new pricing or discount structure, a change in distribution agreements or new terms and conditions of supply]

Q.14 On a scale of 1 to 4, where 1 is 'never' and 4 is 'frequently', how common is it for your clients to abandon or significantly modify a commercial initiative on the grounds that under the provisions on abuse of dominance it may be considered: *[Rotate start]*

a) Predatory Pricing:

Single response only		Total Asked: 139	
1	Never	50	36%
2	2	55	40%
3	3	22	16%
4	Frequently	11	8%
5	Don't know	1	1%
Non-zero respondents	138		
Mean (non-zero respondents)	1.96		

b) An illegal rebate or discount structure?

Single response only		Total Asked: 139	
1	Never	17	12%
2	2	64	46%
3	3	40	29%
4	Frequently	17	12%
5	Don't know	1	1%
Non-zero respondents	138		
Mean (non-zero respondents)	2.41		

c) Single branding or exclusivity?

Single response only		Total Asked: 139	
1	Never	25	18%
2	2	70	50%
3	3	32	23%
4	Frequently	11	8%
5	Don't know	1	1%
Non-zero respondents	138		
Mean (non-zero respondents)	2.21		

d) Tying and bundling?

Single response only		Total Asked: 139	
1	Never	22	16%
2	2	79	57%
3	3	29	21%
4	Frequently	8	6%
5	Don't know	1	1%
Non-zero respondents	138		
Mean (non-zero respondents)	2.17		

e) Refusal to supply?

Single response only		Total Asked: 139	
1	Never	28	20%
2	2	67	48%
3	3	31	22%
4	Frequently	12	9%
5	Don't know	1	1%
Non-zero respondents	138		
Mean (non-zero respondents)	2.20		

f) Discrimination?

Single response only		Total Asked: 139	
1	Never	30	22%
2	2	72	52%
3	3	27	19%
4	Frequently	9	6%
5	Don't know	1	1%
Non-zero respondents	138		
Mean (non-zero respondents)	2.11		

g) Excessive pricing?

Single response only		Total Asked: 139	
1	Never	86	62%
2	2	41	29%
3	3	7	5%
4	Frequently	4	3%
5	Don't know	1	1%
Non-zero respondents	138		
Mean (non-zero respondents)	1.49		

Q.15 Since the Competition Act came into force, in how many cases in which the OFT published a decision under Chapter II have you advised an allegedly dominant client?

Base for statistics: 213		Total Asked: 214	
Sum	512	Standard Error	0.96
Minimum Value	0	Non-zero respondents	86
Maximum Value	200		
Mean	2.40		
Mean (non-zero respondents)	5.95		
Median	0		

Differences in deterrent effect by sector

Q.16 Are there any sectors in which the UK competition law regime as had a particularly strong impact on commercial decisions?

[Unprompted. Multi-code the responses using the sectoral scheme on final page. Do not read out sectors, unless you need to clarify a response that does not fit in the scheme]

Multiple responses allowed:		Total Asked: 214	
1	Mining	3	1%
2	Oil & Gas	16	7%
3	Chemicals	8	4%
4	Construction & building materials	59	28%
5	Forestry & paper	1	*%
6	Steel & Other metals	3	1%
7	Aerospace & Defence	5	2%
8	Diversified Industrial	1	*%
9	Electronic & Electric equipment	3	1%
10	Engineering & Machinery	2	1%
11	Automobiles & Parts	7	3%
12	Household goods & textiles	0	0%
13	Beverages	5	2%
14	Food producers & processors	9	4%
15	Health	8	4%
16	Packaging	1	*%
17	Personal care & household products	0	0%
18	Pharmaceuticals	27	13%
19	Tobacco	0	0%
20	Distributors	2	1%
21	General retailers	22	10%
22	Leisure, Entertainment & Hotels	13	6%
23	Media & Photography	13	6%
24	Support services	1	*%
25	Transport	17	8%
26	Food & drug retailers	9	4%
27	Telecommunications services	23	11%
28	Electricity	19	9%
29	Gas distribution	11	5%
30	Water	4	2%
31	Banks	11	5%
32	Insurance	4	2%
33	Life assurance	1	*%
34	Investment companies	2	1%
35	Real estate	1	*%
36	Speciality & Other finance	10	5%

37	Information Technology hardware	2	1%
38	Software & computer services	6	3%
39	Other	15	7%
40	None	69	32%

Effectiveness of regime and precedent

Q.17 On a scale of 1 to 4 where 1 is 'strongly disagree' and 4 is 'strongly agree', to what extent do you agree with the following statements

[Interviewer note if necessary: 2 means 'disagree' and 3 means 'agree']

a) The UK competition regime is effective in deterring cartels?

Single response only		Total Asked: 214	
1	1- Strongly disagree	10	5%
2	2	44	21%
3	3	115	54%
4	4 – Strongly agree	42	20%
5	Don't know	2	1%
6	No view	1	*%
Non-zero respondents	211		
Mean (non-zero respondents)	2.90		

b) The UK competition regime is effective in deterring other forms of anti-competitive agreement?

Single response only		Total Asked: 214	
1	1- Strongly disagree	10	5%
2	2	79	37%
3	3	99	46%
4	4 – Strongly agree	23	11%
5	Don't know	0	0%
6	No view	3	1%
Non-zero respondents	211		
Mean (non-zero respondents)	2.64		

c) The UK competition regime is effective in deterring abuses of dominance?

Single response only		Total Asked: 214	
1	1- Strongly disagree	18	8%
2	2	92	43%
3	3	85	40%
4	4 – Strongly agree	13	6%
5	Don't know	1	*%
6	No view	5	2%
Non-zero respondents	208		
Mean (non-zero respondents)	2.45		

d) Competition Act decisions have a greater deterrent effect against anti-competitive practices in the same sector other than other sectors.

[If necessary: For example, a decision in the construction sector would have a greater deterrent effect in the construction sector than, say the pharmaceutical sector?]

Single response only		Total Asked: 214	
1	1- Strongly disagree	11	5%
2	2	36	17%
3	3	91	43%
4	4 – Strongly agree	69	32%
5	Don't know	5	2%
6	No view	2	1%
Non-zero respondents	207		
Mean (non-zero respondents)	3.05		

e) Competition Act decisions have a greater deterrent effect against anti-competitive practices of the same type than other types of anti-competitive practice.

[If necessary: For example, a decision against a cartel would have a greater deterrent effect against cartels than predatory pricing?]

Single response only		Total Asked: 214	
1	1- Strongly disagree	5	2%
2	2	31	14%
3	3	98	46%
4	4 – Strongly agree	71	33%
5	Don't know	6	3%
6	No view	3	1%
Non-zero respondents	205		
Mean (non-zero respondents)	3.15		

f) Non infringement decisions are important because they reduce the risk that behaviour which is not anti-competitive is deterred?

Single response only		Total Asked: 214	
1	1- Strongly disagree	17	8%
2	2	40	19%
3	3	67	31%
4	4 – Strongly agree	88	41%
5	Don't know	0	0%
6	No view	2	1%
Non-zero respondents	212		
Mean (non-zero respondents)	3.07		

Factors which create deterrence

Q.18 On a scale of 1 to 4 where 1 is 'not at all important' and 4 is 'very important', how important do you consider the following in deterring infringement *[Rotate start]*

a) Disqualification of directors?

Single response only		Total Asked: 214	
1	1- Not at all important	14	7%
2	2	39	18%
3	3	75	35%
4	4 – Very important	80	37%
5	Don't know	6	3%
Non-zero respondents	208		
Mean (non-zero respondents)	3.06		

b) Private damages actions?

Single response only		Total Asked: 214	
1	1- Not at all important	39	18%
2	2	70	33%
3	3	64	30%
4	4 – Very important	39	18%
5	Don't know	2	1%
Non-zero respondents	212		
Mean (non-zero respondents)	2.49		

c) Fines?

Single response only		Total Asked: 214	
1	1- Not at all important	5	2%
2	2	25	12%
3	3	81	38%
4	4 – Very important	101	47%
5	Don't know	2	1%
Non-zero respondents	212		
Mean (non-zero respondents)	3.31		

d) Adverse publicity?

Single response only		Total Asked: 214	
1	1- Not at all important	12	6%
2	2	64	30%
3	3	93	43%
4	4 – Very important	44	21%
5	Don't know	1	*%
Non-zero respondents	213		
Mean (non-zero respondents)	2.79		

e) Criminal penalties for cartels?

Single response only		Total Asked: 214	
1	1- Not at all important	8	4%
2	2	21	10%
3	3	40	19%
4	4 – Very important	141	66%
5	Don't know	4	2%
Non-zero respondents	210		
Mean (non-zero respondents)	3.50		

Behaviour deterred which is not anti-competitive ('business chilling')

Q.19 On a scale of 1 to 4, where 1 is 'never' and 4 is 'frequently', how often do you think that the UK competition regime deters agreements or conduct that would not be anti-competitive?

[If answer to question is 19 is one, go to question 21. If answer is two, tree or four go to question 20]

Single response only		Total Asked: 214	
1	Never	37	17%
2	2	126	59%
3	3	42	20%
4	Frequently	3	1%
5	Don't know	6	3%
Non-zero respondents	208		
Mean (non-zero respondents)	2.05		

Q.20. Where behaviour is deterred that is not anti-competitive, what types of infringement are firms most often concerned that their behaviour will be seen as? *[Unprompted. Multi-code]*

[Interviewer note: If necessary, pick at random one of the codes below (1-8) as an example. Please choose different example for different interviews]

Multiple responses allowed:		Total Asked: 205	
1	Cartel, including resale price maintenance and the exchange of commercially sensitive information	59	29%
2	Rebates/discounts	42	20%
3	Predatory pricing	36	18%
4	Single branding/exclusivity	33	16%
5	Discrimination	26	13%
6	Tying and bundling	19	9%
7	Refusal to supply	18	9%
8	Excessive Pricing	14	7%
9	Abuse of dominance/market power/ chapter II (unspec)	11	5%
10	Joint ventures/collaborations/business partnering	6	3%
11	Horizontal practices/agreements	5	2%
12	Forcing out of market/market foreclosure	4	2%
13	Breach of chapter II/prohibition on restrictive agreements/anti competitive agreements	4	2%
14	Territorial pricing/restriction	3	1%
15	Vertical Relationship	3	1%
16	Market sharing	2	1%
17	Other	16	8%
18	Don't know/None	15	7%

Improving deterrence

Q.21. Do you have any suggestions for what could be done to improve the deterrence of competition law infringements in the UK? *[Open ended]*

Multiple responses allowed:		Number of mentions
1	Encourage private damages actions	35
2	More criminal prosecutions for cartels	33
3	Increased publicity and education	29
4	Faster decision taking	27
5	More decisions/greater enforcement activity by OFT	19
6	Larger fines	17
7	More resources and/or better trained staff at OFT	16
8	Greater use of director disqualification	11
9	Greater clarity in the law	10
10	More opportunity for companies to obtain guidance from OFT on potential infringements and proposed mergers	10
11	More robust OFT decisions	9
12	Improved incentives for whistle-blowers through leniency programme	6
13	Focus on cases with major market impact	5
14	Greater investigative powers	2
15	More judges in the High Court with competition experience	1
16	Fines on individuals	1
17	Greater involvement for consumer bodies in OFT decisions	1
18	CAT more supportive of OFT decisions	1
19	Enable companies to bring claims directly before the CAT	1
20	European system of allocation of jurisdiction in multi-state competition law cases	1
21	Monitoring of unusual price movements	1

[Thank and close]

That is all the questions that I have. Thank you very much for your time and co-operation. This interview has been conducted in accordance with the Market Research Society's code of conduct and as such all the information you have given will be kept confidential.

B SURVEY OF UK COMPANIES

Overview

B.1 The survey of 202 companies was designed by Deloitte in consultation with the OFT and carried out by the research agency, ORC International. The survey was conducted by means of telephone interviews between 27 February and 30 March 2007. This annexe presents the full text of the survey as well as tables summarising the final results for each question.

Full text questionnaire and final results

Hello, my name is _____ from ORC International. I am calling regarding the OFT research project on the deterrent effect of UK competition enforcement. You should have received a letter about this project which Deloitte is undertaking on behalf of the Office of Fair Trading. We would like to ask you a number of questions about the deterrent effect of UK competition enforcement. The interview will take about 15 to 20 minutes.

Is now a good time to go ahead with the interview? *[If no, schedule another call at a more convenient time. If named sample is unwilling to participate of considers themself unsuitable, ask:]* Is there someone else in the company, with responsibility for compliance with competition law, who would be available for interview? *[If yes, take details and ask to be referred]*

Any information you provide, or views you express, will not be attributable to you by name or firm. Only grouped responses will be seen by the OFT and presented in the report prepared from this survey, which should be published later this year.

Section One: Mergers

We would like to start with some questions about proposed mergers.

Scale of deterrence

Q1. In the last three years, roughly how many proposed mergers has your company considered that qualified, or you believe would have qualified, for investigation under the UK merger control regime?

[If the answer to question 1 is 'none', go to section two (Competition Law), others to question 2]

Base for statistics: 192		Total Asked: 202	
Sum	130	Standard Error	0.19
Minimum Value	0	Non-zero-respondents	38
Maximum Value	25		
Mean	0.68		
Mean (non-zero respondents)	3.42		
Median	0		

Q2. How many of those proposed mergers were abandoned on competition grounds before the OFT became aware of them?

Base for statistics: 38		Total Asked: 38	
Sum	11	Standard Error	0.11
Minimum Value	0	Non-zero-respondents	7
Maximum Value	2		
Mean	0.29		
Mean (non-zero respondents)	1.57		
Median	0		

Q3. How many of those proposed mergers were modified on competition grounds before the OFT became aware of them, and were not subsequently modified or blocked?

Base for statistics: 38		Total Asked: 38	
Sum	5	Standard Error	0.06
Minimum Value	0	Non-zero-respondents	5
Maximum Value	1		
Mean	0.13		
Mean (non-zero respondents)	1.00		
Median	0		

[Interviewer Note: 'Subsequently modified or blocked' means that they were modified or blocked on competition grounds after being investigated by the OFT or CC]

Q4. In how many cases was the decision to abandon or modify the proposed merger taken following external legal advice on the prospects of UK competition clearance? *[Ensure that this number is less than the sum of the answers to questions 2 and 3]*

[Interviewer Note: 'External legal advice' means advice provided by a law firm and not an employee of the company]

Base for statistics: 38		Total Asked: 38	
Sum	4	Standard Error	0.06
Minimum Value	0	Non-zero-respondents	3
Maximum Value	2		
Mean	0.11		
Mean (non-zero respondents)	1.33		
Median	0		

Q5. How many of those proposed mergers led to a finding of SLC [substantial lessening of competition] by the Competition Commission or undertakings in lieu of a reference?

Base for statistics: 38		Total Asked: 38	
Sum	6	Standard Error	0.07
Minimum Value	0	Non-zero-respondents	5
Maximum Value	2		
Mean	0.16		
Mean (non-zero respondents)	1.20		
Median	0		

Mergers deterred which are not anti-competitive ('business chilling')

Q6. On a scale of 1 to 4, where 1 is 'never' and 4 is 'frequently', how often do you think that the UK competition regime deters mergers that would not be anti-competitive?

Base for statistics: 38		Total Asked: 38	
1	Never	11	29%
2	2	18	47%
3	3	8	21%
4	Frequently	0	0%
5	Don't know	1	3%
Non-zero respondents	37		
Mean (non-zero respondents)	1.92		

Section Two: Competition Law

We would now like to ask a number of questions about the effect of the enforcement of competition law by the OFT.

Scale of deterrence

Cartels

First, we would like to ask about arrangements that may have been considered cartels, including resale price maintenance and the exchange of commercially sensitive information...

Q7. Since March 2000, in how many instances has your company abandoned or significantly modified arrangements, or proposed arrangements, with other firms because of the risk of OFT investigation? Please include only arrangements of which the OFT would not have been aware.

[If the answer to question 7 is zero, go to question 9, other to question 8]

Base for statistics: 199		Total Asked: 202	
Sum	126	Standard Error	0.25
Minimum Value	0	Non-zero-respondents	20
Maximum Value	30		
Mean	0.63		
Mean (non-zero respondents)	6.30		
Median	0		

Q8. In how many of those instances did your company take external legal advice?

Base for statistics: 20		Total Asked: 20	
Sum	77	Standard Error	1.48
Minimum Value	0	Non-zero-respondents	17
Maximum Value	30		
Mean	3.85		
Mean (non-zero respondents)	4.53		
Median	2		

Commercial agreements

Turning now to commercial agreements other than cartels...

Q9. Since March 2000, in how many instances has your company abandoned or significantly modified an existing or proposed commercial agreement primarily because of the risk of OFT investigation? Please include only agreements of which the OFT is not aware.

[Interviewer instruction if necessary: This refers to both horizontal and vertical cases]

[If the answer to question 9 is zero, go to question 11, other to question 10]

Base for statistics: 197		Total Asked: 202	
Sum	144	Standard Error	0.33
Minimum Value	0	Non-zero-respondents	21
Maximum Value	60		
Mean	0.73		
Mean (non-zero respondents)	6.86		
Median	0		

Q10. In how many of those instances did your company take external legal advice?

[Interviewer Note: 'External legal advice' means advice provided by a law firm and not an employee of the company]

Base for statistics: 20		Total Asked: 21	
Sum	55	Standard Error	0.74
Minimum Value	0	Non-zero-respondents	17
Maximum Value	15		
Mean	2.75		
Mean (non-zero respondents)	3.24		
Median	2		

Abuses

Turning now to potential abuses of dominance...

Q.11 Since March 2000, in how many instances has your company abandoned or significantly modified a commercial initiative that may have been considered an abuse of dominance because of the risk of OFT investigation? Please include only potential abuses of which the OFT is not aware.

[If the answer to question 11 is zero, go to question 14, other to question 12]

[If necessary prompt with: A commercial initiative is any change in commercial strategy that could potentially be caught by the abuse of dominance provisions, for example a new pricing or discount structure, a change in distribution agreements or new terms and conditions of supply]

Base for statistics: 199		Total Asked: 202	
Sum	19	Standard Error	0.03
Minimum Value	0	Non-zero-respondents	11
Maximum Value	5		
Mean	0.10		
Mean (non-zero respondents)	1.73		
Median	0		

Q12. In how many of those instances did your company take external legal advice?

Base for statistics: 11		Total Asked: 202	
Sum	18	Standard Error	0.41
Minimum Value	0	Non-zero-respondents	10
Maximum Value	5		
Mean	1.64		
Mean (non-zero respondents)	1.80		
Median	1		

Q13. On a scale of 1 to 4, where 1 is never and 4 is frequently, how common is it for your company to abandon or significantly modify a commercial initiative on the grounds that under the provisions on abuse of dominance it may be considered *[Rotate start]*:

a) Predatory pricing?

Single response only:		Total Asked: 11	
1	Never	7	64%
2	2	2	18%
3	3	2	18%
4	Frequently	-	-
5	Don't know	-	-
Non-zero respondents	11		
Mean (non-zero respondents)	1.55		

b) An illegal rebate or discount structure?

Single response only:		Total Asked: 11	
1	Never	7	64%
2	2	4	36%
3	3	-	-
4	Frequently	-	-
5	Don't know	-	-
Non-zero respondents	11		
Mean (non-zero respondents)	1.36		

c) Single branding or exclusivity?

Single response only:		Total Asked: 11	
1	Never	7	64%
2	2	3	27%
3	3	1	9%
4	Frequently	-	-
5	Don't know	-	-
Non-zero respondents	11		
Mean (non-zero respondents)	1.45		

d) Tying and bundling?

Single response only:		Total Asked: 11	
1	Never	8	73%
2	2	2	18%
3	3	1	9%
4	Frequently	-	-
5	Don't know	-	-
Non-zero respondents	11		
Mean (non-zero respondents)	1.36		

e) Refusal to supply?

Single response only:		Total Asked: 11	
1	Never	7	64%
2	2	2	18%
3	3	1	9%
4	Frequently	1	9%
5	Don't know	-	-
Non-zero respondents	11		
Mean (non-zero respondents)	1.64		

f) Discrimination?

Single response only:		Total Asked: 11	
1	Never	6	55%
2	2	3	27%
3	3	-	-
4	Frequently	1	9%
5	Don't know	1	9%
Non-zero respondents	11		
Mean (non-zero respondents)	1.60		

g) Excessive pricing?

Single response only:		Total Asked: 11	
1	Never	9	82%
2	2	2	18%
3	3	-	-
4	Frequently	-	-
5	Don't know	-	-
Non-zero respondents	11		
Mean (non-zero respondents)	1.18		

Effectiveness of regime and precedent

Q.14 On a scale of 1 to 4 where 1 is 'strongly disagree', and 4 is 'strongly agree'; to what extent do you agree with the following statements.

[Interviewer note if necessary: 2 means 'disagree' and 3 means 'agree']

a) The UK competition regime is effective in deterring cartels?

Single response only		Total Asked: 202	
1	1- Strongly disagree	8	4%
2	2	43	21%
3	3	103	51%
4	4 – Strongly agree	29	14%
5	Don't know	13	6%
6	No view	6	3%
Non-zero respondents	183		
Mean (non-zero respondents)	2.84		

Results by company size:

Number of employees		200-499		500-999		1,000 +		Total	
1	1- Strongly disagree	1	3%	6	9%	1	1%	8	4%
2	2	14	40%	6	9%	23	23%	43	21%
3	3	12	34%	39	59%	52	51%	103	51%
4	4 – Strongly agree	2	6%	6	9%	21	21%	29	14%
5	Don't know	4	11%	5	8%	4	4%	13	6%
6	No view	2	6%	4	6%	-	-	6	3%
7	Total	35		66		101		183	

b) The UK competition regime is effective in deterring other forms of anti-competitive agreement?

Single response only		Total Asked: 202	
1	1- Strongly disagree	8	4%
2	2	66	33%
3	3	88	44%
4	4 – Strongly agree	23	11%
5	Don't know	12	6%
6	No view	5	2%
Non-zero respondents	185		
Mean (non-zero respondents)	2.68		

Results by company size:

Number of employees		200-499		500-999		1,000 +		Total	
1	1- Strongly disagree	2	6%	3	5%	3	3%	8	4%
2	2	11	31%	18	27%	37	37%	66	33%
3	3	13	37%	33	50%	42	42%	88	44%
4	4 – Strongly agree	2	6%	6	9%	15	15%	23	11%
5	Don't know	5	14%	3	5%	4	4%	12	6%
6	No view	2	6%	3	5%	-	-	5	2%
7	Total	35		66		101		202	

c) The UK competition regime is effective in deterring abuses of dominance?

Single response only		Total Asked: 202	
1	1- Strongly disagree	8	4%
2	2	80	40%
3	3	84	42%
4	4 – Strongly agree	16	8%
5	Don't know	9	4%
6	No view	5	2%
Non-zero respondents	188		
Mean (non-zero respondents)	2.57		

Results by company size:

Number of employees		200-499		500-999		1,000 +		Total	
1	1- Strongly disagree	4	11%	3	5%	1	1%	8	4%
2	2	15	43%	22	33%	43	43%	80	40%
3	3	10	29%	29	44%	45	45%	84	42%
4	4 – Strongly agree	1	3%	6	9%	9	9%	16	8%
5	Don't know	3	9%	4	6%	2	2%	9	4%
6	No view	2	6%	2	3%	1	1%	5	2%
7	Total	35		66		101		202	

d) The UK merger control regime has a significant effect on my company's mergers and acquisitions activity?

Single response only		Total Asked: 202	
1	1- Strongly disagree	83	41%
2	2	44	22%
3	3	29	14%
4	4 – Strongly agree	19	9%
5	Don't know	10	5%
6	No view	17	8%
Non-zero respondents	175		
Mean (non-zero respondents)	1.91		

Results by company size:

Number of employees		200-499		500-999		1,000 +		Total	
1	1- Strongly disagree	25	71%	26	39%	32	32%	83	41%
2	2	4	11%	16	24%	24	24%	44	22%
3	3	-	-	6	9%	23	23%	29	14%
4	4 – Strongly agree	1	3%	6	9%	12	12%	19	9%
5	Don't know	3	9%	4	6%	3	3%	10	5%
6	No view	2	6%	8	12%	7	7%	17	8%
7	Total	35		66		101		202	

e) The risk of OFT action against anti-competitive agreements is a significant factor motivating my company to comply with competition law?

Single response only		Total Asked: 202	
1	1- Strongly disagree	44	22%
2	2	27	13%
3	3	62	31%
4	4 – Strongly agree	50	25%
5	Don't know	3	1%
6	No view	16	8%
Non-zero respondents	183		
Mean (non-zero respondents)	2.64		

Results by company size:

Number of employees		200-499		500-999		1,000 +		Total	
1	1- Strongly disagree	14	40%	15	23%	15	15%	44	22%
2	2	4	11%	13	20%	10	10%	27	13%
3	3	10	29%	18	27%	34	34%	62	31%
4	4 – Strongly agree	4	11%	11	17%	35	35%	50	25%
5	Don't know	-	-	1	2%	2	2%	3	1%
6	No view	3	9%	8	12%	5	5%	16	8%
7	Total	35		66		101		202	

f) The risk of OFT action against abuses of dominance is a significant factor in motivating my company to comply with competition law?

Single response only		Total Asked: 202	
1	1- Strongly disagree	39	19%
2	2	30	15%
3	3	55	27%
4	4 – Strongly agree	54	27%
5	Don't know	6	3%
6	No view	18	9%
Non-zero respondents	178		
Mean (non-zero respondents)	2.70		

Results by company size:

Number of employees		200-499		500-999		1,000 +		Total	
1	1- Strongly disagree	15	43%	11	17%	13	13%	39	19%
2	2	5	14%	12	18%	13	13%	30	15%
3	3	8	23%	19	29%	28	28%	55	27%
4	4 – Strongly agree	5	14%	11	17%	38	38%	54	27%
5	Don't know	-	-	3	5%	3	3%	6	3%
6	No view	2	6%	10	15%	6	6%	18	9%
7	Total	35		66		101		202	

Factors which create deterrence

Q15. On a scale of 1 to 4 where 1 is not at all important and 4 is very important, how important do you consider the following in deterring infringements? *[Rotate start]*

a) Disqualification of directors?

Single response only		Total Asked: 202	
1	1- Not at all important	5	2%
2	2	25	12%
3	3	59	29%
4	4 – Very important	112	55%
5	Don't know	1	*%
Non-zero respondents	201		
Mean (non-zero respondents)	3.38		

Results by company size:

Number of employees		200-499		500-999		1,000 +		Total	
1	1- Not at all important	-	-	2	3%	3	3%	5	2%
2	2	8	23%	3	5%	14	14%	25	12%
3	3	4	11%	28	42%	27	27%	59	29%
4	4 – Very important	23	66%	33	50%	56	55%	112	55%
5	Don't know	-	-	-	-	1	1%	1	*%
7	Total	35		66		101		202	

b) Private damage actions?

Single response only		Total Asked: 202	
1	1- Not at all important	16	8%
2	2	44	22%
3	3	73	36%
4	4 – Very important	62	31%
5	Don't know	7	3%
Non-zero respondents	195		
Mean (non-zero respondents)	2.93		

Results by company size:

Number of employees		200-499		500-999		1,000 +		Total	
1	1- Not at all important	4	11%	7	11%	5	5%	16	8%
2	2	6	17%	13	20%	25	25%	44	22%
3	3	8	23%	26	39%	39	39%	73	36%
4	4 – Very important	15	43%	19	29%	28	28%	62	31%
5	Don't know	2	6%	1	2%	4	4%	7	3%
7	Total	35		66		101		202	

c) Fines?

Single response only		Total Asked: 202	
1	1- Not at all important	10	5%
2	2	28	14%
3	3	87	43%
4	4 – Very important	74	37%
5	Don't know	3	1%
Non-zero respondents	199		
Mean (non-zero respondents)	3.13		

Results by company size:

Number of employees		200-499		500-999		1,000 +		Total	
1	1- Not at all important	3	9%	4	6%	3	3%	10	5%
2	2	5	14%	13	20%	10	10%	28	14%
3	3	10	29%	33	50%	44	44%	87	43%
4	4 – Very important	15	43%	16	24%	43	43%	74	37%
5	Don't know	2	6%	-	-	1	1%	3	1%
7	Total	35		66		101		202	

d) Adverse publicity?

Single response only		Total Asked: 202	
1	1- Not at all important	6	3%
2	2	36	18%
3	3	59	29%
4	4 – Very important	98	49%
5	Don't know	3	1%
Non-zero respondents	199		
Mean (non-zero respondents)	3.25		

Results by company size:

Number of employees		200-499		500-999		1,000 +		Total	
1	1- Not at all important	2	6%	1	2%	3	3%	6	3%
2	2	8	23%	12	18%	16	16%	36	18%
3	3	9	26%	21	32%	29	29%	59	29%
4	4 – Very important	16	46%	31	47%	51	50%	98	49%
5	Don't know	-	-	1	2%	2	2%	3	1%
7	Total	35		66		101		202	

e) Criminal penalties for cartels?

Single response only		Total Asked: 202	
1	1- Not at all important	6	3%
2	2	15	7%
3	3	47	23%
4	4 – Very important	127	63%
5	Don't know	7	3%
Non-zero respondents	195		
Mean (non-zero respondents)	3.51		

Results by company size:

Number of employees		200-499		500-999		1,000 +		Total	
1	1- Not at all important	2	6%	1	2%	3	3%	6	3%
2	2	4	11%	4	6%	7	7%	15	7%
3	3	6	17%	16	24%	25	25%	47	23%
4	4 – Very important	21	60%	42	64%	64	63%	127	63%
5	Don't know	2	6%	3	5%	2	2%	7	3%
7	Total	35		66		101			

Private damages actions

Q.16 Do you think your company has ever been harmed by breach of competition law by someone else?

[If yes go to question 17, others to question 19]

Single response only		Total Asked: 202	
1	Yes	45	22%
2	No	149	74%
3	Don't know	8	4%
Non-zero respondents	194		
Mean (non-zero respondents)	1.77		

Results by company size:

Number of employees		200-499		500-999		1,000 +		Total	
1	Yes	6	17%	9	14%	30	30%	45	22%
2	No	29	83%	56	85%	64	63%	149	74%
3	Don't know	-	-	1	2%	7	7%	8	4%
4	Total	35		66		101		202	

Q.17 Did your company ever consider bringing private action?

[If answer to question 17 is 3 (yes brought an action) go to question 19, other to question 18]

Single response only		Total Asked: 45	
1	No	25	56%
2	Yes, but the company decided against bringing a private action	14	31%
3	Yes, and the company brought a private action	5	11%
4	Don't know	1	2%
Non-zero respondents	44		
Mean (non-zero respondents)	1.55		

Q.18 Why did your company not bring a private action*? [Open ended]*

Multiple responses allowed:		Total Asked: 39/ Total responses: 68	
1	Expected costs outweighed the benefits	17	25%
2	Time	7	10%
3	Insufficient evidence/burden of proof	9	13%
4	Counter-party much larger/could afford better lawyers	8	12%
5	Damage to commercial relationship with supplier	4	6%
6	Lack of clarity in the law	2	3%
7	Had told OFT who didn't pursue case	2	3%
8	No OFT decision to piggy back on	2	3%
9	Unsure of result	8	12%
10	Other	9	13%

Individual decisions

Q.19 Are there any individual OFT decisions which have had an effect on your company's commercial behaviour? *[If yes, take names of decisions]*

Multiple responses allowed:		Total Asked: 202	
1	Hasbro UK Ltd / Argos Ltd / Littlewoods Ltd	3	1.5%
2	Construction	2	1%
3	Arriva plc and FirstGroup plc	1	0.5%
4	BetterCare	1	0.5%
5	Schools	1	0.5%
6	Non-CA98 decisions	25	12%
7	Don't know	12	6%
8	None	157	78%

Behaviour deterred which is not anti-competitive ('business chilling')

Q.20 On a scale of 1 to 4, where 1 is never and 4 is frequently, how often has the UK competition regime deterred initiatives by your company even though in your view they would not have been anti-competitive?

[If answer to question 20 is one, go to question 22. Other to question 21]

Single response only:		Total Asked: 202	
1	Never	142	70%
2	2	38	19%
3	3	13	6%
4	Frequently	4	2%
5	Don't know	5	2%
Non-zero respondents	197		
Mean (non-zero respondents)	1.39		

Q.21 What types of infringement was your company concerned its behaviour might be seen as?

[Interviewer note: If necessary, pick at random one of the codes below (1-8) as an example, please choose a different example for different interviews]

Multiple responses allowed:		Total Asked: 60	
1	Cartel, including resale price maintenance and the exchange of commercially sensitive information	21	35%
2	Abuse of dominance/market power/ chapter II (unspec.)	9	15%
3	Single branding/exclusivity	6	10%
4	Predatory pricing	3	5%
5	Market sharing	3	5%
6	Rebates/discounts	2	3%
7	Refusal to supply	2	3%
8	Discrimination	2	3%
9	Excessive Pricing	2	3%
10	Forcing out of market/market foreclosure	2	3%
11	Tying and bundling	1	2%
12	Joint ventures/collaborations/business partnering	1	2%
13	Other	2	3%
14	Don't know/None	10	17%

Results by company size:

Number of employees		200-499		500-999		1,000 +		Total	
1	Cartel, including resale price maintenance and the exchange of commercially sensitive information	4	57%	6	50%	11	27%	21	35%
2	Abuse of dominance/market power/ chapter II (unspec.)	-	-	1	8%	8	20%	9	15%
3	Single branding/exclusivity	-	-	2	17%	4	10%	6	10%
4	Predatory pricing	-	-	1	8%	2	5%	3	5%
5	Market sharing	1	14%	-	-	2	5%	3	5%
6	Rebates/discounts	1	14%	-	-	1	2%	2	3%
7	Refusal to supply	-	-	1	8%	1	2%	2	3%
8	Discrimination	-	-	-	-	2	5%	2	3%
9	Excessive Pricing	-	-	-	-	2	5%	2	3%
10	Forcing out of market/market foreclosure	-	-	-	-	2	5%	2	3%
11	Total	7		12		41		60	

Compliance programmes

We now have a question about compliance programmes.

Q22. In the last year, has your company: *[Multi-code]*

a) Had a policy manual or code of conduct relating to competition law?

Single response only		Total Asked: 202	
1	Yes	69	34%
2	No	124	61%
3	Don't know	9	4%
Non-zero respondents	193		
Mean (non-zero respondents)	1.64		

Results by company size:

Number of employees		200-499		500-999		1,000 +		Total	
1	Yes	4	11%	20	30%	45	45%	69	34%
2	No	31	89%	43	65%	50	50%	124	61%
3	Don't know	-	-	3	5%	6	6%	9	4%
4	Total	35		66		101		202	

b) Run seminars on competition law?

Single response only		Total Asked: 202	
1	Yes	53	26%
2	No	145	72%
3	Don't know	4	2%
Non-zero respondents	198		
Mean (non-zero respondents)	1.73		

Results by company size:

Number of employees		200-499		500-999		1,000 +		Total	
1	Yes	2	6%	13	20%	38	38%	53	26%
2	No	33	94%	51	77%	61	60%	145	72%
3	Don't know	-	-	2	3%	2	2%	4	2%
4	Total	35		66		101		202	

c) Required employees to take an online training programme?

Single response only		Total Asked: 202	
1	Yes	18	9%
2	No	178	88%
3	Don't know	6	3%
Non-zero respondents	196		
Mean (non-zero respondents)	1.91		

Results by company size:

Number of employees		200-499		500-999		1,000 +		Total	
1	Yes	1	3%	5	8%	12	12%	18	9%
2	No	34	97%	59	89%	85	84%	178	88%
3	Don't know	-	-	2	3%	4	4%	6	3%
4	Total	35		66		101		202	

d) Employed a dedicated competition compliance officer?

Single response only		Total Asked: 202	
1	Yes	40	20%
2	No	158	78%
3	Don't know	4	2%
Non-zero respondents	198		
Mean (non-zero respondents)	1.80		

Results by company size:

Number of employees		200-499		500-999		1,000 +		Total	
1	Yes	1	3%	15	23%	24	24%	40	20%
2	No	34	97%	49	74%	75	74%	158	78%
3	Don't know	-	-	2	3%	2	2%	4	2%
4	Total	35		66		101		202	

e) Taken external legal advice on competition law matters?

Single response only		Total Asked: 202	
1	Yes	80	40%
2	No	115	57%
3	Don't know	7	3%
Non-zero respondents	195		
Mean (non-zero respondents)	1.59		

Results by company size:

Number of employees		200-499		500-999		1,000 +		Total	
1	Yes	5	14%	18	27%	57	56%	80	40%
2	No	30	86%	45	68%	40	40%	115	57%
3	Don't know	-	-	3	5%	4	4%	7	3%
4	Total	35		66		101		202	

f) Taken economic advice on competition law matters?

Single response only		Total Asked: 202	
1	Yes	32	16%
2	No	161	80%
3	Don't know	9	4%
Non-zero respondents	193		
Mean (non-zero respondents)	1.83		

Results by company size:

Number of employees		200-499		500-999		1,000 +		Total	
1	Yes	1	3%	5	8%	26	26%	32	16%
2	No	34	97%	57	86%	70	69%	161	80%
3	Don't know	-	-	4	6%	5	5%	9	4%
4	Total	35		66		101		202	

Q.23 What other steps has your company taken in the last year to ensure competition compliance?

Multiple responses allowed		Total Asked: 202	
1	Regulated under the FSA/complying with FSA	3	1%
2	On line training/developing online training	3	1%
3	Improvement to the intranet/clear cut policies on the intranet	3	1%
4	Auditing/compliance audit	3	1%
5	Use common sense	2	1%
6	Look more closely at contracts	2	1%
7	New business committee	1	*%
8	Guidance notes	1	*%
9	Work closely with the OFT and trading standards	1	*%
10	Network of compliance officers throughout the UK	1	*%
11	None	123	61%
12	Other	3	1%
13	Don't know	7	3%

Improving deterrence

Q.24 Do you have any suggestions for what could be done to improve the deterrence of competition law infringements in the UK? *[Open-ended]*

Multiple responses allowed:		Number of mentions
1	Increased publicity and education	21
2	Larger fines/tougher penalties	14
3	More decisions/greater enforcement activity by OFT	14
4	Faster decision taking	10
5	Greater clarity in the law	8
6	More resources and/or better trained staff at OFT	7
7	Tackle buyer power of retailers	6
8	Improved incentives for whistle-blowers through leniency programme	3
9	Encourage private damages actions	3
10	More criminal prosecutions for cartels	3
11	Improved alignment in application of UK and EC law	3
12	Narrow scope of jurisdictional test of mergers	2
13	Focus on cases with major market impact	2
14	More detailed examination of complaints	2
15	Greater use of director disqualification	1
16	Breaking up infringing companies	1
17	Replace OFT and CC with minister for competition	1

[Thank and close]

That is all the questions that I have. Thank you very much for your time and co-operation. This interview has been conducted in accordance with the Market Research Society's code of conduct and as such all the information you have given will be kept confidential.

C COMPETITION ACT DECISIONS OF THE OFT

Overview

C.1 The tables in this Annexe show the CA98 decisions published by the OFT since the Act came into force at the time of the research. They are divided into three categories: cartels, commercial agreements and abuses

C.2 The tables include decisions which were struck down, in part or in whole, by the Competition Appeal Tribunal (CAT) and also which have been withdrawn by the OFT.

C.3 Where a decision replaces an earlier decision on the same matter (for example, *Aberdeen Journals*) this is counted as a single decision.

C.4. The two decisions where a written agreement was found to be neither a breach of Chapter I nor Chapter II are included as non-infringement decisions for both commercial agreements and abuses categories.

Cartels

Infringement	
1	Market sharing by Arriva plc and FirstGroup plc
2	John Bruce (UK) Ltd, Fleet Parts Ltd and Truck and Trailer Components
3	Hasbro UK Ltd
4	Northern Ireland Livestock and Auctioneer's Association
5	Lladró Comercial SA
6	Replica Football Kit
7	Hasbro UK Ltd, Argos Ltd and Littlewoods Ltd
8	Collusive tendering for flat-roofing contracts in the West Midlands
9	UOP Limited / UKae Limited / Thermoseal Supplies Ltd / Double Quick
10	Collusive tendering for felt and single ply roofing contracts in the North East of England
11	Collusive tendering for mastic asphalt flat-roofing contracts in Scotland
12	Collusive tendering for felt and single ply roofing contracts in Western-Central Scotland
13	Collusive tendering for flat roof and car park surfacing contracts in England and Scotland
14	Stock Check Pads
15	Aluminium Spacer Bars
16	Schools

Non-Infringement

1	Elite Greenhouses Ltd
2	Anaesthetists' Group '

Commercial Agreements

Infringement

1	MasterCard UK Members Forum Limited
2	Attheraces

Non-infringement

1	General Insurance Standards Council
2	LINK Interchange Network Ltd
3	Notification by the Film Distributor's Association (Formerly the Society of Film Distributors)
4	Lucite International UK Ltd
5	Pool Reinsurance Company Limited
6	Association of British Insurers' General Terms of Agreement
7	DSG Retail Ltd ('Dixons') / Compaq Computer Ltd/ Packard Bell NEC Ltd
8	Memorandum of Understanding on the Supply of Oil Fuels

Abuses

Infringement

1	Napp Pharmaceuticals
2	Aberdeen Journals Ltd
3	Genzyme Ltd

Non-infringement

1	Consignia and Postal Preference Service
2	ICL / Synstar
3	Companies House
4	ABITA and British Airways plc
5	Re-investigation of BSkyB decision dated 17 December 2002: rejection of applications under section 47 of the Competition Act by ITV Digital in Liquidation and NTL
6	E.I. du Pont de Nemours & Co. and Op. Graphics (Holography) Ltd
7	Re-investigation of BetterCare Group Ltd / North & West Belfast Health & Social Services Trust
8	First Edinburgh / Lothian
9	Re-investigation of refusal to supply JJ Burgess & Sons Limited with access to Harwood Park Crematorium
10	TM Property Services Ltd / MacDonald Dettwiler (Hub) Ltd / MacDonald Dettwiler (Channel)
11	DSG Retail Ltd ('Dixons') / Compaq Computer Ltd/ Packard Bell NEC Ltd
12	Memorandum of Understanding on the Supply of Oil Fuels
13	Associated Newspapers Ltd
14	London Metal Exchange