

# The Handbook of Competition Enforcement Agencies

---

# 2011

A Global Competition Review special report  
published in association with:

Edwards Angell Palmer & Dodge UK LLP

**GCR**  
GLOBAL COMPETITION REVIEW

## Overview

**Becket McGrath and Jo Love**

Edwards Angell Palmer & Dodge UK LLP

### The UK enforcement agencies

The enforcement of UK competition law is primarily entrusted to two bodies: the Office of Fair Trading (OFT) and the Competition Commission (CC). The OFT currently enforces both competition law (specifically, the prohibition of anti-competitive agreements and abuse of dominance under the Competition Act 1998 (CA98) and articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU) (previously articles 81 and 82 EC Treaty, respectively)) and consumer protection law. It also decides whether to refer mergers to the CC for a more in-depth investigation, and potentially prohibition, and whether to refer entire markets to the CC for detailed review (known as a market investigation reference) under the Enterprise Act 2002 (EA02). The EA02 also introduced a specific criminal offence of cartel involvement, which is enforced by the OFT and Serious Fraud Office (SFO). The OFT's general competition enforcement and its market reference powers (but not its criminal cartel powers) can also be exercised, in their respective sectors, by the specialist sectoral regulators.

The CC undertakes in-depth investigations of mergers and markets referred to it by the OFT, as well as regulatory reference reviews of certain contested decisions by sectoral regulators, such as pricing determinations.

Certain decisions of the OFT, CC and sectoral regulators can be appealed to the Competition Appeal Tribunal (CAT), an independent, specialist judicial body. The CAT can conduct a full merits review of general competition law decisions, and may review merger control and market reference decisions on judicial review grounds. Decisions of the CAT are reviewable by the Court of Appeal or, for Scottish cases, the Court of Session.

### Recent developments

The OFT's high-profile criminal prosecution of four past and present employees of British Airways (BA) (including a senior board director) for alleged participation in an unlawful arrangement to fix fuel surcharges on transatlantic routes went to trial in April 2010. Unfortunately for the OFT, the

case collapsed shortly afterwards. According to an internal OFT board review, a substantial volume of electronic communications was discovered immediately before cross-examination of a key witness from Virgin Atlantic (which benefited from immunity, as the whistleblower). Since this correspondence had not previously been reviewed by the OFT, or made available to the defendants before the trial, its disclosure at this late stage indicated a 'critical gap' in the evidence on which the OFT's case was based. In the circumstances, the OFT decided that it would be potentially unfair to continue with the trial and offered no evidence. As a result, the defendants were acquitted.

Since the BA case was the first time that a prosecution for the criminal cartel offence had come to trial in the United Kingdom, its collapse was a significant blow to the OFT's criminal enforcement efforts. The OFT is clearly pressing on with criminal cases, however, as evidenced by its confirmation in September 2010 that it had conducted on-site inspections of the UK premises of a number of commercial vehicle manufacturers, to support ongoing criminal and civil investigations into suspected cartel activity in that sector. The following month, the SFO announced that it had dropped its criminal investigation into two sporting goods retailers, JJB Sports and Sports Direct, for suspected fraud and cartel activity. Its EA02 investigation of relevant individuals continues, however, as does the related OFT CA98 investigation into allegations of anti-competitive practices in the same market. According to the OFT website, criminal cartel investigations into the automotive and agricultural sectors are also ongoing at the time of writing.

In the field of civil enforcement, 2010 saw the OFT again breaking its own records on the level of fines for competition infringements by imposing fines totalling £225 million on two tobacco manufacturers and 10 retailers for engaging in practices that reduced price competition for the sale of tobacco products in the United Kingdom. Specifically, the OFT objected to provisions in the vertical agreements between each tobacco manufacturer and each retailer that had the overall

effect of leading to price alignment between the two manufacturer's products. Despite the rather novel nature of the OFT's approach, which did not seek to show horizontal price coordination between the manufacturers, one manufacturer and five retailers reached early resolution agreements with the OFT, under which they admitted to infringements in return for reduced fines. Perhaps unsurprisingly, those addressees of the decision that did not enter into such agreements subsequently appealed the infringement decision to the CAT.

The OFT also reached its first early resolution agreement in an abuse of dominance case in 2010, with pharmaceutical company Reckitt Benckiser agreeing that its strategic withdrawals of prescription medicines infringed the CA98's chapter II prohibition and article 102 TFEU. It agreed to pay a penalty of £10 million for this infringement (reduced from £12 million). This represents the OFT's highest abuse of dominance fine to date. (The United Kingdom's highest abuse of dominance fine remains that imposed by Ofgem on National Grid in 2008, although this was reduced substantially by the Court of Appeal in February 2010, from the original £41.6 million to £15 million.)

On 20 January 2011, the OFT announced its final infringement decision concerning anti-competitive practices between the Royal Bank of Scotland (RBS) and Barclays in relation to the pricing of loan products to large professional services firms, for which it imposed a fine of £28.59 million on RBS (Barclays having successfully applied for leniency). Since that decision follows a previous 'early resolution agreement' with the parties, neither has appealed it to the CAT.

The OFT has closed a number of other cases since last year's edition without reaching infringement findings. Notably, in November 2010 it announced that it had closed its wide-ranging inquiry into price collusion in the groceries sector on administrative priorities grounds. In January 2011, it announced that it was minded to accept binding commitments from motor insurers to end potentially anti-competitive information-sharing arrangements. This is the first time since 2006 that it has used this procedure. Civil investigations into suspected anti-competitive behaviour in online hotel booking, air travel between the UK and Hong Kong and e-book publishing are ongoing at the time of writing. Although the OFT announced in April that it had reduced the scope of its dairy

products inquiry, that long-running case remains ongoing against one supermarket that is contesting the OFT's allegations. The OFT has also yet to issue its civil infringement decision in the BA/Virgin Atlantic investigation, notwithstanding the 2007 early resolution agreement in that case. Ominously for the OFT, the last word on this front was BA's statement in May 2010 that it was 'considering the implications' of the outcome of the BA four criminal trial for that settlement.

On the merger control front, while the number of mergers considered by the OFT during 2010 was slightly up from 2009 (69 compared with 65 in 2009), referrals to the CC were significantly down, with just three in 2010, compared with seven in each of 2008 and 2009 and 10 in 2007. Of those three cases, two were cancelled by the parties following reference and one was cleared unconditionally. The three cases referred to the CC during 2009 all resulted in unconditional clearances.

2010 saw the government using its public interest powers to intervene in a media merger for only the second time ever. Whereas its previous intervention concerned the acquisition by satellite broadcaster BSkyB of a minority stake in terrestrial broadcaster ITV, this time concerns have arisen from plans by News Corporation (the UK's largest newspaper publisher) to acquire the 60.9 per cent of BSkyB that it does not already own. The proposed deal has attracted significant media attention and political controversy. One unexpected consequence has been the transfer of responsibility for all media and telecoms regulation from the Department for Business to the Department for Culture, Media and Sport, following unguarded comments concerning the case by the secretary of state for business to undercover journalists that suggested bias against News Corporation's ultimate controller, Rupert Murdoch. The merger review process remains ongoing at the time of writing.

There were only two new market investigation references to the CC in 2010, with the OFT referring the local bus market in January and communications regulator Ofcom referring the market for 'movies on pay-TV' in August. Although these references mark an increase in activity, compared with no new references in 2008 or 2009, the level of market investigations remains well below that anticipated when the legislation was enacted.

While the CAT did not hand down any judgments against CA98 decisions during 2010,

it has been kept busy with appeals against the OFT's 2009 infringement decisions concerning construction industry bid-rigging and recruitment (noted in last year's edition). Although the number of private follow-on damages actions before both the CAT and High Court continues to grow, it remains the case that none has resulted in a damages award. Significantly, the Court of Appeal dealt a blow to representative actions in 2010, by confirming that claimants were unable to use existing High Court procedures to bring a collective claim against BA on behalf of a large number of airfreight users.

**Proposed reforms**

As anticipated by last year's edition, 2010 saw a change of government in the UK, with a Conservative/Liberal coalition replacing Labour. This has, as predicted, led to the competition law regime being reviewed, resulting in proposals dramatically to alter the institutional framework. Specifically, in October the government announced that it intends to merge the CC with the competition enforcement and market investigation functions of the OFT, to form a new Competition and Markets Authority. It is not yet clear whether the new body will retain the OFT's criminal cartel enforcement

powers. Despite OFT objections, it does look likely that the new body will lack consumer protection powers, except to the extent that its market investigation activity requires consideration of issues that directly affect consumers. There are also question marks over whether sectoral regulators will retain their competition enforcement powers. Although these changes ostensibly arose from efforts by the government to reduce the number of separate regulatory bodies, concerns have also been expressed about the current speed and number of competition investigations. It is not yet clear, however, how the proposed changes will address such concerns.

Formal consultation on the government's proposals is due to take place early in 2011. It appears likely that such changes will require potentially far-reaching amendments to the substantive legal framework within which the existing agencies operate. While the United Kingdom may ultimately benefit from a simpler, more streamlined enforcement system for both competition law and consumer protection, in the short to medium term we can expect to see a degree of uncertainty and disruption, as the new institutional structure, and legal framework, is confirmed and put into place.

---

## EDWARDS ANGELL PALMER & DODGE

---

Dashwood  
69 Old Broad Street  
London EC2M 1QS  
United Kingdom  
Tel: +44 20 7583 4055  
Fax: +44 20 7353 7377

**Becket McGrath**  
bmcgrath@eapdlaw.com

**Jo Love**  
jlove@eapdlaw.com  
  
www.eapdlaw.com

Edwards Angell Palmer & Dodge is known for forging close relationships with clients and aligning its core areas of practice to meet clients' legal and business objectives. Our firm has 12 offices in the United States and United Kingdom and an associated office in Hong Kong. Whether the legal issue involves complex securities, estate planning and fiduciary services, high-stakes litigation, insolvency and restructuring, insurance and reinsurance, intellectual property, private equity, life sciences, public finance, real estate, tax or other legal services, the firm's extensive business knowledge of these focused areas helps make us a value-added member of the client's team.

EAPD fields a team of experienced antitrust practitioners who deliver premier legal services on a cost-effective and 'rapid response' basis. We advise on the full range of US antitrust law and European Union and United Kingdom competition law, including antitrust/competition litigation, merger control, criminal and civil investigations, licensing and distribution issues, monopolisation/abuse of dominance, joint ventures and strategic alliances, market and sector investigations, compliance and state aid. Our antitrust lawyers have particular experience of issues arising in the pharmaceutical, biotech, life sciences, healthcare, financial services, gaming, insurance, retail, communications, media, technology, transport, sports and petrochemical industries.



Strategic research partners of  
the ABA International section

**Law**

---

**Business**

---

**Research**



The Official Research Partner of  
the International Bar Association