



## OPERATIONAL SELECTION POLICY OSP43

### COMPETITION – CASE FILES

**THE RECORDS OF THE DEPARTMENT FOR BUSINESS, ENTERPRISE  
AND REGULATORY REFORM (CONSUMER AND COMPETITION POLICY  
DIRECTORATE), THE OFFICE OF FAIR TRADING, THE COMPETITION  
COMMISSION AND THE COMPETITION APPEAL TRIBUNAL**

1950-2008

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## **1. Authority**

- 1.1 The National Archives' Acquisition and Disposition Strategy 2007 gave a clear direction on the aims and objectives for the selection of public records for permanent preservation.
- 1.2 Acquisition criteria were devised to fulfill the central aims of the Acquisition and Disposition Strategy and specific interpretation of them is to be through Operational Selection Policies. They could cover subjects and themes and would also apply the themes in the Acquisition Criteria.
- 1.3 Operational Selection Policies are intended to be working tools for those involved in the selection of public records. This policy may, therefore, be reviewed and revised in the light of comments received from the users of the records or from archive professionals, the relevant government departments' and agencies' experience of using the policy, or as a result of newly discovered information. There is no formal cycle of review and we welcome comments at any time. The extent of any review and revision exercise will be determined according to the nature of the comments received.
- 1.4 Operational Selection Policies do not provide guidance on access to selected records. It should be noted that under current legislation information obtained during some of the processes carried out by some of the organisations in the scope of this Operational Selection Policy cannot be disclosed.
- 1.5 Records will be selected under the following collection themes of the TNA's Acquisition and Disposition Strategy:
  - 3.1.4 Regulation and support of economic activity by government, including industry, services, agriculture, transport, energy, trade, and employment and productivity
  - 3.2.1 The economic, social and demographic condition of the UK, as documented by the state's dealings with individuals, communities and organisations outside its own formal boundaries

## **2. Scope**

2.1 The policy relates to case files generated in government departments and non-departmental public bodies which are concerned with market and merger situations. Their aim is to promote strong competition which will contribute to productivity, innovation and economic growth with markets competing freely and efficiently. As result, markets will work better for consumers and businesses will be fairer and more competitive. Super-complaints and market studies which are a means of identifying and addressing all aspects of market failure are also included.

2.2 It covers the records of the Department for Business, Enterprise and Regulatory Reform (formerly Department of Trade and Industry) created as a result of the Secretary of State's role in making inquiry references and agreeing remedies and responding to market studies, the records of the Office of Fair Trading in recommending a reference, negotiating and agreeing remedies either with or without a formal reference and responding to super-complaints and carrying out market studies, the records of the Competition Commission (formerly the Monopolies and Mergers Commission) in its

investigation of and reporting on mergers, monopolies and anti-competitive practices and the records of Competition Appeal Tribunal in hearing appeals and actions and reviewing decisions.

2.3 The policy does not cover the records of the sectoral regulators. A separate Appraisal Report has been drafted for The Water Services Regulation Authority (OFWAT) (OSP47) which covers the general regulation of the water industry and the setting of and review of price limits. Nor does it cover the work of the Office of Fair Trading on consumer education and initiatives. The records of any judicial review arising from a decision of the Competition Appeal Tribunal are not included.

### **3. Method**

3.1 The policy has been developed in line with two principles of appraisal outlined in the Appraisal Policy 2004:-

- 2.4.1.2 implementing Grigg recommendations for a government-wide approach to case files and datasets, to ensure rational archival selection
- 2.4.3.1 macro-appraisal which can be defined as assessing the value of records at a government, departmental or unit level
- 2.4.3.2 macro-appraisal encourages government-wide. ...analysis of functions as a guide to identifying records of value

3.2 The policy has also used a procedure identified in the Acquisition and Disposal Strategy as suitable for case files:-

- 4.2.4 Selection of case files, whether in digital or paper form, will use procedures which will ensure as far as possible that decisions are fully informed as to the uniqueness of the information in the set of records, are rigorous and consensual. Such procedures will include the establishment of a temporary advisory panel of researchers.

3.3 Case files may be defined as record series whose component files contain similar information on persons, companies or places, generated in order to implement a specific piece of legislation, regulation or policy. Examples include census returns, military service records or applications to exceed foreign exchange restrictions. Where the series of case files consists of standard transactions, such as registration forms, which require simple processing, each file may contain little information of significance, but the series as a whole may be of research value for statistical analysis and enable broad conclusions as to historical, economic or social trends to be drawn. Where the series of case files sets precedents or touch on current policy development, such as files where legal action is contemplated or carried through, the series may be valuable in aggregate and in addition specific individual files in the series may be of research value in their own right.

3.4 The appraisal of case files poses special problems for archives. They have great potential – though by no means proven – research value to a wide range of researchers, either for their aggregated data or for specific information about a person, a place or an organisation. They are, however, voluminous and raise serious storage issues. The archive is therefore undertaking a risk when selecting them, and that risk can be minimised by consideration of the precise research needs which the records can fulfill, and

by consideration of where the most valuable information on the topic can be located within government.

3.5 The method adopted in this OSP was prompted by these considerations and drew on recommendations in the report by the Committee on Departmental Records (Cmd. 9163, July 1954) and in the later report on Modern Public Records: Selection and Access (Cmd.8204, March 1981). The former, endorsed by the later report, proposed that a census be taken of all case files held in government departments and that a Committee be established to determine 'what papers, if retained, would give the greatest amount of information in the smallest amount of space' (Grigg Report, Para. 109)<sup>1</sup>, including the consideration of sampling techniques.

3.6 A limited census of the all the case files generated by organisations carrying out one function of government, the promotion of strong competition, was conducted by The National Archives. The function is the responsibility of several organisations and it was anticipated that the census would clarify the extent of records concerned with competition, identify areas of duplication and enable rational selection decisions to be made.

3.7 Those departments which play a part in promoting strong competition were identified and their functions and the processes involved were analysed by The National Archives.

3.8 A questionnaire was sent to each of the organisations by The National Archives to complete. Information was provided on the case file series for each of the functions.

3.9 The information from the questionnaires was matched against the processes and other background information about the records, such as the size of the collection and format, in order to ascertain which series produced the most valuable information, whether some information was duplicated and whether any information was held in another form eg published reports.

3.10 The National Archives drew up draft proposals for the types and volumes of records which it considered suitable for selection.

3.11 The National Archives convened a panel of 'experts', consisting of Dr Terry Gourvish, Head of the Business History Unit, London School of Economics and Chairman of the Business Archives Council, Dr Lesley Richmond, Director of Archive Services, University of Glasgow and Member of the Steering Committee, International Council on Archives Section on Business Archives, Professor Michael Waterson, Professor of Economics, Warwick University with research interests in competition in the regulated industries, regulation, access pricing and the comparative analysis of regulatory schemes and competition policy and Professor Stephen Wilks, Professor of Politics and Deputy Vice Chancellor to 2005, Exeter University, author of *In the Public Interest: Competition policy and the Monopolies and Mergers Commission (1999)* the first political history of competition policy and Reporting Panel member at the Competition Commission. They, along with representatives from The National Archives and the concerned departments, met to consider the draft proposals and had the opportunity to examine examples of the records. A further meeting between The National Archives, the Competition Commission and Professors Wilks and Waterson considered

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<sup>1</sup> Committee on Departmental Records. Report (1954) Cmd 9163 - Grigg Committee

the filing structure of a typical inquiry and made proposals on the key documents in an inquiry which should be selected.

3.12 A summary of the meeting is attached at **Appendix 1**.

3.13 The draft proposals were modified to meet the concerns and research needs of business historians and archivists and are published here as the body of this policy.

#### **4. The Department for Business, Enterprise and Regulatory Reform (Consumer and Competition Policy Directorate), The Office of Fair Trading, The Competition Commission and The Competition Appeal Tribunal: functions**

##### **4.1 The Department for Business, Enterprise and Regulatory Reform (Consumer and Competition Policy Directorate)**

The Department for Business, Enterprise and Regulatory Reform is the government department with overall responsibility for setting the framework for competition and consumer issues in the UK. It has responsibility for initiating policy and legislation in the UK and negotiating new competition and consumer law at the European and international level. The overall aim of Government's competition policy is to encourage and enhance the competitive process to bring the wider benefits to the UK economy.

The bodies described below have statutory roles and responsibilities covering competition issues and contribute to fulfilling the Government's aims.

##### **4.2 The Office of Fair Trading**

The Office of Fair Trading's function is to make markets work well for consumers through promoting competition and consumer interests in the UK. It does this by enforcing competition law and consumer protection rules, conducting market studies into how markets are working and communicating with the public.

##### **4.3 The Competition Commission**

The Competition Commission conducts inquiries into mergers, markets and the regulation of the major regulated industries. This leads in turn to an increase in the level of competition in the UK economy and in the UK's performance and productivity in the international economy.

##### **4.4 The Competition Appeal Tribunal**

The Competition Appeal Tribunal considers appeals in respect of decisions made under the Competition Act 1998 by the Office of Fair Trading and the regulators and reviews decisions and other applications or claims involving competition or economic regulatory issues.

#### **5. The Department for Business, Enterprise and Regulatory Reform (Consumer and Competition Policy Directorate), The Office of Fair**

## **Trading, The Competition Commission and The Competition Appeal Tribunal – relationships**

### **5.1 The Department for Business, Enterprise and Regulatory Reform (Consumer and Competition Policy Directorate), The Office of Fair Trading and The Competition Commission**

5.1.1 The Competition Commission does not have original jurisdiction. All cases are referred to it from another body. The Office of Fair Trading conducts studies and observes markets to assess whether a reference to it is appropriate or it might receive complaints about anti-competitive behaviour from competitors, suppliers or customers which it would investigate. Up to 2003 The Office of Fair Trading made recommendations to the Secretary of State (SoS) for Business, Enterprise and Regulatory Reform to conduct inquiries into monopoly/merger situations while the SoS made the formal reference. The Competition Commission has wide ranging powers of investigation and is able to invite and require evidence from the parties and others in and outside the area of inquiry. It is, however, bound by parameters set by the Office of Fair Trading in a monopoly reference and by the SoS in a merger reference. The SoS could also make references outside of the Office of Fair Trading's recommendations. It's decision to refer a merger would be triggered by applying a test of whether the merging organisations would supply at least 25% of the goods or services in the market. Sometimes structural changes such as divestment or behavioural undertakings (for example codes of conduct agreed with the Office of Fair Trading would eliminate any harm to competition and avoid the need for referral. On completion of the inquiry the report would be addressed to the SoS. Any subsequent remedies or prohibition of the merger as proposed by the Competition Commission were also to be approved by the SoS. The Office of Fair Trading also negotiates undertakings with the firms concerned in both monopolies and mergers cases and monitors and reviews these undertakings to see whether they should be varied or revoked. Both the Competition Commission and Office of Fair Trading are involved in discussions on remedies and the feasibility of their implementation. Remedies might include the restriction of vertical behaviour, price controls, and divestiture and, in certain cases, the break-up of a monopoly company.

5.1.2 From 2003 the Competition Commission was given the power to implement and monitor compliance with remedies. The Office of Fair Trading can now make a market investigation reference direct to the Competition Commission while the SoS can make a reference if he is not satisfied with an Office of Fair Trading decision not to make a reference. The SoS does not now take decisions on merger control. Most decisions will be taken by the Office of Fair Trading and the Competition Commission. The SoS now makes references (intervention notice) only in certain specified circumstances (mergers raising public interest, including some newspaper and other media or national security issues).

### **5.2 The Department for Business, Enterprise and Regulatory Reform (Consumer and Competition Policy Directorate), the Office of Fair**

## **Trading, the Competition Commission and the Competition Appeal Tribunal**

5.2.1 The Competition Appeal Tribunal is able, under the Enterprise Act 2002, to review decisions made by the Secretary of State, the Office of Fair Trading and the Competition Commission in respect of merger and market references and to hear appeals on decisions made under the Competition Act 1998 by the Office of Fair Trading. The same principles are used as if it was a judicial review. The outcome would be for the Tribunal to dismiss the application, or quash all or part of the earlier decision.

5.2.2 It also hears actions for damages. It has wide powers to determine appeals and may confirm or set aside all or part of the decision, remit the matter, impose, revoke or vary the amount of the penalty or give directions. Further appeals from the decision of the Tribunal are only on a point of law or concerned with the amount of the penalty and would be to the Court of Appeal.

### **6. The statutory background**

All the organisations covered by the project have statutory powers and responsibilities which provide the framework for their activities. A chronological table of the governing legislation and its impact and any subsequent changes, which it introduced, is at **Appendix 2**.

### **7. Published information**

The Competition Commission publishes all the reports of its inquiries as either Command Papers or as ISBN publications. They provide a very detailed narrative of the inquiry and are also published electronically on its website. Some have been excised. Many documents relating to the case are also available on the website. Some hearings are open to the public especially when there is a large consumer interest.

Similarly Competition Appeal Tribunal documents are published on the website during the course of an appeal. Judgments too are published on the website and are also to be found in the Competition Law Journal.

It is a statutory requirement under the Competition Act 1998 for the Office of Fair Trading to maintain a Public Register of Decisions. It is on the website and the decisions are also held in paper form in the organisation. The Office of Fair Trading also maintains a Public Register of Undertakings which provides details of undertakings and orders agreed in lieu of and following a reference. The orders themselves are published as Statutory Instruments (SIs). There is a separate register of advice from the Office of Fair Trading on whether orders should be revoked. Also on its website are market studies, reviews of undertakings, reasons for making a reference and case closure summaries.

Command Papers and ISBN publications are held at the British Library and in accordance with the Operational Selection Policy on Publications/Grey



Literature (OSP36) <http://www.nationalarchives.gov.uk/documents/OSP36.pdf> would not be selected for The National Archives.

## **8. The proposals**

The aim of this Policy is to select those records which provide the most useful and detailed information about the processes involved in promoting healthy and strong competition in the UK economy and to ensure that the selection policy has due regard for the cost of selection and storage. It is therefore considered that:-

- All the case files covered by this Policy fall into the category of complex case files. Civil servants, Competition Commission panel members and ministers apply a high level of consideration to the information on the files. The files are generated in the course of applying legislation in monopoly or merger situations. The files themselves are also characterised by interpretations and re-interpretations of policy. The Competition Commission case files, in particular, contain both qualitative and quantitative data on companies and industry sectors which is unique
- The most valuable information lies in the consideration of whether a licence requires modification, a reference needs to be made to the Competition Commission, an inquiry or a market study conducted, remedies agreed and the process whereby decisions are made on whether or not to refer. This information will be found in the Office of Fair Trading
- However, unique information about businesses is collected and considered during the Competition Commission's inquiry process and therefore certain "key" records in an inquiry should be selected as well as certain "landmark" cases in full. It is also vital to capture the Commission's decisions in the "unexcised" report
- Up to 2003 the Secretary of State had an important part to play to considering references, outcomes and remedies which should be captured through the selection of case files
- Appeal and review cases should be selected from the Office of Fair Trading and the Competition Commission as these organisations rather than the Competition Appeal Tribunal would provide the more detailed deliberations

## **9. Selection criteria**

### **9.1 Records of the Department for Business, Enterprise and Regulatory Reform (Consumer and Competition Policy Directorate)**

#### **9.1.1 Content**

The files are likely to contain the departmental response to proposed mergers, briefs and arguments prepared by officials for the SoS on the possible impact of a reference, whether a reference was needed, whether

or not to intervene and what if any action should be taken following a report and the decision of the SoS.

### **9.1.2 Arrangement**

Separate file series have been created for departmental and SoS consideration of recommendations on mergers, newspaper and media mergers, EC mergers and monopolies. All the series are mixed file series and contain both policy and case files. Some files are differentiated as case files by the letter C in the file reference with P files denoted as policy files. Responses to market studies are in the FFBD series.

The electronic case files are also identified as a file type within the system and competition case files are captured in theme 4 within the prefix.

### **9.1.3 Size**

There are just over 160 metres of paper files. From 2003 all records which are created electronically are held in the department's corporate electronic record keeping system – MATRIX.

### **9.1.4 Previous selection criteria**

Files which have been selected have been those which are causes celebres either because the merger was known to have received substantial media interest, was large and/or contentious e.g. beer, the review and application of undertakings were controversial, the possibility of making a reference was under discussion or there were attempts by the companies to block the report. With references of the nationalised industries following the Competition Act 1980 the selected case files provide an illustration of the impact of the legislation, how it was used and the interpretation of references made on the question of efficiency.

### **9.1.5 Revised selection criteria**

- Cases which attracted substantial media interest/causes celebres
- Cases leading to changes in policy/regulatory framework/new primary legislation
- Cases where SoS rejected advice on referral
- Cases where SoS rejected recommendations in report
- Cases where SoS challenged the appropriateness of the remedy
- Post 2002 mergers raising public interest issues
- Market studies:- records of the Interdepartmental Working Group and records relating to the responses to the studies

## **9.2 The Office of Fair Trading**

### **9.2.1 Content**

The files contain reports, correspondence with the parties, market studies, analyses, negotiations on undertakings and submissions to the SoS.

### **9.2.2 Arrangement**

Separate file series have been created for the mergers and monopolies files. All mergers files are in the ME series which has been running almost since the establishment of the Office of Fair Trading. Cases considered by the European Commission are in the COMP-M and COMP-JV series. There are a number of closed file series for mergers. The main series for monopolies work was the MON series which was succeeded by the CP and CF series. Currently the CE (Competition Enforcement) series is used. Cases under the EC Merger Regulations were allocated separate file series. Records of the Mergers Panel are in a “new” ME series.

Several of the series are mixed containing both policy and case files. Consecutive numbers were allocated to the cases as they were opened. A system of dividing the files has been developed for the activities involved in monopolies work so, for example, /C is concerned with actions after making a reference and /G is for negotiations of undertakings.

A separate series has not been created for the consideration of super-complaints or market studies.

### **9.2.3 Size**

There are 837 metres of paper files. Although records are created and held electronically, the Office of Fair Trading does not have an electronic records management system (ERMS). The current record management procedure is for records to be printed to paper.

### **9.2.4 Previous selection criteria**

All mergers and monopolies cases which have been referred to the Competition Commission plus other significant cases have been selected. For European mergers Phase 2 files (formal investigations) have been selected.

### **9.2.5 Revised selection criteria**

- All cases referred to the Competition Commission, all pre-notified and undertakings cases and all cases where confidential guidance was given will be selected
- The records of the Merger Panel and its successor the Case Review Group will be selected
- All responses to super-complaints
- All market study reports
- Competition Appeal Tribunal cases for those cases highlighted in the President’s statement in the Tribunal’s Annual Report will be selected from the Office of Fair Trading

## **9.3 The Competition Commission**

### **9.3.1 Content**

Up to 1984 inquiry files have been weeded and in some cases only the report (“unexcised” version) has survived. Other records remaining on the file might be the original signed reference, appointment of Commissioners, correspondence on excising, legal issues, correspondence on the scope of the reference, requests to vary the reference, extensions of time, the draft report, any legal matters and from c.1976 action sheets showing any orders made. A typical post 1984 inquiry file would contain:- statement of issues, main and third party submissions, surveys, reports, provisional findings, working papers, main and third party responses to questionnaires, transcripts of hearings, final report and remedies statement. An inquiry could be as much as 100 boxes. In the Domestic Electrical Goods inquiry the Commissioners considered 950 papers and 5000 postal questionnaires were sent to dealers.

### **9.3.2 Arrangement**

There is one series for the inquiries which are consecutively numbered. Merger inquiries are denoted as M inquiries, newspapers are P inquiries, PM are press mergers, PS are public services references, I are monopolies referred under the Fair Trading Act 1973 and markets referred under the Enterprise Act 2002, CR are references made under the Competition Act 1980, G are reports on the general effect on the public interest of practices within s.78 (1) (b) of the Fair Trading Act 1973, LP are labour practices, T are telecommunications references, WA are Water Industry Act references and S are services references.

### **9.3.3 Size**

There are 215 metres of paper files from c.1950 to 2005. After the latter date all inquiries are held on an ERMS – there are currently 71123 documents taking up 56 gigabytes of storage.

### **9.3.4 Previous selection criteria**

The Competition Commission holds a complete collection of inquiry files although some of them have been weeded. There is no selection policy for them.

All “unexcised” reports are selected.

### **9.3.5 Revised selection criteria**

- All “unexcised reports will be selected
- Inquiry folders as detailed below will be selected

#### **1. Planning**

#### **2. Circulated papers**

#### **3. Meetings and conference calls**

Group agendas

Group minutes

#### **4. Hearings (main parties only)**

Briefs

Transcripts

#### **5. Visits**

Notes

#### **6. Parties (main parties, competitors, customers, government departments, local authorities, possible bidders, suppliers, trade associations only)**

Correspondence

Main submission

Reply to provisional findings

Reply to remedies

#### **7. Remedies**

Papers and statement

Negotiations

#### **8. Findings and report**

*Provisional findings report*

Final version

*Final report*

Drafts

Final version

Appendices

Glossary

#### **9. Post Inquiry Activity**

Summary

Post inquiry review

Judicial review

Appeals

Remedy implementation

- Inquiries of substantial significance will be selected in their entirety
- Competition Appeal Tribunal cases highlighted in the President's statement in the Tribunal's Annual Report will be selected from the Competition Commission

### **9.4 The Competition Appeal Tribunal**

#### **9.4.1 Content**

A typical appeal file might contain a notice of application, summary of application, summary of the appeal, submissions, pleadings, witness statements, expert evidence, transcript of main hearing, ruling, judgment and order. Any records from other organisations which CAT needs for background to the case are either destroyed or returned to the originating department.

#### **9.4.2 Arrangement**

Appeals to CAT have been registered in an annual series and numbered

consecutively.

#### **9.4.3 Size**

There are around 40-50 metres.

#### **9.4.4 Previous selection criteria**

There is no selection policy for the records. None have been destroyed.

#### **9.4.5 Revised selection criteria**

No records will be selected from the Tribunal.

# Summary of meeting of panel experts

Title:	Businesses in England and Wales – Monopolies and Mergers Casework: Meeting of Panel of Experts
Date of Meeting:	19/04/2007
Location:	Conference Room A, The National Archives
Attendees:	Kelvin Smith (TNA) – Chair, Elaine Baldwin (TNA), Jeremy Harley (TNA), Helen Mercer (TNA), Marine Mondelot (TNA), Professor Stephen Wilks (academic expert), Professor Michael Waterson (academic expert), Dr Terry Gourvish (academic expert), Dr Lesley Richmond (academic expert), John Thompson (OFWAT), Jayanti Taylor (OFWAT), Ian Hulme (OFWAT), Denice Dever (Competition Appeal Tribunal), Ian Bennett (OFT), Jenny Godfrey (POSTCOMM)
Apologies:	Elaine MacDowell (OFCOM), Paul Kitcher (OFGEM), Gina Coulson (DTI), Linda Fisher (CC), Kalpesh Brahmhatt (ORR), Rebecca Staheli (ORR)

		Action
<b>1</b>	<b>Scope of the OSP</b>	
1.1	Following discussion it was proposed that a functional analysis of the regulators be undertaken with a view to developing a separate but linked OSP for them. The Monopolies and Mergers casework OSP would then only include the regulators' activities in Competition Act cases. The panel also agreed that market studies and super-complaints should be included.	TNA  TNA
<b>2</b>	<b>Department of Trade and Industry, Office of Fair Trading, Competition Commission, Competition Appeal Tribunal</b>	
2.1	<i>DTI</i> records - (examples related to action after a report had been published) were felt to be valuable because of official and ministerial involvement/comment. Even photocopied newspaper articles helped the researcher to understand the impact of report. There was discussion about weeding the files of ephemera – it was explained to panel that this would not happen. The drawback to these files lay in their structure – filing was chronological rather than by activity on the report making it	

difficult for the researcher to identify the most important records.

*OFT* records - There was a value in documenting the process and documenting a typical case as well as the high profile cases. Therefore, some sort of sampling might be needed to capture such cases and cases which were not referred to CC but where undertakings were negotiated in lieu of a reference, firms were fined, EC merger cases etc. The use of the annual report to identify high profile cases for selection was thought to be acceptable because the annual report contained details of key cases - both referred and non-referred. The panel expressed caution on the use of the annual report to identify cases of importance - these cases might not be particularly significant. There was a need to preserve more than just the public/published outcomes e.g. public register of decisions.

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*CC* records - because of the disclosure provisions in the legislation companies provided information for an inquiry in the knowledge that it was totally confidential. This information is proprietary to the company/agency and is robust and unique. It was described as “gold dust” and it would not be held elsewhere. Although some of the data is in the report obviously it would not be as detailed as the raw data and the analysis made available to panel members. Also missing from the report is the debate between panel members which is also found only in the inquiry records. It was thought that each inquiry was unique and valuable. Using the fileplan for electronic records or the file structure for paper records it should be possible to identify the “key” records for an inquiry e.g. main party submissions and working papers.

SW/MW

“Unexcised” *CC* reports – panel agreed that they should be preserved as an archive set since they contain unique information which would not be found elsewhere.

*CAT* records - a typical case file would contain more records than are posted on the website but the panel thought that more importance should be given to records of appeals to *CAT* from the regulators and records should be selected from them. *OFWAT* cautioned about volume of records created by referees to *CAT*.

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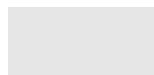
### 3. **The sectoral regulators**

The panel was less enthusiastic about these records. However, there was still a need to capture a function and to capture policy records rather than case records which illustrated the use of sectoral powers. If cases are to be selected it should be those which led to new or changed policy. All mergers go to *CC* in any case. The earliest cases considered by the predecessors of the current regulators e.g. *OFTEL* and *OFGAS* are more likely to be landmark cases and the value of cases diminishes over time. It

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was suggested that where references were made to CC by regulators that regulators records should also be selected.



## Appendix 2

### CHRONOLOGICAL TABLE OF LEGISLATION GOVERNING MONOPOLIES AND MERGERS

Date	Statute	Impact/changes
1948	Monopolies and Restrictive Practices (Inquiry and Control) Act	<ul style="list-style-type: none"> <li>• Established Monopolies and Restrictive Practices Commission</li> <li>• Board of Trade (BoT) able to refer anti-competitive behaviour to the Commission for investigation and report</li> <li>• Applied a public interest test to monopolies</li> <li>• Commission able to consider what action to be taken to remedy situation</li> <li>• BoT to decide on whether action taken in the form of orders to prohibit agreements but had only limited powers to control single firm monopolists by prohibiting some forms of anti-competitive behaviour</li> </ul>
1956	Restrictive Trade Practices Act	<ul style="list-style-type: none"> <li>• Regulation of restrictive practices removed to separate Restrictive Practices Court</li> <li>• Monopolies and Restrictive Practices Commission became the Monopolies Commission</li> </ul>
1965	Monopolies and Mergers Act	<ul style="list-style-type: none"> <li>• Commission able to review mergers and takeovers and became the Monopolies and Mergers Commission (MMC)</li> <li>• Applied a public interest test to mergers</li> <li>• Commission's' powers extended to consideration of monopoly in the supply of services</li> <li>• Gained more significant remedy powers including compulsory divestment</li> </ul>
1973	Fair Trading Act	<ul style="list-style-type: none"> <li>• Established Office of Fair Trading (OFT) headed by Director General of Fair Trading (DGFT)</li> <li>• OFT able to scrutinize competition within markets and advise Secretary of State for Trade and Industry on referrals to MMC</li> <li>• Lowered threshold for reference from 1/3 to 1/4 of the market</li> </ul>

		<ul style="list-style-type: none"> <li>• Introduced references for newspaper mergers in which SoS makes the decision in qualifying mergers</li> <li>• Introduced concept of “promoting effective competition”</li> <li>• MMC recommends remedies to the SoS who remits to the DGFT to negotiate undertakings or prepare orders implementing remedies</li> <li>• Merger approved by MMC could not be blocked</li> <li>• MMC had to specify in report the effects which would be adverse to the public interest</li> </ul>
1980	Competition Act	<ul style="list-style-type: none"> <li>• MMC’s remit extended to public bodies including nationalised industries</li> <li>• References could be made on questions of efficiency and costs and services provided</li> <li>• Able to target cases of market dominance</li> <li>• Able to target conduct which is “intended to have or is likely to have the effect of restricting, distorting or preventing competition”</li> <li>• DGFT’s powers extended to investigate anti-competitive practices and price rises</li> <li>• Applied public interest test to anti-competitive practices and the efficiency of nationalised industries</li> </ul>
1984	Telecommunications Act	<ul style="list-style-type: none"> <li>• The regulator can refer telecoms operators to the CC to consider whether the public interest is adversely affected if the company does not agree to the proposed modification to the conditions of its licence</li> </ul>
1986	Gas Act	<ul style="list-style-type: none"> <li>• The regulator can refer gas companies to the CC to consider whether the public interest is adversely affected if the company does not agree to the proposed modification to the conditions of its licence</li> </ul>
1989	Electricity Act	<ul style="list-style-type: none"> <li>• The regulator can refer electricity companies to the CC to consider whether the public interest is</li> </ul>

		adversely affected if the company does not agree to the proposed modification to the conditions of its licence
1989	Water Act	<ul style="list-style-type: none"> <li>• Director General of Water Services (DGWS) has power to refer variations/modifications, objections to changes in inset appointments to MMC/CC</li> </ul>
1990	Broadcasting Act	<ul style="list-style-type: none"> <li>• Enabled MMC/CC to investigate and report on whether the arrangements for or modifications of licence conditions satisfy the competition test</li> </ul>
1991	Water Industry Act	<ul style="list-style-type: none"> <li>• SoS to refer a merger to CC if gross assets of each of the water enterprises to be merged exceed £30 million</li> <li>• The regulator can refer water companies to the CC to consider whether the public interest is adversely affected if the company does not agree to the proposed modification to the conditions of its licence</li> <li>• DGWS can still request a reference if assets of one company are less than £30 million</li> </ul>
1992	Competition and Service (Utilities) Act	<ul style="list-style-type: none"> <li>• Made further provision for facilitating effective competition in gas and water supply industries</li> </ul>
1993	Railways Act	<ul style="list-style-type: none"> <li>• The regulator can refer operators of rail services to the CC to consider whether the public interest is adversely affected if the company does not agree to the proposed modification to the conditions of its licence</li> </ul>
1998	Competition Act	<ul style="list-style-type: none"> <li>• The Competition Commission replaced the Monopolies and Mergers Commission</li> <li>• Prohibits agreements, business practices and conduct that damage competition – also applies to the sectoral regulators who may also make references to the CC</li> <li>• Monopolies referred by DGFT are subject to veto by SoS who may make references on own initiative</li> <li>• OFT able to action which includes the</li> </ul>

		<p>ability to impose financial penalties</p> <ul style="list-style-type: none"> <li>• Introduced appeals function – the Competition Commission Appeals Tribunal</li> <li>• Confers on the OFT and the sectoral regulators concurrent powers to apply and enforce Articles 81 and 82 of the EC treaty when national competition law is applied to agreements which may affect trade between Member States or to abuse prohibited by Article 82</li> </ul> <p><i>Article 81</i> prohibits agreements, decisions, and practices that may..... prevent, restrict or distort competition in the common market</p> <p><i>Article 82</i> prohibits abuse of a dominant position which may affect trade between Member States</p>
2000	Transport Act	<ul style="list-style-type: none"> <li>• The regulator can refer providers of air traffic services to the CC to consider whether the public interest is adversely affected if the company does not agree to the proposed modification to the conditions of its licence</li> </ul>
2000	Postal Services Act	<ul style="list-style-type: none"> <li>• The regulator can refer postal communications companies to the CC to consider whether the public interest is adversely affected if the company does not agree to the proposed modification to the conditions of its licence</li> </ul>
2000	Financial Services and Markets Act	<ul style="list-style-type: none"> <li>• CC to report on any OFT report which concludes that the regulatory provisions and practices of recognised investment exchanges and clearing houses and rules, guidance and statements of principle made by the Financial Services Authority have a significantly adverse effect on competition</li> </ul>
2002	Enterprise Act	<ul style="list-style-type: none"> <li>• Established Competition Appeal Tribunal</li> <li>• Mergers are referred if there is or is likely to a substantial lessening of competition</li> <li>• The test is now a competition test rather than a wide public interest test</li> </ul>

		<ul style="list-style-type: none"> <li>• CC became a decision making body for merger and market investigations</li> <li>• CC acquired power to implement and monitor compliance with remedies</li> <li>• CC able to determine whether regulators' proposals are adequate to remedy adverse effects and is able to exercise its power of veto and impose licence modifications</li> <li>• DGFT's monopoly reference powers replaced with new powers to make market investigation reference - also applies to the sectoral regulators</li> <li>• SoS to only refer mergers raising public interest issues such as some newspaper and other media mergers and cases relating to national security</li> <li>• OFT, the regulators and the CC to make all other references</li> </ul>
2003	Water Act	<ul style="list-style-type: none"> <li>• DGWS able to make determinations on access to distribution networks by other companies</li> </ul>
2003	Communications Act	<ul style="list-style-type: none"> <li>• Ofcom given the powers to investigate complaints about breaches of conditions imposed on providers and a duty to resolve disputes relating to conditions imposed under the EU Directives</li> <li>• Any references to the CC are to come via the CAT</li> </ul>
2004	Energy Act	<ul style="list-style-type: none"> <li>• Introduced energy code modification appeal jurisdiction whereby the CC considers appeals from Ofgem's decisions on code modifications (previously decisions were open to judicial review)</li> </ul>