UK Competition

Competition and regulatory developments in the UK

ARTICLE

Making the criminal cartel offence fit for purpose

BACKGROUND

The Office of Fair Trading (“OFT”) announced on 27 January 2014 that it had charged a man under the criminal cartel offence in s.188 of the Enterprise Act 2002 (“EA2002”) following an investigation into suspected cartel conduct relating to the supply in the UK of galvanised steel tanks for water storage. The OFT is conducting a related civil investigation into whether businesses have infringed the Competition Act 1998 (“CA1998”).

This is only the third time that criminal charges have been brought under s.188 EA2002, and there has been only one successful prosecution.\(^1\) Reforms aimed at strengthening this regime, and in particular, at making it easier to bring successful prosecutions are however due to come into force shortly. They are part of a wider suite of reforms of the UK competition regime under the Enterprise and Regulatory Reform Act 2013 (“ERRA2013”). One of the main components of these reforms is the creation of a single competition authority, the Competition and Markets Authority (“CMA”), which, from 1 April 2014, will replace the current two-body system of the OFT and the Competition Commission.

This article provides a brief overview of the current cartel offence regime, the changes under the ERRA2013 and the related draft CMA prosecutorial guidance.

THE CURRENT REGIME

Chapter I of the CA1998 prohibits any agreement or concerted practice which has the object or effect of preventing, restricting or distorting competition, unless an exemption from the prohibition applies. Where the agreement or concerted practice affects trade between EU Member States, it may also be prohibited by Article 101 of the Treaty on the Functioning of the European Union (“TFEU”). Companies and individuals found to have breached the Chapter I prohibition are liable to fines of up

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\(^1\) The convictions for cartel offences under the EA2002 were made in June 2008 in relation to the global marine hose cartel. Three company directors were sentenced to imprisonment for between two-and-a-half and three years.
to a maximum of 10% of worldwide turnover for companies, and for individuals disqualification from serving as a director for a period of up to 15 years.

Dishonest participation in a Chapter I CA1998 infringement is not criminalised, but the cartel offence under the EA 2002 is. Cartels are considered to be the most serious form of anti-competitive agreement. Under the EA2002, dishonest participation in a cartel is a punishable by a prison sentence of up to 5 years, unlimited fines, or both. A cartel for this purpose is an arrangement between at least two persons that undertakings will engage in (i) price-fixing, (ii) limiting supply or production, (iii) market sharing or (iv) bid-rigging. Vertical agreements (such as resale price maintenance) do not fall within the scope of the offence.

THE CHANGES UNDER THE ERRA2013

Removal of the requirement for dishonesty
The Government believed that the dishonesty criterion in the criminal cartel offence made it harder to prosecute and that this was weakening the offence’s deterrent effect. The ERRA2013 therefore removes this element from the cartel offence.

Exclusions and defences
To reflect the Government’s intent that the cartel offence should catch only participation in covert cartels, and not more open forms of competitor collaboration, the ERRA2013 introduces various new exclusions to the offence. In particular, it:

• creates two new exclusions from the offence:
  – the notification exclusion – where customers are provided relevant information before the arrangements are made; and
  – the publication exclusion – where the relevant information is publicised in the manner specified; and

• provides that an individual will not commit an offence if the agreement is made in order to comply with a legal requirement.

To address further concerns that removing the dishonesty element of the cartel offence might lower the threshold for prosecution to an unreasonable level,\(^2\) it was also decided to create three new defences to the cartel offence,\(^3\) in particular where:

• there is no intention to conceal the nature of the arrangements from customers;

• there is no intention to conceal the nature of the arrangements from the CMA; and

\(^2\) For example, the Confederation of British Industry (“CBI”) indicated that the proposal risked “criminalising a wide range of standard commercial transactions, in areas such as distribution, mergers and banking” (source: Memorandum submitted by CBI in response to the Enterprise and Regulatory Reform Bill, June 2012, para. 37).

\(^3\) These new defences were introduced in October 2012 by way of Government amendments to the Enterprise and Regulatory Reform Bill. See also UK Competition Newsletter (14/10/2012)
• the defendant took reasonable steps to ensure that the nature of the arrangements would be disclosed to professional legal advisers for the purposes of obtaining advice about them before making or implementing them.

Civil regime unchanged
The amendments to the criminal cartel offence do not impact on the current civil rules under Article 101 and Chapter I.

PROSECUTORIAL GUIDANCE

The ERRA2013 requires the CMA to issue guidance on the principles to be applied in determining, in any case, whether cartel offence proceedings should be instigated. As a first step to comply with this statutory requirement, the CMA published draft ‘Cartel offence prosecution guidance’ in September 2013. The guidance is “an attempt to bring as much transparency as is reasonably possible to the CMA’s exercise of its prosecutorial discretion in relation to the criminal cartel offence in the context of the removal of dishonesty as an element of the offence.”

Much of the guidance is a reframing of the statutory provisions. However, one area which expands notably on the statute is an explanation of the public interest factors that the CMA will take into account in deciding on whether to prosecute. These factors include:

• the seriousness of the offence;
• the level of culpability of the suspect;
• the impact of the offence on the community; and
• whether prosecution is a proportionate response.

The consultation period for the draft guidelines has now finished, and the final form guidance is due to be published by 1 April 2014.

NEXT STEPS

The revised cartel offence and related prosecutorial guidance will apply to cartel activities entered into on or after 1 April 2014. The unamended cartel offence will still apply to cartel activities occurring before 1 April 2014. It could therefore take some time before the impact of the changes, in particular the removal of the dishonesty element, becomes clear.

SOURCES


UK cartel enforcement – past, present, future. Speech by Ali Nikpay to the Law Society Anti-Trust Section (11 December 2012)

Cartel Offence Prosecution Guidance (Consultation Document) (September 2013)
Mergers

OFT PUBLISHED DECISIONS

1. **OFT clears acquisition of certain assets of Finglands Coachways by First Manchester** – The Office of Fair Trading (“OFT”) has now published the full text of its January 2014 decision to clear the anticipated acquisition by First Manchester Limited of certain assets of Finglands Coachways Limited. While the parties were found to overlap on a small number of bus routes in the Greater Manchester area, these overlaps were limited and the overlapping routes were also operated by other effective competitors. Furthermore, there was evidence to suggest that the parties did not significantly compete with each other for tendered contracts. Consequently, the OFT did not believe that it is or may be the case that the merger would be expected to result in a substantial lessening of competition (“SLC”) and thus did not refer the case to the Competition Commission (“CC”) (www.oft.gov.uk, 14 February 2014).

UNDERTAKINGS AFTER A CC REFERENCE

3. **CC accepts final undertakings in Cineworld / City Screen merger** – The CC has accepted final divestment undertakings in relation to the completed acquisition by Cineworld Group plc (“Cineworld”) of City Screen Limited (“City Screen”). The CC concluded that the merger resulted, or may be expected to result, in a SLC in the market for cinema exhibition services in the three areas where Cineworld and Picturehouse face limited competition (i.e. Aberdeen, Bury St Edmunds and Cambridge), and that this could lead to higher prices or reduced quality for local cinema goers. The parties have agreed to divest either a Cineworld or City Screen cinema in each area to a purchaser or purchasers approved by the CC. The CC confirmed it received no representations which caused it to amend the draft undertakings during consultation on the final undertakings in December 2013 (www.competition-commission.org.uk, 31 January 2014).

4. **CC accepts final undertakings in Global Radio / GMG merger** – The CC has accepted final divestment undertakings in relation to the completed acquisition by Global Radio Holdings Limited (“Global Radio”) of GMG Radio Holdings Limited (“GMG”). In May 2013, the CC found that the merger resulted, or may be expected to result, in a SLC in the supply of advertising services to non-contracted advertisers in seven areas of the UK. An application for review of the CC’s decision was dismissed by the Competition Appeal Tribunal (“CAT”) in November 2013. Global Radio must now nominate and divest radio stations in each area to a purchaser or purchasers approved by the CC. Such divestments could be accompanied by an appropriate brand licensing agreement to operate the radio station under a brand owned by Global Radio, and other ancillary arrangements. Global Radio has since agreed to sell eight regional radio stations to Irish radio company, Communicorp, subject to approval by the Irish Competition Authority (www.competition-commission.org.uk, 31 January 2014).
OTHER DEVELOPMENTS OF INTEREST

5. **CC publishes provisional findings in Breedon Aggregates / Aggregate Industries** – the CC has published provisional findings in its review of the completed acquisition by Breedon Aggregates Limited of certain Scottish assets of Aggregate Industries UK Limited. The CC has provisionally found that the transaction gives rise to a SLC for the supply of: (i) asphalt in the Aberdeen area; (ii) ready mix concrete in the Peterhead area; and (iii) asphalt in the Inverness area. Comments are invited on the CC’s provisional findings until 27 February 2014, as are views on remedies until 20 February 2014. The reference period has been extended by eight weeks until 5 May 2014 (www.competition-commission.org.uk, 6 February 2014).

Antitrust

OFT DECISIONS

6. **OFT publishes decision in access control and alarm systems infringement** – The OFT has published its decision on collusive tendering in the supply and installation of control and alarm systems to retirement homes. Three infringements of the cartel prohibition under the Competition Act 1998 (“CA 1998”) were found, each involving several individual tenders. In each of these overall infringements, the participating firms entered into agreements to the effect that for each tender, one firm would share its bid with another, allowing that other to submit a higher bid. The OFT determined that these agreements had the object of restricting competition by price-fixing and market-sharing and thus amounted to infringements of Chapter I of CA 1998. The OFT imposed fines totalling £53,410 on three out of the four participants. The fourth, Cirrus Communication Systems Limited, received full immunity under the OFT’s leniency policy (www.oft.gov.uk, 6 December 2013).

7. **OFT publishes decisions in Mercedes Benz commercial vehicle distribution cartel** – The OFT has published the full text of its March 2013 decisions finding several individual cartels in the distribution of commercial vehicles involving Mercedes-Benz and five of its dealers. The infringing conduct involved market-sharing, price co-ordination and exchange of commercially sensitive information between the dealers, with the object of restricting competition for sales of vans or trucks in the dealers’ respective areas. Each infringement involved different parties, and lasted for different periods of time. Mercedes-Benz and three of the dealers agreed settlements with the OFT, while another dealer received full immunity. The amount of fines imposed totalled £2.8 million (www.oft.gov.uk, 10 February 2014).

Market Investigations

8. **FCA launches market study into retirement income** – The Financial Conduct Authority has launched a market study into retirement income amid concerns that competition in the market is not working well for consumers. This follows the FCA’s thematic review of annuities, which found that some parts of the annuities market are not working well for some consumers. The investigation will look at products purchased from UK active providers by UK consumers using funds from their accumulated pension pot that provide an income during retirement. In particular, the study will assess: (i) customer behaviour and difficulties in identifying the best way to draw income from an accumulated pension pot; (ii) supplier conduct (e.g., how providers treat their customers); and (iii) the structure of the market, including the distribution of the relevant products and the impact of advised/non-advised sales on different types of consumer. Comments are welcome until 14 March 2014, with preliminary findings and a final report expected in Summer 2014 and within 12 months, respectively (www.fca.org.uk, 14 February 2014).
General Competition

9. **Lessons in best practice and cultural change at the OFT: speech by Clive Maxwell** – On 31 January 2014 Clive Maxwell, the OFT Chief Executive, gave a speech describing lessons learned by the OFT in terms of best practice and cultural change in the enforcement of consumer and competition law. A central focus of the speech was the OFT’s internal review of its enforcement work, conducted in light of public criticism during 2010 and 2011. Notable setbacks included the withdrawal of criminal cartel proceedings against British Airways executives and the adverse findings of the CAT in the construction and tobacco cases. While Mr Maxwell maintained that much of the criticism of the OFT was misplaced, changes have been introduced to improve the OFT’s enforcement work with a focus on skills, culture and intelligence. Mr Maxwell claimed these changes are already beginning to show results. Lessons learnt by the OFT will be taken forward by the Competition and Markets Authority (“CMA”) (www.oft.gov.uk, 31 January 2014).

Regulatory

ENERGY

10. **Energy Secretary publishes open letter to regulators regarding gas market review** – The Secretary of State for Energy and Climate Change has published an open letter to the Chief Executive of Ofgem. According to the Secretary of State, the independent review of the energy markets currently being conducted by Ofgem, the OFT and the CMA should focus on the following areas: (i) the market for the supply of gas (in particular, given the fact that the average profit margin for gas is around three times that of electricity which, according to the Secretary of State, is “prima facie evidence of an issue in the market”); (ii) the benefits of further steps towards completion of a single European energy market for consumers and competition (including whether there is merit in further gas pipeline interconnection with Europe); and (iii) the issues arising from the fact that the “Big 6 energy suppliers still see their role as selling gas and electricity rather than having a different business model where the value proposition is to save households energy” (www.bbc.co.uk, 10 February 2014).

11. **Ofgem confirms final policy decision for Gas Security of Supply Significant Code Review** – As part of its Gas Security of Supply Significant Code Review, Ofgem has issued its final policy decision in relation to cash-out reforms. Ofgem considers that, in an emergency, market rules should provide appropriate incentive to gas shippers to balance supply and demand. In addition, the decision sets out Ofgem’s final proposals for a centralised demand-side response (“DSR”) mechanism. This would reveal the cost of interruption for large consumers and pay them for reducing their demand before an emergency. Ofgem continues to consult on the text of draft business rules on cash-out reform, associated code drafting and modifications to shipper and supplier licences to implement cash-out reforms, as well as a draft licence obligation on National Grid Gas to design and introduce a DSR mechanism. Responses are invited until 9 April 2014 (www.ofgem.gov.uk, www.ofgem.gov.uk, 12 February 2014).

TELECOMMUNICATIONS/MEDIA/TECHNOLOGY

12. **House of Lords Select Committee recommends reforms to improve media plurality** – In its report on media plurality published this month, the House of Lords Select Committee on Communications (the “Committee”) made several recommendations for future media plurality policy. The Committee recommends that Ofcom conduct periodic reviews of media plurality (every four or five years) to examine the sufficiency of plurality at the time. Ofcom should be able to demand divestments in certain circumstances. The Committee also recommends reform of the system for reviewing media mergers. According to the Committee, a clear distinction between competition and plurality policy should be maintained, with the competition authorities continuing to conduct a competition
assessments and Ofcom assessing plurality. However, Ofcom (rather than the Secretary of State) should be responsible for the ultimate public interest decision on whether the merger can proceed (www.publications.parliament.uk, 4 February 2014).

13. Department for Culture, Media and Sport consults on Digital Communications Infrastructure Strategy – The Department for Culture, Media and Sport (“DCMS”) welcomes views on the terms of reference for its strategy on the UK’s digital communications infrastructure for 2015-2025, known as the Digital Communications Infrastructure Strategy (“DCIS”). Incorporating an assessment of current UK infrastructure and what this might look like in 10-15 years, DCIS will develop a framework for the UK’s future digital communications infrastructure. This will be based on (i) an appreciation of potential data volumes; (ii) likely developments across the communications sector; and (iii) future demand for technology and services from consumer, business and the public sector users. The steps required to encourage private sector investment in digital communications infrastructure, likely developments in the regulatory environment (including the role of Ofcom and the EU in fostering investment) and the role of government will also be assessed. Comments are welcome until 28 March 2014, with interim and final reports expected by July and December 2014, respectively (www.gov.uk, 6 February 2014).

14. Ofwat decides against substantial favourable effect notice for Thames Water charges – The Water Services Regulation Authority (“Ofwat”) will not re-open Thames Water’s price limits for 2014-15 using the “substantial favourable effect” mechanism. The substantial effect mechanism allows Ofwat to review price limits, if a circumstance beyond prudent management control has a favourable or adverse effect on the company to an extent equivalent to at least 20% of company turnover. Ofwat considered its decision to be proportional due to: (i) the difficulties associated with retrospectively targeting a change in the calculation of RPI at only one company; (ii) uncertainty as to the impact on cost of capital of quantitative easing by the Bank of England; and (iii) acceptance by Thames Water that its investors will absorb cost increases arising in 2010-15 above the allowances assumed in existing price limits. Following Ofwat’s determination last year of Thames Water’s application for an interim adjustment, the current price limits will remain in place for 2014-15 (www.ofwat.gov.uk, 11 February 2014).

15. CC updates procedural rules for setting national tariffs for NHS health care services – The CC has finalised the final version of the National Tariff Methodology Reference Rules under the Health and Social Care Act 2012 and accompanying guidance. These rules contain the procedure for assessing references to the CC from Monitor on the methodology for setting a national tariff for NHS health care services. Monitor may make these references where sufficient objections to its proposed tariff methodology are made. The rules and guidance will be adopted by the CMA (www.competition-commission.org.uk, 10 February 2014).

16. Final determination of ORR 2013 price review accepted by Network Rail – Network Rail has accepted the Office of Rail Regulation’s (“ORR”) determination, made on 31 October 2013, of Network Rail’s outputs and funding for the price control period 2014-19. Following acceptance, Network Rail must now develop a delivery plan explaining how it will deliver the required outputs and manage the rail network from 1 April 2014 until 31 March 2019. The determination requires Network Rail (i) to reduce the cost of running the railways by 20%; (ii) to increase punctuality and reliability for long distance passenger services;
and (iii) to improve infrastructure management, network resilience and safety. During the price control period, Network Rail will spend £38 billion on maintaining, renewing and improving the rail network (www.rail-reg.gov.uk, 10 February 2014).

**AVIATION**

17. **CC updates procedural rules for appeals of airport licence conditions** – The CC has issued the final version of its procedural rules for determining airport licence condition appeals under the Civil Aviation Act and accompanying guidance. Following only minor amendments arising out of the consultation, the final rules largely reflect the draft rules consulted on in November 2013. The rules and guidance are to be adopted by the Competition and Markets Authority for use after 1 April 2014 (www.competition-commission.org.uk, 10 February 2014).

18. **CAA proposes licences for the economic regulation of Heathrow and Gatwick airports** – The Civil Aviation Authority (“CAA”) has published notices of its proposed licences for the economic regulation of Heathrow Airport Limited (“HAL”) and Gatwick Airport Limited (“GAL”), commencing on 1 April 2014. These licences would be the first under the new Civil Aviation Act 2012. The proposals follow the decision of the CAA in January 2014 that HAL and GAL have significant market power (“SMP”) in relation to the provision of airport operation services at Heathrow and the provision of airport operation services to passenger airlines at Gatwick, respectively. The CAA justified the imposition of licences as, it concluded, competition law would not be sufficient to protect airport users. Heathrow’s licence includes a price control of RPI-1.5% as well as service conditions while the licence of Gatwick is based on GAL’s own commitments to its airline customers. HAL, GAL and any other person with a qualifying interest (e.g. airlines) now have six weeks to seek permission to appeal with the CC or CMA (www.caa.co.uk, 13 February 2014).

**Procurement**

19. **Monitor closes investigation of cancer surgery services commissioning** – Monitor, the sector regulator for health services in England, has closed its investigation into the commissioning of certain cancer surgery services in Greater Manchester and Cheshire. The investigation considered whether NHS England had breached the National Health Service (Procurement, Patient Choice and Competition) (No.2) Regulations 2013 as a result of certain elements of its commissioning process. However, this process has now been discontinued with a new process and service specification, fully compliant with the Regulations, being developed (www.monitor.gov.uk, 31 January 2014).

**Consultations**


22. **Ofcom consults on excess construction charges for Openreach Ethernet Access Direct services** (www.ofgem.gov.uk, 14 February).

23. **Ofgem issues statutory consultation on changes to Special Condition 1 of IGT licence** (www.ofgem.gov.uk, 31 January 2014).


27. Ofgem consults on ENWL’s latest Competition Notice (http://uk.practicallaw.com, 10 February 2014).


30. Ofgem consults on regulatory instructions and guidance for Data Communications Company (www.ofgem.gov.uk, 12 February 2014).


34. Cabinet Office publishes revised guidance on its use of procurement measures to promote tax compliance (www.gov.uk, 7 February 2014).

35. CC publishes working papers on payday lending market investigation (www.competition-commission.org.uk, 31 January 2014).


40. Ofgem publishes letter on the role of industry in creating market conditions needed to support smart metering (www.ofgem.gov.uk, 6 February 2014).