

Jobs for the boys

Matthew Hall reviews the role of the CMA in controlling cartels



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The European Commission grabs all the headlines for its uncompromising cartel fines, while the UK equivalent (the Office of Fair Trading (OFT), now replaced by the Competition and Markets Authority (CMA)), is often seen as a laggard in this area. However, the CMA does have teeth and is determined to show this. During 2013, as the OFT, it handed down two cartel fining decisions against a total of ten companies (*Mercedes-Benz Commercial Vehicles* [2013] and *Access Control and Alarm Systems* [2013]) and moved forward several other investigations, including a new criminal cartel investigation against individuals.

The OFT was always careful to point out that its efforts to stamp out cartels in particular, but also other anti-competitive practices more generally, involve action on several fronts. The same will be true now the CMA has been fully up and running since 1 April 2014. It will continue advocacy and support for corporate compliance programmes, but actual enforcement action against individual companies and individuals will remain an important part of the mix. The CMA's January 2014 strategy document ('Vision, value and strategy for the CMA') states that one of its five strategic goals will be to 'deliver effective enforcement', so as to:

... deter wrongdoing [and] ensure that businesses and individuals understand the law and know that effective sanctions follow if they break it.

There is also pressure from the UK government to decide cases and fine companies. In January 2014, the Department for Business, Innovation

& Skills published a document ('Competition and Markets Authority; Performance Management Framework') stating that it expects the CMA:

... to select and conclude an appropriate mix of cases, including... multiparty cartel cases, to maximise impact, end abuse and create a credible deterrent effect across the economy.

It is, therefore, clear that competition cases from the CMA will continue to flow, with cartel enforcement a clear focus. Against this background, the cartel fining decisions and the other cases advanced by the OFT in 2013 are instructive for a number of reasons. Any company trading in the UK (or indeed the EU as a whole, since the principles which apply everywhere in the EU are essentially the same) should be aware of the general issues raised.

What is a 'cartel'?

Anti-competitive agreements and practices are *prima facie* banned under EU and UK law. Article 101(1) of the Treaty on the Functioning of the European Union (TFEU) prohibits agreements between 'undertakings' and concerted practices:

... which may affect trade between [EU] member states and which have as their object or effect the prevention, restriction or distortion of competition.

This is in effect repeated in UK law for agreements which only impact the UK (s2(1) of the Competition Act 1998 (the 'Chapter I prohibition')). If the arrangement impacts trade between EU member states and the UK, then both provisions can apply.

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Some individual agreements or practices which are *prima facie* banned by Article 101(1) and/or the Chapter I prohibition (and are therefore void) are nevertheless exempted under, respectively, Article 101(3) TFEU or s9(1) Competition Act.

Agreements or practices covered by Article 101(1) and/or the Chapter I prohibition can be horizontal (between companies at the same level of the market; competitors) or vertical (between companies at different levels of the market; non-competitors). A 'cartel' is simply a type of anti-competitive agreement or practice involving competitors.

Case law has clearly established that some types of agreements and practices have as their 'object' the restriction of competition and are therefore automatically *prima facie* anti-competitive. No 'effect' on competition needs to be shown.

So far as concerns agreements between competitors, 'object' infringements are recognised to include what can broadly be described as 'cartel' activities, in particular price fixing, geographic market sharing, customer sharing and similar activities. Importantly, under EU and UK law, the exchange of information that reduces uncertainties about future behaviour is also an object infringement and treated as cartel activity.

Object infringements can in principle be exempted under Article 101(3) TFEU or s9(1) Competition Act, but this is difficult and unusual and, in any event, in practice cartel activities cannot be exempted.

If a regulator such as the EC or the CMA takes a decision finding that there has been an 'object' infringement of competition law then it will usually fine the company in question. The maximum amount of these fines is controlled by statute but within this the CMA (and EC) deliberately set fines at a high level as a deterrent, both in relation to the future conduct of the companies in question and as a warning to others.

Fine setting by the CMA and liability for fines

Section 36 of the Competition Act 1998 provides that the CMA may impose a 'financial penalty' (fine)

on an 'undertaking' which has intentionally or negligently committed an infringement of Article 101 TFEU or the Chapter I prohibition. In setting the fine, the CMA must have regard to the guidance for the time being in force (s38(8) of the Competition Act 1998). However, the maximum amount of the fine is 10% of the worldwide turnover of the undertaking.

The cartel offence is committed by individuals who engage in cartel arrangements with horizontal competitors that fix prices, limit supply or production, share markets or rig bids in the UK.

The OFT's fining guidance, which was adopted by the CMA, was published on 10 September 2012 ('Guidance as to the appropriate amount of a penalty', OFT423). Broadly, this sets out a six-step approach to calculating a fine. In the first step the CMA applies a percentage rate to the relevant turnover of the undertaking (relevant turnover generally being turnover in the relevant product and geographic market in its last business year).

Cartels are treated particularly harshly. The guidance states that in this first step the CMA will apply a rate of up to 30% to an undertaking's relevant turnover, and that for the most serious infringements of competition law, which include 'hardcore cartel activity', the actual rate will be towards the upper end of the range. Given that in the next step ('adjustment for duration') the resulting figure is usually multiplied by the number of years of the infringement, it can be seen that the fine for long-running cartels in particular will often be very significant when compared with the total turnover of the business (albeit always subject to the cap of 10% of total group turnover).

Potential personal liability

All cartels are of course put in place by individuals. Many countries, including the UK (s188 of the Enterprise Act 2002, as amended by the Enterprise and Regulatory Reform Act 2013), have therefore

introduced personal criminal liability for cartel activities. In the UK this is the 'cartel offence'.

The cartel offence is committed by individuals who engage in cartel arrangements with horizontal competitors that fix prices, limit supply or production, share markets or rig bids in the UK. It operates alongside the provisions of the TFEU and Competition Act 1998

and the prosecution or conviction of individuals under s188 in connection with a competition law infringement is not relevant for the purpose of setting the amount of a fine payable by an undertaking under the TFEU or the Competition Act 1998.

Leniency and settlement

As with other regulators worldwide, the CMA has a leniency programme, which (under the OFT) has shown itself very effective at rooting out cartels. Under the CMA's leniency programme, businesses that come forward and report their involvement in cartel activity may avoid a fine or have the fine reduced substantially. Individuals involved in cartel activity may also be granted immunity from criminal prosecution for the 'cartel offence'.

The vast majority (but not all) of the OFT's cartel cases were started as a result of whistleblowing under the leniency programme. This is a complex area and the OFT was continually refining its rules. On 8 July 2013, the OFT published revised leniency guidance, which was accompanied by two 'Quick Guides', one aimed at businesses and one aimed at individuals. The CMA has adopted this guidance.

It is also possible to 'settle' with the CMA once an investigation has started. This requires an admission of the infringement, in exchange for a discounted fine.

The OFT's 2013 cases

In the *Mercedes-Benz Commercial Vehicles* case (issued on 27 March 2013), the OFT fined Mercedes-Benz and five of its independent commercial

collusion in return for immunity from penalty under the OFT's leniency policy.

This case illustrates a number of points about cartel investigations

The OFT was also keen to point out that it undertakes own-initiative cartel investigations, stating:

... these cases also underline that the OFT can uncover cartels even in cases where the businesses involved do not blow the whistle.

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vehicle dealers a total of £2.8m. The dealers involved were mainly active in areas within the North of England and parts of Wales and Scotland. The nature of the infringements varied but all contained at least some element of market sharing, price coordination or exchange of commercially-sensitive information. One of the dealers avoided a fine, having been the first company to come forward after the investigation commenced to provide evidence of

in the UK. The OFT used it to send a signal that small companies active in local markets are not immune from competition law enforcement, stating that:

... the OFT will take firm action against companies that collude to deny customers the benefit of fair competition regardless of the size of the firms involved or geographic scope of the investigation.

Finally, the case served as a reminder that under UK (and EU) competition law the mere exchange of commercially-sensitive information can be seen and fined as a cartel.

The *Access Control and Alarm Systems* decision (issued 6 December 2013) again provided a reminder that even small companies can be fined. In this case the OFT targeted three companies for engaging in collusive tendering concerning the supply and installation of access control and alarm systems to retirement properties. A fourth party escaped fines since it had applied for leniency. The combined value of the at least 65 tenders involved amounted to only around £1.4m.

As with any cartel case, the companies in these cases may now find themselves subject to private claims for damages in the UK courts. The OFT, presumably much to the dismay of the companies in the *Access Control and Alarm Systems* case, commented that, although it was not required to make any findings about effects on prices, the conduct is likely to mean higher prices were paid by many people. That is certainly what any customers who bring damages claims will be saying.

The OFT's announcements about its other investigations during 2013 are also instructive. On 26 March 2013, the OFT announced that the UK Asbestos Training Association (UKATA) had, following discussions with the OFT, ended an arrangement that appeared to recommend the prices at which its members provide training services (*UK Asbestos Training Association* [2013]).

As a general rule, pricing recommendations made by trade associations to their members may raise serious competition concerns where they result in those members not competing with each other on the merits. This is a type of price fixing and therefore trade associations (and their members) need to be very careful when discussions or activities stray

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into this area. Emphasising this, the OFT commented:

[This] announcement sends out a wider message to trade associations that they should not undertake initiatives that could result in reduced price competition between their members.

Another case (*Care Home Medicine Cartel* [2014]) provides a reminder that even short-term cartels may be fined. On 12 December 2013, the OFT announced that a prescription medicine supplier, Hamsard, had agreed to pay a fine of £388,000 for entering into a market sharing agreement. The cartel only ran between May and November 2011. The other party, Celesio, escaped a fine entirely since it was the whistleblower (first in). Hamsard's fine was reduced since it also used the OFT's leniency programme (second in) and cooperated with the OFT under its settlement procedure.

This was a bald market sharing agreement; the companies agreed that Tomms Pharmacy (owned by Hamsard) would not supply prescription medicines to existing Lloyds Pharmacy (owned by Celesio) care home customers in the UK. In return, for at least some of the time, Lloyds also agreed not to supply prescription medicines to existing Tomms care home customers.

The OFT issued its statement of objections (a formal procedural step) in this case on 24 January 2014, and the formal decision was released on 20 March 2014.

There was yet more activity against companies in December 2013, with the OFT announcing that it had launched a formal investigation into suspected anticompetitive agreements and/or concerted practices involving entities in the property sales and lettings sector (*Investigation into property sales and lettings and their advertising* [2014]). This case concerns the advertising of fee rates in media entities and these companies' approach to each other's customers. No further information was available at the time of writing (except that the CMA is continuing the case).

Finally, the OFT demonstrated that there is still life in the cartel offence. In March 2013, it announced

that it had opened a new criminal investigation (*Investigation into the supply of products to the construction industry* [2014]). As part of the investigation, searches were carried out at a number of locations and seven individuals were arrested in the Midlands. Early in 2014

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that case moved forward, with one individual being charged and appearing in court.

Another criminal case started early in 2014. On 27 January 2014, the OFT confirmed that it had charged an individual under s188 of the Enterprise Act 2002, the criminal cartel offence, following an investigation into suspected cartel conduct in respect of the supply in the UK of galvanised steel tanks for water storage. The CMA, in addition to taking on this case, is conducting a related civil investigation into whether businesses have infringed the Competition Act 1998.

The CMA will be very careful taking these criminal cases forward, given that the OFT never secured a conviction (save where guilty pleas were entered) and had to stop the airline passenger fuel surcharge case (*R v George* [2010]). That latter situation followed the discovery during the trial of a substantial volume of electronic material, which neither side had previously been able to review.

Conclusion

It is clear that being involved in a cartel remains a key risk area for all businesses. Apart from fines, cartel decisions invariably give rise to reputational damage and these days it is almost inevitable that customers will bring private actions for damages.

For its part, the CMA will continue actively to investigate and take enforcement action against cartel activity in the UK. The OFT's 2013 cases provide illustrations of the following issues in particular:

- small companies operating in local markets are not immune;
- short-term cartels will not be spared;
- individuals will be targeted under the cartel offence;

- the risks arising out of just the exchange of confidential information;
- the particular risks arising out of involvement in trade associations;
- the potential benefits of using the OFT's (now CMA's) leniency programme and of settlement; and
- the OFT (now CMA) will open cases on its own initiative – it does not always rely on whistleblowers.

It is also clear that competition law compliance programmes remain very important, whatever the size of the business. Apart from reducing the risk of a cartel (or other anticompetitive activity) taking place in the first place, a key benefit is the possibility of taking advantage of leniency if the programme catches a cartel. ■

Access Control and Alarm Systems [2013] UKOFT CA98/03/2013

Care Home Medicine Cartel [2014] UKOFT CE/9627/12

Investigation into property sales and lettings and their advertising [2014] UKOFT CE/9827/13

Investigation into the supply of products to the construction industry [2014] UKOFT CE/9705/12

Mercedes-Benz Commercial Vehicles [2013] UKOFT CE/9161-09

R v George & ors [2010] EWCA Crim 1148

UK Asbestos Training Association [2013] UKOFT (no reference)