Competition Law Association
British Group of the
Ligue Internationale du Droit de la Concurrence
(International League for Competition Law)
www.competitionlawassociation.org.uk

Roundtable Meeting: 7 April 2011

Developments in UK Competition Law Fining Policy

We were very fortunate to be joined by Jackie Holland, Director of Competition Policy at the OFT, who gave an excellent presentation on developments in UK competition law fining policy, and Philip Woolfe from Monckton Chambers presented the draft National Report for the September 2011 Oxford LIDC Congress relating to Question A (Fines in anti-trust investigations).

Jackie Holland - Developments in UK Competition Law Fining Policy

Jackie's presentation, which reflected her own view rather than those of the OFT, was particularly topical in light of the CAT's recent judgments in the *construction* and *recruitment* cases. The slides covered four main areas:

- How the OFT seeks to encourage compliance with competition law within the framework of an optimal enforcement regime.

  Jackie referred to the guidance which the OFT provides to business, its recent work on competition compliance and its guidance to business on novel "horizontal" competition law issues.

- How the OFT seeks to achieve its objective of deterring firms and individuals from breaching competition law.

  Jackie summarised the conclusions of the key research studies on deterrence, including the Deloitte report, the London Economics report and the OFT's own report on drivers of compliance and non-compliance with competition law. The London Economics report benchmarked the UK regime to an "optimal regime" and concluded that a mix of sanctions (financial penalties, leniency and individual sanctions) was important.

- The appropriate principles for a penalty setting framework.

  Jackie set out some general themes for a penalty-setting framework, including transparency (i.e. the general methodology for setting fines and also transparency as regards the way in which penalties are calculated in individual cases); consistency/certainty (i.e. the need to ensure that, for particular types of infringements, a consistent approach is adopted) and flexibility (so that the framework can be adapted to take account of the circumstances of each case). Jackie noted that the OFT aims to achieve an appropriate balance between consistency and flexibility in practice (particularly at step 4, where the penalty is adjusted to take account of aggravating and mitigating factors).

- How the OFT sets penalties in practice (in line with the 5 step approach set out in its guidance).

  Slides 6 to 9 set out the five step approach in the OFT's guidelines on penalties, and contain a significant amount of detail on the approach adopted by the OFT in previous cases.

Jackie concluded that financial penalties play an important role in deterring companies from breaching competition law and achieving compliance but that other sanctions (particularly individual sanctions) are also important.

Philip Woolfe – Draft UK National Report on Question A for Oxford Congress (Fining Policy)

Philip Woolfe presented his draft report on Question A for the Oxford Congress which asks: "*What are the most important factors that should determine the level of fines imposed for infringements of competition rules? Should there be a binding framework to determine the level of fines? Who should decide?*"

Philip began by summarising the contents of the draft report, including the section on the legal framework (section 2), statistics (section 3) and the normative questions and recommendations (section 4). Philip grouped the normative questions and recommendations in section 4 into the following broad themes:

- Which body should determine the level of fines?

  Philip referred to the recent BIS consultation paper which set out three possible options: (i) the retention of the existing administrative system (with improvements); (ii) an adversarial or judicial system; and (iii) an internal tribunal within the CMA. He invited comments from the audience on the desirability of these options.

  Philip queried whether option (iii) was really distinct from options (i) and (ii): if the tribunal is not truly independent from the CMA, then it would be equivalent to the administrative system in option (i); and if it was truly independent then it would be equivalent to the judicial system in option (ii). Option (iii) also raised the possibility of additional costs for parties to an investigation and questions of fairness.

  <u>Views expressed by members:</u>

  - One advantage of a prosecutorial system is that, given the size of penalties (which incentivise parties to appeal) and the interventionist approach adopted by the CAT in recent cases, it would enable companies to get to an ultimate decision more quickly, whilst reducing costs for business.

  - Would a prosecutorial system really save much time or money? Presumably the OFT would still need to conduct significant fact-finding and at least advance to the equivalent of the statement of objections stage before prosecuting the case?

  - It might be possible/desirable to separate the substantive issue of whether there has been a competition law infringement (which the CMA could investigate under an administrative system) and the level of penalty (which could be left to the CAT to determine under a judicial system). There was a feeling that, in the construction case, there was significant duplication between the OFT's administrative investigation and the CAT's appeal process on the issue of penalties.

- Any change to a judicial system would require modifications to the OFT's leniency/immunity programme and the introduction of sentencing guidelines (in order to achieve a level of consistency and transparency). It was also not clear how the OFT's current policy of achieving deterrence could be achieved under a prosecutorial system.

- Which factors which should be taken into account when setting the level of fine?

  Philip queried whether a consumer welfare or total welfare standard should be adopted when assessing the effect of an infringement: the UK currently adopts a consumer welfare standard whereas some jurisdictions such as New Zealand adopt a total welfare standard which takes account of any deadweight loss.

  On consistency with other penalties, Philip referred to the CAT's judgment in *Tomlinson* where it had concluded that corporate manslaughter and health and safety cases were too far removed from competition law infringements to provide a meaningful comparison as regards the level of penalty. Philip queried whether other offences may provide more meaningful benchmarks.

  Views expressed by members:

  - Other possible comparators mentioned by members included the corporate offence in the new Bribery Act (where putting in place adequate compliance training and systems and procedures operates as a defence to the corporate offence). Other possible comparators included the FSA (which had recently revised its guidance on setting penalties).

  - There was some debate about whether the 10% range at step 1 (starting point) was appropriate. Members were not aware of any equivalent ranges for other economic crimes, but members referred to the 30% figure used by the European Commission in its fining guidelines, which is considerably higher.

  - There was some debate as to whether (and to what extent) the level of penalty should be reduced if the company has put in place a rigorous competition compliance programme, with differing views on this point.

  - Linked to this, there was some debate about how to deal with the issue of "rogue employees" in setting fines. It was pointed out that the OFT retains the ability to depart from the guidelines in particular cases. Hence, at least in theory, an individual could be prosecuted for the cartel offence whilst the company might not be fined for the infringement of competition law.

  - A potential concern with any reduction in penalty being linked to the undertaking taking disciplinary action against employees is that it may encourage companies to identify scapegoats.

- Seriousness and deterrence

  Philip queried whether, when settling the penalty, it was truly possible to separate out the seriousness of an infringement from the overall effect on competition. He invited views on whether the OFT's approach to deterrence needed to be revisited in light of the recent CAT judgments in *construction*.

Views expressed by members:

- There was some debate as to whether a system based on turnover (rather than profitability) was appropriate. Members generally agreed that relevant turnover (as a proxy for the economic impact of the infringement) was the appropriate starting point. It also had the benefit of being certain and readily identifiable from statutory accounts (as opposed to profitability, which has many different measures).

- Members discussed whether larger fines should be imposed if the company is highly diversified (since the penalty may only account for a small proportion of its total turnover). This issue was linked to discussions (following the CAT's construction judgments) on the issue of the minimum deterrence threshold.

- The size of the market and profitability levels could then be considered as a sense check at step 3 of the guidelines.

- It would be relatively unusual for turnover not to be the appropriate starting point in step 1 (absent exceptional circumstances, such as those in the *recruitment* case, where the statutory measure of turnover did not reflect the economic reality of the parties' activities). The guidelines are sufficiently flexible for issues such as deterrence to be factored in at step 3 of the OFT's guidelines.