

Competition Law Association Round Table: Developments in UK Competition Law Fining Policy

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Note: The views I express today are strictly personal and may not reflect those of the OFT

Areas to Cover

- **Setting the scene: an optimal enforcement regime**
 - How does the OFT try to encourage compliance with competition law?
- **Deterrence: the research**
 - What sanctions help to deter breaches of the law?
- **Overall principles for a penalty setting framework**
 - What principles should be considered when developing a penalty setting framework?
- **OFT penalty guidance approach**
 - What is the OFT's methodology for penalty setting?

Setting the scene: an optimal enforcement regime

- **Using OFT Annual Plan two overarching themes:**
 - High impact enforcement to achieve compliance with competition law;
 - enforcement action against companies (including penalties where appropriate)
 - Individual sanctions (criminal cartel offence and/or director disqualification) where appropriate
 - prioritise cases to make most effective use of our limited resources
 - Influencing and changing the behaviour of businesses, consumers and Government to make markets work well
 - aim to avoid breaches of the law in the first place
 - guidance to business on the law
 - guidance to business and directors on compliance

Deterrence: the research

- **Deloitte research (2007) - *The Deterrent Effect of OFT Competition Enforcement by the OFT***
 - Perceived importance of sanctions in deterring infringements: criminal sanctions, disqualification of directors, adverse publicity, fines and private damages actions
- **London Economics report (2009) - *An Assessment of Discretionary Penalties Regimes***
 - Compared UK regime to an 'optimal' regime – found that a mix of sanctions (e.g. financial penalties, leniency, individual sanctions) was important to an optimal regime
- **OFT research (2010) - *Drivers of Compliance & Non-Compliance with Competition Law***
 - Confirmed importance of 'sticks' - adverse reputational impact (company/personal), financial penalties, criminal sanctions, director disqualification orders and internal disciplinary sanctions
 - Plus noted some 'carrots' – management commitment, positioning in market as 'ethical' company, confident employees knowing 'rules of game' and competing hard, internal rewards

Overall principles for a penalty setting framework

- **Transparency**

- General methodology
- Individual case

- **Consistency/certainty**

- For some elements need general approach for all cases (or categories of cases)

- **Flexibility**

- To take into account individual factors/circumstances of case

- **Discussion point:**

- Which of these principles do you regard as being most important?
- Are there other relevant principles?
- Where is the appropriate balance between consistency and flexibility?

OFT penalty guidance approach (1)

- **Published guidance, required by s38 CA98, approved by SoS**
- **Twin objectives:**
 - Reflect seriousness of infringement
 - Deterrence of undertakings involved (specific deterrence) and other undertakings (general deterrence)
- **Five step approach:**
 - Step 1 – starting point
 - Step 2 – adjustment for duration
 - Step 3 – adjustment for other factors
 - Step 4 – adjustment for aggravating and mitigating factors
 - Step 5 – adjustment to prevent maximum penalty being exceeded and to avoid double jeopardy

OFT penalty guidance approach (2)

- **Step 1 – starting point**

- % to reflect seriousness of infringement (up to 10%):
 - Take into account - nature of product, structure of market, market shares, entry conditions, effect on competitors/third parties, damage to consumers
 - More serious infringements, higher starting point %
- Applied to relevant turnover of undertaking in market affected by infringement

- **Step 2 – adjustment for duration**

- Multiplier based on number of years of infringement may be applied

OFT penalty guidance approach (3)

- **Step 3 – adjustment for other factors**

- Adjustment to achieve twin objectives of OFT penalties, in particular deterrence
- May take into account economic/financial benefit from infringement, special characteristics including size and financial position of undertaking
- Penalty at end of Step 2 may go up or down
- In practice, this is step where financial hardship discounts have been given in appropriate cases

- **Step 4 – adjustment for aggravating and mitigating factors**

- Aggravating factors include: role of undertaking as leader/instigator, involvement of directors/senior management, retaliatory/coercive measures, continuing infringement after start of investigation, repeated infringements, intentional (rather than negligent) infringement
- Mitigating factors include: role of undertaking (eg acting under severe duress/pressure), genuine uncertainty about whether was infringement, adequate steps having been taken to ensure compliance, termination of infringement after start of investigation, cooperation

OFT penalty guidance approach (4)

- **Step 5 – adjustment to prevent maximum penalty being exceeded and to avoid double jeopardy**
 - Statutory cap of 10% of worldwide turnover
 - Taken into account any fine already imposed by European Commission/another NCA/court in respect of the same anti-competitive effects
- **Leniency and early resolution discounts**
 - Where applicable, these discounts are made at the end of the calculation

Conclusion

- **Financial penalties play an important role in deterring companies from breaching competition law and achieving compliance**
- **Other sanctions important too (particularly individual sanctions)**
- **Range of factors taken into account when setting appropriate financial penalty**

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