



Competition Law Association

British Group of the
Ligue Internationale du Droit de la Concurrence
(International League for Competition Law)

www.competitionlawassociation.org.uk

Comments in response to the discussion document *The deterrence effect of competition enforcement by the OFT*, November 2007 ("OFT Consultation Document")

1. Introduction

1.1 These comments are submitted on behalf of the UK Competition Law Association ("CLA")¹ which is affiliated to the Ligue Internationale du Droit de la Concurrence ("LIDC"). The CLA welcomes the opportunity to contribute to the debate on the deterrence effect of the enforcement work of the Office of Fair Trading ("OFT") and Competition Commission ("CC") in respect of merger control and the work of the OFT in the competition area raised in the OFT's Consultation Document.

1.2 The CLA does not seek to address every question raised in the OFT Consultation Document, but confines its comments to the questions discussed below.

2. Timing of the next OFT study

2.1 The CLA considers that it is appropriate to repeat the study in 3 years time rather than sooner. It is unlikely that circumstances will have changed so significantly by November 2008 to warrant a repeat of the study within a year. It is considered that a longer period would give the OFT greater clarity when assessing the specific deterrent effects of various types of competition enforcement.

2.2 The difficulties of assessing the marginal deterrent effect of enforcement are well documented. The danger of using survey evidence is that it is in its nature anecdotal and may not give an accurate picture.

¹ The membership of the CLA includes barristers, solicitors and in house lawyers, academics and other professionals including economists, patent agents and trade mark agents. The main aim of the CLA is to promote freedom of competition and to combat unfair competition.

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3. Under the radar mergers

- 3.1 The CLA considers that the most effective deterrent to under the radar mergers is the power of the Competition Commission to order divestment in a merger that has proceeded without a prior clearance under the Enterprise Act. This power encourages a party to notify a merger that may give rise to competition concerns.
- 3.2 The CLA does not currently see any need for adopting a compulsory merger notification system instead of the current voluntary procedure. If introduced, compulsory notification of qualifying mergers might well result in notification of significantly more mergers out of over caution as happened with the EC system of notification of restrictive agreements. Such an over cautious approach would be likely to hamper and delay the present notification system without providing considerable additional benefits in terms of ensuring compliance.
- 3.3 In any event, as below the radar mergers are generally those which fall at the smaller end of the scale, it is possible that the recently revised approach to markets of insufficient importance would apply to them.

4. Factors affecting deterrence

- 4.1 The maximum level of fines under the Competition Act 1998 (10% of the undertakings group worldwide turnover) is set sufficiently high to ensure general and specific deterrence. The issue therefore is whether the OFT's approach to fining is sufficient to create a deterrent effect. While it would doubtless be very effective if fines were linked to the profitability of the cartel activity it is acknowledged that the difficulties inherent in arriving at a profit figure may be too great and may result in time consuming disputes with the cartel participants. However the OFT Consultation Document reports that according to the great majority of those interviewed, director disqualification and criminal penalties act as the two most important deterrents against breaches of the competition rules. The survey results of company representatives responsible for compliance are particularly telling in that respect because they demonstrate that these sanctions are viewed very seriously within the relevant companies and are a potent consideration in the minds of individuals (both in a professional and a personal capacity). Interestingly, at the time the interviews were conducted, there had been no publicity regarding director disqualifications. The concern shown in the company survey about disqualification suggests that there is scope for greater use by the OFT of publicity in respect of this sanction.
- 4.2 The survey evidence also points to the deterrent effect of criminal sanctions. Publicity surrounding the high profile applications for extradition to the US of alleged offenders is likely to have had the desired effect of promoting deterrence. Now that the OFT has exercised its powers in respect of criminal prosecutions,² it is likely that the deterrent effect of these sanctions will increase.

5. Business chilling and vertical price restrictions

- 5.1 While resale price maintenance often operates to the detriment of the consumer, it is recognised that a vertical price restriction can in some circumstances be pro-competitive and enhance both total and consumer welfare. It is often the case that the most harmful

² <http://www.offt.gov.uk/news/press/2007/177-07>

cartels are those that operate on a horizontal level and the CLA therefore consider that the OFT should consider concentrating its enforcement activities on such horizontal cartels.

6. Abuse of dominance

- 6.1 The CLA believes in addressing this issue it is helpful to consider the company responses to the survey of those in larger companies (and therefore those who may be more likely to be dominant). It appears that such companies are likely to take advice on issues relating to dominance. The comment of one person surveyed that a dominant undertaking fights with 1 hand behind its back is a not infrequently expressed complaint from undertakings with large market shares. The publication of detailed guidelines on issues arising in relation to dominance and abuse are undoubtedly helpful for dominant undertakings and their advisers and the CLA supports the production of such clear guidelines. In any event the CLA concludes that there is no need for the OFT to take more abuse cases.

If you wish to discuss any of the above issues kindly initially contact Geraldine Tickle at geraldine.tickle@martjohn.com or call on 0870 763 1529.

The Competition Law Association

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