

December 2009

Competition

OFT focuses efforts on the construction sector

On 22 September 2009, the OFT announced that it had imposed fines totalling £129.5 million on 103 construction companies across England for engaging in anti-competitive behaviour. Just over a week later the OFT fined six recruitment agencies a total of £39.27 million in connection with the supply of candidates, again in relation to the construction sector.

The OFT's construction case focused on "cover pricing", the practice of obtaining from a competitor a price at which to bid, in the anticipation that the cover price received would be too high to win the tender process. In six cases, companies also used compensation payments. Although the OFT has the power to fine companies up to a maximum of 10% of worldwide turnover for breaches of EU or UK competition law, in this instance the fines averaged just over 1% of the companies' annual worldwide turnover. This is contrary to earlier indications from the OFT that it was considering imposing fines at significantly higher levels than in similar cases in the past. The change in stance appears to have been at least in part prompted by representations made by the UK Contractors Group (UKCG), which has sought to persuade the OFT to take into account the effects of the economic downturn on the construction industry. The UKCG has also championed the industry's willingness to engage with the OFT to stamp out what the OFT described as the "widespread and endemic" practice of cover pricing. Together with the National Federation of Builders, the UKCG has invested heavily in raising awareness of competition law amongst the industry, which culminated earlier this year in the launch of a Competition Law Code of Conduct.

In the recruitment agencies decision, the OFT found that eight companies had organised a collective boycott of a new

intermediary in the market, Parc UK. The agencies also agreed between themselves target fee rates for the supply of candidates to intermediaries and certain construction companies in the UK. These agreements were implemented following five meetings of the cartel known as the "Construction Recruitment Forum".

Current indications are that 26 companies have appealed the OFT's bid rigging decision (although one may be deemed to be out of time), mainly in respect of the penalties imposed, whilst a number of parties, including Hays, are expected to appeal the construction recruitment decision. A key issue in both cases is the OFT's use of a Minimum Deterrence Threshold (MDT) designed to uplift fines on the grounds of deterrence. The starting point of the fines in the recruitment decision was set at 9% (just 1% below the maximum of 10%) of a party's relevant turnover and further adjustments were then made, including in some cases for aggravating factors (e.g. senior management involvement or acting as leader/instigator) or mitigating factors (e.g. applying for leniency, introducing effective compliance policies and in one case the company's poor financial situation). The 9% starting point and use of the MDT are however intended to send a clear message that the OFT will not tolerate hardcore cartel activity.

All change as Treaty of Lisbon comes into force on 1 December

As well as changing the structure of the European Union, the Lisbon Treaty which largely came into force on 1 December (save for some deferred institutional changes), brings with it a number of terminology changes for competition law. The EC Treaty, which contained the main competition related Articles, is now known as the Treaty on the Functioning of the European Union or TFEU. Whilst the substantive content of Articles 81 to 86 has not altered, the numbering of those Articles has changed to Articles 101-106 TFEU (with 81 & 82 becoming 101 and 102 respectively).

The Lisbon Treaty has also made slight changes to the names of the Luxembourg courts. The EU's top court, the European Court of Justice (ECJ) will now be called the Court of Justice. Its lower court, the Court of First Instance (CFI), will be called

the General Court. The term 'The Court of Justice of the European Union' is the collective name for those two courts plus any specialist Judicial Panels (the only current one being the EU Civil Service Panel, although there is unconfirmed

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speculation that a specialist competition Panel could be created sometime in the future). A number of these changes in terminology will require amendments to UK Law and provision is made in the European Union (Amendment) Act 2008 for those changes to be made formally by statutory instrument.

In terms of changes to substantive law, it is unlikely that the repeal of Art 3(1)(g) EC (requiring Member States to implement "a system ensuring that competition in the internal

market is not distorted") will affect the landscape of competition law and practice in the foreseeable future, given that not too dissimilar wording to Art 3(1)(g) has been incorporated into a binding Protocol to the Lisbon Treaty. There is some debate as to whether the increased focus in Lisbon on social policy objectives (in Articles 9 & 14 TFEU) might in the future influence the Court of Justice of the European Union's approach to certain issues (such as the definition of an undertaking in competition law).

English Commercial Court allows "parallel proceedings" in cartel cases

In a recent case, the English Commercial Court declined to grant a stay in a claim for damages where proceedings had already been brought in Italy, potentially widening the field for claimants to engage in "forum shopping". The Court decided that proceedings could be brought against those subsidiary companies domiciled in England, even though

they claimed to have no knowledge of the cartel activities of their parents, against whom the Commission's infringement decision had been addressed. This was on the basis that those subsidiaries had effectively implemented the cartel agreement by selling the cartelised products on the English market.

To refer or not to refer: that is the question!

The OFT has recently published for consultation draft revised guidance on the exceptions to its duty to refer merger cases to the Competition Commission (CC) and its ability to accept undertakings in lieu of a reference. The OFT states that in applying the *de minimis* exception it will consider a number of factors including whether the public cost of a reference (around £500,000) outweighs the

consumer harm that would result from the merger. The draft guidance also expands on the situations in which the OFT will consider accepting undertakings in lieu of reference. The OFT has invited comments by 15 January with an intention to publish the final version in Spring 2010.

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