

Higher UK Anti-trust Fines on the way

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The UK Office of Fair Trading (OFT) published revised fining guidelines on 10 September 2012¹. Following recent judgments of the UK Competition Appeal Tribunal² (CAT) which substantially reduced fines imposed by the OFT, the OFT has now given itself freedom to impose higher fines.

In particular, the OFT has increased the starting point for determining the level of fine from a maximum of 10% of relevant turnover to a maximum of 30% of relevant turnover and added an additional step for adjustment for deterrence or proportionality. This change is motivated by the OFT's desire to ensure that anti-competitive behaviour in markets which account for only a small percentage of a group's sales can nevertheless be set at a level which the OFT believes provides sufficient deterrence. The net effect is likely to be that businesses will face higher fines if they commit infringements, and, until a body of case law on the new guidelines develops, the amount of fine in a given case will be even more difficult to reliably predict.

The new guidelines are effective immediately, including to existing investigations which have not yet progressed to a statement of objections.

The key changes in more detail:

- The maximum starting point for calculating a fine has increased from 10% to 30% of relevant turnover³

The OFT has justified this increase by saying that it allows it greater scope to distinguish between the seriousness of the different types of infringement and aligns its method for determining the starting point of the fine with that of the European Commission. The OFT has also said that for the most serious infringements, such as price fixing, it will use a minimum starting point of 25% of relevant turnover. However the OFT says it will also take into account the structure of the market, and the degree of consumer harm caused.

- In addition, the OFT has added an additional 'adjustment for specific deterrence and proportionality'. The OFT may impose an uplift where it considers that the likely financial benefit which the business has gained as a result of the infringing conduct is likely to outweigh the penalty. The OFT will have regard to total turnover and margin at the time the penalty is imposed, rather than the time the infringement took place.
- An additional aggravating feature has been added to penalise 'persistent and repeated unreasonable behaviour', such as repeatedly failing to meet OFT deadlines.
- Fines remain subject to an overall cap of 10% of group worldwide sales.

1. OFT 423 *Guidance as to the appropriate amount of a penalty*, September 2012
http://www.oft.gov.uk/OFTwork/publications/publication-categories/guidance/competition_act/oft423
2. [2011] CAT 3 (<http://www.catribunal.org.uk/238-7067/Judgment.html>); [2011] CAT 6 (<http://www.catribunal.org.uk/238-7051/Judgment.html>), [2011] CAT 7 (<http://www.catribunal.org.uk/238-7060/Judgment.html>) and [2011] CAT 9 (<http://www.catribunal.org.uk/238-7090/Judgment-Non-confidential-version.html>). The CAT found that the OFT was bound by the parameters of its own guidelines and had used the wrong turnover, misapplied its Minimum Deterrence Threshold, and failed to have sufficient regard to the characteristics of the construction industry and the specific facts of each case in setting the level of fine.
3. i.e. the sales of the products or services made in the year prior to the date when the infringing conduct was found.

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