

The OFT finds that an exchange of information on independent school fees violates national competition provisions but accepts a "structured settlement" (Independent Schools)

United Kingdom, Anticompetitive practices, Exchange of information, Sanctions/Fines, Settlement, Services

Office of Fair Trading, 20 November 2006, Decision n° CA98/05/2006, Exchange of information on future fees by certain independent fee-paying schools, Case CE/2890-03

<http://www.offt.gov.uk/NR/rdonlyres/...>

In late December 2006, the UK Office of Fair Trading ("OFT") published a decision in which it found the exchange of commercially sensitive information between fee-paying independent schools in the UK to be unlawful under UK competition law. The investigation, one of the largest OFT investigations to date, concluded that 50 independent schools had infringed Chapter I of the Competition Act 1998 (the UK's equivalent to Article 81 EC prohibiting anti-competitive agreements) by providing each other information on future proposed fee levels and proposed fee increases.

OFT guidance notes that an exchange of pricing information may lend itself to price co-ordination and therefore to the reduction of competition which would otherwise be present between entities that are competitively aligned. In this instance, the OFT found evidence of a regular and systematic exchange of information through what was known as the "Sevenoaks Survey" (Sevenoaks being one of the schools involved and whose bursar collected, collated and circulated information at regular intervals to the other participants). The OFT concluded that the fee information that was shared over three academic years contravened the Competition Act 1998 by distorting price competition between the schools and likely caused higher fees than would otherwise have been the case.

However, despite the evidence of this anticompetitive behaviour, the schools escaped heavy financial sanctions as the OFT chose instead to pursue a "structured settlement". Under this settlement, the schools agreed to an admission of liability in return for each receiving a nominal financial penalty (no more than £10,000 in any one case) and collectively contributing to an independently monitored educational trust for students who might have been affected by the arrangements in question. Most notably, the OFT refrained from making a ruling as to the actual effects of the anticompetitive activity on school fee levels. In addition, the OFT reserves the right to increase the fine in respect of any school by way of further decision if it fails to comply with any of the terms of the agreed settlement. It also reserves the right to make an application for the levied fines to be increased and to request payment of its costs if any of the participating schools brings an appeal against the decision before the Competition Appeal Tribunal ("CAT").

This case has a number of novel aspects. It is the first time the OFT has imposed financial penalties on a charity sending a strong message that no undertaking, regardless of its status, can afford to be ignorant of the competition law provisions (and that the OFT will not be deterred from pursuing more severe penalties in the future). More interestingly, it is the first time the OFT has reached this kind of "settlement agreement" and highlights, according to its Chief Executive John Fingleton, the OFT's "willingness to consider innovative solutions in appropriate cases." In the absence of such an

agreement, the OFT commented that it would likely have set penalties of at least 5% of the relevant turnover of the schools as the participants must have been aware (or were at least negligent in not recognizing) that such information sharing would lead to the restriction, prevention or distortion of competition in the market in question.

In the circumstances, a more nuanced approach proved desirable with the OFT recognizing the non-profit, charitable status of independent schools and the likely effect any substantial fines would have in terms of increased fees or reduced services for present and future students. The OFT is also acutely aware of the cost and administrative burden of pursuing investigations and of defending appeals before the CAT which have become more frequent in recent years. As such, the OFT has committed itself to focusing its limited resources on taking infringement decisions in matters that deliver the most tangible benefit to consumers (i.e. hard-core cartels). In turn, it aims to maintain a level of flexibility in resolving other matters by adopting alternative approaches to resolution which will also minimise the risk of any appeal. The form of voluntary redress pursued by the OFT in this case is a clear example of such thinking and may indeed provide a template for future actions as the OFT sets out to enforce competition law more effectively and in the most practical, pragmatic and cost efficient way. It should, however, be noted that this kind of settlement will not deprive an injured third party from bringing a damages claim before the CAT on the back of an infringement decision.

On this case, see also: The OFT proposes for the first time a settlement in order to cease information exchange and price-fixing (Independent Schools), A. Jones, e-Competitions, May 2006-II

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