Neighbourhood watch

Are property sales and letting agents under scrutiny? Suzanne Rab & Andrew Francis say you can put your house on it

IN BRIEF

- The Office of Fair Trading has launched an investigation into suspected anti-competitive agreements involving companies operating in the property sales and lettings sector (OFT case: *CE/9827/13*).
- The investigation puts under the microscope possible violations of competition law relating to fee rates in the media and the companies' approach to each other's customers.

The Office of Fair Trading (OFT) is investigating a potential infringement under the Competition Act 1998, Ch I which is the UK domestic legislation applying to restrictive agreements, including cartels. Chapter I mirrors the EU competition law prohibition on restrictive agreements contained in Art 101 of the Treaty on the Functioning of the EU. Chapter I prohibits agreements, decisions and concerted practices between or among undertakings or associations of undertakings (including trade associations) which have as their object or effect the prevention, restriction or distortion of competition within the UK and which affect trade in the UK. The OFT may impose penalties of up to 10% of turnover on a company or association that is found to have violated a provision of UK or EU competition law, including Ch I. Individual directors may face disqualification from acting as a company director for up to 15 years.

The provision of property sales and letting services is generally fragmented and regarded as competitive. However, the fact that individual agents are competitors and may cooperate in the listing and sale of real estate means that competition issues can arise. Agents may also be members of trade associations which serve many legitimate purposes such as market research, member education, marketing and advertising on behalf of members. Because the very nature of trade associations involves interaction between competitors, trade association activities can also raise competition issues, for example if they provide a forum for collusion on prices or terms of supply.

OFT inquiry

Based on the OFT's limited public statements, the scope of its investigation is not entirely clear at this stage, other than that it is focusing on Ch I (ie anti-competitive agreement or arrangement between parties operating at the same level in the supply chain). The OFT states that it is investigating "advertising of fee rates" and the approach of property companies to "each other's customers".

Examples of arrangements between competing property or letting agents that could infringe Ch I include agreements:

- to fix commissions or minimum commissions or fix the allocation of commissions (whether by reference to an absolute level or differential relative to competitor pricing);
- to fix other elements of the price such as discounts, rebates or other price-related terms offered to property owners or tenants;
- not to compete for certain clients or types of clients (for example, commercial or residential); and
- not to compete in certain geographic areas.

Clearly, an express agreement over any of the above would fall foul of Ch I, although one of the main areas of risk relates to the exchange of competitively sensitive information. This includes current or future pricing information including components of pricing such as commissions or planned marketing strategies. Sharing such information even indirectly through a third party such as a media or advertising company could provide evidence from which the OFT may infer an anti-competitive agreement in certain circumstances.

It is not clear at this stage whether the OFT has concerns regarding indirect information exchange over fees where, for example, the exchange of information in a vertical arrangement provides evidence from which an unlawful horizontal agreement can be inferred. According to this principle, when information on price is exchanged between two or more undertakings operating at the same level of supply/distribution (ie A and C who could be property companies) via a common trading contractual party (ie B who could be an advertising company) operating at a different level in the supply chain, there can be said to exist horizontal price fixing agreements between the retailers (A and C) themselves. The UK Court of Appeal has been satisfied that A, B and C can be seen as parties to a single infringement as opposed to independent vertical agreements in the recent *Replica Football Shirts* case (Cases 102/1/1/03 and 1022/1/1/03, *JJB Sports plc v Office of Fair Trading; Allsports Limited v Office of Fair Trading* [2004] CAT 17, para 141, [2004] All ER (D) 23 (Oct)). Interestingly, in another context when the OFT made its infringement decision in *Tobacco* it decided not to pursue allegations relating to the indirect exchange of information on future retail prices (OFT decision *Case CE/2596-03: Tobacco*, 15 April 2010).

Practical compliance

While well-informed businesses will know that an express agreement with a competitor on fees and customers will fall foul of competition law, there are some less obvious competition law risk situations. The following hypothetical situations are used to illustrate this point in a property context.

Hypothetical scenario 1: Commissions

The following is a discussion over social drinks between four property sales and letting agents (Andy, Barry, Charlie and Dave) from four independent firms in the fictitious Real Town:

Andy: It is good to see you guys again. The market seems to be picking up, but it is still sluggish.

Barry: It has been tough as we all know. A tightening up of commissions would help.

Charlie: I am not sure we should be talking about fees.

Barry: Oh, c'mon. We are not agreeing anything. I am just saying what everyone around this table really thinks that a little consistency on rates in this difficult market would allow us to earn a decent living.

Charlie: I am all for earning a decent living.

Andy: We could set some realistic floors and ceilings for commissions and prune the discounts. That would allow us to get back on our feet. It might also create some certainty in a volatile market. Clients would also get some predictability rather than the ups and downs we have seen of late.

Barry: I'd like to have some stability.

Charlie: Well, we have been thinking on similar lines. I might dig out our strategic plan for the next year on where we see rates moving.

Andy, Barry and Charlie met up again and shared their firms' marketing plans by e-mail. Dave did not attend the meeting. He was included on all the e-mail correspondence. A few months later, the four firms advertised their commissions in a variety of media. Although the rates were all different they were markedly closer and set at higher levels than in previous years.

Hypothetical scenario 2: Lettings listings

The following is a conversation between the managing partners at two independent letting agents (Edna and Fran) and Greta, an advertising agent:

Edna: Hiya Fran. How are you doing?

Fran: Could be better. There is more movement but it is patchy.

Edna: It is a similar story here. I am seeing a lot of activity in North Field but it is pretty quiet down South.

Fran: Well, as you mention it we are more interested in South Field. If we did not bump into your folks in that area it would help.

Edna: That might make sense if we were not rubbing shoulders with you in the North. I will have a look at our listings and see.

Greta: I can say now that the split between you sees most of the listings for Letting Go in the North and Let Down in the South.

Fran: I will need to check the numbers. I will get back to you.

Edna and Fran exchanged a number of phone calls over the next month relating to trends in their respective listings. Two months later, Letting Go withdrew all its listings from the South. Let Down announced that it was no longer letting properties in the North and that it would refer potential tenants for those areas to Letting Go.

> *"The provision of property sales & letting services is generally fragmented"*

The above are obviously stylised and, ultimately, inconclusive scenarios. However, they illustrate the potential pitfalls to be aware of where close competitor interactions may provide evidence from which an authority could infer an anti-competitive agreement or understanding along with other evidence. These include the following:

- The fact that there is no written agreement over commissions or customers is not decisive.
- The arrangements might help the individual companies to weather the storm of tough economic times and there may be more price stability and choice in the long run. These factors will not tend to provide a defence where price-fixing or market allocation are involved.
- A party may not say or agree to anything at a meeting and may not be a participant in all contacts. However, even passive players may be found to be involved in unlawful arrangements if, through their actions or inactions, they indicate to the other participants their agreement to the collusive outcome.
- Similar pricing, of itself, is not necessarily proof of collusion. However, when viewed in the context of exchange of commercially sensitive information this may be taken as evidence of collusion by a competition authority.
- Third parties such as brokers, advertisers or other service providers may offer a forum for unlawful exchanges of information between competitors. This can provide evidence of an unlawful concerted practice where commercially sensitive future information has been passed in each direction giving insights into likely future competitive behaviour and reaction to it.
- In recent cases, it has often been e-mails that have been used as evidence of an anti-competitive agreement. Relevant information may be in hard copy or electronic form including: hard drives, optical media (CDROM, DVD), removable media (secure digital cards, memory sticks, and floppy disks), and mobile phones.
- Even telephone calls can provide evidence of an agreement. The competition authorities have used mobile phone records and the timing and frequency of calls to show an unlawful agreement in the past.
- Customers or other third parties who are harmed by practices that violate competition law may claim damages for the loss that they have suffered. This could take the form of monetary compensation for the alleged overcharge, whether in the form of increased booking fees, commissions or rent.

Next steps

The OFT expects to take a decision on the next phase of the investigation next month. The investigation is an interesting development as it is targeting "hardcore" practices (ie cartel behaviour) rather than market failings which may not be as a result of the practices of individual companies. It is lawful to compete aggressively but as the investigation shows the property sales and letting sector is not immune from competition law scrutiny. It is important, therefore, for companies and individuals operating in the sector to have an understanding of how competition law can apply to their day-to-day activities. Furthermore, as an investigation can be expensive, time-consuming and result in severe penalties, follow-on damages actions and attendant bad publicity, it makes sense to follow basic competition law guidelines. **NLJ**

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