apse membership resources

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OFT issues guidance on competition law and its application to public bodies

To: All contacts in England, Wales, Scotland and Northern Ireland

Key issues
Guidance on competition law for public bodies
Explanations of terms provided
Intention is to ensure public bodies understand their responsibilities

1. Background

Following voluntary assurances given to the Office of Fair Trading (OFT) by members of a group of school suppliers in the public sector concerning the way they compete for business from schools in England, the OFT has published guidance to help public sector bodies understand when and how competition law applies to them.

Members of the Pro5 group of Public Sector Buying Organisations (PSBO) were approached by the OFT in 2011 following a complaint which highlighted possible competition concerns about the way their goods and services were marketed to schools. PSBOs are combined purchasing bodies formed by some local authorities to provide schools with better value goods and services.

In this case, each member of the Pro5 group has worked with the OFT to address concerns, in particular, PSBO assurances recognise that, where they are given discretion under relevant legislation and regulations, schools remain free to purchase goods and services from any supplier they choose, and each PSBO remains free to decide independently how, where and at what price to market goods and services to schools and other customers. The OFT has made no finding of an infringement of competition law by members of the Pro5 group.

The OFT's new guide on the application of competition law to public bodies highlights that competition laws apply to publicly owned bodies whenever they engage in 'economic activity'. The OFT stated that "The issues that our guidance covers are increasingly relevant and important as public services provision is being opened up further to the private and voluntary sectors. The OFT is committed to supporting compliance with the law and, more generally, to ensuring that a level playing field exists for all operators in these markets."

In broad terms, the guidance notes that a public body should ask itself the following questions for each of its activities:

- Am I offering or supplying a good or service, as opposed to, for example, exercising a public power?
- If so, is that offer or supply of a 'commercial' - rather than an exclusively 'social' - nature?

The guidance is at http://www.oft.gov.uk/shared_oft/ca-and-cartels/OFT1389.pdf

2. The Guidance

The guidance provides a high level overview of the key principles to which a public body should have regard when assessing whether its activities will be subject to UK or EU competition law.

It notes that public bodies are also increasingly seeking to generate revenues by utilising assets or spare capacity in markets beyond their core public functions. Such developments reinforce the need for public bodies to be aware of their existing and ongoing obligations under UK and EU competition law when carrying out their functions.

The report provides a framework of steps to which public bodies should have regard and goes through a number of steps which are outlined below.

2.1 Public bodies as 'undertakings'

A public body will be subject to the UK and EU competition law prohibitions discussed in the guide if and when it acts as an 'undertaking'. The term 'undertaking' is not defined in the CA98 or the TFEU, but its meaning has been considered in UK and EU case law. That case law has defined 'undertaking' as covering any natural or legal person engaged in 'economic activity', regardless of its legal form or the way in which it is financed. The focus of the assessment of whether a body is an undertaking is therefore on the nature of the particular activity undertaken, not the nature of the body undertaking it.

As such:

- The term 'undertaking' can apply equally to public sector bodies and not-for-profit bodies, (as well as to private sector bodies). Public authorities, State-controlled enterprises, charities, etc. all fall within the definition of an undertaking, if they are carrying on an economic activity.
- The legal form of the body in question is also irrelevant to the question of whether it acts as an undertaking. A body need not, for example, be an incorporated company in order to be an undertaking.
- The fact that a body is intended to be non-profit making will not, of itself, be sufficient to deprive it of its status as an undertaking.

It is important to note that this 'functional' approach means that a public body may act as an undertaking – and therefore be subject to competition law – for some of its activities, but not for others. For example, a body vested with public powers to grant applications to organise motorcycling events was found not to be acting as an undertaking when making such authorisation decisions, but was considered to act as an undertaking when carrying out related economic advertising and sponsorship activities. Each activity must be considered separately to assess whether or not it is 'economic'.

2.2 Identifying 'economic activity'

Whether a particular activity carried on by a public body is treated as an economic activity necessarily depends on the specific facts at hand and as such, past cases may provide only limited wider guidance to those seeking to apply legal precedent to their own specific circumstances. Nevertheless, the case law has set out certain broad principles that public bodies should take into account when assessing whether their own conduct amounts to economic activity.

In broad terms, a public body should ask itself the following questions for each of its activities separately:

- Am I offering or supplying a good or service, as opposed to, for example, exercising a public power?
- If so, is that offer or supply of a 'commercial' – rather than an exclusively 'social' – nature?

If the answer to both of the above is yes, then – for the purposes of that activity (and any related upstream purchasing) – the public body is likely to be regarded as an undertaking.

2.3 Does the public body offer or supply goods or services?

It is the activity of **offering or supplying** goods or services on a given market that is the characteristic feature of an economic activity. Where – by contrast – an activity does not itself involve such offer or supply and is not related to a subsequent downstream offer or supply of goods and services by the body in question, that activity will generally not be considered economic activity.

Exercise of 'public powers'. The exercise by a body of powers which are 'typically those of a public authority' are deemed not to involve the offer or supply of goods or services on a market. Ultimately, the distinction between such public functions and economic activities involving the provision of a good or service on a market will depend on the facts of each case. The guidance reiterates the point that the exercise by a body of certain 'public powers' would not prevent other 'non-core' activities carried out by the same body being subject to competition law.

Purchase of goods or services. Competition law may apply to agreements and conduct relating to a public body's purchasing activities (whether individually or jointly with others). However, in determining whether a public body is acting as an undertaking in relation to such purchase of goods or services in a market, the economic or non-economic nature of that purchasing activity depends on the end use to which the public body puts the goods or services bought:

- If the purchased goods are related to a subsequent offer or supply of goods or services on a market by the public body in question, then, if the downstream supply is considered to be an economic activity, the purchasing activity is also likely to be deemed to be 'economic'.
- By contrast, where a public body purchases goods or services in a given market, but does **not** directly offer or supply any goods or services in that (or a related) market, that body will not typically be acting as an undertaking for the purposes of UK or EU competition law when it makes such purchases.

2.4 Where goods or services are offered or supplied by the public body, is that offer or supply of a 'commercial' nature, as opposed to an exclusively 'social' nature?

Where public bodies do offer or supply goods or services, it is necessary to consider whether that downstream supply is of a commercial or, instead, an exclusively social nature.

Commercial activity. The provision of goods or services on a 'commercial' basis will constitute economic activity. The clearest example of this is an activity undertaken for profit in direct competition with private sector companies:

- For example, Companies House has been found to act as an undertaking when competing with private sector information providers in the supply of online company data search tools.
- Similarly, a public body will also generally be regarded as engaging in economic activity when it carries out 'wider markets activities' (being 'non-core', discretionary activities using capacity not needed for the body's statutory duties, which are provided in a competitive market with a view to generating revenues).

However, the concept of 'commercial' activity should not be considered limited to such examples: importantly, an activity need not in fact generate a profit – or even have a profit-making motive – in order to be deemed to be commercial in nature (and thus to be an 'economic' activity). Thus, the fact that a public body provided employment recruitment services free of charge did not prevent the EU courts finding that those services were an economic activity, as they could be (and had previously been) provided by private sector companies.

'Social' activity. By contrast, where public bodies carry out an activity of an exclusively social nature, neither that activity, nor the bodies' purchase of goods or services for the purpose of that activity, will generally be treated as an economic activity. Again, any assessment of whether an activity is of an exclusively social nature will necessarily be highly fact specific, and must take account of all aspects of the activity in question. While certain individual features of an activity – such as, for example, a lack of connection between the cost of providing a good or service and the price (if any) paid by end users – may suggest that an activity is inherently 'uncommercial', all aspects of the activity must be considered as a package, rather than feature by feature.

Past case law on this issue does not provide a clear definition of when an activity will be considered to be 'social'. Those cases do establish certain principles, however, that public bodies can seek to apply when determining in a given case whether they are undertaking a social activity:

- The activity must be exclusively social – an activity that is fundamentally 'commercial' but also pursues some public service objectives will still be an economic activity.
- Activities which by their very nature could not – even in principle – be carried out for profit without State support have previously been characterised as being 'exclusively social'.

Exclusively social. The activity must be of an exclusively social nature. An activity that would otherwise be deemed to be commercial in nature (and therefore 'economic') will not necessarily be sheltered from competition law simply because it also pursues some extra public service objectives.

Impossibility of profit. Exclusively 'social' activities have previously been characterised as those which by their very nature could not – even in principle – be carried out for profit without State support. Where the nature of the activity is such that profitable private sector involvement is impossible, no 'market' for the activity exists. Market forces do not (and could not) therefore play any part in the activity and, as such, that activity would not be capable of having anti-competitive effects.

The fact that a public body's conduct was capable of having anti-competitive effects in the market has been taken by the UK Competition Appeal Tribunal as evidence that that conduct was economic. Importantly, however, the fact that private sector companies currently do not carry out

activities in the market does not preclude the possibility of the activity being found to be 'economic'.

- For example, where private sector companies have in fact carried out the activity in question in the past, this may indicate that it is not an activity that must necessarily be carried out by a public authority, and therefore that the activity is 'economic'.
- Similarly, the fact that a government or public body decides not to allow private sector companies to provide a certain good or service (and, for example, instead provides it wholly in-house) does not necessarily mean that that activity is not 'economic'.

3. Exclusions

The guidance notes some exclusions including:

- Where agreements are entered into because of a legal requirement, for instance one imposed by UK legislation or directly applicable EU legislation, including where agreements are entered into as a result of formal directions issued by a state regulator.;
- Agreements relating to "services of general economic interest" and "revenue-producing monopolies" may also be exempted so that competition law does not prevent undertakings assigned to these particular tasks from operating them; and
- The Secretary of State can issue orders exempting certain categories of agreement from UK competition law if this is necessary on public policy grounds or to avoid conflict with international legislation. So far though, only three such orders have been made on public policy grounds in narrow categories of agreements in the defence sector

4. Consequences for public bodies of engaging in economic activity

The Guide notes that the fact that a public body acts as an undertaking and is subject to UK and EU competition law does not necessarily mean that it will have to amend its practices. Indeed, compliance with competition law should not materially impede public bodies' efficient exercise of their functions. Instead, public bodies need to self-assess whether their conduct is compliant with competition law to determine whether any amendments are required. However, the OFT is keen to ensure that, where public bodies do engage in economic activities, a level playing field and a similar commitment to compliance exists for all operators in those markets, particularly in mixed markets in which public bodies, private firms and third sector organisations (for example, charities) compete alongside one another. It states that effective competition in those markets can benefit the wider economy by encouraging greater productivity and innovation and preserving long term growth, while continuing to provide greater value for money to the taxpayer.

The report notes that failure by a public body to comply with competition law in carrying out an economic activity can have serious consequences. For example, an agreement entered into, or decision made, which breaches UK or EU competition law will be automatically void and unenforceable and third parties (including injured competitors, customers and consumer groups) that have suffered loss as a result of an undertaking's infringement of competition law can bring a civil damages claim against that undertaking in the UK courts.

The OFT's powers are also described including investigations and, where appropriate, substantial fines, those in breach can be directed to change their behaviour, individuals can be prosecuted and company directors can be disqualified from managing a company for up to 15 years.

5. Comment

APSE welcomes the focus on competition law for public bodies as a further reminder of the sector's responsibilities. The OFT is clearly interested in ensuring public bodies are aware of the regulations and act accordingly. The message is that the public sector should be as concerned with competition as their counterparts in the public sector are.

The guidance outlines the sanctions for breach of competition law and this reflects the expectations of the OFT. The case of the PSBOs noted at the start of the briefing is an example of the type of circumstances to which the guidance applies. Whilst competition laws are and will remain a significant considerations for those authorities engaging in what might be considered to be 'commercial ' activities it should not be used as a means to fetter local authorities , and particularly those managing frontline services, from developing innovative approaches to service delivery. This will include options for charging and trading for services or entering into agreements to develop local economic activity. Whilst authorities need to be mindful of competition laws and seek appropriate advice it is nevertheless important to note that UK local authorities, generally speaking, have been very vigilant to avoid anti-competitive behaviour and have some very noticeable successes in innovation in local service delivery. Providing authorities follow guidance and advice on competition issues they ought not to be overly alarmed by competition rules so as to hamper innovation.

APSE has carried out significant work in the past on this subject and continues to offer courses which address the topic. A range of support is available from APSE.

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