



Boundaries in indirect concerted practices and cartel leniency cases

ARGOS AND LITTLEWOODS V OFFICE OF FAIR TRADING
JJB SPORTS V OFFICE OF FAIR TRADING

The Court of Appeal's combined judgment in *Argos and Littlewoods v Office of Fair Trading (OFT)* and *JJB Sports v OFT* confirms that competitively sensitive information passed indirectly, but intentionally, from one competitor to another through a third party may well infringe UK competition laws. The judgment also has implications for the way in which the Competition Appeal Tribunal reviews penalties imposed on cartellists by the OFT – in particular the need to ensure that those fined are not unequally treated compared to those granted immunity.

Background

Office of Fair Trading action to penalise price-fixing

The appeals arose from two widely publicised decisions taken by the Office of Fair Trading (OFT) in 2003. In August 2003, the OFT found that a number of retailers and wholesalers, and their supplier (Umbro), had fixed prices of replica football kits in 2000 and 2001. Fines totalling over £18m were imposed, the largest of which were £6.641m on Umbro and £8.373m on JJB Sports (a retailer). The OFT claimed its intervention had led to a reduction in the price of adult shirts from £40 to as low as £24. Several months later the OFT imposed fines of £17.28m on Argos and £5.37m on Littlewoods for fixing the prices of certain toys and games manufactured by Hasbro. Again, the participation of the supplier was core to the arrangement. The fine on Hasbro itself would have been £15.59m, but was reduced to zero to reflect the fact that Hasbro had successfully applied for immunity under the OFT's leniency procedure. The OFT publicised that its action had reduced the price of Monopoly from £17.99 to £13.49.

A key element of the analysis in both cases was that, in addition to separate bilateral agreements between the manufacturer and each retailer, the OFT had found indirect concerted practices between the competing retailers based on the exchange of confidential information between them through their common supplier. This 'horizontal' element meant the infringement of competition law was regarded by the OFT as particularly serious, and partly explained the size of the penalties imposed.

Competition Appeal Tribunal confirms OFT findings

The OFT's analysis was challenged before the Competition Appeal Tribunal (CAT), but was upheld. The CAT confirmed the existence of the indirect concerted practices (trilateral agreements) in both cases, and expressed the principle in broad terms, stating in the replica football kits case that: 'if one retailer A privately discloses to a supplier B its future pricing intentions in circumstances where it is reasonably foreseeable that B might make use of that information to influence market conditions, and B then passes that pricing information on to a competing retailer C, then in our view A, B and C are all to be regarded on those facts as parties to a concerted practice having as its object or effect the prevention, restriction or distortion of competition. The prohibition on direct or indirect contact between competitors on prices has been infringed.'

The parties in both cases also appealed the penalties imposed by the OFT. As well as arguing that the penalties were excessive, Argos and Littlewoods claimed that they had been unfairly treated given that the OFT had wrongfully given Hasbro, as whistleblower, full immunity.

The CAT reduced the penalties payable by the appellants to some extent (save for Allsports, for whom it actually increased the fine). But it was reluctant to investigate whether the OFT had been wrong to give full immunity to Hasbro given that Hasbro itself had not appealed. (Although somewhat counter-intuitive, a company receiving immunity may actually have an incentive to appeal to the CAT in so far as the launching of the appeal

delays third parties from bringing follow-on appeals for damages under s47A of the Competition Act 1998.) In this case, as Hasbro had not appealed, the CAT considered that the OFT's treatment of a successful leniency application was irrelevant to an assessment of its treatment of other parties that had not applied for leniency at all.

The Court of Appeal's judgment

Conditions for finding indirect concerted practices

The Court of Appeal's (CA's) judgment confirms the CAT's view that the OFT had been correct to find the existence of indirect concerted practices between the competitor retailers in both the toys and games and replica football kit cases. Although the court expressly emphasised that manufacturers must be free to discuss actual or likely retail prices with individual retailers in confidence, the CA described the discussions in the replica football kit case as having a 'strong and unusual context which makes it clear that there was a horizontal element in the subject of discussion.'

The CA agreed with the CAT's view that an illegal concerted practice may be established and penalised where only one competitor has provided information about its future pricing to another. To this extent, reciprocity, in terms of mutual disclosure of commercially sensitive information, is not required to establish an infringement. But it is clear from the CA's judgment that an infringement will be found only if the party receiving the information appreciates that the supplier was given the information by another competitor in the first place and decides to act on it.

Although not relevant to the actual findings in these cases, the CA agreed with the appellants that the CAT had expressed itself too widely in the passage quoted above. Specifically, the CA's judgment strongly suggests that, in its view, the OFT has to show that the retailer disclosing information to the supplier must actually foresee that it will be passed on to a competitor. It is not enough for an authority to show that the retailer should have known that the information would be passed on.

Competition Appeal Tribunal's role in reviewing penalties imposed by the OFT

Recognising the CAT's specialist expertise, the CA did not alter the penalties determined by the CAT. But it

disagreed with the CAT's view as to the extent to which the CAT has the power to reconsider OFT decisions to grant full immunity to a party that successfully applies to the OFT by becoming a whistleblower (as was the case for Hasbro in the toys and games case). As a result of the CA's judgment, it is clear that if a party receiving immunity does choose to appeal an OFT decision (to delay damages actions being brought), then the CAT is entitled on appeal, and may be required, to review whether the decision to grant immunity to that party was correct.

Of more practical importance, where a penalised party appeals a decision and challenges the OFT's grant of immunity to an immunity applicant who does not appeal, the CAT is still required to review the basis on which leniency was granted by the OFT if the leniency recipient was centrally involved in the facts of the infringement. The CA decided that such a review is necessary to ensure that there has not been unequal treatment as between the immunity recipient and the other parties. Although the position of the leniency recipient will be unaffected, if the OFT cannot establish that its grant of immunity was reasonable and objectively justified, the CAT should reduce the penalty imposed on the other parties.

Practical implications of the Court of Appeal judgment

The need for guidance on communications

It has been clear for some time as a matter of European law that direct contact between competitors is not necessary for the finding of a concerted practice between them. Indirect contact may suffice. In this context, it is important to remind personnel that it is not an excuse to an infringement of competition law to argue that they did not communicate directly with a competitor.

In practical terms, the CA judgment is undoubtedly helpful in ensuring legal certainty: to impose penalties in situations where there has not been direct contact, the OFT must demonstrate that the party supplying the information actually foresees that it will be passed on to a competitor. The OFT needs to be mindful of this when considering future investigations. This limitation on when a concerted practice may be found means that there is limited risk of a company becoming party to a concerted practice 'by accident'.

Nonetheless, these cases provide a sharp reminder of the need to act carefully when discussing competitive information within a 'vertical' (ie supplier/customer) relationship. Companies should be careful to ensure that information exchanged between them and their suppliers and/or distributors is treated appropriately, that it is not intended to be passed on to third parties and that their discussions do not amount to resale price maintenance. A failure to observe these principles will be costly, with the OFT willing to consider substantial fines as a deterrent.

Impact of the CA's judgment on companies receiving immunity

The CA's statements that the CAT may be required to reconsider the correctness of an OFT decision to grant immunity may dissuade those granted immunity by the OFT from appealing the decision to the CAT for tactical reasons. In light of the CA's judgment, appealing to the CAT might mean losing immunity if it disagrees with the OFT's assessment.

By contrast, companies that have been fined will be further encouraged by this judgment to challenge the OFT's decision. Assuming the immunity recipient does not appeal, the CAT may still review the OFT's decision to grant immunity in analysing whether it has treated other parties equally, although such a review would not impact the position of the immunity recipient. Taken as a whole, the practical implications of this part of the judgment may well be that the OFT's leniency regime – previously relatively isolated from review by the CAT – will come under increasing scrutiny going forward.

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