INTRODUCTION

This publication gives details of cases that were considered under the Competition Act 1998, and subsequently closed during 2004. The summaries do not necessarily set out the full reasons the OFT has for closing a case. Nor will they reflect all the kinds of cases that we handle.

These summaries were originally published on a monthly basis as a part of the OFT’s online Weekly Gazette, which is no longer published.
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INTRODUCTION

Welcome to the ninth issue of this section of the Gazette. The purpose of this section is to inform the public of a selection of cases that have been considered under the Competition Act 1998 (the Act), and subsequently closed. This issue includes cases that were closed between October 2003 and January 2004. The next issue of this section will be in the Gazette published in March.
CLOSED CASES

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We have decided to publish closed case summaries because they are indicative of how the OFT might approach similar cases, and we hope they will be useful to complainants and industry alike. The summaries do not necessarily set out the full reasons the OFT has for closing a case. Nor will they reflect all the kinds of cases that we handle. You should also refer to the OFT’s decisions published on the public register, on the OFT website at http://www.of.t.gov.uk/Business/Competition+Act/Decisions/index.htm

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List of closed case summaries

- Supply of Nike brand sports goods
Supply of Nike brand sports goods
Complainant: Own initiative case
Complaint against: Nike (UK) Limited
Case closed: 15 October 2003
Issue: Clauses in Nike’s Selective Distribution Criteria which could have been interpreted to imply that appointed retailers were discouraged from discounting new season products
Relevant provision: Chapter I of the CA’98

Outline of case
In common with many sports and other goods brands, Nike operates a selective distribution system in which retailers have to meet certain criteria in order to qualify as an approved Nike account. Nike’s European Distribution process had a clause in its Account Evaluation Process documentation which stated:

- “Quality criteria – Nike in season products should not be displayed alongside discounted out of season products ... Benefit – protects in season product price/value.”

The OFT was concerned that this phrase might imply that in season products were not to be discounted. Whilst Nike might wish that its new products were displayed differently from old lines, there did not seem to the OFT to be any need for the word “discounted” to be used in achieving this. Similarly, the criteria for Internet Presentation and Sales stated: “Displays discounted or out of season products on a separate web page”.

Nike assured the OFT that the intention behind these clauses was not to seek to enforce a minimum resale price on retailers. Nike said that it does not prevent its resellers from discounting, and does not refuse to supply products to resellers that discount. Indeed, Nike’s European Retail Distribution Policy stated that it “makes no attempt to control the prices of our products at retail”. Nike was already in the process of revising and updating its distribution criteria and, in consultation with and on recommendation of the OFT, has now removed the relevant ambiguous clauses.

OFT’s action: Case closed
Case Officer: david.troy@oft.gsi.gov.uk
Case reference: CE/1706/02
INTRODUCTION

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List of closed case summaries

- Alleged resale price maintenance in the supply of power upgrades for trucks
- Supply of environmental data and of property-specific environmental risk reports
Alleged resale price maintenance in the supply of power upgrades for trucks
Complainant: Powertrucks International Limited
Complaint against: Commercial Power Solutions Limited
Case closed: 9 February 2004
Issue: Whether agreements existed between Commercial Power Solutions Limited and certain of its dealers to fix the resale prices of Volvo power upgrades to customers in the UK.
Relevant provision: Chapter I of the CA’98

Outline of the case

In August 2003, Commercial Power Solutions of Wigton, Cumbria, issued a circular to its dealers, to inform them of its business policies, and plans for future development. Amongst other topics, the circular referred to restrictions on resale prices; in particular to work relating to Volvo trucks. The circular was subsequently withdrawn by Commercial Power Solutions.

Commercial Power Solutions informed the OFT that its intention was simply to recommend resale prices to dealers for their guidance, and has agreed to write to dealers to make clear to them that they remain free to sell and install any product at whatever prices they wish.

The OFT has completed its investigation of this complaint, and has found insufficient grounds to suspect resale price maintenance.

OFT’s action: Case closed
Case Officer: Geoffrey.kenton@oft.gsi.gov.uk
Case reference: CE/3395/03

Supply of environmental data and of property-specific environmental risk reports
Complainants: Sitescope Limited and EDR Landmark Limited
Complaint against: The Environment Agency
Case closed: 28 November 2003
Issue: Possible margin squeeze
Relevant provision: Chapter II of the CA’98

Outline of case

The Environment Agency (the Agency) supplies bulk environmental data to third parties, Value Added Resellers (VARs), for use in compiling property-specific environmental risk reports. The Agency has also launched a new Property Search Report product in the downstream market. The complainants alleged that proposed new charges and terms for the supply of data amounted to an abuse of a dominant position by the Agency.
The OFT considered that there was a possibility of a margin squeeze occurring, if the margin between the Agency’s wholesale and retail prices was too small to enable a reasonable rate of return to be earned in the downstream market. An investigation under section 25 of the CA’98 was initiated in May 2003.

Information obtained from the Agency and the VARs was assessed against alternative tests for the presence of a margin squeeze. During the course of the investigation there was also a significant reduction in the Agency’s proposed wholesale charges. OFT reached the view that on the basis of the current facts there was insufficient evidence of a margin squeeze to pursue the investigation further.

OFT’s action: Case closed
Case Officer: ian.windle@oft.gsi.gov.uk
Case reference: CE/2312/03 & CE/2608/03
INTRODUCTION

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List of closed case summaries

- Alleged resale price maintenance in the supply of bathroom fittings
- Alleged price-fixing in the supply of chemical abrasive products
- Laboratory Materials
- AMLR
Alleged resale price maintenance in the supply of bathroom fittings

Complainants: Premier Heating Supplies
Complaint against: Eurobath International Limited
Case closed: 19 March 2004
Issue: Whether agreements existed between Eurobath International Limited as the exclusive UK distributor of the IL Bagno range and certain of its retailers to fix the resale prices of IL Bagno bathroom products.

Relevant provision: Chapter I of the CA’98

Outline of the case

In August 2003, Eurobath International Limited wrote to inform Premier Heating Supplies that its supplies of IL Bagno products would be terminated. In the same letter, Eurobath International Limited referred to the level of discounts that Premier Heating Supplies had been giving its IL Bagno customers and stated that the interests of other IL Bagno retailers had been taken into consideration when the decision to terminate supply was taken.

In response to queries from the OFT, Eurobath International Limited stated that maintaining a resale price agreement in relation to the supply of IL Bagno products was not the motivation behind the termination of supply arrangement with Premier Heating Supplies and at no time has Eurobath International Limited been involved in resale price maintenance agreements with its retailers. The OFT’s investigation did not find sufficient grounds to suspect resale price maintenance.

OFT’s action: Case closed
Case Officer: toby.druiff@oft.gsi.gov.uk
Case reference: CE/3409/03
Alleged price-fixing in the supply of chemical abrasive products

Complainants:  
Complaint against:  Tyrolit Limited and Capital City Abrasives Limited
Case closed:  1 March 2004
Issue:  Whether agreements existed between Alan Charlton Abrasives and Tyrolit Limited and/or between Alan Charlton Abrasives and Capital City Abrasives Limited to fix the resale prices of Tyrolit chemical abrasive products to customers in the UK.

Relevant provision:  Chapter I of the CA’98

Outline of the case
The OFT received documents which gave reasonable grounds for suspecting the existence of price-fixing agreements involving Alan Charlton Abrasives, of Newcastle upon Tyne, Tyrolit Limited of Crick, Northamptonshire, and a main distributor of Tyrolit products, Capital City Abrasives Limited, of Stoke on Trent.

The OFT has completed its investigation of this complaint, and has found no evidence substantiating the existence of any price-fixing agreement involving any of the above-named undertakings.

OFT’s action:  Case closed
Case Officer:  geoffrey.kenton@oft.gsi.gov.uk
Case reference:  CE/3834/03

Laboratory Materials

Complainants:  
Complaint against:  Sci-Net Group
Case closed:  February 2004
Issue:  Whether the members of the Sci-Net Group had entered agreements to share markets and fix prices

Relevant provision:  Chapter I of the CA’98

Outline
In June 2003 a member of the Sci-Net Group (“Sci-Net”) made an application for leniency under the OFT’s leniency programme for anti-competitive agreements in respect of its possible involvement in agreements to share markets and fix prices.

Sci-Net had been formed in 1999 by several companies involved in the supply of laboratory equipment, glassware and chemicals. The purpose of Sci-Net had initially been to promote joint purchasing and marketing initiatives between the members. However, in June 2001 Sci-Net adopted a new constitution that contained the following rules:
• “Sci-Net members are not confined to territories or geographical areas in the scope of their operation but agree not to intentionally take commercial advantage of, or damage the trading interest of, a fellow member.”
• “Sales leads or business opportunities resulting from joint sales and marketing activities will generally be directed to that member closest in location to the potential, or in the case of export leads to that member who has declared an interest in a particular market.”

In April 2002 the members of Sci-Net made a further agreement to distribute sales leads between them on the basis of allocated postcodes.

Although OFT enquiries revealed that the market-sharing agreements were not implemented, and that the offending rules in the constitution were amended as soon as legal advice was received, any agreement which has an object to share markets whether by territory, size or type of customer, infringes the Chapter I prohibition.

The OFT was also concerned about the co-operation between the members of Sci-Net to produce a joint sales catalogue that included prices generally entered at the manufacturers’ recommended retail prices. The OFT considered that the members of Sci-Net risked co-ordinating their prices by producing a joint catalogue that included prices. Although OFT enquiries suggested that members of Sci-Net were free to discount the prices in the catalogue, an agreement to publish recommended prices is capable, in certain circumstances, of restricting competition and may infringe the Chapter I prohibition.

In general, the OFT considers that agreements which have the object or effect of restricting price competition constitute serious infringements of Chapter I prohibition. However, as the market-sharing agreements were not implemented by Sci-Net, and given that Sci-Net had no future plans to produce a joint catalogue that included prices, the OFT decided not to proceed with enforcement action. In making this decision, the OFT was mindful of the fact that the members of Sci-Net had a relatively small share of the supply of laboratory materials.

The OFT contacted the members of Sci-Net who confirmed in writing that the agreements of concern to the OFT had ended and that they would not enter any similar agreements in the future.

OFT’s action: Case closed
Case Officer: sean.mcnabb@oft.gsi.gov.uk sarah.northam@oft.gsi.gov.uk
Case reference: CE/2958/03
AMLR
Complainants: Association of Licensed Multiple Retailers (ALMR)
Complaint against: BSkyB
Case closed: 30 March 2004
Issue: Whether BSkyB infringed the CA98 by pricing excessively to pubs and clubs in the UK, by price discriminating between commercial customers and between commercial and residential customers and by offering unfair contract terms to pubs and clubs in the UK.
Relevant provision: Chapter II of the CA’98

Outline of the case
On 30 July 2003 the OFT received a complaint from the Association of Licensed Multiple Retailers (ALMR) concerning BSkyB’s pricing of its premium channels for showing in licensed retail premises (i.e. ‘pubs and clubs’) in the UK. The complaint alleged that BSkyB had infringed the Chapter II prohibition of the CA’98 by abusing its dominant position on the market for the supply of pay-TV channels with premium sports content (e.g. Sky Sports) to pubs and clubs in the UK. The alleged abuses comprised excessive pricing to pubs and clubs in the UK; price discrimination between commercial customers and between commercial and residential customers; and the imposition of unfair contract terms on pubs and clubs in the UK.

Additional evidence was provided on 12 November 2003. Having considered all the evidence provided to it the OFT has concluded that it does not have reasonable grounds to suspect that BSkyB has infringed the Chapter II prohibition and that a formal investigation is therefore unjustified, for the reasons set out below.

The Chapter II prohibition applies a two-stage test for a finding of an infringement. This requires an assessment as to whether an undertaking is dominant in a relevant market, and if it is, whether it has abused that dominant position. Given that the OFT has no reasonable grounds to suspect that the conduct complained of in this case constitutes an abuse (as explained below), the OFT is not required to decide whether BSkyB is dominant and therefore has not come to a conclusion on what the relevant market would be in this case.

Regarding the allegation that BSkyB is abusing a dominant position by pricing excessively to pubs and clubs, the OFT does not consider that the evidence provided by the ALMR gives it sufficient grounds to suspect that pricing levels give rise to an infringement of the Chapter II prohibition. The evidence provided by the ALMR included evidence of price increases, switching costs and BSkyB’s growth in revenues and cost savings achieved by the company.

The OFT notes that the evidence provided may be consistent with a situation where prices are excessive, it does not in itself suggest that an unlawful abuse has taken place. For example, initial low prices (and hence steep price rises) may be consistent with a situation where demand patterns for a new product and the cost of offering a product to one customer group rather than another are unknown and where therefore prices may be subsequently adjusted to the market price. Further, although the presence of high switching costs may help a dominant undertaking to sustain excessive
prices, the existence of such costs does not in itself imply that prices are excessive. Finally, given that BSkyB has only recently started to make returns on its investment in digital technology, evidence of the company’s profitability does not in itself support the allegation of excessive pricing.

The OFT also does not consider that it has reasonable grounds to suspect that BSkyB’s pricing policy constitutes abusive price discrimination contrary to the Chapter II prohibition. This is because some price differences between different customer segments may be justified on the basis of differences in the cost of supplying them. Furthermore, in the presence of very high common and fixed costs – as is the case here - price discrimination can be justified on the basis that it increases output and enhances consumer welfare. Finally, for price discrimination to be an abuse, the OFT also requires evidence of excessive pricing or that the discrimination has been used to exclude competitors. The ALMR has presented no evidence to the OFT that either of these requirements is met.

Finally, upon examination of BSkyB’s contract terms, it does not appear to the OFT that the terms tie customers to BSkyB – for example by imposing a minimum contract term – such that competition may be significantly restricted. As a result these terms are unlikely to be abusive within the meaning of Chapter II.

In light of the above, the OFT has closed its file on this matter.

OFT’s action: Case closed
Case Officer: tanja.salem@oft.gsi.gov.uk
Case reference: CE/3250/03

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INTRODUCTION

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List of closed case summaries

- Resale Price Maintenance by Ecoflow plc
- Supply of Waterskiing Wakeboards
- Fee Guidance by a Professional Body
Resale Price Maintenance by Ecoflow plc ('Ecoflow')
Complainant: An Ecoflow distributor
Complaint against: Ecoflow (formerly Ecoflow Ltd)
Case closed: 20 April 2004
Issue: Resale price maintenance with regard to magnatherapy products.
Relevant provision: Chapter I of the CA'98

Outline of the case
On 2 April 2002, the OFT received a complaint from a retailer alleging that Ecoflow, a manufacturer of magnet-based therapy products, had threatened to refuse to supply its products unless they were sold at the recommended resale price. The OFT subsequently opened an investigation under s25 of the CA98 in which it obtained evidence, in the form of trading agreements and various supporting documentation originating from Ecoflow, which indicated that Ecoflow and many of its distributors had infringed the Chapter I prohibition.

During the course of the investigation, Ecoflow informed the OFT that it had undergone a change of ownership and that the new managers had taken various steps to ensure compliance with the CA98. Due to these reasons, and the OFT’s other casework priorities, the OFT was willing to accept assurances from Ecoflow that it will not enter into any minimum resale price agreements with its distributors. Ecoflow has given these assurances without prejudice to its position that it has not infringed the CA98. The OFT has closed its file.

Full text of Ecoflow’s assurances:
'Ecoflow Plc, a public limited company registered in England and Wales with registration number 04443360, and having its registered office at Kingsmill Road, Tamar View Industrial Estate, Saltash, Cornwall, PL12 6LD (the 'Company') hereby gives the Office of Fair Trading the following assurances:

1. The Company will not itself or through any officer of the Company or any person authorised to act on behalf of the Company:

(a) include in a contract for sale or agreement relating to the sale of goods a term or condition which purports to establish or provide for the establishment of minimum prices to be charged on the resale of goods in the United Kingdom; or
require, as a condition of supplying goods to a distributor, the inclusion in a contract or agreement of any such term or condition, or the giving of any undertaking to the like effect; or

(c) notify to distributors, or otherwise publish on or in relation to any goods, a price stated or calculated to be understood as the minimum price which may be charged on the resale of those goods in the United Kingdom; or

(d) withhold supplies of goods from a distributor seeking to obtain them for resale in the United Kingdom on the ground that the distributor has sold or is likely to sell below the recommended resale price.

For the avoidance of doubt, these assurances do not in any way restrict the Company from recommending a resale price for goods supplied to its distributors.

2. The Company will circulate to all its distributors within one month from the date of these assurances a statement conveying their substance and advising such distributors that they are free to sell, advertise and display for sale goods supplied by the Company at whatever price they may choose. A copy of this statement will be sent to the Office of Fair Trading marked for the attention of The Director of Competition Enforcement Division 7.

For and on behalf of Ecoflow Plc'

OFT’s action: Case closed
Case Officer: Andrew.Murray@oft.gsi.gov.uk
Case reference: CP/1285/02
Supply of waterskiing wakeboards

Complainant: Waterskiing World UK, a supplier of waterskiing equipment

Complaint against: Waterskiing World UK ('WWUK') appeared to have agreements with its network of retail dealers to set minimum retail prices (resale price maintenance)

Case closed: 29 March 2004

Issue: WWUK is the sole UK distributor for two US-made brands of waterskiing wakeboards. In February 2004, WWUK wrote to the OFT to explain that it had been made aware that retail pricing agreements it had made with all of its 35 specialist retail dealers were likely to constitute price-fixing, a breach of Chapter I. WWUK wanted the OFT to confirm whether this was indeed the case and advise what, if any, remedial action it needed to take. WWUK was willing to take such action as the OFT would propose.

Prior to 2000, WWUK gave its dealers recommended retail prices ('RRPs') and the dealers were free to retail the wakeboards at whatever price they wished. From 2000 onwards, WWUK changed its dealer terms and set 'pre-discount' retail prices at which the dealers had to sell. This was known as the 'Cash Promo Price' and was included on WWUK's price lists. Although the Cash Promo Price was below nominal RRP, it nevertheless amounted to a price-fixing agreement because the dealers were not allowed to deviate from the price.

The OFT confirmed to WWUK that the Cash Promo Price was price-fixing and was likely to constitute a breach of Chapter I. The OFT indicated that, due to the small size of the relevant market, and WWUK's willingness to take remedial action, it would be prepared to take no further enforcement action provided WWUK:

1. amended any infringing agreements with its dealers;
2. informed its dealers in writing that they are free to set their own selling prices.

WWUK agreed to do this and has sent out appropriate letters to its dealers and has amended its price lists to show RRPs only.

OFT’s action: Case closed
Case Officer: dave.troy@oft.gsi.gov.uk
Case reference: CE/4079/04
Fee Guidance by a Professional Body

Complainant: Member of the public
Complaint against: The Notaries Society
Case closed: 30 April 2004
Issue: That a professional body should not recommend fees for work carried out by its members
Relevant provision: Chapter I of the CA98

Outline of the case

When engaging the services of a Notary, the complainant was informed that the fee charged was in line with the minimum fee set by the Notaries Society. The Notaries Society is the voluntary membership body for Notaries practicing in England and Wales.

In April 2003, the Notaries Society Council issued fee guidance in the form of an ‘Opinion of Council’. This stated inter alia: ‘At present it is the opinion of the Council...that the minimum hourly rate [charged by notaries] should be £180 with a minimum fee of £60.’ Furthermore, the publicly available leaflet ‘Seeing a Notary’ reiterated the Society’s minimum fee recommendation of £60. The OFT advised the Society that the decision to issue its members with recommended guidance on fees was likely to infringe the Chapter I prohibition.

The Notaries Society Council met on 20 April 2004, and unanimously agreed to withdraw their published Opinion on notarial fees and all previously published Opinions on the subject. The Council has approved proposed amendments to the leaflet ‘Seeing a Notary’, which will be available on the Notaries Society website www.thenotariessociety.org.uk during May 2004. In particular, clause 9.3 will state that there are no set charges for fees but that the Notaries Society recommends members charge fees appropriate to the level of service offered.

The Notaries Society will also publish a statement in its next occasional newsletter in July 2004 to inform members of the change to the leaflet and that the change has arisen following an investigation by OFT.

OFT’s action: Case closed
Case Officer: Carissa.Roberts@oft.gsi.gov.uk
Case reference: CE/3667-03
INTRODUCTION

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CLOSED CASES

The Office of Fair Trading has the power to investigate complaints of breaches of the Chapter I and Chapter II prohibitions and Article 81 and Article 82 of the EC Treaty under the Act. The Chapter I prohibition and Article 81 cover agreements between undertakings, decisions by associations of undertakings and concerted practices which prevent, restrict or distort competition or are intended to do so, while the Chapter II prohibition and Article 82 cover the abuse of a dominant position in a market.

The Chapter I and Chapter II prohibitions apply when trade within the United Kingdom may be affected. Article 81 and Article 82 apply when trade between member states may be affected.

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List of closed case summaries

- Alleged resale price maintenance in the supply of industrial adhesives
- Alleged price-fixing in the supply of Calor Autogas on the Shetland Islands
- Alleged resale price maintenance in Swarovski Crystal
- Returnable Chemical Containers
Alleged resale price maintenance in the supply of industrial adhesives

Complaint against: Power Adhesives Limited

Case closed: 28 April 2004

Issue: Whether resale price maintenance agreements existed between Power Adhesives Limited and its distributors.

Relevant provision: Chapter I of the CA98

Outline of the case

The Office’s enquiries have centred on Power Adhesives Limited’s relationship with its distributors. In particular, whether there had been attempts to prevent Power Adhesives Limited’s distributors from competing against each other to support a resale price maintenance agreement.

During the course of its informal enquiries, the OFT gathered information from the complainant and Power Adhesives Limited. Power Adhesives Limited was asked to provide a background explanation to certain documentation which it had circulated to its distributors. Power Adhesives Limited stated that the intended purpose of these documents was not to help maintain a resale pricing policy and at no time had it been involved in resale price maintenance agreements with any of its distributors. The OFT’s investigation did not find reasonable grounds to suspect resale price maintenance.

Following the Office’s enquiries, Power Adhesives Limited intends to undertake internal training on compliance with the relevant competition legislation and write to all its distributors to help educate them on Power Adhesive’s Limited’s policies on compliance. Power Adhesives Limited are also considering whether changes are needed to their distributor agreements.

OFT’s action: Case closed

Case Officer: toby.druiff@oft.gsi.gov.uk

Case reference: CE/3935-04
Alleged price-fixing in the supply of Calor Autogas on the Shetland Islands

Complainant: a local resident to Shetland Islands Council Trading Standards Department

Complaint against: Rearo Supplies Limited, J Burgess Garage Limited, J&K Anderson, Brae Stores Limited and Mainlands Limited

Case closed: 30 April 2004

Issue: whether the above undertakings were engaged in the price-fixing of Calor Autogas

Relevant provision: Chapter I of the CA98

Outline of the case

The OFT received a complaint from Shetland Islands Council and made further enquiries which gave the OFT reasonable grounds for suspecting the existence of price-fixing agreements between the sole supplier of Calor Autogas on the Shetland Islands, Rearo Supplies Limited, and the four Shetland Island retailers of Calor Autogas: J Burgess Garage Limited, J&K Anderson, Brae Stores Limited and Mainlands Limited.

In general, the OFT considers that agreements which have the object or effect of restricting price competition constitute serious infringements of the Chapter I prohibition. However, the OFT has decided to close its investigation on the basis that Rearo Supplies Limited has terminated all elements of its agreements with retailers which involve price setting and has given assurances that it will not enter into any future agreement with retailers which seeks to set prices, and in light of the size of the market and the number of consumers affected, the likely consequences of any enforcement action, and the OFT’s other casework priorities.

OFT’s action: Case closed

Case Officer: Padraig.SHEERIN@oft.gsi.gov.uk

Case reference: CE/3219/03
Alleged resale price maintenance in Swarovski Crystal

Complainant: UK retailer
Complaint against: Swarovski UK Limited
Case closed: 30 April 2004
Issue: Alleged resale price maintenance in the sale of crystal giftware
Relevant provision: Chapter I of the CA98

Outline of case

In April 2002, a UK retailer complained to the OFT about what it believed to be action taken against it by Swarovski UK Limited (‘Swarovski’) following the retailer’s discounting of Swarovski products. The retailer also provided the OFT with a copy of Swarovski’s standard form written dealer agreement and drew the OFT’s attention to a clause in that agreement which required retailers to inform Swarovski in advance of all special offers planned by retailers in the framework of clearance sales. The clause also entitled Swarovski to repurchase the products concerned.

In light of the complaint the OFT decided that it had reasonable grounds to suspect that Swarovski was seeking to restrict the freedom of retailers to determine their own resale prices in breach of Chapter I of the Competition Act 1998 (‘the Act’). The OFT subsequently opened an investigation under section 25 of the Act, during the course of which it obtained evidence from a number of retailers indicating that Swarovski had sought to restrict their discounting activities.

Swarovski wrote to the OFT on 30 April 2004 indicating its intention to amend its standard form written dealer agreement in order to address the OFT’s concerns. At the same time Swarovski gave an express assurance to the OFT that it would not seek to influence the prices at which Swarovski products were sold by UK retailers. In light of these developments, and taking into account its casework priorities, the OFT has decided to close its investigation. The OFT nonetheless retains the right to reopen its file at any time in the future should it have grounds to suspect that Swarovski has, after 30 April 2004, sought to interfere with UK retailers’ freedom to set the prices at which they sell Swarovski products to UK consumers.

OFT’s action: Case closed
Case Officer: Liz.Smart@oft.gsi.gov.uk
Case reference: CE/1346-02
Returnable Chemical Containers

Complaint against: The British Chemical Distributors and Traders Association (BCDTA)

Case closed: 11 May 2004

Issue: The setting of charges for the use of returnable chemical containers.

Relevant provision: Chapter I prohibition of the CA98

Outline of the case

A complaint was made to the OFT alleging price fixing in the supply of returnable containers by a number of chemical distributors. Our investigation identified that the chemical distributors were following a Code of Practice established by the British Chemical Distributor and Traders Association (BCDTA).

The BCDTA’s Code of Practice recommends the use of returnable containers for hazardous chemicals. It also sets standard rates that its members should charge their customers for the use of these returnable containers.

It appeared that this Code of Practice would fall within the Chapter I prohibition. However, as the Code of Practice was set up to help promote higher health and safety standards and environmental best practice within the chemical distribution industry it was necessary to consider whether these benefits outweighed any competition restrictions that it may have caused, in order to satisfy the criteria for an individual exemption.

The OFT considered on the basis of the evidence presented by the BCDTA that the exemption criteria was unlikely to be met. Following discussions with the OFT, the BCDTA agreed to withdraw its Code of Practice. As a result of this the OFT has decided to close its investigation.

OFT’s action: Case closed

Case Officer: Helen.cameron@oft.gsi.gov.uk

Case reference: CE/2732/03
INTRODUCTION

Welcome to the fourteenth issue of this section of the Gazette. The purpose of this section is to inform the public of a selection of cases that have been considered under the Competition Act 1998 (the Act), and subsequently closed. This issue includes cases that were closed in July 2004. The next issue of this section will be in the Gazette published in September.
CLOSED CASES

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List of closed case summaries

- Everbuild Pinkgrip
Outline of the case

Everbuild Building Products Ltd (Everbuild) is a manufacturer of adhesives, sealants and building chemicals which it supplies to both the building and construction market and the consumer DIY sector. One of its products, Pinkgrip, is a direct bond adhesive, formulated specifically for the professional user.

An anonymous tip off provided the OFT with a circular sent by Everbuild to its customers specifying minimum resale prices for Pinkgrip and stating that:

‘For your protection as well as ours, we do intend to enforce these minimum price levels and are prepared to withdraw supply to companies selling below these prices.’

The OFT considers that if the recipients of the circular had agreed to comply with this instruction, it was likely that this would have constituted a Resale Price Maintenance agreement.

Following OFT intervention, Everbuild sent a letter to all recipients of the circular, retracting its statement that it intended to enforce minimum resale prices, and stating that all customers are free to set their own resale prices for Pinkgrip.

In the light of this changed behaviour, the OFT has concluded that pursuing this case further would not be justified in the circumstances.

OFT’s action: Case closed
Case Officer: Katherina.weiss@oft.gsi.gov.uk
Case reference: CE/4587/04
INTRODUCTION

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List of closed case summaries

- Mastic Asphalt Council
- Nottingham Post Group Limited
Mastic Asphalt
Complainant: The Mastic Asphalt Council (MAC)
Complaint against: The Mastic Asphalt Council (MAC)
Case closed: 22 July 2004
Issue: Whether the MAC recommended selling prices to mastic asphalt contractors
Relevant provision: Chapter I of the CA98

Outline of the case
The OFT obtained evidence of the MAC issuing suggested daywork rates - covering labour materials and plant – to mastic asphalt contractors. The rates are used for pricing or costing minor works additional to main contracts and historically have been a feature in the construction industry.

Formal enquiries were initiated under Chapter I suspecting the MAC to be an association of undertakings which made a decision on recommending selling prices to mastic asphalt contractors. That is, restricting the freedom of contractors to determine and compete on their own prices.

The MAC stated that daywork rates applied only in rare circumstances e.g., where unforeseen work was needed that only the on-site contractor could do. In these circumstances, suggested daywork rates protected clients and did not appreciably affect competition. Revenue derived from daywork was estimated to comprise less than 1-2 per cent of most contractors’ turnover and the rates were not mandatory.

The OFT’s enquiries were inconclusive. There was insufficient evidence that the MAC’s suggested rates had the object of restricting competition. The views of contractors (and their clients) were needed to determine what effects the rates had on competition. However, it was decided that the commitment of resources to further investigation was not justified because of the apparently small market size and low consumer detriment involved as well as other casework priorities. The OFT reserves the right to reopen its investigation at any time in the future should new evidence come to light.

OFT’s action: Case closed
Case Officer: David.Golledge@oft.gsi.gov.uk
Case reference: CE/4222/04
Nottingham Post Group Limited

Complainant: Topper Newspapers Limited

Complaint against: Nottingham Post Group Limited (NPG)

Case closed: July 2004

Issue: Whether the NPG had infringed the Act by pricing advertising space in the Recorder newspaper at below cost.

Relevant provision: Chapter II of the CA98

Outline of the case

Topper Newspapers Limited (Topper), publisher of a free weekly newspaper in the Nottingham area, complained to the OFT alleging that the Nottingham Post Group Limited (NPG) was selling advertising space in its Recorder newspaper, a competing free weekly, at below cost. The NPG also publishes a daily, paid-for newspaper (the Nottingham Evening Post) and several other titles in the Nottingham area.

Taking account of the Competition Appeal Tribunal’s judgment on Aberdeen Journals¹, the OFT opened a formal investigation to determine whether the NPG had infringed the Chapter II prohibition by abusing a dominant position in the market for the sale of advertising space in free and paid-for newspapers in the Nottingham area by selling advertising space in the Recorder at a predatory level. The OFT’s investigation focused on whether the allegation of abuse could be substantiated and did not reach any firm conclusions on market definition.

When assessing allegations of predation, the OFT considers that the relevant time frame for analysis is the time period over which the alleged predatory price(s) prevailed or could reasonably be expected to prevail. In this instance, the OFT took the 40 month period between March 2000 to June 2003² to be the relevant time frame. Over this time frame, the OFT took the view that, in this case, almost all costs could be classed as variable.³ Variable costs were therefore virtually equivalent to total costs. The NPG’s financial data, using one method of allocating certain costs that are shared across the NPG,⁴ showed that the Recorder’s turnover did not cover its total costs⁵ by 0.5 per cent of turnover, in aggregate, over the 40 month period. This suggested that the

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² The period over which the OFT had reasonable grounds to suspect an infringement.
³ In this instance, with the possible exception of certain building costs.
⁴ For example, centralised functions carried out for all NPG publications such as advertising sales, IT, finance/accounts, etc.
⁵ Total costs in this instance did not include a required normal rate of return, which the OFT considers would be very small in this case, given the very low level of capital employed in the NPG.
Recorder also did not cover its variable costs, in aggregate, over this period, albeit by a very small margin.

The OFT, in determining whether this constituted predatory pricing by the NPG, considered alternative methods of allocating certain costs that are shared across the NPG and what impact this had on the financial position of the Recorder newspaper. In this instance, using a plausible, alternative cost allocation methodology changed the financial position of the Recorder such that it covered its total costs. The OFT could not rule out the possibility that this approach more closely reflected the true costs of producing the Recorder newspaper.

The OFT therefore felt that it could not demonstrate, to the required standard of proof, that the NPG had priced advertising space in the Recorder at below cost, given that:

- the Recorder, using one method for allocating shared costs, failed to cover its total costs in aggregate over the 40 month period by only a very small margin and
- there is a plausible, alternative method of allocating shared costs which makes the Recorder profitable over this period.

In addition, the OFT has not found any documentary evidence showing that the NPG intended to force Topper out of the market.

For these reasons, the OFT concluded that there were no grounds for further action and has closed its file.

OFT’s action: Case closed
Case officer: Mark Lea: mark.lea@oft.gsi.gov.uk
Case reference: CE/2490/03

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6 On the standard of proof, the Competition Appeal Tribunal (then known as the Competition Commission Appeal Tribunal) said in Napp Pharmaceutical Holdings Limited v Director General of Fair Trading, [2002] CAT 1, ‘It is for the Director to satisfy us in each case, on the basis of strong and compelling evidence, taking account of the seriousness of what is alleged, that the infringement is duly proved, the undertaking being entitled to the presumption of innocence, and to any reasonable doubt there may be’ (Paragraph 109). The Tribunal has applied the same standard in other cases referred to it, for example, Aberdeen Journals [2003] CAT 11.
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List of closed case summaries

- alleged abuse of a dominant position by Netjets Europe Ltd
- benchmark.
Alleged abuse of a dominant position by Netjets Europe Ltd.

Complainant: European Skytime Ltd.
Complaint against: Netjets Europe Ltd.
Case closed: 9 September 2004
Issue: Alleged abuse of a dominant position
Relevant provision: Chapter II and Article 82 of the CA98

Outline of the case

The OFT received a complaint from European Skytime Ltd (‘ESL’) that Netjets Europe Ltd (‘NJE’), a supplier of private aviation services including a fractional aircraft ownership programme, had refused to supply to it further fractional shares in aircraft beyond NJE’s existing contractual commitments to ESL. ESL copied their complaint to NJE.

The OFT carried out some preliminary enquiries into this complaint (and some related matters), which included sending informal information requests to NJE and ESL. On the basis of the information received it appeared unlikely that NJE occupied a dominant position in a relevant market. On this basis, the OFT took the view that it did not have reasonable grounds to suspect an abuse of a dominant position by NJE and has closed the case.

OFT’s action: Case closed
Case Officer: Tom Sheehan@oft.gsi.gov.uk
Case reference: CE/3989/04
Investigation into the terms of membership of the Benchmark scheme operated by the Heating and Hotwater Information Council

Complainant: Aqueous Logic Limited

Complaint against: Heating and Hotwater Information Council (HHIC) which is part of the Society of British Gas Industries, a trade association

Case closed: 1 September 2004

Issue: The terms of membership under which businesses supplying specialist chemically based water treatment products used in the protection and cleaning of gas central and hot water heating systems can participate in the Benchmark scheme.

Relevant provision: Chapter I of the CA98

Outline of the case

The Benchmark scheme is managed and run by the HHIC. The scheme provides a series of codes of practice designed to encourage the correct installation, commissioning and servicing of domestic central heating systems. The majority of the UK’s gas central heating and hot water system manufacturers/suppliers (boilermakers) participate in the Benchmark scheme. The scheme also enjoys considerable amount of industry support which includes major builders’ merchants and the main gas central heating and hot water installer organisations.

The Benchmark scheme requires that businesses involved in the supply of specialist water treatment products must have their products endorsed by a boilermaker before they can be considered for participation. The OFT considered whether this requirement provided non-discriminatory and objective criteria on which to allow participation and if these businesses would be put at a competitive disadvantage if they were unable to participate due to not obtaining the required endorsement.

However, before the OFT came to a final view, the HHIC took the decision to suspend the participation of all suppliers of specialist water treatment products, including existing participants, in the Benchmark scheme. The HHIC will re-examine this position following the introduction of an appropriate British Standard or industry methodology which can used to provide independent testing of the quality of specialist water treatment products used in the cleaning and protection of gas central heating and hot water systems. The OFT believes that the HHIC’s action is likely to remove the current potential for the Benchmark scheme to adversely effect competition between suppliers of specialist water treatment products and has therefore concluded that further investigation would not be justified.
OFT’s action: Case closed
Case officer: toby.druiff@oft.gsi.gov.uk
Case reference: CE/4124/04
Competition Act 1998

Competition case closure summaries

November 2004

INTRODUCTION

Welcome to the 17th issue of this section of the Gazette. The purpose of this section is to inform the public of a selection of cases that have been considered under the Competition Act 1998 (the Act), and subsequently closed. This issue includes further cases that were closed in September 2004. The next issue of this section will be in the Gazette published in December.
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List of closed case summaries

- Alleged price-fixing of Pagid brand vehicle brake products
- Alleged price-fixing of EBC vehicle brake products
Alleged price-fixing of Pagid brand vehicle brake products

Complainant: A private consumer
Complaint against: TMD Friction UK Limited and Motorsport World
Case closed: 14 September 2004
Issue: Whether an agreement existed between TMD Friction UK Limited and Motorsport World to fix the resale prices of Pagid brand vehicle brake products
Relevant provision: Chapter I CA ’98 and Article 81(1) EC Treaty

Outline of the case

In May 2004, the OFT received a complaint from a consumer who was concerned by a statement contained in the website of Motorsport World, a retailer of Pagid brand products, which indicated that those products were to be sold on to customers at fixed prices.

The OFT carried out an investigation and found no evidence of the existence of a price-fixing agreement between Motorsport World and the current owner of the Pagid brand, TMD Friction UK Limited.

It was established that Motorsport World’s website statement was incorrect, and the dealer accordingly removed it.

OFT’s action: Case closed
Case Officers: Stephan.Pukas@oft.gsi.gov.uk
Geoffrey.Kenton@oft.gsi.gov.uk
Max.Ditchfield@oft.gsi.gov.uk
Case reference: CE/4434/04

Alleged price-fixing of EBC vehicle brake products

Complainant: A private consumer
Complaint against: Freeman Automotive (UK) Limited (trading as EBC Brakes), Camskill Motorsport and Motorsport World
Case closed: 14 September 2004
Issue: Whether agreements existed between EBC Brakes and Camskill Motorsport and between EBC Brakes and Motorsport World, to fix the resale prices to customers of EBC vehicle brake products
Relevant provision: Chapter I CA ’98 and Article 81(1) EC Treaty
Outline of the case

In May 2004, the OFT received a complaint from a consumer concerned by a statement which appeared on the website of Camskill Motorsport, a retailer of EBC brake products. It indicated that EBC placed a limit on the level of discount a dealer could give to customers of those products. The OFT subsequently discovered that a similar statement appeared on the website for another dealer, Motorsport World.

The OFT carried out an investigation and found insufficient evidence of the existence of any price-fixing agreement between EBC Brakes and either of the two dealers concerned. The dealer website statements, which were the subject of this investigation, no longer appear.

OFT’s action: Case closed
Case Officer: Stephan.Pukas@oft.gsi.gov.uk
Geoffrey.Kenton@oft.gsi.gov.uk
Max.Ditchfield@oft.gsi.gov.uk
Case reference: CE/4404/04