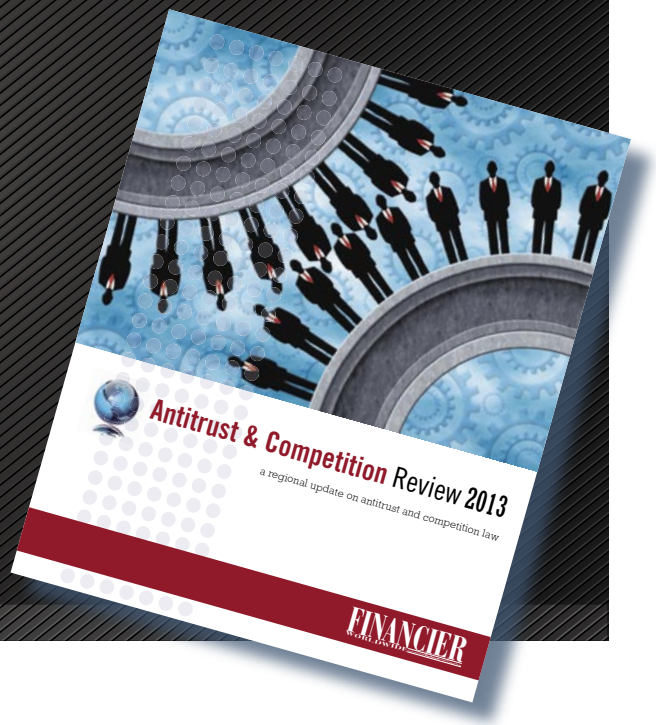
ANTITRUST & COMPETITION REVIEW 2013



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FW: To what extent have authorities in the UK intensified their enforcement of antitrust regulations? Are they becoming more adept at collaborating with regulators in other jurisdictions?

O'Regan: The Office of Fair Trading (OFT) and Competition Commission (CC) protect consumers' interests by using all their competition powers. They collaborate closely with other regulators, coordinating investigations into international cartels and mergers, including any involving foreign companies. The OFT has invested heavily in its cartel investigation capabilities, including intelligence-led and covert investigations and criminal investigations against individuals. Both authorities conduct studies and investigations into markets where competition is not working well. The OFT ensures competition in public markets, such as healthcare and education, and that government policy does not restrict competition. In April 2014, the OFT and CC will merge to create a new world-class authority, the Competition and

Markets Authority (CMA), with enhanced powers across all its work.

FW: What general advice would you give to companies that find themselves subject to an antitrust dawn raid? What should a company's immediate response be in this situation?

O'Regan: The most important thing is to be prepared and to remain calm; the middle of a dawn raid is no time to cobble together a defence strategy. A carefully planned and rehearsed response plan, formulated with external counsel, will ensure that everyone knows their role and the raid is managed smoothly. Many companies hold mock raids to test procedures, identify weaknesses and implement improvements. The plan should be implemented and external counsel contacted immediately, under internal counsel's leadership. Investigators' powers must be understood, they must be shadowed and their instructions followed. Employees should cooperate. Interviews and questioning should only take place with a lawyer present.

FW: What developments in merger control law or application of the law have you seen in the UK? Do dealmakers generally find it difficult to obtain the necessary clearance?

O'Regan: The OFT and CC are both very active in merger control. Whilst the majority of mergers are approved without a lengthy CC review, a small proportion are either subject to full review or require remedies to obtain OFT approval. The CC often requires remedies and recently prohibited two mergers between foreign companies that other authorities had already approved. In mergers in local markets, parties often, inadvisably, do not take legal advice and close deals without first notifying the OFT. Minority shareholdings are also investigated, as in *Ryanair/Aer Lingus*. The principal concern is unilateral effects, in particular the risk of price rises from loss of rivalry between the parties, but in *Anglo American/Lafarge* coordinated effects concerns necessitated extensive divestments. The OFT has exhibited a strong preference for 'up-front buyers'. As the agencies are increasingly interested in local markets and markets that are a small part of the parties' overall businesses, parties contemplating mergers must take legal advice at an early stage to identify and mitigate any merger control risks.

FW: What considerations do companies need to make to avoid abuse of dominance? Are regulators in the UK increasingly interventionist in this area?

O'Regan: Although relatively uncommon, the OFT is presently undertaking several dominance investigations. Companies with market power must keep their commercial practices under regular review. This involves assessing possible market dominance, the competitive effects of the conduct and any possible justification for

it. Where a company is or may be dominant, it must take care in implementing practices such as rebates and discounts, product tying and bundling, exclusive contracts, unfairly low prices, unfairly high prices and other conduct that may exclude or prevent market entry by rivals.

FW: In what ways can antitrust issues apply to commercial arrangements, such as intellectual property, distribution agreements, and joint selling?

O'Regan: Competition law applies to all agreements between competitors and vertical agreements between companies at different levels of the supply chain. This includes R&D, technology licensing, franchising, distribution and supply, and joint purchasing, selling and production agreements. The UK follows EU law; accordingly EU block exemptions and European Commission guidance are applicable and companies must 'self-assess' compliance with UK and EU competition law. The OFT is currently investigating commercial arrangements in the online hotel booking and pharmaceutical sectors.

FW: Have you seen a rise in antitrust-related disputes, including complex class actions and private ligation? Do companies need to be mindful of this risk?

O'Regan: There has been a significant increase in 'follow-on' damages claims after OFT and European Commission infringement decisions in cartel and dominance cases. The UK is an attractive jurisdiction, with experienced judges, a broad disclosure regime and the ability to cross-examine witnesses. Many parties are foreign, with claimants seeking damages for losses suffered throughout the EU from international cartels, leading to complex jurisdictional challenges. Standalone actions are less common, but not unknown. Most actions settle, confidentially, before trial. However, damages have been awarded in two recent dominance cases, albeit lower than those claimed, including, in one case, exemplary damages. Class actions are unknown and group actions difficult to bring; almost all cases are brought by companies. The government will introduce reforms to facilitate actions by consumers and small businesses, including an 'opt-out' regime for collective actions and encouraging alternative dispute resolution. An increase in damages actions is therefore likely.

FW: What considerations should a company make if it uncovers a potential antitrust/competition breach and undertakes an internal investigation? Are companies encouraged to self-report any wrongdoing?

O'Regan: When anti-competitive conduct is suspected, the first step is to fully and quickly understand the facts, by interviewing employees and reviewing emails and documents, to determine if a breach has occurred. Once this is done, the

potential exposure should be determined, with any continuing breach terminated immediately and consideration of reporting the cartel to the OFT, the European Commission and possibly other authorities, particularly in an international cartel. There is no time to waste; any reduction in fine depends on companies' order in applying for leniency. The OFT encourages both self-reporting and whistleblowing and operates a leniency program for companies and a 'no action' regime for individuals that self-report.

FW: What is your advice to companies on rolling out an antitrust compliance program throughout their organisation? Do best practices include regular audits and on-going training, for example?

O'Regan: Compliance is an essential part of corporate governance. Programs must be comprehensive, thorough, and unequivocally supported by directors and senior management. Effective programs may reduce fines for any breaches that still occur. Effective programs are risk-based, identifying, assessing and mitigating specific competition risks arising from the company's business. Compliance must focus on higher-risk activities, such as joint activities or contacts with competitors, and sales and marketing. Policies, procedures and training should be devised to avoid risks materialising and to detect any that do occur. Audits may be appropriate if cartel behaviour is suspected or when an acquisition is made.

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Matthew O'Regan is a partner in Burges Salmon's Competition Unit, and specialises in all aspects of British, European and international competition law, both contentious and non-contentious, across a broad range of industry sectors. His experience includes merger control, cartel and dominance investigations, state aid, economic regulation and competition litigation and appeals. He regularly appears as an advocate in the EU courts. Mr O'Regan holds law degrees from the Universities of Nottingham and Amsterdam and was admitted as a solicitor in 1997. He was also a member of the Brussels Bar between 2001 and 2011.

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