COMPETITION LAW: RECENT LESSONS FOR SMALL BUSINESSES, COMPANY OWNERS AND DIRECTORS, AND THE SELF-EMPLOYED

Matthew O'Regan

Published on 14th July 2020

Note: this Note was originally published on 13 July 2020. It has been revised to take account of subsequent developments up to and including 23 July 2020

Many small businesses and the self-employed may be forgiven for thinking that competition law only applies to large, often multi-national companies.

However, they would be wrong to do so. A number of very recent cases in which SMEs and self-employed professionals have either been found to have been involved in anti-competitive practices, or are under investigation for suspected anti-competitive behaviour, provide a very strong warning that all businesses, however small, must be aware of and comply with the Competition Act 1998 ("**the Act**"). These are:

- a decision by the Competition and Markets Authority ("**CMA**") to impose fines on a number of ophthalmologists for fixing their consultation fees for private patients;
- an announcement by the CMA that it intends to impose a fine of over £250,000 on a Brighton musical instruments store for fixing its retail prices;
- a decision by the High Court to disqualify for seven years a former director of a Somerset estate agent that the CMA found had engaged with rivals in fixing commission rates; and
- an announcement by the CMA that it is investigating a number of convenience stores and pharmacies that it suspects may have charged excessive prices for hand sanitiser during the Covid-19 pandemic (three of these investigations have since been closed with no action being taken by the CMA).

Relevant provisions of the Competition Act 1998

The Act contains two prohibitions on anti-competitive behaviour. The 'Chapter I prohibition' (s.2 of the Act) prohibits agreements and concerted practices between undertakings that prevent, restrict or distort competition in the United Kingdom. The 'Chapter II prohibition' (s.18 of the Act) prohibits the abuse of a dominant position by one or more undertakings.

An 'undertaking' is any entity that carries on an economic activity. An 'economic activity' is the supply of goods or services on a market for remuneration. It does not matter whether this is carried on with a view to making a profit; therefore, charities and other non-profit-making bodies will be subject to competition law in respect of activities for which they sell goods or provide paid-for services, for example healthcare and education. It would also include commercial activities carried on by local authorities, for example letting business premises and operating car parks. The legal form of the undertaking is also irrelevant: it includes, but is not limited to, limited companies, LLPs and partnerships, unincorporated associations, co-operatives and sole traders.

The scope of the application of competition law is thus wide.

Ophthalmologists: CMA imposes fines on individual professionals for fixing prices for private healthcare services

On 1 July 2020, the CMA announced that it had fined Spire Healthcare and six consultant ophthalmologists for fixing the price of private consultations for 'self-pay' patients at Spire's hospital in Macclesfield. A seventh ophthalmologist was not fined, as they had informed the CMA of the price-fixing and so obtained immunity from fines under the CMA's 'leniency programme', under which businesses that inform the CMA of anti-competitive behaviour receive either immunity from, or a reduction in, any fine that it could otherwise impose.

The CMA decision was published on 15 July 2020 and each of the ophthalmologists involved is mentioned by name. Three operated through their own service companies, the others as sole traders. The hospital's management organised a dinner for five consultants in the summer of 2017. Even though the topic of fees was not the purpose of the meeting and was not on the agenda, it was nevertheless discussed. A Spire employee subsequently emailed all seven consultants suggesting a charge of £200 for an initial consultation. The consultants responded to this and agreed to do so, and those not already charging £200 increased their fees to this level. This arrangement lasted nearly two years. One of the motivations for a

common, standard fee was that it would reduce confusion for patients and give all consultants the same opportunity for new self-pay patients. Clearly, this was not a justifiable reason for this conduct, which increased prices and eliminated price competition.

Spire was fined £1.2 million for instigating and facilitating the cartel, even though it did not benefit from it, as the fees were paid to the consultants. The six ophthalmologists were each fined between £2,978 and £642. These are based on each party's turnover and reflect this being a serious infringement of competition law and the need to deter others. Spire's penalty was increased as it had instigated the infringement. All parties' penalties were reduced for their cooperation with the CMA, in admitting their infringement.

This is not the first time that the CMA has identified price-fixing by ophthalmologists. In 2015, it fined a membership organisation £382,500 for recommending fee levels, circulating detailed price lists for use in negotiations with insurers and sharing consultants' future pricing and business intentions.

The CMA's investigation and decision provides a number of learning points for all self-employed professionals, not only doctors:

- competition law applies to them
- they should not discuss, agree or share information on their fees or prices with others, including at informal social events and through emails
- 'reducing confusion for customers' is not a justification for price-fixing
- Involvement in price-fixing can lead to financial penalties being imposed by the CMA
- if they are or have been involved in price-fixing, they can obtain either immunity from fines, or a reduction in fine, by informing the CMA under its 'leniency programme'
- the fact that they have been involved in illegal, anti-competitive behaviour will become public following conclusion of a CMA investigation

It is notable that the CMA did not seek to bring criminal prosecutions against the ophthalmologists involved in the cartel: it is an offence under the Enterprise Act 2002 for an individual to enter into a price-fixing agreement. Finally, it will be interesting to see whether the General Medical Council takes disciplinary proceedings against the doctors involved: it is possible that involvement in anti-competitive behaviour could constitute professional misconduct.

Musical instruments: CMA intends to fine musical instruments retailer for engaging in resale price maintenance

The CMA has been investigating a number of manufacturers of musical instruments for resale price maintenance ("**RPM**"). This follows several other investigations of RPM in other sectors, that have led to heavy fines being imposed on manufacturers.

RPM is a practice by which a manufacturer seeks to require retailers to charge a specific price, or at least a minimum price, for its products. In some cases, manufacturers have sought to either prohibit online advertising of prices, or have imposed maximum permitted discounts from the recommended price when goods are sold online. In many cases, manufacturers threaten to reduce wholesale discounts, withdraw marketing support or even to refuse to supply retailers that do not comply with these policies. Manufacturers will often monitor retailers' pricing by using sophisticated software. In many cases, they will also have discussions with retailers, often after a retailer complains about rivals not respecting the manufacturer's pricing policy and undercutting them, particularly with online sales.

Until now, the CMA has decided to impose fines only on manufacturers that have been found to have engaged in RPM practices; it has exercised its discretion not to proceed against retailers. However, on 17 July 2020, it announced that, for the first time, it had imposed a fine on a retailer. The CMA has found that Yamaha engaged in RPM of its keyboards and electric guitars between 2013 and 2017, including with GAK, a musical instruments retailer in Brighton that also operated online. Yamaha informed the CMA of this conduct, under its 'leniency programme'. GAK also admitted its involvement.

In October 2015, the CMA sent GAK an 'advisory letter', raising concerns that GAK may have been involved in RPM. An 'advisory letter' is sent by the CMA when it has concerns about a business's practices, and recommends that the business self-assesses its compliance with competition law. (The CMA may also send a 'warning letter', where it has stronger evidence of possible anti-competitive behaviour: in this case, the recipient must also tell the CMA what it has done, or is planning to do, to comply with competition law. It would appear that, despite receipt of the advisory letter, GAK continued to participate in Yamaha's RPM activities until March 2017.

It appears that the CMA considers that GAK took 'insufficient action to address concerns about possible RPM'. It may be that this was the reason why the CMA, for the first time,

adopted a formal infringement decision against a retailer and imposed a fine on it for being involved in RPM. The CMA has imposed on GAK a fine of £278,945; this includes an increase of 15% for ignoring the CMA's advisory letter (as well as a 20% discount for admitting the infringement). This is a very substantial penalty for a business that, according to its most recent published accounts, had a turnover of £21.5 million and made a very small profit. It is hard not take the view that GAK is being made an example of, for ignoring the advisory letter. Yamaha, despite initiating the RPM scheme, presumably with several retailers, escaped being fined by applying for immunity.

The CMA's action against GAK provides a number of learning points for small retailers and other SMEs:

- competition law applies to them, just as much as to large businesses
- whilst RPM is initiated by manufacturers (in order to control retail prices and sales via the internet), it is prohibited for retailers to agree to participate in RPM, even unwillingly
- retailers involved in RPM can be fined: the fact that the CMA may have chosen not to fine retailers in earlier RPM cases does not prevent it doing so
- businesses that receive either a 'warning letter' or an 'advisory letter' from the CMA must take it seriously, comply with its terms and - if necessary – change their business practices
- businesses involved in RPM and other anti-competitive behaviour can avoid or reduce CMA fines by informing the CMA and cooperating with it under the CMA's 'leniency programme'

As a post-script, the CMA has announced its own on-line price monitoring tool to detect suspicious pricing activity and possible RPM across all sectors. Retailers must therefore ensure that they do not engage in RPM, do not agree with or implement manufacturers' policies that restrict their pricing or marketing activities (in particular, online) and set their prices independently.

Estate agents: disqualification of directors of estate agents found to have fixed sales commission rates

The CMA has investigated a number of agreements between estate agents to fix commission rates for the sale of residential property. One such cartel concerned estate agents in the

Somerset town of Burnham-on-Sea. In May 2017, the CMA adopted a decision that found that six estate agents (five of which traded as limited companies and the sixth as a partnership) had infringed the Chapter I prohibition by agreeing to fix commission rates for residential sales. Fines totalling £370,084 were imposed on five agencies, the sixth was not fined as it had immunity from fines under the CMA's leniency programme. Fines on two agencies were reduced under the leniency programme.

The CMA subsequently brought applications for the disqualification of directors of the three agencies that did not qualify for leniency. Under s.9A to the Company Director Disqualification Act 1986, a director of a company that had been found to have infringed UK or EU competition law must be disqualified as a company director if their conduct makes them unfit to be a director. The maximum period of disqualification is 15 years.

Three directors gave disqualification undertakings to the CMA, under which they agreed not to act as company directors for between 3 and 5 years. However, a fourth director refused to give an undertaking and the CMA's application for his disqualification was heard by the Insolvency and Companies Court (part of the High Court) in June 2020. On 3 July 2020, the Court handed down its judgment, pursuant to which the director was disqualified for seven years. This was the first time that the CMA had pursued a disqualification proceeding to court: in all other cases, directors have offered undertakings, which will usually include a discount in the duration of the disqualification.

The director (who was not an estate agent, but a part-owner of the company) had not been involved in the day-to-day management of the agency and did not have contact with either customers or competitors. He also did not attend any meetings at which employees of the six agencies discussed and agreed to fix commissions. However, internal documents (meeting minutes and emails) seized by the CMA showed that he had been aware that his employees were planning to attend a meeting at which it was intended to agree increased fees and that they had informed him of the outcome of that meeting, at which minimum commission rates were agreed. Accordingly, with such knowledge of the intended purpose of the meeting and the price-fixing agreement made at it, and by not taking all reasonable steps to put a stop to this anti-competitive behaviour, the director breached his duties as a company director.

The Court held the director's misconduct made him unfit to be concerned in the management of a company. He was therefore disqualified for seven years, even though he had not organised or led the cartel discussions and had not been involved in its

implementation. He was disqualified for being aware of the cartel and not taking steps to prevent or stop his company's involvement.

This case is a strong warning to directors of companies, whether small or large, of the personal consequences that may befall them if a company of which they are a director is involved in anti-competitive behaviour. It provides the following learning points:

- small businesses can be punished heavily for the anti-competitive behaviour of their employees
- a director has a duty to ensure that their company does not engage in anti-competitive behaviour and must take all reasonable steps to prevent or stop behaviour of which they are aware
- a director must act promptly if they become aware of actual or possible discussions by their employees with employees of other firms
- a successful immunity application will, and a successful leniency application may, provide protection against director disqualification proceedings
- disqualification for involvement in, or failing to prevent, anti-competitive behaviour will be for a long period

Convenience stores and pharmacies: allegations of excessive pricing of hand sanitiser

The Covid-19 pandemic has led to many allegations of businesses unjustifiably increasing the price of basic essentials, such as meat, flour, pasta, painkillers and hand sanitiser. The CMA has published regular updates on its website of its identification of and responses to competition and consumer law problems identified when businesses have behaved unfairly, including complaints of 'price gouging'.

The Chapter II prohibition prohibits the abuse of a dominant position. Where a business has a dominant position in a market for a particular product or service, it may be an abuse of that dominant position for it to charge an 'excessive price'. A price is 'excessive' where it bears no reasonable relation to the economic value of the product, such that the dominant undertaking has reaped trading benefits that it could not obtain in conditions of normal competition. There is no single test for assessing this. However, a price may be excessive and 'unfair' where it is considerably above the costs of production, or by reference to a benchmark for the same or similar goods in the same or other markets, although there may also be other appropriate methodologies for determining this.

On 18 July 2020, the CMA announced that it has opened a Chapter II investigation into four pharmacies and convenience stores that it suspected had charged excessive and unfair prices for hand sanitiser. The identity of the four businesses is unknown, but it is reasonable to suppose that they are small businesses active in a local area: had the investigation concerned large, chain businesses, it is likely that their identifies would have become known by now. Data published by the CMA indicates that price increases for hand sanitiser have been highest in independent chemists, independent stores operated under a 'symbol' mark and independent retailers; prices charged by grocery multiples have changed little.

On 13 July 2020, it announced that three of these investigations had been closed, with no action being taken. In one case, this was because there was no evidence that the price being charged was excessive (presumably, in relation to its wholesale costs). In two others, the CMA has stated that the evidence so far available showed that it was 'unlikely' that either retailer had infringed competition law and that the (limited) volumes of hand sanitiser sold by them meant that continuing the investigation would have delivered limited, if any, consumer benefits.

The results of the fourth investigation are, of course, unknown: it is at an early stage.

The CMA's investigations exhibit a number of conceptual and practical difficulties. Its case seems to be based upon an increased price being 'unfair' when it is raised to a level above what some, often vulnerable people are able to pay, by reference to their income, for what is seen as an 'essential' product in a healthcare emergency. Even if there was evidence of this and this could constitute an abuse (which is by no means clear) the CMA must still establish dominance in a properly defined market: this requires an undertaking to face few competitors, so that it can raise prices. In the case of a pharmacy or convenience store, to do so, the geographic market must be extremely small, so that there are few, if any competitors. Is this realistic? A further conceptual difficulty is whether a price increase is 'unfair', in a market situation where demand has increased rapidly, such that supply could not, at least initially, keep pace and wholesale supply costs have probably risen: in such circumstances, one would expect price rises even in competitive markets. Finally, as a practical matter, as an individual store will probably sell very small volumes of the product under investigation, is it worth the CMA devoting scarce resources to investigating conduct that, even if it could be proven to be abusive under the Chapter II prohibition, has had a very small impact on consumers?

It will be interesting to see what enforcement action, if any, the CMA may take in relation to the fourth, on-going investigation.

In the meantime, and notwithstanding the CMA having quickly closed three of its investigations, businesses large and small are under regulatory scrutiny and should consider carefully their pricing, for both legal and reputational reasons. This is reinforced by a joint open letter from the CMA and the General Pharmaceutical Council ("**GPhC**") warning pharmacies not to increase prices by more than their usual mark-ups and not to pass on higher operating costs by disproportionately increasing the mark-up on essential goods. The GPhC warns that unfair pricing that infringes competition or consumer protection law may damage public confidence in pharmacy and constitute professional misconduct. A similar message on the reputational risks of so-called 'price gouging' is clear from a joint statement made on 3 July 2020 by the CMA and a number of industry bodies, including the Association of Convenience Stores, the Association of Independent Multiple Pharmacies and the British Retail Consortium.

Conclusion

The cases considered in this Note make it very clear that competition law applies to all businesses, regardless of their size, structure and legal form. This includes SMEs, the trading activity of charities and local authorities, sole traders and self-employed professionals.

The consequences of infringing competition law can be severe, whether for the business itself or for its managers and directors. Business owners, directors and managers must therefore take seriously compliance with competition law.

23 July 2020

Matthew O'Regan is a specialist competition law barrister. He has extensive experience of all aspects of competition law, including: advising businesses on ensuring that their agreements or practices are compliant with competition law; undertaking internal investigations into possible anti-competitive conduct; advising businesses under investigation for suspected anti-competitive behaviour, including unannounced 'dawn raid' investigations by the CMA and other authorities; advising on and making applications for leniency to the CMA and European

Commission under their respective leniency programmes; advising individual employees subject to compulsory interviews by the CMA; and advising on appeals against infringement decisions, whether before the Competition Appeal Tribunal or the European Courts. His clients range from multinational companies to SMEs, local authorities, sole traders and individual employees. In appropriate cases, he is qualified to accept instruction on a public access basis from companies and individuals.