
International developments

From the UK

The following items come from the Office of Fair Trading's website <<http://www.offt.gov.uk>> and its magazine, *Fairtrading*.

International cooperation halts cross-border scam

A Spanish company that misled UK businesses into paying for advertisements in a directory has been stopped through cooperation between the OFT and its colleagues in Spain.

European City Guide, based in Barcelona, has been told to change its mailshots by the Catalan Department of Industry, Commerce and Tourism after the OFT raised its concerns with the authority. It is believed that more than five million mailouts were sent to European businesses over the past two years — mostly to British and French firms.

European City Guide has agreed to cancel half the 800 contested invoices, some of which were for more than £1000. It has also agreed to obtain approval from the Catalan authority before issuing revised mailouts.

The OFT received more than 100 complaints from British businesses claiming they had been incorrectly invoiced and called on the Catalan authority to investigate.

European City Guide had sent out mailshots asking businesses to check enclosed details about their company that it planned to place in its directory. The mailings gave the impression that the directory entries were free. However, small print meant that traders who signed and returned an enclosed form — even if simply correcting or adding to the details provided — were committed to paying for three entries and a copy of the directory.

Pharmaceutical company fined

A Cambridge-based pharmaceutical company has been fined £3.21 million for abusing a dominant market position. This is the first financial penalty to be set by the OFT under competition law.

Napp Pharmaceuticals was found to have supplied sustained-release morphine (trade name MST) to patients in the community at excessively high prices while supplying hospitals at discount levels that blocked competitors.

In addition to the fine the OFT has told Napp that it proposes to make a direction requiring Napp to bring the infringements to an end, in particular by:

- immediately reducing the price of MST tablets to the community; and
- limiting the degree to which community prices can exceed hospital prices.

The OFT is considering Napp's representations on its proposals and expects to make, and publish, the direction shortly.

Reform for competition needed in professions

Professions should be fully subject to competition law and unjustified restrictions on competition should be removed, John Vickers, Director General of Fair Trading, recently stated.

Among the OFT's recommendations is the removal of the entitlement to request that professional rules be excluded from the 1998 Competition Act's prohibition on anti-competitive agreements.

Publishing an OFT report on competition law and the professions John Vickers said:

Competition brings consumers lower prices, more choice and new services. The law to combat restrictions on competition should apply as widely as possible and the scope to exclude professional rules from competition law should be removed.

There remain numerous restrictions on competition in the professions. Apart from those shown to be necessary for economic efficiency and consumer benefits, restrictions on competition should go.

Existing restrictions include:

- restricted consumer access (e.g. most clients cannot see a barrister without a solicitor);
- demarcation (e.g. competition between barristers and solicitors is inhibited and the conveyancing market is restricted);
- hindrance of 'one-stop shops'— professional rules prevent multi-disciplinary partnerships (practising barristers have to be sole practitioners);
- restrictions on the competitive strategies that professionals can use in advertising and marketing; and
- dampening of price competition by fee guidance for some professional work.

The following recommendations were made to Ministers.

- Removing the exclusion system — the Competition Act 1998 provides for an exclusion from the Act's prohibition on anti-competitive agreements for agreements which constitute designated professional rules. The Director General's view is that this entitlement to exclusion should be removed.
- Queen's Counsel system — the distinction between QCs and junior barristers has significant effects on competition. The review questions the operation of the system as a quality mark, and its value to consumers.

Main restrictions in professional rules

Multi-disciplinary practices (MDPs)

Various rules of different professional bodies prevent or hinder the establishment of multi-disciplinary practices. These practices could bring together accountants, lawyers and other professionals such as surveyors and estate agents. Potential benefits such as overhead cost savings, more flexible allocation of resources and more open access to the professions could result.

Access

Restrictions on barristers having direct access to clients restricts their ability to compete with each other and solicitors and requires customers to employ two types of lawyer where one might do.

Advertising restrictions

The Law Society and the Institute of Chartered Accountants in England and Wales (ICAEW) prohibit the seeking of business by telephone from potential clients and comparative fee advertising.

Barristers are prohibited from making direct comparisons with other barristers and from referring to their success rates. Removal of these restrictions could lead to better information for customers and sharpen competition.

Fee guidance

The Royal Institution of British Architects (RIBA) issues non-mandatory guidance to architects on the fees they should charge. The OFT believes that it could act to restrict or distort price competition.

Conveyancing and probate

Further implementation of ss. 34–52 of the Courts and Legal Services Act (CLSA) would allow banks and building societies to provide conveyancing services. Solicitors currently have 95 per cent of the market. Similarly, further implementation of ss. 54 and 55 of the CLSA would be likely to increase competition in the market for probate services.

Legal professional privilege

When, for example in the provision of tax advice, lawyers are in competition for work with non-lawyers, legal professional privilege can distort competition. Privilege has its origin in case law and is recognised in European law. There are clearly fundamental arguments for protecting the exchanges between clients and their legal advisers. However, in such cases, there is an argument for reviewing the scope of privilege to remove the distortion in competition that favours the lawyer.

Accountants — the 50 per cent rule

This restricts statutory audit to those who practise in a firm controlled by qualified persons. This rule might inhibit the formation of MDPs involving auditors. Relaxation of the restriction would require amendment of UK and European law.

From the US

The following items come from the Federal Trade Commission's press releases on its website <<http://www.ftc.gov>> and from *Antitrust & Trade Regulation*, published by the Bureau of National Affairs, Inc.

FTC acts against drug companies

Generic drugs

In the third such complaint of the past year the FTC recently charged three drug makers, Schering-Plough Corporation, Upsher-Smith Laboratories and American Home Products Corporation, with entering into anti-competitive agreements aimed at keeping low-cost generic drugs off the market. The Commission has alleged that Schering, the maker of K-Dur 20, a widely prescribed potassium chloride supplement, illegally paid Upsher-Smith and American Home Products millions of dollars to induce them to delay launching their generic versions of the drug. The FTC claims the agreements have cost consumers more than \$100 million.

A case against Hoechst Marion Roussel (now Aventis), Carderm and Andrx has been withdrawn from adjudication while a proposed consent agreement is considered. The FTC alleged that HMR, the maker of Cardizem CD, agreed to pay Andrx millions of dollars to delay bringing its generic version of Cardizem CD to market. The annual market for Cardizem CD, a widely prescribed drug for hypertension and angina, is about \$750 million. Under the terms of the consent agreement, the companies would be barred from entering into arrangements to delay the entry of generic pharmaceuticals.

A complaint alleging similar anti-competitive behaviour by drug manufacturers, Abbott Laboratories and Geneva Pharmaceuticals, Inc. for Abbott's brand-name Hytrin hypertension and prostate drug was filed and settled at the same time through a Commission order prohibiting similar arrangements in the future.

Illegal monopoly alleged

The FTC also recently charged The Hearst Trust, The Hearst Corporation (a communications and entertainment company) which The Hearst Trust owns and First DataBank, a wholly-owned Hearst Corp. subsidiary, with illegally acquiring a monopoly over a key type of drug information database used by pharmacists and others. This resulted from Hearst's 1998 acquisition of its main competitor in that market, Medi-Span.

The FTC alleges the acquisition allowed The Hearst Trust, The Hearst Corporation, and First DataBank (collectively referred to as 'Hearst') to monopolise the market, resulting in drastic price increases for such databases. The FTC also alleges Hearst illegally withheld important information about the Medi-Span acquisition required for a pre-merger antitrust review by the federal antitrust agencies.

The FTC intended asking the court to order Hearst to create a new competitor to replace Medi-Span and to forfeit its profits from the anti-competitive price increases that followed the acquisition of its only competitor.

Telemarketers pay \$152 million back to consumers

The FTC recently reported on five years of enforcement of the Telemarketing Sales Rule which has operated since 31 December 1995. During the rule's first five years, the Commission (or the US Department of Justice, acting on its behalf) brought 121 law enforcement actions alleging rule violations. Three-quarters have been concluded, resulting in injunctions against misrepresentations and future violations of the rule, outright bans against some or all forms of telemarketing in some cases, and monetary judgments totalling more than \$152 million in consumer redress and \$500 000 in civil penalties.

The Telemarketing Sales Rule requires telemarketers to make specific disclosures of material information, prohibits misrepresentations, limits the hours that telemarketers may call consumers, prohibits calls to a consumer who has asked not to be called again and sets payment restrictions for the sale of certain goods and services. Some defendants promised loans and credit cards for an advance fee, but never delivered. Others misled consumers by telling them that they were not currently protected against credit card fraud, and mistakenly claimed that if the consumers did not purchase their services, they could be held liable for all unauthorised charges made with their cards. Some defendants operated travel scams, misrepresenting the total cost of the vacation travel package offered, and failing to disclose material restrictions on the use of the package, such as requiring attendance at timeshare sales presentations. Still others engaged in phoney prize promotions, fraudulently offering purportedly valuable prizes to consumers to induce them to purchase products.

Following are some recent cases.

Office supplies

Corporate Supplies Inc., based in Cummings, Georgia, and its principals agreed to pay \$20 000 in consumer redress as part of a settlement with the FTC. The FTC alleged the defendants duped their victims into accepting and paying for shipments of unordered toner cartridges and other office supplies. In addition to paying consumer redress, the defendants are permanently banned from engaging in the sale of non-durable office supplies and must post a

\$200 000 performance bond before engaging in telemarketing activities.

Bogus medical billing

A federal district court has ordered a temporary halt to a California-based telemarketing scheme that purportedly sold work-at-home medical billing opportunities. Medicor LLC, and its manager promised consumers they could earn up to \$1500 per week using their home computers to process medical bills for physicians. The FTC alleges the defendants misrepresented their medical billing work-at-home opportunities by touting false earnings claims, misrepresenting the assistance they would arrange for consumers to get work and that refunds were readily available. At the Commission's request, the court froze the defendants' assets, and appointed a temporary receiver pending a hearing.

Seven-year ban on telemarketer

Computer & Web Publications, Inc. and its owner have agreed to pay \$81 000 in consumer redress as part of a settlement with the Federal Trade Commission. The FTC alleged the defendants engaged in a fraudulent business opportunity scheme. The FTC filed a suit against the above-named defendants, as well as AMP Publications, Inc., and its owner as part of Project Biz-illion\$, a nationwide crackdown on fraudulent business opportunities. The FTC alleged that the defendants advertised large potential incomes for work-at-home computer users, but few, if any, consumers who purchased their program were able to make such earnings. Under the terms of the settlement, Computer & Web Publications, Inc. is barred from marketing or selling any work-at-home business opportunity for seven years and is prohibited from making false and misleading statements when engaging in the promotion or sale of any product or service. (In February 2001 the court entered a \$4.9 million default judgment against AMP and its owner and permanently banned them from engaging in the sale of work-at-home business opportunities.)

Predatory lending

The FTC has increased its enforcement activities to halt systematic and widespread abusive lending practices, commonly known as predatory lending. The matter outlined below was the FTC's 15th case involving the subprime lending industry since 1998. The Commission has also testified before Congress and federal and state agencies on predatory lending problems, and made recommendations on legislative and regulatory changes to strengthen consumer protections.

The FTC has implemented an aggressive consumer education program and has published a series of free publications specifically for homeowners and potential home buyers. It also hosts forums on predatory lending. This year's was being held in April in New York to bring together about 300 consumer advocates, bankers, state and federal regulators, New York homeowners and senior citizens to explore legislative, legal and community-based initiatives that combat predatory lending.

FTC charges one of USA's largest subprime lenders

In March 2001 the FTC filed a complaint alleging that Associates First Capital Corporation and Associates Corporation of North America used systematic and widespread abusive lending practices. The FTC alleges that The Associates used deceptive marketing to induce consumers to refinance existing debts into home loans with high interest rates, costs, and fees, and to purchase high-cost credit insurance. They were also charged with violating several other federal laws, including the Truth in Lending Act, Fair Credit Reporting Act, and Equal Credit Opportunity Act, and with using unfair tactics in collecting consumers' payments on its loans. In addition to seeking other relief the FTC asked the court to award redress to all borrowers who were injured as a result of the defendants' practices. (Subprime lending refers to the extension of loans to persons who are considered to be higher risk borrowers. The Associates, like other subprime lenders, charged its customers prices that were substantially higher than those available to borrowers in the prime market.)

The FTC said The Associates hid essential information from consumers, misrepresented loan terms, flipped loans (rolled over) and packed optional fees to raise the costs of the loans. Those victimised were generally the most vulnerable — hard-working homeowners who had to borrow to meet emergency needs and often had no other access to capital.

Microsoft and Hewlett-Packard — misleading Pocket PC claims

Under proposed settlement agreements with the FTC, Microsoft and Hewlett-Packard have agreed to stop misrepresenting that Pocket PC handheld computers — personal digital assistants or PDAs — came with built-in wireless access to the Internet and email at any time and from anywhere. According to the FTC, Pocket PC users must purchase and carry additional equipment such as a modem to get mobile access to the Internet and email, a fact not clearly disclosed in the joint Microsoft-HP advertising campaign.

Several of the challenged ads picture a Pocket PC accessing email or Internet sites and claim the device can access them any time. While the ads contained a disclosure at the bottom stating 'Modem Required. Sold separately', the disclosure was inconspicuous and appeared in extremely fine print at about four points.

Under the terms of the two proposed consent agreements Microsoft and HP would be barred from engaging in similar acts or practices in the future. The agreements would apply to PDAs (and any other handheld Internet or email access devices) that do not come with built-in wireless Internet and email access.

HP and Microsoft are voluntarily disseminating consumer education materials about the various factors consumers should consider when purchasing PDAs, such as whether a PDA offers built-in wireless access. HP has posted a brochure *Helpful Facts About Personal Digital Assistants* on its website at <<http://www.hp.com/go/pdabrochure>>.

Microsoft is running an essay as an advertisement highlighting the inability of most PDAs to provide wireless access to email and the Internet without a modem as an advertisement in leading US newspapers. A detailed consumer education brochure from Microsoft can be accessed at <http://www.microsoft.com/mobile/pocketpc/pdainfo.asp>.

\$5 million refunds from pyramid promoters

Operators of an Internet-based business opportunity that promised easy income for investors in an Internet shopping mall network have agreed to settle FTC charges that their scheme was an illegal pyramid operation. Under the terms of the settlement, Bigsmart.Com L.L.C. and its principals will provide up to \$5 million in consumer redress and post a \$500 000 performance bond before engaging in any new multi-level marketing activity. The defendants also are prohibited from engaging in any illegal pyramid schemes.

According to the FTC, Bigsmart marketed Internet theme 'malls' that it claimed would enable investors to earn substantial income from commissions on products purchased through the Internet. The malls were a collection of links to retail sites maintained by independent third-party merchants, such as MarthaStewart.com, and to a 'Superstore' maintained by Bigsmart itself. Traffic was directed to the malls through the personalised Bigsmart 'welcome pages' that members bought access to for a \$10 application fee and a \$99.95 'hosting' fee. Although Bigsmart claimed that members would make substantial amounts of money, the scheme was structured in such a way that to realise continued financial gains would depend on '... the continued, successive recruitment of other participants', not on retail sales of products and services to the public.

From Canada

The following items come from the Competition Bureau's website <<http://competition.ic.gc.ca>>.

International price fixing conspiracy

The American company Carbone of America Industries Corp. recently pleaded guilty to fixing prices for the product 'isostatic graphite' in semi-machined and non-machined form. The Federal Court Trial Division in Toronto fined the company \$300 000.

Isostatic graphite is a strong, fine-grain carbon product resistant to heat and chemicals. It is commonly used for electrical discharge machinery, dies for the continuous casting of metals, and various products used in the semi-conductor industry.

Carbone was a member of an international cartel that agreed to fix prices and divide world markets for isostatic graphite. Carbone had sales of isostatic graphite in Canada estimated at approximately \$1.64 million during the period of the conspiracy, which lasted from about July 1993 to February 1998.

From New Zealand

The following items came from the NZ Commerce Commission's media releases listed on its website at <<http://www.comcom.govt.nz>>

Powermax magnetic water conditioner — no effect on bacteria and parasites

The distributor of the Powermax magnetic water conditioner, Julian's Electrical & Energy Conservation Limited, has admitted in the New Plymouth High Court that Powermax does not and cannot eliminate bacteria and parasites from water.

Commerce Commission Chair John Belgrave said that the claims made by Julian's Electrical were not just false, but they also created a potentially serious health risk.

Mr Belgrave said that Julian's Electrical has agreed to display corrective advertising throughout the country.

Julian's Electrical made the false claims in newspaper advertising and articles, in telephone marketing and in brochures. Since launching Powermax in 1998 Julian's Electrical has set up more than 140 distributors.

Powermax is made in the United States and consists of two magnets that are strapped to water pipes. Julian's Electrical relied on claims made by the manufacturer and carried out no independent tests.

The Commission had independent tests done, including tests on water contaminated with faecal bacteria. All the independent tests gave the same result — Powermax did not eliminate bacteria and parasites.

Kmart New Zealand and Atlas Imports and 'genuine' leather belts

As part of a settlement with the Commerce Commission, Coles Myer New Zealand Holdings Limited, which trades as Kmart New Zealand, and Atlas Imports Pty Limited today offered refunds and started corrective advertising for making misleading claims that six styles of men's belts were leather or genuine leather.

Atlas and Kmart acknowledge that the labels were misleading and advertising breached the Fair Trading Act.

The settlement is for about 9000 belts that Atlas supplied to Kmart, but information received during the investigation suggests that this may be an industry-wide problem in New Zealand and Australia.

Commission chairman Mr Belgrave said:

Consumers are prepared to pay more for leather goods. Multiply a few dollars per belt by the 9000 at Kmart and you get a significant total. Multiply a few dollars by the much bigger number that may be in many shops, and consumers could have paid hundreds of thousands of dollars more.

Atlas' parent company, A Royale & Co (Aust) Pty Limited, supplies a large number of chain stores in Australia [s. 87B undertakings supplied to the ACCC by A Royale & Co will be reported in the August issue of the *ACCC Journal*].

In New Zealand four of the styles of belt Atlas supplied were labelled 'leather' but contained no leather hide at all. They were made up of 18–37 per cent reconstituted leather — leather scraps ground up and then mixed with glue — with the remainder being other fabrics. One style labelled 'leather' contained 24 per cent leather hide while another, labelled 'genuine leather', contained 61 per cent leather hide.

From Europe

The following items come from the European Commission's website at <http://europa.eu.int/rapid/start/egi/guesten.ksh?qry>.

Microsoft not to influence decisions of European digital cable operators

The European Commission has carried out an investigation into the investments of US software company Microsoft Corp in the European digital cable television industry. This was to ensure the technology decisions of cable operators are made on merit and suppliers of set-top box technology can compete with Microsoft on equal terms. The investigation will be closed now Microsoft and its strategic allies have agreed to abolish or change their so-called 'Technology Boards' so that the latter's recommendations are no longer binding.

After a Commission investigation, Microsoft has agreed to modify its relationship with two partner companies, to avoid exercising undue influence over their choice of set-top box technology.

Last year Microsoft agreed to reduce its joint controlling position in UK cable TV operator Telewest to a simple minority interest.

After last year's Microsoft/Telewest investigation, the Commission decided to examine Microsoft's strategic investments in other leading European broadband cable operators: Dutch-based UPC, NTL of Britain and TV Cabo of Portugal. In UPC and NTL, the investment was accompanied by the setting up of a joint Technology Board that made binding recommendations on technology decisions of the cable company.

To avoid discussions on the status and powers of these Technology Boards, Microsoft agreed with one cable operator to abolish the Technology Board completely and with the other cable operator to change the Technology Board into an Industry Technology Forum that will be equally open for competing suppliers of set-top box technology.

Digital TV is expected to become the most widespread means for consumers to access entertainment, education, news and e-commerce as well as digital TV programs. Cable operators will offer consumers a full range of advanced broadband communications services considered vital for the development of the information society in Europe.