COMPETITION LAW ISSUES GUIDANCE (as at Nov 10)

Introduction

The image of a cartel is generally of a furtive gathering of greedy financiers, winking at each other and agreeing prices over brandy and cigars. However, standard methods that have been used beneficially and lawfully within the HE sector for decades are now at risk of amounting to cartel behaviour, in the context of new conditions now applying. Without being alarmist, it is best to be aware that the repercussions can be disastrous for the reputation and finances of the institutions involved, and can even lead to the prosecution/potential imprisonment of the individuals involved. Guidance is therefore set out below to help protect against this painful scenario.

Background

The recent Browne report indicated that provision of higher education must become more competitive, based on price and teaching quality. Quality and competition are to be safeguarded by an independent Higher Education Council (replacing the four bodies that currently oversee the HE system) to enforce minimum quality standards, to provide information to students in choosing an institution and course, and to evaluate institutions on how they provide fair access to all. (Some of this remit will clearly overlap with current Equality legislation, which most universities already take great pains to follow and so have the basic systems in place upon which to build.) The government will implement most of the report’s recommendations but with a "hard" cap on tuition fees of £9,000 per year (not the "soft" cap of £6,000 plus a levy on fees over £7,000 as Browne recommended).

Universities are subject to EU and UK competition law. Therefore discussions between the universities regarding student intake numbers, the courses that they will be running or dropping and the fees they will be charging are likely to infringe competition law. In the UK, agreements between "undertakings" with the object or effect of restricting competition are prohibited by the Competition Act 1998, and the Office of Fair Trading can impose significant fines for infringement of the prohibition (of up to 10% of income). There would be severe negative publicity and risk of private actions for damages brought by anyone who has suffered harm from the infringement. There is also the possibility of criminal sanctions for any individuals who are dishonestly involved in agreements which fix prices (tuition fees), share markets (divvy up courses between them) or limit supply (agree a cap on student numbers), and the prospect of third party damages claims from those who have suffered loss as a result of unlawful agreements. There used to be doubt whether educational institutions qualified as "undertakings" under the Competition Act, but the OFT showed with its decision in the independent schools case in 2006 that it will enforce competition law principles against educational institutions.

In that case, 50 schools were found to have infringed the Competition Act by exchanging confidential information regarding future pricing intentions on a regular and systematic basis. Even without any explicit agreement between the schools as to what fees they would charge, this exchange of confidential and commercially sensitive information was sufficient to constitute an unlawful concerted practice in breach of competition law. The OFT issued a statement of objections to the schools infringing competition law by exchanging specific, confidential and commercially sensitive information, regarding the fees intended to be charged for boarding and day pupils and the percentage increases they represented. The OFT said that through this the schools knowingly substituted practical co-operation for the risks of competition in the relevant markets. However, the OFT agreed to a settlement with the schools, whereby schools admitted they participated in exchange of information the object of which was to distort competition in the UK and agreed to make an ex gratia payment towards a GBP 3 million educational trust fund for the benefit of the pupils at the schools concerned. Exceptional circumstances meant that the OFT reached this resolution and it is unlikely to take a light touch approach with any similar arrangement between colleges or universities in the future. Furthermore, the OFT’s investigation was prompted by a report by The Sunday Times which
also submitted a file of evidence to the OFT. With the interest surrounding university fees and funding, institutions must remember their activities will be subject to public scrutiny. (See also note on Freedom of Information below.) The Higher Education Council will publish a survey of charges each year and protect students’ interests when an institution fails or a new one enters the market. Competition in the higher education sector is set to increase, with any attempt to circumvent it severely reprimanded.

Since 2006, the OFT has doled out harsher sanctions. In July 2010, tobacco retailers and producers were fined £225m for restricting trade. Recently RBS agreed to pay £28.5m as a fine for staff disclosing confidential information to Barclays. Even a one-off disclosure can fall foul of the rules. In a 2009 case, only a single meeting was involved and there was no direct link with the prices later charged. Care must also be taken over benchmarking/identifying best practice.

Guidance

The following are useful ground rules:

- Any discussion or exchange of data between competing universities about their future pricing intentions (including the level of their future tuition fees) is likely to be problematic under the competition rules.
- Discussions or exchanges between competing universities about the number of student places they intend to offer is also risky, especially if discussions or disclosures occur between competing universities on a per-course basis, or are broken down into type or category of students.
- Any agreement, arrangement or understanding between competing universities would likely to be anti-competitive if its sole purpose was to reach an understanding on what would be charged to third parties for the provision of goods or services.
- When considering the possible impact of the competition rules on any discussions, exchanges or cooperation, universities should assess in general terms whether it might adversely affect intensity of competition between them and any third parties.
- There should always be an objectively justifiable reason for competitors to enter into discussions or disclosures about something that could be regarded as confidential or commercially sensitive e.g. to further joint purchasing of commodities to achieve economy.
- A clear agenda should be circulated and reviewed before any discussion or meeting takes place. Any agenda items that might create competition law difficulties should be identified and either they (or the discussion/meeting) should be abandoned.
- The pre-agreed agenda should be followed. If a discussion strays into a potentially anti-competitive area then attendees should immediately terminate the discussion, or if they find they cannot, they should leave the meeting and ask for their departure to be noted in the minutes.
- Notes should be taken of what was discussed or exchanged. An absence of minutes could be taken as indicating that the attendees engaged in anti-competitive behaviour.
- The above applies to a discussion between just two universities as well as a meeting at which a larger number of universities are represented.
- An individual listening to an anti-competitive discussion is vulnerable to an accusation of infringing competition rules, even if not participating in that discussion.
- The above also applies to meetings within an informal social context, or as part of a formal gathering.
- Reference to competitors means universities (or other higher education providers) that either currently do compete with each other (actual competitors) or could realistically begin to compete with each other (potential competitors). A Russell Group university or 1994 Group university could not assume that another university outside the group was not a competitor for competition law purposes.
Grey areas

Inevitably there are some uncertainties, especially in these initial stages of change. One difficulty is that Universities are being encouraged to communicate and cooperate with each other to save costs, achieve operating synergies and improve efficiency levels, and sharing some confidential or commercially sensitive data to do so may seem inevitable. The competition rules will however apply to any such contacts between competing universities.

Infringement is less a risk where discussions and disclosures concern: data not confidential or commercially sensitive; information already in the public domain; aggregated and anonymised data, from which it is not feasible to attribute any specific commercially sensitive or confidential data as originating from a particular university; and historical data unlikely to enable a university to predict how a competing university might act commercially in future.

Where competing universities collaborate, for example by sharing facilities, purchasing goods or services jointly to achieve purchasing synergies to reduce cost of provision, or by joint marketing and commercial activities, the following should be taken into account:

- Arrangements between competing universities confined to the joint purchasing of non-strategic goods or services is less likely to create competition issues, unless joint purchasing involved goods or services that had an important impact on the participating universities' service offerings, overheads or operating margins.
- Collaboration arrangements limited to sharing facilities between universities to give reduced overheads, and yet still involve universities which independently compete for new business and students, can be arranged to comply with the competition rules if care is taken (see ground rules above), though where facilities could be regarded as "essential facilities" to which third parties need access in order to carry on business, it can be tricky.
- An arrangement extending to how the participating universities market themselves or provide goods or services, especially if undertaking these activities jointly, is likely to require close scrutiny under the competition rules.
- If the cooperation arrangement extends to universities agreeing the prices at which they will provide goods or services, or the quantity of such goods or services that they will provide (for example, the numbers of student places they will offer) then it will be difficult to ensure compliance with the competition rules.
- Universities should also consider whether collaboration might adversely affect the intensity of non-price competition between them e.g. universities competing in a specific area of commercially-focused research cannot agree not to poach each other's key research staff, because whilst pricing may not be affected, how they compete such as in terms of innovation may be restricted.

Therefore, although competition law prohibits agreements which restrict competition, agreements can be exempt where the beneficial effects can be shown to outweigh the restrictions of competition created. The provisions of the collaboration must be the least restrictive possible, consistent with achieving the beneficial effects sought, and the overall balance must be positive, with what is gained from the collaboration outweighing restrictive effects. (Agreements on tuition fees or agreements on which courses each institution will offer are still unlikely to pass the test, as there will usually be a less restrictive means of attaining the improved efficiencies or output that a collaboration of this nature might bring.)

Caution is still needed even where Government officials effectively broker discussions between competitors to try to achieve a policy objective. The OFT has acknowledged that organisations can find themselves in a difficult position trying to follow Government policy in one area and yet remain within the boundaries of compliance of competition law. It has said that it will educate the Government as to the competition law constraints that can arise in such circumstances, and will
**publish short form guidance** to organisations that may be affected. In the meantime, institutions need to take care when embracing Government calls for closer collaboration.

Also of general assistance may be the OFT Frequently Asked Questions mini-guide published in relation to the application of the Competition Act to agreements between independent schools, at:


**NB - Freedom of Information**

Freedom of Information will remain relevant (as it is probably a far cry away that decreasing publicly funded investment will remove universities from falling within being public authorities for these purposes). It is likely that requests from such as journalists will increase. Universities should be open and transparent, and be aware that virtually all documentation produced by staff will be disclosable, either in relation to a FoI request or as a Data Protection subject access request. In many organisations, there can sometimes be a lack of proper/appropriate recording/discretion - especially with email, as its apparently informal nature can lead to it being treated as akin to some ‘off-the-record’ chat/phone call. All staff need to be aware that emails – like all other communications – are a permanent record and that, in effect, nothing is ever ‘off-the-record’.

**Summary**

In general, four questions need to be kept constantly in mind in dealings between competing universities:

1. Is there an objectively reasonable and justifiable aim that the universities are seeking to achieve?
2. Are there unnecessary restrictions on competition being imposed or accepted?
3. Will arrangements deliver benefits to students/consumers of university services?
4. Are the arrangements the least restrictive means of achieving the objective and benefits?

In addition, there will always need to an individual fact- and context-specific assessment, taking account of the commercial position of participating universities and the marketplace for the goods or services involved. The position/guidance will also need to be modified from time to time as the changes evolve.

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