

PROJECT CONDOR BOARD REVIEW

Introduction

This paper summarises the findings and recommendations of an OFT Board-led review (the Board Review) into the events leading up to the collapse of the criminal trial in **R v Burns and others**, the response of the executive management of the OFT and the Board's conclusion.

The Board Review was conducted by three Non-Executive Directors, Alan Giles (Chair), James Hart and Philip Marsden, supported by OFT staff unconnected with the case. Its terms of reference were:

'To review and report back to the Board on the facts and circumstances surrounding, and the events leading to, the decision by the OFT to offer no evidence at the criminal trial in **R v Burns and others** and, in the light of these, to make recommendations to the Board concerning the investigation and prosecution of criminal cartel cases, whether in relation to procedures, processes, policies or other matters.'

Findings and Conclusions

Key findings and conclusions of the Board Review in relation to the investigation and prosecution of the case were that:

- the test set out in the Code for Crown Prosecutors was met on both evidential and public interest grounds and the decision to prosecute was sound and appropriate. There was no evidence of any failure to meet the Code test before 7 May 2010; and the decision not to offer evidence on 10 May 2010 was correct
- it was appropriate not to refer the case to the Serious Fraud Office
- the collapse of the case resulted from a highly unusual combination of factors. The OFT had made mistakes, but no indication was found that anyone at the OFT had been negligent, or that the OFT did not have the capability to pursue a complex criminal case. The issues identified essentially relate to the processes used in the case

- even if the process weaknesses identified had not occurred, there is no certainty that the case would have succeeded. Cases under the criminal cartel regime raise many legal and practical challenges and thus a proportion will inevitably fail
- the case was very complex and the OFT found itself on a considerable learning curve. With the benefit of hindsight it was not ideal as the OFT's first contested criminal case
- some of the issues which arose, and which might also arise in other cases, had the potential to undermine the credibility of the prosecution with a jury and, as transpired in this case, with the court. In particular, the alleged cartel was a bilateral one in which the immunity applicant and its witnesses (who were also immune from prosecution) were equally implicated in the alleged offence. The reliability of the witnesses might be questioned
- there is some legal uncertainty as to the scope both of the OFT's obligations as a prosecuting authority to obtain, and its power to require disclosure of, documents which might be relevant to the defence, especially where there is pressure to disclose documents which may be legally privileged. This is a difficult issue, made more so by this case, as the court required greater disclosure of the witness material than had been foreseen. Differing approaches to disclosure and privilege around the world can cause difficulties in international cartel cases
- the communication, identification and management of risk are critical, especially in a case as challenging and important as this one. Although significant risks were brought to the attention of senior management at certain points during the case, the risks were not as systematically and regularly reassessed and reported on as they should have been. In a case such as this there should have been greater involvement and challenge from senior management and from other parts of the organisation with an interest in the issues arising. In this case the processes in place were insufficient to ensure

that this happened and control often appeared to lie some way down the organisation

- governance and risk management processes in this case were affected by a number of unusual circumstances, which contributed to some ambiguity in management responsibility:
 - a system of case conferences was used in criminal cartel cases instead of the project and risk management framework which applies throughout most of the rest of the OFT and the activities of the Cartels and Criminal Enforcement Group, at least in relation to criminal investigations, tended to take place somewhat independently of the rest of the OFT; also there was heavy reliance on external Counsel to provide quality assurance
 - the Chief Executive took the decision to recuse himself from the case¹ (which the Board Review considered was appropriate, though it noted that it was a complicating factor in the oversight of the case) and the Chairman was consequently the decision maker in respect of the test in the Code for Crown Prosecutors; however his role did not involve executive oversight of those responsible for the conduct of the case; also the Board Review found that there had been considerable change in the line management above the Cartels and Criminal Enforcement Group during the course of the case
- it would have been better if the roles of lead investigator and disclosure officer in this case had not been combined and if evidential material derived from electronic sources could have been imaged and/or seized at the outset, and

¹ The Chief Executive recused himself from the decision-making process in Project Condor in view of contacts he had had with the Chief Executive of BA whilst in another position prior to joining the OFT.

- the OFT has learned lessons and made improvements in its processes, both while the case was continuing and since its collapse.

Recommendations

In the light of its findings the Board Review made a number of recommendations to the Board, in particular that:

Process & Governance:

- the OFT should make further improvements to its investigation methodology and its risk and project management framework for criminal cases, including an adapted version of the Effective Project Delivery risk and project management framework already used for civil and other cases within the organisation. This framework should include clearer stop/go decision points to assess whether the risk environment has changed from the initial evaluation and more formalised reporting stages for the Board and Executive Committee
- for high profile criminal cases the OFT should consider adopting some form of steering group, chaired by the Executive Director responsible and involving external counsel where appropriate, to strengthen both internal and external challenge and quality assurance. The Executive Director would, based on the risk assessment, decide if and how to arrange for a 'fresh pair of eyes' review. Counsel should not be relied on as a 'fresh pair of eyes' however if they have been closely involved in case review meetings on the investigation
- the OFT should review the adequacy of its training for those managing criminal cartel investigations

Leniency guidelines:

- the OFT's leniency guidelines should be reviewed. This should include careful consideration of how best to ensure that immunity or leniency applicants are aware that disclosure of witness account material, including legally privileged material, may be required in criminal cases. Any concern about possible chilling effects on future leniency applicants must be weighed against the huge financial and other advantages to applicants resulting from immunity
- a distinction should be drawn between legally privileged material to which confidentiality will normally attach and commercially sensitive material which a leniency applicant cannot withhold. It should be made clear in the leniency guidelines that where material is withheld from the OFT on the basis of claims of privilege or commercial sensitivity, the OFT may require the applicant to make it available for review by independent counsel or, where appropriate, by an OFT lawyer unconnected with the case, and

Evidence handling and management of forensic IT:

- the OFT should better control the gathering of electronic evidence and at least insist on direct control over any IT consultants engaged in this process. An OFT forensic data specialist should be involved throughout any complex prosecution.

Management Response

In its response to the Board Review, the Executive Committee of the OFT welcomed the recommendations and noted that these would play an important part in helping the OFT to strengthen the criminal cartel enforcement regime. The Executive Committee emphasised its commitment to ensuring that criminal cartel investigations and prosecutions are conducted robustly, efficiently and fairly and to ensuring that the lessons learned in this case are fully captured.

The Executive Committee pointed out that many changes have already been made or are planned, some as a result of the issues arising in this case and others as part of

the OFT's ongoing commitment to building its capability across all of its functions. These changes are primarily aimed at improving the criminal enforcement regime. However, a number enhance civil cartel enforcement as well.

In particular within the Cartels and Criminal Enforcement Group:

- a comprehensive training programme to refresh and enhance the skills of investigators was designed and launched earlier this year - this will be completed in early 2011
- a new system for recording and reporting case actions and decisions has been implemented
- in-house forensic IT capabilities have been significantly strengthened through intensive training during 2010 - this will continue during 2011
- steps have been taken to ensure that in all new criminal cartel cases teams have direct access to relevant electronic evidence
- an adapted project management framework is now in place, to improve both the assessment and reporting of risk, and to introduce clearer milestones during the lifetime of enforcement cases
- steering committees are already in use in significant civil cartel cases which have reached the stage where cross-office input can productively be provided. The same principles will be applied to all criminal cases, whether competition or consumer
- an additional senior official experienced in leading criminal investigations has been appointed and it is planned to recruit another criminal prosecutor early in 2011

- a review of the OFT's case team structures and investigation processes in criminal cartel cases has been launched
- a review of the Cartels and Criminal Enforcement Group's approach to intelligence handling and analysis has started and will continue in 2011
- a review of the OFT's leniency policy and guidance is planned and external stakeholders will be consulted, if appropriate, and
- it is the intention to review the appropriateness of the current Memorandum of Understanding with the Serious Fraud Office in relation to the cartel offence.

The Executive Committee noted that the Board Review had recognised that some difficult and sensitive questions were identified as a result of this case that do not lend themselves to straightforward solutions, notably the tension between leniency, privilege and disclosure and international differences in approaches to these issues. Nevertheless, it made clear that the OFT is determined, and has started to plan, consistent with the recommendations of the Board Review, to seek to obtain clarity on these important matters, through encouraging and contributing to debate.

Board Conclusion

The Board fully accepts the findings and recommendations of the Board Review, approves the response of the Executive Committee of the OFT and notes the actions taken or proposed to be taken by the OFT in the light of the case and the report of the Board Review.

The Board agrees that the actions taken or to be taken by the OFT were and are appropriate in the light of the report of the Board Review. It emphasises the need to ensure thorough implementation and suggests that the Executive Committee, in keeping with the recommendations and actions under review, also considers any further steps which might be desirable in light of the recommendations.

The Board asks that a review of implementation of the Board Review's recommendations takes place and that it is discussed by the Board no later than May 2011.

The Board concludes that this summary of the Board Review's findings and recommendations and of the Executive Committee's response should be published together, with the full report of the Board Review annexed, as an attachment to the public minutes of the Board.

December 2010

APPENDIX

PROJECT CONDOR

INTRODUCTION

Background

This paper sets out the findings and recommendations of an OFT Board-led review (the Board Review) into the events leading up to the collapse of the criminal trial in **R v Burns and others**.²

The case arose out of an investigation by the OFT into alleged price fixing of fuel surcharges for long haul passenger flights by British Airways (BA) and Virgin Atlantic Airways (VAA). The allegations came to the OFT's attention as a result of a successful application for leniency by VAA. Following an initial approach by VAA's lawyers, Herbert Smith (HS), in March 2006, the OFT began two separate investigations. 'Project Chrysalis' is a civil investigation concerning the activities of BA and VAA under the Competition Act 1998 (CA98). This investigation is continuing. 'Project Condor' was a criminal investigation under the Enterprise Act 2002 (EA02) directed at the individuals alleged to have been concerned in the alleged cartel. It led to four men being charged in August 2008. A number of VAA employees admitted involvement and were granted immunity from prosecution; all four defendants were present or former BA employees.

The criminal trial began on 26 April 2010, the OFT having successfully defended applications on several preliminary legal issues.

On 10 May 2010 the OFT decided to offer no evidence after the discovery of a large volume of VAA electronic material, which neither the OFT nor the defendants had previously been able to review. In view of the quantity of material, the court's rulings about disclosure and the timing of witness hearings, the OFT accepted that it would potentially be unfair to continue the trial and the defendants were acquitted.

Following the collapse of the trial the OFT was criticised by the defence and the media, although the defence withdrew a number of allegations made in the immediate aftermath. There have been adverse reputational impacts for the OFT and the competition regime and significant costs for the taxpayer. The Board decided that there should be a review of the relevant events, outside the case team. The Board Review members would operate in accordance with the Civil Service Code³ as reflected in the Board Rules of Procedure⁴ with a view to making recommendations for the conduct of future criminal cartel cases. Such recommendations would inform policy as appropriate.

The Board Review sought to establish the facts by means of a thorough and fair process, reviewing relevant documents and speaking at length to those directly involved in the case (OFT staff and

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³ Civil Service Code June 2006 http://www.civilservice.gov.uk/publications/pdf/cs_code.pdf.

⁴ Board Rules of Procedure 1 November 2007 http://www.of.gov.uk/shared_of/board/rules.pdf.

external counsel). The overriding intention was to understand what had happened and to identify improvements which the OFT might make to its processes.

FINDINGS

Summary of Findings

The collapse of this case resulted from a highly unusual combination of factors. The issues for the OFT identified by the Board Review essentially relate to process: weaknesses in the internal oversight and procedures used in this case.

The Board Review concluded that the OFT had made mistakes, but found no indication that anyone at the OFT had been negligent, or that the OFT did not have the capability to pursue a complex criminal case. Indeed, it considered that a number of individuals working on the case had performed particularly well in difficult circumstances.

The Board Review considers that even if the process weaknesses identified had not occurred, there is no certainty that the case would have succeeded. Cases under the criminal cartel regime raise many legal and practical challenges and thus a proportion will inevitably fail. This case was very complex and the OFT found itself on a considerable learning curve; with the benefit of hindsight it was not ideal as the OFT's first contested criminal case.

Nevertheless, serious consideration of the recommendations of the Board Review is crucial to reduce the risk of problems occurring in future.

The decision to take on the case

Project Condor was the OFT's first contested criminal case and it was only the second time it had brought a criminal prosecution⁵ since the implementation of the EA02. The OFT was under considerable internal and external pressure to use these powers and to apply its competition expertise in conjunction with the development of its criminal enforcement capabilities, but no other suitable cases had been identified. The leniency regime was largely untested in a criminal context and there were potential tensions with competition regimes in other jurisdictions. At the outset of the case, the OFT had only recently recruited and begun to expand the staff with appropriate skills and experience and they were relatively few in number at that time. A steep learning curve could have been anticipated.

After VAA applied to the OFT for leniency the OFT had to determine whether or not to pursue the case. There was a complex set of circumstances. It could not be fully known at the time how all of these would play out. Amongst factors tending to favour taking the case were that it was alleged to involve members of senior management, including a BA board member, most of whom had received competition compliance training; and the alleged activity was covert. In terms of the wider context, a decision not to take the case could have damaged perceptions of the UK enforcement regime. The alleged activity took place in the UK between two UK companies and if the OFT had elected not to prosecute the UK nationals involved faced possible extradition to the US. Indeed, they might have opposed extradition on the basis that the UK was the appropriate forum for any criminal proceedings.

However the case had challenging aspects. The airline industry was experiencing economic difficulties and it was contended by some (and indeed argued at the trial) that the alleged fixing of the passenger

⁵ The first was the Marine Hose case, **R v Whittle and others**, in which three defendants pleaded guilty and were convicted at Southwark Crown Court on 10 June 2008.

fuel surcharge (which was in response to an exogenous event and only made a partial recovery of the parties' additional fuel costs) pre-empted price shadowing that would have occurred anyway. The parties were high profile rivals; they were also involved in other competition investigations. The international nature of the alleged cartel activity would add complexity. The main evidence, consisting of records of telephone contacts where the content could only be established by witness statements, was likely to be less compelling in the eyes of a jury than, say, direct evidence of secret meetings, albeit that such evidence is likely to be rare. In addition, a jury might have been influenced by the likelihood that there would be significant deterrence at the corporate level in the form of civil fines. Indeed, BA had agreed to pay a fine of £121.5 million.

There were also challenges of a sort which might arise in other criminal cartel cases, some with the potential to undermine the credibility of the prosecution with a jury and, as transpired in this case, with the court. In particular, the alleged cartel was a bilateral one in which the immunity applicant and its witnesses (who were also immune from prosecution) were equally implicated in the alleged offence. Their reliability as witnesses might be questioned.

Most of the issues and risks were identified by staff working on the case although with hindsight perhaps not all of them were given sufficient weight at the outset. Importantly however, the Board Review concludes that when the decision to prosecute was taken, the evidence was undoubtedly strong enough to meet the requisite test in the Code for Crown Prosecutors ('the Code test'). Counsel were positive about the presentation of the prosecution case despite the possibility that the court and/or jury might take a different view, and this contributed to the decision to proceed.

Whilst in retrospect this was a challenging case for the OFT to have taken on as its first contested criminal case and notwithstanding the outcome, it provided important learning and legal clarification, in particular on certain issues determined during preliminary hearings. In addition, the Board Review notes that several individuals involved in the case had performed particularly well in difficult circumstances and should be commended for their diligence and hard work.

The decision not to refer the case to the SFO

The OFT decided not to refer Project Condor to the Serious Fraud Office (SFO) for possible investigation by the latter but instead to consult the SFO as needed. Whilst the SFO had superior criminal investigatory experience and resources, especially in relation to forensic analysis and recovery of electronic data, the SFO did not have the OFT's competition expertise. In the light of the factors outlined at the beginning of the previous section, it was considered important that the OFT should develop its own criminal enforcement capability. Furthermore the SFO at that time was involved in several major investigations and undergoing internal reorganisation. There was no guarantee the SFO would accept the case for investigation or, if it did accept it, elect to prosecute. As mentioned above, if the SFO did not prosecute, a likely consequence could have been the extradition of the defendants to the US, creating a perception that the OFT had abdicated its criminal enforcement powers.

The Board Review supports the decision not to refer the case to the SFO.

The decision to prosecute

In making a decision to prosecute, the OFT must apply the Code test. This is a continuing obligation. After detailed consideration and legal review, the OFT concluded that the Code test was met on both evidential and public interest grounds and the decision to prosecute was sound and appropriate. The

Board Review concurs with this assessment and found no evidence of any failure to meet the test before 7 May 2010.⁶

Investigation methodology and risk management

In Project Condor, the roles of lead investigator and disclosure officer⁷ were combined. In practice it may not always be possible to have a disclosure officer who is independent of the case team. Nevertheless the Board Review considers that in this case it would have been better if a person who was not also involved in the day to day running of the investigation had been responsible for ensuring that relevant material was complete and chronologically stored and for dealing with questions raised by the defence prior to the trial in relation to unused material. The Board Review also found that HS's preparation of the witnesses complied with the relevant rules⁸ but the OFT had not formally ensured that it did.

The case team employed a system of case conferences⁹ similar to that used in the SFO, supported by investigation reports and attended by Counsel. The Board Review found that the case conferences became too infrequent and were insufficient to provide an appropriate and necessary project and risk management framework and means of ensuring upward communication, especially for complex investigations. For example, the Board Review considers the decision to allow VAA to retain control of the electronic evidence should have been subject to scrutiny at a higher level in the OFT than it was.

The Board Review notes that various steps have now been taken to promote best practice in criminal investigations. Additional training in forensic IT techniques is underway and recent steps to reorganise and strengthen the Cartels and Criminal Enforcement Group (CCEG) are commended. Further experienced criminal investigation and enforcement specialists have been or are in the process of being recruited and more emphasis is placed on holding regular team meetings and reporting issues to the senior management of the OFT. The OFT is also reviewing other potential criminal cases in the light of the experience of **R v Burns and others**.

Document handling and management of forensic IT

Electronic evidence was central in this case and the Board Review considers that it would have been better if material derived from electronic sources could have been imaged and/or seized at the outset. The OFT concluded that it was unnecessary in this case to obtain a warrant to enter premises and seize evidence; instead it required that documents be produced. The OFT recognised that the latter approach was likely to yield less material than might be obtainable under a warrant. The OFT could still require the company to search computer hard drives for current and deleted material and it was anticipated BA would cooperate.

⁶ 7 May 2010 was the Friday before the decision to offer no evidence was taken on Monday 10 May.

⁷ The disclosure officer was the official responsible for managing documentary evidence, ensuring amongst other matters that relevant material was complete and properly ordered and dealing with issues arising in relation to such material.

⁸ Set out in **R v Momodou and Limani** [2005] 2 Cr. App. R. 6, CA.

⁹ The system of case conferences involved regular meetings where the case team discussed developments in the case, task lists and task allocation, evidence gathering, lines of enquiry and so on. The OFT had decided to employ this case conference system in CCEG rather than the 'Effective Project Delivery' project and risk management framework applied throughout most of the rest of the Office because of the distinct characteristics of the cases handled by CCEG. Key aspects of EPD are set out in the Glossary at the end of this document.

Although the Board Review recognises that the extent of an investigation and the resources which can be devoted to it cannot be unlimited, the decision to rely on IT contractors instructed by solicitors acting for BA and VAA to gather electronic evidence meant that the collection of material had to be negotiated with those firms. The IT contractors compiled evidential material on databases by reference to search criteria specified by the OFT. The OFT did not have the benefit at all times of its own IT specialist who could have validated the contractors' processes and certified the completeness of the recovery. No warranties were sought from HS or its IT specialists (FTI) that the VAA database (Attenex) was a complete and accurate compilation of all files meeting the OFT's criteria, as the OFT considered such compliance to be implicit in VAA's leniency obligations. The most flagged documents on Attenex were provided to the OFT but only after HS had redacted them. Had the OFT, as originally contemplated, taken possession or imaged copies of VAA's hard drives, the nature of the redactions made by HS would have been transparent.

The Board Review notes that advice on the approach to gathering electronic evidence was taken from Counsel and forensic IT experts. Nevertheless, leaving the immunity applicant in control of the electronic evidence placed the OFT in a difficult position and contributed to the failure to identify a large number of missing documents from the email account of a key VAA witness. These were in one of ten '.nsf' container files which had been created automatically by the system to capture documents which could not be read during the key-word search. The container files were listed as such in the FTI exception handling report.¹⁰ It was not appreciated that there were thousands of documents in these files and the difficulty and cost of recovery appears to have been overestimated. Some of these files were checked, but unfortunately not the file which was subsequently found to have emails of one of the VAA executives. This specific and ultimately critical gap¹¹ would have been evident had the electronic material been put into chronological order. This was not done as it was felt to be unnecessary since the files concerned had already been specified as lying within a defined time period.

In the closing stages of the trial much was made of the apparent timing of a single email, properly disclosed earlier to the defence and therefore not one of the missing documents, which the defence argued appeared to contradict a significant part of the prosecution case. The potential significance of the email, and thus the need for an explanation, had been overlooked by the OFT and its three Counsel, and was not raised by defence Counsel until a late stage. Problems of this nature are not uncommon in complex cases relying on documentary evidence, and had this been an isolated issue it could have been resolved during the trial. However it is bound to have influenced the court's attitude to the prosecution. The Board Review considers that the weaknesses in investigation processes and in the management oversight in this case referred to in the previous section increased the risk of such an incident occurring.

The relationship with VAA and HS

The decision to allow VAA to retain control of the electronic evidence was made partly because it was thought to be cost-effective and efficient. Also, relatively limited experience of applying the leniency regime in a criminal context caused the OFT to be too accommodating and, at least initially, insufficiently robust in its dealings with the immunity applicant.¹² In spite of the real benefits of

¹⁰ The FTI exception handling report was a list of error 'Exception' notifications generated by Attenex when it encountered 454 files which were configured in a manner which was not compatible with the Attenex software.

¹¹ This problem only emerged once the trial was underway, immediately before the relevant VAA witness was to have given evidence. There was not time for the OFT or the defence to review the additional documents. In the circumstances it would potentially have been unfair to continue the trial and therefore the OFT decided to offer no evidence. The 'gap' in the evidence was thus a key factor in the collapse of the trial.

¹² The threat of withdrawal of immunity was always implicit and in the later stages of the case such a threat was formally made to VAA.

immunity in terms of relief from financial and criminal liability, such flexibility was assumed to be necessary so as not to discourage would-be applicants and their advisors from applying for immunity. Actually in this case the OFT's approach was counterproductive and did not take sufficient account of the fact that an immunity applicant generally has an incentive to do only what is necessary to satisfy its obligations to cooperate. Indeed, an applicant may have many reasons for wishing to limit disclosure, particularly where it is potentially exposed to damages actions and investigations in other jurisdictions. By the same token, the immunity applicant's solicitors are bound to act in the best interests of their client and while they have certain duties as officers of the court, neither they nor their client necessarily has an incentive or obligation to ensure a successful prosecution.

In this case, HS resisted requests for disclosure of key documents on various grounds, including LPP, commercial confidentiality and relevance. Their control of the database changed the dynamic between VAA and the OFT to one characterised by frequent challenges from HS to the OFT's requests for information and some controversial redactions. This created delay, extra costs and frustration, and ultimately was perceived very negatively by the court.

The tension between LPP, leniency and disclosure

The tension between establishing the proper extent of the disclosure obligations owed by the OFT to the defence in criminal cases which feature a leniency applicant, and the protection of evidence subject to LPP, is a difficult issue, made more so by this case. It goes wider than the competition regime or UK law and there are diverging approaches around the world, which might cause difficulties in international cartel cases.

The OFT's leniency programme is predicated on the understanding that an assurance of leniency or immunity, while conditional on continuing cooperation, will not lightly be withdrawn (indeed, withdrawal would almost certainly be challenged). There is a tension in criminal cases between the OFT's need to encourage applicants to come forward with evidence, the applicant's interest in asserting its LPP rights, and the OFT's obligation as a prosecuting authority to take reasonable steps to obtain disclosure of documents which might be relevant to the defence. This tension arises from the legal uncertainty as to the scope of this obligation where the material may be legally privileged, and the extent of the OFT's power to require disclosure in these circumstances. In this case the court appeared to be sceptical of the immunity applicant's motives and required far greater disclosure of witness material than had been foreseen, a risk that was insufficiently anticipated. It became increasingly difficult to meet the court's requirements and this led to escalating problems in the preparation and presentation of the case.

The OFT was in the position of seeking disclosure from an immunity applicant (who was subject to a duty of cooperation) of material, some of which the applicant considered to be protected by LPP, which arguably it was not in the applicant's interests to disclose. Indeed, disclosing such material to the OFT, which would involve waiving privilege in LPP documents, might risk making it disclosable to US litigants, increasing a leniency applicant's exposure to damages claims.

At the time VAA first approached the OFT, the published leniency guidance was a high level document, focused on encouraging whistleblowers. Substantially revised guidelines were issued in December 2008 dealing in detail with the obligations of leniency applicants. These were influenced by the difficulties the OFT faced in obtaining material in this case and controversially provided that in some circumstances the OFT might require parties to waive legal privilege in respect of certain documents.

The Board Review notes that there are differences internationally as to the extent to which disclosure is required from leniency and immunity applicants. The US authorities do not require leniency applicants to waive privilege (which made it more difficult for the OFT to secure disclosure of such material in this case). It appears that in practice prosecutors in the UK may be subject to more onerous obligations as regards third party material than are US prosecutors. The disclosure required by the court in **R v Burns and others** was broader than would be likely to be required in the US.

The Board Review notes that where material is withheld on the basis of claims of LPP, and such claims are disputed, one possible solution is to require the relevant party to make it available to independent Counsel for review. The Board Review recognises however that using independent Counsel will not always be appropriate. If the disputed witness material in this case had been reviewed by independent Counsel, the OFT might have secured more material earlier, but at the risk of satellite litigation. A theoretical alternative might be a review by a 'hearing officer', reporting to the Chairman or the Board, but this would be more usual in a civil context. An approach used effectively in this case in relation to certain BA records involved review by an OFT lawyer unconnected with the case.

Governance and risk management

The communication, identification and management of risk are critical, especially in a case as challenging and important as this one. Although significant risks were brought to the attention of senior management at certain points during the case, the Board Review found that the risks were not as systematically and regularly reassessed and reported on as they should have been. In a case such as this there must be significant involvement and challenge both from senior management and other parts of the organisation with an interest in the issues arising. The Board Review found that in this case the processes in place proved insufficient to ensure that this happened. Indeed, control often appeared to lie some way down the organisation.

There were a number of unusual circumstances, described in the rest of this paragraph, that affected the governance and risk management processes in this case, and which contributed to some ambiguity in management responsibility. The Board Review endorses the Chief Executive's decision to recuse himself,¹³ although it notes that this added a complication to the oversight of the case in that it was his role to chair ExCo.¹⁴ The Chairman was therefore the decision maker in respect of the Code test and consequently had a degree of involvement in the case, but his role did not involve executive oversight of those responsible for the conduct of the case. There was a change of management within CCEG in 2009, although the Board Review finds that this was well handled and did not influence the collapse of the case. During the period prior to the handover, there had been five changes in the line management above CCEG and this may have had the effect of reducing opportunities for debate about the case between CCEG and senior management. Above all, as discussed further below, the Board Review notes that the OFT EPD¹⁵ framework of checks and balances was not applied in criminal cartel cases, where the case conference system described above was used. Furthermore CCEG activities tended, at least in relation to criminal investigations (where this approach was to some extent justified by the nature of the work), to take place somewhat independently of other parts of the OFT. Also there was heavy reliance on external Counsel to provide quality assurance in this case.

A major case such as Condor should have been 'reserved for Board involvement' under the OFT's Rules of Procedure. The Board discussed how decision-making on Condor should be handled in February 2008, taking into account the recusal of the Chief Executive, and agreed that the Chairman should represent the Board in the decision on whether or not to prosecute (ultimately taken in May 2008). The

¹³ The Chief Executive recused himself from the decision-making process in Project Condor in view of contacts he had had with the Chief Executive of BA whilst in another position prior to joining the OFT.

¹⁴ The Executive Committee, the OFT's senior executive body accountable to the OFT Board.

¹⁵ Effective Project Delivery, a project and risk management framework applied throughout most of the OFT but from which CCEG was excluded because of the distinct characteristics of the cases handled by that group. Key aspects of EPD are set out in the Glossary at the end of this document.

minute of that discussion set out in general terms the process for decision-making in criminal cases.¹⁶ Thereafter, there was limited consideration of the case by the Board or by ExCo until preparatory hearings were under way. Outside the Board and ExCo, the only formal decision points involving the Chairman were the decision to take the case and the decision to prosecute.

The Board Review considers that criminal cases would benefit from an EPD style approach to risk management as used in all other cases, providing stop/go decision points and opportunity for re-evaluation of risk, with Board and senior executive oversight. A more formal project management methodology would also help balance the complex interdependencies between parallel criminal and civil cases, though the Board Review found these were well managed in this case, the OFT having sought advice from Counsel and implemented sensible procedures, for example, to keep criminal and civil case teams separate. The Statement of Objections in the civil case was postponed so as to avoid any contention that there might be any prejudice to the trial;¹⁷ however taking the cases in series would have created risks.

Whilst the Board Review considers that the decisions to involve Counsel at an early stage of the investigation and to appoint senior prosecuting Counsel in 2009 were in line with good practice, it finds that there was too much reliance on challenge and quality assurance from Counsel.

Finally, the Board Review emphasises that decision making should be kept clear so as to minimise legal risks and to avoid compromising agility, and that its aim is to improve risk management but not to modify the OFT's appetite for risk, or its willingness to pursue contested criminal cases.

The decision not to offer evidence

The Board Review considers that the decision not to offer evidence was correct. However it found that the decision-making process over the weekend of 8th and 9th May could have been better coordinated.

RECOMMENDATIONS

The Board Review notes that the OFT has already learned lessons and made improvements in light of this case. In addition it makes the following recommendations.

1. The OFT must control the gathering of electronic evidence or at least insist upon having direct control over any IT consultants engaged in this process by a leniency applicant. It must ensure that all images taken of electronic media stores are forensically sound and it must retain direct control of them as well as of all electronic evidence.
2. The leniency guidelines should be reviewed and consideration should be given to including an explicit notice to immunity applicants that they may expect requests for disclosure of witness account material (including LPP material) in any criminal proceedings conducted by the OFT arising out of their proffer. The OFT should in addition consider specifying in the guidelines that such disclosure may be required as a condition of leniency/immunity. Any concern about the impact of this approach to disclosure and possible chilling effects on future leniency applicants

¹⁶ 'The Board agreed that decisions in criminal cases would be an individual decision taken at Board member level, usually the CEO, guided by ED M&P and ED P&S. In exceptional circumstances, the Chairman will take on the role of decision maker.'

¹⁷ A decision will be taken on the issuing of the Statement of Objections in the Chrysalis case once certain further work is completed by the OFT.

must be weighed against the huge financial and other advantages to applicants resulting from immunity.

3. It should be made clear in the leniency guidelines that where material sought by the OFT is withheld on the basis of claims for LPP or commercial sensitivity, the OFT may require the applicant to make it available for review by independent Counsel (the instructions to whom will be disclosable) or, where appropriate, by an OFT lawyer unconnected with the case.
4. A clear distinction should be drawn between LPP material to which confidentiality will normally attach and commercially sensitive material which a leniency applicant cannot withhold. The OFT can give assurances to an applicant that such material will only be released to the defence if in the view of the OFT it is relevant material for the purpose of necessary trial disclosure and only after careful consideration of any representations to the contrary.
5. The OFT should strongly encourage the current international debate taking place through ICN or OECD and other competition authorities on best practice in international cartel investigations, with a view to securing greater clarity and alignment on the tension between disclosure and LPP.
6. If during a criminal case it is envisaged that the OFT may need to seek information from enforcement bodies in other jurisdictions, a formal Letter of Request should be obtained early in the proceedings to avoid trial delays.
7. The OFT should consider specifying criteria to determine whether criminal cartel cases, particularly complex and high profile ones, should be referred to the SFO.
8. Every criminal case team should ensure that any witness familiarisation sessions comply with the appropriate rules,¹⁸ obtain records of such sessions (which will be disclosable) and notify the defence of what has occurred.
9. The OFT should review the adequacy of its formal and refresher training in managing investigations and intelligence analysis.
10. The OFT should ensure that an OFT forensic electronic data specialist is involved throughout any complex and/or high profile investigation and prosecution.
11. In complex criminal cases the disclosure officer should not be a person who is also responsible for the day to day running of the investigation. Responsibilities for evidential and intelligence matters should also be separated.
12. A formal cascade system should be set up beneath case conferences and investigators should submit 'decision logs' to supervisors for inclusion in the case management system. This will add rigour to workload planning, aid record keeping and mitigate the risks of over-reliance on key individual members of staff.
13. The OFT should consider introducing an adapted form of EPD as a management framework in criminal cases, particularly in high profile cases with 'gateway' stop/go decision points to assess whether the risk environment has changed from the initial evaluation and formalise the reporting of major milestones to the Board and/or ExCo. This will improve allocation of resources, communication, constructive challenge and risk management.

¹⁸ Set out in **R v Momodou and Limani** [2005] 2 Cr. App. R. 6, CA.

14. For high profile criminal cases the OFT should also consider some form of steering group, chaired by the ED responsible and involving external Counsel (where appropriate), the General Counsel's Office, Policy and the Office of the Chief Economist to strengthen oversight, risk assessment and improve cross-office involvement. The ED would, based on the risk assessment, decide if and how to bring in a 'fresh pair of eyes' to provide challenge and quality assurance. Counsel should not be relied upon as a 'fresh pair of eyes' however if they have been closely involved in case review meetings on the investigation.
15. The findings and recommendations arising from the Board Review's study of this case should be considered by the Executive Committee¹⁹ of the OFT.

October 2010

¹⁹ The composition of the Executive Committee is detailed in the Glossary.

GLOSSARY

Attenex – database of electronic evidential material from VAA

BA – British Airways

CA98 – Competition Act 1998

CCEG – Cartels and Criminal Enforcement Group

The Code test – the test set out in the Code for Crown Prosecutors, 2004. Broadly, a prosecution must satisfy: (1) the **evidential** test: there must be a realistic prospect of conviction, that is, it must be more likely than not that a court, properly directed, will find the defendant guilty; and (2) the **public interest** test: the public interest arguments in favour of prosecution (for example, likelihood of significant sentence, public harm caused by offending) should outweigh those against (for example, long delay, defendant assisting investigators).

EA02 – Enterprise Act 2002

EPD – Effective Project Delivery, a risk management framework applied throughout most of the OFT but from which CCEG was excluded because of the distinct characteristics of the cases handled by that group. Key aspects of EPD involve having a common approach for all types of projects, robust scoping and planning, clear roles and responsibilities for people managing and delivering projects, clear roles for steering committees to provide advice to projects, categorisation of projects into three governance levels according to their significance, a structured project lifecycle with clear project phases, a systematic approach to quality assurance and a system for monitoring project progress, for transparency and accountability. Integral to EPD are processes including risk assessment, monitoring and mitigation and project reporting, as well as stakeholder and resource management.

ExCo – The Executive Committee, the OFT's senior executive body accountable to the OFT Board.

Executive Committee – As announced on 21 September 2010, the OFT's Executive Committee now comprises John Fingleton, Chief Executive; Vivienne Dews, Executive Director; Clive Maxwell, Executive Director; Robert Laslett, Executive Director; Amelia Fletcher, Chief Economist; Frances Barr, General Counsel; and Barney Wyld, Senior Director, Strategy and Communications.

FTI – IT consultants retained by HS on behalf of VAA

HS – Herbert Smith, solicitors to VAA

ICN – International Competition Network

LPP – Legal Professional Privilege

M&P – the Markets and Projects group

Project Condor – the criminal cartel investigation under the Enterprise Act 2002 relating to individuals alleged to have been involved in fixing fuel surcharges for long haul passenger flights

Project Chrysalis – the civil investigation concerning the activities of BA and VAA under the Competition Act 1998.

P&S – the Policy and Strategy group

SFO – Serious Fraud Office

VAA – Virgin Atlantic Airways