

By Email
Bob Ricketts CBE
Director of Provider Policy
Department of Health

Direct line

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Email

Dear Bob

Thank you for your letter of 21 December 2011, which refers to the Office of Fair Trading's recently published guide 'Public Bodies and Competition Law' (OFT1389) ('the Guide'), and sets out a number of provisions which are contained in the Health and Social Care Bill.

We set out some observations which we hope are of assistance in response to your letter below. However, as you note in paragraph 7 of your letter, and as we note at paragraph 2.13 of the Guide, a conclusive analysis of whether a public body is acting as an 'undertaking' or not for the purposes of competition law, and of the distinction between public functions and economic activities involving the provision of a good or service on a market, will depend on the specific facts of each case. We would also be obliged to give due consideration to any arguments made in relation to these issues during the course of a particular investigation before reaching a decision in any individual case.

Case law relating to public bodies

Relevance of legal status and features of the proposed licensing regime

In setting out various considerations which have been held relevant in deciding whether a public body is an 'undertaking', the Guide notes that the legal form of an entity is irrelevant to the question. Nor is the fact that an entity is State-controlled or non-profit making determinative of the issue.

We are not aware of any UK or EU case law to the effect that the fact that an entity is subject to a particular regulatory regime is capable, in itself, either of rendering that body an undertaking or of removing that status.



'Functional' approach to undertakings

We also note the well-established line of case law stating that a body may be held to be acting as an 'undertaking' for some purposes but not for others, depending on which activity is being considered.

As noted in your letter, a key question is whether a particular activity of a public body consists of offering goods or services in an economic market. We are not aware of any case law to the effect that either the volume or the value of that particular activity is capable, in itself, of either rendering that body an undertaking or of removing that status.

Penalties for infringements of competition law by public bodies

It is relevant to note that of course just because a body is held to be an economic 'undertaking' does not mean that any of its activities necessarily infringe any competition rules. Moreover, not every potential infringement that comes to the attention of the OFT will be the subject of a formal investigation under the Competition Act 1998 ('the Act'). The OFT considers which cases to investigate based on its published prioritisation principles and may consider alternative means of bringing infringements to an end.

However, if the OFT were to issue an infringement decision against a public body for breach of the Chapter I or II Prohibitions of the Act, and/or for breach of the prohibitions contained in Articles 101 or 102 TFEU, it may under section 36 of the Act require the undertaking to pay a penalty in respect of the infringement.

In doing so, it is required under section 38(8) of the Act to have regard to the OFT's (published) guidance at the time being in force. Also, before issuing an infringement decision or imposing a penalty, the OFT must issue to the undertakings concerned a statement of objections setting out particulars of the alleged infringement and proposed next steps, including in relation to penalties. We are then required to have regard to any representations made in response to the statement of objections.

In the Guide, the OFT noted that in a public services market case, the OFT will consider the range of options available to it, and will balance the beneficial deterrent effect of a formal decision and possible fine against the impact that payment of a fine might have on the public body and ultimately, the taxpayer. This reflects both the prioritisation assessment and, in formal

¹ The OFT is currently consulting on proposed revisions to its penalties guidance.

investigations, the OFT's obligation to have regard to a party's relevant representations when deciding whether and in what amount to impose a fine.

I hope that this is of some assistance.

Yours sincerely

Deborah Jones Director Services, Infrastructure & Public Markets