

'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.¹ 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

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