

## The Racecourse Association Ahead at the Finish Line

**By Jennifer Skilbeck**  
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The Competition Appeal Tribunal's ("CAT") recent judgment in *The Racecourse Association v OFT* [2005] CAT 29 raises the important issue of the circumstances in which joint selling might be considered anti-competitive. It is particularly welcome since it knocks on the head any starting presumption that joint selling is anti-competitive. That should have the effect that any parties with good competitive reasons for joint selling will be less afraid to do so, and their advisers less inclined to discourage it. In particular since joint selling may not be regarded as *prima facie* anti-competitive, the difficulties of supporting the limited scope for an exemption need not, in appropriate cases, be relied on.

### The facts

The case concerned the sale of new interactive betting rights to horse racing for the purpose of launching a new channel devoted to horse racing that was to be financed by betting income generated by those viewing the channel. Technological developments enabled broadcasters to make money from broadcasting races by providing an associated opportunity for interactive betting via television or the internet, and thereby at the same time provided the race courses with a new source of income through the sale of those interactive betting rights.

The case arose out of the joint sale of such rights by 49 of the 59 UK race courses to a consortium, Attheraces (ATR) made up of Channel 4, BSkyB, and Arena Leisure. The agreement ran for a 10 year period (with a five year break clause), and ATR was to share its income with the courses, providing a minimum payment of £306m over ten years.

For its part, ATR would provide a television channel and website showing live racing, provided without charge to the viewer. Both would allow associated fixed odds and pool betting, which financed the agreement. The viewer was free to watch the racing and place bets elsewhere (or not at all), if preferred.

The end result was that more money would be available for the benefit of racing through the payments to the race courses, viewers would be able to watch racing via their televisions or internet on a new channel which did not require a subscription, and a new and optional betting opportunity would be supplied to viewers which would fund the entire enterprise.

The parties jointly notified the OFT with a view to obtaining clearance for the agreement under Section 14 (since repealed), alternatively an exemption under Sections 4 or 9 of the Competition Act 1998 ("the Act"). However, during the course of the OFT's investigation ATR and Arena departed from the views they had expressed in the notification and supported the OFT's view that the agreement was anti-competitive. At around this time, it had become apparent to ATR that the venture would not be profitable. The OFT found the agreement to be anti-competitive, and rejected the application for exemption. The 49 race courses, who were party to the agreement, the Racecourse Association, and the British Horseracing Board (who are responsible for ensuring the proper financing and administration of horseracing) appealed the decision to the CAT.

### **The OFT Decision**

The OFT concluded that the agreement between the race courses to sell the rights jointly was anti-competitive in effect. It had the effect of preventing, restricting or distorting competition in the supply of those rights by increasing the price to ATR, and restricting the incentives for increasing course "output" (output being defined as making the races run by the courses more attractive to ATR – the alleged disincentive arose out of the detailed arrangements for the sharing of the returns between courses).

The OFT also concluded that although the agreement provided a new product providing consumers with a fair share of the benefit, those benefits could be obtained without collective selling. Notwithstanding that a minimum number of racecourses would need to sign up in order for the service to be worth offering at all, the OFT believed ATR could have collected a portfolio of licences with race courses through negotiation with individual courses or small groups of courses, making each deal subject, if necessary, to a minimum number of participating courses.

### **The CAT**

The CAT observed that there is no presumption that an agreement has an anti-competitive effect. The burden fell on the OFT to show with a reasonable degree of probability that this agreement had an effect on competition, which was appreciable. That depended on the context in which the agreement operated, and, where relevant, by reference to the situation that would exist in the absence of the agreement, the so-called counter-factual. Further, an agreement would not be anti-competitive if entered into by undertakings which were not in competition with each other, as recognized in the Commission's Horizontal Guidelines.

The race courses argued that there was no evidence that any buyer wanted to purchase the rights individually; all wanted to purchase all, or as many as possible, of the rights. They argued therefore that collective selling was necessary for the creation of the new channel.

The CAT rejected the OFT's argument that collective selling was not necessary in order to obtain an agreement with ATR. It did so on the basis of the full description of the factual background and negotiations that had taken place between the parties and provided to the OFT by the race courses. Important background supplied in the notification, not referred to by the OFT in the decision (nor specifically relied on by the CAT), was the urgent need for further and more secure funding for race courses and the BHB's commitment, with government support, to finding further finance through new products and, in particular, the joint selling of media rights. The evidence also demonstrated that in the absence of any collective agreement it was extremely unlikely that the new service envisaged would have been developed at all. The CAT concluded that the courses were not in competition in the selling of the interactive rights; all buyers wanted all or a majority of the rights.

The CAT criticised the OFT for failing to have any regard to the facts that had been supplied to the OFT in taking its decision.

The CAT usefully reviewed the somewhat limited case law on necessity and when arrangements that were necessary fell outside Article 81 EC, and hence outside Chapter I of the Competition Act. It concluded that “ostensibly restrictive arrangements which are *necessary* to achieve a proper commercial objective will not, or may not, constitute an anti-competitive infringement at all. Whether or not they will do so requires an objective analysis of the particular arrangement...”. In such a case the burden of proof would fall on the party alleging necessity. In fact *necessity* was not required. It was sufficient that without the restriction the object of the agreement would be *difficult* to implement.

The CAT set aside the decision. Having concluded that there was no infringement of Chapter I, the CAT did not consider it necessary to consider whether the OFT was right to refuse an exemption.

### **Collective selling – a new approach?**

Both the UK and European competition authorities have generally taken the view that collective selling of sports rights is anti-competitive and requires justification for it to be permitted. A recent example at the European level is the Commission’s decision in *UEFA Champions League* where it granted an exemption (OJ L291/25 8.11.2003). Reports from Brussels indicate that the Commission is still not satisfied with the sale of the rights by the FA Premier League and is poised to launch a new investigation. Obviously the CAT judgment turned on its own facts and notably the fact that this was the sale of new rights that had never been sold before. However it reinforces the need for a thorough factual investigation and that there can be no presumption that collective selling is anti-competitive.

### **The role of the OFT in the enforcement of competition law**

ATR has purported to terminate the agreement and the racecourses faced the threat of competition law damages if the OFT decision had stood. The CAT noted that any Decision of the OFT and resulting appeal and judgment of the CAT would bind the parties in such a claim (Section 47A of the Competition Act), so that the outcome of the appeal remained of considerable commercial importance. In this case the OFT reached an appealable Decision, so that the judgment is determinative of the competition law issues.

The OFT had a policy of informing complainants of the reasons for closing a file without reaching a Decision, which was obviously intended to inform and assist the complainant. Most notably in *BetterCare* (26 March 02) the OFT declined to take the complaint further on the grounds that the relevant party “was not an undertaking”. The OFT had not intended that to amount to a “Decision” (the CAT held that it was), nevertheless such an observation would clearly have prejudiced the claimants had they sought to have the matter determined in court proceedings, the only alternative source of a remedy.

The OFT continues to make such statements, such as a party is “likely” or “not likely” to be dominant (*JJ Burgess v OFT* [2005] CAT 25) or that assurances given by a party “remove the competition problem that gave rise to the alleged breach” (*Pernod Ricard v OFT* [2004] CAT 10). In any case where the OFT ventures an opinion which is nevertheless held to be short of a “Decision” court proceedings may be made that much more difficult for the claimant (who is usually the party affected by the opinions) and the enforcement of competition law likewise prejudiced. The CAT’s observations are thus a useful reminder of the further significance of the OFT’s procedures in alternative proceedings in the High Court.

**Unanswered questions: sporting agreements and the significance of the consumer interest**

The CAT did not find it necessary to decide two interesting points argued before it. One related to the extent to which the fact that an agreement exists in a sporting context should affect the competition law assessment, for example the consumer interest in exploring the options for adequate funding. This issue has generated considerable academic discussion and will no doubt continue to do so until the CAT or European Courts provide clear guidance.

The second flowed from the fact that, as the CAT acknowledged, a higher price for the rights would not in any event have been passed on to consumers as a result of the competitiveness of the downstream betting market. The appellants argued that, as it was accepted that the courses' collective action could not have resulted in any detriment to consumers, no anti-competitive effect was made out and there could therefore be no infringement. The issue is whether the existence of consumer detriment is a legal requirement inherent in Article 81(1) and section 2 of the Act as well as a relevant policy consideration for the OFT. The CAT acknowledged the 'potentially wide-ranging importance' of this question and, perhaps understandably, elected not to decide the issue which was not determinative in the light of its other findings

In this context the OFT failed altogether to consider whether the agreement between the consortium members (at least one of which had initially chosen to bid in competition with others) was itself anti-competitive, as driving down the price paid to the racecourses and thus available for promoting the "consumer interest".

*From Monckton Chambers, Christopher Vajda QC acted for the race courses and the RCA before the CAT, and Julian Gregory was junior counsel for the OFT.*

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