

UK Competition Law

This note summarises the UK and European prohibitions against anti-competitive agreements and abuse of dominance, gives details of the authorities' far-reaching powers of investigation and the increasingly severe penalties which may be imposed on firms, company directors (whether or not they knew of the infringement) and individuals. It concludes by suggesting how the risk of infringement may be minimised.

Anti-competitive agreements

Agreements (which need not be in writing) between firms, which have as their object or effect the prevention, restriction or distortion of competition, are illegal. The effects of an agreement will depend on its precise terms and the economic context in which it is set. There is no exhaustive list. Certain types of agreement contain so-called 'hardcore' restrictions and are prohibited, almost without exception. These are agreements that:

- directly or indirectly fix prices or other trading conditions;
- limit or control production, markets, technical development or investment;
- share markets, customers or sources of supply; or
- co-ordinate responses to an invitation to tender.

Exemptions

An otherwise anti-competitive agreement will, nevertheless, be permitted where: (1) it does not have an appreciable impact on competition; or (2) its economic advantages outweigh its anti-competitive effects.

Abuse of a dominant position

Abuse by one or more firms of a dominant position (usually a market share of 40% or more) is prohibited. There is no exhaustive list of what constitutes abusive behaviour and a dominant firm should therefore avoid:

- any form of conduct which exploits its trading partners and/or customers; or which
- tends to exclude actual or potential competitors.

Powers of investigation

In the UK, alleged infringements of competition law may be investigated by the Office of Fair Trading, and/or the Serious Fraud Office, or by a sectoral regulator (such as OFCOM) and in Europe, by the European Commission. In broad terms, each has the power:

- to make written enquiries;
- without prior notice, to enter business and private premises without a warrant, and to force entry if in possession of a warrant (known as a 'dawn raid');
- to copy and/or seize documentary evidence including hard copies, soft copies and voicemails including expert recovery of 'deleted' material;
- to require any individual to produce such documentary evidence;
- to ask for on-the-spot explanations of documents; and
- to interview individuals either voluntarily or by compulsion.

There are a number of criminal offences which may be committed where an investigation is obstructed.

Consequences of anti-competitive behaviour

For the Business

- Fines of up to 10% of annual worldwide group turnover.
- Customers, suppliers and competitors that have suffered loss may claim monetary damages – the courts are not involved in investigating alleged anti-competitive behaviour but they will hear compensation claims.
- Substantial management time and costs could be run up in dealing with any investigation, court action and damage limitation activities.
- Agreements concerned would be void and unenforceable.
- Adverse press coverage resulting in lost business.

For individuals

- Director disqualification where a director knew about, or ought to have known about, any anticompetitive behaviour engaged in by his/her company.
- Criminal conviction with up to five years in prison for the most serious anti-competitive activities.

Minimising the risk of infringement

The risk of infringement can be reduced by implementing a 'Competition Law Compliance Programme'. This identifies sensitive areas of a firm's business, provides training to front line employees and managers, as well as a competition compliance manual. It may also include a compliance audit to uncover potential problems and preparation for a possible future dawn raid.

Competition law compliance is nowadays considered to be part of good corporate governance and the existence of a compliance programme demonstrates to the authorities that the directors of a company take compliance seriously. As well as enabling a company to minimise the risks of an infringement (and the severe sanctions that may follow), the existence of a competition law compliance programme will reduce the likelihood of director disqualification in the event of a breach.

Merger control

Competition law also regulates M&A activity and joint ventures. TLT's Merger Control team works closely with clients to obtain the necessary regulatory clearances. Further information is available upon request.

This note is for guidance only. It cannot be a substitute for professional legal advice.

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