

Competition Law - Not (Always) a Big Deal

Those who got our recent property eZine may have been surprised to learn that competition law is not just interested in the Microsofts and BAs of this world.

From next April, it could be unlawful for a shopping centre to agree with a tenant that it will not lease another unit to one of the tenant's competitors, because land agreements are to become subject to the law.

But most agreements have always been subject to it. It is a mistake to assume your activity is too small to arouse the law's interest and, crucially, some prohibited behaviour may seem like sensible business practice, and not obviously wrong.

An innocent breach will not result in the law's most chilling sanctions - being fined 10% of your turnover, directors' disqualification and imprisonment - but it may lead to a lesser fine, contracts being held invalid, or your being sued by those who think they have suffered as a result.

So what is competition law?

It's complex, and no bulletin can do it justice. However, we can set out a guide for those not looking to be experts. Broadly, competition law prohibits two things:

1. Abuse of a dominant position by a single business.
2. Anti-competitive agreements between businesses (the focus of this eZine).

This ranges from flagrantly abusive price fixing and bid rigging, to limiting supply and even seemingly sensible agreements to divide the market up in the interests of efficiency.

You should also be wary of sharing information with competitors if this could lead to an unspoken understanding or gentlemen's agreement.

The headline points about anti-competitive agreements are as follows.

The Restriction

"Anti-competitive agreements" is a shorthand. The prohibition is against:

- (i) agreements between businesses,
- (ii) decisions by business associations or

(iii) concerted practices

which (a) may affect trade, and

(b) have as their object or effect the prevention, restriction or distortion of competition

(unless they are exempt).

(to paraphrase section 2(1) of the Competition Act 1998)

Exemption

Agreements may not be unlawful if they confer a benefit on customers; say, in the example above, if a fair share of the efficiency saving is passed on.

The exemption only applies if the anti-competitive part of the agreement is necessary for the benefit. In other words, anti-competitive provisions cannot piggyback an agreement which benefits customers in some other way.

De Minimis Agreements

Agreements do not breach competition law if their impact is too small to have an appreciable effect *on the relevant market*.

Market definition (in terms of product and geographic area) is a central issue in competition law. A price fixing arrangement between the only two pubs in a village could be unlawful. The village might be an appropriate geographic market definition if each pub was the only close competitive restraint on the other, even if a third pub a few miles away provided some competitive restraint against the most flagrantly abusive pricing.

The same arrangement between two pubs in central London would be neither here nor there; but would they therefore bother? If you perceive some competitive advantage to the arrangement, that is a warning sign that it is not *de minimis*. Besides, per **"The Restriction"** above, the test is one of *"object or effect"* - i.e. it is an offence to try to distort the market, regardless of whether you succeed.

Agreements between parties with less than an aggregate 10% share of the relevant market will generally be *de minimis*; or 15% for "vertical" agreements between non-competitors.

Enforcement and Leniency

Investigations usually start because the suspicions of the OFT (or a sector regulator like Ofcom) are aroused by complaints about things like high price or profit, or low quality, variety or innovation, especially as compared with similar markets.

From there, the OFT (or other regulator) has investigatory powers, including:

- To request information.
- To conduct "dawn raids" of a business's premises and even directors' homes, and take copies of documents (paper and electronic).
- To engage in covert surveillance.

In "hardcore" cartel cases, whistle-blowing participants can get up to 100% exemption from fines. The idea, of course, is to sow the seeds of mistrust among cartel members. Investigations can therefore get started for this reason instead.

The level of leniency depends mainly on what evidence is furnished and how soon the participant comes forward. For example, was an investigation already ongoing? Were they the first to come forward? Second, third, etc. leniency applicants may still get some (declining) concession.

In Conclusion

The above only touches on what is a complex area. If you have any specific concerns or would like further information, please email **Stephen Critchley** or phone him on **020 7242 3191**.

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