Anti-Competitive Practices
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Introduction
The law aims to promote healthy competition. It bans anti-competitive agreements to fix high prices, makes it illegal to agree not to compete with other businesses, and prevents companies from abusing a dominant market position. There are heavy penalties for breaking the law, including fines, employees being disqualified from being a director - or even incurring a prison sentence. The law also provides extra powers to protect competition. Mergers between businesses can be prevented if they reduce competition. Uncompetitive markets can be investigated, if they are deemed to reduce competition or result in unfair competition.

The term “Unfair competition” encapsulates conduct by businesses which amounts to gaining an unfair advantage over their competitors, or unfairly preventing other businesses from trading successfully.

Unfair competition may consist of:
• Abuse of a dominant position. A business holds a dominant position if it has such a position of strength that it is not constrained by competitive pressures. Possible forms of abuse of this economic power that might lead to unfair competition include giving an unjustified competitive advantage to some customers compared to others, and denying access to essential inputs to competitors in other markets, so as to drive them out of the market.
• State aid, where a business gains an unfair competitive advantage as a result of a State subsidy.
• Collusive behaviour, for example if companies in an industry agree to boycott a new competitor, thereby preventing entry.
• Trade mark infringement, where a business misuses a competitor's trade mark.
• Passing off, where a business misleads customers into confusing its products with those of a competitor.
• Patent or registered design right infringement, where a trader uses, without authorisation, an innovation over which the law provides a time-limited monopoly.
• Copyright or unregistered design right infringement, where a trader copies, without authorisation, and outside the copying allowed by law, materials created by a competitor.
• Misuse of confidential information, where a trader misuses information obtained under conditions of secrecy for unauthorised purposes.
• Misleading advertising, including misleading comparative advertising.
• Misuse of the Internet domain name registration system.
• In some jurisdictions, misappropriating goodwill by other means, even without deception or infringement of any statutory protections.

(Ref:http://www.reckon.co.uk/guide/complaining-about-anti-competitive-practices/#acaniredistributetheguide). Other sections of this guide have also been modified and adapted into this paper where applicable.
**Agreements, cartels and conspiracies**
The above list excludes infringements that are directly detrimental to consumers or buyers (rather than competitors), such as cartels or exploitative abuse, which are explained in some detail below.

**CARTELS**
The principal form of anti-competitive practice which the average buyer may expect to encounter is the cartel, defined as follows:

“An informal association of manufacturers or suppliers to maintain prices at a high level and control production, marketing arrangements, etc”.

In its simplest terms, a cartel is an agreement between businesses not to compete with each other. The agreement is usually secret, verbal and often informal.

Typically, cartel members may agree on:
- prices
- output levels
- discounts
- credit terms
- which customers they will supply
- which areas they will supply
- who should win a contract (bid rigging).

Each of the above types of agreement is prohibited by the Competition Act and Article 81 of the EC Treaty. In addition, the Enterprise Act makes it a criminal offence for individuals to dishonestly take part in certain specified cartels, essentially those that involve price fixing, market sharing, limitation of production or supply or bid rigging.

Cartels can occur in almost any industry and can involve goods or services at the manufacturing, distribution or retail level.

Some sectors are more susceptible to cartels than others because of the structure or the way in which they operate. For example, where:
- there are few competitors
- the products have similar characteristics, leaving little scope for competition on quality or service
- communication channels between competitors are already established
- the industry is suffering from excess capacity or there is general recession.

(Ref: www.oft.gov.uk/advice_and_resources/resource_base/cartels/what-cartel)

**TYPES OF CARTEL**
Two principal categories may be identified:
- the price-fixing cartel, whereby members seek to charge higher prices than they would be able to under free market conditions
- the market-sharing cartel, under which firms seek to divide the market up among themselves, attempting to exclude new entrants to that market.

There are various patterns and practices which can give an indication that a price fixing or market sharing arrangement might be in operation. These include:
- high profit levels
- unexplained price increases
- a limited number of suppliers or manufacturers
- the use of identical and similar phrases by suppliers in announcing price increases
- collusive pricing
- collusive tendering
- bid rigging.
Bid rigging may take various forms, as follows:
- bid suppression – a number of firms expected to bid do not in fact do so
- complementary bidding - some firms agree to submit bids which are too high to have any realistic chance of acceptance
- bid rotation - all firms expected to bid do so but take turns at being the lowest (and hence winning) bidder.

It is obviously useful for buyers to be able to detect bid rigging when it occurs. Tell-tale signs include:
- the same supplier emerges as the successful bidder on a number of successive occasions
- a given bidder is noticeably higher on some bids than others without any obvious reason
- the number of firms submitting bids is less than might reasonably be expected in the circumstances
- all bid prices drop when a potential new bidder enters the picture.

There are various questions which the astute buyer can ask himself to reduce the risk of exposure to bid rigging. For example:
- Are similar phrases used when notifying buyers of price changes?
- Do such price changes demonstrate an identifiable pattern over a period of time?
- Does the nature of the industry and its products particularly lend itself to cartels in general and bid rigging in particular.

In the view of the Office of Fair Trading (OFT), the best defence a buyer has against cartels is to be aware that they can and do exist, and ensure that his buying policy or strategy reflects this awareness. For example, contracts for the procurement of goods or services may include a clause to the effect that suppliers are not members of a cartel. If it subsequently emerges that the supplier in question is, in fact, a member of a cartel, the existence of this clause makes it much easier for the buyer to claim damages.

**Main Issues**
At the beginning of 1995, the OFT announced the formation of the Cartels Task Force, equipped with a 24-hour phone and fax line to encourage informants to come forward. Announcing this new initiative, the then Director General, Sir Bryan Carsberg, said that mere suspicion was not enough to take action. He had to have evidence to secret deals. “That is why I am keen to obtain inside information, particularly from present or former employees.”

Cartels also constitute an infringement of EC legislation. The most typical situation would be for an arrangement to exist between companies located in various member states, their agreement consisting of price fixing and the division of markets. Such agreements are rarely, if ever, committed to paper. The European Commission has to rely upon such documentation as it can obtain, as well as inferences to be drawn from the conduct of the parties in order to ascertain whether the parties are, in fact, acting in collusion or whether their parallel conduct is coincidental.
The principal pieces of legislation relating to cartels and anti-competitive practices are the Fair Trading Act 1973 and the Competition Act 1998 (supplanting the RTPA – Restrictive Trade Practices Act 1976) under which:

a) anti-competitive agreements are banned - this new legislation targets agreements which actually damage competition, unlike the previous legislation which unnecessarily attacked many perfectly harmless agreements; and

b) abuses of a dominant market position are illegal, with severe penalties, expressed as a percentage of turnover, for offenders (The Competition Act 1998 and Article 82 the ECT Treaty incorporated in British law by the European Communities Act 1972 prohibit the abuse of a dominant position).

After an initial transitional period when some measure of exemption from the law was available in certain cases, the Act came into full effect on 1 March 2000.

Abuse on Dominant Position

A dominant position in competition law refers to a situation where an enterprise is not constrained by competition. This might be, for example:

• A monopoly (for example a water company).
• A dominant position in a local market, if buyers will not travel long distances (for instance funeral services).
• A dominant position in supplying spare parts or intellectual property licenses, even if there is effective competition for the main product (for example a car maker).

• A discretionary power to determine who is allowed to supply in a market (for instance on safety grounds).
• Abuse of a dominant position is the misuse of the power associated with a dominant position. Examples include:
• Ceasing to provide services which have no effective substitute (including constructive denial through unfair prices) in a way that excludes competitors.
• Using a dominant position to exclude competitors, such as through predatory targeting of special offers.
• As a dominant supplier to a trade, setting prices and terms that place some customers or types of customers at a competitive disadvantage.
• Exploiting abnormal restrictions on competition, for example high prices that take advantage of illegal activity.

This does not mean that businesses do not have the right to choose their trading partners, to compete on price or capacity, to offer different prices to different customers, or to extract rents or profits. But those who hold a dominant position have a special responsibility not to use their dominant position for an improper purpose, or to use their power beyond what is needed for legitimate purposes.

Some conduct that may appear abusive might be justified by reference to specific legitimate purposes: this is known as objective justification. For example, excluding a contractor who failed a safety test may be justified, if the test in question is the least restrictive way of meeting a genuine safety purpose.
Unjustified State aid
The EC Treaty also restricts State aid to enterprises. State aid means benefits (including tax concessions) given to specific enterprises. It excludes investment on the same terms as a private sector investor, and remuneration for public services on market-tested terms or on the basis of an objective assessment of expenditure requirements.

The European Commission has broad powers to approve State aid. But if aid has not been notified then repayment of the aid may be secured through the UK courts.

Anti-competitive conduct by State bodies
State bodies engaged in commercial activities (such as a local authority acting as a landlord) are subject to the same rules as private enterprises.

Bodies that discharge regulatory or administrative duties (for instance, liquor licensing) are not covered by competition law. But action is still possible under administrative law for unreasonable failure to take account of competition, as well as under EC law if international trade may be affected. In particular Article 86(1) of the EC Treaty extends the prohibition on abuse of a dominant position to some abuses of State power (see, for example, the Corbeau case).

In all cases involving State power, whether directly or through enterprises with special rights assigned by the State, public interest purposes might provide a justification for otherwise abusive acts. The law recognises justifications for the delivery of public services and for income raised for the State by fiscal monopolies.

Such justifications are limited by proportionality: only restrictions on competition that are necessary for the public interest purpose to be achieved are permissible. Furthermore, even if a State restriction on competition is itself permitted, its exploitation by an enterprise (public or private) in a dominant position may still be abusive.

Remediation
A House of Lords research paper (70 pages, PDF) on the Bill that led to the Competition Act 1998 noted that “the range of powers available to address anti-competitive behaviour which breaches the Bill's two prohibitions is formidable”. And indeed they are: the regulators have powers to impose substantial fines and to compel the provision of information. Private court action was not highlighted as a significant enforcement mechanism at the time of the bill.

Yet the regulators’ considerable powers can only help if the regulators decide to use these powers. And whilst the law protects against mistakes by regulators by providing a right of appeal to the Competition Appeal Tribunal, it provides no appeal against a decision not to investigate, other than an application for judicial review on notoriously difficult to establish grounds, such as irrationality.

The main UK regulator, the Office of Fair Trading (OFT), has a deliberate policy not to investigate most cases of infringement of competition law that amount to unfair competition, and to focus instead on cases such as cartels.
Even when they do investigate, the timescales of the regulatory process can be horrendous, both in the UK and at the European Commission. Further, regulators can get things wrong, requiring legal action at the Competition Appeal Tribunal to correct their decisions.

If the regulator responsible for an industry is willing to investigate the issue, or if the case is of sufficient importance for cross-border trade to convince the European Commission to devote resources to the case, if the investigation proceeds in a timely manner, and if the regulator does not make serious mistakes in its analysis, then a case might not need to go to court. It is also possible that a well-reasoned complaint from a company, explaining the relevance of competition law, will lead the person engaging in anti-competitive conduct to mend their ways. Infringers will know, however, that the regulators are often toothless in practice in unfair competition cases.

Given this, it isn’t that feasible that a company should rely solely on the regulators set up by the Government. In many cases, it would be advisable to plan for the worst case scenario and assume that a case will have to be heard in court. Cases involving competition law claims in England and Wales are normally heard in the Chancery Division of the High Court in central London. There is also a rule of court for EC competition claims in Scotland.

Stopping anti-competitive conduct?
An application to the court for an injunction or interdict can be made. Urgent claims can be heard by the court very quickly. In addition to court fees and the cost of case preparation and legal representation, a claimant will normally need to provide an undertaking in damages, that is to promise to compensate the other side for the cost of complying with interim measures if the court finally decides that there was no infringement.

The regulators also have powers to issue interim directions when they have grounds to suspect an infringement of competition law. There is no fee for making such applications, and no undertakings in damages are required.

Awarding damages?
Infringements of UK or EC competition law are breaches of statutory duty entitling a company to compensation for any losses suffered. If a claimant has obtained an infringement decision from a regulator, that decision (subject to any appeal against it) is binding on the judge determining damages, and any claim for damages will normally be heard by the specialist Competition Appeal Tribunal, rather than by a generalist court.

If not, damages can be claimed directly as part of a court claim for breach of competition law.

Most claims for damages for proven breaches of competition law have been settled out of court on confidential terms, and it is difficult to know how generous a court will be in assessing the complex issues of causation and quantum that can arise.

CIPS Position on Practice
Whenever possible CIPS draws the attention of the OFT to instances where a cartel is thought to already exist, or is expected to arise. Areas where CIPS has
received notification of the possible existence of cartels are wide and varied and include electric cable, corrugated packaging materials, plastics, bricks, quarry tiles, floor coverings, concrete and pesticides, to name just a few.

**Associated Organisations**

Office of Fair Trading  
The principal body concerned with the detection (and where possible, eradication) of cartels is the OFT (Office of Fair Trading).  
The address is:

Fleetbank House  
2-6 Salisbury Square  
LONDON  
EC4 Y 8JX  
020 7211 8000  
website: www.of.t.gov.uk

**The Competition Commission**

The Competition, which was set up by the Competition Act 1998, came into being on 1 April 1999 when it replaced the MMC (Monopolies and Mergers Commission). In essence, the Commission has two sides to its work: a reporting side which has taken on the role of the MMC and an appeals side, which will hear appeals against decisions made under the prohibition provisions of the new Competition Act 1998.

The role of the MMC was to investigate and report on matters referred to it relating to mergers, monopolies, anti-competitive practices, the regulation of utilities and the performance of public sector bodies.

A merger may be defined as a voluntary joining of two or more companies. The reasons can be:

- economies of scale (horizontal merger)
- the need to ensure security of supply within the supply chain (vertical merger)
- the need to diversify their portfolios (conglomerate mergers of unrelated organisations).

The remit of the Competition Commission may most easily be understood by referring to Articles 81 and 82 (formerly Arts. 85 and 86) of the Treaty of Rome.

Article 81 prohibits all agreements and concerted practices which may effect trade between member states which have the effect or objective of preventing, restricting or distorting competition.

Article 86 prohibits any commercial organisation from abusing a dominant position which it may enjoy insofar as it may effect trade between member states.

**Relevance to purchasing and supply management**

The existence of monopolies or mergers which substantially change the balance of power can be of great concern to purchasers undertaking supply chain management. A purchaser's scope for negotiation may be reduced and true partnership arrangements might be difficult to establish. The purchasing manager should consider other resources, such as sourcing abroad, forming purchasing consortia (the legal implementations of this need to be carefully considered), reporting to the Office of Fair Trading, sourcing with the
Further Information
smaller suppliers, or implementing a vertical merger to bring the supply source under control or encourage entry of fresh sources of supply into the market to increase competition.

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