

# The regulatory environment and policy regarding competition

**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 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: [http://www.offt.gov.uk/advice\\_and\\_resources/resource\\_base/cartels/what-cartel](http://www.offt.gov.uk/advice_and_resources/resource_base/cartels/what-cartel))

Besides cartels the law prohibits agreements, decisions of trade associations and concerted practices that prevent restrict or distort competition, unless they are justifiable in accordance with specific statutory conditions. Unjustified anti-competitive agreements are unenforceable. Compensation can also be sought for harm caused by illegal practices.

Further, an exploitative abuse can be characterised as a use of a dominant position which is illegitimate because of a direct adverse effect on the interests of customers.

## EC legislation

EC case law is clear that conduct by a dominant firm which exploits customers can, in some cases, be prohibited by Article 82, even if it does not have an anti-competitive object or effect. What is less well understood is the exact circumstances in which the prohibition applies, and how to calculate what price is low enough (or what level of service quality is high enough) to ensure compliance with Article 82.

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, and 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 EC 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 of a 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 (e.g. a water company).
- A dominant position in a local market, if buyers will not travel long distances (e.g. for funeral services).
- A dominant position in supplying spare parts or intellectual property licenses, even if there is effective competition for the main product (e.g. a car maker).
- A discretionary power to determine who is allowed to supply in a market (e.g. 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, e.g. 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, e.g. 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.

## Anti-competitive conduct by State bodies

State bodies engaged in commercial activities (e.g. a local authority acting as a landlord) are subject to the same rules as private enterprises.

Bodies that discharge regulatory or administrative duties (e.g. 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 behavior 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.

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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.