



The Law Society

Note on Competition Law

Legal Services

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Competition law consists of two distinct jurisdictions:

- EC law which applies where there is an effect on trade between Member States
- UK law which applies where there is an effect on trade in the UK.

Both systems can be engaged at the same time.

UK law consists of:

- the Competition Act 1998 which follows the approach of the EC system and prohibits restrictive practices and abuses of dominant position
- the Enterprise Act 2002 which creates criminal offences in respect of involvement in cartels and also deals with mergers and market investigations.

The Competition Act

The Chapter 1 prohibition (section 2) prohibits:

“agreements between undertakings, decisions by associations of undertakings or concerted practices which:-

- a) may affect trade within the United Kingdom and**
- b) have as their object or effect the prevention, restriction or distortion of competition within the United Kingdom**

The concept of an undertaking is very wide and embraces any economically active unit. Agreements may be oral or written and need not be legally binding to fall within the scope of the prohibition. Furthermore, the authorities may piece together a patchwork of agreement during the course of an investigation.

Concerted practices have been defined as a form of practical co-operation knowingly entered into by the parties which is intended to amount to substitution for competition in the market. Parallel behaviour, however, is not of itself evidence of a concerted practice.

Decisions of associations of undertakings is aimed at trade associations. The Law Society is a trade association and is thus constrained by competition law considerations. The effect of this is that the Law Society can advise its members of the implications of, for example, the BVT consultation, but firms must be free to make their own decisions. The Law Society cannot make recommendations to firms; even non binding recommendations are caught.

Whilst the Office of Fair Trading (OFT) accepts that the position is unique as the LSC is a monopsonist purchaser, the OFT further holds that this does not make a difference from a competition law perspective. There is no exemption from competition law for firms facing a monopsonist purchaser.

Solicitors' firms are also constrained by competition law. There would be an effect on the market if firms decided, for example, not to bid for contracts or to bid at a certain price. The co-ordination of behaviour, whether related to price or not is prohibited. Similarly, any covert signal that would have the same effect is prohibited.

Where there has been a breach of the prohibitions that was committed intentionally or negligently, the OFT may impose financial penalties of up to 10% of the turnover in the UK of the infringing undertaking.

Third parties who suffer losses as the result of any unlawful agreement or conduct may claim for damages in the courts.

The Enterprise Act

Under this Act, certain activities involving cartels became illegal. The relevant provisions of the Act came into effect on 20 June 2003.

The “cartel offence” is committed where one person dishonestly agrees with one or more other persons to make or implement or to cause to be made or implemented arrangements whereby at least two undertakings will engage in cartel activity.

The Act lists activities that may constitute the offence and this includes (but is not the full list):

- Horizontal price fixing, ie price fixing between competing undertakings
- Limiting or preventing supply
- Bid rigging
- Sharing markets ie dividing the market up between competing undertakings by agreement

The offence can be committed by individuals not companies. Penalties are six months on summary conviction with a fine up to the statutory maximum and five years on indictment and an unlimited fine.

The test for dishonesty is that in *R v Ghosh* (1982) QB 1053: whether what was done was dishonest by the ordinary standards of reasonable and honest people and if so whether the defendant realised his actions were dishonest according to those standards.

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