COMPETITION ACT 1998

This document offers preliminary guidance to CTPA members and staff on their conduct within the context of EC and national competition law.

TRADE ASSOCIATIONS

The Competition Act 1998 ("Act") prohibits agreements between undertakings, decisions by associations of undertakings, or concerted practices which may affect trade in the United Kingdom and have as their object or effect the prevention, restriction or distortion of competition. The CTPA and its members are subject to the Act.

A trade association exercising its legitimate functions should not infringe competition law. However, in certain circumstances it may provide directly or indirectly the vehicle for anti-competitive or collusive activity and any decision, rule or recommendation of a trade association or agreement between its members which has an appreciable effect on competition will infringe the terms of the Act and the prohibition under Chapter 1 of the Act.

One of the most important principles of competition law is that each company must make its own independent business decisions without coordinating with its competitors.

Valid activities of a trade association which should not contravene the law include:

- representing to Government, the European Commission and other public bodies the interests of its members on legislation, regulations, taxation and policy matters;
- promoting and protecting the interests of its members in the media;
- collecting and disseminating statistics and market information (at the industry, rather than individual competitor, level) and information about legislation and Government policy;
- promulgating standards, codes of practice or standard terms and conditions of sale in the interests of the industry as a whole;
- providing a range of services of an advisory nature on, for example, legal or environmental matters.
- providing generic advice of a more commercial nature, i.e. that is not concerned with individual competitor behaviour.

If an agreement contains certain limited restrictions of competition it may nonetheless be permissible where it (a) can be shown to contribute to improving production or distribution, or to promoting technical or economic progress, (b) allow consumers a fair share of the resulting benefit, (c) are indispensable in obtaining these objectives and (d) do not incur the possibility of eliminating competition in respect of a substantial part of the products in question. Examples could include standard terms and conditions, technical standards and codes of conduct. The CTPA will obtain legal advice in these circumstances, as such the justifications for such exceptions require a careful analysis.

THE COMPETITION ACT 1998 AND ENTERPRISE ACT 2002

The EU's competition law is enshrined in Articles 101 and Article 102 of the Treaty on the Functioning of the European Union and in a number of separate Regulations. On 1 March 2000 the UK Competition Act 1998 became effective and UK competition policy falls to be considered under this legislation as well as the EU legislation. The EU and UK legislation is substantively similar in most respects.[1]

[1] Whether and to what extent EU legislation applies in the UK after Brexit, during any transitional period and thereafter depends on what is subsequently agreed between the UK and the EU. However, given that the UK and EU competition legislation is substantively similar, the principles in these guidelines are unlikely to be materially affected by Brexit.

Article 101 prohibits agreements which have as their object or effect the prevention, restriction or distortion of competition in the EU internal market. Article 102 proscribes the abuse of dominant positions. The 'Chapter 1 Prohibition' of the Competition Act 1998 is modelled on Article 101; the 'Chapter 2 Prohibition' of the Act is modelled on Article 102; and Section 60 of the Act sets out certain principles with a view to ensuring that the UK authorities handle cases in such a way as to ensure consistency with EU law.

Members should take individual advice about selective distribution authorised retailer agreements. Under normal circumstances, these should fall under the EU Vertical Agreements Block Exemption Regulation and/or the equivalent exclusion order for vertical agreements enacted under the UK Competition Act.

The major reform of UK competition law introduced by the Enterprise Act 2002 (as amended by the Regulatory Reform Act 2013) was the introduction of a criminal sanction known as the "cartel offence" which applies to individuals.

An individual is guilty of the cartel offence where he or she agrees with one or more other persons that undertakings will engage in one or more of the prohibited hardcore cartel activities.

These are:

- Price-fixing
- Limitation of supply or production
- Market sharing; and/or
- Bid-rigging

Where the relevant conduct occurred before 1 April 2014, then it is also necessary to establish that it was undertaken "dishonestly". This requirement was removed for conduct from 1 April 2014 onwards, i.e. potentially making it easier to prosecute.

Members should be aware that those who commit the cartel offence face terms of imprisonment of up to 5 years and the possibility of unlimited fines.

The cartel offence operates alongside the Competition Act 1998. A company could be found to have breached the Competition Act while an individual (for instance a company director) could in addition or alternatively be tried in relation to the cartel offence. A director could also be disqualified from acting as a director for up to 15 years.

While the Competition Act and the Enterprise Act strengthen the law on anti-competitive agreements, activities of trade associations which have no appreciable effect on competition will be of no concern, although it is a low threshold for having an appreciable effect. It is commonly understood that trade associations will seek as wide a membership base as possible from industry. However, it should be borne in mind that the wider the membership among those in a given product market within the UK, the greater is the risk that any anti-competitive behaviour carried on by an association will have an appreciable effect. This will be of greater significance where the membership is limited to a particular stage of the production or distribution chain, when members are likely to be actual or potential competitors.

To ensure strict compliance with UK and EU Competition Laws, the CTPA has prepared the following statements in the form of a Guidance Note. All CTPA meetings and other activities must be conducted in accordance with these guidelines.

The Guidelines apply equally to any meetings or discussions engaged in by members outside the Association.

CTPA COMPETITION GUIDELINES

1. DON'T discuss the prices your company or its competitors will charge customers, profit margins, discount or trade rebate structures or levels, future pricing plans, or timings of price changes.

2. DON'T discuss individual company terms and conditions of sale or purchase, including terms of credit, cost calculation methods, payment guarantees etc.

3. DON'T discuss levels of production, sources of supply, specifications (except standards approved following legal advice), quantities or descriptions of goods, or processes of manufacture.

4. DON'T discuss areas in which new business will be done or the people with whom such business will be done.

5. DON'T discuss possible courses of action which members may wish to follow to recover costs as a result of raw material price increases.

6. DON'T engage in discussions with competitors to allocate or share customers or their purchasing volumes or to allocate markets or marketing areas, regardless of whether the allocation is by is by territory, by type of customer or otherwise.

7. DON'T discuss particular distribution or trading arrangements (for example parallel trading, grey market or diversion) other than those of a general nature that have an effect on the industry as a whole.

8. DON'T discuss administrative or disciplinary action by the CTPA or its constituent committees/groups against a particular member in the absence of legal guidance.

9. DON'T engage in any discussion or activity which would produce an adverse economic impact on competing companies.

10. DO keep an agenda and minutes of all meetings and other joint activities in order to ensure there is a clear paper trail of what will be and what has been discussed.

11. DO leave the meeting if a competitor discloses sensitive, commercial information. In addition, expressly minute that you are distancing yourself/your company from this disclosure.

12. DO ensure your employees, particularly new employees, are given regular refreshers on the competition law rules.

Note: this document is for general guidance only and is not a comprehensive list of all activities and discussions which might be deemed in breach of the relevant competition law legislation.

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