Gaby Hardwicke SOLICITORS

Briefing Note: Competition Law

Introduction

This Briefing Note is intended to provide a brief introduction to competition law and should not be relied upon as legal advice. Please contact us for advice on your specific circumstances.

Briefing Note
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What is competition law?

At the heart of competition law is the principle that competition between businesses ultimately benefits the consumer, as businesses will compete on price and quality in order to achieve sales thus giving the consumer choice. Distortion of competition is seen as anti-consumer and therefore most restrictions on competition are unlawful.

Competition law in the UK comprises both UK and European Union (EU) law. Despite separate jurisdictions and independent regulating bodies – the Competition and Markets Authority (CMA) for the UK and the European Commission for the EU – the legislation largely mirrors each other and therefore if a business is found to be in breach of UK competition law it is likely to be in breach under EU law as well, and vice versa.

Why does it matter – the penalties

First and foremost, a business in breach of competition law in any EU jurisdiction can be fined up to 10% of its worldwide turnover. Recent fines include:

- a $1.4bn fine against Microsoft in 2008;
- a $116m fine against Sony, Toshiba, Hitachi and others in 2015; and
- a $2.42bn fine against Google in 2017.

As illustrated by these fines, companies do not need to be resident or established in either the UK or the EU to be liable for breaches of competition law as it is dependent on whether their conduct or agreements have an **effect** on trade within the UK or the EU (discussed further below).

Further penalties include:

- any agreement in breach of competition law is automatically void;
- individual parties that have suffered a loss as a result of the breach can take civil action against the parties to the breach, in addition to the fine issued by the regulating body;
- disqualification from serving as a director for a period of up to 15 years; and
- in the case of cartels, up to five years' prison sentence, unlimited personal fines or both (UK law only).

It is therefore important to seek legal advice if there is even the smallest possibility of a breach of competition law. Further, as we will discuss below, interpreting and applying competition law requires specialist expertise as the legislation is far reaching and has historically been interpreted very widely.

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UK competition law

UK competition law is broken down into two 'chapters' to reflect its EU counterpart, namely:

1. Chapter I of the Competition Act 1998 which *'prohibits any agreement or concerned practice which has the object or effect of preventing, restricting or distorting competition'*; and

2. Chapter II of the Competition Act 1998 which *'prohibits the abuse of a dominant market position'.*

As stated above these chapters have been interpreted very widely to cover all manner of agreements and practices.

As UK and EU legislation largely reflect each other this Briefing Note will focus on the provisions and interpretation of UK law. If you require further information focused specifically on EU competition law please contact us for advice on your specific circumstances.

Chapter I of the Competition Act 1998

Chapter I can be broken down into four elements, each of which must be present in order for there to be a breach. For there to be a breach, there must be:

1. *an agreement, decision or concerned practice;*

2. *made between undertakings;*

3. *which may affect trade within the UK; and*

4. *which has as its object or effect, the prevention, restriction or distortion of competition within the UK.*

Whereas Chapter I concerns agreements which may affect trade in the UK, its EU counterpart (*Article 101 of the Treaty on the Functioning of the European Union*) concerns agreements, decisions or concerned practices which affect trade within **Member States**. As stated above a business does not need to be resident or established in either the UK or the EU to be liable under either Chapter I or Article 101.

'*Agreement, decision or concerned practice'.* This has been drafted to cover not only formal written agreements, but also 'gentlemen's agreements', whether oral or written, decisions of trade associations and informal market practices, for example, when there is an understanding that other market players will amend their pricing upon a competitor's announcement/actions. As such, this covers nearly all consequential activities, even if there has been no contact between parties.

'*Made between undertakings'.* An undertaking is any natural or legal person engaged in an economic activity. Due to this wide interpretation it is presumed that this element will always be present and it includes charities and not-for-profit organisations. When an agreement is made between a parent company and its subsidiary, they will normally be regarded as a single undertaking, counter to ordinary company law. However, if the subsidiary operates wholly independently from its parent company then any agreement between them may be in breach under EU legislation. It is therefore important that any agreement between parent companies and subsidiaries be reviewed in light of both jurisdictions.

'*Which may affect trade within the UK*'. An agreement will only have an **effect** on trade if the nature of the agreement and the concerned undertakings' positions within the relevant market are significant enough for its operation to have an appreciable effect on the market. The CMA considers that if the market share of the undertakings is below the following thresholds (the *De Minimis*) then their position within the relevant market is **not** significant enough to have an appreciable effect on trade:

1. agreements between competitors the *aggregate* market share of the parties must not exceed 10%; or

2. agreements between non-competitors the market share *held by each* must not exceed 15%.

However, if the agreement contains as its **object** the prevention, restriction or distortion of competition (discussed below) then it will automatically be deemed to have an appreciable effect on the market regardless of whether the undertakings' market share is below the *De Minimis* threshold.

Therefore, to apply the *De Minimis* exemption an undertaking must prove that a) the agreement, decision or concerned practice does not have as its **object** the prevention, restriction or distortion of competition and b) that the undertaking's market share (or combined market share) does not exceed the above thresholds.

Defining a business's market share is discussed in more detail below. It is important to note that if the market share of the undertakings subsequently increases the exemption will terminate and the business will be deemed in breach.

'*Which has as its object or effect the prevention, restriction or distortion of competition within the UK*'. This is the final hurdle and is typically a question for the regulator and/or court. If the agreement has the **object** of preventing, restricting or distorting competition, no analysis into the effects of the agreement is necessary as the agreement will automatically be in breach. The Competition Act 1998 includes a non-exhaustive list of agreements and/or decisions which are considered to have the **object** of preventing, restricting or distorting competition. This list includes price fixing, limiting production, market sharing, exclusive dealings and tie-ins to other supplementary obligations or products. Conversely, if an agreement does not have the object of preventing, restricting or distorting competition it may still have that **effect**. In this situation, the agreement would be reviewed on a case by case basis which allows parties to put forward grounds of justification which may amount to a defence.

Exemptions from Chapter I

Separate to the *De Minimis* exemption mentioned above, the Competition Act 1998 allows for 'small agreements' i.e. agreements where the parties' joint turnover does not exceed £20 million to be immune from fines provided that the agreement does not contain price-fixing.

In addition, the avoidance methods which may be applied to avoid a breach of *Article 101 of the Treaty on the Functioning of the European Union* may be applied in the UK. However, these exemptions require specialist interpretation and apply only in particular circumstances. If you require further information on Chapter I's exemptions please contact us for advice on your specific circumstances.

Chapter II of the Competition Act 1998

Chapter II prohibits anti-competitive conduct by undertakings which benefit from being dominant in their relevant market. Chapter II is based on its EU counterpart (*Article 102 of the Treaty on the Functioning of the European Union*) and prohibits:

1. *abusive conduct;*

2. *by one or more undertaking which, either singly or collectively, hold a dominant position in the market; and*

3. *which may affect trade within the UK.*

Again, whereas Chapter II is focused on conduct which may affect trade within the UK its EU counterpart concerns decisions which affect trade within **Member States**.

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An undertaking's dominance is determined by a two-stage forensic test in which the regulator will determine:

1. the relevant product market; and
2. the relevant geographical market.

In identifying the relevant product market it is necessary to determine whether the undertaking's products are substitutable for or with that of its competitors. If there are no substitutable products then the relevant product market will be small and there is greater risk of being deemed dominant. For example, if a business sells phone chargers which can charge all phones, then its market share is likely to be deemed very small due to the amount of competitors and substitute phone chargers. However, if it is the only seller of a bespoke phone charger which only charges a particular phone then the regulator is likely to argue that the business does not operate in the phone charger market, but in a small niche of that market in which it is dominant. By asking these sorts of questions and the use of experts the regulator will define the undertaking's relevant product market.

The relevant geographical market follows the same rubric. The smaller the geographical market the more likely there is dominance. For example, if a business sells caffeinated drinks worldwide it would be competing with the likes of the Coca-Cola Company, Pepsi-Co, and Dr Pepper Snapple Group and therefore its market share is likely to be very small. Conversely if it is 1 of 3 companies which sells exclusively on the Isle of Wight your market share will likely be very high as the relevant geographical market will be limited to that area.

Ultimately a company will be considered dominant if it is able to behave independently of its competitors, customers and ultimately consumers.

To be in breach however it must also commit an abuse. The concept of 'abuse' is broad and covers any conduct by a dominant company which allows it to enhance or exploit its market position to the detriment of competitors and consumers. Potential abuses include the refusal to supply so as to prevent effective competition, exclusive purchasing as to create a barrier to entry, tying or leveraging so as to extend a position of dominance and pricing with exclusionary effects.

Abuses under Chapter II can be objectively justified provided that the conduct:

1. is reasonable in order to protect commercial interests;
2. is due to technical or commercial constraints;
3. is reasonable in order to promote efficiency; or
4. is in the public interest.

Unlike Chapter I above there are no exemptions.

Conclusion

As highlighted above a breach of competition law can have serious implications to any business, whether a company or an individual. As this briefing note is intended to provide a brief introduction to competition law it does not cover:

1. merger control;
2. regulators' powers of investigation;
3. leniency programme; or

4. court procedure and enforcement.

If you would like further information on any of the above please contact us for advice on your specific circumstances.

If you would like to know more about this topic or our legal services, please contact Mark Williams on 01323 435900 or mew@gabyhardwicke.co.uk

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