

## ECM Competition Law Compliance Manual

This Manual is intended to give employees of ECM an overview of UK and EU competition law. If having read the manual an employee wishes to discuss an element with the managerial team, or request further information, they should do so.

### Summary of the main rules (UK law)

#### **The Chapter I prohibition: anti-competitive arrangements**

The Chapter I prohibition of the Competition Act 1998 prohibits any agreement or practice between two or more businesses that restricts competition in the UK and has an effect on trade within the UK. The effect on trade and competition can be actual or potential, but must be appreciable.

If, for example, you arrange with a competitor to fix prices, or to allocate customers or markets, the arrangement will be prohibited by Chapter I. More routine commercial agreements such as distribution agreements can also be caught under these provisions.

Both agreements and behaviour are caught by the Chapter I prohibition. Agreements can be either written or oral, and can be informal arrangements such as a 'gentleman's agreement'. Therefore, a social meeting at which two competitors informally "agree" to share customer information and not to undercut each other's prices will be caught by the prohibition. An agreement caught by the Chapter I prohibition is automatically void and unenforceable, and the parties to it may be subject to heavy fines.

Under the Enterprise Act 2002, the directors of a company found to have infringed the Chapter I or II prohibition may face disqualification for up to 15 years.

#### **Chapter II prohibition: abuse of a dominant position**

The Chapter II prohibition makes it illegal for companies with strong market power (referred to as a "dominant position") to exploit their position in a way which may affect trade within the UK, for example, by imposing excessively high or predatorily low prices, or discriminating between customers without justification. A long-term supply arrangement where the customer is "tied-in" for too long may also be considered an abuse.

#### **Cartel offence**

The Enterprise Act 2002 made it a criminal offence for individuals to dishonestly enter into an agreement relating to a company's involvement in hardcore cartel activity. The Enterprise and Regulatory Reform Act 2013 amended the Enterprise Act by removing the requirement that an individual must be acting "dishonestly". It also introduced three defences to the commission of the cartel offence:

- i. In a case where the arrangements would (operating as the parties intend) affect the supply in the UK of a product or service, it is a defence to show that, at the time of the making of the agreement, he or she did not intend that the nature of the arrangements would be concealed from customers at all times before they enter into agreements for the supply to them of the product or service.

- ii. It is a defence to show that, at the time of the making of the agreement, the individual did not intend that the nature of the arrangements would be concealed from the Competition and Markets Authority.
- iii. It is a defence to show that, before the making of the agreement, the individual took reasonable steps to ensure that the nature of the arrangements would be disclosed to professional legal advisers for the purposes of obtaining advice about them before their making or (as the case may be) their implementation.

The cartel offence, as amended by the Enterprise and Regulatory Reform Act 2013, only applies to agreements that are made after 1 April 2014, and relate to arrangements made or to be made after 1 April 2014. The original cartel offence will continue to apply to ongoing prosecutions and investigations, and future cases involving agreements/ arrangements predating 1 April 2014.

In all cases, it is an offence for two competing companies to agree to fix prices, share markets, limit production or supply, or to rig bids.

An individual found guilty of the cartel offence will be liable to a criminal sentence of up to five years' imprisonment instead of, or in addition to, an unlimited fine. This is also an extraditable offence.

It is irrelevant whether the company has been, or will be, found to have infringed the Chapter I prohibition (or Article 101 of the TFEU). If the elements of the cartel offence are satisfied, you, the individual, will be liable to prosecution and investigation by the Competition and Markets Authority and Serious Fraud Office.

### **Territorial application**

The Competition and Markets Authority can investigate and impose fines in respect of agreements made outside the UK by UK-registered companies or companies registered in other jurisdictions where the agreement in question is intended to be implemented in the UK.

### **Summary of the main rules (EU law)**

#### **Article 101: anti-competitive arrangements**

Article 101 of the TFEU prohibits any agreement or practice between two or more businesses which affects trade between the member states of the EU and which has the specific effect of preventing, restricting or distorting or restricting competition within the EU to an appreciable extent. The effect on trade and competition can be actual or potential.

If, for example, you arrange with a competitor to fix prices, or to allocate customers or markets, the arrangement will be prohibited by Article 101 of the TFEU. However, more routine commercial agreements such as joint ventures and distribution agreements can also be caught.

#### **Article 102: abuse of a dominant position**

Article 102 of the TFEU makes it illegal for companies with strong market power (referred to as a "dominant position") to exploit their position in a way which may affect trade between

member states of the EU, for example, by imposing excessively high or predatorily low prices, or discriminating between customers without justification.

### **Territorial application**

The EU competition rules apply in all 28 EU member states: Austria, Belgium, Bulgaria, Croatia, Cyprus, the Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, the Netherlands, Poland, Portugal, Romania, Spain, the Slovak Republic, Slovenia, Sweden and the UK. Equivalent rules apply in Norway, Iceland and Liechtenstein, because the substance of the EU competition rules have been extended to cover all states within the European Economic Area (EEA), which currently comprises the 28 EU member states and those three additional countries.

### **Dos and Don'ts**

This next section of the manual describes some of the specific situations that an employee may come across (in respect of competition law), and gives guidance on how to deal with them. In any cases of doubt, an employee must refer to the managerial team.

An employee must be aware that they may be subject to disciplinary action under the company's disciplinary procedure if they engage in any of the following practices which are described as likely to be illegal (indicated by a cross ("X")), or if they fail to consult a member of the managerial team (who may make a decision to take legal advice on behalf of the company) before engaging in any of the practices indicated by a question mark ("?").

Employees must bear in mind that where conduct is classified as potentially illegal this merely indicates that competition issues frequently arise in situations of this type. It is often possible to overcome the potential problem by making careful considerations, and/ or obtaining a clearance from the competition authorities.

### **Pricing**

#### **Likely to be illegal:**

**X** Contacting a competitor to ask whether, if you were to raise your prices, he would do the same.

**X** Discussing with a competitor the prices of key raw materials that you both purchase.

**X** If you have a dominant market position, making sales below average variable cost to drive competitors out of the market.

**X** You have a dominant market position and want to offer an extra discount to customers who buy exclusively from you.

**Prior clearance by the managerial team needed (in all of these situations, the managerial team may decide to obtain legal advice):**

**? Suggesting that you and a competitor increase leverage with a supplier of non-key items**

by purchasing jointly.

? Making an announcement of price changes in advance of the date the new price comes into effect (and retracting it when other companies do not follow suit).

**Generally permissible:**

- You offer customers discounts related to the volume of their individual orders.

**Supply**

**Likely to be illegal:**

X Discussing a supply arrangement with a competitor in order to get a feel for selling prices in the market.

X Agreeing resale prices with a supplier or distributor.

**Prior clearance by the managerial team needed:**

? Entering into product-swap arrangements with a competitor.

? Entering into exclusive distribution agreements.

? Discussing with a competitor the possibility of closing one of your plants and substituting a product supplied by him.

**Generally permissible:**

- Recommending resale prices or conditions of resale to a distributor provided that no pressure is exerted on the distributor to adhere to the recommendations.

**Internet selling**

**Likely to be illegal**

X Placing restrictions on a distributor or customer making online sales.

X Charging higher prices to a distributor or customer for products intended for online resale.

**Import and export**

**Likely to be illegal:**

X Specifying one price to a distributor if he is selling the product in the UK and a higher price if he is going to export it to another EU country.

X Requiring a distributor neither to resell the product for export to another EU country nor sell it himself to a customer in another EU country.

**Prior clearance by the managerial team needed:**

? Requiring an exclusive distributor not actively to seek customers outside his allocated territory.

### **Refusing to deal**

#### **Likely to be illegal:**

**X** If you are in a dominant position, refusing without any objective justification to deal with an existing customer.

#### **Generally permissible:**

- Making an independent decision not to deal with a certain party on credit because of justified concerns about creditworthiness.

### **Trade associations**

#### **Likely to be illegal:**

**X** Discussing at a trade association meeting at which competitors are present product prices, terms of sale, product or marketing plans, or business relations with suppliers or customers.

#### **Prior clearance by the managerial team needed:**

? Joining a trade association.

#### **Generally permissible:**

- Attending trade association meetings generally (subject to having reviewed agendas in advance with the managerial team)
- Discussing health and safety issues at a trade association meeting.
- Discussing proposed changes in the law relevant to the industry.

### **Acquisitions and disposals/business structures**

#### **Prior clearance by the managerial team needed:**

? Buying or selling all or some of the shares of another company, or merging with it.

? Buying all or part of the business or assets of another company, or selling all or part of the business or assets of your company.

? Establishing a joint venture or making a joint investment in a business with another company.

## **Technological co-operation**

### **Likely to be illegal:**

**X** Agreeing with a competitor the exact introduction time of new technology which you are both developing independently.

### **Prior clearance by the managerial team needed:**

? Discussing the possibility of carrying out joint research and development with a competitor.

? Entering into technology licensing arrangements.

### **Generally permissible:**

- Undertaking joint research and development, where all parties participating are free to exploit the results.

## **Information gathering**

### **Likely to be illegal:**

**X** Exchanging individualised, private, current/recent information on sales, prices, discounts, terms of business etc. directly with a competitor.

### **Generally permissible:**

- Participating in a scheme approved by competition law counsel in which sales volumes are supplied to an independent third party which aggregates the figures and distributes the aggregated industry-wide sales figures to participants.
- Obtaining information on competitors' sales and prices from publicly available sources, such as the media, or from customers.

## **Tying**

### **Likely to be illegal:**

**X** If you have a dominant market position, informing a customer that you will only supply product A (in which you are dominant) if he also purchases product B from you.

### **Dealing with competitors generally**

As soon as you are dealing with a competitor alarm bells should ring. Do not have any discussion with a competitor concerning prices, price changes, discounts, pricing methods, costs, warranties, transportation charges, terms of sale, marketing initiatives or product plans without first consulting the managerial team.

### **Likely to be illegal:**

X Dividing up different projects between you and a competitor, for example by agreeing to bid for different contracts.

X Having discussions or making plans with a competitor to keep a new arrival out of the market.

X Warning a competitor or new market entrant to stay off your patch.

X Discussing with a competitor possible investments that you or the competitor are considering making in a particular country.

X Agreeing to boycott particular customers or suppliers.

X Making an agreement or acting with a competitor in such a way as to allocate sales, territory, customers or products between you and the competitor.

**Prior clearance by the managerial team needed:**

? Discussing a joint venture proposal.

**Watch your language**

Take care with your language in all business communications, whether in writing or in the course of telephone conversations or meetings. Careless language could be very damaging if the company is subject to an investigation by the competition authorities or is involved in litigation with another company. A poor choice of words can make a perfectly legal activity look suspect.

Many internal documents are likely to come under scrutiny during an investigation or legal proceedings involving a third party, even those which you might believe to be confidential such as diaries, telephone call records or personal note books. Documents in this context are not limited to papers, but will include any form in which information is recorded: computer records and databases, e-mail, microfilms, tape recordings, films, videos and so on can all be examined.

You should therefore follow these guidelines:

- Consider whether you need to write anything down at all.
- If you think it might be a sensitive area, speak to someone in the managerial team before committing it to paper.
- Whenever you write something down, remember that it could be made public one day.
- Avoid giving the impression that a customer is getting special treatment ("This is a special deal for you only"), particularly if the company may be in a dominant market position.
- Avoid any suggestion that an industry view has been reached on a particular issue such as price levels.
- Do not use guilty vocabulary ("Please destroy/delete after reading").
- Do not speculate about whether an activity is illegal or legal.
- Do not write anything that implies that prices are based on anything other than the company's independent business judgement.
- Do not keep papers for any longer than provided for in the company's document retention programme.

- Avoid keeping lots of different versions of the same document in your files or computer system.
- State clearly the source of any pricing information (so it does not give the false impression that it came from talks with a competitor).
- Keep accurate notes of all meetings with competitors
- Avoid power or domination vocabulary, such as “This will enable us to dominate the market”, or “We have virtually eliminated the competition”.
- Avoid language suggesting that the company has a strategy to drive a competitor out of business.
- Follow the same rules if annotating copies of notes or memorandums originated by others.

### **E-mail and voicemail**

E-mail and voicemail can often contain even more damaging statements than letters or memoranda, because they are usually sent or left casually, in the false belief that they are confidential or will be destroyed after a short time. Both e-mail and voicemail messages can be accessed during an inspection by the competition authorities or in legal proceedings. They are regarded as a particularly good source of information because they are stored by time and date and can give a full picture of what was done and said.

You should therefore:

- Take as much care in sending messages by e-mail or leaving them on voicemail as you would when sending a letter or memorandum. Assume that all e-mail or voicemail messages may be read or heard by others, including competition authorities.
- Keep in mind that e-mail and voicemail messages, even if deleted, leave a potentially damaging record that may have to be produced to the competition authorities or in legal proceedings.
- Exercise particular caution with messages sent to or received from outside the company over the internet. Remember that e-mail messages are often appended to other e-mail messages and may be forwarded or replied to several times.

ECM (Vehicle Delivery Service) Ltd  
The Airport  
Carlisle,  
United Kingdom, CA6 4NW  
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