

Competing fairly

An introduction to the laws on anti-competitive behaviour

Competition
law 2005

What this quick guide is about

Competing fairly is one of a series of quick guides designed to inform businesses about how the Office of Fair Trading (OFT) applies competition law in the UK. You need to know about competition law to avoid becoming a victim of anti-competitive practices and to avoid breaking the law. *Competing fairly* provides a brief introduction to the laws on anti-competitive behaviour and an overview of the other quick guides in the series. More comprehensive information is available in a number of detailed competition law guidelines we have published in conjunction with the various sector regulators. Details of our other publications, and how to obtain copies, are at the back of this guide.

This guide does not cover the rules governing mergers. These are explained in more detail in other publications available from the OFT.

Competing fairly is an introduction to competition law only and should not be relied on as a substitute for the law itself. If you have any doubts about your position under the law, you should seek legal advice.

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1 Introduction

Why competition is important

Open and vigorous competition is good for consumers because it results in lower prices, new products of a better quality and more choice. It is also good for fair-dealing businesses, which flourish when markets are competitive.

The laws on anti-competitive behaviour

In the UK anti-competitive behaviour is prohibited under Chapters I and II of the Competition Act 1998 (the Act) and may be prohibited under Articles 81 and 82 of the EC Treaty. These laws prohibit anti-competitive agreements between businesses and the abuse of a dominant position in a market.

Relationship between UK and EC Law

The Act prohibits anti-competitive behaviour that affects trade in the **UK**. Articles 81 and 82 prohibit anti-competitive behaviour that affects trade in the **EU**.

Since 1 May 2004, the OFT has had the power to apply and enforce Articles 81 and 82 in the UK. When doing this, we must follow the case law of the European Court. When applying the Act, section 60 of the Act requires us to ensure that we act consistently with EC law.

For further details on the relationship between EC and UK competition law, see the guideline *Modernisation*.

The Office of Fair Trading (OFT) has a wide range of powers to investigate businesses suspected of breaching these laws and we can order that offending agreements or conduct be stopped.

Businesses that breach the law can be fined up to ten per cent of their worldwide turnover and third parties (including injured competitors, customers and consumer groups) can bring damages claims against them. In addition, individuals found to be involved in cartels can be fined and imprisoned for up to five years and directors of companies that breach the prohibitions can be disqualified for up to 15 years.

Concurrency

Competition law is enforced in the UK principally by the OFT. However, in certain industries (communications, gas, electricity, water and sewerage, railway and air traffic services) the sector regulators have been given 'concurrent powers' to apply and enforce competition law. You will find a list of these sector regulators and their contact details at the back of this guide. Although this guide is based on our experience and practice, it should also be of assistance if you are dealing with one of the sector regulators.

Definition of 'business'

Throughout this guide, we refer to a 'business'. This term (also referred to as an 'undertaking' in our more detailed competition law guidelines) means any entity engaged in economic activity irrespective of its legal status, including companies, partnerships, Scottish partnerships and individuals operating as sole traders.

2 What is prohibited?

Anti-competitive agreements

Chapter I of the Act and Article 81 of the EC Treaty prohibit agreements between businesses that prevent, restrict or distort competition or are intended to do so and which affect trade in the UK and/or EU.

Agreements likely to be prohibited include those which:

- fix the prices to be charged for goods or services
- limit production
- carve up markets
- discriminate, eg, between customers (eg, charge different prices or impose different terms where there is no difference in what is being supplied).

Agreements can be formal or informal, written or verbal. An informal understanding or telephone conversation where two competitors agree to match each other's prices will be caught in the same way as a formal agreement between them.

The prohibitions also cover decisions of associations of businesses as well as concerted practices (ie, cooperation which falls short of an agreement or decision).

Cartels

Cartels are the most serious form of anti-competitive agreement. They are agreements between businesses not to compete with each other, eg, on price, discount levels, credit terms or in respect of particular customers or in particular areas. Cartel agreements can often be verbal and may be hard to uncover.

There are a number of signs that may indicate a cartel is operating. Look out for suppliers that

- raise prices by the same amount at around the same time
- offer the same discounts or have identical discount structures
- quote or charge identical or very similar prices
- refuse to supply a customer because of their location
- use give-away terms or phrases, such as 'the industry has decided margins should be increased' or 'our competitors will not quote you a different price'.

The presence of these signs does not necessarily mean a cartel is operating. Some, such as similar prices or price changes at around the same time, can indicate healthy competition. However, you should be particularly suspicious where several of the signs are present.

Abuse of a dominant market position

Chapter II of the Act and Article 82 of the EC Treaty prohibit a business which holds a dominant position in a market from abusing that position.

A dominant position in a market essentially means that a business is generally able to behave independently of competitive pressures, such as other competitors, in that market.

Conduct which may be considered an abuse by a business in a dominant position includes:

- charging excessively high prices
- limiting production
- refusing to supply an existing long standing customer without good reason
- charging different prices to different customers where there is no difference in what is being supplied
- making a contract conditional on factors that have nothing to do with the subject of the contract.

Exclusions and exemptions

Competition law may not apply to some categories of agreement and conduct. Agreements or conduct may be excluded from investigation under the Act or Articles 81 or 82 of the EC Treaty because they are instead subject to examination under other laws. Agreements (but not conduct) may be exempt because they meet certain requirements set out in legislation in respect of certain categories of agreement and are considered not to be anti-competitive. These exclusions and exemptions are explained in detail in the guidelines *Agreements and concerted practices* and *Abuse of a dominant position*.

An agreement that does not fall within any of the excluded or exempt categories may still be lawful if it satisfies certain conditions. You can find further details on this in the guideline *Agreements and concerted practices*.

Guidance

It is for businesses themselves to determine whether or not their agreements and/or conduct comply with competition law. However, the European Commission and the OFT both publish guidance (such as this series of quick guides and our more detailed guidelines) to assist businesses in this respect.

The OFT also offers confidential informal advice to businesses on the application of the law and, where a case raises a novel or unresolved issue about the law, we may decide to publish written guidance in the form of an Opinion for the benefit of a wider audience.

Further information

Further information is available in our quick guide *Cartels and the Competition Act 1998* – and in our guidelines *Modernisation, Agreements and concerted practices* and *Abuse of a dominant position*.

3 Making a complaint

We rely on complaints to help us in enforcing competition law. If you suspect that a competitor, supplier, customer or any other business is infringing the law, please contact us with your concerns.

Potential grounds for complaint

There are a number of signs that may indicate a business is breaching the law. These include:

- an existing long standing major supplier suddenly decides, for no apparent reason, to stop supplying you with a product
- you receive quotes from various suppliers that are surprisingly and unusually similar
- a major supplier refuses to sell you the product you want unless you also buy a separate and unconnected product
- you approach a number of competing suppliers and find that only one is willing to supply the goods you want in your area
- a supplier prevents you from selling their products at a discount
- you have recently entered a particular market and a major competitor has responded by charging extremely low prices that you suspect would not cover their costs.

The fact that a business is behaving in any of these ways does not necessarily mean it has breached the law. In some cases the behaviour in question may be a perfectly legitimate response to strong competition in the market.

How to complain

Please call us on **08457 22 44 99** before making a complaint. We will be able to advise you on whether the matter is likely to raise any competition issues and, if it is, the kind of information you should provide us with when submitting your complaint.

We usually expect complaints to be made in writing, giving as much factual information as possible, to enable us to carry out an initial assessment of your complaint as quickly as we can. However, complaints regarding suspected cartels should be made over the telephone by calling our cartel hotline on **020 7211 8888**.

What happens to the complaint?

We will first check that the complaint can be dealt with under the Act (or Articles 81 or 82), and will let you know if it relates to different legislation or should be handled by another body. We will also inform you if we do not propose to take any action. We will usually advise you within 30 days as to whether your complaint about alleged anti-competitive behaviour raises issues which justify further work.

We may launch a formal investigation if we have reasonable grounds for suspecting that competition law has been breached. We do not have to investigate possible infringements. In deciding whether to launch a formal investigation, we will consider whether this would be appropriate, taking into account our resources and other casework priorities.

In all cases, we will let you know how we are dealing with your complaint and keep you informed of any progress. You may also be asked to provide further information.

Confidentiality

To investigate a complaint fully, we often need to reveal the information we have obtained, and the source of that information, to the business being investigated. However, we will protect your identity as far as possible if there is a good reason. If you are concerned about the disclosure of your identity, you should raise this with us as soon as possible.

If you think any of the information you provide might seriously damage your commercial interests if it is disclosed, you should clearly mark it as confidential and explain why you think it should be treated as such. You should try to limit the amount of information to be regarded as confidential. We do not accept blanket requests for confidentiality.

If we consider it necessary to reveal any of the confidential information you have provided, we will discuss this with you.

4 Investigations

We have a wide range of powers to investigate suspected competition law infringements. We can obtain documents and information from businesses suspected of committing an infringement as well as from their competitors, customers or suppliers. We can also enter and, where we have obtained a warrant, search premises.

We will either send a written notice to a business requiring documents and/or information to be provided or visit premises to obtain the information we need.

Anyone who fails to cooperate with the investigation (eg, does not respond to a notice or refuses to provide requested information or documents), obstructs OFT officials or hides, destroys or falsifies relevant documents may be guilty of a criminal offence punishable by a fine and/or, in some cases, imprisonment.

Written requests

We can send a written notice to a business to:

- require provision of documents (which includes information recorded in any form)
- require provision of information that is not already written down (eg, a sales manager might be required to provide estimates of market shares)
- require past or present officers or employees of the business to explain any documents produced.

Entering premises

In some cases, we will visit premises to obtain information.

When entering premises without a warrant, OFT officials have similar powers to request documents as when making written requests. In addition we can take steps to preserve or prevent interference with documents we are entitled to see (eg, require offices to be sealed for as long as is reasonably necessary).

A warrant gives OFT officials further powers. We can use reasonable force to gain access to the premises. Once we have gained access, we can search the premises for relevant documents and take away copies.

Handling of information

The law provides various safeguards to protect certain information during an investigation. Further details are set out in our guideline *Powers of investigation*.

Further information

Further information is available in the quick guide *Under investigation?* and in the guideline *Powers of investigation*.

5 Enforcement

Infringement decisions and directions

If we consider that the law has been infringed, we will write to those concerned to explain the case against them and give them a chance to respond, both in writing and by meeting with OFT officials. Further details of the OFT's procedures in this respect are contained in the quick guide *Under investigation?*

If we subsequently decide there has been a breach of competition law, we will notify the infringing businesses and publish the decision on our website. We may issue directions (eg, ordering the business to change or terminate the offending agreement or stop the offending conduct). If a business fails to comply with our directions, we may seek a court order to enforce them.

Alternatively, we may conclude that there are no grounds for action. In this case we will notify those concerned and may publish a decision to this effect on our website.

Interim measures

In certain urgent circumstances (eg, where there is a real danger of serious permanent harm to a particular business), we may require a business to comply with a temporary order (eg, to stop certain conduct) while we complete our investigation.

Commitments

Instead of making an infringement decision, we may be prepared to accept commitments (ie, binding promises) from a business relating to their future conduct. We must be satisfied that the commitments fully address our concerns. Commitments have the same force and effect as directions by the OFT.

We will not, other than in exceptional circumstances, accept commitments in cases involving cartels which include price-fixing, bid-rigging, output restrictions or quotas, sharing or dividing markets or cases involving the serious abuse of a dominant position.

Further information

Further information is available in the guideline *Enforcement*.

6 What happens to businesses that break the law?

Financial penalties

Businesses that infringe competition law can be fined up to ten per cent of their annual worldwide turnover. We have published guidance explaining how we will set a financial penalty and will have regard to this when setting penalties. For further information see the *OFT's guidance as to the appropriate amount of a penalty*.

Immunity

Small businesses may be immune from financial penalties under the Act. There is no immunity, however, for those involved in price-fixing agreements or in relation to infringements of Article 81 or Article 82 of the EC Treaty.

This immunity applies only to financial penalties: an anti-competitive agreement or an abuse of a dominant position is still an infringement. We may still take enforcement action and third parties may still claim damages.

Other consequences

- Agreements that infringe Chapter I or Article 81 are void and cannot be enforced.
- Under the Enterprise Act 2002, it is a criminal offence for individuals to engage dishonestly in cartels. Individuals found guilty by a court can be imprisoned for up to five years and face an unlimited fine.
- Company directors whose companies breach competition law may be subject to competition disqualification orders, which will prevent them from being involved in the management of a company for up to 15 years.
- Damages claims can be brought by third parties and by consumer groups on behalf of named consumers against businesses that breach competition law.

Further information

See the guideline *Enforcement* and the *OFT's guidance as to the appropriate amount of a penalty*. Details of the cartel offence are given in the OFT Enterprise Act guidance *The cartel offence: guidance on the issue of no-action letters for individuals* and details of the disqualification regime are given in the OFT Enterprise Act guidance *Competition disqualification orders*.

7 Appeals and actions in the courts

Appeals against our decisions are heard by the Competition Appeal Tribunal (CAT). A further appeal from the CAT may also be possible and will be held in the Court of Appeal, Court of Session or Court of Appeal in Northern Ireland, depending on whether the CAT sat as a tribunal in England and Wales, Scotland or Northern Ireland respectively.

Where a third party (such as a competitor or customer) has been affected by anti-competitive behaviour which they believe infringes competition law, they can take action in the courts to stop the behaviour and/or seek damages, in addition to or instead of making a complaint to us.

Where an infringement of competition law has been already established (eg, by a decision of the OFT or the European Commission), a claim for damages can be brought before the CAT. Such a claim may be brought by a third party (for example, a competitor or customer) or by a specified body as a representative claim on behalf of a group of named individual consumers.

Further information

Further information is available in the guideline *Enforcement*.

8 Leniency in cartel cases

Cartels are the most serious form of anti-competitive agreement and the OFT has a special interest in ensuring they are uncovered and broken up.

Why should cartel members come forward?

We are prepared to offer lenient treatment to businesses that come forward with information about a cartel in which they are involved. Under our leniency programme, members of cartels may have their financial penalty reduced substantially or they may be able to avoid a penalty altogether.

To qualify for leniency, a business must cooperate fully with our investigation and stop their involvement in the cartel from the time they come forward.

Although leniency may result in the business avoiding or receiving a reduced financial penalty, the unlawful agreement remains void and cannot be enforced. In addition, third parties may still have a claim for damages in the courts. We cannot provide immunity from penalties imposed by competition authorities outside the UK, such as the European Commission.

How to ask for leniency

To ask for leniency, businesses must contact the Director or Deputy Director of Cartel Investigations at the OFT (contact details are at the back of this guide) or their counterpart at the appropriate sector regulator. This step has to be taken by a person who has the power to represent the business.

Confidentiality

Members of a cartel who apply for leniency may be concerned about their identity being disclosed. We will try, where possible, to keep their identity confidential. Where we issue a Statement of Objections, it will be necessary to disclose the identity of a leniency applicant.

Definition of ‘Statement of Objections’

If we take the view that a business has infringed competition law, we will send them a **Statement of Objections** which is, in effect, a proposed infringement decision and we will invite views from the business.

‘No-action letters’ for individuals

A business applying for leniency may also wish to consider requesting that certain individuals be granted immunity, in the form of ‘no-action letters’, from criminal

prosecution for the cartel offence. Where a business has been granted total immunity under the leniency programme, we will normally be prepared to issue no-action letters to named current and past employees and directors. See the OFT Enterprise Act guidance *The cartel offence: guidance on the issue of no-action letters for individuals*.

Competition disqualification orders

We will not apply for a competition disqualification order against any current director of a company whose company benefited from leniency in respect of the activities to which the grant of leniency relates, or against any beneficiary of a no-action letter in respect of the cartel activities specified in that letter. For further details see the OFT Enterprise Act guidance *Competition disqualification orders* and *The cartel offence: guidance on the issue of no-action letters for individuals*.

Further information

Further information is available in the quick guide *Leniency in cartel cases* and in the *OFT's guidance as to the appropriate amount of a penalty*.

9 Compliance

Why comply?

Businesses that comply with competition law will avoid the serious consequences of non-compliance, which may include:

- financial penalties
- agreements being void and unenforceable
- claims for damages
- adverse publicity.

What steps need to be taken?

The steps needed to comply will depend on a range of factors including the size and nature of the business and the risk of them committing an infringement.

The risk of non-compliance will be higher if a business is in a dominant position or involved in markets where there are significant opportunities for colluding with competitors, or if they are so large and diverse that it is difficult to monitor the activities of individual employees. In these circumstances, a formal compliance programme is likely to be needed.

Smaller businesses may not need to implement a formal compliance programme, but they do need to make sure employees are aware of competition law and the need to comply with it.

Employees with an understanding of competition law will also be able to recognise when their employer might be the victim of anti-competitive agreements or conduct and they will be well-placed to act to protect their employer's interests.

Compliance programmes

There is no standard compliance programme. However, there are four main features that must be included as a minimum for a programme to work effectively. They are:

- the support of senior management
- appropriate policy and procedures
- training
- regular evaluation.

If you are thinking about implementing a compliance programme, you should consider seeking further advice from a legal adviser or compliance specialist. The OFT does not approve individual compliance programmes.

Further information

Further information is available in the quick guide *How your business can achieve compliance*.

10 Further information

How to contact the OFT

Enquiries and complaints

If you have a question about the OFT or if you suspect that another business is breaching competition law and wish to complain or discuss your concerns, telephone **OFT Enquiries** on **08457 22 44 99** or email **enquiries@oft.gsi.gov.uk**. Alternatively, write to:

Office of Fair Trading
Fleetbank House
2-6 Salisbury Square
London EC4Y 8JX

Cartels

If you suspect one of your competitors, suppliers or customers is part of a cartel, phone our cartel hotline on **020 7211 8888**. If you wish to make an application for leniency, telephone the Director or Deputy Director of Cartel Investigations on **020 7211 8117**.

Publications

You can order free copies of our publications by phoning **0800 389 3158** or emailing **oft@ecgroup.uk.com**
You can also download our publications from **www.oft.gov.uk**

Quick guides

This booklet is one of a series of quick guides designed to inform you about how we apply competition law in the UK. *Competing fairly* gives an overview of the law while the other guides cover specific areas.

Competing fairly (OFT447)

How your business can achieve compliance (OFT424)

Under investigation? (OFT426)

Cartels and the Competition Act 1998 (OFT435)

Leniency in cartel cases (OFT436)

This information is available in other formats and languages on request.

CD-Rom on compliance

We also provide a CD-Rom called *Compliance matters!* (OFT723) explaining the importance of compliance.

Competition law guidelines

Detailed information on the Competition Act 1998 and Articles 81 and 82 of the EC Treaty is given in a series of guidelines we have published in conjunction with the sector regulators. The titles shown below are currently available:

Agreements and concerted practices (OFT401)

Abuse of a dominant position (OFT402)

Market definition (OFT403)

Powers of investigation (OFT404)

Concurrent application to regulated industries (OFT405)

Enforcement (OFT407)

Trade associations, professions and self-regulating bodies (OFT408)

Assessment of conduct (draft) (OFT414a)

Assessment of market power (OFT415)

Vertical agreements (OFT419)

Land agreements (OFT420)

Services of general economic interest exclusion
(OFT421)

OFT's guidance as to the appropriate amount of the penalty (OFT423)

Modernisation (OFT442)

Enterprise Act guidance

We produce a series of booklets on various parts of the Enterprise Act 2002. The two mentioned in this quick guide are:

Competition disqualification orders (OFT510)

The cartel offence: guidance on the issue of no-action letters for individuals (OFT513)

You can find a full up-to-date list of our Enterprise Act guidance at **www.oft.gov.uk/Business/Legal+Powers/Enterprise+Act/publications.htm**

Dealing with the OFT

Individuals, businesses and their advisers are entitled to be treated with courtesy, respect and in a non-discriminatory manner. If you have a concern or complaint about our procedures, you may contact us by phone (phone **OFT Enquiries** on **08457 22 44 99**) or write to us setting out your concerns. Complaints in writing should be sent to us at:

Office of Fair Trading
Fleetbank House
2-6 Salisbury Square
London EC4Y 8JX

Sector regulators

Office of Communications (OFCOM)
Riverside House
2a Southwark Bridge Road
London SE1 7DB
Tel: 020 7981 3000
www.ofcom.org.uk

Gas and Electricity Markets Authority (OFGEM)
9 Millbank
London SW1P 3GE
Tel: 020 7901 7000
www.ofgem.gov.uk

Northern Ireland Authority for Energy Regulation
(OFREG NI)

Brookmount Buildings

42 Fountain Street

Belfast BT1 5EE

Tel: 028 9031 1575

ofreg.nics.gov.uk

Office of Water Services (OFWAT)

Centre City Tower

7 Hill Street

Birmingham B5 4UA

Tel: 0121 625 1300

www.ofwat.gov.uk

Office of Rail Regulation (ORR)

1 Waterhouse Square

138-142 Holborn

London EC1N 2TQ

Tel: 020 7282 2000

www.rail-reg.gov.uk

Civil Aviation Authority (CAA)

CAA House

45-59 Kingsway

London WC2B 6TE

Tel: 020 7379 7311

www.caa.co.uk

This is available in other formats and other languages.

Please call 0800 389 3158 for details.

Published by the Office of Fair Trading
Printed in the UK on paper comprising
75 per cent post-consumer waste and 25 per cent ECF pulp
Product code OFT447
Edition 03/05 Printed 03/05/15,000
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www.oft.gov.uk