FREIGHT TRANSPORT ASSOCIATION

A Shipper's Guide to the Abolition of Liner Conferences

Maximising your opportunities under the new regime

How this guide works

On 18 October 2008 the liner shipping conference system was abolished in all trades to and from Europe by the European Commission.

This did not happen by accident. Since the establishment of the British Shippers' Council in 1955, FTA has been at the forefront of efforts to moderate the behaviour of these shipping cartels, first through consultations on general rate increases, tariffs and surcharges and the negotiation of voluntary codes of conference practices governing these matters, then in reining in the abusive actions of various conferences through the European courts, and finally in campaigning for their abolition.

Our 50 plus years of combined knowledge of the conference system and liner shipping markets therefore places FTA in a unique position to provide shippers and other supply chain partners with expert advice in this specialist area of freight logistics.

The purpose behind this guide is therefore to give advice to shippers on how to capitalise on the momentous changes taking place in global liner shipping markets arising from the abolition of the liner conference system in Europe. While the guide has been compiled for the benefit of shippers in Europe, it will have particular significance for shippers the world over, particularly those trading with Europe.

With shippers frequently on the back foot in the past, now is the time for them to take the initiative, to change the customer–supplier dynamic to ensure that enduring changes are made to long-standing practices that have not always been to their benefit. Now is the time for change and creativity in negotiating more modern logistics contracts and agreements, such as those evident, for example, in total logistic contract arrangements.

This guide offers advice on the new EC competition law environment, some ideas about changes you can make, what the lines can and cannot do under the new competition rules and, importantly, how shippers can protect their new won rights. Moreover, the guide explains how EC competition rules applies to shippers and what risk management steps they should take in their dealings with shipowners and their competitors to ensure compliance with EC competition rules.

This guide comes as a pair, and in order to take full advantage of the opportunities presented by the abolition of liner conferences, shippers are advised to use this guide in conjunction with FTA's 'Negotiating modern liner shipping terms, a shipper's guide. Details of how to obtain this guide are contained within this document.

Disclaimer

The information provided in this publication is general and may not apply to a specific situation. Legal advice should always be sought before taking any action based on the information provided. Neither the publication nor the information provided is intended to create, nor does receipt of it constitute, a legal relationship.

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BACKGROUND

For the first time for over 100 years shippers are at liberty to negotiate their shipping requirements on trades to and from Europe free from the shackles of liner conferences. After a 20 year campaign, in September 2006, FTA, its shipper members and the other members of the European Shippers' Council (ESC), secured the abolition of anti-competitive liner conferences that have undermined shippers' bargaining power for so long.[1]

With effect from 18 October 2008, liner conferences and the old way of doing business came to an end. From that date, all EU and non EU carriers which took part in conferences operating on trades to and from the EU had to end their conference activities, that is price fixing and capacity regulation, on those trades.

Shippers now have greater freedom of choice – unlimited freedom to negotiate with the shipping line of their choice, the product, the price that they want – fully protected by EC competition law. This guide explains the new commercial environment that exists following the abolition of liner conferences and how you can take advantage of it. It will provide you with practical guidance regarding how to conduct rate negotiations as well as guidance on other aspects of your relationship with carriers.

The new European Commission guidelines on the application of the EC competition rules to liner shipping confirm that they are intended to maintain competitive markets for the benefit of shippers as consumers. The guidelines emphasise that the shipping sector is subject to competition law in the same way as other business sectors. This is particularly true for information exchanges, such as that planned by the European Liner Affairs Association (ELAA) trade association based in the UK. Apart from the consortia block exemption (still to be reviewed by the Commission), there are no longer any exemptions from EC competition law in the liner shipping sector. When serving European trades, shipping lines no longer are allowed to rely on any type of 'anti-trust immunity' provided in other parts of the world.

PURPOSE OF THIS GUIDE

This guide is designed to help shippers in the newly liberalised liner shipping market place which started on 18 October 2008. It is designed for shippers doing business with Europe, irrespective of whether they are situated outside or within Europe, at this time because of the fundamental change in the commercial relationships between shippers and the lines following the outlawing of liner conferences from that historic date.

There are three key areas where this guide will answer your questions.

- Competition law risk areas for shipping lines in the aftermath of liner conference cartels requiring vigilance by shippers to protect their new rights
- Opportunities for shippers to use competition law to negotiate commercial advantages where liner conferences dictated prices and terms in the past[2]
- The need for greater competition law compliance and risk management by shippers in their own dealings with lines and forwarding agents in the new climate of competition law enforcement in the shipping sector

1 Historically, Regulation (EEC) No 4056/86 permitted liner conferences to operate legalised cartels with the authority to fix prices, regulate capacity and agree surcharges. In September 2006 Regulation 1419/2006 was adopted which repealed Regulation 4056/86 from 18 October 2008. Shipping lines have enjoyed a two year transitional period from September 2006 to October 2008.

2 Further guidance on negotiating shipping terms can be found in the Freight Transport Association Guide *Negotiating modern liner shipping terms – a shipper's guide* which can be found at www.fta.co.uk/information/sea-freight

Many, if not most, European-based shippers will already have a comprehensive EC competition law compliance regime in place. This guide is therefore not intended to be a comprehensive guide to each individual shipper's obligations under EC competition law. Rather, it is intended to provide best practice advice for shippers so that they understand the legal changes that took place in liner shipping from 18 October 2008 and to highlight particular areas where shippers may benefit from the competition law changes, but may find themselves in new or increased danger of infringing the EC competition rules.

You will find a general introduction to EC competition law and a summary of the relevant legal provisions at Annex 1 to this guide but you should consult your in-house legal team, FTA or competition lawyers if you need further information about how these rules apply specifically to your business.

BEST PRACTICE

Provide a copy of this guide to your in-house legal team

What are the competition law risks for shipping lines?

WHY IS THIS IMPORTANT FOR MY BUSINESS?

From 18 October 2008 the way in which shipping lines do business with shippers became radically different and many practices pursued by shipping lines which had been legal became illegal. This section highlights the types of practice that are prohibited under EC competition law from 18 October 2008 (see below).

It is vitally important for shippers to understand what shipping lines are and are not permitted to do under EC competition law so that they can take advantage of the new commercial environment and protect their new rights effectively.

When conference pricing was abolished, the bargaining power of shippers increased as prices and terms and conditions can now be freely negotiated. This does not just apply to the port to port rates in the tariff but to all charges. If you are aware of your new rights you will be able to use this change to your advantage to obtain more favourable terms. For example, you will be able to monitor and compare the individual price lists offered by different shipping lines in order to get the best prices.

BEST PRACTICE

Review how your prices are made up

Review your contractual terms and conditions

Refer to the FTA's guide: *Negotiating modern liner shipping terms – a shipper's guide*, available at www.fta.co.uk/information/sea-freight

BEST PRACTICE

View www.fta.co.uk/information/international-supply-chain to monitor information on price and bunker sucharge movements

WHAT DOES EC COMPETITION LAW SAY?

The abolition of liner conferences prohibits agreements and arrangements which restrict competition. This includes agreements, understandings, arrangements or concerted practices with competitors:

- to fix prices
- to agree common terms and conditions
- to allocate or share customers, markets, or territories
- to limit capacity or output of products or the availability of services
- to share opportunities to tender for business

In addition, in some circumstances, particularly in markets where there are few (shipping) companies, exchanging commercially sensitive information between competitors of itself can infringe competition law (eg information relating to market strategy, target customers, product development, prices and margins, costs of production or supply, the manner in which a company will implement a new piece of legislation and the implications for the business of doing so).

WHAT CONFERENCE PRACTICES ARE PROHIBITED FROM 18 OCTOBER 2008?

As a result, from 18 October 2008 the following (non-exhaustive) list of practices are prohibited under EC competition law.

- Conferences on trade routes to and from Europe
- Conference tariffs
- Conference Terminal Handling Charges (THCs)
- Conference surcharges (eg Currency Adjustment Factor – CAF) and formulae used to calculate fuel charges (eg Bunker Adjustment Factors – BAF)
- Coordination of General Rate Increases (GRIs)
- Conference business plans
- Manipulation of capacity
- Discussions between shipping lines regarding capacity forecasts of individual lines or such forecasts developed by a trade association that could lead to joint decisions
- Publication of recent data identifying market shares by individual line (usually less than 12 months old)
- Rate restoration programmes

HOW ELSE WILL LINES HAVE TO BE CAREFUL?

There are also some 'grey' areas where shipping lines will have to tread very carefully to ensure that their behaviour does not infringe EC competition law. These 'grey' areas include the following.

- The exchange of information between two or more shipping lines
- Behaviour at trade association meetings
- The use of standard terms and conditions produced by a trade association

INFORMATION EXCHANGE

General principles

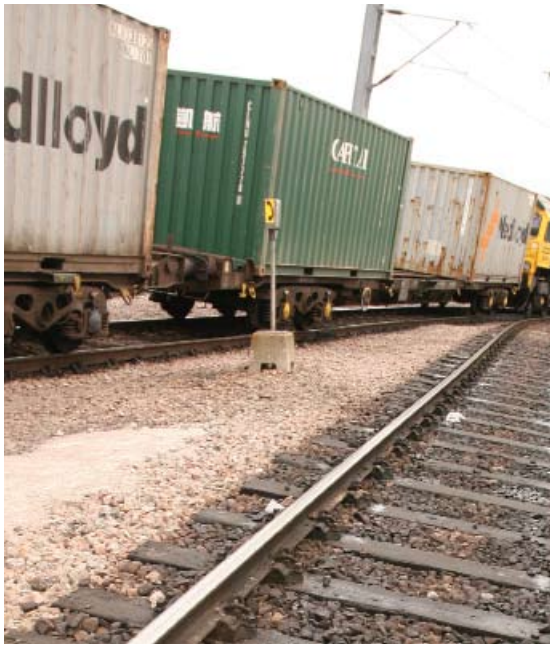
Shipping lines will have to be extremely careful with regard to the exchange of information. This is because the exchange of commercially sensitive market data which would enable the data of individual lines to be identified could, in certain circumstances, breach EC competition law.

Shipping lines will no doubt be taking the changes brought about by the abolition of liner conferences seriously and are likely to implement their own training programmes to try and ensure that they do not behave illegally under the rules. Nonetheless, shippers still need to be vigilant and swift to report any continuing cartel behaviour to the European Commission. The following information is provided to enable shippers to identify when lines may be exchanging information illegally. (Further explanation as to how shippers can monitor lines' behaviour is set out on pages 10 and 17).

The key point to remember is that every shipping line must determine independently the policy which it intends to pursue on the market. Shipping lines must not have direct or indirect contacts with their competitors which influence how those competitors behave or which reveal their own (intended) conduct, if those contacts are aimed at, or have the effect of, restricting competition.

There *will* be a breach of competition law if shipping lines exchange information:

- with the object of restricting competition (for example, if lines were to exchange information on tariffs (prices and surchages for example) by e-mail with a view to coordinating their price lists)
- as a means of implementing an anti-competitive practice such as monitoring compliance with a cartel (for example, lines might e-mail market share data to each other so that they can monitor whether each line is complying with a market sharing arrangement)



There *might* be a breach of competition law if shipping lines exchange information which reduces or removes uncertainty as to how their competitors will behave and which has the result that competition between shipping lines is reduced.

The European Commission's guidelines

The European Commission published guidelines on the application of EC competition law to maritime transport services on 1 July 2008. The guidelines, although not legally binding, provide guidance on the legality of information exchanges between liner shipping companies. The key points to draw from the guidelines are as follows.

The exchange of information between shipping lines is *more likely to breach competition law* when:

- it is commercially sensitive (not published)
- it is individualised market data (ie allows data for individual lines to be identified)
- it relates to price, capacity, investment or costs
- it is exchanged in concentrated markets (eg trades where there are three lines or less)
- it is recent (less than a year old)
- it is future data (ie data relating to a line's view of how the market will develop or to the strategy it intends to follow), especially where it relates to prices or output
- it is exchanged frequently
- it is not shared with customers

For example, any trade association, such as the ELAA, will have to consider carefully whether it can facilitate information exchange in respect of thin trades such as West Africa or South Africa where the markets are likely to be concentrated.

The exchange of information between shipping lines is *less likely to breach competition law* when:

- it is aggregated
- it is historic

Information of over a year old has been seen to be historic. However, this is not a fixed time limit and the extent to which data becomes obsolete over time will be relevant to assessing if information exchange is lawful.

The sharing of aggregate statistics and general market information is therefore generally permissible.

What should I look out for?

Shippers should be vigilant to monitor the types of information exchange that the shipping lines adopt after the demise of liner conferences. In particular, shippers should be alert to indications that lines are exchanging information on the following topics.

- Their individual tariffs (prices and surcharges for example)
- Their individual market shares
- Whether they will enter a new trade
- Whether they will exit a particular trade
- Whether they intend to implement a new pricing strategy
- Whether they intend to create new capacity

BEST PRACTICE

Be alert for indications that lines are engaging in illegal information exchange (eg does a line appear to know confidential information about another line's business? Have you overheard representatives from two separate lines discussing for example prices?)

Exchanges of capacity forecasts

The guidelines note that shipping lines should take particular care in relation to exchanges of capacity forecasts, even in aggregated form, when this takes place in concentrated markets (eg thin trades such as West Africa or South Africa).

This is because in liner shipping the sharing of capacity data would be one of the key ways in which lines could coordinate their conduct, and because it has a direct effect on prices.

The guidelines indicate that aggregated capacity forecasts showing in which trades capacity will be deployed might be anti-competitive to the extent that they may lead to the adoption of a common policy by several or all carriers and result in the provision of services at above competitive prices.

The guidelines also note that there is a risk that aggregated data could be disaggregated as it could be read together with announcements by the lines enabling them to identify each other. This would enable undertakings to identify the market positions and strategies of competitors.

Price indexes showing average price movements

In liner shipping, there is also a risk that the use of price indexes showing average price movements for the transport of a sea container might infringe competition law.

According to the guidelines, price indexes showing average price movements are unlikely to breach the competition rules *provided* that the information is sufficiently aggregated. This means that so long as the information cannot be broken down so as to allow lines to identify the competitive strategies of their competitors, price indexes are unlikely to breach competition law.

However, if a price index were to reduce or remove a line's uncertainties about what its competitors might do in the future so that competition between them was restricted then it would breach competition law.

In assessing, whether price indexes are lawful the following are relevant.

- The level of aggregation of the data
- Whether the data is historical or recent
- The nature and the frequency at which the index is published

The use of price indexes must also be considered in the context of any other information exchange that is taking place between lines. For example, the use of a price index on its own might not breach competition law, but if lines were also exchanging information on capacity and volume data, lines might be able to combine these various sources of information to identify the competitive strategies of their competitors.

BEST PRACTICE

Seek clarification from the lines regarding what they intend to do with your data, in particular whether they intend to use it as part of an information exchange

Try to protect information you give to shipping lines with a confidentiality clause/agreement which states, for example, that information provided to a line in the context of a tender process cannot be used for any other purpose

TRADE ASSOCIATIONS

The shipping lines are establishing a trade association to represent them in Europe. The intention of the trade association is to provide a number of services for lines including the exchange of information and price indices. Shipping lines will need to be assiduous in ensuring that no improper discussions or exchanges of information take place in that context. This will particularly be the case if the meetings of the trade association take place outside the EU (eg in Singapore as apparently planned by the ELAA).

In liner shipping, as in any sector, discussions and exchanges of information can take place in a trade association provided that it is not used as:

- a forum for cartel meetings
- a structure that issues anti-competitive decisions or recommendations to its members
- a means of exchanging information that reduces or removes a line's uncertainty as to what its competitors might do in the future with the result that competition between lines is restricted

Such anti-competitive behaviour should be distinguished from discussions that are legitimately conducted within trade associations, for example on technical and environmental standards.

There is a high risk that ELAA members will be tempted to follow the initial policy that they presented to the European Commission regarding the exchange of information. As part of that policy, they indicated that they wished to continue to co-ordinate certain aspects of their business behaviour. If they do implement their original policy they will inevitably reduce or remove a line's uncertainties about what its competitors are doing in the market.

Naturally, shippers will not be able to monitor themselves the discussions taking place amongst shipping lines in the context of a trade association. However, if shippers report suspicious behaviour to FTA, then FTA may be able to spot patterns of illegal conduct (see the case study on page 12 for an example of how this might work in practice).

BEST PRACTICE

Report indications of illegal conduct to FTA and your internal legal department

STANDARD TERMS AND CONDITIONS

It is unlawful for competitors to agree the terms and conditions which they will offer to third parties.

If the ELAA or other trade association were to produce standard terms and conditions for its members these should be entirely voluntary so that its members are not obliged to use them. Further, they should not directly or indirectly fix prices or restrict pricing in any way.[3]

BEST PRACTICE

Compare any contract terms you receive to check if they appear to be standard. If they are, challenge them and say that you do not want to do business on terms which appear to have been agreed with other parties

In reviewing your contractual terms refer to the FTA guide *Negotiating modern liner shipping terms – a shipper's guide* available at www.fta.co.uk/information/sea-freight

DO ANY SPECIAL RULES APPLY TO DOMINANT SHIPPING LINES?

In addition to complying with the rules set out above, any lines which have a dominant position have a special responsibility not to exclude competitors from the market or to exploit customers.

Whether a particular line is dominant will depend on the size and strength of that line in relation to others in the market but, as a general rule, a line is unlikely to be considered dominant if its market share is less than 40 per cent. This is only a guide because in practice, assessing whether a particular company is dominant can be a complex process involving lawyers and economists. It is advisable to seek professional advice if you suspect that a dominant company is abusing its dominant position.

In general, the competition rules which apply to dominant companies are more likely to be relevant to lines which operate on thin trades where there are not many competitors and which have high market shares on those trades.

Competition law does not prohibit the holding of a dominant position. It is only if the dominant company acts in a way which is unfair or abusive that there will be a breach of competition law.

Examples of abuse include:

- **predatory pricing**: for example if a dominant line were to price below cost when supplying customers, with the aim of driving competitors out of the market
- **refusal to supply**: for example if a dominant line were to refuse to supply an existing customer for an anti-competitive reason. However, a line can refuse to supply where there are good commercial reasons (eg the shipper in question is a bad credit risk)
- **excessive prices**: for example if a dominant line were to charge prices that had no reasonable relation to the value of the service the line was providing

3 In TACA (Transatlantic Conference Agreement) the European Commission concluded that an agreement that prohibited members of a liner conference from entering into individual service contacts at rates negotiated between a shipper and an individual line infringed Art 81(1). Under the agreement members were permitted to offer standard service contracts only on the terms negotiated by the TACA secretariat, which constituted a serious fetter on their ability to compete with one another.

- **unfair discounts**: for example a dominant line grants discounts which apply only if a shipper takes all its requirements on a particular trade from the dominant supplier
- **discrimination**: for example a dominant line treats two customers in a different way for an anti-competitive reason
- **tying**: for example where a dominant line forces a shipper to buy capacity on a trade it does not want as a condition for being allowed to purchase capacity on a trade it does want and which the shipper can source on reasonable commercial terms only from the dominant line

Please note: the examples of abuse outlined above are only contrary to the competition rules where a line is dominant. In ordinary circumstances, for example, a line is free to refuse to supply a shipper for any reason.

BEST PRACTICE

Be aware that there is more chance that a line will be dominant on a thin trade

Be alert to a dominant line behaving in any of the abusive ways outlined opposite, particularly on thin trades

If you suspect that a line is abusing its dominant position consult FTA and seek legal advice

How can shippers protect their rights?

INTRODUCTION

Lines have been engaged in legalised cartel behaviour for over 100 years and it may be difficult for the industry to adapt to the new regime under EC Competition law, particularly in the early days. The European Commission, FTA, as well as national competition authorities, will therefore be monitoring the industry closely.

However, it is crucial that shippers do not simply rely on competition authorities to crack down on anti-competitive practices, but take a proactive approach to protecting their rights. They can do this by:

- learning to spot indications of anti-competitive behaviour
- training their employees to identify and report anti-competitive behaviour
- being familiar with the remedies available in the event of a suspected breach of competition law

WHAT SHOULD I BE LOOKING OUT FOR?

Much cartel and other anti-competitive behaviour tends, by its nature, to be conducted in secret and it can be difficult to detect that an unlawful practice is taking place. To assist, you will find below a summary of some of the indications of improper conduct and the signs to look out for.

- Evidence that shipping lines are agreeing or otherwise colluding on fixed or recommended levels of rates

  Examples
  - after negotiations with three or four shipping lines you find that they have each offered you identical or very similar prices and terms and conditions
  - you notice that if one line increases its rates, the others quickly follow suit
  - you notice that several lines raise prices by the same amount at around the same time
- Evidence that shipping lines are agreeing or otherwise colluding on any aspect of charges or the formulae used to calculate charges (eg BAFs)

  Examples
  - after negotiations with three or four shipping lines you find that they each have identical or very similar charges
  - you receive an e-mail from one shipping line attaching a formula for calculating surcharges for a particular trade. You notice by looking at the e-mail chain

beneath that the schedule was originally e-mailed to that line by a second line and has been forwarded on to you

- Evidence that shipping lines are agreeing to split customers or markets between them or agreeing to withdraw or not use vessel capacity

  Examples

  - a line suddenly stops operating a particular route for no apparent reason so that you are forced to deal with a different line on that route
  - a line that you have a long-standing relationship with refuses to accept your business on a particular route for no apparent reason and yet continues to operate that route for the benefit of other customers
  - a line refuses your business because of your location
  - a line frequently refuses to accept your business on a particular route even though you know or strongly suspect it has capacity
  - in the past lines have agreed to limit the number of containers supplied in a market that was not concentrated. This is now unlawful
- Evidence that shipping lines are discussing sensitive internal information with other carriers

  Example

  - during a negotiation with one line, that line's representative tells you information about another line which would be considered a business secret or confidential to that other line, eg "I can tell you for a fact that Shipping Line X won't be operating that trade for too much longer"
- Evidence that carriers have common strategies when negotiating prices, rebates, surcharges or other supply conditions

  Examples

  - you receive a standard form contract from all the lines on a specific trade
  - during a negotiation with one line, that line's representative uses phrases such as, "the industry has decided that margin should be increased" or "other lines will not quote you a different price"

WHAT SHOULD I DO IF I THINK A LINE IS BEHAVING ILLEGALLY?

If an individual in your business is aware of, or suspects, a potential competition law infringement by one or more shipping lines, he/she should:

- report their concerns to their line manager and/or in-house legal team immediately
- take care not to destroy any documents and other materials (eg e-mails, faxes, meeting minutes, terms and conditions) which they think might be evidence of anti-competitive behaviour
- make a contemporaneous record of any conversations or circumstances which they suspect involved improper conduct so that there is a record of precisely what was said and done

WHAT SHOULD MY BUSINESS DO IF A LINE IS BEHAVING ILLEGALLY?

There are various options available to your business when confronted with improper conduct.

- If you consider that a particular representative of a line has behaved improperly (but this is not in accordance with that line's competition policy) you might consider speaking to the relevant individual's line manager to see if the issue can be resolved informally. It may be that the individual was not acting in accordance with company policy, that it was a one-off incident and that the issue can be resolved through the line's internal disciplinary procedures
- If the matter cannot be resolved this way and the individual's line manager is unresponsive, you may wish to make a formal complaint to the shipping line

- If you suspect that serious or widespread infringements are taking place but you do not have concrete evidence of this you can make a formal complaint to the competition authority in the relevant jurisdiction (eg the European Commission of the European Union or the Office of Fair Trading (OFT) in the United Kingdom). In these circumstances it would be inadvisable to approach the line directly as this would tip them off and give them time to destroy incriminating evidence. As a result of the complaint, the relevant competition authority might decide to (a) do nothing or (b) open a formal investigation which can result in the imposition of fines up to 10 per cent of the line's worldwide group turnover
- If you believe that a line/lines are engaging in anti-competitive behaviour and you have strong evidence to support this you might commence legal proceedings against the relevant line(s) in court, either to seek an injunction (a court order that the line(s) immediately cease particular conduct) and/or damages for any loss you have suffered. The European Commission is encouraging businesses as well as consumers to claim compensation in their national courts when they are the victims of an infringement
- If a competition authority were to decide that shipping lines had infringed competition law and you had suffered loss as a result of that illegal behaviour you would be able to bring an action for damages in court for any loss you have suffered in what is called a 'follow on' action. In the UK there is a speedy and comparatively simple procedure for claiming damages (and the costs) if successful
- In any of the above situations, consider informing FTA who may be able to assist you further

CASE STUDY*

Caroline Coral works at Savvy Shipper Co

On 18 October 2008 Caroline is asked to arrange the shipment of a large consignment of widgets from Felixstowe to Miami. Caroline is up to date on the recent changes to liner shipping and knows that she will have considerable freedom to negotiate with the shipping lines.

There are five lines that operate between Felixstowe to Miami and Caroline decides to speak to them all to see where she can get the best terms for Savvy Shipper Co.

First Caroline telephones Henry Hammerhead at Shark Shipping to get a quote. Henry tells her that the best deal he can offer is £4,450 and that he can "guarantee that she won't find a better deal elsewhere." When Caroline puts forward a set of terms and conditions which Savvy Shippers has prepared Henry says that Caroline must accept a set of standard trade association approved terms and conditions or there's no deal. When Caroline points out that this might be contrary to competition law, Henry sneers and comments that he's happy to look at her standard terms but that he "can't guarantee that some of Savvy Shipper's goods won't get lost at sea or accidentally left behind."

Next Caroline speaks to Sam Seaweed at Great White Shipping Lines. Sam is happy to negotiate on price and other terms and by the end of the day Caroline has negotiated a rate of £4,400.

The next morning Caroline speaks to Barbara Blowfish at Tiger Shark Lines on the telephone. Barbara promises to send over a quote by e-mail later that day. An hour later Caroline receives an e-mail from Barbara with a quote of £4,450. Caroline notices that the quote is similar to the other two she has received but dismisses it as coincidence.

Caroline e-mails Barbara back to say that she has had a better offer from Great White Shipping and to ask whether Barbara can improve her quote. Barbara calls back to say she isn't prepared to improve on her first quote and comments that, "I wouldn't rely too heavily on what Sam Seaweed tells you. From what I hear, Great White aren't making much on the Felixstowe/Miami trade and are thinking of pulling out."

Later that day Caroline meets with an old friend, Corrie Clownfish at Basking Shark Shipping Services. Caroline has used Basking Shark for years for her Felixstowe/Miami business and has found them to be very reliable. However, when she gets to the meeting Caroline

* You should assume for the purposes of the case study that none of the shipping lines are dominant in the Felixstowe/Miami trade.

finds Corrie very red faced: "I'm afraid Basking Shark hasn't actually got any capacity left for your consignment." When Caroline asks why not, Corrie is very apologetic but unable to provide any real explanation.

Caroline decides to use Great White Shipping Lines as they have capacity and provided the best terms. However, when Caroline goes to see Sam Seaweed to sort out the paperwork he looks embarrassed and confesses, "I'm sorry but I've just heard we'll no longer be able to service this route for you as we're no longer operating any transatlantic routes."

As Caroline leaves Great White Shipping's premises she sees Barbara Blowfish and Henry Hammerhead going into a meeting room with one of Sam's colleagues.

Caroline decides that there is definitely something fishy going on. What should she do?

ANSWER

The case study raises the following issues.

Shark Shipping has tried to *impose a trade association approved set of terms and conditions* on Savvy Shipper and threatened to leave Savvy's goods behind if Caroline does not agree to these.

It is not clear whether the trade association terms and conditions are compulsory for its members. It is contrary to competition law for a trade association to require its members to use a set of standard terms and conditions. Under competition law, Shark Shipping is free to use whatever terms and conditions it wishes. There is therefore no reason why Henry is compelled to use them other than by choice for purely commercial reasons.

It may be that the trade association has simply approved these terms and conditions but does not require its members to use them and that Shark has voluntarily chosen to use them. If this is the case, it is not contrary to competition law for Henry to try and impose these terms and conditions on Caroline. This forms part of normal commercial negotiations and whether Caroline accepts them will depend on the strength of her negotiating position.

Caroline has received a very similar quote from three lines: Shark, Great White and Tiger. Although it is not conclusive evidence, this may suggest that at least those three lines are engaged in *price-fixing*, which is a serious competition law infringement.

Great White and Basking have refused to take Caroline's business when there is no good reason for them to turn down business. This may indicate a *market sharing arrangement*, which is also a serious breach of competition law.

Basking strangely has no capacity for Caroline's consignment. Although, this could be for perfectly innocent reasons, Caroline should be alert to the fact that lines may be *limiting capacity deliberately* in order to put prices up or to share markets. This would also breach competition law.

There is also evidence that various lines *are exchanging commercially sensitive information*. Barbara Blowfish appears to know the future commercial strategy of Great White as regards the Felixstowe/Miami trade that is something which should ordinarily be commercially sensitive information. Caroline has also seen three lines meeting together at Great White's premises. The exchange of commercially sensitive information can, in certain circumstances in and of itself, constitute a competition law infringement.

However, more importantly, the exchange of commercially sensitive information may also indicate that the lines are engaged in *cartel behaviour* and are exchanging information to monitor whether the various parties are complying with the rules of the cartel. In this case, it seems likely when all the facts are considered together.

- The three near identical quotes received from three separate lines
- Barbara Blowfish's inside knowledge of Great White's strategy, particularly the fact that she seems to have found out before Sam Seaweed
- The meeting taking place at Great White Shipping between three competing lines
- The unusual circumstances surrounding Great White's hasty exit from transatlantic routes
- The fact that Basking, who has always previously had capacity, has been unable to take her business

Caroline should

- Report all of the facts above to her line manager and in-house legal department and explain her suspicions
- Make a written record as soon as she can of what has happened and the conversations she has had
- Make sure that she does not destroy any electronic or hard copy evidence (eg the e-mail quotation sent to her from Barbara Blowfish)

Savvy Shipper should

- Consider whether to approach the OFT or the European Commission to report its suspicions that the lines are operating a cartel

HOW DID THE SHIPPING BUSINESS CHANGE ON 18 OCTOBER 2008?

- Lines must now have their own tariff and/or pricing policy
- Lines are no longer permitted to use conference tariffs and charges
- Lines must now engage in individual negotiations with customers
- Each line should now determine their charges independently including origin THC, ocean freight, destination THC, CAF and BAF charges
- Each individual line should take an independent decision to increase charges and should not increase charges in line with other carriers or follow the behaviour of one particular line
- So called 'anti-trust immunity' granted in other parts of the world no longer applies to the shipping trades to and from Europe (and may be contracted out of by shippers on all trades)
- Membership of a consortium or alliance does not exempt the lines from any of the above

BEST PRACTICE

Consider inserting a clause in your contracts covering global business or trades both inside and outside the EC jurisdication requiring shipping lines to comply with EC competition law on a global basis as a matter of contract. See Annex 3

WHAT ARE MY NEW OPPORTUNITIES?

- You no longer have to do business with liner conference secretariats or individual shipping lines on a take it or leave it basis: *instead you can take the lead in negotiations*
- You no longer have to sign up to preordained cartel rates: *instead you can insist that shipping lines engage in individual negotiations with you on price*
- You no longer have to accept industry rate increases from January to January if this does not suit your business: *you can negotiate rates when it suits your business and over periods which are relevant to your business*
- You can review the period that you want and tailor the terms and conditions to suit your business planning cycles. You can negotiate longer term agreements if that is what you wish, even on an exclusive basis for a period up to five years (normally)
- You no longer have to sign up to conference tariffs and charges: *instead you can negotiate on these and not wait to be dictated to on tariffs, surcharges, THCs or unpredictable GRIs*
- As conference surcharges have been abolished and individual lines have to decide Independently how they are going to manage the risk of fluctuating fuel prices and currency movements, *shippers will have the opportunity to influence how these issues will be handled in their contracts*
- You no longer have to accept uniform charges or prices: *you can compare the prices and charges of individual shipping lines and select the best deal for your business*
- There is no particular reason why, after 18 October 2008, the existing commodity based tariff structure should be the model for the future. In a competitive market pricing should be based on what the market will bear or what added value carriers can offer. The commodity classification which lines have historically used has been based on the conference system. Therefore from 18 October 2008, each line should reassess its commodity classification. *Shippers may want to reassess the way in which their prices are determined without reference to this system but based instead around negotiation of the added value and quality of service that a particular line can offer*
- You will no longer have to sign up to rates and terms designed to suit the shipping lines' timetable, capacity, ports of call, service and pricing strategies: *instead you can use your own tailor made contract and you can put your contract with your terms and rates on the table for the shipping line to sign*
- Previously shippers have entered into informal agreements with lines by fax/e-mail or even a gentleman's agreement: *you can consider entering more formal contractual arrangements with carriers in order to protect your rights. In particular consider:*

BEST PRACTICE

See the FTA guide *Negotiating modern liner shipping terms – a shipper's guide* available at www.fta.co.uk/information/sea-freight

Consider developing FTA standard terms and conditions to apply on a voluntary basis

- *negotiating for the inclusion of a warranty that the line has complied with competition law and has not agreed prices with competitors. Such a warranty would give you an immediate action for damages if the line had agreed prices or otherwise breached competition law*
- *inserting a clause to the effect that any information you provide to the line will not be shared with any other party and will not form part of any (unlawful) information exchange within the ELAA or otherwise*

- *You can now take advantage of the freedom of choice and pricing flexibility that the lines must offer on all trades to and from Europe – from transatlantic and Far East to Europe/South America and South Africa/Europe or India*
- The changes which took place on 18 October 2008 may create a good opportunity to *review your terms of trade with your suppliers or customers*. For example, importers may consider changing the terms of trade from CIF to FOB so that the importer is responsible for negotiating the freight rates on the basis that there is less chance of competition abuses occurring in Europe than in the Far East for example, as the practices of shipping lines will be under far greater scrutiny in Europe
- Shippers can use competition law to their advantage to *negotiate fair terms from a dominant line*

BEST PRACTICE

Ensure that your shipping line service provider and/or intermediary (forwarder) gives a competition law warranty such as the example warranty attached at Annex 3 of this guide

Consider inserting a clause in your contracts covering global business or trades arguably outside the EC jurisdiction requiring shipping lines to comply with EC competition law on a global basis as a matter of contract

BEST PRACTICE

Review your supplier freight terms of trade arrangements

Advise your overseas suppliers of the changes which prohibit liner conferences and the fixing of rates and surcharges so that when they negotiate with lines they can take advantage of them

What are the competition law risks for shippers?

INTRODUCTION

The full exposure of liner shipping to EC competition law impacts on shippers and other players in the marketplace (eg your suppliers, freight forwarders and logistic service providers). For example, shipping lines might try to use shippers as conduits for information exchange with a view to co-ordinating terms and rates indirectly.

It is therefore of the utmost importance that shippers are not only watchful for signs that lines may not be acting in compliance with EC competition law, but also mindful of the competition law risks that they themselves face.

WHAT ARE THE MAIN COMPETITION LAW RISKS FOR SHIPPERS?

- Being used by lines as conduit for improper information exchange
- Joint purchasing
- Information exchange
- Discussions through your Trade Association or other trade associations

A conduit for improper information exchange

Shippers should be alert to the dangers of inadvertently being drawn into any anti-competitive conduct that shipping lines might engage in. In particular, shippers should be wary of being used as a conduit for lines to engage in improper information exchange. For example, lines might use shippers to find out what prices competitors are charging.

In the light of the current OFT investigations into suppliers and supermarkets you will need legal advice before entering into any bilateral discussion about prices with shipping lines.

BEST PRACTICE

If one line asks you what another line or lines are charging stop the conversation and make a note of the conversation and inform your in-house legal team

Joint purchasing

There are also circumstances in which joint purchasing by shippers might raise competition concerns.

The European Commission's notice on horizontal cooperation agreements states that if competing purchasers cooperate who are not active on the same relevant market further downstream, this will rarely breach the competition rules unless the parties have a very strong position in the buying markets, which could be used to harm the competitive position of other players in their respective selling markets.

Joint purchasing arrangements are *unlikely* to breach EC competition rules where:

- the shippers concerned are not active on the same relevant market further downstream (eg shippers who are active in different geographic markets or who sell entirely different products)
- the shippers concerned are small or medium-sized businesses, with (collectively) a relatively small market share
- the shippers concerned retain the ability to source supplies otherwise than through the joint purchasing arrangements
- there are no ancillary restrictive practices between the shippers in addition to the joint purchasing arrangements themselves (eg agreements not to use or boycott certain lines)

Purchasing agreements only risk infringing the competition rules if the cooperation does not truly concern joint buying, but serves as a tool to engage in a disguised cartel (ie price fixing, output limitation or market allocation).

A joint purchasing agreement is unlikely to infringe the competition rules if the parties to the agreement have a combined market share of *less than 15 per cent* of the relevant purchasing market. In some cases the selling market also may be relevant.

If these requirements are not satisfied, the joint purchasing arrangements are likely to breach the competition rules, unless they are eligible for exemption.

The Commission's notice also notes that collective agreements between *many* or *all* of the participants in an industry to purchase important inputs together, and those where participants agree to purchase all of their requirements exclusively though joint agreements, will normally infringe the competition rules.

An agreement is unlikely to be eligible for exemption where any of the following circumstances apply.

- The shippers concerned are obliged to source all or a high percentage of their requirements through the agreement
- The joint purchasing agreement distorts the structure of demand in the market in a way that the Commission considers impermissible, for example by imposing a maximum purchase price on members
- The shippers concerned accept ancillary restrictions (eg on their ability to use the jointly purchased input as they wish) or restrictions on resale

The conditions for exemption are more likely to be satisfied where the joint purchasing arrangements exist in a market context within which participants will pass on some of the benefits from improved supply terms to customers, and will remain free to choose between suppliers in relation to a significant proportion of their requirements if more favourable terms and conditions might be negotiated by them individually.

In practice, it can be difficult to determine readily whether a joint purchasing arrangement (a) infringes competition law and if it does, (b) whether it might nonetheless be eligible for an exemption. It is therefore advisable to seek legal advice on the precise joint purchasing arrangement contemplated.

BEST PRACTICE

If you are considering a joint freight purchasing arrangement with other shippers, consult your in-house legal team

Information exchange

Shippers should be aware that the competition rules on information exchange apply to them in two circumstances. They apply to:

- the exchange of information between a shipper and its competitors who sell competing products
- the exchange of information between shippers

Exchanges of information between a shipper and competitors who sell competing products

This type of information exchange falls outside the scope of this guide and only a summary of the applicable rules is given below. For a full explanation of how the rules apply to your particular business you should consult your in-house legal department.

In short, it can be unlawful to exchange information which it might be commercially useful for you or the competitor to know about each other's business. For example, you should not share commercially sensitive information relating to:

- marketing strategy
- target customers
- product development
- prices and margins
- costs of production or supply
- the manner in which your company will implement a new piece of legislation and the implications for the business of doing so

Exchanges of information between shippers who are not competitors in any selling market

Of greater relevance to this guide is the extent to which shippers who do not compete in any selling market may share information with each other. In this context shippers are considered competitors in the market for purchasing services from shipping lines. Although it may not be immediately obvious that shippers are competitors in this way, it is vital that shippers do not breach the competition rules by engaging in improper information exchange with each other.

For example, shippers may wish to exchange aggregated data on volumes and prices in order to use these in their negotiations with shipping lines. The permissible role of FTA or any other trade association in any such information exchange is therefore also relevant here.

The same basic rules and principles that apply to shipping lines as regards the scope of permissible information exchange also apply to shippers (eg the exchange of information is less likely to infringe competition law where the information being shared is historic and aggregated). For an explanation of those rules please refer to the paragraphs on information exchange starting on page 6.

In summary, shippers should not discuss:

- price and terms and conditions of trading
- agreeing to use the services of one line
- agreeing to collectively boycott a particular line or lines

Discussions at your trade association

Trade associations can be a major source of competition infringements, as they bring competitors together on a regular basis and there is a high risk that discussions between attendees could overstep the mark. You should therefore take particular care about what you discuss with other shippers at FTA and other trade association meetings.

Photo courtesy of Roadways Container Logistics

You should also be aware that even informal discussion with a competitor can infringe the rules. If you and a representative from a competitor have a drink or lunch together, your conversation could still infringe competition law and put you both at risk, if it relates to commercially sensitive issues.

For this reason, you are advised to avoid social contact with competitors and you should not discuss business affairs other than in formal meetings and in relation to clearly defined topics. If you have a good business proposal to develop with a competitor, obtain advice prior to discussing it with the competitor.

BEST PRACTICE

FTA provides guidance to members on the rules on compliance with competition law for FTA meetings of the British Shippers' Council and International Supply Chain Forum

Examples

QUESTION *You are attending a shippers conference where a group of shippers asks you to join them for lunch. During the meal the conversation turns to the rates that a particular line is charging on a trade. Many of the shippers feel that the prices are too high and one suggests that everyone round the table should 'teach that line a lesson' and boycott that particular trade as there are several alternative lines to choose from. What should you do?*

ANSWER You should not agree to participate. The group is agreeing to collectively boycott a particular line. If you were to participate you would be acting in breach of the competition rules. Instead you should make it clear to the others that you do not wish to be involved and leave the lunch immediately. You should make a note of what happened and speak to your in-house legal team as soon as possible.

QUESTION *You agree to join an old friend who works at another shipper for a drink after work. Your friend comments that he feels he is being charged 'extortionate rates' by a particular line on some trades and wants to compare prices with you. Should you share that information?*

ANSWER No, you should not share information with another shipper regarding the prices you are paying different lines for specific trades.

QUESTION *A shipper you know meets you after an FTA meeting. He suggests that if he names a figure for a particular trade you could nod if what you're paying is within a certain margin. Can you agree to this proposal?*

ANSWER No, you should not agree to this proposal. There is little different between this scenario and the one in the question above.

QUESTION *At the end of a trade association meeting you end up talking to a group of shippers where someone suggests that you all refuse to accept prices from lines that are above a certain figure. What should you do?*

ANSWER You should not agree to participate. Instead you should make it clear to the others that you do not wish to be involved and leave immediately. You should make a note of what happened and speak to your in-house legal team as soon as possible.

QUESTION *You bump into a shipper in the airport lounge on the way home from a conference you have both been attending. Conversationally he asks whether you are finding that prices on a particular trade have been going up recently. How should you respond?*

ANSWER It is permissible for you to respond in general terms about general trends. However, you should be careful not to go into specifics and if the conversation becomes more specific you should bring it to a close immediately.

QUESTION *In the course of negotiations with a particular line its representative says that if you tell him the quotes you already have from the other lines, he will beat them. Can you tell him what the other lines have quoted?*

ANSWER No. To be sure of complying with competition law you should avoid disclosing to lines the details of what other lines have quoted. This is to avoid being used as a conduit for illegal information exchange between lines.

HOW CAN I PROTECT MYSELF?

If a colleague, competitor or other third party approaches you with a proposal or information which you believe may be anti-competitive, use the '3 Rs' procedure.

- **Refuse** to get involved until you have taken legal advice
- **Record** in writing the proposal and the fact that you refused
- **Report** the incident to your manager. Where appropriate, your manager will obtain external legal advice on what follow up action, if any, you and the business should take

HOW CAN I PROTECT MY BUSINESS?

- Review your risk management and competition compliance strategies to ensure your full compliance with EC and national competition law which are becoming ever more complex
- Ensure that all relevant employees have undertaken appropriate training

BEST PRACTICE

Give this guide to your internal legal department and ensure that all employees have received an appropriate level of training

DOs	DON'Ts
DO make sure you are familiar with this guide	**DON'T** talk to more than one shipping line at the same time
DO learn to spot indications of anti-competitive behaviour and be alert to any indication that lines are slipping back into bad conference habits or exchanging information illegally	**DON'T** get drawn into being used as a conduit for illegal information exchange between lines
DO consider whether a line might be dominant on a thin trade and be alert to any signs of abusive conduct	**DON'T** discuss with other shippers or remain in a meeting where shippers are discussing collective exclusive dealing where a number of shippers all agree to use the services of one line: • price and terms and conditions • collective boycotts of lines • joint purchasing
DO train your employees to identify and report anti-competitive behaviour	
DO report any suspicious behaviour to your line manager or in-house legal department	
DO report suspicions of illegal conduct to FTA	
DO seek legal advice if you have doubts about the legality of a line's behaviour	**DON'T** exchange information with shippers about any of the above matters
DO become familiar with the options available in the event of a suspected breach of competition law and consider taking advantage of them if necessary	**DON'T** remain at any trade association or professional body meeting at which any of the above are discussed. If you leave such a meeting you should make a written record of having done so and give it to your own legal department. In addition, make it clear to the other meeting participants that you are not prepared to participate in any anti-competitive behaviour and that you require your objection to be noted in any meeting minutes
DO advise your overseas supplier of the changes to EU competition law to liner shipping so that when your supplier negotiates with lines it can take advantage of them, or consider ex works purchasing	
DO consider entering into more formal contractual arrangements with lines in order to protect your rights	
DO consider voluntary use of any trade association, including future FTA, standard terms and conditions[4]	
DO refer to FTA's guide: *Negotiating modern liner shipping terms – a shipper's guide*	
DO review how your prices are made up and, in particular, review with carriers the way in which their products have been priced (based on the commodities system) which in the new regime may no longer be relevant	
DO compare any contract terms you receive from shipping lines and check if they appear to be standard. If they are, challenge them	
DO consider whether to insist on inclusion of a clause obliging your shipping line service provider to agree to comply with EC competition law on a global basis	
DO seek clarification from the lines regarding what they intend to do with you data and whether it will be used in an information exchange	
DO try and protect the information you provide to shipping lines with a confidentiality clause	
DO make sure that your business risk management and competition compliance strategies are up to date to ensure your business does not fall foul of EC competition law	

4 In conjunction with members FTA is currently pursuing possible standard terms and conditions

AGGREGATED DATA means data that has been collated from a number of different lines or shippers (or other sources) and combined together so that it is impossible to identify data relating to a particular individual company.

BAF means Bunker Adjustment Factors.

CAF means Currency Adjustment Factors.

CIF a contract term indicating that price includes cost, insurance and freight.

COMMERCIALLY SENSITIVE INFORMATION means information which is not usually available in the public domain and which would ordinarily be considered confidential to a business, for example information relating to a company's marketing strategy, target customers, prices and margins.

CONCENTRATED MARKETS means a market in which there are few players (usually three or less). In the shipping context it is likely that trades on which there are three lines or less would be considered concentrated markets.

DOMINANT LINE means a line which has 'significant market power' (rarely below a market share of 40 per cent and presumed above 50 per cent). In practice, the concept of dominance/significant market power is a complex concept and it can be necessary for lawyers and economists to undertake a detailed analysis in order to determine whether a particular company is dominant. In broad terms a company is said to be dominant if it has the ability to prevent competition on the relevant market and the ability to behave independently of competitors, customers and ultimately consumers.

EC COMPETITION LAW means the competition rules found in Articles 81 and 82 of the EC Treaty. The Treaty provisions are supplemented by various regulations and directives of the European Commission as well as decisions from the European Courts.

ELAA means the European Liner Affairs Association.

ESC means the European Shippers' Council.

EU means the European Union which currently has the following 27 member states: Austria, Belgium, Bulgaria, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden and the United Kingdom.

EUROPEAN COMMISSION means the European Commission of the European Union. Within the European Commission there are different departments or 'Directorates-General' which are responsible for different areas of policy. The Directorate-General for Competition (DG Competition) is responsible for competition policy and enforcement.

FOB means Free On Board indicating that the receiver is responsible for payment of sea freight.

GRI means General Rate Increases.

INDIVIDUALISED DATA means data which allows individual lines or shippers to be identified.

OFT means the Office of Fair Trading which is the UK's competition authority.

THC means Terminal Handling Charges.

THIN TRADES means trades on which only few lines operate (eg West Africa or South Africa).

INTRODUCTION

The EC Treaty aims to create a single market with free movement of goods and services throughout the EU. To achieve this, the Treaty contains rules that are designed to ensure that competition within the EU is not restricted or distorted.

WHERE DOES EC COMPETITION LAW APPLY?

EC competition law applies throughout the current 27 members of the European Union[5] and, by virtue of the European Economic Area Agreement, in Iceland, Liechtenstein and Norway. (Nearly all these European countries also have their own domestic competition rules, often based on or similar to the EC rules.)

WHAT DO THE EC COMPETITION RULES SAY?

The main provisions of EC competition law are contained in Article 81 and Article 82 of the EC Treaty.

- **Article 81(1)** prohibits agreements between businesses, decisions by associations of undertakings or concerted practices which may affect trade between EU member states and which have as their object or effect the prevention, restriction or distortion of competition within the EU. All prohibited agreements are void and unenforceable under Article 81(2)
- **Article 81(3)** provides for the possibility of exemption from Article 81(1) if certain criteria are satisfied
- **Article 82** prohibits the abuse by one or more undertakings of a dominant market position within the EU (or a substantial part of it) in a way which may affect trade between EU members states
- **The EC Merger Regulation** allows the European Commission to control certain mergers and joint ventures between large companies operating in Europe. This is outside the scope of this guide and is not considered in any further detail

The Treaty provisions are supplemented by various regulations and directives of the European Commission as well as decisions from the European Courts.

WHO ENFORCES THE EC COMPETITION RULES?

The principal enforcement authority in the EU is the European Commission, acting through its Directorate-General for Competition (DG Competition), which is based in Brussels.

The European Commission has the power to:

- carry out unannounced on-the-spot investigations (or 'dawn raids') at firms' premises if it suspects a competition law infringement
- search private homes
- impose interim measures to stop anti-competitive behaviour pending the outcome of an investigation
- impose substantial fines up to 10 per cent of worldwide group turnover
- order the parties to an agreement, or perpetrators of abusive conduct, to cease their activities

Since 1 May 2004, the powers and obligations of EU member states to enforce Articles 81 and 82 have also been increased. The Office of Fair Trading is the UK's competition enforcement authority, which can apply Articles 81 and 82 in the UK as well as UK competition law.

WHAT ARE THE CONSEQUENCES OF INFRINGING EC COMPETITION LAW?

In addition to the substantial fines that the Commission may impose (individual fines have exceeded €500 million Euro and total fines on a single cartel in the region of €1 billion), infringement of Articles 81 and 82 can also have the following consequences.

- An infringing agreement or abusive conduct will be unenforceable
- Parties in breach of Articles 81 and 82 can face actions in national courts for damages or other remedies
- A party to a contract that breaches Article 81 may, in certain circumstances, be able to sue his co-contractor for damages
- Adverse publicity for the business concerned
- Diversion of management time in dealing with, for example a dawn raid and any subsequent investigation
- In the UK a breach of competition law can also lead to a Company Director Disqualification Order, preventing the person from acting as a director for up to 15 years
- In the UK the forming of cartels is also a criminal offence for which individuals may be fined and/or imprisoned for up to five years
- Individuals can also be fined (as well as the relevant business) and/or imprisoned for failing to co-operate/obstructing an investigation (eg by hiding evidence or giving misleading answers to questions posed by the authorities)

WHAT TYPES OF BEHAVIOUR DOES EC COMPETITION LAW PROHIBIT?

1 RESTRICTIVE AGREEMENTS (Article 81)

EC competition law prohibits (and declares unenforceable) agreements and concerted practices or arrangements which restrict competition.

What is an agreement?

An agreement includes:

- written contracts whether signed or unsigned
- standard terms of business
- agreements reached by telephone, fax or e-mail, in a meeting or in any other way
- letters of intent
- unwritten understandings and 'gentlemen's agreements'

An agreement does not have to be legally binding in order to be caught by the competition rules. A morally binding agreement where the parties expect each other to act in a certain way would be caught.

5 Austria, Belgium, Bulgaria, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Poland, Portugal, Romania, Slovenia, Spain, Sweden, United Kingdom.

An agreement may be an agreement for competition law purposes even if you break it or have no intention of honouring it in the first place. A handshake with no words spoken may be enough in some cases for an agreement to be found.

The crux is that the parties have shown or expressed their joint intention to behave in a particular way, and the effect of their behaviour will be (whether intentionally or not) to prevent, restrict or distort competition. Competition law will then apply.

Which restrictions breach competition law?

The effect of the agreement is what counts, not what words are used or how it was formed. The following is not an exhaustive list but describes some of the more serious competition law infringements and risk areas.

Price fixing

Probably the clearest and most widely publicised infringements of competition law involve 'price fixing' between competitors, such as agreements to set the price at which either or both of them will sell or buy products and agreements to establish minimum prices or to establish a common pricing system (eg if price increases will be introduced at the same time). Also prohibited are agreements between competitors with respect to discounts, charges and credit terms offered to their respective customers.

Agreeing common terms and conditions

It is also unlawful for competitors to agree (non-price) terms and conditions which they will offer to third parties. This applies to all terms and conditions, including terms limiting or excluding liability under a contract, duration of appointment, clauses preventing the customer from purchasing competing products, termination provisions and so on.

Market sharing

As with price fixing, market sharing is one of the most serious competition law infringements. It includes arrangements between competitors to:

- allocate territories between them, eg each competitor agrees not to call on customers in a certain geographic area
- allocate customers or suppliers, eg when competitors 'divide' between themselves the customers or suppliers with which they each deal
- allocate product lines, eg when competitors agree which of them will supply certain products to third party customers

Limitation of output

A further, serious infringement of competition law could arise if competitors agreed to limit capacity or output of products or the availability of services. The suspicion is that companies seek to limit output in order to share markets and/or raise prices artificially, to the detriment of customers.

Bid rigging/collusive tendering

Another very serious infringement of competition law which can arise is when competitors co-ordinate tenders which they submit to third parties. For example, it is unlawful for tenderers to nominate amongst themselves who will win a particular bid, the others submitting non-serious 'cover' bids which are deliberately priced higher or offer less favourable terms than the winning bid. Companies have been known to operate rotas amongst industry participants and to take turns at leading the bidding. Collusion in respect of tenders is a form of market sharing and is very likely to result in serious penalties for the companies and individuals involved.

Trade association activities and other meetings with competitors

Trade associations are a major source of competition infringements, as they bring competitors together on a regular basis and there is a high risk that discussions between attendees could overstep the mark.

You should be aware that even informal discussion with a competitor can infringe the rules. If you and a representative from a competitor have a drink or lunch together, your conversation could still infringe competition law and put you both at risk, if it relates to commercially sensitive issues.

For this reason you are advised to avoid social contact with competitors and you should not discuss business affairs other than in formal meetings and in relation to clearly defined topics.

If you have a good business proposal to develop with a competitor, obtain legal advice prior to discussing it with the competitor.

Exchange of commercially sensitive information

In some circumstances, particularly in markets where there are few companies, exchanging commercially sensitive information between competitors of itself can infringe competition law. If the competition authorities were to find on company premises, information containing trade secrets or other commercially valuable information of a competitor, it might appear to the authorities that an unlawful agreement of some kind was in operation, even if that was not the case.

It is therefore prohibited to exchange with competitors commercially sensitive information relating, for example, to marketing strategy, target customers, product development, prices and margins, costs of production or supply, the manner in which a company will implement a new piece of legislation and the implications for the business of doing so, etc. In short, it can be unlawful to exchange information which it might be commercially useful for you or the competitor to know about each other's business.

Restrictions which are sometimes exempt

Some restrictive arrangements can benefit from exemption in certain circumstances. However, it is advisable to seek legal advice BEFORE entering into any restrictive arrangement which you believe may be exempt. Examples of arrangements which are sometimes exempt include:

- joint purchasing – where companies pool their purchasing power in order to negotiate a better deal with a strong supplier
- joint production – whether through a production joint venture or by way of cross-supply agreements between competitors
- exclusive dealing arrangements with customer and suppliers

Serious restrictions of competition such as price fixing, market sharing, limitation of output and bid rigging will not be exempt and will normally result in a fine and/or imprisonment.

II ABUSE OF DOMINANCE (Article 82)

Article 82 EC Treaty prohibits conduct which amounts to the 'abuse of a dominant position'.

This prohibition only applies if a company is 'dominant'. Companies with a dominant position have a special responsibility not to exclude competitors from the market or to exploit customers (eg by charging excessive prices). Whether a company is dominant depends on the size and strength of the company in relation to others in the market but, as a general rule, a company is unlikely to be considered dominant if its market share is less than 40 per cent.

Competition law does not prohibit the holding of a dominant position. It is only if the dominant company acts in a way which is unfair or abusive that there will be a breach of competition law. Examples of what might be an abuse are given below.

Examples of abuse of dominant position

- **Predatory pricing** if a dominant company prices below cost when supplying to customers, with the aim of driving competitors out of the market
- A dominant company **refusing to supply** an existing (or sometimes a new) customer on anti-competitive grounds. The company can refuse to supply where there are good commercial reasons, such as the customer is a bad credit risk
- **Excessive prices** imposed by a dominant supplier
- **Unfair discounts** imposed by a dominant supplier, eg discounts which apply only if the customer takes *all* their requirements for a product from the dominant supplier
- **Discrimination** by a dominant supplier, such as by treating two customers in a different way because one has recently started competing against the company and the other has not
- **Tying**, where a dominant supplier forces a customer to buy products it does not want as a condition for being allowed to purchase the product it does want and which the customer can source on reasonable commercial terms only from the dominant supplier

This is a non-exhaustive list; for example, conduct by a dominant company to drive a competitor out of the market may take many forms. The form does not much matter. It is the intention, aim and carrying out of the plan which could breach the law, whatever methods are used.

PENALTIES

Breach of UK competition law can result in severe consequences for you, your fellow employees and your business. The following are among the possible consequences.

Prison or fines

The Competition Act provides that any company in breach of the law can be fined up to 10 per cent of the global turnover of the group of companies to which it belongs. The Office of Fair Trading has fined companies millions of pounds under this legislation.

The Enterprise Act 2002 makes the forming of cartels and bid rigging a criminal offence. The Serious Fraud Office has been given tough powers to assist the Office of Fair Trading to enforce this legislation. You run a serious risk of going to prison and paying a large personal fine if you breach these rules.

In addition, you could be fined and/or jailed for failing to co-operate during an investigation.

Court action for damages

Customers and competitors may be able to sue the business if they suffer loss or damage as a result of any anti-competitive activity on your part.

Agreements void

Any restrictions in an agreement which fall foul of competition law will be void and unenforceable. This can result in the entire agreement being unenforceable and consequent loss of revenue for the business.

Disqualification as a director

For directors, a breach of competition law can also lead to a Company Director Disqualification Order, preventing the person from acting as a director for up to 15 years.

Extensive powers of investigation

The competition authorities have wide-ranging powers to investigate breaches, including the power to carry out on-the-spot investigations, to conduct interviews and to perform undercover surveillance. As mentioned above, individuals (and the business) can be fined and individuals can be sent to prison for obstructing an investigation, such as by hiding evidence or providing misleading answers to questions posed by the authorities.

Drain on management and resources

Dealing with an investigation is time-consuming and a significant drain on management. Professional fees incurred can also be a significant cost.

Bad publicity

A breach of competition law could have disastrous consequences (commercial as much as legal) for the company's reputation.

ENTERPRISE ACT 2002

Criminalisation of cartel activity

The Enterprise Act introduced criminal penalties for individuals who dishonestly engage in cartel activities and it introduced the possibility of disqualification of company directors, where their company breaches competition law.

In its simplest terms, a cartel is an agreement that businesses will not compete with each other. The agreement is usually secret, oral and often informal.

The cartel offence requires that an individual acts dishonestly. The concept of dishonesty is governed by criminal law and requires a jury to decide whether, according to the ordinary standards of reasonable and honest people, what was done was dishonest and, if so, whether the defendant realised that what he was doing was dishonest by those standards. It is unlikely that someone who has acted in good faith in compliance with legal advice would be considered dishonest.

The cartel offence applies to agreements between competitors which involve:

- price fixing, including agreements relating to sales price, rebates, discounts, credit terms and price-change indices, for example:
  - limitation of supply or production
  - market sharing
  - bid rigging

The offence will be committed whether or not the agreement is implemented and whether or not the individuals were authorised to act on behalf of the company concerned. Prosecutions are instituted by the Office of Fair Trading or the Serious Fraud Office. These authorities have extensive powers of investigation including covert surveillance powers (such as placement of bugging devices) and 'tailing' suspects.

The cartel offence is punishable by a maximum penalty of five years imprisonment and/or an unlimited personal fine.

Leniency/no-action letters

The Office of Fair Trading operates a leniency programme under which the first company to come forward and confess to involvement in anti-competitive activities may benefit from 100 per cent reduction from any fines and confirmation that individual employees and directors will not be prosecuted or disqualified. Companies who subsequently provide information to the OFT which significantly contributes to the chances of it reaching an infringement decision, may benefit from a reduction of any fine by up to 50 per cent and protection for individual employees/directors at the OFT's discretion.

EXAMPLE COMPETITION LAW WARRANTY

The [ ] line warrants that for the duration of this agreement it will comply with EC competition law.

For further information please contact:

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