

ashurst

Quickguides

# Overview of UK Competition Law



# Overview of UK competition law

---

## Quickguide overview

This Quickguide provides an overview of UK competition law. Topics covered include:

- The relevant law and sanctions
- Chapter I issues (anti-competitive agreements)
- Chapter II issues (abuse of a dominant position)

For further information on any of these areas, please speak to one of the contacts listed on the final page of this Quickguide or your usual Ashurst contact.

## Brexit

The UK left the EU on 31 January 2020 and the Brexit Transition Period ended on 31 December 2020. On 1 January 2021, the UK and EU became two fully distinct regulatory, legal and customs territories, whose relationship is governed by the Trade and Cooperation Agreement (TCA).

Businesses should seek legal advice in relation to cases which were in progress and/or factual matters which existed before 1 January 2021, as these may be subject to transitional arrangements.

This publication is not intended to be a comprehensive review of all developments in the law and practice, or to cover all aspects of those referred to. Readers should take legal advice before applying the information contained in this publication to specific issues or transactions. For more information please contact us at London Fruit & Wool Exchange, 1 Duval Square, London E1 6PW T: +44 (0)20 7638 1111 F: +44 (0)20 7638 1112 [www.ashurst.com](http://www.ashurst.com).

Ashurst LLP is a limited liability partnership registered in England and Wales under number OC330252 and is part of the Ashurst Group. It is a law firm authorised and regulated by the Solicitors Regulation Authority of England and Wales under number 468653. The term "partner" is used to refer to a member of Ashurst LLP or to an employee or consultant with equivalent standing and qualifications or to an individual with equivalent status in one of Ashurst LLP's affiliates. Further details about Ashurst can be found at [www.ashurst.com](http://www.ashurst.com).

© Ashurst LLP 2021 November 2021

# Overview of UK competition law

---

## 1. Overview of the law and sanctions

### What is competition law?

In a truly competitive market, consumers benefit from price competition, greater product development, improved product specifications and better quality of service between competitors. Competition law is concerned with agreements or practices which actually or potentially distort competition within a market in a way which is ultimately detrimental to the consumer.

The UK competition rules focus on the following areas:

- prohibiting agreements or understandings between competitors that are likely to prevent or restrict competition (unless they can be shown to give rise to benefits to consumers which outweigh any restrictions of competition);
- prohibiting agreements or understandings between companies which are not competitors (such as agreements between suppliers and customers) that are likely to prevent or restrict competition (again, unless they can be shown to give rise to benefits to consumers which outweigh any restrictions of competition);
- prohibiting certain so-called "abusive" practices by any business which enjoys a very strong market position such that it can act without regard to its customers, competitors or suppliers;
- prohibiting or modifying mergers, acquisitions of businesses/assets or the creation of joint ventures where the transaction is likely to prevent or restrict competition. Such transactions may trigger the merger control powers of the UK Competition and Markets Authority (CMA) where the parties involved meet certain thresholds;
- where competition across a particular market does not appear to be functioning effectively, the authorities have the power to review the whole market and investigate how competitive conditions might be improved, even if no specific competition infringements are suspected or subsequently identified; and
- preventing the grant of a subsidy, that is likely to distort competition, unless the subsidy falls within one of the exemptions.

This Quickguide focuses on the first three of these areas. It does not consider merger control, market investigations or subsidies. It also does not consider cases which were in progress and/or factual matters which existed in the UK before 1 January 2021, which may be subject to transitional arrangements.

### What are the sanctions for infringing competition law?

In the UK, the CMA enforces UK competition law (the CMA replaced the Office of Fair Trading (OFT) and the Competition Commission (CC) as the primary enforcement body for UK competition law on 1 April 2014). Within their respective industry sectors, the UK utility regulators (including Ofcom, Ofwat, Ofgem, etc.) have concurrent power with the CMA to enforce UK competition law.

#### Civil and criminal penalties

Any infringement of UK competition law could have serious consequences. In particular:

- in the UK, it is a criminal offence for an individual to enter into an agreement between competitors to rig bids, fix prices, share markets or customers, or limit production or supply (known as the "cartel offence") subject to certain statutory exclusions and defences (for agreements entered into prior to 1 April 2014, the individual must have acted dishonestly; for agreements entered into on or

after 1 April 2014, the dishonesty requirement has been removed). Conviction for the cartel offence carries with it a maximum penalty of five years' imprisonment and/or an unlimited fine;

- the UK competition authorities have powers to impose very significant fines on businesses found to be in breach of competition rules (up to 10 per cent of worldwide aggregate group turnover under UK competition law);
- contractual restrictions that infringe competition law will be void and unenforceable, meaning they cannot be enforced through court action. If the void restrictions go to the heart of the commercial arrangement so that the essence of the agreement is changed by their deletion, the whole agreement could be void;
- directors of UK companies that have infringed UK competition law may be disqualified from acting as a director for up to 15 years;
- business personnel and companies may incur fines for failing to comply with procedural requirements (such as providing requested information) imposed by the CMA. Further, they may incur criminal liability (punishable by further fines and/or prison sentences of up to two years) where they obstruct an investigation by the CMA;
- third parties may be able (and are increasingly deciding) to sue for damages where they have suffered loss as a result of any prohibited anti-competitive agreements or conduct under UK competition law; and
- decisions by competition authorities that a business has infringed competition law are always well publicised with correspondingly significant damage to the business' reputation.

### **Investigations**

The CMA is vested with the power to conduct investigations at business (and, in certain circumstances, domestic) premises and to take copies of documentation, electronic files, e-mails, and, in certain cases, to seize original documents. These powers can also be used to inspect the premises of a business which is not under suspicion but which may have evidence which is relevant to an investigation into another business, such as a customer, competitor or supplier. These "dawn raids" can occur without notice. In addition, the CMA has powers to interview individuals who are connected to the businesses under investigation. Such compulsory interviews can be required with minimal notice during a dawn raid. For further information on dawn raids and the powers of the competition authorities, see the Ashurst Quickguide: [Dawn raids: dealing with inspections by competition authorities in the UK](#)).

## **2. Chapter I issues**

### **Background – the basic competition prohibition and the legal exemption**

Chapter I of the UK Competition Act 1998 (Competition Act) prohibits agreements between two or more undertakings, decisions by associations of undertakings, or concerted practices:

- which may affect trade within the UK (or any part of it); and
- which have as their object or effect the prevention, restriction or distortion of competition within the UK.

The UK prohibition is not absolute. Section 9 of the Competition Act sets out an exemption to the Chapter I prohibition which applies where an agreement, although anti-competitive in principle, offers benefits (such as improving production or distribution or promoting technical or economic progress) that outweigh any harm to competition, provided that:

- consumers receive a fair share of the resulting benefits;
- the restriction is indispensable to attaining those benefits; and

- the restrictions do not afford the parties the possibility of eliminating competition for a substantial part of the products or services in question (the "exemption criteria").

Determining whether or not an agreement benefits from the exemption set out in section 9 will require an analysis of the economic effects of the restrictions in question. It is no longer necessary or possible to apply to the authorities for a formal decision confirming that the exemption criteria are met in a particular case. Instead, the parties and their advisers must complete their own analysis, with limited opportunities for case-specific advice from the competition authorities (although there is extensive generic guidance available from the competition authorities and past decisions will often also inform the analysis).

Competition infringements under Chapter I fall into two broad categories: infringements by object; and infringements by effect. With infringements by object, the very purpose of the agreement is to achieve the anti-competitive restriction (for example, price fixing or market sharing). Infringements by object are the most serious forms of competition infringement and it is very unlikely that the exemption in section 9 would apply in cases involving an infringement by object.

Infringements by effect concern restrictions whose purpose is not to restrict, prevent or distort competition but where there is a restrictive effect in practice, whether intended or not. Such restrictions are much more likely to fall within the section 9 exemption, although adjustments to the terms of the infringing agreement are often necessary to make sure that the exemption criteria are fully met.

From a competition compliance perspective, restrictions by object give rise to the most compliance risk because they are the most likely to lead to sanctions against a business and/or individuals. It is, however, important to be able to spot possible restrictions by effect so that steps can be taken to ensure that the exemption criteria are met and/or that any compliance risk is minimised.

## Dealing with competitors

Examples of prohibited or risky practices between a business and its competitors from a UK competition law perspective are set out below. These are known as "horizontal issues" because they arise between businesses operating at the same level in the supply chain. Most horizontal infringements of competition law are considered to be "object" infringements and are therefore among the most serious forms of competition infringement. Under UK law, many of these types of horizontal infringements (forms of cartel) are also criminal offences.

### Price fixing

Some of the most serious infringements of competition law are agreements with competitors to fix, align or co-ordinate:

- price levels (maximum or minimum), price increases (including their timing), price ranges, discounts, or other related pricing actions; or
- the terms and conditions upon which products or services are supplied or obtained.

Price fixing agreements will be illegal regardless of the form they take and however informally they were reached. Cartel-type collusion on pricing/fees will almost always lead to the imposition of fines, which can be extremely high. Price fixing may also be a criminal offence in the UK.

The exchange of price-related information between competitors is also likely to infringe competition law, as discussed further below.

### Market sharing and customer allocation agreements

Generally, unless a business enjoys a dominant market position (as described in Section 3 below), it is entitled to decide *unilaterally* whether it wants to sell its services to a particular customer or category of customers, or whether it wants to be active in a particular geographical location (and it may refuse to do so for any valid business reason). However, it is not permissible to come to any sort of *joint* understanding with a competitor in relation to these matters. Any discussions with competitors, either

directly or indirectly through intermediaries, which have the effect of allocating customers by product type or geographically, or of restricting advertising or marketing activities in any way, are likely to be illegal. In addition, participation in an agreement between competitors to share markets or customers may be a criminal offence in the UK.

### **Agreements to limit or restrict production, capacity or service quality**

As a general principle, competitors must not agree, either directly or indirectly, to restrict the quantity or quality of any service which they offer. Agreements to limit production or output levels (which would typically cause prices to rise as supply decreases) or any agreement to cut production capacity will be illegal. Involvement in production or capacity restriction agreements may also be a criminal offence.

Similarly, an agreement to limit technological development or investment in research into improvements in product or service quality can damage competition and can be unacceptable to the authorities where it prevents or hampers innovation (although this would not be a criminal offence in the UK).

### **Bid rigging**

It is illegal to seek to fix the outcome of a bid or tender process where businesses are invited to submit offers to win a proposed contract. Bid rigging can take many forms, including:

- direct liaison between competitors in relation to each bid. Any exchange of information between competitors about the price or terms and conditions which they are planning to offer is likely to be highly risky in competition law terms;
- prior agreement about the percentage or value of contracts that each competitor will win each year; and
- reflecting wider cartel arrangements between the parties, such as price fixing or market sharing.

Involvement in bid rigging may be a criminal offence in the UK.

Where a business is unable to bid independently, a joint bid with a competitor can be legal. However, this will normally have to be an openly joint bid and legal advice should be sought in advance of entering into any such arrangement.

### **Agreements and understandings between purchasers**

It may be an infringement of competition law for purchasers to agree jointly the prices they will pay suppliers. Prima facie, such an agreement is anti-competitive, but it might be possible to show that, on balance, the agreement benefits from the Chapter I exemption because, for example, the joint purchasing allows a number of small businesses to pool their purchasing power and negotiate better wholesale prices, making savings which enable them to compete better against their large rivals.

Agreements with competitors not to purchase from a particular supplier or service provider also carry competition compliance risk. While it is perfectly legitimate to take a unilateral decision as to which supplier to purchase from, there may be competition concerns where such issues are discussed between competitors and a joint response (such as a boycott) is agreed.

### **Joint/coordinated arrangements or terms of business**

Arrangements between competitors to operate certain elements of their business on a joint basis, or to collaborate or coordinate the manner in which they offer their services may also infringe competition law. Joint arrangements are more likely to be viewed favourably by competition authorities where they do not directly affect the choice or price of products or services available to the end consumer.

## Information exchanges, meetings and trade associations

Any direct exchange of commercially sensitive information between actual or potential competitors is likely to infringe competition law. In some circumstances even unilateral disclosure of such information may constitute an infringement.

Irrespective of whether a meeting is held in a formal or informal setting, or under the guise of a trade association, legal advice should be obtained before businesses share any current information relating to the following areas:

- prices and pricing strategy, including discounts, rebates, etc;
- methods by which prices are calculated;
- terms and conditions of business, promotions and special offers;
- general market strategy;
- customers; or
- other information which a competitor would not normally be able to discover.

Professional meetings with an anti-competitive agenda clearly should not take place at all. In social meetings between competitors, the main competition risk is an allegation that informal social gatherings were a forum for information exchanges and/or competitive collusion.

The CMA recognises that, in certain circumstances, an exchange of information via an independent body such as a trade association or data services provider which collates the information and produces historical statistics on an aggregated basis may be acceptable. However, information should never be exchanged in this manner where recipients would be able to identify which company supplied the relevant information, or could reverse-engineer to identify the data for individual companies, even if the identity of those companies remained anonymous. In addition, considerable caution should be exercised as to the type of information which is exchanged even on an aggregated and historical basis.

The golden rule is that any exchange or disclosure of information (whether directly with/to competitors or through a trade association or other third party) should not enable a business to forecast more precisely the competitive conduct of its competitors or reduce the degree of uncertainty about the operation of the market which would have existed in the absence of such an exchange of information.

## Dealing with customers and suppliers

Agreements between a business and its suppliers, or between a business and its agents or distributors, may also raise concerns under competition law. These are known as "vertical issues" because they arise between businesses operating at different levels in the supply chain.

Competition restrictions contained in a vertical agreement may benefit from exemption if they fall within the criteria set out in the retained Vertical Agreements Block Exemption (VABE) (which provides a blanket exemption for agreements which meet certain criteria), or if they meet the individual exemption criteria set out in Chapter I. Broadly, exemption under the VABE will depend upon the market shares of the parties not exceeding 30 per cent, neither party being classified as a "competitor" of the other, and the absence of "blacklisted" clauses, such as resale price maintenance, market sharing, or certain forms of export ban. Where it is not possible for a vertical agreement to benefit from exemption under the retained VABE (e.g. because the relevant market share thresholds are exceeded), a detailed analysis will need to be carried out to determine whether the individual exemption criteria are met.

Some potential "vertical" problem areas are described below.

### Resale price maintenance

Resale price maintenance arises where an independent distributor is instructed by its supplier to sell the products it purchases from that supplier at a particular fixed or minimum resale price. All

resellers/retailers should be free to set their own prices. Maximum or recommended prices from the supplier are permitted, provided that these do not act as fixed or minimum prices in practice.

It is permissible to control the price of a product sold by an intermediary who is truly the "agent" of the supplier without autonomy to act independently, although this is a technical distinction on which legal advice should be sought. (Note that the definition of an "agent" for these purposes is specific to competition law and turns essentially on the degree of risk which the agent is required to bear – a commercial agency relationship may not be considered to be "agency" for competition law purposes).

### **Discussions with customers**

Commercial customers may well seek to drive down prices by revealing the prices quoted by a competitor. This is entirely acceptable, and often occurs in practice. However, it would not be acceptable if it became institutionalised to any extent, i.e. where customers are systematically required to reveal competitors' prices. Where information about customers' downstream pricing (or other terms and conditions) starts to flow between customers via a mutual supplier, there is a risk of a "triangular" cartel developing, such that each customer knows the intentions of its competitors. This type of systematic information flow has been found by the UK authorities to be tantamount to a cartel, and heavy fines have been imposed on businesses involved in such arrangements.

### **Dealings with suppliers**

The main competition law issue which arises in dealings with suppliers is collusive tendering by purchasers, whereby purchasers agree to act together in a certain way to force a particular outcome from the supplier. For example, as noted above, an agreement between competitors as to the purchase prices to be offered to a common supplier is likely to infringe competition law. An agreement between competing purchasers to boycott a supplier who behaves in a particular way would also be likely to infringe competition law. "Triangular" cartels can also develop where information about wholesale pricing (or other terms and conditions) starts to flow between competing suppliers via a mutual customer. As with information flows between reselling customers via a mutual supplier, this is considered to be equivalent to a cartel.

## **3. Chapter II issues**

### **Background**

Chapter II of the Competition Act prohibits the abuse of a dominant position by one or more undertakings having a dominant position in a particular market, insofar as it may affect trade within the UK (or any part of it).

A business can be said to be in a dominant position where it *possesses "market power" and can therefore behave, to an appreciable extent, independently of its competitors, customers and, ultimately, consumers.* Whether a business is dominant is a complex question of law and economics but, broadly speaking, concerns will begin to arise where a business has a share of 35 to 40 per cent or more of supplies or purchases of goods or services in a properly defined geographical and product market. The level of market share is a guide only: the key issue is whether the business in question has market power.

In order to assess this, it is necessary to consider the market conditions within which the business competes, including for example:

- the number of competitors and their respective market shares;
- the ease with which new competitors can enter the market; and
- the extent of any countervailing purchasing power of customers.

Dominance itself is not unlawful. Chapter II is concerned with the *abusive* activities of a dominant player in a market. Dominant businesses, because of their enhanced market power, have a special responsibility not to allow their conduct to impair genuine undistorted competition. Where a business



enjoys a strong market share, aggressive commercial behaviour which would have been perfectly legitimate if undertaken by a business with a smaller market share may constitute an "abuse" of the dominant business' market power.

Abuses of a dominant position can be divided into two broad categories:

- *exclusionary abuses*, which have the object or effect of consolidating and/or reinforcing the dominant business' strength in the market place; and
- *exploitative abuses*, where the dominant business takes advantage of the fact that neither customers nor competitors are able to restrain its commercial behaviour.

Some of the types of conduct by a dominant business that are likely to infringe UK competition law are described below.

## Unfair prices

A price will be deemed to be unfair and an abuse of a dominant position under UK competition law if it bears no reasonable relation to the economic value of the service supplied. The abuse may occur not only where prices are too high but also where they are too low. Examples of unfair pricing include:

- Charging excessively high prices – it is abusive for a business to take advantage of its commercial strength to make an unfairly high margin or return. There are evidential difficulties in this area and historically the UK competition authorities have not often pursued these types of cases. However, there have been a number of recent cases (some of which are still ongoing) involving allegations of excessive pricing in the pharmaceutical sector, and the authorities now appear to be more open to investigating this type of behaviour.
- Predatory (below cost) pricing – this arises where a dominant business deliberately lowers its prices below cost so as to drive out competition (very often with the intention of raising prices again once the opposition has been eliminated). The analysis of predatory pricing requires a careful assessment of fixed and variable costs, but a dominant business should not price at a loss without first seeking legal advice as to whether such a step would be considered abusive. To date, cases alleging (and finding) predatory pricing have been more common than excessive pricing cases.
- "Margin squeeze" – this arises where a business is dominant in an upstream market selling a wholesale product and also competes in the related downstream market against its wholesale customers (for example in a market such as broadband, where the telecoms infrastructure owner selling wholesale level access to the infrastructure will also typically compete in relation to downstream retail broadband services). In such a market, it can be an abuse if the dominant business' upstream pricing is set too high, or its downstream pricing is set too low, such that the margin which can be made by competing retail providers is either negative or artificially reduced.

## Discrimination

Certain discriminatory practices carried on by a dominant business may be illegal. These include charging significantly different prices for similar transactions (going beyond variations in prices resulting solely from normal commercial negotiations) unless the differences can be objectively justified, for example, as a result of differences in tax, labour costs, market trends, exchange rates, transport costs or distance, or cost efficiencies resulting from bulk purchases/commitments.

## Discounting and other loyalty incentives

Discounts given by dominant businesses are not in themselves illegal, provided they reflect a genuine reduction in cost in serving that business (for example, volume discounts based on cost efficiencies arising out of larger sales volumes). Rebates and discounts (normally standard methods by which a business seeks to attract or retain customers) can be anti-competitive when offered by a dominant business if they are designed to reward or encourage loyalty and to prevent customers from switching to alternative suppliers. The concern is that a dominant business could tie up sections of the market by entering into arrangements that secure the future purchasing decisions of customers, thereby

weakening further the ability of its competitors to win market share from it. Any business which might be considered to be dominant in a particular market should seek legal advice when considering any proposed loyalty discounts or rebates.

### **Exclusive or long-term arrangements**

It can constitute an abuse for a dominant business to enter into exclusive contracts. This is because the market presence of the dominant business is so strong that exclusive arrangements may make it very difficult for competing suppliers to find purchasers for their products, or for purchasers to find alternative suppliers. Exclusivity may be acceptable for a short period of time, but this will depend on an assessment of the impact of the provision on market conditions and legal advice may be required.

For the same reasons, long-term contracts may be abusive where one of the parties is in a dominant position.

### **Refusal to supply**

It can be an abuse for a dominant business to refuse to supply goods, services or access to key infrastructure or technology (such as interface information). This is a complex issue, but it is possible that a dominant business could be forced to supply access, goods or services where to refuse to do so would artificially distort the market (because, for example, the financial barriers are too high for a competitor to be expected to build its own competing infrastructure).

### **Tying**

It can be an abuse to require a customer to purchase a combination of separate goods or services where the bundled goods/services are not also available separately. For example, requiring a customer to purchase products A and B where only A is actually wanted.

It may also be abusive to offer "economic inducements" to customers to purchase the tied products or services by making it economically attractive to buy them as a package where the price reduction has no objective justification by reason of genuine cost savings.

### **Predatory behaviour towards new entrants**

As noted above, "exclusionary" practices by a dominant business which operate to reinforce or consolidate its market share can infringe competition law. A dominant business needs to take care to ensure that it does not deliberately prevent or hamper new entry or the expansion of existing competitors, and that it does not apply different conditions or requirements in relation to its trading arrangements with new entrants.

# Ashurst Quickguides

---

Ashurst's Quickguides are a mini-library of short legal summaries on a range of key issues relevant to businesses. For a full list of current titles and the most up-to-date versions, please visit our Quickguide hub ([here](#)).

If you would like further information on this guide, please speak to your usual contact at Ashurst or one of our contacts listed below.



**Euan Burrows**  
Partner  
London/Dublin

+44 20 7859 2919  
[euan.burrows@ashurst.com](mailto:euan.burrows@ashurst.com)



**Neil Cuninghame**  
Partner  
London/Dublin

+44 20 7859 1147  
[neil.cuninghame@ashurst.com](mailto:neil.cuninghame@ashurst.com)



**Duncan Liddell**  
Partner  
London/Dublin

+44 20 7859 1648  
[duncan.liddell@ashurst.com](mailto:duncan.liddell@ashurst.com)



**Nigel Parr**  
Partner  
London/Dublin

+44 20 7859 1763  
[nigel.parr@ashurst.com](mailto:nigel.parr@ashurst.com)



**Steven Vaz**  
Partner  
London/Dublin

+44 20 7859 2350  
[steven.vaz@ashurst.com](mailto:steven.vaz@ashurst.com)



ashurst

[www.ashurst.com](http://www.ashurst.com)