

The Enterprise Act 2002

Competition Law Aspects

1. **Aim**

The purpose of this Information Sheet is to outline those provisions of the Enterprise Act 2002 (EA02) that deal with competition law.
2. **Scope**
 - 2.1 This note covers only some of the provisions of and does not, except as far as necessary, deal with the provisions of the Competition Act 1998, Articles 81 and 82 of The Treaty of Rome or the provisions of any statute regulating mergers.
 - 2.2 Article 81 of the Treaty of Rome prohibits agreements or arrangements between undertakings that restrict competition.
 - 2.3 Article 82 of the Treaty of Rome prohibits the abuse of a dominant position.
 - 2.4 The Competition Act 1998 incorporates into United Kingdom law provisions that have a very similar effect to those of Articles 81 and 82 of the Treaty of Rome.
 - 2.5 Breach of any of the provisions referred to above could result in a company being liable to pay damages to third parties, the payment of fines and in the company being party to an unenforceable agreement. Until now, however, such a breach would not result in liability for any of the directors of a company.
 - 2.6 Both European and UK law provide that some business combinations are unlawful unless the EU Commission or the UK Competition Commission has previously approved them. These could apply either when a company is acquiring another company or business or when it is entering into a joint venture.
3. **Policy Behind the Enterprise Act 2002**
 - 3.1 The UK Government believes that there is evidence to show that the UK economy is less productive than those of its competitors and that this can be attributed, in part, to anti-competitive practices between businesses. It therefore believes that outlawing such practices will improve productivity. It also believes that the civil law consequences of breaking competition law are not a sufficient disincentive to doing so.
 - 3.2 EA02 therefore contains provisions to alter the position. First, they create a new criminal offence, "the Cartel Offence". Second, they amend the existing law, under which a person can be disqualified from acting as a director of a company, by providing that a person may be so disqualified if a company of which he is a director commits a breach of competition law. Thirdly, it grants special investigatory powers to the OFT so that it can investigate suspected Cartel Offences. Fourthly, EA02 contains provisions that will make it easier for a party who has suffered loss because of a breach of competition law to sue the offender for damages.
4. **The Cartel Offence**
 - 4.1 The sections of EA02 that create the Cartel Offence are Sections 188 to 191.
 - 4.2 An individual commits the Cartel Offence:

"if he dishonestly agrees with one or more other persons to make or implement, or to cause to be made or implemented, arrangements [of the kind referred to below] relating to at least two undertakings.....".
 - 4.3 The word "dishonestly" refers to the state of mind of the individual. To prove that someone has acted dishonestly, two things must be shown. First, that the act done was, according to the standards of reasonable and honest people, dishonest and, second, that the individual must have realised that what he was doing was, by those standards, dishonest. Both these points have to be proved by evidence beyond reasonable doubt. It has been said that the sort of evidence which would point to dishonesty is likely to include a failure to seek legal advice, attempts to disguise or hide activity, secret meetings and the absence or destruction of records.
 - 4.4 The four types of arrangements which are outlawed are:
 - price fixing;
 - limiting production or supply;
 - sharing markets;
 - bid rigging.

- 4.5 These categories are not as extensive as those that are prohibited by existing competition law. In addition, they only apply where the parties provide the relevant products or services at the same level in the supply chain – so called “horizontal” agreements - and there has to be reciprocity. This last point means that if only one party agrees, for example, to fix its prices, then no offence will be committed. However, an offence would be committed if, for example, one party agrees to fix its prices, whilst another party agrees to supply only certain customers, because there would be a price fixing and a market sharing arrangement.
- 4.6 Price fixing includes both direct and indirect fixing of prices. Examples of indirect price fixing would include agreements about relative price levels or ranges, agreements about the level of rebates or discounts, transport charges or methods of quoting.
- 4.7 Market sharing would include the sharing of an individual customer or customers.
- 4.8 Bid rigging is an arrangement under which, in relation to a request for bids in relation to the supply of a product or service in the UK, or for the production of a product in the UK, either party will not make a bid or both parties will make a bid, but ones arrived at in accordance with the arrangements. If, for instance, one party agrees to bid at a level that will ensure that its bid is not accepted, thus letting in the other party, that would be an offence. As far as bid rigging is concerned, it has been said that it is the only one of the prohibited activities where, for all practical purposes, the carrying out of the activity would invariably indicate a dishonest intention and amount to commission of the offence.
- 4.9 It is enough to agree to make any of the arrangements, even if they are not implemented. It would also be a criminal offence to conspire to make such arrangements or attempt to make such arrangements, even if you fail.
- 4.10 The maximum penalty is imprisonment for up to five years or a fine or both.
- 5. Directors’ Disqualification**
- 5.1 The provisions dealing with directors’ disqualification are inserted in the Company Directors Disqualification Act 1986 by Section 204 of EA02.
- 5.2 The Company Directors Disqualification Act says that a person can, in certain circumstances, be disqualified from acting as a director of a company (including as a shadow director). Until EA02, most of the grounds on which a director could be disqualified from acting related to an insolvency situation.
- 5.3 Now a court must disqualify a person for up to 15 years from acting as a director if a company of which he is a director commits a breach of competition law and the court considers that his conduct as a director makes him unfit to be concerned in the management of a company.
- 5.4 A company will commit a breach of competition law if it infringes either Article 81 or Article 82 of the Treaty of Rome or the corresponding provisions of the UK Competition Act 1998.
- 5.5 A director would not be able to plead ignorance by, for instance, not seeking advice on competition law or curtailing the ambit of a company’s compliance program. A director will face disqualification where he knows or should have known of breaches of competition law.
- 5.6 It is clear from guidance which has been issued by the OFT that a decision on whether or not to apply for a disqualification order will, unsurprisingly, depend on the seriousness of the case. The OFT has indicated that there are six factors which would be taken as being indicative of particularly serious cases:
- 5.6.1 planning, devising, approving or encouraging the activity of the undertaking which caused the breach;
- 5.6.2 ordering, encouraging or advocating the participation in a breach of competition law;
- 5.6.3 ordering or pressurising the people identified as having a direct or indirect role in the breach to engage in that breach;
- 5.6.4 attending meetings in which the activity constituting the breach occurred or was discussed;
- 5.6.5 directing, ordering or pressuring staff to attend meetings for the purpose of participating in or discussing the breach;
- 5.6.6 ordering, encouraging or advocating retaliation against businesses that were reluctant to or refused to participate in the breach.
- 6. Powers of Investigation**
- 6.1 The sections giving specific powers of investigation of Cartel Offences to the OFT are Sections 193 and 194 of EA02.

- 6.2 The OFT can carry out an investigation whenever it has reasonable grounds to suspect that a Cartel Offence has been committed. This is not a high threshold. It can then exercise its powers if it thinks there is good reason to do so.
- 6.3 The OFT can, by written notice, require a person under investigation (or any other person) to answer questions or provide information at a specified time and place. These questions and information can relate to any matter relevant to the investigation.
- 6.4 The OFT can require documents to be produced and can take copies of them and require explanations of them. The OFT cannot require information or documents which are the subject of legal professional privilege.
- 6.5 The OFT has power to enter premises under a warrant issued by the High Court. Warrants will be granted in circumstances where the judge is satisfied that there are reasonable grounds for believing that there are, on the premises, documents which the OFT would be entitled to obtain under the provisions referred to in the last sub-paragraphs.
- 6.6 Although there are provisions restricting the use to which the OFT can put documents and information which it has obtained using the above powers, the powers are wide. There is limited protection against self-incrimination.

7. **Action to be Taken**

- 7.1 It is clear that any contact with competitors, whether via trade associations or directly, is now potentially risky. Everyone in a business needs to be aware of the need to avoid discussions that might suggest cartel activity to maintain records of such discussions to counter this.

- 7.2 Existing agreements and understandings will need to be reviewed and those that offend against EA02 ended. It appears that implementing an arrangement made before EA02 came into force will be a breach of the Act. It should be noted that EA02 does not have an exclusion for agreements of minor importance, although most other competition laws do, so that arrangements that are lawful now under this rule, may cease to be.
- 7.3 Procedures for notifying to management contacts or proposals that may infringe competition law will need to be developed.

This information sheet has been prepared to highlight some of the key issues relating to the competition aspects of the Enterprise Act 2002. It is intended to be for general guidance only and is not a substitute for specific legal advice. It is based upon our understanding of the legal position as at July 2003 and may be affected by subsequent changes in the law. Should you require any specific legal advice on the issues covered, please contact James Partridge by email at james.partridge@ts-p.co.uk or call 01892 510000.