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A Briefing Guide to

Cartels And Competition: The Law, Its Enforcement And The Need For Advice

RAHMAN RAVELLI

Cartels And Competition

The authorities are increasingly keen to hold to account those that they believe are not meeting their legal obligations in relation to cartels and anti-competitive behaviour.

There is no company, individual in business or employee that can afford to ignore the civil and criminal sanctions that can be applied under the competition rules. And no one can consider themselves immune from the possibility of third party private damages actions if they breach competition law.

Anti-competitive behaviour can distort markets and bring major legal problems for those who are involved in it. Everyone in business needs to know their legal options if faced with such an investigation – and be able to seek the best legal expertise available.

Those in business that recognise that they may have been involved in such illegal activity will need to consider what they need to do to reduce their liability and any potential penalties. Many others will need to ensure their staff and representatives are familiar with competition law and the signs of possible wrongdoing. And there will be those who require advice on how to proceed if they feel they have suffered losses or damage because of such illegal activity.

Anti-competitive behaviour is a worldwide issue that can involve a number of enforcement agencies examining activity that crosses many borders or even continents. Coordinating your response to such an investigation is a demanding task. Anyone possibly facing such criminal proceedings has to be represented by a legal team with the necessary business crime expertise. And if you feel you have been harmed by cartel behaviour you need to seek advice from those who know exactly how to proceed in order to minimise the damage caused.

At Rahman Ravelli, our cartels and competition specialists are all experts in this field, with years of experience in representing UK and international corporates, chief executive officers, directors and senior business individuals.

Our caseload covers each and every business sector, sees us represent those who do business in many countries in all parts of the globe and involves us dealing with enforcement authorities around the world. Our expertise has made us the first and only stop for those either facing a competition investigation or wishing to bring

a legal action against a company or individual that they believe has acted in an anti-competitive way.

Cartels – The Penalties

A cartel is an arrangement where potential business competitors agree not to compete with each other. It is likely to be a fairly secretive and informal agreement, could be verbal or written and could possibly be arranged in any professional or industrial sector.

In UK law, the Competition Act 1988 and Article 81 of the European Community Treaty prohibited cartels. Any business that was found to be a member of a cartel could be fined up to 10% of its worldwide turnover. While this arguably had an effect on major companies, it was thought to be only a minor deterrent to individuals involved in cartels.

But this changed in June 2003, when Part 6 of the Enterprise Act 2002 came into force – and targeted individuals. Section 188 of the Act set out the definition of the new criminal cartel offence. Under Section 188, an individual is guilty of the offence if they have agreed with another person to make or implement (or cause to be made or implemented) an arrangement between at least two parties to fix prices, limit supply or production, share customers, share supply or to enter into bid-rigging arrangements. Until the Enterprise Act 2013 came into law, the prosecution had to prove that the individual had acted dishonestly. That is no longer the case.

Under the Enterprise Act 2002, an individual can be tried in a magistrates court, where the maximum punishment is six months imprisonment and/or a maximum fine of £5,000. But, as is very likely, the case goes to a higher court, anyone found guilty of the criminal cartel offence can be imprisoned for up to five years and / or have an unlimited fine imposed. Under Section 204, directors can be disqualified from being a director for a maximum period of 15 years.

As well as the main cartel offence, there are also related offences in the Act. These are unreasonable failure to comply with requirements to answer questions or provide information (which can carry a prison sentence of up to six months and/or a fine of up to £5,000), making false or misleading statements or intentionally obstructing an investigation, both of which can mean up to two years in prison and/or an unlimited fine, and destroying, concealing or falsifying documents, which can mean up to five years in prison and/or an unlimited fine.

Defences To Cartel Allegations

The removal by the Enterprise Act 2013 of the need to prove dishonesty as part of a cartel prosecution could have led to an increase in prosecutions.

But the Act also introduced three defences against an allegation of cartel behaviour.

An individual does have a defence if they can show that:

The customer was given relevant information in advance of agreeing to purchase the goods

or services on offer or that such information was published before the arrangements were implemented.

He or she did not intend the nature of the agreement to be kept secret from customers or from the CMA.

He or she took reasonable steps to seek legal advice before acting as they did in reaching an arrangement with another party.

Competition Law Enforcement

In the UK, competition law is enforced by the Competition and Markets Authority (CMA) and the European Commission (EC). Both agencies can conduct civil or criminal investigations and can impose heavy fines against any company found to have broken competition law.

But private enforcement is also an option. This involves a company or individual that believes they have suffered a loss due to a breach of competition law bringing an action for damages against those they blame for that breach. Such a claim can follow a decision being made by the CMA or EC. These are referred to as follow-on claims and are heard at London's Competition Appeals Tribunal. But claims can be brought regardless of whether there is any EC or CMA investigation ongoing or concluded. These are called stand-alone claims.

The Enterprise and Regulatory Reform Act 2013 outlines when the CMA can investigate.

When deciding whether to investigate, the CMA has to consider issues such as:

- Whether the relevant market prevents, restricts or distorts competition regarding the supply or acquisition of products in the UK.
- Whether the Secretary of State has given a public interest intervention notice, requesting that the CMA investigates.
- The adverse effect on competition
- Public interest considerations, such as whether the arrangement has an effect on competition that may work against the public interest.

Self-Reporting And Leniency

Leniency

It is important to be aware that it is possible to obtain immunity from prosecution by admitting to participation in a cartel.

Individuals or businesses that self-report their involvement in cartel activity and then co-operate fully with the CMA investigation can receive a reduction in the penalty imposed. The CMA offers three levels of protection: Types A, B and C.

Type A leniency is the most far-reaching. It is usually referred to as immunity protection as it guarantees immunity from fines, prosecution of individuals and director disqualification. But this is only available to the first business or individual to report and provide evidence of a cartel that the CMA is either not already investigating or does not have sufficient information about. To receive Type A leniency, the business or individual must:

- Admit involvement in a cartel.
- Provide the CMA with all relevant information.
- Cooperate during the whole investigation.
- Have no further participation in the cartel activity.
- Not have forced another party to take part in the cartel.

Type B is available if an investigation has commenced and the applicant is the first to seek leniency. It can lead to an applicant receiving the same benefits that are available under Type A but this is subject to the discretion of the CMA.

Type C is available to those that provide evidence of cartel activity who do not gain Type A or B immunity. This may be because they were not the first to apply for leniency. It can mean, at the CMA's discretion, a company's fine being reduced by up to 50% and an individual receiving immunity.

In 2017, the CMA published guidance on applications for leniency from those in the regulated sector. This guidance related to what has been termed the single queue system. This involves an application for leniency being made only to the CMA but, if all conditions for leniency are met, the application should secure the applicant's place in the leniency process with all authorities.

The CMA's leniency programme is independent of that run by the European Commission. As a result, companies that are involved in cross-border cartels should apply for leniency to all relevant competition authorities.

The Importance Of The Best Legal Advice

Individuals and companies that find themselves involved in cartel activity, either as a victim of it or facing allegations relating to it, have to know how to respond. Making the right decisions and embarking on the most appropriate course of conduct are huge factors when it comes to securing the best and most appropriate outcome. That is the case whether you are the one accused of cartel behaviour or the one harmed by it.

Prevention

Without wanting to state the obvious, companies and individuals accused of cartel behaviour would not be facing the allegations if they had in place preventative measures that were fit for purpose.

At Rahman Ravelli, our corporate crime experts analyse the potential for anti-competitive behaviour, identify the risks in workplace practices and then devise and help implement procedures that can reduce that risk. This prevents companies having to face the possible reputational and financial damage, not to mention the risk of conviction, which can follow an allegation of anti-competitive behaviour.

Training staff in the relevant law and what to look out for as signs of possible cartel behaviour, coupled with an appropriate whistle blowing procedure for them to raise any concerns, can also reduce the chances of anti-competitive behaviour.

Companies that have a great deal of power in a market in which they trade also need to

ensure that they do not use that strength to unfairly exploit their position at the expense of others. This could happen where a company acts alone or in conjunction with another. But it could also occur when a merger is proposed that may have a significant effect on the market – and may prompt complaints from a third party that would be affected by such a merger.

Such issues may not always be immediately apparent, which is why such organisations may need to seek advice to remain legally compliant.

In the UK, the CMA can carry out market investigations to examine how competition is working in a particular business sector. These can be conducted even when there is no evidence or suggestion of competition law being breached. The EC can carry out similar investigations if there are concerns that markets are not working properly. Such enquiries can lead to competition law investigations against individual companies – which could prove costly for any company that has not taken steps to identify and reduce the risks of it acting illegally.

Rahman Ravelli carries out everything from in-depth audits through to close analysis of working practices to ensure you are aware of the risks and know what to do if a problem arises. We make it our job to ensure the right steps are taken so that the risks are managed carefully.

Investigation

If a company is made aware of concerns that it (or at least some individuals within it) may be involved in anti-competitive behaviour or that the company has been harmed by such activity, it has to view the investigation of such concerns as a priority. Corporate Investigations

Only a carefully planned and executed investigation will be able to determine if there has been any anti-competitive behaviour. We are recognised experts in conducting internal investigations and deducing if there has been wrongdoing, how it was committed and the most appropriate course of action.

Such an activity is the foundation of any response to allegations of anti-competitive behaviour.

Response

Any intelligent response to an allegation of anti-competitive behaviour has to be swift. Not responding or delaying a response can be hugely damaging. It can be the difference between being able to successfully challenge the allegations and being charged or the difference between being prosecuted and being granted immunity.

Any such allegations may be accompanied by a dawn raid, which will involve searches, material being seized and individuals being interviewed. Knowing both your rights and the legal limits on the behaviour of those carrying out the raid or any subsequent investigations is an essential part of mounting any defence to allegations. For example, if a premises is raided checks should be made on the validity of the

search warrant and exactly what the investigators are entitled to take away.

Our cartel teams regularly advise on such matters. Such advice is of great value: a dawn raid can be an intimidating experience; especially if it is accompanied by the arrest of staff members who are taken away to be interviewed or by the seizure of huge amounts of data and documentation. If someone is interviewed by investigators who have had a long time to look into allegations and seek evidence, that person's first response to questioning can set the tone for the rest of the investigation. For that reason alone the right legal representation is important.

What has to be remembered is that in many competition investigations there may be the possibility of reaching a negotiated settlement. Such a settlement where there has been an abuse of the market can see a company agree a settlement in exchange for a reduced fine. But such a conclusion may take careful negotiation, which can only be handled by those with experience in this field.

Private Actions

As mentioned earlier, those who believe they have suffered losses as a result of a cartel can bring private actions for damages. Such actions can place a huge responsibility on the company or individual that is being blamed for the losses. But bringing such a claim is also a large and far from simple undertaking.

Whether bringing or defending such an action, you need to have your case managed by an expert who is familiar with the processes involved and capable of analysing the circumstances surrounding the alleged wrongdoing. This has to be someone who can obtain and assess all the available evidence, uncover material relevant to the case that may not have already been made available and use all this and legal argument to challenge the assumptions being made by the other side.

Everyone at Rahman Ravelli who handles such cases is a recognised expert when it comes to such skills.

The Need for Expertise

Enforcement agencies around the world are taking a tougher approach to cartels and anti-competitive behaviour. The UK and other countries such as the US and Ireland have imprisoned individuals for breaking competition law and other nations have legislation making this possible.

Anyone facing such allegations needs representation from those with expertise in this field and all other legal areas relevant to their case. Our team at Rahman Ravelli provides all of that.

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