

Competition Law – Briefing Note

Introduction

As bookshops find themselves more and more under competitive pressures, I suspect the BA is going to be asked frequently by a number of its members to 'do something' about the current (unfair) terms and conditions that exist in the market place.

Terms and conditions are a matter between individual booksellers and individual publishers and wholesalers, so when trade associations like ourselves get involved in discussing T&Cs with suppliers we have to be mindful of competition issues which are covered especially by the Competition Act 1998. This briefing sets out, in general terms, what an Association like the BA can – and cannot – do.

In broad terms, the BA can make general comments to individual publishers on behalf of its members, but what it can't do is to provide a forum or facility whereby two or more booksellers are able to get together to agree terms of trade and/or prices, or to carve up markets. Boycotts cannot also be organized by two or more booksellers against individual suppliers. The Competition Act also makes it illegal for companies to abuse a dominant market position.

Furthermore, the Competition Act prevents manufacturers from having anything to do with setting the actual selling price adopted by retailers.

View of the current government

It is clear that recent governments have positively welcomed competition and open markets. The view taken has been that 'the competition regime' is one of the prime drivers behind any economic success the UK might have had. It is highly unlikely that the present government and competition authorities would support a return to the Net Book Agreement. This view is supported by the fact that in 1998 the Office of Fair Trading published a report: "*An evaluation of the impact upon productivity of ending RPM on books*" which - in effect - welcomed the end of the NBA and arrival of our free pricing regime in 1995.

The Competition Act 1998

The Competition Act 1998 (the "Act") prohibits agreements between undertakings [see Note 1 below], *decisions by associations of undertakings* [our emphasis] and concerted practices which may affect trade within the United Kingdom and have as their object or effect the prevention, restriction or distortion of competition within the UK.

The Act contains a non-exhaustive list of prohibited conduct. Businesses must not enter into agreements, decisions or practices which:

- **Directly or indirectly fix purchase or selling prices or any other trading conditions;**
- Limit or control production, markets, technical development or investment;

- Share (i.e. carve up) markets or suppliers; or
- Discriminate between customers or suppliers, for example charging different prices or imposing different terms where there is no difference in what is being supplied.

This illustrative list does not set a limit on the investigation and enforcement activities of the OFT, which can also refer a matter to the Competition Commission for further investigation. Other examples of prohibited conduct might include:

- **Agreement between undertakings to all source goods from a particular source,**
- **Agreement between undertakings to all cease to supply certain goods,**
- **Agreement between undertakings of the price at which goods are to be sold (price fixing),**
- Agreement to work together in the case of certain natural occurrences,
- Standards agreed by an industry association. [see Note 2 below]

Any agreement between undertakings, decisions by associations of undertakings or concerted practice that restricts or distorts competition is covered (not just the types of agreement listed above). An agreement may be formal (such as legally binding contracts, whether oral or written) or informal (such as unwritten 'gentlemen's agreements'). Even the smallest businesses need to avoid getting involved in anti-competitive agreements, such as cartels.

Note 1 " Undertaking" covers any natural or legal person engaged in economic activity, regardless of its legal status and the way in which it is financed. "Economic activity" is any activity consisting in offering goods or services on a given market. "Undertaking" therefore includes companies, firms, businesses, partnerships, individuals operating as sole traders, agricultural co-operatives, associations of undertakings (e.g. **trade associations** such as BA), non profit-making organisations and (in some circumstances) public entities.

Note 2 Standards that implement domestic or European regulation and provide the technical detail to make the regulation work are likely to be compliant with competition law.

These are some examples of what may be illegal and legal.

Example 1 Likely to be illegal

Competition concerns may arise if undertakings simply agree to adopt a particular course of action. For example, if a group of retailers all agree between themselves to impose a charge for a particular service from a certain date then that is likely to be in breach of competition law, whether the agreement

originated as a result of pressure by government, associations or from a group of undertakings.

Example 2 Likely to be legal

By way of contrast, it is understood that several electrical retailers have independently decided to stop supplying VCRs and others are dropping the supply of analogue TVs. This is because of the advent of DVD and digital. *Each retailer made their decision independently and there were no agreements between them.* The commercial imperatives are very clear, and Government is turning off the analogue television signal. So in this case there is no breach of competition law as there is no agreement/understanding between the retailers to stop supplying products. [The BA would, however, warn against promoting or facilitating the exchange of information (whether directly or indirectly through a third party) on commercially sensitive competitive matters that should otherwise be determined individually by the players in the market.]

Example 3 Illegal

There is great concern over the poor financial returns paid to widget manufacturers. Pressure is applied by lobby groups to give widget manufacturers a fairer deal. The retailers of widgets feel pressure from those sympathetic to the plight of widget manufacturers, including MPs with widget manufacturers as constituents. The retailers say that they have been placed under "immense pressure" by several stakeholders to raise widget prices to alleviate stress for widget manufacturers. The widget manufacturers and retailers say that no collusion took place, but the independent competition authority takes a different view, ruling that retailers and widget manufacturers colluded in raising retail prices. Evidence uncovered shows that the retailers exchanged future retail pricing intentions between them, not directly, but through the widget manufacturers. A fine is imposed of between 1-2% of worldwide turnover of the retailers involved.

Abuse of a dominant market position

The Competition Act, together with Article 82 of the European Community (EC) Treaty, also prohibits abuse of a dominant market position, within the UK, or the EU or a substantial part of it, if it may affect trade in the UK or the EU respectively. The dominant market position may be held by one or more undertakings, so a trade association itself may occupy a dominant market position, as may groups of its members. Prohibited conduct where there is a dominant position includes, for example, directly or indirectly imposing unfair prices or trading conditions, limiting production to the prejudice of consumers, applying dissimilar conditions to similar transactions and making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which have no connection with the subject of contracts.

Consequences of infringement

The involvement of an association of undertakings such as the BA in an infringement of prohibitions in the Act may result in financial penalties being imposed on the association, its members or both.

Further information

This Briefing Note to Council is designed only to give background information in the very broadest of terms. More comprehensive guidance on this issue can be found in the OFT's publications:

"Agreements and concerted practices: understanding competition law" at:
http://www.offt.gov.uk/shared_offt/business_leaflets/ca98_guidelines/oft401.pdf

"Trade associations, professional bodies and self-regulating bodies" at:
http://www.offt.gov.uk/shared_offt/business_leaflets/ca98_guidelines/oft408.pdf

or from your own legal advisers.

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