



The Competition Authority
An tÚdarás Iomáiochta

**Guide to Competition Law
and Policy for Businesses**

November 2009

Contents

About the Competition Authority	02
Benefits of competition	03
Promoting competition	03
Mergers and acquisitions	04
Anti-competitive behaviour	04
Trade associations	05
Cartels	05
The harm caused by cartels	06
Detecting cartels – warning signs	06
The price fixing cartel	06
The market sharing cartel	07
The bid rigging cartel	07
Abuse of dominance	08
Powers of the Competition Authority	09
Penalties for breaches	09
Private actions	10
Stopping anti-competitive behaviour – how you can help	10
Gathering and preserving evidence	11
What will the Competition Authority do?	11
Confidentiality	12
Can the Competition Authority give advice or comment on investigation?	12
The Cartel Immunity Programme	13
More information	14

About the Competition Authority

The Competition Authority's mission is "to ensure that competition works well for consumers and the Irish economy."

The Competition Authority is the national agency responsible for enforcing Irish and European competition law. These laws prohibit anti-competitive agreements between businesses and the abuse of a dominant position by a business.

Competition law protects the competitive process by ensuring that products and services are competitively priced, of good quality and innovative. This benefits everyone: consumers, businesses and the economy as a whole.

The Competition Authority strives to ensure that competition works for the benefit of all consumers in Ireland. Since businesses are consumers themselves, this includes making competition work well for business. The Competition Authority does this through a range of statutory functions.

Where there is evidence of businesses engaging in anti-competitive practices – through price-fixing cartels or abuse of a dominant position – the Competition Authority can intervene. Where appropriate, the Competition Authority brings those engaged in such practices before the courts. The Competition Authority can also block mergers and acquisitions that would substantially lessen competition.

The Competition Authority also has a broader duty to promote competition in the economy. To prevent future problems for businesses and consumers, the Competition Authority advises the Government about the implications for competition of proposed legislation or regulations. The Competition Authority in this way seeks to ensure that regulations are not an unnecessary burden on business.

Competition Authority investigations have led to the successful prosecution of businesses and persons for operating illegal cartels. Through its studies of various sectors of the economy, the Competition Authority has identified pro-competitive reforms – for example in legal services, electricity, and bus transport – and continues to advocate for reforms that would benefit businesses.



Benefits of competition

Promoting competition

In a competitive market, individual businesses may win or lose but the customer always gains.

Competition has many benefits:

- It increases choice – by stimulating a broader range of products and services.
- It ensures value for money – by ensuring firms compete on price and quality.
- It stimulates innovation and productivity – by motivating firms to create new products and reduce costs in order to win customers.
- It supports economic growth – by promoting choice, value, innovation and productivity.

Businesses benefit from having a choice of providers competing for their custom by offering better prices, better quality and new innovative products or services.

The Competition Authority has a statutory duty to promote competition in the economy by:

- Studying sectors of the economy to examine levels of competition.
- Identifying State laws or administrative practices that impact negatively on competition.
- Advising the Government, its Ministers and agencies, about the implications for competition of proposed legislation or regulations.
- Advising public authorities about competition issues.
- Informing the general public about competition issues.

Competition can be restricted by State laws, regulations or administrative practice. This also denies consumers, businesses and the economy the benefits of competition.

Where the Competition Authority finds that competition is being unnecessarily restricted by the State, it makes recommendations for reform. Examples of such restrictions on competition include:

- Excessive requirements to enter an industry or profession.
- A long-term legal right to a monopoly.
- A ban on advertising of prices.



Mergers and acquisitions

Anti-competitive behaviour

Mergers and acquisitions in industries that supply your business can be good or bad for your business and consumers:

- Good mergers lead to a more efficient business which passes on some of those efficiency savings to its customers.
- Bad mergers lead to a situation where one or more businesses have the power to raise their prices to their customers. That is, they substantially lessen competition.

Mergers over a certain financial threshold must be notified to the Competition Authority. The Competition Authority then has the power to block mergers where it finds that it will lead to a substantial lessening of competition. This must be done within strict legal time frames.

The Competition Authority aims at all times to ensure that it reviews mergers in a timely manner.

Anti-competitive behaviour can come in many forms. Any agreements, decisions or concerted practices that are anti-competitive are prohibited under competition law in both Ireland and the EU.

The law does not prohibit all agreements, decisions or concerted practices: only those that are harmful to consumers or rival firms. Those that threaten to raise prices to consumers or restrict output are deemed to be particularly harmful.

Competition law has found that some hard-core agreements between competitors are always harmful to consumers. A cartel is an illegal agreement between two or more competitors not to compete with each other. Cartels typically involve a secret conspiracy among many businesses. Those businesses and individuals found guilty of hard-core cartel offences face a number of penalties, including fines and jail sentences.

Other agreements that are not considered to be hard-core cartels may breach competition law where they have anti-competitive effects. Examples include: agreements between firms that are not competitors but are related through a chain of distribution, e.g. manufacturers and distributors, distributors and retailers, franchisors and franchisees. Agreements between competitors on research and development, group purchasing and standard-setting can also fall foul of competition law. These agreements may have been entered into for reasons other than the elimination of competition, but may nonetheless breach the law because of their anti-competitive effect.



Businesses that have a very large market share and thus hold a powerful position in relation to their competitors and their customers are also prohibited from behaving in certain ways that are anti-competitive. Holding a dominant position is not wrong in itself. Exploiting a dominant position to stifle competition is, however, anti-competitive. Attempting to eliminate your competitors or prevent new competitors emerging, by abusing your dominant position, can be a breach of competition law.

Trade associations

Trade Associations have certain obligations under Competition law. It is extremely important that trade associations understand and abide by these laws. The Competition Authority has published a Guidance Note to Trade Associations on how Competition Law affects them. The Guidance Note can be accessed at:

<http://www.tca.ie/PromotingCompetition/GuidanceNotes/GuidanceNotes.aspx>

Decisions of trade associations and representative organisations can breach competition law where the particular decision has the objective or effect of being anti-competitive.

Cartels are recognised as the most serious form of anti-competitive behaviour.

Cartels are illegal throughout the European Union. Indeed, throughout the world, cartels are recognised as the most serious breach of competition law. If found guilty, cartel members may be heavily fined and/or imprisoned. Pursuing cartels is the Competition Authority's top priority.

The following are regarded as hard-core cartels:

- Price fixing - agreeing the price that cartel members will charge for goods or services.
- Market sharing - agreeing on which locations or group of customers they each sell to.
- Limiting production - controlling the amount of goods or services produced in order to ensure prices remain high.
- Bid rigging/collusive tendering - agreeing how they will each tender or "bid" for a contract for goods or services to "rig" the outcome so that the business or public agency pays more for those goods or services.

Cartel agreements need not be in writing. Unwritten agreements or coordinated practices among competitors are equally illegal. Nor is it necessary for the agreement or concerted practice to achieve its desired effect to be found illegal. Simply entering into the agreement or concerted practice is illegal.

The Competition Authority relies heavily on information provided by those who discover cartels. Anyone with information is encouraged to bring it to the attention of the Competition Authority.

The harm caused by cartels

"Cartels result in consumers paying higher prices without any extra benefits and undermine the competitiveness of the Irish economy."

Cartels deprive consumers of the benefits of competition. They enable businesses to earn higher profits for less effort, hurting consumers and businesses in the process. In May 2006, Judge Raymond Groarke, during sentencing of two cartel participants involved in a heating oil cartel, said: *"Being involved in a cartel was theft."*

Many Irish consumers and businesses have probably been the victims of a cartel without ever realising it. A cartel will result in:

- Businesses and consumers paying more.
- Poorer quality goods.
- Less choice.

In addition cartels, if left unchecked, indirectly harm your business and the economy as a whole by raising the costs of doing business and reducing the incentive for businesses to become more efficient and to innovate.

Detecting cartels – warning signs

The price fixing cartel

A key element of competition is price. It is essential that your business sets its prices independently. Price-fixing agreements can take many forms. As well as agreeing to charge the same price, members of a cartel may also illegally agree on discounts, margins, price differentials, price increases or minimum prices.

Warning signs of price fixing:

- Signs of exchanges of confidential or sensitive business information between competitors.
- Any evidence that two or more sellers of a particular product have agreed to price or discount their products in a certain way.
- Price changes by a number of sellers of very similar products. Has the range of prices on offer suddenly narrowed? Have prices discounts suddenly changed?
- Price changes that occur in a regular and similar ways over time.
- The use of similar phrases or explanations when price changes are announced.

The presence of one of these warning signs does not necessarily mean a cartel is present. Indeed, the fact that prices are the same, or change at the same time, is not of itself enough to establish the existence of a cartel. However, you should be suspicious if some of them are present.

The market sharing cartel

Market sharing cartels occur when competing firms allocate specific customers, types of customers or geographic areas to one another.

Warning signs of market sharing:

- Any evidence that two or more sellers of a particular product have agreed not to sell to each other's customers.
- If you are told by a business that it cannot sell to you because of an arrangement it has with a competitor.
- Telltale phrases such as "that competitor should not have sold to you because it is not his territory".

The bid rigging cartel

Bid-rigging, also known as collusive tendering, is another form of cartel behaviour. It involves bidders for a contract agreeing on who will win the contract. Common forms of collusive tendering include bid suppression, cover bidding, and bid rotation. Submitting a tender to a procurement process that is designed not to win the contract is considered anti-competitive.

Warning signs of bid rigging:

- Competitors submit identical tenders.
- Bids contain less detail than expected.
- Some tenders are much higher than published price lists, previous tenders by the same firms or properly prepared client cost estimates.
- There are fewer competitors than normal submit tenders or suppliers refuse an invitation to bid.
- There is an unexplained large difference between the winning tender and all other tenders.

Abuse of dominance

The dividing line between aggressive competition and abuse of a dominant position can often be blurred and it may not be possible to see that behaviour was abusive until after the event.

A dominant position in a market means a firm can act independently of its competitors and consumers. The firm is able to operate without taking account of the reaction of its competitors, its customers or final consumers.

Holding a dominant position is not wrong in itself. For a breach of competition law to occur, a dominant position must be abused. In other words, the firm must exploit its dominant position to stifle competition.

A firm may abuse its dominant position by attempting to eliminate competitors and/or deny access to new entrants. Conduct that may be considered abuse by a firm in a dominant position includes:

- predatory pricing - selling a product or service at a very low price, intending to drive competitors out of the market, or create barriers to entry for potential new competitors;
- exclusive dealings – where a retailer or wholesaler is 'tied' to purchase from a supplier on the understanding that no other distributor will be appointed or receive supplies in a given area;
- tying - making the sale of one good conditional upon the purchase of a different good;
- refusal to supply - as an excuse to eliminate competition.

Only in limited circumstances will the above behaviours constitute a breach of the Competition Act.

Powers of the Competition Authority

Penalties for breaches

The Competition Authority has a number of investigative powers, including:

- Power of entry and search: Authorised Competition Authority officers can enter or search your premises or dwelling with a warrant issued by the District Court;
- Power to seize documents and records: Authorised officers can seize your documents or records on foot of a warrant issued by the District Court;
- Power to summon witnesses: The Competition Authority can summon witnesses to be examined under oath. Witnesses have the same immunities and privileges as a witness before the High Court. Failure to appear before the Competition Authority on foot of a witness summons is a criminal offence;
- Power to require production of records and information: The Competition Authority has the power to require you to produce records and information. Non-compliance is a criminal offence;
- Power to require information from third parties: The Competition Authority can obtain information from third parties, including professional advisors and financial institutions.

The Competition Authority's pursues hard-core cartels by investigating cases and preparing files for the Director of Public Prosecutions (DPP) and recommending criminal prosecution.

For non-hardcore cases of anti-competitive behaviour, the Competition Authority seeks to end the behaviour and harm to consumers. Where a business or group of businesses refuses to cease the behaviour, the Competition Authority goes to the High Court.

Businesses and individuals found guilty of hard-core cartel offences can face fines and/or jail sentences. In Ireland, only a court can decide that competition law has been broken. The Competition Authority does not itself impose any fines or other sanction on anti-competitive behaviour.

- A business, on conviction on indictment (before a judge and jury) may be fined up to €4 million or 10 per cent of the business turnover, whichever is greater.
- An individual found guilty of an offence may be fined up to €4 million or 10 per cent of their individual turnover, whichever is greater. They may also receive a prison sentence of up to five years.

Also, under Irish company law, a company director convicted of a criminal offence under competition law will automatically face disqualification from acting as a director for five years. The severity of the penalties available to the court reflects the serious nature of cartel behaviour.

Any individual or business that assists the cartel may also be found guilty of a criminal offence. Individuals have been successfully prosecuted for the crime of aiding and abetting a cartel. Those individuals received suspended jail sentences.

Stopping anti-competitive behaviour – how you can help

Private actions

The Competition Authority cannot recover money on behalf of anyone who believes they have been overcharged as a result of a cartel. Anyone injured by an anti-competitive behaviour may bring a civil (not criminal) action under Irish competition law. This may lead to an injunction or a court declaration against the behaviour and damages paid. Compensation in excess of actual damages (exemplary damages) may be awarded to the injured person or business.

The Competition Authority needs the help of buyers of goods and services, employees and the public at large to assist in combating anti-competitive behaviour.

Contact the Competition Authority and report suspected anti-competitive behaviour. Please include as much information as possible.

You can report anti-competitive behaviour via:

- “Complaint” forms on our website: www.tca.ie
- Email: complaints@tca.ie
- Phone: 1890 220 224 (international: +353-1-8045400)
- Fax: +353-1-8045401
- Writing to: The Competition Authority, Parnell House, 14 Parnell Square, Dublin 1.

What will the Competition Authority do?

Gathering and preserving evidence

In the event of a criminal prosecution, guilt must be proved "beyond reasonable doubt". To assist the Competition Authority in its investigation, it is vital that all available evidence is gathered and preserved as soon as you suspect a cartel. Cartel arrangements are usually made secretly and can be difficult to detect. Watch out for the warning signs detailed earlier in this booklet. Keep a note of what you observe.

Evidence may be in many forms. Letters informing you of price changes, notes of telephone conversations, records of meetings, may all provide an essential link in the evidence chain. Any documents should be preserved in their original state. You should retain the document as you received it and not make any additional notes or marks on it. No matter how insignificant it may appear at the time, carefully record and document everything. Even minor details may be crucial.

Make notes at every stage. Include details of conversations with representatives of the firms allegedly involved, together with details of times, dates and the location where such conversations took place. You can never make too many notes but it is very easy to make too few.

Please take similar steps where you suspect a firm may be abusing a dominant position.

Members of the public, employees, individual businesses, trade organisations, public representatives, Government Departments and public agencies are all invited to report suspected anti-competitive behaviour to the Competition Authority.

As a first step, the Competition Authority will check that the issue of concern can be dealt with under competition law. Where the issue is within the Competition Authority's remit, it may be resolved quite quickly without the need for legal action. Some issues require a more detailed evaluation in order to assess their significance. A few cases proceed all the way to court. Every effort is made to complete investigations as quickly as possible.

The Competition Authority operates a screening system to focus resources on the substantive cases while ensuring that the rest are dealt with quickly but fairly. In all matters, the Competition Authority's focus is to protect the competitive process throughout the economy for the wider public interest.

Confidentiality

Can the Competition Authority give advice or comment on investigation?

Our policy and obligations

Any information you give the Competition Authority is treated as confidential.

It is the Competition Authority's policy not to:

- talk about individual investigations,
- reveal who the person who has complained is during an investigation,
- give the names of organisations or people being investigated, or
- give information to the media.

However, the Competition Authority may have to disclose confidential information if required to do so by law. We may be required to disclose information if:

- Disclosure is for the purpose and administration of Competition Law.
- Disclosure is necessary for the prevention of the commission of a criminal offence.
- When disclosure is made in the course of legal proceedings.

Your responsibilities

The Competition Authority asks that you avoid talking about individual investigations or give information to the media. In particular, you should not let the people or businesses suspected of being involved in anti-competitive activities know that you have made, or are going to make, a complaint to the Competition Authority. This will only warn a cartel or dominant business and could mean that evidence is removed or destroyed.

The Competition Authority does not act on anyone's behalf, like a solicitor does. Thus, the Competition Authority does not:

- Give legal advice.
- Comment publicly on whether it is investigating a particular alleged anti-competitive behaviour or not.
- Comment on the progress of any investigation.



The Cartel Immunity Programme

The Cartel Immunity Programme is a vital weapon in the fight against cartels.

The Cartel Immunity Programme is an important programme that has been introduced by the Competition Authority. Most importantly, it provides a means to break the secrecy surrounding cartel agreements.

If you are a member of a cartel, you could avoid prosecution if you are the first individual or business to self-report your involvement in the cartel. You may then avoid fines and jail time. The clear benefit of the programme is the possibility of immunity from prosecution for the first person to come forward and co-operate fully with an investigation.

Qualification

In order to obtain immunity, you should come forward as soon as possible and before the Authority has gathered enough evidence to complete its investigation. You must take effective steps to terminate your participation in the illegal activity. You must do nothing to alert your former associates that you have applied under the programme. Before you approached the Authority, you must not have forced another party to participate in the illegal activity nor should you have acted as an instigator in the cartel.

Throughout the course of the Authority's investigation you must be completely co-operative. In particular, you must reveal all offences in which you were involved, and you must provide full and truthful disclosures. In the case of a company or corporation, the application for immunity must be a corporate act.

Other leniency models

Leniency models like the Cartel Immunity Programme are common throughout the world. The European Commission has a Leniency Notice to reward companies that report cartels. The Commission can offer full immunity or a reduction in fines that would otherwise be imposed on a cartel member. In 2006, Bayer escaped huge fines after it applied for leniency for its role in fixing prices and sharing customers for certain types of synthetic rubber. The company had lodged applications for leniency in December 2002, and subsequently prompted the investigation into the cartel. The other companies in the cartel were later subjected to €519 million worth of fines.

Applying for immunity in Ireland

Applications for immunity must be made to the designated officer in the Competition Authority. Contact with the designated officer must be in person or by telephone.

The designated officer may be contacted on 087 763 1378 between the hours of 10am and 4pm Monday to Friday, except public or bank holidays.

More information

More information on the Competition Authority is available on our website: www.tca.ie

To contact us

- Email: info@tca.ie
- Phone: 1890 220 224 (international: + 353 1 8045400)
- Fax: + 353 1 8045401
- Write to: The Competition Authority, Parnell House, 14 Parnell Square, Dublin 1.

Disclaimer

This booklet does not give legal advice. Individuals should refer to the competition legislation and obtain independent legal advice when questions of law arise or if a particular situation causes concern.

