

October 2012



**The Competition Authority**  
An tÚdarás Iomaíochta

## Your Business and Competition Law

How it helps you & what you  
need to know



# Introduction

Competition benefits everyone - businesses, consumers and the economy as a whole. It encourages businesses to compete for customers. Buyers of goods and services - from individual shoppers to businesses - benefit from paying less and having more choice and better quality. Competition results in open, dynamic markets, featuring increased productivity, innovation and better value.

When consumers benefit from competition, the economy does too. For example, when the price of electricity falls because of more suppliers and increased competition, the cost of doing business comes down. This makes Irish businesses more competitive at home and abroad, which in turn supports economic growth and ultimately job creation.

When there is a lack of competition, for example, where there is a price-fixing cartel or a company abusing a dominant position, both businesses and consumers suffer. The cost of doing business goes up.

While all businesses must comply with competition law, it is also there to protect you and your business from anti-competitive behaviour by others.

This booklet aims to help you stay on the right side of competition law, help protect your business from anti-competitive conduct by others, help spot when others are engaging in anti-competitive behaviour and guide you if you suspect anti-competitive activity.

The Competition Authority is the national agency responsible for enforcing Irish and European competition law. The Competition Authority's responsibilities are to:

- investigate breaches of competition law and take action against them
- advise Government Departments and policy-makers on ways to protect and improve competition in the economy
- evaluate mergers to ensure that pro-competitive mergers are allowed and ones that will harm competition are not



# Avoid becoming a victim of anti-competitive behaviour

There are things you can do to protect your business from anti-competitive behaviour. The main thing is to be vigilant and to report any suspicions of anti-competitive behaviour to the Competition Authority. Sometimes it is difficult to differentiate between healthy competition and behaviour that is in breach of competition law. However, there are a number of things that are against the law which you should look out for among competitors and suppliers.

1. Cartels
2. Abuse of a dominant position
3. Other potentially anti-competitive agreements

## Cartels

Cartels, where two or more businesses agree not to compete with each other, are the most serious form of anti-competitive behaviour. The agreement does not have to be in writing, nor does it even have to have been carried out. Simply making a cartel agreement is illegal.

Cartels include:

- agreements to fix prices for goods and services, including agreements with competitors on discounts etc.
- market-sharing where competitors divide up locations or customers among themselves
- controlling the amount of goods or services in order to keep prices higher
- rigging bids among competitors so that the outcome guarantees one person or company in particular wins the contract

What to look out for:

- signs that competitors are exchanging confidential pricing or sensitive business information
- evidence competitors have agreed to price or discount products in a certain way
- price changes happening in regular and similar ways over time
- use of similar phrases or explanations by competitors when price changes are announced
- refusals to quote (or inexplicably high quotes) to supply customers outside their normal trading areas
- comments by sellers that certain customers are “their customers”
- Restrictions on output that reduce the quantity of desirable goods available to consumers and which keep prices high



# Abuse of dominance

# Other potentially anti-competitive agreements

Holding a dominant position in a market means that a business has the power to act independently of its competitors, customers or suppliers. Holding a dominant position is not illegal, however using that position to stifle competition is an issue.

Companies abuse a dominant position by, for example, attempting to eliminate competitors or stop new entrants to the market.

What to look out for (note: the following may indicate an abuse of dominance, depending on the circumstances):

- predatory pricing: selling a product or service below cost to drive competitors out of the market
- exclusive dealings: where a company 'ties' a retailer or wholesaler to purchase from them on the promise that no other company will be supplied in that area
- tying: making the sale of one thing to your business conditional on buying something else
- refusal to supply: as an excuse to eliminate competition

Other agreements (written or otherwise) which may be anti-competitive, depending on the circumstances, include:

- agreements (like resale price maintenance) between firms that are not competitors but are connected through a chain of distribution, for example, manufacturers and distributors, distributors and retailers, franchisors and franchisees
- agreements between competitors that reduce competition, by co-ordinating behaviour, preventing new competition or discouraging aggressive competition
- agreements incorporating long exclusivity periods

These agreements may have been entered into for seemingly valid business reasons but may be in breach of competition law because of their anti-competitive effect.

# Making sure your business stays on the right side of the law

Making sure you or your business does not become a victim of anti-competitive behaviour is important. It is equally important that you make sure your business stays on the right side of the law. Penalties for breaches of competition law are severe and include fines of up to €5 million, prison sentences of up to 10 years and disqualification from being a company director for five years.

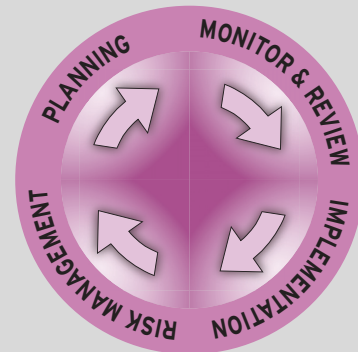
It is vital to encourage a culture of compliance in your business. This should be evident from the top levels of management down through all levels within the organisation. All staff should demonstrate a commitment to complying with the law. A competition law compliance programme is a way your business can strive to have the right measures in place and can form part of your company's overall risk management and compliance measures.

Having an effective compliance programme in place not only reduces the risk of breaking the law but helps create a culture of compliance with the law, which gives your business a competitive edge and can lead to improved performance. Compliance goes hand in hand with good ethical behaviour and corporate responsibility.

Every business needs to design a compliance programme that suits its needs. It will depend on the structure and conditions of the market you are operating in and the size and structure of your business. A compliance programme does not need to be costly but should be implemented fully, with proper training for staff and reviewed regularly. Once staff are trained they will also be able to spot instances where your firm is a potential victim of an anti-competitive practice.

The Competition Authority has a helpful guide available on how to set up an effective compliance programme. It is available on our website.

Here we outline some simple steps to setting up your compliance programme.



### 1. Identifying and assessing the risks

The first step is to analyse your business agreements, processes and practices to identify any areas where competition law might be a factor. Examples of these might include contracts with suppliers or competitors, or incentives to sales representatives to increase turnover.

### 2. Planning and development

The next step is to plan and develop a compliance programme suitable for your business, based on the risks you have identified. This will involve nominating appropriate staff to be responsible for the programme, designing the programme, a written document outlining the programme and procedures for non-compliance.

### 3. Implementation and training

When your programme is ready it needs to be rolled out to all staff. Management and staff should understand what the programme is about, why it is good for the business and important to adhere to it and understand the implications of failing to comply. Everyone should be fully trained on all aspects of the programme once it is launched and on an ongoing basis. It is a good idea to link the compliance programme to performance management and other staff/business policies.

### 4. Monitoring and review

Once your programme is up and running it is important to monitor and review how it is working. It is a good idea to include it as a management function and report on it regularly. Monitoring will help you to see if the measures you put in place are effective in preventing breaches of competition. You should also review the programme itself from time to time to make sure it is working well and is properly supported and to make sure the risks have not changed.

Further information on the steps outlined above can be found in the Competition Authority's guide to complying with competition law.



# Compliance Checklist

# Note on Trade Associations

Here is a quick checklist to help you with your compliance programme. This checklist is intended as an aid and is not exhaustive. Legal advice is still the best and safest route to follow for complete confidence.

- ✓ Ensure that the identity of the Compliance Officer is known to all staff
- ✓ Ensure that the Compliance Officer has an 'open door policy'
- ✓ Design the compliance programme to suit your business
- ✓ Ensure that all staff have access to the compliance programme
- ✓ Give training to all staff on the compliance programme
- ✓ Have all members of management and staff sign declarations stating that they have read and fully understand the competition law compliance programme and have been adequately trained
- ✓ Training and monitoring of compliance should be ongoing and the compliance programme regularly reviewed
- ✓ Report any suspected anti-competitive behaviour immediately
- ✓ Seek legal advice if there is any uncertainty

Membership of trade associations and business representative bodies offers benefits to businesses. They offer a way for businesses to jointly represent the views of the industry, to lobby effectively and promote their business. However, competition law equally applies to trade associations or 'groups of undertakings' under competition law. Trade associations need to be careful not to co-ordinate activity of their members, especially in relation to pricing issues or collective action such as boycotts.

The Competition Authority has published comprehensive guidance, available on our website, specifically aimed at trade associations: [Guidance Notice on Activities of Trade Associations and Compliance with Competition Law](#).

This provides trade associations with guidance on what activities they can engage in while still complying with competition law.





# Checklist for members of trade associations

Members of a trade association can ultimately be held responsible if the trade association they belong to acts in an anti-competitive way and as such they should:

- ✓ Ensure that there is a proper agenda before any meeting
- ✓ Check that discussions are properly recorded and that any omissions or mistakes in minutes are corrected at the next meeting
- ✓ Keep proper records of all agendas, minutes and other relevant documentation circulated
- ✓ Be careful when entering into discussions with other members during or after meetings and avoid any discussion on issues such as pricing, sales, volumes, markets and customers.
- ✓ Avoid any exchanges of information, especially strategic information such as plans to expand into new geographical areas, to reduce or increase prices.
- ✓ Seek legal advice before making any commitments or entering into any agreements on what appear to be sensitive issues that might raise competition concerns

- ✓ When attending meetings of a trade association:
  - report any members involved in anti-competitive discussions
  - object immediately to any discussion of pricing, volumes and illegal co-ordinated conduct
  - leave the meeting if the discussion continues, reiterating your objection
  - make sure that your objection is noted
  - distance your company from the discussion in writing immediately afterwards
  - make sure that you do not implement anything that was agreed

# What to do if you suspect anti-competitive behaviour

## Cartel Immunity Programme

If you or your business has been or is involved in a cartel there are steps you can take. The Competition Authority along with the Director of Public Prosecutions (DPP) offers a Cartel Immunity Programme. This offers a person or company involved in a cartel the opportunity to seek immunity for prosecution in exchange for being the first to admit involvement along with full co-operation with any subsequent investigation and prosecution.

If you wish to seek immunity for involvement in a cartel, you can apply to the designated officer by phoning **087 7631378**. The Cartel Immunity Programme could mean you escape prosecution along with hefty fines and a possible jail sentence.

If you suspect a competitor, supplier, customer or any other business of engaging in anti-competitive activity you should report it to the Competition Authority.

Email: [complaints@tca.ie](mailto:complaints@tca.ie)

Phone: 1890 220 224

Website: [www.tca.ie/complaints](http://www.tca.ie/complaints)

Write to: The Competition Authority,  
Parnell House,  
14 Parnell Square,  
Dublin 1



# Penalties for competition offences

The Competition Authority pursues hardcore cartels by investigating cases and preparing files for the DPP and recommending criminal prosecution.

For non-hardcore cases of anti-competitive behaviour the Competition Authority will seek an end to the behaviour directly with the parties. Commitments or undertakings given to the Authority can be made an order of the Court and are legally binding. However, if a business or group of businesses refuses to cease the behaviour the Competition Authority takes proceedings in the High Court.

Businesses and individuals found guilty of hardcore cartel offences can face fines and/or jail sentences. In Ireland, only a court can decide that competition law has been broken. Also, it is the Court that decides on the sanction to be imposed.

Any individual or business that assists a cartel can also be found guilty of a criminal offence. Individuals have been successfully prosecuted for aiding and abetting cartels in Ireland.

In 2012 increased penalties for competition offences were introduced. The Competition (Amendment) Act 2012 brought new enforcement tools to help the Competition Authority investigate and enforce competition law, increased fines and penalties and new measures to help injured parties seek compensation following a competition law conviction.

- Maximum fine in the district court - **€5,000**
- Maximum prison sentence in the District Court - **6 months**

- Maximum fine for criminal conviction in the Central Criminal Court - **€5 million**
- Maximum prison sentence for criminal conviction in the Central Criminal Court - **10 years**

In addition

- the Probation Act can no longer be applied for competition offences
- a convicted person will have to pay the costs of the investigation, detection and prosecution
- if the Authority accepts commitments from a company it can now apply to have those made an order of court, meaning a subsequent breach would be a contempt of court
- actions for damages by injured parties are now easier to take.

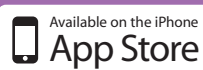
All of these measures send out a clear message that competition offences are regarded as very serious and will be treated that way by the courts.

It is in the best interests of your business to make sure that you stay on the right side of competition law or indeed if you suspect others of anti-competitive behaviour you should report it.



Further information for businesses can be  
found on the Competition Authority website  
[www.tca.ie](http://www.tca.ie)

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*Disclaimer*

This booklet does not give legal advice, it is intended as a guide. Individuals and businesses should refer to the competition legislation and seek independent legal advice.