

# APSCo Update on Legal & Compliance Issues

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## HOW TO COMPLY WITH COMPETITION LAW

### What is prohibited?

The [Competition Act 1998 \(the Act\)](#) under Chapters I and II, prohibits anti-competitive behavior such as anti-competitive agreements between businesses and the abuse of a dominant position by a business.

### Anti-competitive agreements:

[Chapter 1 of the Competition Act 1998](#) prohibits anti-competitive agreements between businesses.

A company must not:

- Agree to fix prices or terms of trade, for example agreeing price rises with your competitors.
- Agree to limit or control your production, markets, technical development or investment to reduce competition.
- Share markets or sources of supply.
- Carve up markets or customers, for example agreeing with a competitor that you will bid for one contract and they will take another; or
- Discriminate between customers, for example charging different prices or imposing different terms where there is no difference in the circumstances of supply.

Any agreement that prevents, restricts or distorts competition is covered (not just the types of agreement listed above). An agreement could be formal (such as legally binding contracts) or informal (such as unwritten "gentlemen's agreements" or a practice). The most serious types of anti-competitive agreements are called cartels (if two or more businesses agree not to compete with each other in certain ways, it is called a 'cartel').

You can find further guidance about cartels and other anti-competitive activities [here](#).

### Other anti-competitive agreements:

Other agreements that could be anti-competitive, whether in writing or otherwise, include:

- Horizontal agreements - agreements for co-operation between two or more competing businesses operating at the same level in the market (e.g., joint selling or joint purchasing with competitors; standard setting); and
- Vertical agreements - agreements between companies operating at different levels of the production or distribution chain (e.g., between supplier and retailer or manufacturer and distributor).

### Abuse of a Dominant Market Position

[Chapter II of the Competition Act 1998](#) prohibits the abuse of a dominant position by one or more businesses having a dominant position in a particular market within the UK. This mainly applies to businesses that have a large market share, usually 40% or more, although it does not determine on its own whether a business is

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dominant. The Competition & Markets Authority (CMA) specifies in its [guidance](#) that a business is only likely to hold a dominant position if it is able to behave independently of the normal constraints imposed by competitors, suppliers and consumers. Other factors taken into consideration in determining whether a company is dominant include the number and size of competitors and customers and whether new businesses can easily set up in competition.

The type of practices that could indicate abuse include but are not limited to:

- Charging unfair prices, such as prices so low that they do not cover the costs of the products or services sold.
- Imposing other unfair trading conditions on customers; or
- Limiting production or refusing to supply an existing customer without an objective reason.

## Exemptions

Some agreements that restrict competition are exempt from the Competition Act 1998's prohibition where they satisfy certain conditions.

The Act distinguishes two types of exemptions: exemptions for individual agreements and block exemptions.

### ➤ Exemption for individual agreements

The Act sets out the conditions to be met to benefit from an individual exemption:

- The agreement must contribute to clear efficiencies.
- It must provide a fair share of the resulting benefits to consumers.
- The restrictions on competition that it provides for must be no more than the minimum that is necessary to enable consumers to gain these benefits.
- It must not give the parties to the agreement the opportunity to eliminate competition from a substantial part of the relevant market.

If all the above conditions are met, the agreement can be exempt from the prohibition set out in Chapter 1 of the Act for as long as these conditions remain in place.

The parties involved in such an agreement do not need to seek any authorisation from the CMA. They need to satisfy themselves, based on a self-assessment, that the agreement fulfils the conditions listed above.

### ➤ Block exemptions

Under the Competition Act 1998, the Secretary of State may make a 'block' exemption order that exempts from the Chapter I prohibition any particular categories of agreement which the CMA considers are likely to satisfy the conditions for exemption as required for individual agreements and listed above.

This will ensure confidence for companies that, if their agreement meets the conditions of the block exemption, the said agreement will be legal and will reduce the burden of assessing compliance with UK competition law for the parties to the agreement.

An agreement that falls within a category specified in a block exemption and meets the conditions specified in the block will:

- Not be prohibited under the Chapter I prohibition of the Act,
- Will be enforceable by the parties to the agreement.

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The parties will ensure that:

- The conditions to benefit from the block exemption are met,
- They are in a position to prove that the agreement meets the conditions.

Where an agreement has as its object or effect an appreciable restriction of competition but does not fall within the terms of the relevant exemption, the parties to the agreement will need to consider the following questions:

- Should it be amended so as to bring it within the terms of the block exemption?
- Does it fulfil the conditions for individual exemption?

**Important note:** Neither the individual exemption nor the block exemptions exempt agreements from the application of provisions equivalents to the Chapter I prohibition of the Act in the laws of other jurisdictions, such as Article 101 of the Treaty on the Functioning of the European Union (TFEU) in the EU.

Further details and guidance on the application of the individual exemption and the block exemptions can be found [here](#) and [here](#).

## Your responsibility in complying with Competition Laws:

Set out below is a non-exhaustive list of “do’s and don’ts” that will give employees an early warning of areas, which may infringe competition law.

### Do’s:

- **Do** avoid contact or meetings with competitors unless you have a legitimate reason for doing so and take care when meeting competitors outside of working hours. You should undertake a risk assessment before any planned meeting with competitors, to identify the sensitivity of information that may be exchanged as a result of the meeting - e.g., information you are not allowed to share with a competitor such as future pricing decisions.
- **Do** discuss any proposed agreements by or with competitors with your line manager before negotiations begin.
- **Do**, if a competitor starts discussing any of the items listed under "**DON'TS**" below, always state that you cannot discuss such matters, terminate the conversation, and make your line manager aware immediately.
- **Do** report it, if you discover anything corrupt or otherwise improper occurring in relation to your business.
- **Do** make sure, that all staff receive appropriate up to date competition law compliance training to recognise such anticompetitive behaviour. New joiners must receive training as part of their induction process.
- **Do**, monitor and review your internal policy and processes regarding competition legislation.

### Don'ts:

- **Don't** discuss or agree arrangements with competitors relating to prices, rates, discounts, timing of pricing changes, or other trading conditions or restrictions relating to markets and/or sources of supply.
- **Don't** discuss or agree arrangements with competitors regarding blacklisting or boycotting of any customers, competitors, or suppliers.
- **Don't** discuss or agree arrangements with competitors regarding cooperation agreements with competitors, without agreeing with your line manager first.

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- **Don't** discuss or agree arrangements with competitors on bids for contracts or procedures for responding to bid invitations.

References to “**arrangements**” above are not limited to arrangements in writing. Arrangements can be written, or oral and include not only formal arrangements but also informal arrangements and activities and can be inferred from surrounding circumstances.

## If you're involved in anti-competitive activity

- Your business can be fined up to 10% of its worldwide turnover and sued for damages.
- You can be fined or sent to prison for up to 5 years if you're found guilty of being involved in cartel activity.
- Company directors can be disqualified from being a director for up to 15 years.
- You could be pursued for damages and be tied up in litigation.
- Your business's reputation could be damaged.
- You can spend years fighting legal cases.

You can find more guidance about the risks of contravening with UK Competition Law in the Short Guide provided by the CMA [here](#).

## How to report anti-competitive activity

The way you report anti-competitive activity depends on the type of activity.

### ➤ Report a Cartel

Contact the Competition and Markets Authority (CMA) cartels hotline if you:

- know about a cartel.
- have been involved in one.

Businesses and individuals that come forward to report their own involvement in a cartel may have their financial penalty reduced or avoid a penalty altogether.

The CMA offers financial rewards of up to £100,000 (in exceptional circumstances) for information about cartel activity. You can find more information about the potential reward [here](#).

### ➤ Report other anti-competitive activity

Contact the CMA if you have concerns about anti-competitive activity at the [general.enquiries@cma.gov.uk](mailto:general.enquiries@cma.gov.uk)

Ensure you provide the CMA with:

- your contact details.
- the business you have concerns about and a description of the issue along with any supporting evidence.
- the market area according to the UK Standard Classification Index.
- details of any other organisations you have contacted.

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## ➤ Report your concerns to an industry regulator

You can also report concerns about anti-competitive activity to the following Regulators:

- [Civil Aviation Authority](#) for airports and air traffic services.
- [Financial Conduct Authority](#) for financial services in the UK.
- [Monitor](#) for health services in England.
- [Ofcom](#) for television, radio, telephone, postal and internet services.
- [Ofgem](#) for gas and electricity in England, Wales and Scotland.
- [Ofwat](#) for water and sewage services in England and Wales.
- [Office of Road and Rail](#) for railways in England, Wales and Scotland.
- [Payment Systems Regulator](#) for payment systems in the UK.
- [Utility Regulator](#) for gas, electricity, water and sewerage in Northern Ireland.

Further guidance about the report of anti-competitive activity can be found [here](#).

**If you have any queries, please contact the legal helpdesk at [legalhelpdesk@apsco.org](mailto:legalhelpdesk@apsco.org).**