

RESTRICTED AGREEMENTS AND CONCERTED PRACTICES



Competition Policy Seminar
December 10-11, 2013
Saint Lucia

What is Anticompetitive Business Conduct?

Under the Revised Treaty, Art.177 states:

1. A Member State shall, within its jurisdiction, prohibit as being anti-competitive business conduct, the following;

a) Agreements between enterprises, decisions by associations of enterprises, and concerted practices by enterprises which have as their object or effect the prevention, restriction or distortion of competition within the Community,

What are Restricted Agreements and Concerted Business Practices?

Examples are set out at Art. 177 (2) which states:

Anti-competitive business conduct within the meaning of paragraph 1 includes the following:

- a) the direct or indirect fixing of purchase or selling prices
- b) the limitation or control of production, markets, investment or technical knowledge
- c) the artificial dividing up of markets or restriction of supply sources
- d) The application of unequal conditions to parties undertaking equivalent engagements in commercial transactions thereby causing a competitive disadvantage
- j) Exclusionary vertical restrictions; and
- k) Bid -rigging

Are Restricted Agreements and Concerted practices bad?

THE ANSWER IS YES and NO!

- Agreements between enterprises or decisions by associations of enterprises in itself are not bad. It is the intent of the agreements or decisions.
- **POSITIVES** - Firms can collaborate in a number of ways to gain some competitive advantage for a sector through joint investment in costly infrastructure, or undertake R&D, or procurement of goods and services to reduce the cost to the sector or individual firms. Customers benefit from such behaviour
- **NEGATIVES** - What is considered bad is use of such agreements to abuse consumers or create an unfair advantage against new entrants or prevent the entry of competitors into a market.

Common Types of Abuses

Price Fixing:

- This occurs when enterprises with a significant share of a market agree to influence the prices for product (or service) in a manner calculated to obtain higher than competitive prices for their goods or services from customers.
- **Example 1: In 2009**, the UK Office of Fair Trading (OFT) imposed fines totalling £39.27 million on six recruitment agencies for price-fixing and the collective boycott of another company in the supply of candidates to the construction industry in the UK. The six (6) firms entered into an agreement and/or concerted practice to fix target fee rates for the supply of candidates to intermediaries and certain construction companies in the UK. One new entrant into the market suffered from a boycott of business from the members of the cartel who sought to reduce competition in the market.
- **Example 2: In 2011**, the European Commission settled a cartel investigation with four producers of cathode ray tubes (CRT) glass used in televisions and computer screens. Japanese firms Asahi Glass (AGC) and Nippon Electric Glass (NEG) and Germany's Schott AG were fined a total of € 128.7 million for operating a cartel that ultimately affected consumers in Europe. Samsung Corning Precision Materials (SCP) of Korea was granted full immunity for being the first to give information about the cartel. The cartel lasted from 23 February 1999 until 27 December 2004 and coordinated the prices for CRT glass in the European Economic Area (EEA)

Common Types of Abuses

Market sharing/customer allocation:

- This relates to agreements between enterprises to allocate markets or customers to reduce competition among enterprises in a market for goods or services. Consumers are the losers suffering higher prices and reduced choice and quality.
- **Example 1: In 2012**, the European Commission fined seven international groups of companies a total of € 1 470 515 000 for participating in either one or both of two distinct cartels in the sector of cathode ray tubes ("CRT"). For almost ten years, between 1996 and 2006, these companies fixed prices, shared markets, allocated customers between themselves and restricted their output.
- One cartel concerned colour picture tubes used for televisions and the other one colour display tubes used in computer monitors. The cartels operated worldwide.
- Chunghwa, LG Electronics, Philips and Samsung SDI participated in both cartels. Panasonic, Toshiba, MTPD (currently a Panasonic subsidiary) and Technicolor (formerly Thomson) participated only in the cartel for television tubes.

Common Types of Abuses

Bid-rigging

Competing enterprises conspire to agree to artificially raise bid prices to ensure the winning bid is higher than under a competitive process. Increasing the cost to commercial, public or individuals awarding the contracts.

- **Example: In 2009**, the OFT imposed fines totalling £129.2 million on 103 construction firms in England which it has found had colluded with competitors on building contracts in illegal anti-competitive bid-rigging activities on 199 tenders from 2000 to 2006, mostly in the form of 'cover pricing'.
- In 11 tendering rounds, the lowest bidder faced no genuine competition because all other bids were cover bids, leading to an even greater risk that the client may have unknowingly paid a higher price.
- The OFT also found six instances where successful bidders had paid an agreed sum of money to the unsuccessful bidder (known as a 'compensation payment'). These payments of between £2,500 and £60,000 were facilitated by the raising of false invoices.
- The infringements affected building projects across England worth in excess of £200 million including schools, universities hospitals, and numerous private projects from the construction of apartment blocks to housing refurbishments.

Are there any Exemptions for Anti-competitive Business Conduct in the RTC?

Article 177.4 states:

Any enterprise shall not be treated as engaging in anti-competitive business conduct if it establishes that the activity complained of:

- (a) contributes to:
 - (i) the improvement of production or distribution of goods and services or
 - (ii) the promotion of technical or economic progress, while allowing consumers their fair share of the resulting benefit;
- (b) imposes on the enterprises affected only such restrictions as are indispensable to the attainment of the objectives mentioned in subparagraph (a); or
- (c) does not afford the enterprise engaged in the activity the possibility of eliminating competition in respect of a substantial part of the market for goods or services concerned.

How is a Restricted Agreement or Concerted Practice investigated

According to the Treaty consideration shall be given to:

- a)** the relevant market defined in terms of the product and geographic context;
- b)** market structure and development;
- c)** the level of competition amongst the participants in terms of the number of competitors, production capacity and product demand;
- d)** the barriers to entry of competitors; and
- e)** the history of competition and rivalry between participants in the sector of activity
- f)** the appropriate theory of competitive harm.

How is a Restricted agreement or Concerted practice determined?

Practical Steps used by competition authorities:

Step 1 - Define the relevant product market:

- **The relevant product market comprises all those products and/or services that are regarded as interchangeable or substitutable by the consumer by reason of the products' characteristics, their prices and their intended use;**
- **The relevant geographic market comprises the area in which the firms concerned are involved in the supply of products or services and in which the conditions of competition are sufficiently homogeneous**

How is abuse of dominance determined?

Step 2 – Market structure

- **Thresholds, e.g. a firm with greater than 40 percent of the market may be considered dominant (see Guyana and Trinidad and Tobago competition law)**

Step 3 – the barriers to entry of competitors; and

Step 4 – the level of competition amongst the participants in terms of the number of competitors, production capacity and product demand;

Step 5 – the history of competition and rivalry between participants in the sector of activity

Step 6 – the appropriate theory of competitive harm.

What action can be taken when abuse is found?

Article 174.4 states:

The Commission shall, to the extent required to remedy or penalise anti-competitive business conduct referred to in Article 177:

- (b) order the termination or nullification as the case may require, of agreements, conduct, activities or decisions prohibited by Article 170;
- (c) direct the enterprise to cease and desist from anti-competitive business conduct and to take such steps as are necessary to overcome the effects of abuse of its dominant position in the market, **or any other business** conduct inconsistent with the principles of fair competition set out in this Chapter;
- (i) order payment of compensation to persons affected; and
- (j) impose fines for breaches of the rules of competition.



THANK YOU!!!