

Competition & Bookselling: Avoiding The Pitfalls

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Not too long ago, when the Competition Act and its prohibitions were mentioned in the context of the book industry, eyes used to glaze over. But recent rulings and positions over agency terms on e-books taken by the US Department of Justice and the EU Commission have concentrated the minds of many wondrously. The publishers in the US ended up being fined collectively an estimated \$55,000,000 – because they were found to have conspired together in a New York restaurant to talk about imposing common terms and conditions (in an effort to thwart Amazon), thus contravening US anti-trust law. Here in the UK, the OFT imposed a fine of £58.5 million on BA for fuel surcharge price fixing. In the EU fines can be eye-watering – witness the recent €1 billion (yes, billion) fine imposed on Intel for pricing practices. It is also increasingly commonplace for those affected by anti-competitive practices to seek civil damages in the UK (and other) courts, relying on the decision of the regulatory establishing the fact of the infringement. All in all, this is serious stuff!

The DoJ case and the increased interest of the OFT and EU Commission in the book market has had implications for the BA and bookselling. Frankly, it is much more difficult these days to get two or more publishers in the same room together to discuss, say, trade initiatives, in case it could be construed that they had shared information on commercial matters. Indeed, the Publishers Association now has a lawyer present at many of its meetings to ensure there is no discussion which contravenes UK competition law, and at British Retail Consortium Board meetings (which I attend), a written Statement on Competition Policy appears on every BRC agenda, which the Chairman of the meeting solemnly reads out before the start of the meeting to protect the association from any anti-competitive discussion taking place.

So in view of all this, under current competition legislation, booksellers should be very mindful of what they discuss and agree among themselves when they convene with other booksellers at meetings etc both inside – and outside – the BA, or consider together some sort of commercial venture like the formation of a buying group or consortium.

For these reasons, the BA wants to ensure members are aware of the ins and outs of current competition legislation, setting out what they can – and cannot - do.

There is good news and bad news on issues of compliance. The good news is that, in relation to the most serious conduct capable of attracting the highest levels of fines and scrutiny, the legal position is clear and straightforward for the most part. The bad news is that in many other areas the law remains fiendishly complicated and unclear. “*On the one hand and on the other hand*” is what you often hear from the professional advisers. Lawyers have to be brought in to advise on particular situations – which is expensive - and you often get told by them that “*It depends on individual circumstances etc*” and therefore general advice is very difficult to give.

So what I have tried to do by means of this brief article is to relay to you – *in very broad and general terms* – the provisions of the Competition Act 1998 and how it might affect you – a BA member – and also how it might affect the BA itself. This is not, I stress, a definitive guide. Indeed, if you are thinking of getting together with other booksellers to progress some sort of commercial initiative, you should certainly map out clearly in writing your intentions and seek your own legal advice.

Competition legislation particularly affecting booksellers

As background, there are three main pieces of competition legislation in the UK (our Irish members have very similar provisions), these being:

1. The Competition Act 1998.
2. The EU Enforcement Regulation (called Regulation 1/2003) - which gives national competition authorities the power to apply Articles 101 and 102 of the EU Treaty which, in almost identical terms to the UK competition laws, prohibits such arrangements where they affect trade between EU member states.
3. The Enterprise Act 2002, which introduces a criminal offence for individuals who dishonestly engage in cartel agreements. These are agreements where two or more competing companies dishonestly engage in any one of a number of commercial activities which include price-fixing. Again, the penalties for a successful prosecution under this Act are severe: three directors of companies' party to a marine hoses cartel are serving sentences of between two and three years for involvement in a cartel which operated both here and in the United States.

Competition Act 1998

How is the Competition Act ["CA"] relevant to booksellers? There are two particular parts to the CA which are pertinent:

- Chapter 1 Prohibition
- Chapter II Prohibition

Prevention of Fair Competition - Chapter 1 Prohibition

The key part is Section 2(1). This **prohibits agreements between undertakings which may affect trade in the UK and which have the object or effect of preventing, restricting or distorting competition within the UK or a part of the UK.**

This would mean that it would be illegal for two or more booksellers to get together to fix prices and/or to discuss or share market information. This also applies if two or more booksellers got together to discuss the terms and conditions of supply offered by one or more publishers, or agreed to get together to obtain a better trade discount from their suppliers as, again, they would be acting anti-competitively and would be vulnerable to prosecution.

The key distinction under Chapter I is between (i) horizontal agreements between actual or potential competitors and (ii) vertical agreements between, e.g., a manufacturer and retailer. The former are treated much more harshly under competition law. They include obvious "no no's" such as price-fixing or customer or market allocation and the sharing of commercial sensitive information between competitors (e.g., pricing intentions). Vertical agreements, by contrast, tend to be viewed more benignly provided the markets shares of the parties to the agreement are below 40% and no so-called "hardcore" restrictions are included (such as resale price maintenance and absolute territorial protection). So, for example, in a vertical context, recommended pricing is fine provided it does not translate into fixed minimum pricing.

Importantly, an agreement will only breach the Chapter 1 Prohibition if it has as its object or effect an *appreciable* prevention, restriction or distortion of competition in the UK. If any such agreement does not have an *appreciable* effect on competition it will fall outside the scope of the Chapter I Prohibition. The question as to what represents an ‘appreciable’ effect is open to many different interpretations depending on the circumstances. But, in the case of horizontal agreements that involve obvious restrictions of competition (e.g. price fixing) an appreciable effect will almost always be assumed. In other contexts, the market shares of the parties to the agreement will usually be the key indicator. In establishing the meaning of *appreciable* effect the OFT has invariably adopted the EU Commission’s threshold for agreements of minor importance of a 5% or 10% combined market share. For example, the EU Commission’s Horizontal Guidelines indicate that joint purchasing agreements are unlikely to restrict competition where the parties’ combined market share is below 15%

The Chapter 1 Prohibition extends to “decisions by associations of undertakings” and such an association of undertakings may infringe the Chapter I Prohibition if its decisions, rules, recommendations or other activities lead to an *appreciable* restriction of competition. The term “decisions” is widely construed and extends to cover “recommendations”.

So, for instance, if you wanted to get together with other booksellers to form a buying group in order to purchase at improved trade terms, you would – in all likelihood – be moving into areas potentially covered by the Chapter 1 Prohibition – even if it was left to individual booksellers to fix their own selling prices of the books they purchased in this way.

And if the BA made a suggestion to two or more booksellers that they might well do ‘xyz’ when negotiating with publishers on matters concerning pricing and/or terms and conditions of supply, it would be likely to be construed that the BA was, in fact, making a recommendation to its members, and so the BA could be vulnerable to action against both it as an individual entity as well as against each of its members.

Misuse of a Dominant Market Position - Chapter II Prohibition

The Chapter II Prohibition applies where there is an abuse by one or more undertakings of a dominant position within the UK, or any part of it, which may affect trade in the UK (s.18(1) Competition Act). Whether or not a particular entity has a dominant position will depend on whether it is immune from the normal competitive disciplining forces of the market and can act with a high degree of independence from those forces. The most common metric of dominance is market shares, with 40% being a “safe harbour.” Examples of abuse include imposing unfair purchase prices and using discriminatory trading conditions in a way that places other parties at a competitive disadvantage. Importantly, *it is not enough for a concern merely to dominate a market; there also has to be proof that abuse was practised.*

Buying Consortia

Members of the BA will typically be considered as actual or potential competitors at the retail level. Accordingly, an agreement between two or more competitors to jointly purchase products from suppliers will generally engage Chapter I. At the same time, however, it is recognised that small and medium sized enterprises (SMEs) often face a small number of powerful suppliers, and may therefore need to engage in joint purchasing to achieve better terms - or terms that are closer to those achieved by larger purchasers. In general, if the share of the total purchasing market accounted for by the parties to the joint purchasing

agreement is less than 15% it is very unlikely that competition concerns would arise. Above this level you will need to engage in a more detailed, individual assessment.

Any fixing of retail prices and sharing of information between competitors would be likely to contravene competition legislation, even if market shares are small. In all cases, two important points should be emphasised. First, it is imperative that even if there is joint purchasing this must not lead to any understanding, coordination, or limitation in relation to selling prices. The latter would be a very serious violation. Second, to reduce the chances that joint purchasing would lead to some spill over of information into the selling side, try to keep the teams doing the purchasing and selling activities entirely separate. Joint buyers will sometimes form a new purchasing entity, or entrust that activity to a third party procurement person (e.g. an accountant). Such requirements may be perceived as overkill in the case of SMEs, but it is always worth bearing in mind the need for some separation of buying and retail sales functions.

A potted summary

In practice, the UK Act prohibits:

- Actual or potential competitors on a relevant competition market:
 - Setting fixed or minimum prices at which they sell their goods or services
 - Sharing customers
 - Allocating geographic areas or customer types amongst themselves
 - Agreeing to discriminate against certain types of customer (collective boycotts, for example) and
 - Agreeing common terms on which they supply.
- The Act also prohibits some so-called “vertical” agreements; for example, where a manufacturer seeks to set the resale price at which its dealer can sell (i.e. it prohibits resale price maintenance) or there is absolute territorial protection from out-of-territory sales in the case of exclusive distribution. (A restriction on “active” sales is fine but it cannot lead to total protection from out-of-territory “passive” sales requests.)

The Act extends to exchange of confidential information between competitors as well as to agreements themselves, especially where the information exchanged relates to prices charged, particular customers to whom sales have been made and the terms of such sales. Exchange of information as to costs can also be caught. The Act also catches non-binding, “gentlemen’s agreements”. The term “agreement” also includes a trade association’s governing documents and extends to recommendations made by a trade association to its members.

Conclusions

Members must not agree, or even discuss, their company prices, pricing policies, discounts or rebates with other businesses; even the act of exchanging such confidential price information could amount of an unlawful agreement - even if the exchange is not reciprocal and there is no agreement that either party would adhere to the exchanged price or information.

Similarly members of trade associations must not be involved in any discussion as to the allocation of particular customers or markets to particular members or the imposition of quotas or caps on production.

These are the most serious competition law violations, which are to be avoided, and policed, at all times. But competition law also affects other areas such as vertical distribution agreements and abuses of a dominant position.

A good discipline in all cases is to ask yourself how would you feel if a particular discussion, whether orally or in writing, landed on the desk of a competition regulator or was put before a High Court judge. If, having asked this question, you have any unease, then it is nearly always sensible to verify compliance, ideally before the agreement or practice is put into effect.

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