

# Unfair competition?

## Brief guide to complaining about anti-competitive conduct or regulations



Reckon LLP is a consultancy specialising in regulation and competition economics. This guide sets out our understanding of relevant laws and procedures, and our service offering and pricing at the time of going to press. It provides general information only and is not a full substitute for professional or legal advice tailored to your circumstances.

## The law protects your business

### Abuse of a dominant position

The Competition Act 1998 and the EC Treaty incorporated in British law by the European Communities Act 1972 prohibit the abuse of a dominant position.

A dominant position in competition law refers to a situation where an enterprise is not constrained by competition. This might be, for example:

- A monopoly (e.g. a water company).
- A dominant position in a local market, if buyers will not travel long distances (e.g. for funeral services).
- A dominant position in supplying spare parts or intellectual property licenses, even if there is effective competition for the main product (e.g. a car maker).
- A discretionary power to determine who is allowed to supply in a market (e.g. on safety grounds).

Abuse of a dominant position is the misuse of the power associated with a dominant position. Examples include:

- Ceasing to provide services that have no effective substitute (including constructive withdrawal through unfair prices) in a way that excludes competitors.
- Using a dominant position to exclude a competitor, e.g. through predatory targeting of special offers.
- As a dominant supplier to a trade, setting prices and terms that place some customers or types of customers at a competitive disadvantage.
- Exploiting abnormal restrictions on competition, e.g. high prices that take advantage of illegal activity.

This does not mean that businesses do not have the right to choose their trading partners, to compete on price or capacity, to offer different prices to different customers, or to extract rents or profits. But those who hold a dominant position have a special responsibility not to use their dominant position for an improper purpose, or to use their power beyond what is needed for legitimate purposes.

Some conduct that may appear abusive might be justified by reference to specific legitimate purposes: this is known as objective justification. For example, excluding a contractor who failed a safety test may be justified, if the test in question is the least restrictive way of meeting a genuine safety purpose.

### Agreements, cartels and conspiracies

The law prohibits agreements, decisions of trade associations and concerted practices that prevent, restrict or distort competition, unless they are justifiable in accordance with specific statutory conditions.

Unjustified anti-competitive agreements are unenforceable. Compensation can also be sought for harm caused by illegal practices.

### Unjustified State aid

The EC Treaty also restricts State aid to enterprises. State aid means benefits (including tax concessions) given to specific enterprises. It excludes investment on the same terms as a private sector investor, and remuneration for public services on market-tested terms or on the basis of an objective assessment of expenditure requirements.

The European Commission has broad powers to approve State aid. But if aid has not been notified then repayment of the aid may be secured through the UK courts.

### Anti-competitive conduct by State bodies

State bodies engaged in commercial activities (e.g. a local authority acting as a landlord) are subject to the same rules as private enterprises.

Bodies that discharge regulatory or administrative duties (e.g. liquor licensing) are not covered by competition law. But action is still possible under administrative law for unreasonable failure to take account of competition, as well as under EC law if international trade may be affected. In particular Article 86(1) of the EC Treaty extends the prohibition on abuse of a dominant position to some abuses of State power.

In all cases involving State power, whether directly or through enterprises with special rights assigned by the State, public interest purposes might provide a justification for otherwise abusive acts. The law recognises justifications for the delivery of public services and for income raised for the State by fiscal monopolies.

Such justifications are limited by proportionality: only restrictions on competition that are necessary for the public interest purpose to be achieved are permissible.

Furthermore, even if a State restriction on competition is itself permitted, its exploitation by an enterprise (public or private) in a dominant position may still be abusive.

## But enforcement can be tricky

### The law provides means of redress

The Office of Fair Trading (OFT) and some sector regulators oversee the UK competition rules. Complaining to the OFT is free. If an infringement decision is made, a claim for damages can be made in the Competition Appeal Tribunal. The Tribunal also hears appeals against decisions of the OFT and the sector regulators.

Competition law can be enforced through actions for damages or applications for interim relief in the courts of England and Wales, Scotland or Northern Ireland. It can also be invoked as a defence in legal proceedings.

### But there are still some shortcomings

Despite these structures, getting effective redress for unfair competition can be difficult in the UK. The regulators have been slow and ineffective at pursuing abuse cases.

In 2004-2005, the OFT opened 1,173 complaint cases but only 17 formal investigations.

The OFT focuses its resources on mergers and on conduct thought most detrimental to consumers. Many abuses have little visible direct effect on consumers, and these cases have received inadequate attention. On 6 July 2005 the Tribunal found that the OFT had been wrong to overlook abuse in a case involving funeral directors' access to a crematorium, and reminded it that the law prohibits abuse whether it directly prejudices consumers or not.

The sector regulators are also impaired by conflicting claims on their resources. Whilst normal statutory duties do not apply in competition cases, it is still difficult for them to disregard their other policies entirely. Environmental and funding pressures, and the need to encourage monopolies to achieve efficiency improvements in the short term, may impair the protection of individual businesses and of innovative ways of competing.

Going to court can be faster and more effective, but is also more expensive, time-consuming and risky.

### What this means for complainants

In order to make effective use of current enforcement mechanisms, a complaint must be focused on valid competition law issues, pre-empt counter-arguments, and provide a clear scope for the investigation. It should provide the terms of reference for an investigation and prevent drift or abandonment.

## How we can help

We offer a complaint drafting and handling service specifically designed to address the shortcomings of the current UK system of competition law enforcement.

Presented with a real business problem or grievance, we identify the elements that can give rise to a competition law issue, and draft a focused written complaint that pre-empts likely counter-arguments and defines a clear scope for the investigation to prevent drift and abandonment.

### Our fee for handling a complaint

An initial one-hour discussion of your case with a Reckon partner is free. We then send you within three working days a free note setting out our understanding of the problem and what competition complaints might help solve it.

We are not interested in pursuing bad cases. If we do not think that you have a valid competition complaint, we will say so and refer you to other avenues if possible.

We may decline a case, if unavailable or conflicted out.

If, having examined our free note, you decide to ask us to handle your case, the maximum fee for our work to prepare a written complaint will be £2,500+VAT. A lower fee may be charged for very simple cases or if we can be persuaded to work on a *pro bono* basis.

### What is included

A £2,500+VAT payment guarantees the following:

- Detailed examination of your case and evaluation of the prospects of a complaint under competition law.
- The preparation of a complaint document tailored to your complaint and the relevant authorities, designed to act as terms of reference for the investigation.
- Complaint submission and initial follow-up of UK authorities, if you ask us to deal with them directly.

### What is not included

We cannot help with cases involving allegations of covert cartel or fraudulent conduct; applications for leniency in cartel cases; or the conduct of litigation. You should probably contact a solicitor to handle such issues.

Our complaint handling service is self-contained and designed to deliver results for a simple fixed fee. We also offer other consultancy services in regulation and competition economics; please visit [www.reckon.co.uk](http://www.reckon.co.uk) for further information about our range of services.

## How to complain

### Office of Fair Trading (OFT)

The OFT's published advice is to call 0845 224499 for advice on "whether or not the matter is covered by the Act", before submitting a complaint.

If you ask Reckon to handle your complaint, we will begin by understanding your business grievance and expressing it in the language of competition law. We can then call the OFT with all relevant elements at hand and try to ensure that the complaint goes to the right person.

### Other regulatory bodies

Complaints about certain sectors specified by the legislation may be transferred by the OFT to a sectoral regulator (CAA, NIAER, Ofcom, Ofgem, Ofwat or ORR). The European Commission can also consider matters that might affect trade within the European Union, and has exclusive powers to control State aid. Contact details for these regulators are on our website.

If you ask Reckon to handle your complaint, we will consider whether it falls within a regulated area and whether it is appropriate to invoke European Community procedures. We will then target the relevant regulators.

### Contacting Reckon LLP

For an initial discussion of a case or to ask Reckon to handle a complaint, please call:

- Franck Latrémolière Tel. 020 7841 5858
- Nicholas Francis Tel. 020 7841 5859

You can also write to [f.latremoliere@reckon.co.uk](mailto:f.latremoliere@reckon.co.uk) or Reckon LLP, 20 Theobald's Road, London, WC1X 8PF.

Visit [www.reckon.co.uk/unfair](http://www.reckon.co.uk/unfair) for further information.