# Competition Law – Introduction for Due Diligence

This element introduces the broad spectrum of competition law in the UK

# Competition Law

Given its purpose, nature and scope, competition law is a **pervasive issue** for clients and might arise in a range of different contexts. When conducting due diligence you should be mindful of its scope and its practical application; the consequences of competition law being breached can be significant and might take effect in multiple jurisdictions.

In the UK, the key regulator for competition law is **the Competition and Markets Authority (CMA)**. There are four key areas of competition law as shown below. We have considered Merger Control in the previous Topic.

**Competition Law includes**

* Anti-competitive agreements
* Abuse of a dominant position
* Merger control
* Subsidy control

Due diligence review of contracts may reveal concerns in relation to anti-competitive agreements in particular. As a corporate lawyer any concerns should be discussed with specialist lawyers.

# Anti-competitive agreements

Competition law controls the conditions under which companies can co-operate with each other, whether or not they are competitors and even if they are at different levels of the supply chain known as the ‘**Chapter I prohibition’**.

For the prohibition to ‘bite’, each of the three criteria listed in section 2 must be met:

1. There must be an **agreement between undertakings**, a decision by associations of undertakings or a concerted practice between undertakings; which
2. **may affect trade** within the UK; and
3. has as its object or effect the **prevention, restriction or distortion of** competition within the UK.

**Key Consequence**

An agreement that meets these three criteria is prohibited (and therefore void) unless it comes within an exemption.

**Exemptions?**

* Certain categories of agreement are excluded from the regime by a block exemption as the competition authorities consider the arrangements to be beneficial and to be encouraged (e.g. distribution agreements.
* There is also a **de minimis threshold** exempting agreements that are not expected to have an appreciable impact on trade.
* Exemptions also apply to agreements that (1) **contribute to improvements** in production/distribution or promoting technical or economic progress while allowing consumers a fair share of the resulting benefit; (2) only impose restrictions that **are indispensable to the attainment** of these objectives; and (3) do not afford the parties the possibility of **eliminating competition**.

‘**Horizontal’ and ‘Vertical’ agreements**

The application of the Chapter I prohibition will differ depending on whether an arrangement is classed as a 'horizontal' or a 'vertical' agreement.  Agreements are classified as **vertical** if for the purposes of the agreement the parties operate at **different levels of the supply chain.  Horizontal** agreements, meanwhile, operate at the **same level of the supply chain**.

**Horizontal Agreements**

The Chapter I prohibition clearly controls the conditions under which **competitors** can co-operate under a horizontal agreement – remembering that, under normal market conditions, competitors can be expected to compete on a range of factors including price, product quality and innovation.

Examples of horizontal agreements include **joint purchasing agreements** and **research and development** agreements made between competing enterprises.  Depending on their terms, these agreements may fall under exemptions.

Horizontal agreements where the parties are aiming to fix prices or divide up customers or markets could lead to the creation of a **'cartel'**: individuals involved in setting up a cartel will be guilty of a criminal offence. Where competitors cease to compete as a result of a cartel, consumers have no choice but to pay **artificially high prices** or to accept **worse non-financial** conditions.

**Vertical Agreements**

The Chapter I prohibition also controls the conditions under which parties can co-operate under a **vertical agreement**.

One of the most common forms of vertical agreement is the **distribution agreement**, between a supplier of products and a distributor who will buy the products and then sell them on to the end customers.

Most vertical agreements will be drafted so as to benefit from a block exemption of the Chapter I prohibition.

Even where the block exemption does not apply the agreement will not necessarily fall foul of the Chapter I prohibition, however, the parties will need to consider the extent to which the agreement might have the effect of restricting competition.

# Competition law: Penalties

Breach of competition law can have **significant consequences**:

* The CMA can, for example, impose **significant fines** (amounting to up to 10% of worldwide turnover for each infringement) if the Chapter I or Chapter II prohibitions are breached.
* Directors might individually face:
  + **fines;**
  + **imprisonment** and/or
  + **disqualification** from acting as a director.
* There might also be **civil liability**, with those affected bringing civil claims for damages.
* **Reputational damage** might be significant (for both companies and their directors).

# Summary

* Competition law is pervasive and covers anti-competitive agreements, abuse of a dominant position, merger control and subsidy control.
* The Chapter I prohibition will cause anti-competitive agreements or specific provisions within such agreements to be void – there are various exemptions that will apply differently to horizontal and vertical agreements.
* Consequences of breaching competition law are potentially considerable and might result in fines; civil claims for damages; imprisonment; disqualification as a director; and reputational damage.