**Competition law – Chapter I prohibition**

This element explains the UK’s prohibition on anti-competitive agreements

**Introduction**

Competition law controls the conditions under which companies can co-operate, either as competitors (**horizontal**) or at different levels of the supply chain (**vertical**).

Such agreements are controlled under s2 Competition Act 1998 (‘**CA**’), which is the UK’s prohibition on anti-competitive agreements. This is sometimes referred to as the ‘**Chapter I** **prohibition**’ (because s2 appears in Chapter I of the CA).

This topic explains the fundamental principles and analyses s2 CA and introduces certain relevant ancillary sources (such as block exemptions).

**The Chapter I prohibition**

Section 2(1) CA sets out the Chapter I prohibition.

For the Chapter I prohibition to bite, each of the three criteria listed in s2(1) must be met:

an agreement between undertakings, a decision by associations of undertakings or a concerted practice between undertakings; which

may affect trade within the UK (if implemented/ intended to be implemented in the UK) OR otherwise, is likely to have an immediate, substantial and foreseeable effect on trade in the UK; and

has as its object or effect the prevention, restriction or distortion of competition within the UK.

**Agreement, decision and concerted practice**

Bear in mind that all three terms – ‘agreement’, ‘decision’ and ‘concerted practice’ – in s2(1) CA are included to ensure that anti-competitive behaviour is captured in its many different forms, rather than for the purpose of making arbitrary distinctions between different types of collusion. Section 2(1) is deliberately broad.

The term ‘**agreement**’ could include any commercial contract, though it is wider as it includes non-binding and informal agreements too.

A **decision by an association of undertakings** would most commonly be taken by a trade association or professional body of some sort (established with at least some degree of formality), which may seek to co-ordinate the activities of its members (often by means of its rule-book).

A **concerted practice** is often described in general terms to mean an ‘informal co-operation’ between two or more undertakings without any formal agreement, decision or understanding. For example, suppliers of a particular type of goods might all raise their prices to the same level at the same time.

**May affect trade within the UK / likely to have an immediate, substantial and foreseeable effect on trade in the UK**

s.2(1)(a) (‘… **may affect trade in the UK**…’) catches potential, as well as actual and demonstrable, effects. It is not necessary, when applying this criterion, to specify the effect with any great particularity. For example, a given agreement in the UK may affect trade because it might affect sales of particular products, or the structure of the market or even just the pattern of trade. To fall within s.2(1)(a), the parties must have implemented or intended to implement the agreement in the UK.

s.2(1)(b) in contrast, covers agreements which were not implemented/intended to be implemented in the UK (i.e. were made in a foreign jurisdiction) but which are likely to have an ‘…immediate, substantial and foreseeable effect on trade in the UK’. This provision was introduced by the Digital Markets, Competition and Consumers Act 2024 and provides Chapter I with explicit extra-territorial reach. This could be used by the CMA to investigate an agreement, decision or practice made by technology companies based in other jurisdictions but which affects their UK users/consumers.

**Object or effect is the prevention, restriction or distortion of competition**

**This is the crux of s2.** ‘Prevention, restriction or distortion’ are interchangeable terms and, in practice, we use the expression ‘restriction of competition’ as a catch-all term.

It may be sufficient that the companies have an ‘object’ (ie intention) of restricting competition without actually implementing their plans. Conversely, it can also be sufficient that agreements have as their ‘effect’ the restriction of competition, even if that is not their intention.

**What does ‘restriction of competition’ mean?** The primary purpose of competition law is to protect consumers, not competitors of the parties to the agreement, although it is clear that the removal of competitors from the marketplace (and hence consumer choice) is likely to have a negative knock-on effect for consumers.

S2(2) CA provides a non-exhaustive list of common types of activity that *prima facie* fall within the general prohibition.

(a) directly or indirectly fix purchase or selling prices or any other trading conditions. Example: A supplier supplies its products to distributors on the condition that all distributors agree to abide by the supplier’s predetermined price list when selling the products on (this is known as ‘resale price maintenance’).

It is easy to see how this leads to higher prices for the ultimate consumer. A price fixing agreement removes the key form of competition between distributors, ie competition on the price.

(b) limit or control production, markets, technical development or investment. Example: A supplier sells its products to a distributor on condition that the distributor does not sell to any customer outside a certain territory.

In its most noxious form, this is known as a ban on ‘passive’ sales i.e. sales where the customer approaches the retailer. It is objectionable because an ultimate consumer should be free to ‘shop around’ and, having identified the distributor from whom it wishes to purchase, not be turned away for an arbitrary reason such as its geographic location. Such a restriction is considered to be particularly harmful to the free movement of goods and services.

A supplier preventing ‘active’ sales (eg preventing the distributor from targeting customers within, or outside, a certain territory in its marketing) is another, albeit less damaging, way of limiting markets.

(c) share markets or sources of supply. Example: A supplier and its distributors agree to carve up the market artificially: one distributor will sell goods in one geographical area and another in another geographical area (eg the North and South of England). Such arrangements are not uncommon in distribution agreements (particularly those which are exclusive or sole) and it is for this reason that distribution agreements commonly fall within the prohibition.

This scenario would create unfairness for consumers who could end up with a limited choice, depending on where they live.

(d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage. Example: A supplier and its distributors decide together they won’t supply to party C (a ‘collective boycott’).

The effect on consumers here is less direct. However, cutting out C from the supply chain in this way creates an artificial disadvantage for C as against its own competitors. It is likely to be better for the ultimate consumer if C is able to compete on a ‘level playing field’.

(e) make the conclusion of contracts subject to acceptance by other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of the contracts. Example: A supplier of Product A sells Product A to distributors on condition they also purchase Product B, whether the two products are related or not (‘bundling’).

Competing suppliers of Product B suffer to the extent that distributors are already tied in to purchasing Product B from Company X. Ultimately, consumers for Product B are likely to suffer as competitors (and hence consumer choice) are squeezed out of the market.

**Block exemptions**

You will appreciate that the Chapter I prohibition is broad and it captures many common commercial agreements, eg distribution agreements.

The CA resolves this problem by providing exemptions to the prohibition.

One type of exemption is a ‘block exemption’. Block exemptions are pieces of legislation. A block provides a detailed set of rules applicable to all agreements of a particular category (ie a block of agreements). Broadly speaking, it is the commercial purpose of an agreement which determines in which block (if any) it belongs. Any agreement belonging to the block to which a block exemption refers is, as a matter of law, exempt from the general prohibition – always provided that its terms comply with the detailed provisions of the respective block exemption.

Block exemptions are crucially important in practice. The details of the block exemptions are beyond the scope of this element.

**Effect of the anti-competitive behaviour too small to be considered appreciable**

Another form of exemption is that applying to anti-competitive behaviour the effect of which is too small to be considered appreciable. This is known as the *de minimis* rule and derives originally from the EC’s published guidance on their approach, which was also adopted by the CMA.

This principle is not truly an exemption to the prohibition because it does not derive from legislation. Rather, it sets a limit on the applicability of one of the criteria of the general prohibition. In certain cases where the parties’ shares of the relevant markets affected by the agreement fall below certain thresholds, there is no infringement of the general prohibition.

In practice, measuring a given client’s market share is a complex exercise, because it is necessary first to determine, as a matter of fact in any given scenario, what are ‘the relevant markets affected by the agreement’.

**Effect of the anti-competitive behaviour too small to be considered appreciable**

Once a client’s market share has been ascertained, then the following conditions must be met in order to determine whether, as a matter of fact in any given scenario, there is an appreciable effect on competition.

• **Vertical Agreements** - the market share of each party taken separately **must not exceed 15%**

• **Horizontal Agreements** – the market share of the parties together **must not exceed 10%**

**Effect of the anti-competitive behaviour too small to be considered appreciable**

The *de minimis* (“too small to be meaningful”) rules are subject to some important provisos, which can render the parties’ market shares irrelevant:

notwithstanding how small the parties’ market shares are, the parties cannot benefit from these *de minimis* rules in relation to agreements which have as their *object* the prevention, restriction or distortion of competition ie any intentional restriction of competition in a market. Therefore, the *de minimis* principle is only applicable in cases of inadvertently anti-competitive conduct. If the agreement contains any hardcore restrictions (eg price fixing) the *de minimis* principle will not apply.

It is better for the parties to an agreement to ensure its terms comply with the relevant block exemption, if possible, than to rely on these de minimis provisions.

**Self-assessment?**

The final line of protection against liability for infringing the Chapter I prohibition where neither a block exemption nor the *de minimis* rules provide an ‘escape route’ is to turn to s9 CA in order to argue that the agreement is exempt on its own merits. The principle underlying s9 CA is to render exempt from the Chapter I prohibition agreements which are fundamentally desirable from a commercial or policy point of view, albeit they may have minor anti-competitive side-effects.

**To this end, s9 CA sets out four stringent conditions all of which must satisfied**. The agreement must:

have a positive effect, ie contribute to improvement of production or distribution, or promote technical or economic progress; andallow consumers to receive a fair share of the benefit; andnot impose restrictions on the undertakings concerned that are beyond those strictly necessary to help to achieve the previous two objectives; andnot act as a tool to effectively eliminate competition in relation to a substantial part of the affected products.

Any agreement with hardcore restrictions or which has as its object the restriction of competition is very unlikely to fall within s9. Due to the difficulty of applying these conditions in practice and the resultant risk and uncertainty, this provision is rarely relied upon.

**Summary**

• The Chapter I prohibition is broad in scope, and applies in principle where:

• an agreement between undertakings, a decision by associations of undertakings or a concerted practice between undertakings…

• … may affect trade within the UK (where the agreement is implemented or intended to be implemented in the UK), or in other cases is likely to have an immediate, substantial and foreseeable effect on trade in the UK, and

• has as its object or effect the prevention, restriction or distortion of competition within the UK.

• If there is a prima facie infringement of the Chapter I prohibition, then you should consider:

• block exemptions - pieces of legislation which exempt parties to an agreement from infringement of the Chapter I prohibition;

• the possibility that the parties’ market shares are below the relevant thresholds depending on whether the parties are competitors or not; and

• whether the client can self-assess under s9 CA, ie to try to prove that all four criteria of s9 CA are present in the agreement.