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The Fair Trading Commission

FTC 2

The Fair Trading Commission

of

Seychelles

COLLUSIVE AGREEMENTS

These guidelines are not a substitute of the Act or any Regulations and should instead be read in conjunction with the relevant legal instruments. The examples used within these guidelines are for illustration and do not set a limit on the investigation and enforcement activities of the Commission. Persons in doubt with regards to how their commercial activities may be affected by the Act may wish to seek legal advice. The Commission may, from time to time, review and issue revised versions of its guidelines.

1. Introduction

FCA Sections 11-12, 16-17 and 25-27 prohibit agreements between enterprises, which are considered collusive within the definition of these sections, unless they are excluded as per the Schedule to the Act. Various forms of agreement are covered in the three sections, but all essentially amount to agreements that directly prevent competition, thus eliminating the benefits that free competition provides to consumers and the economy more generally. In common with competition agencies world-wide, therefore, the FTC sets a very high priority on enforcement of the prohibition on collusive agreements.

Enterprises in Seychelles are therefore strongly recommended to avoid intentional breaches of these sections of the Act, and to seek legal or other expert guidance on any aspects of their business that might inadvertently breach the provisions. The FTC will expect businesses to have reviewed their practices to ensure compliance with the law in this regard. Enterprises engaged in collusive agreements are encouraged to come forward with information to enable the FTC to enforce the prohibition. The FTCs ‘leniency’ programme, described in Chapter 5 of these guidelines, provides substantial financial incentives to do so.

These guidelines set out some of the factors and circumstances which the FTC may consider in determining whether agreements are collusive. They indicate the manner in which the FTC will interpret and give effect to the provisions of the Act when assessing agreements between enterprises.

These guidelines should be read in conjunction with *FTC 6: Remedies and Penalties*.

Interpretation of ‘agreements’

The Act defines “agreements” very broadly:

“’Agreement’” includes any agreement, arrangement or understanding, whether oral or in writing or whether or not it is or is intended to be legally enforceable.

The term “concerted practice,” means co-operative or co-ordinated conduct between enterprises achieved through direct or indirect contact, that replaces their independent action, but which does not amount to an agreement.

These agreements are prohibited in the law and the FTC may impose a financial penalty, issue a direction, or both. However, the FTC shall not impose a financial penalty unless it is satisfied that the breach of the prohibition was intentional or negligent.

An agreement may be reached via a physical meeting or the parties or through an exchange of letters or telephone calls or any other means. All that is required is that parties arrive at a consensus, an understanding, on the actions each party will, or will not take.

The fact that a party may have played only a limited part in the setting up of the agreement, or may not be fully committed to its implementation, or participated only under pressure from other parties does not mean that it is not party to the agreement (although these factors may be taken into account in deciding on the level of financial penalty).

The prohibition of collusive agreements applies equally to agreements between sellers to fix prices to customers, and agreements between buyers to fix prices at which they purchase from suppliers.

2. Agreements under FCA 11-12, 16-17 and 25-27 of the Act

The above sections of the Act provide an illustrative list of such agreements which have the object or effect of:

(a) fixing the selling or purchase prices;

(b) sharing markets or sources of the supply; or

(c) restricting the supply of goods or services to, or the acquisition of them from, any person.

Price Fixing

There are many ways in which prices can be fixed. For example, the agreement may involve either the price itself or the components of a price such as a discount, establishing the amount or percentage by which prices are to be increased, or establishing a range outside which prices are not to move.

Price-fixing might also take the form of an agreement to restrict price competition. This may include, for example, an agreement to adhere to published price lists or not to quote a price without consulting potential competitors, or not to charge less than any other price in the market. An agreement might restrict price competition even if it does not entirely eliminate it. Competition might, for example, be restricted despite the ability to grant discounts or special deals on a published list price or ruling price.

An agreement might also fix prices by indirectly affecting the prices to be charged. It may cover the discounts or allowances to be granted, transport charges, payment for additional services, credit terms or the terms of guarantees, for example. The agreement might relate to specific charges or allowances or to the ranges within which they fall or to the formulae by which prices or ancillary terms are to be calculated.

Artificial dividing up of markets or sources of supply

Enterprises might agree to share markets for goods or services, whether by territory, type or size of customer, or in some other ways. Such agreements are collusive if they restrict, prevent or distort competition significantly. This prohibition applies equally to agreements between sellers to share markets and agreements between buyers to share sources.

Restricting the supply of goods or services to, or the acquisition of them from, any person

An agreement which restrict the supply or acquisition of goods or services in the form of fixing production levels or quotas or dealing with structural overcapacity will be regarded as collusive if it restricts, prevents or distorts competition significantly. If two enterprises were, for example, to agree to restrict their production capacities, or to refrain from producing as much as they would independently, or to divert production into other markets (for example, overseas), such an agreement might be considered collusive, creating an artificial scarcity of the goods and driving up price. [1] The FTC does not need to observe price effects to form a view that such a restriction of supply constitutes a prohibited collusive agreement.

Such a restriction of supply might emerge only over the long term, and still be regarded as prohibited collusive agreement. For example, agreements to limit technical development would normally be considered collusive, as would agreements to limit capacity or otherwise restrict investment.

Similarly, agreements between *buyers* to keep prices down by restricting purchases can also be regarded as collusive if they restrict, prevent or distort competition significantly.

[1] 'For example, agreements between retailers to restrict opening hours would be prohibited.

Significant prevention, restriction or distortion of competition

Horizontal agreements can only be found to be collusive if the FTC believes that they 'significantly prevent, restrict or distort competition'. This phrase should not be interpreted to mean that the magnitude of any price increases or other damage to other persons' interests will be assessed and measured against some standard. In common with other competition agencies, the FTC will interpret 'significant' in this phrase to be 'of significance' or 'not insignificant'.

By definition, any agreement that has as its object or effect, price-fixing, market sharing or the restriction of supply, will be considered significantly to restrict, distort or prevent competition.

Note that Section 11-12, 16-17 and 25-27 defines agreements as collusive if they have the object or effect, in any way, of restricting competition The FTC will, if necessary, carry out analysis to determine the effects of agreements and may find them to be collusive if it determines that the effect is anticompetitive in this manner. Evidence that an agreement did not have an anticompetitive object will not therefore necessarily serve to prevent the agreement being found to be in breach of the Act, although it may have a bearing on the penalty, if any, that the FTC imposes. Certain types of restrictive agreements are regarded as having an object which is so manifestly anticompetitive that consideration of their effects is unnecessary. These include horizontal restrictions to fix prices, share markets (territories or customers), quotas or limitation on production or sale and minimum RPM .

3. Bid Rigging under FCA 27 of the Act

One form of collusive agreement is bid rigging. It is unlawful for two or more persons to enter into an agreement whereby:

(a)One or more of them agree to undertake not to submit a bid in response to a call or request for bids or tenders; or

(b) As bidders or tenderers they submit, in response to a call or request, bids or tenders that are arrived at by agreement between or among themselves.

Bid rigging is the way that conspiring competitors effectively raise prices where purchasers – often but not necessarily government – acquire goods or services by soliciting competing bids. Essentially competitors agree in advance who will submit the winning bid on a contract being let through the competitive bid process. It is not necessary for all bidders to participate in the conspiracy.

This prohibition relates to agreements between competitors. Agreements between bidders and employees at the purchasing body are unlikely to be regarded as breaches of the Competition Act, although they may well be offences under other statutes (especially those dealing with ethics). For example, it would not normally be a matter for the FTC if a more expensive bid was selected in a tendering process, over an apparently more attractive lower bid, or if some bidders have more information from the buyer than others. [2]

Forms of bid rigging

Bid rigging can take many forms, such as bid suppression, complementary bidding, bid rotation or subcontracting. The FTC will not necessarily always classify any bid-rigging scheme it finds into these forms, but describes them briefly in order to explain what form of evidence it might seek when investigating bid-rigging.

[2] The FTC should have an MoU with other regulators or agencies to pass on any materials related to unlawful transactions/behavior.

Bid Suppression

In bid suppression schemes, one or more competitors who otherwise would be expected to bid, or who have previously bid, agree to refrain from bidding or withdraw a previously submitted bid so that the designated winning competitor's bid will be accepted.

Complementary Bidding

Complementary bidding (also known as cover or courtesy bidding) occurs when some competitors agree to submit bids that either are too high to be accepted or contain special terms that will not be acceptable to the buyer. Such bids are not intended to secure the buyer's acceptance, but are merely designed to give the appearance of genuine competitive bidding. Complementary bidding schemes are the most frequently occurring forms of bid rigging and they defraud purchasers by creating the appearance of competition to conceal secretly inflated prices.

Bid Rotation

In bid rotation schemes, all conspirators submit bids to take turns being the low bidder. The terms of the rotation may vary; for example, competitors may take turn on contracts according to the size of the contract, allocating equal amounts to each conspirator company. A strict bid rotation pattern suggests collusion is taking place.

Subcontracting

Subcontracting arrangements are often part of a bid-rigging scheme. Competitors who agree not to bid or to submit a losing bid frequently receive subcontracts or supply contracts in exchange from the successful low bidder. In some schemes, a low bidder will agree to withdraw its bid in favour of the second lowest bidder, in exchange for a lucrative subcontract that divides illegally obtained higher prices.

Exemption

An agreement or term of an agreement involving bid rigging shall not be considered collusive under section 27 (1), if the agreement that is entered into or the submission that is arrived at, are only by enterprises each of which is,an affiliate of every one of the other enterprise.

Price fixing and bid-rigging

Some forms of bid-rigging investigated under Section 27 could also breach the prohibition on horizontal collusive agreements in Section 11-12, 16-17 and 25-26. For example, bid-rigging agreements might fix the prices at which bids are made, or specify a restriction of supply through not bidding.

4. Resale Price Maintenance (RPM)

FCA section 16(1) states that it is unlawful for any two, or more enterprises that are suppliers of goods, or their agents, to enter into or carry out any agreement whereby the enterprise or their agents as the case may be, undertake to-

> (a) Supply, goods only to dealers whether those dealers are-parties to the agreement or not, which undertake to resell or have resold goods in accordance with agreed conditions as to the price at which those goods may be resold; or
>
> (b) Supply goods to dealers that resell or have resold goods in breach of any conditions as to the price at which those goods may be resold on terms, less favourable than those applicable in the case of other dealers carrying on business in similar circumstances, or withhold supplies of goods from dealers

Thus, enterprises are prohibited from forcing resellers of their products to sell the products at or above a certain price. Suppliers may not require resellers to stick to an agreed price, or to any prices printed on the product. Similarly, the prohibition extends beyond 'headline' prices to discounts or other special offers that might have the effect of changing the effective price that customers pay. Thus, suppliers may not impose conditions preventing their resellers from discounting, for example.

RPM within *bona fide* 'agency' arrangements, in which one enterprise acts on behalf of another but does not take title of the goods or services, may be permissible. However, The FTC will examine any such arrangements and would expect to take action under Section 16-20 if it believed that the agency arrangement aimed at evading the Section 16-20 prohibition*.* Factors that may be considered include the purpose of the agency arrangement, the extent to which the supplying enterprise retains control over the goods or services, and whether the supplying enterprise assumes the risk of loss.

A supplier can however recommend a minimum resale price to a reseller, provided that the recommendation is not binding. Where a resale price appears on a good whereby the supplier or producer has recommended a minimum resale price, the reseller shall ensure that the words “recommended price” appear next to the resale price.

5. Leniency

Due to the secret nature of cartels, enterprises participating or which have participated in them should be given an incentive to come forward and inform the FTC of the cartel’s activities. The benefits of granting lenient treatment to enterprises which cooperate with the FTC outweigh the benefits arising from fully enforcing financial penalties on those enterprises.

As leniency programmes have found to be effective in other competition regimes, a similar programme will form part of Seychelles enforcement strategy. Enterprises which come forward with information that enables or assists the FTC to determine that a breach has taken place under the relevant FCA section, may receive substantial reductions in, or complete immunity from, financial penalties levied by the FTC for that cartel.

Granting substantial reductions in or complete immunity from, financial penalties levied by the FTC for that cartel is at the discretion of FTC and at all times weighing the relevance, timing, content and impact of such information.

Quality of information provided by an enterprise

As a minimum to meet the conditions for lenient treatment by the FTC, the information provided by the enterprise under these guidelines must be such as to provide the FTC with sufficient basis for taking forward a credible investigation or to add significant value to the FTC investigation. In practice this means that the information is sufficient to allow the FTC to exercise its formal powers of investigation or genuinely advances the investigation.

Confidentiality

An enterprise coming forward with evidence of cartel activity may be concerned about the disclosure of its identity as an enterprise which has volunteered information. The FTC will therefore endeavour, to the extent that is consistent with its obligations to disclose or exchange information, to keep the identity of such enterprise confidential throughout the course of its investigation.

Procedure for leniency

An enterprise which wishes to take advantage of the lenient treatment detailed in these guidelines must contact the FTC. Anyone contacting the FTC on the enterprise's behalf must have power to represent the enterprise.

Application for leniency may be made either orally or in writing. Initial contact can be made by telephone or email. Upon such application, the CEO shall, within 3 days of the application having been made, respond in writing and acknowledge the receipt of the application for leniency and shall specifying the way the application has been received by the FTC. In the event of a dispute as to whether an application for leniency was made, the acknowledgement letter of the CEO shall be conclusive evidence of such application.

The enterprise making a leniency application should immediately provide the FTC with all the evidence relating to the suspected breach available to it at the time of application for leniency.

Effects of leniency

Leniency does not protect the enterprise from the other consequences of breaching the competition law.

References

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