

Competition law survival for construction firms

October 2004

An industry under intense scrutiny

The activities of construction firms in Europe have been the subject of intense scrutiny from the European Commission, responsible for competition law enforcement in Europe, over the last 20 or so years. Whether it's beams, pipes, bars, tubes or cement and roofing felt, all have been the subject of cartels. In all, the Commission has detected and punished 17 construction cartels (well over a quarter of all cartels), imposing a staggering €1.5 billion in fines on the participants including the biggest individual fine of nearly €250m on Lafarge in the plaster board cartel.



The building industry is the pulse of the economy. The substantial amount of the fine reflects the size of the market, the impact of the illicit agreement on the consumer and the repeated infringement of the competition rules by two of the companies. The Commission is focusing its drive to stamp out cartels on the key sectors of the European economy, where its action can directly improve the well-being of consumers, as is the case here

Mario Monti in relation to the 2002 Plasterboard cartel in which 4 companies were fined €478m, the largest ever fine in the construction industry



The punishment of construction cartels has not been the exclusive domain of the European Commission. The regulator responsible for competition law enforcement in the UK, the Office of Fair Trading, has only had similar powers to the European Commission since March 2000, but already it has punished a roofing cartel in the Midlands.

Competition law survival

Given this industry profile, awareness of the rules and compliance with them are a key business priority. On page 4 you can find details on how to download a complimentary copy of our Competition Survival Pack (CSP), along with a list of its contents. The CSP explains the rules and provides guidance on how to comply with them. A flavour of the key competition issues for construction companies is provided below and covered in greater detail in the CSP.

Rules and consequences

There are two important competition rules to be aware of. One prohibits agreements, whether formal or informal, which restrict competition. The other prohibits exploitation of significant market power or abuse of a dominant position.

Detection of breaches of these rules and punishment are achieved through a combination of incentives on companies which break the rules to come forward and on powers of investigation and penalisation on the part of the regulators.

Detection

Detection is achieved on two levels. On one level companies are encouraged to blow the whistle on fellow wrongdoers, since if first in line with decisive information they can expect immunity from fines, or if late, at least lenient treatment. On the other, the competition regulators are given powers of investigation, enabling dawn raids on business premises and even private homes and vehicles (the latter with warrant only), along with powers of search and seizure.

Punishment

Punishment also works on two levels.

On the one hand, the Commission or the OFT can fine *the company* up to 10% of worldwide turnover for contravention of either rule. The magnitude of fines has increased dramatically as the Commission, in particular, seeks to increase the deterrent effect (for example the Belgian roofing felt cartel was fined €1m in 1986. Compare that with the €478m imposed on the plasterboard cartel in 2002). The severest penalties are generally reserved for the most serious offences, typically price fixing, market sharing or bid rigging. Firms which enter into anti-competitive arrangements, may also face actions for damages in the courts from other firms who have suffered as a result.

Individual participation is also penalised by criminal sanctions in the UK of up to 5 years imprisonment and/or personal fines, together with directors' disqualification.

Compliance and dealing with dawn raids

Bearing these sanctions in mind, compliance is key. Introduction of a tailored compliance programme can help diminish the risks of contravention. It can also mitigate the level of fine in the event that a company is found not to have complied.

An unexpected visit from the Commission and/or the OFT can be a difficult experience. With a well-considered policy on dealing with dawn raids, companies can better protect their legal interests and manage the immediate burdens that such raids create. Given the construction industry's competition law profile, a dawn raid procedure could be a particularly useful business tool. The same procedure can also be adapted for investigations from other authorities, such as the Inland Revenue or Customs & Excise. A dawn raid response manual for construction firms is obtainable from any one of the contacts at the back of this booklet.

Litigating competition

The competition rules work both ways. Whilst a company that infringes either prohibition may be punished, equally a firm that has suffered loss as a result of such infringement may seek to claim damages. Until recently, this prospect has been relatively overlooked. A combination of recent legal developments has however, made increased litigation based on infringement of the competition rules a much likelier prospect. The European Commission emphasises in its modernisation programme the key role of national courts in local competition law enforcement; the UK now has the specialist Competition Appeal Tribunal, created in part to deal with litigation based on infringement of the competition rules; and the Court of Appeal has finally awarded damages for breach of the prohibition on restrictive agreements. Details of these developments and how to claim damages can be found in the "Litigating competition" chapter of the CSP.

Procurement law

Firms should also be attentive to the procurement rules governing the running of competitions by public sector bodies for the award of construction contracts. The rules dictate the procedures that public bodies have to follow in awarding contracts and also the general principles that should be observed in order to ensure equal treatment of bidders. In the event that the rules are breached an aggrieved contractor has the right to challenge the procedure, either by injunction or a claim in damages.

How to obtain a copy of the Competition Survival Pack

To access the guide you will need to be a subscriber to our Law-Now website. To register please visit www.law-now.com/law-now/csp1. By completing the on-line form you will be registered automatically to receive updates to the Survival Pack and information on competition and EU legal developments.

The latest edition of the Competition Survival Pack covers the following areas:

- Competition law in the EU and UK - basic principles
- Restrictive agreements
- Vertical agreements
- Horizontal agreements
- The cartel offence
- Trade associations
- Market definition and market power
- Abuse of a dominant position
- Pricing issues
- Test your competition law knowledge
- Compliance programmes
- Competition authorities' powers of investigation
- What you need to know about dawn raids
- Dealing with the authorities
- Concurrent powers of regulators in the UK
- Modernisation
- EU enlargement
- Litigating competition
- EC merger control and EC merger checklist
- National merger control in the UK and other countries and UK merger checklist
- The technology transfer block exemption
- Lifesciences and competition law
- The oil and gas industry – do's and don'ts in competition law
- Financial services and competition law

Contacts

Susan Hankey

Direct Line: +44 (0) 207 367 2960

Email: susan.hankey@cmck.com

Caroline Cummins

Direct Line: +44 (0) 207 367 2914

Email: caroline.cummins@cmck.com

Salim Gunny

Direct Line: +44 (0) 207 367 3458

Email: salim.gunny@cmck.com

Rupert Choat

Direct Line: +44 (0) 207 367 3573

Email: rupert.choat@cmck.com