



## briefing

competition - june 2008

### Competition Law in Construction: Key steps to minimise risk

#### Information from our competition law team

In spring 2008 competition law hit the headlines in the UK, as the OFT made these announcements:

- 17 April: the issue of a "Statement of Objections" (SO) to 112 construction firms in England, alleging engagement in "bid rigging" activities
- 11 June: the sentencing of three UK businessmen to imprisonment for between two and a half to three years for cartel offences, and their disqualification from acting as company directors for periods of between five and seven years

These developments emphasise how important it is to reduce competition law risk. The consequences of infringement have never been so serious.

Implementing a planned "compliance strategy" can go a long way towards reducing exposure to competition law risk. Done properly, it will both prevent future infringements and allow a business to reduce its exposure to historic breaches.

The potential consequences of competition law infringement in the UK include regulatory fines of up to 10% of turnover, claims from third parties for compensation for loss suffered, imprisonment of individuals convicted of the criminal cartel offence, and directors' disqualification - not to mention the significant time, expense and disruption that an investigation will cause.

#### Looking forward – Compliance

To reduce the risk of future competition law infringement, take the following steps:

- Train staff in the key principles of competition law: what is forbidden, what the consequences are of breaching the law, what the company's policy is
- Emphasize that individuals can commit a criminal offence if they engage in "cartel activity" – it is their personal risk, as well as the company's
- Repeat the training at regular intervals (for example, annually)
- Implement a company competition law compliance policy
- Ensure that the compliance policy has the full backing of senior management
- Ensure that there are clear reporting lines to senior management for competition law concerns

Taking these steps can do much to reduce the risk of an infringement being committed by the company. And once taken, the business can market itself as compliant – and that could give it a competitive edge.

#### Looking back – Audit and leniency

A business that has committed itself to compliance in the future may still be concerned about its past conduct. What can it do to reduce the threat that a historic breach might pose?

- Investigate objectively any historic conduct that is a cause for concern – internal or external legal audit can assist with this process
- Take legal advice on areas of concern
- Consider approaching the OFT to apply for lenient treatment

The key aims of the process are to ensure that the company is able to take steps to protect itself from regulatory fines, and that individuals are not convicted of the "cartel offence".

The OFT operates a “leniency policy”, under which businesses that provide evidence of competition law infringements may benefit from reductions in regulatory fines of up to 100%. It also offers “cartel no-action letters” which give immunity to prosecution for the criminal cartel offence to individuals who inform it of cartels and who co-operate fully.

Detailed rules apply, but essentially the sooner the business (or the individual) comes forward, the better. Pro-actively reviewing past conduct is not an easy process, and naturally it can be preferable to let a “sleeping dog lie”. However, a rigorous internal audit followed by an application for leniency to the OFT will almost always maximize the scope for “damage limitation”.

### Unannounced inspections – “dawn raids”

When the OFT investigates a suspected infringement of competition law, it conducts a detailed process of fact-finding. As part of that fact-finding process, the OFT can – and often does – exercise its powers to conduct inspections of business premises – popularly known as “dawn raids”.

Under the Competition Act 1998, the OFT can conduct an investigation where there are reasonable grounds for suspecting that UK or EU competition law has been infringed. It has specific and detailed powers under that Act to enter business premises to obtain documents relevant to the investigation.

Such inspections are usually unannounced. Often, a business will only find out that it is under investigation when an OFT team arrives to conduct an inspection.

The next steps for every business are:

- get legal advisers on site as quickly as possible – either the in-house team or external counsel
- co-operate with the OFT – failure to comply with an OFT requirement made in the context of an investigation can be a criminal offence.

### Morgan Cole

Morgan Cole’s competition law team advises on competition law issues of all kinds.

We have a team of lawyers in each of our locations trained to respond in the event of a “dawn raid”.

We deliver tailored compliance policies and training programmes that help businesses to reduce the risks of competition law infringement.

For more information, contact Toby Tyler in the Competition Team or Paul Millar or Joanna Rees in the Construction Team.

## Our people



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Toby qualified as a solicitor in 2001. He joined Morgan Cole in 2004, having trained and worked in the London and Brussels offices of Clifford Chance from 1999 to 2004. He specialises in competition law, and advises in particular on:

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- investigations and dawn raids by competition authorities
- commercial agreements and the application of ‘block exemptions’
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