

The Treaty on European Union (or Maastricht Treaty) and Treaty on the Functioning of the European Union (TFEU) aim to create a single market with free movement of goods and services. In particular, the TFEU contains rules intended to prevent restriction or distortion of competition. These rules have force throughout the European Economic Area (EEA), not just the EU.

Specifically:

- Article 101(1) of the TFEU prohibits agreements between undertakings (i.e. businesses, and to some extent state institutions and public bodies), decisions by associations of undertakings or concerted practices which may affect trade between EU member states and which have as their object or effect the prevention, restriction or distortion of competition. This prohibition is subject to Article 101(3) which provides for exemptions subject to certain criteria being satisfied.
- Article 102 of the TFEU prohibits abuse by one or more undertakings of a dominant market position within the EU or a substantial part of it in a way which may affect trade between member states.
- In addition, the EU Merger Regulation (as it is commonly known) allows the European Commission to control certain mergers and joint ventures between large undertakings operating in the EU.

There are other EU rules relating to competition – concerning e.g. free movement of goods and the enforcement of national intellectual property rights, state aid (prohibiting national governments or their agencies from providing support to businesses so as to distort competition) and public procurement – but those mentioned above are the main pillars.

Most EU member states, including the UK, have national competition rules, often modelled on the EU ones. The enforcement powers of the European Commission and of national competition authorities (such as the Competition and Markets Authority in the UK) are considerable. They include investigative powers including unannounced on-the-spot investigations, imposition of

interim measures to halt anti-competitive behaviour pending the outcome of an investigation and imposition of substantial fines (up to 10% of worldwide group turnover) for breach of the Article 101 or 102 prohibitions.

Product and geographic markets are often narrowly defined for the purposes of Article 102 (abuse of a dominant position). However an undertaking that has a large market share will not necessarily be considered dominant. An undertaking is only dominant if it has a position of economic strength which enables it to hinder effective competition on the market by allowing it to behave to an appreciable extent independently of its competitors and customers, and ultimately of consumers. So, whilst market share is an important factor, other factors such as barriers to entry to the market (e.g. intellectual property rights, established distribution networks, the presence of brand or customer loyalty) will also be relevant.



If an undertaking is in a dominant position it needs to be careful.

The following are examples of behaviours that will constitute abuse of a dominant position:

- Excessively high pricing, predatory pricing (i.e. low pricing designed to eliminate a competitor) or loyalty schemes such as rebates which have the object or effect of obliging customers to purchase all or most of their requirements from the dominant supplier.
- Refusal to supply, without objective justification.
- Tying, e.g. where a supplier agrees to supply particular products or services only if the customer agrees to buy other unrelated products or services from the supplier.

We can help you ensure compliance with the competition rules in the context of particular transactions.

However, in order to ensure compliance, you may need to raise the awareness of staff through training and put in place systems to help ensure appropriate behaviours and monitor compliance. And in some cases, businesses are well advised to put in place contingency arrangements to deal with unannounced investigations by the competition authorities. Again, we can advise.

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This document is written as an outline guide only and any action should not be based solely on the information given here. Appropriate professional advice should always be taken in specific instances.

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