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Competition Law: Impact on NGOs and Charities

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Competition Law: Impact on NGOs and Charities

Scope

This note sets out the major concepts in competition law (also known, primarily in the US, as antitrust law), and how it might affect and be used by charities and NGOs in furthering their aims.

What is competition law?

Competition laws (also known as antitrust laws), are in force in more than 120 jurisdictions around the world. They are concerned with the idea that companies should compete with each other, to ensure that customers have access to good-value, innovative products. While the content of these laws vary, as do the sanctions applicable for breach, competition laws generally prohibit:

- anti-competitive agreements between companies. These are often referred to as cartels. A prime example of a cartel is an arrangement between Company A and Company B to sell their (supposedly competing) products at the same price. Cartel behaviour also includes agreements to allocate customers or markets, or to rig a tendering process (by, for example, agreeing at what price to bid);
- the abuse of a dominant position. Companies with a “dominant position” in any given market have a special responsibility not to abuse that position. This means they cannot, for example, charge excessively high prices; refuse to supply customers without good reason; force customers; charge exploitatively low prices (to force competitors out of the market); and “tie” or “bundle” their products together (such that customers are forced to buy products they did not want). A dominant company typically has a market share of more than 40%; and
- mergers that would adversely affect competition. For example, if the two major suppliers of a given product were to merge to create a company with a market share of 60%, that merger would likely be prohibited.

In Europe, competition laws also include a prohibition on the state selectively granting advantages to companies (“state aid”) and rules relating to government tender procedure. In Europe (and elsewhere), a breach of competition law can lead to severe fines, the nullity of any affected contract, and damages claims from affected third parties.

Compliance

While above we have used the term “companies”, it is more correct to use terms like “undertakings” or “entities”. Publically owned companies and charities and NGOs are all subject to competition laws in Europe and elsewhere, when they are carrying on an economic activity. See, for example, a 2011 policy document from the UK Office of Fair Trading¹ on the application of competition rules to public bodies².

While competition authorities are unlikely to prioritise enforcement against charities and NGOs, the sector is not immune to investigation and enforcement under competition laws. For example, in the UK competition authorities instigated and imposed fines (of less than £10,000) on private schools (registered with charitable status) who exchanged information about future pricing. The infringement was found to have been “obvious”, “regular and systematic”.³

A key feature of competition law is that breach can lead to contracts becoming void. Consequently compliance is advisable even where the risk of enforcement is low.

We consider some key areas where charities and NGOs should be careful to remain compliant with competition law are:

- In any coordination between you and other charities and NGOs where you are engaging in economic activity: for example, agreeing speaking rates for senior representatives, or agreeing to boycott certain suppliers, would both raise competition concerns.
- In any role as part of a trade association. In circumstances where you facilitate meetings between entities that compete, you may be liable for any anticompetitive agreements concluded or maintained through those meetings.
- Similarly, in any role where you transmit information between entities. For example, if you are a conduit between two competitors to discuss any charity or NGO-related matters, you must not be a courier of competitively sensitive information between those parties which might give them inappropriate insights into each other’s competitive behaviour or strategies.
- In applying for government and other tendered contracts. It is not permissible to “rig” the outcome of a tender process, by, for example, agreeing with a third party that they should not participate, so as to increase your chances of winning the tender. Further, in the EU, state aid rules may apply in relation to running social projects and providing public benefit services.

Competition law “as a sword”

More likely, competition law could be helpful as a tool to exert pressure and achieve outcomes for charities and NGOs. Where competition works well, prices for customers are low and innovation is high. Dominant companies can be prevented from carrying out exclusionary or exploitative practices.

If you are aware of anti-competitive behaviour (for example, a dominant company charging exploitatively low prices, or companies agreeing to divide geographical markets), you can make

¹ Now subsumed into the Competition and Markets Authority or CMA

² https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/284407/OFT1389.pdf

³ <http://webarchive.nationalarchives.gov.uk/20140402142426/http://www.offt.gov.uk/OFTwork/competition-act-and-cartels/ca98/decisions/schools>

a complaint to a competition authority. Alternatively, if you can establish standing (the right to bring a lawsuit), you can make an application to a court.

Charities and NGOs are well placed to lead or co-ordinate “class action” claims on behalf of groups of individuals who have lost money as a result of a competition law infringement. In the past, the UK consumer body, Which?, brought a claim on behalf of a group of customers against companies concerning the fixing of the price of replica football kits. In North America, class action law suits are common and often brought by specialist law firms. In Europe, class actions in respect of competition law infringements are being encouraged by legislative developments. Claims in Europe are often made on a “follow on” basis, which means they follow a finding of a competition authority. In that situation, the claimant does not need to prove a breach of competition law; just that the breach resulted in loss.

Competition law can also be a useful tool where there is corruption. Agreements tainted by corruption often fall foul of competition law. For example, the provision of a “bung” in a tender process would amount to an agreement to rig the tender. There may be some instances where a competition investigation may be more acceptable from a political perspective than making allegations of corruption.

Competition Advocacy

As above, competition law helps protect consumers and businesses. In recent years, as more and more jurisdictions adopt and develop their competition laws, NGOs and charities have played a greater role in encouraging the adoption of competition laws; helping jurisdictions implement and enforce competition law and helping companies comply. For more, see *“The role of NGOs in competition law enforcement”*, Mehta, Mehta and Dube.⁴

For NGOs involving themselves in competition advocacy, the key issue is credibility. In bringing matters to the attention of nascent competition authorities, an NGO should be able to explain why a given behaviour was an infringement of competition law, and be able to assist with the legal and (if necessary) economic analysis. This may be best done through the involvement of external advisors.

Finally, charities and NGOs may want to be involved in persuading entities that certain agreements can be made in a manner compliant with competition law. For example, we are aware of cases where competitors agreed to pay staff a living wage, despite prima facie concerns that such an arrangement might be deemed anti-competitive. Despite the agreement having the effect of increasing costs (and so, prices), the purpose of the arrangement is arguably not anti-competitive per se and its effects on prices and competition would be minimal. Moreover, it is unlikely that such a case would be an enforcement priority of competition authorities or a realistic target for litigation.

NGOs with an understanding of competition law could help broker such agreements.

See for example: <https://www2.fairwear.org/living-wage-portal-obstacles/competition-law/>

⁴ In Research Handbook on International Competition Law, Ezrachi ed, 2012



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