GUIDEBOOK ON ANTI-MONOPOLY AND CONFIDENTIALITY (COMPETITION AND CONFIDENTIALITY POLICY)

RECIPIENTS: EMPLOYEES AND ENTITIES COOPERATING WITH THE COMPANY

What is a prohibited competition restricting agreement?

A prohibited competition restricting agreement is an action which infringes on the prohibition defined in the Act on Competition and Consumer Protection as well as in the Treaty on the Functioning of the European Union exercised by competition protection bodies - the President of The Office of Competition and Consumer Protection (UOKiK) in Poland and European Commission. It is an offence prosecuted ex officio on the initiative of a respective body.

Competition restricting agreements are viewed as a very serious threat to the economy and society, particularly consumers.

The consequences of a prohibited competition-restricting agreement include fines (of up to 10% of the company's annual turnover), claims of injured third parties, loss of reputation, decrease in enterprise value and loss of customers.

Moreover, a managing person may be fined up to PLN 2 million, for intentionally allowing an undertaking to infringe the prohibition.

In addition, an agreement falling within the scope of the prohibition is automatically void and unenforceable.

What does a term 'prohibited competition restricting agreement' mean?

Prohibited competition restricting agreements include, among others, any agreements or arrangements or concerted practices between businesses or a decision or a non-binding recommendation by a trade association which have as their object or effect the prevention, restriction or distortion of competition; they include price fixing, limiting or controlling sales, production, technical development or investment, market sharing, application of dissimilar terms to equivalent transaction or bid rigging (hereinafter referred to as 'collusion'.)

The prohibition covers all formal and informal agreements and arrangements which are not entered into force.

Who can commit a collusion?

Collusion may be agreed upon by entrepreneurs (companies) or trade associations. The agreeing parties may be in a horizontal (competitors) or vertical (e.g. supplier-customer) relation.

Managing persons are also liable for intentionally allowing a collusion.

What are the types of collusions?

The collusion may concern horizontal arrangements (between competitors), e.g., price fixing, market sharing, exchange of confidential information, production/sales control, bid rigging or boycotts etc.

Price fixing constitutes an agreement between competitors aimed at fixing, directly or indirectly, the purchase or selling price of a product.

Examples include: agreeing purchase or selling prices including minimum prices; agreeing the amount or percentage by which prices are to be increased, establishing a range outside which prices are not to move, adhering to published price lists, agreeing the date of coming into force of a price increase, agreeing pricing methods, agreeing not to sell below cost, agreeing the levels of discounts or allowances to be granted, agreeing credit policies or warranties or transport charges or terms of sale or payment or marketing initiatives.

Market sharing is an agreement between competitors on any matters related to sharing markets or customers.

Examples include: geographic division of markets so that competitors agree on regions within which they shall not operate or sell and/or market division, whereas competitors agree not to supply a certain category of product or not to supply to a certain type or size of customer.

Exchange of confidential information - an agreement between competitors on the exchange of information normally regarded as commercially confidential is prohibited.

Matters normally regarded as confidential include: prices, sales data, market shares, profit margins and the identity of customers or agents or suppliers or terms on which a given business is conducted with them. The provision of general historical information on market conditions to a third party market research entity that is not a competitor is permissible, provided that only statistical information is being communicated and that the break down of information by product, country or period does not allow identification of the individual companies concerned. As a broad rule of thumb, at least four different companies should be involved in any aggregation of satisfied information in order to avoid the risk that they can be individually identified. In addition, the information should be of historical rather than current nature.

Production/sales control is an agreement between competitors to fix production levels or set quotas and control or limit investment.

Bid rigging - an agreement under which competitors covertly consult on the elements of a tender or bid are prohibited, without disclosing to the party letting the contract that they are co-operating, or agreement between a tender organiser and a bidder on the terms or result of the tender. Note that joint bidding whereby two or more potentially competing tenderers openly submit a joint bid to the party letting the contract may be permitted.

NOTE: BID RIGGING IS A CRIMINAL OFFENCE IN POLAND.

A collusion may also pertain to vertical agreements (between entities on different trade levels) including, for example, resale price maintenance (RPM), restrictions on the use of tying/binding agreements etc.

Resale price maintenance (RPM) and other restrictions governing resale - an agreement whereby a supplier seeks to impose prices and conditions of resale on a buyer is prohibited.

Supplier can impose a maximum sale price and/or recommend a sale price, provided that they do not amount to a fixed or minimum sale price which results from a pressure from, or an inducement offered by any of the parties. Suppliers must not oblige customers to sell at a specified price or penalise customers who do not sell at the recommended price. Any agreement containing a restriction on the type of client to which the purchaser of a product is authorised to resell, for example, solely to the end consumer and not to dealers is prohibited. As a customer, you must refuse to buy from any manufacturer or supplier who attempts to impose his prices or terms and conditions of resale.

Restrictions on use include any agreement containing restrictions on end use imposed by a supplier on the purchaser of a given product as they may constitute a violation of competition law.

Tie-in sale arrangements - agreements under which a customer shall buy two or more types of product when it only wishes to buy one may be problematic.

What activities are blacklisted?

Do not under any circumstances:

a. agree (even informally) or collude with competitors on prices, minimum prices, maximum prices, levels of discounts whether to give discounts or other commercial conditions;

b. agree (even informally) or collude with competitors on sharing or dividing geographical areas or customers (i.e. agreeing not to compete fully or even not at all in certain areas or for certain customers) - "market sharing";

c. agree (even informally) or collude with competitors on how to respond to an invitation to tender for supplies, work or other contracts - "bid rigging";

d. agree (even informally) or collude with competitors to limit or control production, markets, technical development or investment;

e. exchange or discuss with competitors confidential commercial information such as, for example, pricing information, cost information, market share information, discounts given by and prices paid to [the Company]'s suppliers, cost structures, customer information, sources of supply etc.;

f. agree (even informally) or collude with competitors to impose, directly or indirectly, unfair purchase or selling prices or other unfair trading conditions;

g. agree (even informally) or collude with competitors to apply dissimilar conditions to equivalent transactions with other trading parties thereby placing them at a competitive disadvantage;

h. agree (even informally) or collude with competitors to make the conclusion of contracts subject to agreement on other obligations, which by their nature or according to commercial usage have no connection with the subject matter of such contracts.

Safety measures: what is the practice when we participate in trade association works, meetings or contact a competitor?

Employees should maintain the utmost care when participating in trade association or group meetings so as to avoid taking part in any anticompetitive activity as these types of meetings may give rise to circumstances where infringements of competition law could take place. To the extent that a trade association promotes and defends the general interest of a particular industry or commercial sector vis-à-vis local, national or international authorities or is concerned with self-regulation, there are likely to be few problems under competition law. However, discussions on those matters described above cannot be allowed. If any such discussions are held or decisions taken in a meeting at which you are present:

- you should formally object to such discussions taking place or such decisions being taken;
- you should ensure a situation in which your objection is recorded in the minutes of the meeting;
- you should leave the meeting immediately; and
- you should confirm in writing after the meeting that you left and that you had no wish to take part in such discussions or decisions as were held or taken at the meeting.

Note: The exchange of information within the framework of a trade association will not fall within the prohibitions unless it contains confidential and commercially sensitive information relating to, among others, prices, customers, or other confidential market data. Usually information which is general or is compiled in such a format that it is not possible to identify the specific information of individual companies, will not be intercepted. Agreements on common standards (e.g. within the framework of a trade association) will not fall within the prohibitions on condition they are objectively justified (such as quality or safety standards) and are not used, directly or indirectly, to make market entry by new competitors impossible or more difficult or hinder competition in any other way.

What is a trade secret?

A trade secret, as set forth in art. 11 (2) of Unfair Competition Act, is technical, technological, organisational or other information having an economic value which, as whole or in particular combination and their elements are not commonly known to people usually dealing with this type of information or not easily accessible to such persons as long as the person authorised to use the information or dispose of it has undertaken to, with due diligence, keep it confidential.

As a rule, all information classified above as confidential information is covered by that definition.

Why trade secret should be protected?

As mentioned above, exchange of business secrets with competitors may constitute a violation of competition law. Moreover, disclosure of such information to any unauthorised person/entity constitutes an act of unfair competition subject to civil liability.

Safety measures: what type of language should be used in correspondence?

All documents and communications produced by the Company and its employees or contractors are liable to be examined by a competition authority. A document of any kind, including minutes of meetings, internal memos, internal e-mails (including "deleted" e-mails, a record of which may remain in the system) and invoices could be used as evidence against the Company. In case of an inspection by a competition authority, inspectors can also look at telephone and fax records, desk diaries and electronic diaries.

It is, therefore, not enough to simply avoid activity that may infringe the competition rules. Adverse inferences may be drawn from innocent behaviour if notes and records do not accurately reflect the real situation. Further, even where you may not have retained a record of a discussion, a competitor or customer may have done so and this could be revealed to the authorities.

That is why the language that you use during business communications should be carefully chosen, as a poor choice of words can make a perfectly legal activity look suspect. It is vital to avoid the use of careless terminology including language or expressions which could suggest the existence of anti-competitive collusion.

Ambiguous or vague language and inappropriate expressions can also have a harmful effect on the position of the company under investigation.

Hence, the following points should be kept in mind:

a. Always evaluate the need for, and benefit to be gained from, a written communication.

b. Be aware of the language you use. A poor choice of words can make a perfectly legal activity look suspect. A poor choice of words can make a perfectly legal activity look suspect. Avoid using ‘war games’ vocabulary, such as ‘We will

dominate the market after this' or 'We will eliminate X.' Similarly, avoid using 'guilty' vocabulary, such as 'delete after reading' or 'please destroy'.

c. You should clearly state the source of any pricing or other information concerning competitors. Thus, for example, if a customer tells you that a competitor is proposing to increase prices from the next week on and you circulate this information within the company, record the source of the information. Failure to do this may give the impression that the information has been obtained illegally, for example, by means of a prohibited agreement to exchange information between the company and its competitors.

d. Keep accurate notes of any conversations with competitors, setting out the reasons for the conversation and summarising what was discussed. If the competitor sought to discuss sensitive topics, record your response, for example, 'I told him that this was not something I was prepared to discuss and the call was terminated.'

e. Do not give the impression that certain customets or types of customers receive special treatment (for example, 'our special price applies only to you') even if this may seem likely to attract a customer to a particular service.

f. Avoid any reference to company policy unless you have a precise and comprehensive knowledge of it. Inaccurate summaries of company policy may prove damaging.

g. You should not create the false impression that company policy is anything other than the result of independent decision-making. Never mention, for example, that a decision conforms 'to agreements made within the industry' or 'in the manner followed by the industry', even if such references may seem adequate to justify decisions taken internally or with regard to a third party.