



COMPETITION LAW AS A SWORD

A business may consider using competition law as a sword if it is struggling to break into or expand in a market, it is concerned that it does not operate in a level playing field, or if it is seeking damages as compensation for losses suffered by the actions of a cartel or a dominant operator.

Anti-competitive agreements may include agreements to fix prices, share customers or markets, or limit or control production, markets, technical development or investment. They may also involve the exchange or disclosure of commercially sensitive information.

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If a business has a dominant position in a market, the business can breach competition law by abusing that dominant position. Abuse of a dominant position may include without objective justification, for example:

- refusing to supply an existing customer;
- offering different prices to similar customers;
- requiring customers wishing to purchase one product to purchase another product in addition;
- charging low prices that do not cover the business's costs in order to drive out competitors; and/or
- charging excessive prices.

There are two options available to a business faced by an anti-competitive arrangement or conduct, namely:

1. making a complaint to the relevant competition authority, which may then launch an investigation; and
2. bringing a claim before the relevant court, which, if successful, could result in an award of compensatory damages.

Whether a business makes a complaint or brings a claim, the desired outcome may include an end to the anti-competitive behaviour, if that has not been terminated already.

Group claims involving more than one claimant are also increasingly common.

Litigation funding from specialist providers may be available for particular cases, including where a claimant seeks to recover damages for losses caused by a cartel. Where a competition authority has

established the existence of a cartel, it may be unnecessary for a claimant to prove the existence of the cartel, as the court may be able to rely on the authority's decision.

Making a complaint to the relevant competition authority

A business can make a complaint about a suspected breach of competition law to the relevant competition authority or sector regulator. The relevant UK competition authority is the Competition and Markets Authority (**CMA**), and the EU's counterpart is the European Commission (the **Commission**).

Complaints are an important part of promoting competitive markets because they inform competition authorities of anti-competitive behaviour, potentially leading to investigations and fines as well as an end to the behaviour.

Advantages

- If the competition authority decides to investigate the complaint, it will take control of the proceedings. Consequently, making a complaint to the competition authority may be less costly and less time-consuming for the complainant than bringing a claim for damages.
- Competition authorities, including the CMA and the Commission, have extensive investigative powers from which the complainant can ultimately benefit. If the complainant brought a claim in the courts or tribunal, it would have to gather the evidence itself.
- Competition authorities are prohibited from disclosing certain confidential information. They

may also aim to keep the identity of the complainant confidential whilst considering whether to investigate the complaint formally.

Disadvantages

- A successful complaint to a competition authority will not result in the complainant being awarded damages or legal costs. The outcome is intended to be punitive for the party in breach of competition law (for example, a company that breaches competition law may be fined up to 10% of its annual worldwide turnover), rather than compensatory in favour of the complainant.
- A complainant cannot force a competition authority to investigate their complaint. Competition authorities do not have the resources to investigate all of the complaints received. However, a complainant can approach the CMA or the Commission, for example, for a pre-complaint discussion and to seek an initial view as to whether it would be likely to investigate the matter further if an in-depth complaint were to be made.
- If the competition authority opens a formal investigation, it may need to reveal a complainant's identity and the information supplied by the complainant in order to allow the business under investigation to respond properly to the information provided.
- Investigations can be lengthy and may take a considerable time because there are no statutory time limits for reviewing a complaint.

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Bringing a claim before the relevant court or tribunal

A business can bring a competition claim before the relevant court or tribunal.

Advantages

- A successful claim may result in the claimant being awarded compensatory damages and the majority of its legal costs.
- The claimant has more control over the proceedings as opposed to in an investigation by, for example, the CMA.

Disadvantages

- An unsuccessful claimant may have to pay a majority of the costs of the other party.
- It will be more expensive and time-consuming to bring a competition claim than make a complaint because the claimant will be more involved in the proceedings.

Should a claimant bring a claim before the High Court or the CAT?

In England and Wales, a claim can be brought before the High Court or the Competition Appeal Tribunal (**CAT**).

- The limitation periods within which a claim may be brought differ.
- The claim will be heard by specialists in both the High Court and the CAT. Claims brought before the High Court are heard in the Competition List where judges have competition law expertise. Claims brought before the CAT are heard by a tribunal comprised of a qualified lawyer and two members who typically have expertise in an economic field.
- The High Court and the CAT are both able to grant final injunctions. The High Court can also grant declaratory relief (for example, a declaration that a particular arrangement infringes competition law).
- Both the High Court and the CAT have a wide discretion over the award of costs and if successful the claimant can generally recover the majority of its legal costs from the counterparty.

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