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Collusion or Competition?

When referring to the current tendering environment a very experienced and successful TfC Member said recently "It is tough out there". In times of pressure it is reasonable for those managing organisations to look for ways to reduce the pressure and more importantly the risks which are inherent in any form of competitive exercise. This is even more the case when small, voluntary providers are involved where the survival of the work which many have strived to build over many years is at risk. The notion of joining together with others in similar situations and pooling resources, skills and tendering knowledge becomes very attractive. The need for some guidance in this area was recognised by the former Office of the Third Sector when TfC was asked to edit the publication *Working in a Consortium* [December 2008] (*Link on Competition or Collusion Section*)

One response to the problems has been and is being development in a number of areas is the so-called "Hub and spoke" model of consortium working. During June and the first two weeks in July TfC has received numerous enquiries regarding this model of working some with concerns with regard to Competition Law compliance. Indeed one such arrangement raised concerns in five national providers. So what are the potential problems with regard to competition law? And are there any other business considerations to bear in mind when considering either establishing or joining a structure based on this or any other consortium model?

Competition Law
UK competition law derives from the European Treaty of Rome amended in February 1992 [Maastricht] – Article 85; and amended again in December 2009 [Lisbon] – Articles 81/82. These are known as the "Competition Articles" which remained essentially the same in both Treaties. At their heart is the statement;
"*Nothing shall be done which in any way prevents, hinders or distorts competition*"

It is upon this platform upon which UK Competition Law has been built. Guidance and information are provided, and compliance is regulated by the Office for Fair Trading (OFT).

Chapter 1 of the Act deals with:
"Agreements etc. preventing, restricting or distorting competition."

So that together such activities are known as "*Chapter 1 prohibitions*"

Chapter 2 of the act addresses:
"*Abuse of Dominant Position"*

Conduct is defined as abuse of a dominant position if it consists in:
(a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;
(b) limiting production, markets or technical development to the prejudice of consumers;
(c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
(d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of the contracts.

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Competition has, over the years, developed into a specialist and complex area of law. However, there are a number of well-defined activities which organisations generally should take care to avoid. It is important to note that the responsibility to ensure compliance rests with Board members, Trustees or Directors (Directors) not managers, the CEO or others in a senior management position. This responsibility should be demonstrated by one or more Directors having clearly stated responsibility for oversight of compliance with the Competition Act. The reason for this is quite stark in terms of the penalties available for a failure in compliance. Note that the penalties are directed at the Directors, these include the Directors of Companies Limited by Guarantee. These are:

- **Companies** that are found to have breached competition law can be fined **up to 10 per cent** of their annual worldwide turnover and ordered to change their behaviour.
- **Individuals** who dishonestly engage in cartel activity can be prosecuted and sentenced to **up to five years in prison and/or a fine.**
- **Company directors** can be disqualified from managing a company for **up to 15 years**.

It is therefore essential that the Trustees/Directors understand fully the implications to them personally if the organisation for which they have any responsibility breaches competition law. The argument of having no knowledge of the breach is no defence, systems should be in place to ensure that a breach does not occur.

Chapter 1 Prohibitions

In practical terms these prohibitions amount to any activity, however limited, which hinders or removes competition. Activity of this sort by organisations can amount to the formation of a cartel. These are the most serious types of anti-competitive agreements, where two or more organisations tendering for contracts agree (whether in writing or otherwise) not to compete with each other.

Cartels include agreements to:

- fix prices or otherwise agree between them the price to be charged;
- engage in bid rigging (for example, quoting a single standard price);
- limit production;
- Secure a contract and then share customers or markets;

Other agreements that could be anti-competitive include agreements (whether in writing or otherwise) that:

- involve joint selling or purchasing with competitors such as forming a non-compliant consortium structure;
- involve a retailer agreeing with its supplier not to sell below a particular retail price; or
- have a long exclusivity period (over five years).

The business models which have been referred to TfC for comment seem likely to contravene the Chapter 1 prohibitions in a number of areas:

- By simply removing competition – the principle being employed by the hub and spoke structure of consortium appears generally to be that the management hub undertakes tendering "on behalf of" a number of providers, then dividing up the work in some way to a closed group of providers rather than the organisations tendering in their own right, competing against each other. This is particularly difficult where providers have paid a fee for membership of the consortium thereby closing the group entirely to competition. Open and competitive sub-contracting can be a legitimate means of consortium working. This is the approach used in framework agreements where there is open competition to enter the framework, and in most cases a second stage of competition within the framework for specific contracts.;

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- By the consortium members agreeing a single overall price before tendering with the intention that this is the price that their customer (local authority or PCT) is to be charged for each service contract. This activity can be considered to be price fixing;
- By quoting a standard price in a tender for a public sector. This is then passed on to one or more providers in a consortium arrangement. This could be considered to be bid rigging;
- The act of tendering for a contract amounts to selling a service to a public sector purchaser. Selling service provision jointly with other competitors is can in many cases be considered to be anti-competitive unless appropriate safeguards are in place which ensure open and fair competition. In some cases the hub and spoke approach suggests that work will be sub-contracted in a manner which is similar to that employed by Prime contractors. This might be possible provided that there is full, open and compliant competition down the supply chain, and that competition is not limited to a closed group of providers.

It is difficult to see how a tender based on a hub and spoke model for a public contract can be compliant with the stated requirements of most tenders. Most prohibit or require a statement regarding non-collusive activity. The following is typical:

Any tenderer who:

- *fixes or adjusts the amount of its tender by or in accordance with any agreement or arrangement with any other party; or*

- *communicates to any party other than the Council any amount or approximate amount of its proposed tender or information which would enable the amount or approximate amount to be calculated (except where such disclosure is made in confidence in order to obtain quotations necessary for the preparation of the tender or insurance or any necessary security); or*

- *enters into any agreement or arrangement with any other party that such other party shall refrain from submitting a tender; or*

- *enters into any agreement or arrangement with any other party as to the amount of any tender submitted; or*

- *offers or agrees to pay or give or does pay or give any sum or sums of money, inducement or valuable consideration directly or indirectly to any party for doing or having done or causing or having caused to be done in relation to any other tender or proposed tender, any act or omission**, shall be disqualified**.*

Concerted Practice

The term used for collusion in the European context is “concerted practice”. There has been a considerable body of case law developed with a view to strengthening the Competition Articles and ensuring that all public sector purchasing is underpinned by competition rather than collusion.

The Courts have taken the limitation on collusion further than merely tendering in compliance with competition rules. Recent judgements have made it clear that the representatives of organisations who meet together, even on occasion, in order to discuss potential activities which could breach competition law could be acting in an illegal manner with the managers involved placing their Directors at risk. This could mean that far from forming a consortium which does not comply with the law, simply meeting to discuss the possibility of forming a non-compliant consortium model might breach competition law.

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On June 4, 2009, the European Court of Justice ("ECJ") rendered an important judgment regarding whether or not and to what degree the law allows competitors to exchange information. The ECJ has concluded that **a single meeting at which one company discloses a single piece of information capable of removing uncertainties in the market may be sufficient to establish an infringement under the Community Competition Laws**.

The ECJ judgment confirms the view that a concerted practice is already anti-competitive if it has the potential of having negative effects on competition. So it is not necessary to tender in an anti-competitive way in order to break the law, it is sufficient to plan to operate in such a manner. It is likely that by two or more providers simply discussing the hub and spoke consortium models which TfC has seen those providers may be in breach of EU law. It is not necessary to prove an actual prevention, restriction or distortion of competition for providers to be in breach of the law.

In the case referred to above, as far as information exchanges between competitors are concerned, the ECJ reiterated that each operator in the market must independently determine the policy which it adopts. The ECJ points out that providers are expected to adapt themselves intelligently to their competitors' existing or anticipated conduct. However, **Article 81 EC Treaty strictly excludes any direct or indirect contact between competitors, which might influence them or might lead to them disclosing their intentions or decisions about their own conduct in the market place for their services. The ECJ concludes that the exchange of information between competitors would infringe competition rules if it reduces or removes the degree of uncertainty as to the operation of the market in question, with the result that competition between providers is restricted.** Prior discussion with other providers of any aspect of a tender, not just price, could be contrary to EU law.

It is sometimes believed that price fixing relates to consumer law. **The ECJ made it clear that this is not the case. The fact that the information exchanged did not relate to consumer prices was found to be irrelevant.** The ECJ held that a concerted practice can infringe competition rules **even if there is no direct connection between that practice and consumer prices.**

The ECJ judgment sets a strict standard for information exchanges. **It clearly shows that information exchanges as such are capable of infringing Article 81 (1) EC Treaty**. It also endorses enforcement activities of national competition authorities when applying national provisions similar to Article 81 (1) EC Treaty. The judgment should **remind providers to check their policy in relation to contacts with competitors and to ensure that Board monitoring is in place which minimises risk for the organisation and for Directors personally:**:

- a concerted practice can infringe competition rules i.e. it is not necessary to consider the actual effects of the practice;
- it is irrelevant whether or not there is a direct connection between the concerted practice and consumer prices;
- an infringement of the competition rules can occur if the subject-matter of the information exchanged concerns matters which relate to any aspect of competition and has the potential to remove removes uncertainties from the market;
- it will be assumed that providers taking part in a concerned practice take account of the information exchanged with their competitors, unless they are able to prove the contrary with sufficient evidence;
- **a single meeting may be sufficient to establish that a competition law has been breached**.

It is therefore essential that providers who are already members of, or are considering becoming members of a consortium structure which has the potential to breach EU or UK competition law consider their position with great care, and take appropriate, specialist legal advice well ahead of taking any action, even to the extent of attending meeting where the proposals which have the potential to be anti-competitive are to be discussed.

Business Considerations
It is likely that a hub and spoke approach to consortium tendering contravenes both UK and EU competition law with those involved risking dire consequences for their organisations and Directors. This is especially the case where the model whereby involves the establishment of a central tendering and management body acting on behalf of a closed group of providers who have paid a fee for the privilege of membership.

Great care should also be taken in undertaking any collaborative activity as the sharing of information about the provider organisation comes with its own risks. Having clarified that the proposed activity does not breach competition law, and given that the sharing of any information may have the potential to be regarded as anti-competitive, the next step is to address the issue of confidentiality with regard to information. The basic essential in forming any type of consortium is for the parties to enter into confidentiality and information sharing agreement. This agreement should spell out the purpose of the collaboration, the roles of the parties and clearly state how the collaboration is not collusive and does not breach competition law. The most important aspect of such an agreement is that it must be between the Boards of the participating providers and signed by a Director on behalf of the Board. The risks are so considerable that entering into arrangements of this kind should not be left to managers, however competent they may be.

Collaborative working is a real possibility and an effective solution for many organisations. However, to be effective and avoid the very real risks of collusion and breach of competition law, these matters should be considered at an early stage within the context of suitable policies and with director oversight. This has recently become even, more important with the announcement during the second week in July that the health regulator Monitor has vowed to crackdown on collusion in NHS commissioning and procurement. The chair and interim chief executive of Monitor said that the regulator will tackle collusion, making the point that the practice is illegal and stifles patient choice.

For help with consortium formation TfC offers both in-house training on how to form a consortium as well as a consortium development programme which supports the creation of compliant models of collaborative working.

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October 2012

TfC are not lawyers. Appropriate legal advice should be sought before establishing or joining any kind of collaborative business structure, be it with one or more other organisations or providers.

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