Competition Law

An overview of how competition law affects the HTA

Purpose of this guide

This guidance provides a briefing for HTA employees, suppliers, directors, and volunteers (such as group and committee representatives) involved in the activities of the HTA. It aims to explain the reasons competition law exists, and to outline some of the implications of this for how we operate as a trade association. The guidance does not set out to provide a comprehensive or detailed guide to this body of law, and nor can it cover every eventuality which may occur in the HTA's operations. A key benefit of any trade association, and in particular serving on one of our committees, is networking and sharing information. However, without understanding the key points of competition law set out in this guide, there is a risk of inadvertently sharing competitively sensitive information. However, by understanding and following the guidance set out in this document, people involved in the HTA's activities will substantially reduce the risk of adverse legal consequences to the association, themselves, and other businesses or organisations they are associated with.

The purpose of competition law

Competition law is designed to protect businesses and consumers from anti-competitive behaviour. The law safeguards competition between businesses in order to deliver open, dynamic markets and enhanced productivity, innovation and value for customers. In short, competition drives value for consumers, and so at its heart competition law is about protecting the interests of the general public. All businesses must comply with competition law and there can be serious consequences for businesses and individuals, including directors, for non-compliance.

Consequences for breaking competition law

Businesses that are found to have broken competition law can be fined up to 10% of their annual worldwide turnover and ordered to change their behaviour. Businesses can also be subject to damages claims by third parties whose interests have been harmed by breaches of competition law. Company directors can be disqualified from managing a company for up to 15 years for breaking competition law, and people who engage in cartel activity can be investigated for committing a criminal offence and sentenced to up to 5 years in prison and/or made to pay a fine. Individuals may also be subject to the confiscation of assets under the Proceeds of Crime Act 2002. The reputational damage that would result from the HTA breaking competition law would be substantial, and it's therefore imperative that individuals and businesses working in the association act within the letter and spirit of the law. The possibility of this may seem remote and theoretical, but the Competition and Markets Authority (CMA) has in the past investigated trade associations and their members. These investigations often begin with dawn raids following tip-offs and have led to fines to trade associations of millions of pounds.

Key areas of risk

For businesses in general, there are three main areas of anti-competitive behaviour to be particularly aware of and avoid. These are sharing of competitively sensitive commercial information, cartels, and other anti-competitive practices, situations and agreements. For trade associations such as us, we also need to ensure that the rules of any association-run schemes (such as quality standards, codes of practice, or certifications, as well as association membership itself) do not create unfair competition. Unfair competition could be created for instance by unfairly and/or arbitrarily restricting access to schemes and their benefits for different businesses.

Sharing competitively sensitive commercial information

A cartel can be created where rival businesses share competitively sensitive commercial information, or even when one business provides such information to another without being asked for it. Information sharing can be easy and start off entirely legally (for instance via benchmarking), but slowly develop into something illegal without individuals realising it. The law around sharing competitively sensitive commercial information is broad. However, a key consideration in determining if information is competitively sensitive is the extent to which sharing it reduces uncertainty about how a company is going to behave in the market in future. For instance, businesses comparing historical data for use in benchmarking does not involve sharing information about that business' future behaviour; any risk is further reduced when benchmarking occurs against anonymised averages as opposed to named businesses. However, if these businesses discussed or shared data about their future plans (for instance around intended pricing, planned output, customers they plan to target, or wages they intend to offer), then this would be far more likely to be anti-competitive and illegal. Because the HTA collects and facilitates the exchange of industry and state-of-trade information from and between members, we take particular care that our meetings and data gathering/sharing exercises do not facilitate the sharing of competitively sensitive commercial information between individual members. We also require that notices are read out at our meetings reminding participants about the need to comply with competition law.

Cartels

Cartels are the most serious types of anti-competitive agreements, where two or more businesses agree, whether in writing or any other way, not to compete with each other. Cartels deprive consumers and other businesses of the benefits and commercial returns that should result from fair competition. As a trade association that brings together different businesses, it is particularly important that we ensure that our activities, do not intentionally or unintentionally create a cartel.

Cartels include agreements to:

- Fix or agree prices between businesses
- Engage in bid-rigging (for example cover pricing, where some businesses agree to submit bids that are too high to be accepted by the customer, so that an agreed-upon low bidder wins the business)
- Limit production or output
- Share customers or markets (for example by agreeing with another business not to compete with each other by targeting certain customers or territories)

Managing association schemes fairly

Schemes such as product or business certifications or standards can drive up and incentivise businesses to continuously improve the value they provide for customers. They also help customers to recognise and distinguish standards of assurance for different products and services. The HTA owns and manages a number of these schemes, and is therefore legally responsible for ensuring that these schemes do not become anti-competitive. Key considerations to ensure that a scheme is not anti-competitive are around ensuring that rules and admission criteria for the association or any of its schemes are transparent, proportionate, non-discriminatory and based upon objective standards. We are also obliged to ensure that the requirements for any quality certification schemes we own or manage are fair, reasonable and are available to all businesses that meet them; rules for schemes admission should not be irrelevant to the objectives of the scheme or in any way arbitrary. In terms of the processes we use for managing our schemes, we take care that a scheme cannot be used to re-inforce a dominant market position, or by one business to obtain a competitive advantage over another (for instance by being involved in investigating complaints made against competitors).

Competition law is about protecting the interests of the general public

People who engage in cartel activity can be investigated for committing a criminal offence, and be sentenced to up to five years in prison

Other anti-competitive practices

There are many other ways in which businesses can behave in an anti-competitive manner which are less likely to affect us as a trade association. These include abuse of a dominant market position, which would typically be the case for businesses with a market share of 40% or greater. Abuses of a dominant position can include: refusing to supply an existing customer without objective justification; offering different prices or terms to similar customers without objective justification; giving non-cost-justified rebates or discounts to customers that reward them for a particular form of purchasing behaviour or accepting exclusivity provisions; requiring customers wishing to purchase one product to purchase a different one in addition (tying or bundling); charging prices so low that they do not cover the costs of the product or service sold; refusing to grant access to facilities that a business owns which may be essential for other competitors to operate in a market. Other agreements that could be anti-competitive include agreements (verbal or written) that involve: joint selling or purchasing with competitors; a retailer agreeing with its supplier not to sell below a particular retail price; agreeing to long exclusivity periods.

Implications for people in the HTA

Whilst the law can appear complex and daunting, it's important to remember that it is there to support fair and competitive business activity and is therefore entirely in line with our objectives as a trade association. As long as HTA employees, contractors, and volunteers act within the spirit of ensuring fair competition and value for consumers, it's unlikely that any they will be breaking competition law. However, sticking to the following 'Do's and Don'ts' will protect you individually as well as the HTA and its members as a whole.

Do	Don't
Ask if in doubt. Senior staff in the HTA are aware of and trained on competition law, and where necessary we have access to legal advice to guide HTA activity. We can't provide legal advice to members on their own activity, but your own solicitors will be able to provide you with guidance.	Worry! Competition law is there to protect businesses and consumers. If you're aware of the broad provisions of the law set out in in this guidance and act in good faith, you're unlikely to go too far wrong.
Report any instances where you think HTA activities such as meetings, networking, or information sharing are breaching competition law (gandc@hta.org.uk) . We will investigate and take the appropriate corrective action.	Share competitively sensitive commercial information or future commercial decisions with other businesses. Discussing historical data, current market conditions or general future challenges in the market is very unlikely to be anti-competitive. However, discussing or agreeing with other businesses (for instance) future pricing is highly likely to be anti-competitive.
Follow the scheme rules we have in place. These are designed to protect the HTA and its members, by minimising the risk of anti-competitive behaviour; scheme rules are reviewed by qualified legal professionals.	Use HTA (or any other) meetings, networking groups, or committees to develop, discuss or agree collective commercial policies, activities or strategies between members.
Raise any concerns about information sharing in any of our meetings immediately with the chair of the meeting and/or HTA representative present. They are briefed and empowered to end any discussions at risk of breaking the law and to support participants raising such concerns.	Discuss in meetings your business' future plans in areas such as pricing, production or output levels, wages, or targeting of customers, markets or territories.

Further information

It's beyond the scope of this document to provide comprehensive information on competition law. However, further information on competition law is available from the Competition and Markets Authority (CMA), a non-ministerial department of government responsible for tackling unfair commercial behaviour. The following table provides some further reading and information.

CMA guidance on Competition Law	https://www.gov.uk/government/publications/competition-law-risk-a-short-guide/competition-law-risk-a-short-guide
CMA guidance for Trade Associations on Competition Law	https://www.gov.uk/government/publications/competition-law-dos-and-donts-for-trade-associations/what-do-trade-associations-need-to-know-about-competition-law
CMA examples of Trade Associations fined for anti-competitive behaviour	https://competitionandmarkets.blog.gov.uk/2018/03/06/trade-associations-are-you-complying-with-competition-law/
Case study on unfair operating scheme rules in a trade association	https://bateswells.co.uk/updates/the-importance-of-competition-law-compliance-for-trade-associations-and-accreditation-bodies/