TTFTC

Creating a culture of competition law compliance in the workplace.

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3. Identifying and mitigating competition law risks in your organization

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8. Navigating your way on the Anti-Competition Seas

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- The Commission recommends that all organizations undertake a review of their agreements, conduct and procedures for compliance with the Fair Trading Act ("the Act").

- Ideally, organizations should put in place a competition law compliance programme that applies to all employees, including the Board of Directors to ensure ongoing compliance with the Act.

- The benefits of having a robust competition law compliance programme are many and varied but contraventions of the Act involve serious consequences.


Wheel of
Fair
Trading

TRIVIA


TO COMPLY, OR NOT TO COMPLY - IS THAT A QUESTION?

F

- S. 44(2) of the Fair Trading Act, Ch. 81:13, " Where an enterprise contravenes any of the provisions of this Act, the Court may impose a fine **not exceeding ten per cent of the annual turnover of the enterprise concerned**.

- S.44(3) In imposing the fine, the Court shall take into account—
  - its estimate of the economic cost of the agreement to the customers of the goods or services in question;
  - the time for which the agreement was in effect;
  - whether the commission of the offence under this Act, is the first offence; and
  - any other matter the Court may consider as having a bearing on the seriousness of the offence.

The amount of the fines levied against anti-competitive measures around the world

Source: Allen & Overy

Concurrences
Antitrust Publications & Events

The French Competition Authority imposes a €435.000 fine on a construction company for exchanging information *(Santerne)*

4 MARCH 2021

The UK Competition Appeal Tribunal upholds the Competition Authority's finding that a pharmaceutical company broke competition law by exchanging information *(Lexon)*

25 FEBRUARY 2021

The French Supreme Court rules that an undertaking continues to be involved in a cartel if it keeps receiving invitations to participate without clearly distancing itself and makes other participants interpret that it shares their objectives *(Goodmills Deutschland / Grands moulins de Paris)*

10 FEBRUARY 2021

The German Competition Authority imposes fines to three steel forging companies for exchanging information *(Bharat Forge Global / Musashi Bockenau / Bad Sobernheim)*

4 FEBRUARY 2021


COMPETITION
LAW
Tips

- Each organization must assess its own competition law risks and determine what is required to ensure compliance.

- How? Review your existing contractual and non-contractual arrangements/ agreements to determine whether there are any existing concerns.

- A review of your business arrangements will offer an opportunity to consider the conduct of your competitors, suppliers and other business contacts to determine whether there is any detriment to the consumer or the economy (this can be pecuniary or non-pecuniary in nature).

- An effective compliance program should reflect industry specific risks, business specific risk and the jurisdictional context.

- An effective compliance program is a mechanism for recording complaints, categorizing them by issue, promptly investigating the underlying conduct and monitoring and evaluating post conduct.

Objectives

1. Enforcement and the need to protect your organization's reputation;
2. Establishing greater internal motivations to do the right thing;
3. Helping you to be in a stronger position for customers, investors, suppliers/vendors;
4. Obtaining executive commitment;
5. Obtaining your staff's trust in the compliance program;
6. Senior managers leading by example;
7. Continuously improving the compliance programme; and
8. Developing a compliance culture and adhering to the rule of law.

Advice for Corporate Counsel

- Establish ethics and compliance as a strategic priority;
- Gain Board buy-in and position your programme as a top priority ;
- Learn the key steps to design and implement a programme tailored to your organization;
- Measure and demonstrate a successful and effective programme to your leadership.

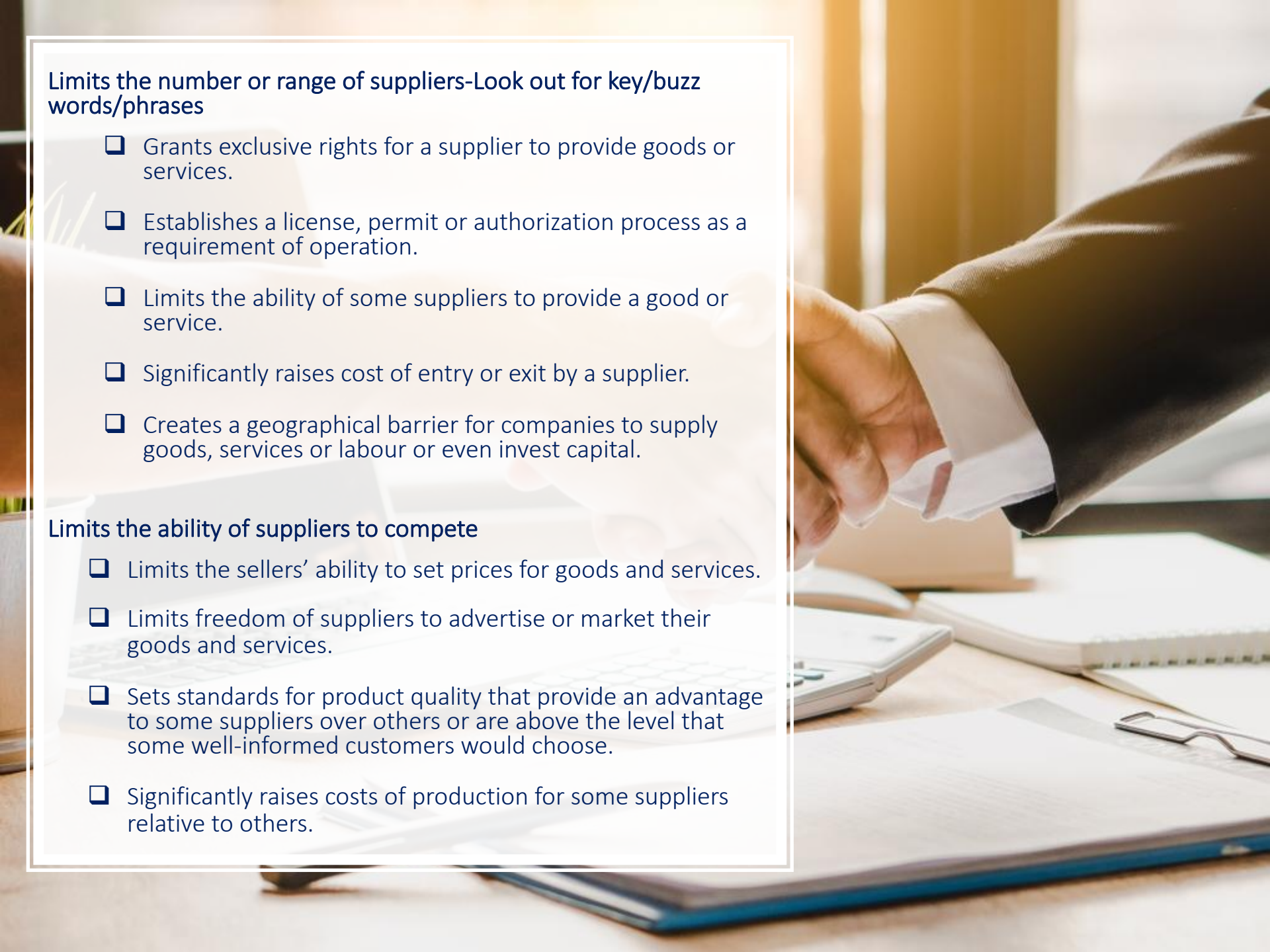
Role of the Board

- Make sure all Board members understand their responsibilities with respect to the programme, and applicable regulations;
- Report on the content and operation of the programme on a regular basis (at least quarterly);
- Submit the compliance budget and staffing levels for review and approval;
- Establish an escalation process to ensure timely reporting and resolution of matters;
- Provide effective and role-relevant training;
- Make the Board aware of risk assessments and board-specific risks to the organization;
- Update the Board members on emerging trends and topics of interest.

Identifying and mitigating competition law risks in your organization

❑ **Agreements with Competitors-** some types of agreements entered into between competitors such as information exchange agreements or joint purchasing or selling may have the effect of preventing, restricting or distorting competition in breach of the Act.

❑ **Agreements with Non-competitors**—agreements with suppliers or distributors could also be anti-competitive in nature if they contain certain types of provisions such as resale price maintenance or exclusivity provisions.



Limits the number or range of suppliers-Look out for key/buzz words/phrases

- Grants exclusive rights for a supplier to provide goods or services.
- Establishes a license, permit or authorization process as a requirement of operation.
- Limits the ability of some suppliers to provide a good or service.
- Significantly raises cost of entry or exit by a supplier.
- Creates a geographical barrier for companies to supply goods, services or labour or even invest capital.

Limits the ability of suppliers to compete

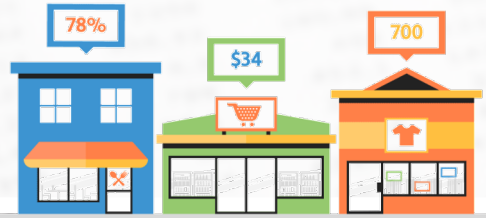
- Limits the sellers' ability to set prices for goods and services.
- Limits freedom of suppliers to advertise or market their goods and services.
- Sets standards for product quality that provide an advantage to some suppliers over others or are above the level that some well-informed customers would choose.
- Significantly raises costs of production for some suppliers relative to others.

Reduces the incentive of suppliers to compete

- Requires or encourages information on supplier outputs, prices, sales or costs to be published
- Exempts the activity of a particular industry or group of suppliers from the operation of the provisions of the Fair Trading Act.

Limits the choices and information available to consumers

- Limits the ability of consumers to decide from whom they decide to purchase from
- Reduces mobility of consumers between suppliers of goods or services by increasing the explicit or implicit costs of changing suppliers.



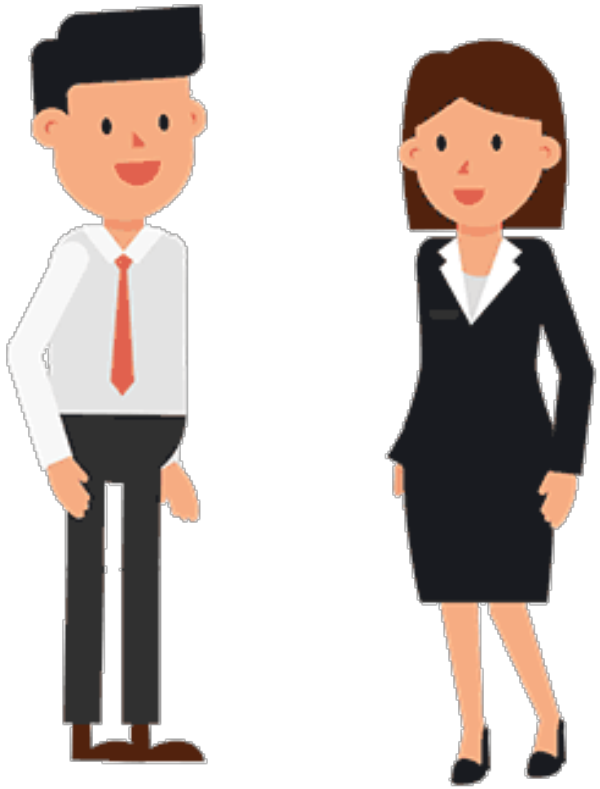
Agreements can be:

- **Explicit:** "We all need to agree that we are going to increase our prices by 10%"
- **Implicit:** "Our company's not interested in this job, so we're not going to bid too aggressively but we are interested in the job coming up at the next round"
- Any form of understanding in writing (letter, e-mail), verbal or a "gentleman's agreement"
- Implied from recommendations issued by a trade association and followed by members
- Don't have to be effective – the intent to distort competition is sufficient

Mind your language!

- ✗ Don't speculate whether an activity is legal
- ✗ Don't imply you have "inside" or "confidential" on a competitor
- ✗ Don't use ambiguous or inappropriate language for example, Market dominance
- ✗ Don't communicate with your competitor without a legitimate business reason
- ✗ Don't communicate with your competitor indirectly e.g. via a common supplier

Remember nothing is ever "off the record"
Communication = letters, e-mail, internal memos, social media, etc



Forms of Competitor Contact include:

- ❑ Direct contacts with competitors (phone and one-to-one)
- ❑ Market Research
- ❑ Personal Life
- ❑ Connections through previous employments
- ❑ Trade/Industry associations

Information that should not be shared

X Information on prices, price formulae, costs, business strategy, rebates, discounts, volumes, productivity levels

X Information on customers, suppliers, marketing strategy, sales volumes and targets

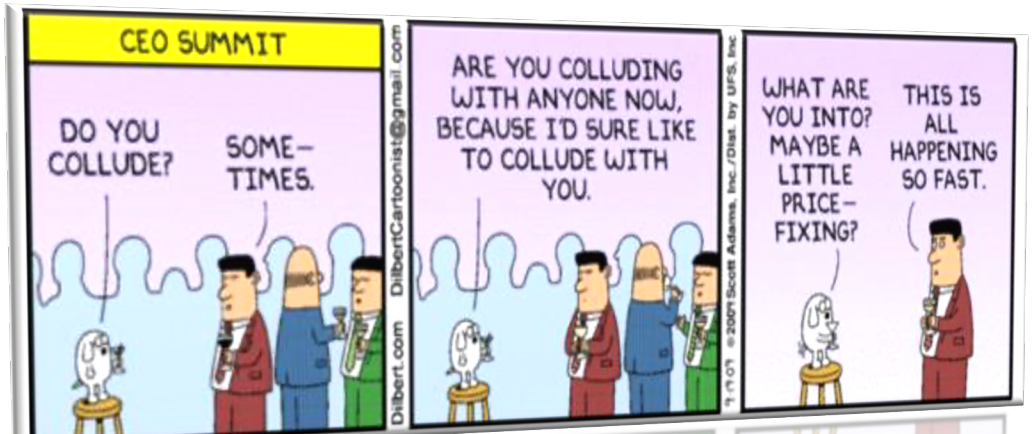
X Future strategy and plans

Information that can be shared

- ✓ Published industry statistics
- ✓ Annual reports
- ✓ Legislative developments
- ✓ Historic cost and sales data
- ✓ Information in the public domain
- ✓ Aggregated data

What does this mean in practice?

Bid Rigging	○ Letting a competitor win a job in return for him letting you win a job ○ Agreeing with a competitor that one of you bid intentionally high or not bid
Price Fixing	○ Agreeing with a competitor to charge the same price, eliminate discounts or refuse to go below a minimum price
Price fixing (customers)	Basic rule: we cannot fix the price or rules at which customers resell products: ○ Fixed resale prices (i.e. Recommended, minimum or maximum resale price) ○ Export bans (i.e. Restricting to who or where the customer resells the product)
Market Allocation	○ Only soliciting a particular type of customer or region while competitor only solicits another ○ Dividing up customers among competitors in any way
Abuse of Dominance	○ Excessive or predatory pricing (i.e. pricing below costs without a legitimate business reason) ○ Refusal to supply products or output restrictions ○ Tying (i.e. forcing a buyer to purchase one product before supplying another)
Exchange of Confidential Information	○ Sharing information concerning (future prices, margins, discounts, credit or other terms) ○ Sharing information on commercial strategies, market share or allocation of customers/markets



"That should read $20.00.
I'd make the correction, but don't want to be accused of price-fixing."

Bid Rigging

Bid-rigging

Warning Signs in Documents Submitted

Similar anomalies in documentation

- Same type of paper
- Same misspellings and grammatical errors
- Handwriting
- Wording
- Calculations and miscalculations
- Alterations
- Bids come from the same place (from the same fax number or email address)

Similar prices are quoted from different suppliers

- The same price for a long period of time
- Previously different from one another
- Increased price and it is not justified by increased cost
- Eliminated discounts especially in a market where discounts were previously given
- A large difference between the price of a winning bid and other bids

Observed after the call for bids

- ❑ Same supplier is often the successful bidder
- ❑ Winning bidder does not accept the contract
- ❑ Winning bidder subcontracts work to unsuccessful bidders
- ❑ Significant difference between price of winning bid and other bids
- ❑ A bidder seems to have knowledge of its competitor’s confidential bid
- ❑ Pattern suggesting rotation of successful bids among several suppliers

Awarding Contracts

- ❑ Avoid splitting contracts between suppliers with identical bids.
- ❑ Establish a complaint mechanism for suppliers to voice competition concerns.
- ❑ Ask questions if prices or bids don't seem to make sense.

Staff involved in procurement activities, investigators and auditors should all understand the different forms of bid rigging, and should know what signs to look out for in order to detect this behaviour.

Keeping records allows for comparisons over time and helps staff spot patterns. Letting bidders know that you conduct this level of analysis could help to deter potential bid-rigging.

Conduct interviews with unsuccessful vendors and vendors who no longer offer supply of the product.

ABUSE OF DOMINANT POSITION

Examples of behaviour that could amount to an abuse by a business of its dominant position include:

- Imposing unfair trading terms, such as exclusivity;
- Excessive, predatory or discriminatory pricing;
- Refusal to supply or provide access to essential facilities; and
- Tying – i.e. stipulating that a buyer wishing to purchase one product must also purchase all or some of their requirements for a second product from the dominant supplier;
- Removing competing products from retail outlets;
- 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.

These are no more than examples, and are not exhaustive

The Commission's Considerations

- The dominant company's abusive conduct must hamper or eliminate rivals' access to supplies or markets.
- The abusive conduct must cause the anticompetitive effect. Causation should be established by comparing prevailing competitive conditions with an appropriate counterfactual where the conduct does not occur.
- The anticompetitive effects must be sufficiently significant to create or reinforce market power
- Detrimental effects on consumers, competitors and the economy alike.

Dominant position relates to a position of economic strength enjoyed by an undertaking which enables it to:-

i. Prevent effective competition being maintained in the relevant market
ii. Affording it the power to behave to an appreciable extent independently of its competitors, customers, and ultimately of its consumers.

Dominance per se by an enterprise in a relevant market is not unlawful.

Abuse occurs when an enterprise or group of enterprises uses its dominant position in an exclusionary & exploitative manner.

Case 27/76 **United Brands** Company and United Brands Continentaal BV v Commission [1978] ECR 207

Do's and Don'ts

- Treat similar customers and distributors/vendors/suppliers consistently and without any discrimination and any changes should have proper economic justification.
- Ensure that refusal to supply is discussed in advance with your internal legal department and record the business reasons such as concerns about creditworthiness or shortage of product.
- Provide quantity rebates, which reflect cost savings in economies of scale, and are available to all buyers and without any restriction on buyer's choice of supplier.
- X Grant discounts rebates or bonuses only after consulting with CEO and internal Compliance officer.
- X Pricing should not give a false impression of excessive or predation in market.
- X Unreasonably and without any commercially written reason cut off or reduce supplies to an existing customer/supplier.
- X Agree to refuse to deal based on discussions or agreements with competitors.
- X Do not apply different discounts / rebates for different customers unless it is economically justifiable.
- X Grant loyalty rebates or discounts which have the effect of tying a customer to a supplier or any rebates which are based on the percentage of its requirements purchased by a customer.

Is it cheating or competing? It's your business as Corporate Counsel to know the difference…The Curious Case of Cartels

- There are certain forms of anti-competitive conduct that are known as cartel conduct.

They include:

- Price fixing, when competitors agree on a pricing structure rather than competing against each other
- Sharing markets, when competitors agree to divide a market so participants are sheltered from competition
- Rigging bids, when suppliers communicate before lodging their bids and agree among themselves who will win and at what price
- Controlling the output or limiting the amount of goods and services available to buyers.

- There are a number of signs that may indicate that a cartel is operating.

Look out when the supplier:-

- Raises prices by the same amount and at around the same time
- Offers the same discounts or have identical discount structures
- Quotes or charges identical or very similar prices
- Refuses to supply a customer because of their location,
- Uses give-away terms or phrases, such as:

'the industry has decided that margins should be increased'

'we have agreed not to supply in that area', and

'our competitors will not quote you a different price.'

The presence of these signs does not necessarily mean that a cartel is operating

A cartel may be more likely to exist in an industry where:

- There are few competitors
- The products have similar characteristics (which leaves little scope for competition on quality or service)
- Communication channels between competitors are already established and
- The industry is suffering from excess capacity or there is general recession.


MERGERS

- Companies should undertake a particularly close review of compliance programs when conducting its pre and post merger due diligence as well as during.

- Pre-merger due diligence provides the opportunity for transacting parties to evaluate compliance risks, determine whether to go forward with the transaction despite those risks, and lay the groundwork for improving upon and integrating their compliance efforts immediately after completing the transaction.

- The Commission will expect an acquiring company to make reasonable efforts to uncover potential misconduct at the acquired company and evaluate possible compliance gaps, and then work to close those gaps.

- Even if the predecessor company had compliance problems before the acquisition, the Commission will likely look favorably upon those successor companies that use the transaction as an opportunity to remedy those problems.

Pre-merger due diligence considerations

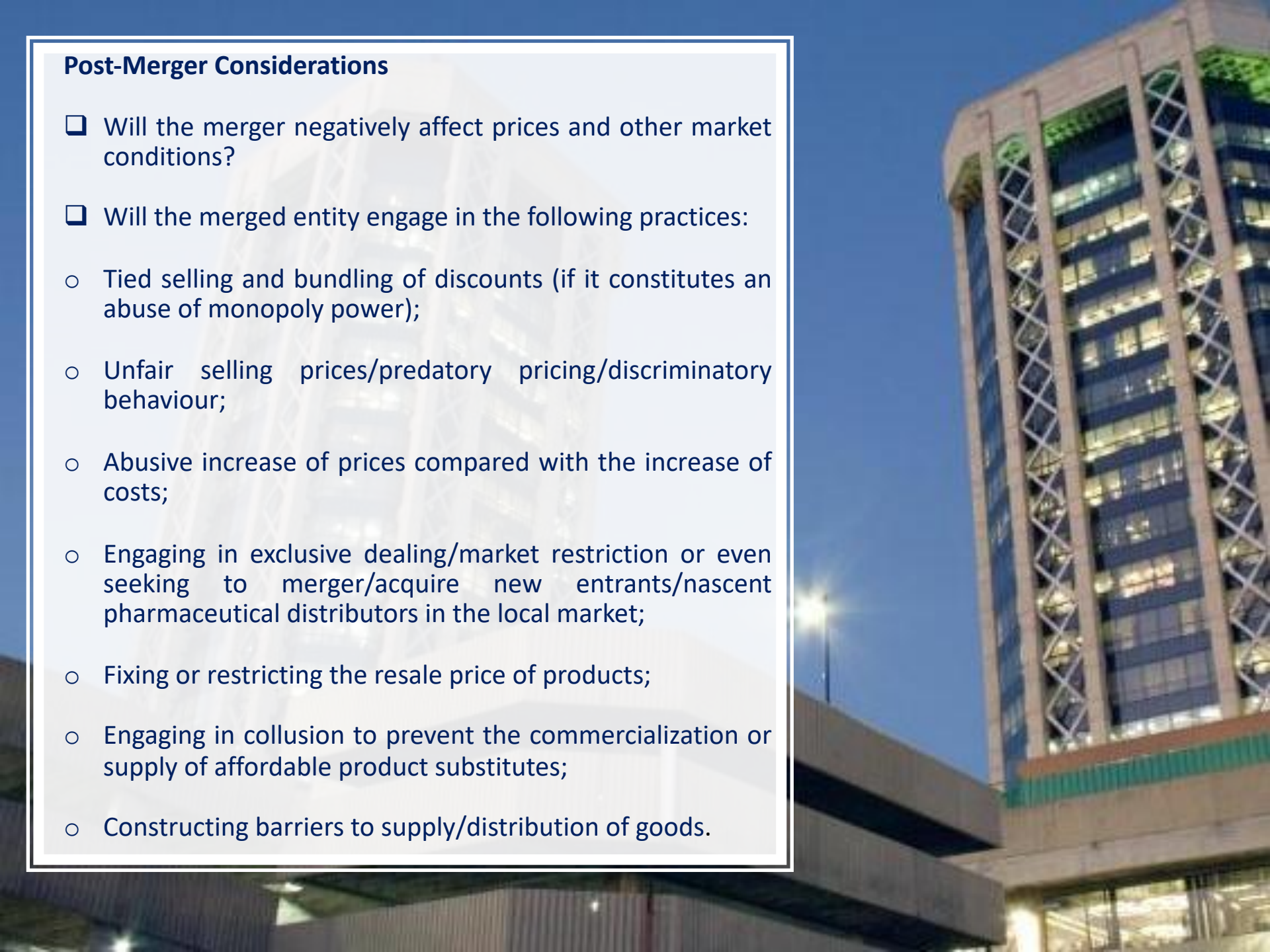
- Companies must be vigilant of the risks of sharing information with a competitor before and during merger negotiations. A concern that remains until the merger closes.
- Effective protocols should be designed and maintained to prevent anticompetitive information sharing.
- If competitively sensitive information must be exchanged for diligence and integration planning purposes, parties should employ third-party consultants and other safeguards that limit the dissemination and use of that information within the parties' businesses.
- Counsel should fully analyze potential competitive issues raised by the proposed transaction as early as possible. This will allow counsel and clients to articulate a sound business rationale for the merger.
- Anticipate and address customer/competitors' concerns. Impact on employees of target company.
- Identify the regulatory approvals/permits/licenses that may be required (local and/or foreign).
- Would the proposed merger transaction lead to any detriment to the consumer or the local economy? Would it lead to a monopoly being created?
- Compare the post-merger outcomes with and without the deal.

NEVER

- Dictate to the merging entity the prices and terms of trade to be offered by it to its customers, or what customers it may not approach.
- Limit the merging entity's participation in other business development opportunities.
- Agree upon prices, sales terms, customers, and geographical areas prior to closing of the merger.

The strategic rationale for the proposed merger transaction may be at risk if you cannot effectively address these challenges

- Loss of market share as competitors go after customers and staff;
- Loss of key talent, as often the best and brightest leave due to uncertainty;
- Elongated dip in productivity and increased costs of transition;
- Disruption, fear and uncertainty among leaders and staff;
- Misaligned organization structures, decision making processes and systems;
- Clash of cultures, companies continue to operate separately;
- Failure to realize potential benefits of integration, including cost savings.



Post-Merger Considerations

- ❑ Will the merger negatively affect prices and other market conditions?
- ❑ Will the merged entity engage in the following practices:
  - Tied selling and bundling of discounts (if it constitutes an abuse of monopoly power);
  - Unfair selling prices/predatory pricing/discriminatory behaviour;
  - Abusive increase of prices compared with the increase of costs;
  - Engaging in exclusive dealing/market restriction or even seeking to merger/acquire new entrants/nascent pharmaceutical distributors in the local market;
  - Fixing or restricting the resale price of products;
  - Engaging in collusion to prevent the commercialization or supply of affordable product substitutes;
  - Constructing barriers to supply/distribution of goods.

Navigating your way on the Anti-Competition Seas

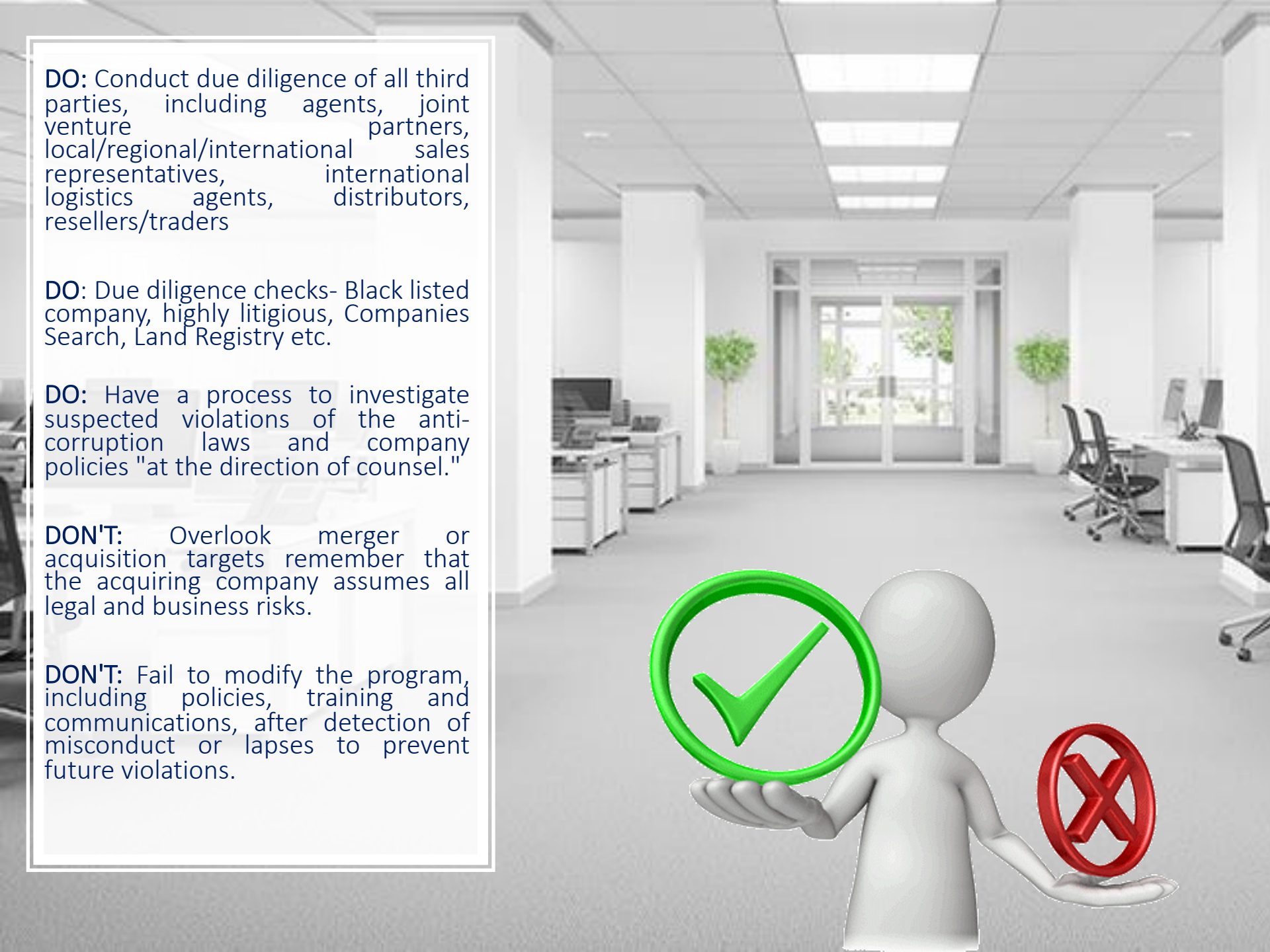
DO: Conduct due diligence of all third parties, including agents, joint venture partners, local/regional/international sales representatives, international logistics agents, distributors, resellers/traders

DO: Due diligence checks- Black listed company, highly litigious, Companies Search, Land Registry etc.

DO: Have a process to investigate suspected violations of the anti-corruption laws and company policies "at the direction of counsel."

DON'T: Overlook merger or acquisition targets remember that the acquiring company assumes all legal and business risks.

DON'T: Fail to modify the program, including policies, training and communications, after detection of misconduct or lapses to prevent future violations.



- ❑ Do your employees have contact with your competitors at industry events or otherwise?
- ❑ In your market, do employees move frequently between competing businesses and do you have people who have recently joined from competing businesses?
- ❑ Do your employees seem to have information about your competitors' prices or business plans?
- ❑ Are your customers also your competitors?
- ❑ Do you ever work in partnership with your competitors?
- ❑ Are you entering into exclusive contracts for long periods (five years or more)?
- ❑ Do your agreements contain joint selling and purchasing provisions with your competitors?
- ❑ Do your agreements contain requirements to share commercially sensitive confidential information, or to collaborate, with your competitors?
- ❑ Does your company impose resale restrictions on retailers that sell your products?
- ❑ Does your company have a large share of any of the markets in which it operates in?

Practical considerations for companies under investigation

Organizations should put in place procedures for handling investigations.

- ❑ **Check** whether the inspection is being conducted under a warrant.
- ❑ **Ensure** that the Commission officials are accompanied at all times.
- ❑ **Contact** IT and all on-site personnel and inform them of investigation, or importance of cooperation, and remind them to ensure that IT systems do not destroy or delete any documentation during the investigation.
- ❑ **Check** any documents requested by the Commission to ensure they are within the scope of the investigation and to determine whether they are covered by legal privilege or are commercially confidential.
- ❑ **Mark** confidential documents as such and withhold privileged documents. Take a note of all files and documents examined by the Commission and retain copies of all documents copied or taken by the Commission.
- ❑ **Designate** a computer expert to assist the Commission's Investigator in relation to all electronic records.
- ❑ **After the search**, hold follow-up meetings to decide what further steps should be taken, such as whether further explanations or documents should be provided to the Commission.

- No organization can engage in hard core cartel activity, such as price fixing, market sharing, limiting production and bid rigging. These anti-competitive activities are ALWAYS against the law, regardless of the size of the organization or the industries in which they operate in.

- One must appreciate that risks may be greater in highly concentrated industries, for larger companies in strong (potentially dominant) positions or for those companies that are in regular contact with her competitors.

- Competition law risks may be lower for smaller companies that have very low market shares.

TTFTC

TODAY'S HOMEWORK

- Do you know who your organization's main competitors are?
- Do you know what is your organization's market share in T&T?
- Have you received any complaints that are anti-competitive in nature? What did you do?
- Have you made any complaints about a fellow competitor?

Elements of an effective anti-competition compliance program include:-

- The design and comprehensiveness of the program;
- The culture of compliance within the company;
- Responsibility for, and resources dedicated to, anti-competition compliance;
- Anti-competition risk assessment techniques;
- Compliance training and communication to employees;
- Monitoring and auditing techniques, including continued review, evaluation, and revision of the anti-competition compliance program;
- Reporting mechanisms;
- Compliance incentives and discipline; and
- Remediation methods.

CPI COMPETITION POLICY INTERNATIONAL

Concurrences
Antitrust Publications & Events

International Competition Network

GCR
GLOBAL COMPETITION REVIEW

LEXOLOGY®

Call to Action

- Report potential breaches of the Fair Trading Act to the Commission.
- Send your Compliance Policy (even in draft form) which addresses anti-competition for review by the Commission.
- Encourage people to report anti-competitive behaviour of competitors, suppliers or customers.
- Address anti-competitive practices into your internal Compliance documents/programmes.
- Decide how to identify anti-competitive practices, risks and trends, ideally as part of your general risk management process.
- Consider what controls are needed to manage, minimize or eliminate the risks identified.
- Embed a successful reporting culture that supports timely reactions and fair outcomes (updating your case management software).

What agreements are condemned by the cartel offence?

A. Price fixing, limitation of production or supply, the sharing of markets, and bid rigging

B. Crisis cartels, specialization agreements, research and development agreements, and any kind of horizontal co-operation

C. Franchising, exclusive distribution, selective distribution and all other agreements that introduce territorial restrictions

D. Both A and C

MAMBAPPC

Monopolies

Anti-competitive agreements

Market sharing

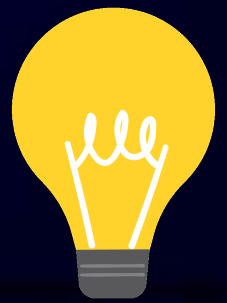
Bid rigging

Abuse of dominant position

Price Fixing

Predatory Pricing

Collusion



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