Fair Trading Commission
Seychelles

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**Mahe:** Block B, Third floor, Unity House, Tel: 4325250
**Praslin:** Pension Fund Complex, Grand Anse, Tel: 4233109
Email: info@ftc.sc | Web: www.ftc.sc

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# Your Guide to **Competition Law** in Seychelles

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# Introduction

Following the launch of the Economic reform in 2008, Seychelles enacted its first competition law with the aim to promote, maintain and encourage competition. The act prohibits the prevention, restriction and distortion of competition by prohibiting various anti-competitive practices in the market.

Effective competition provides significant benefits for consumers through greater choice, lower prices and better quality of goods and services. Competition also provides strong incentives for enterprises to be more efficient and innovative, thereby helping raise productivity growth across the economy and enhancing the competitiveness of the country as a whole.

The successful establishment of a market economy requires the existence of a competition culture within the country and a change in mind-set and attitudes among consumers, business people and the government. Consumers, the business community as well as all government actors must have an awareness of competition and an understanding of how it will benefit them.

## Our Vision:

*"Be the leading institution in the protection of consumers and the competition process for the promotion of socio-economic welfare"*

## Why this Booklet?

This booklet is specifically designed to serve as an explanatory guide of the fair competition Act. It outlines the role of competition, various conducts covers under the fair competition act, provide a brief note on how the Commission investigates cases and explain the possible remedies and penalties for infringing the act.

## Our Mission:

*"Advocating & enforcing consumer rights and obligations whilst fostering a fair competitive business environment in Seychelles"*

The mandate to advocate competition is one of the principal roles of the Fair Trading Commission hereafter referred to as "the Commission". The Commission was established in November 2009 to "safeguard the interest of consumers, to monitor and investigate the conduct of
business enterprises, to promote and maintain effective competition in the economy."

# What is Competition?

It is competitive rivalry between enterprises or sellers independently striving for the patronage of buyers in order to achieve a particular business objective, e.g. profits, sales and/or market share. "This rivalry may take place in terms of price, quality, service or combinations of these and other factors which customers may value." (OECD, 1999).

***This booklet is not a substitute for the act itself. The commission reserves the right to revise the booklet as and when it finds it appropriate to do so.***

## For Consumers

The most obvious benefit of competition is that it results in goods and services being provided to consumers at lower prices. Competition encourages businesses to compete for consumers resulting in:

- consumers paying less,
- receiving more choices, and
- getting better quality for their money.

## Increased Efficiency & Productivity

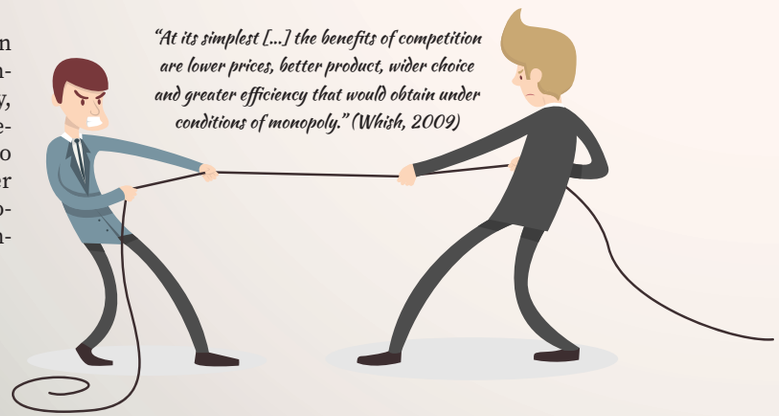
Vigorous competition drives enterprises to improve their efficiency, keep cost down and become more productive so as to gain and keep a larger market share. Besides promoting efficiency, competition leads to higher productivity, ensures easy availability of inputs at competitive prices and even facilitates better management of enterprises, thereby allowing all market players a level playing field in a healthy business environment.

## It Stimulates Innovation

As competitors strive to produce new, better quality products for consumers, competition have the dynamic effect of stimulating innovation. In today's technology-driven world, competition creates strong incentives for businesses to be more innovative, adopt new technology, techniques and processes so as to offer consumers more innovative products and choices at reduce prices. This enhances both.

## It Bolsters Competitiveness & investment

Competition bolsters the international competitiveness of both the business sector and the country as a whole in today's global market which are paramount to Seychelles new emerging market economy. Competition also plays a vital role in creating the conditions necessary to attract inward investment and capital for the development of the country resulting in increased wealth, employment and social welfare.



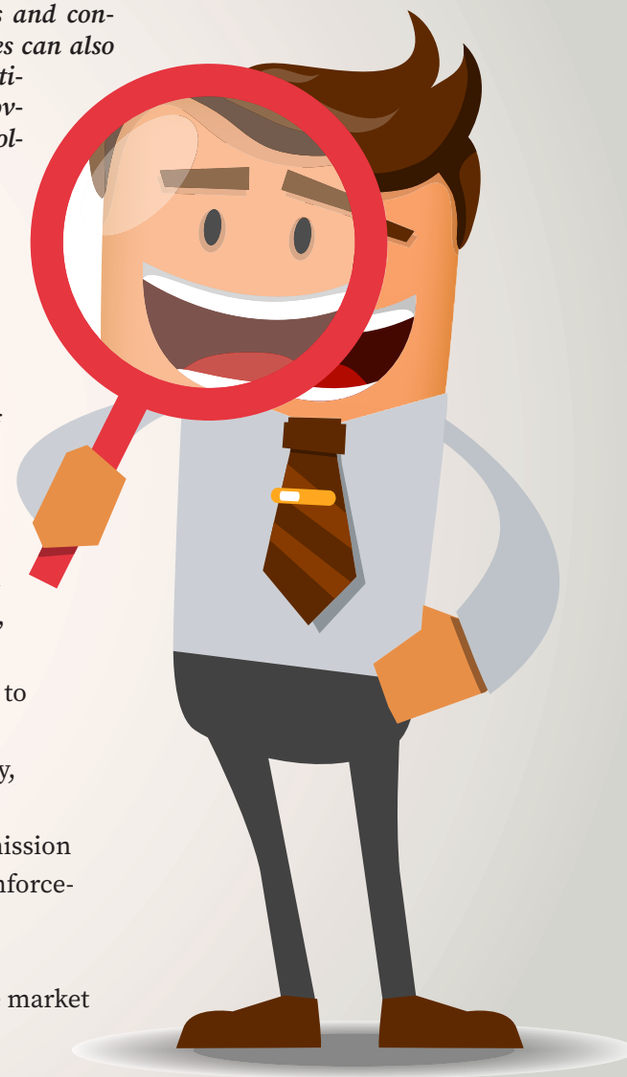

Market studies are research projects conducted to gain an in-depth understanding of markets and business practices. It involves examination of various aspects of markets that may be detrimental to consumers.

*"As well as investigating adverse effects on competition caused by business and consumer behaviour, market studies can also examine restrictions on competition that can arise through Government regulation or public policy". (OFT UK, 2010)*

## Possible outcomes of market studies

- Improvement in the quality and accessibility of information for consumers,
- Encouraging businesses in the market to self-regulate,
- Making recommendations to Government to change regulations or public policy,
- Commitment of the Commission to take advocacy and /or enforcement actions.
- May also conclude that the market is working well.

**When conducting market studies the Commission will liaise with various stakeholders including businesses, consumers and government agencies for required information. Your Contribution will be vital.**



# Market Studies

Market studies are one of the proactive tools available to the Commission to address competition and consumer protection problems beside advocacy and enforcement.

Market studies play a vital role in competition and consumer protection laws.

> *"keep under review commercial activities to ensure that practices that may adversely or unfairly affect the interest of consumers and businesses are prevented or terminated". The Commission is also mandated under the FTC Act to "undertake studies and publish reports and information regarding matters affecting the interests of consumers and enterprises".*

*"Market studies enable the [Commission] to identify and seek to remedy, through advocacy, enforcement action or other means, conduct and other features of markets that are harming consumers". (Priest & Winton, 2008, p. 3).*

## When to Conduct Market Studies?

- When anticompetitive behaviour is suspected in a sector, but the Commission does not know the exact nature and source of the competition problem. Market study can examine whether there is a problem and if so study its effects, the causes of those effects and propose ways that such problems may be resolved.

- As a lead-in to competition and consumer protection advocacy and or enforcement action where violation of competition law is suspected or it appears that the market is not functioning well for consumers.

- To fact-find so as to improve the Commission's knowledge of markets or practices or look at developing markets so as to build technical expertise about markets.

- To analyse policy issues, regulation and or policy/regulations proposals by government that may create barriers to entry into a market, distort competition or prevent competitive markets from developing. Market studies will lead to advocacy to government to review and update these policies/regulations in order to minimise adverse effects on competition and consumer.



# The Fair Competition Act

In 2009, the Seychelles took one of the most important steps in its economic reform program when the Government enacted the landmark Fair Competition Act hereafter referred to as the ("FCA") and establishes the Fair Trading Commission to administer the Act.

> *An Act to promote, maintain and encourage competition, to prohibit the prevention, restriction or distortion of c ompetition and abuse of dominant positions in trade, to ensure that enterprises, irrespective of size, have the opportunity to participate equitably in the market place and to provide for matters connected therewith.*

The introduction of the competition law in a country is crucial for a successful competitive market- driven economy. While competition forces enterprises to become more efficient and to offer a greater choice of products and services at lower prices, it is recognized that enterprises may also have the incentive to acquire super profit through collusion, or abuse of market power, thereby causing market failure. For instance, cartels may fix prices or reduce production so as to increase prices to consumers; a dominant enterprise may indulge in predatory behaviour, prevent entry of potential competitors, or foreclose market access through exclusive arrangements with distributors. The end result is consumers pay higher prices, get lower quality products and end up with limited choices.

The FCA deals with the conduct of enterprises in the market and includes prohibition of anticompetitive agreements, abuse of a dominant market position, and merger control regulation to prevent excessive concentration that could lead to abuse of dominance.

The FCA is presented in this booklet in three main categories:

(a) Restrictive business practices
(b) I) Anti-competitive agreements
    II) Cartel
(c) Merger

# Abuse of dominance

An enterprise is free to expand as large as it pleases, or achieve as big a market share as it can. The problem arises only when an enterprise starts abusing its dominant position. Abuse of dominance is one of the most challenging areas of competition law since enterprises can achieve dominant position legitimately through innovation, superior production or greater entrepreneurial effort, and many practices that appear on the surface to be anti-competitive can serve legitimate pro-competitive purposes.

***Under the FCA an "enterprise or enterprises together hold a dominant position or a joint dominance in a market if that enterprise or enterprises together occupy such a position of economic strength as will enable them to operate in the market independently without effective competition from their clients, competitors or potential competitors".***

***Being dominant is, in itself not a breach of the Act, but "Any conduct on the part of one or more enterprise or enterprises which amounts to an abuse of dominant position in a market is prohibited, if it may adversely or unfairly affect trade within Seychelles".***

**The FCA prohibits abusive conducts that:**

- Restrict entry in a market
- Prevent/deter rivals from competing
- Eliminate or remove a competitor
- Impose unfair prices and conditions that are excessive, unreasonable, discriminatory or predatory
- Limit production, market or technical development
- Apply dissimilar conditions to equivalent transactions placing rivals at competitive disadvantage
- 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.
- Exclusive dealing, market restriction or tied selling.

# Advocacy

Building a competition culture in Seychelles will ease the work of the Commission when it comes to enforcing the FCA. The aim is to make the public aware of the benefit of competition and businesses aware of the consequences of violating the FCA so that businesses will be more ready to comply with the law, the public will be more willing to corporate with the Commission and the policy makers and government will be more supportive to the mission of the Commission.

***According to the International Competition Network Advocacy Working Group (ICN);***

***"A cornerstone of a successful market economy is the existence of a "competition culture" within a country – an understanding by the public of the benefits of competition and broad-based support for a strong competition policy. An important focus for competition advocacy by the competition agency is the development of this competition culture. All parts of a society – consumers, businesspeople, trade unions, educators, the legal community, government and regulatory officials and judges – should be addressed in this effort. This proposition is now widely accepted. Competition officials in most countries are diligent about informing their citizens about the value of competition and of their efforts in promoting it." (Clark, 2004). So does the Commission.***

The Commission faces a strenuous task in building awareness and support for competition in Seychelles. However the instruments at the disposal of the Commission to influence the regulatory framework are manifold. The Commission uses various commonly used methods to build public awareness on competition. This includes but not limited to:

- making information about its activities available in public domain
- regularly publishing its enforcement decisions
- press conferences
- dissemination of its guidelines on specific competition law matters
- organizing seminars, workshops and conferences with stakeholders
- participate in the design and review of legislation, regulation, privatization schemes, etc.
- issuing opinions, either upon request or on their own initiative.

> *"Competition advocacy refers to those activities conducted by the competition authority related to the promotion of a competitive environment for economic activities by means of non-enforcement mechanisms, mainly through its relationships with other governmental entities and by increasing public awareness of the benefits of competition."*

# Enforcement

Following proof of an infringement of the FCA, the Commission needs to give appropriate remedies and penalties for the offence. Guidance for enforcement measures to be employed is provided for by the FCA.

When applying a remedy the Commission is always mindful of the gravity of the offense and the extent to which the competition process and consumer welfare has been harmed. Remedies employed are carefully weighed on a case by case basis.

## Possible Remedies

### Directions

Directions are given in instances of merger controls to prohibit mergers that substantially lessen competition in the market and in instances where mergers have been effected without prior approval of the Commission. It is also employed in cases of restrictive agreements and anti-competitive business conducts such as price fixing and bid rigging.

In merger cases directions provided are either in the form of divestment of interests or desist from completion or implementation of the merger.

In cases of restrictive agreements the Commission can declare the agreement null and direct the enterprise to rescind it.

In cases of anti-competitive business practices the Commission can direct the enterprise to cease the anti-competitive conduct.

### Financial Penalties

The FCA provide for the Commission to also impose a financial penalty on an enterprise. "Where the Commission imposes a financial penalty on an enterprise the financial penalty shall not exceed 10 percent of the turnover of the enterprise in Seychelles during the period of the breach of the prohibition up to a maximum period of years."

### Interim Measures

It may happen that during the investigations phase, the Commission may find evidence that a restrictive business practice or an agreement is preventing, restricting, distorting or substantially lessening competition and that there is a risk of causing serious irreparable damage to a particular person. In such cases the Board may impose an interim measures to prevent serious or irreparable damages, protect public interest and to prevent pre-emptive action by an enterprise under investigation.

### Undertakings

During the investigation phase an enterprise may wish to come to an agreement as to the way in which they should remedy the situation at hand. The FCA states that "an enterprise may offer a written undertaking to the Commission to address any concern that has arisen, or is likely to arise, during an investigation in respect of a restrictive business practice subject to investigation".

Nonetheless, the Commission reserves the right not to consent based upon the satisfactory level of the undertaking and whether it addresses all the matters concerned. If accepted the undertaking shall be published as the Commission's



# Types of Abuse of Dominance Practices

***An enterprise may infringe the FCA through either exploitative of exclusionary abuses.***

***Exclusionary abuses involve practices by dominant enterprises that take advantage of their position to significantly distort the competitive process. Exploitative types of abuses involve the direct exploitation of customers and consumers.***

*Examples of abusive conducts:*

### Price discrimination:

Price discrimination occurs when a product is sold to different customers at different prices that do not reflect the costs of supply. An enterprise can charge different prices for different units of a product where cost of supplying the unit is the same or it can charge same price for different units of product where cost of supplying differs. Price discrimination can take various forms such as discounts, tying and bundling. On one hand Price discrimination can be exploitative, exclusionary and can distort competition. On the other hand, price discrimination can also be pro-competitive.

### Predatory pricing:

Predatory occurs when a dominant firm charges very low prices, so low that its competitors are driven out of the market, new firms find it unprofitable to enter, and the market is monopolized. The dominant firm will incur temporary losses during its low pricing policy with the intention of raising prices in the future to recoup losses and gain further profits. Such behaviour may offer consumers advantages in the short run but in the long run lead to higher prices, reduced quality and less choices.

### Refusal to supply:

Which arises when a vertically integrated dominant firm in the upstream market refuses to supply an essential goods or refuses to allow access to an essential facility to its downstream rival or set prices to its downstream competitors at such level that even an efficient competitor is unable to compete profitably in the downstream market. In consequence the downstream competitors may be forced to exit the market. This occur when access to an essential facilities or the input required downstream is indispensable to operate in downstream markets, there are no effective substitute for the input and the latter cannot be duplicated by competitors due to economic and technical constraints.

### Excessive pricing:

Excessive pricing occur when a dominant enterprise exploit its dominant position to charge excessively high selling prices. An "excessive price", may be defined as a price that is significantly above the economic value of the product. A dominant enterprise may use excessive pricing to sustain profits that are appreciably higher than it could expect to earn in a competitive market.

It is, crucial that business practices which may generate efficiencies to the benefit of consumers are not mistaken as competition-distorting practices, including when they are put in place by dominant enterprises. Also, the achievement by an enterprise of a dominant position on the basis of greater efficiency, the delivery of innovative and high-quality products and services, is a normal outcome in a market-based economy and should not be outright opposed. For these reasons, the FCA makes provisions under which an abuse can be exempted if:

- it produces benefits, that improve production or distribution of goods,
- it produces benefits, that promote technical or economic progress,
- it produces benefits, that benefit consumers,
- the effect of the enterprise behaviour is as a result of its superior competitive performance, and
- the enterprise is enforcing its right by virtue of copyright, patent and registered design or trademark.

# Assessment

The Commission would find an enterprise's behaviour an abuse only after detailed examination of the market concerned and the effects of the undertaking's conduct. The investigation follows a three step analysis; first, the relevant market, where the alleged abusive practice takes place, needs to be defined in order to identify the immediate competitors to the dominant enterprise. Second, the holding of a dominant position needs to be appraised. Third, the evaluation of the abusive practice and its actual impact on market competition needs to be conducted. Given that various economic aspects of a market are interlinked, the assessment of market power requires an assessment of all competitive conditions relevant to the market in question. The factors to be considered include but are not limited to market shares, market concentration, barriers to entry and expansion, buyer power and innovation.

# Horizontal mergers

Horizontal mergers may result in three anti-competitive effects. The merger may eliminate direct competition between the two merging parties, may create substantial market power which may ultimately result in increased prices and may increase market concentration which could strengthen the ability of firms to collude on prices and decisions.

In assessing horizontal mergers, the Commission will consider various factors such as:

- Markets shares
- Potential entry and expansion
- Closeness of other firms and scope for repositioning their products/ services
- The Power of buyers
- The likelihood of collusion post-merger

# Vertical mergers

Vertical mergers may result in two anti-competitive outcomes that could lead to increased prices to consumers. Post-merger, the upstream firm may decide to stop supplying input to its downstream rivals or the downstream division of the merged entity may refuse to purchase supplies from its upstream rivals. These possibilities may lead to foreclosure of competitors in both the upstream and downstream markets by limiting access to supplies or to customers. In addition this may prevent new firms from entering the market.

However, vertical mergers may also result in pro-competitive outcome such as more efficient management of the merged entity, the avoidance of double margin on retail prices and better services offered to consumers by avoiding the free-rider problems.

In assessing vertical mergers both the pro and anti-competitive effects of the proposed merger will be considered.

# Exemptions

The FCA also makes provisions for some mergers to be permitted under certain conditions.

A merger may be permitted if it can be established that there are no alternative ways of realising the post-merger efficiency gains but only through the proposed merger.

In case of a failing firm, the merging parties needs to show the reasonable steps taken to identify alternative firms to purchase the assets of the failing firm that will be less likely to reduce competition.

# Mergers

*Mergers between businesses take place when two companies combine into one entity to create a larger company. Mergers can substantially reduce competition and harm consumers if it leads to a situation where one or more businesses have the power to raise their prices regardless of the reactions of the remaining competitors.*

**A merger is defined in the FCA as "the acquisition or establishment, direct or indirect, by one or more enterprises, whether by purchase of shares or assets, lease of assets, amalgamation or combination or otherwise, of control over whole or a part of the business of an immediate competitor, supplier, consumer or other enterprises".**

## Assessment

Mergers can be horizontal or vertical. Horizontal mergers are mergers between two suppliers at the same level of the supply chain.

Vertical mergers are mergers between two firms at different stages of the production chain or between an upstream and a downstream firm (e.g. between a wholesaler and a retailer).

*Any enterprise wishing to effect a merger where it is likely to control 40% of a market need to apply to the commission for permission to effect a merger. Upon receipt of the merger application the Commission will start an investigation to assess the proposed merger and recommendation will be made to the Board of Commissioners for approval or prohibition of the merger.*

*Under the FCA, the Commission has the power to investigate and approve or prohibit mergers between companies of a certain size.*

***"All mergers involving an enterprise that –***

***(a) by itself controls; or***
***(b) together with any other enterprise with which it intends to effect the merger is likely to control, 40 percent of a market or such other amounts as the Minister may prescribe are prohibited unless permitted by the Commission in accordance with" the FCA***

In assessing the proposed merger, the Commission will assess various factors to determine the likely anticompetitive effect of the proposed merger.



# Anti-competitive Agreements

***Agreements between enterprises are classified as either horizontal or vertical. Horizontal agreements refer to agreements between competitors acting on the same level of the supply chain. Vertical agreements refer to agreements between upstream and downstream firms in the same or related market at different stages of supply chain.***

## Bid-rigging (Horizontal)

Involves collusion between bidders to arrange the bids before they are submitted, or for some bidders to refrain from bidding. A bidding process is designed to generate a pool of competitive bids for a contract like building a government building or for providing a service. When the contractors secretly determine which bid should be accepted and then submit bids in a way which promotes a particular bid, this is bid rigging. Bid rigging can be accomplished by pulling out of the bidding pool at the last minute, offering a bid which is way over-priced, or attaching unfavourable terms to a bid. These practices create the illusion of a diverse pool of bids to choose from, but they inevitably lead to a single contractor's bid as the obvious choice, thereby eliminating the competitive aspect of the process.

## Exclusionary conducts (Vertical)

Are agreements entered or arrived between enterprises which are in competition with each other with the effect of either to prevent, restrict or limit the supply of goods or services of the acquisition of goods or services. Such agreements creates or maintain monopoly power by disadvantaging and harming competitors.

## Market Sharing (Horizontal)

Are agreements in which competitors divide markets among themselves. In such schemes, competing firms allocate specific customers or types of customers, products, or territories among themselves. For example, one competitor will be allowed to sell to certain customers or types of customers. But will not sell to customers allocated to its competitors. In other schemes, competitors agree to sell only to customers in certain geographic areas and refuse to sell to customers in geographic areas allocated to conspirator companies.

*Continued on Page 8*

## Resale Price Maintenance (Vertical):

A resale price maintenance (RPM) agreement is a contract in which a supplier and a downstream distributor agree to a minimum or maximum price the distributor will charge its customers. Under RPM, the distributor's freedom to define its own pricing policy for the upstream firm's products is limited and distributors are prevented from competing too fiercely on price. RPM schemes can allow different degrees of flexibility:

- Under strict RPM the supplier imposes the resale price which downstream enterprises must respect;
- A less strict variant is the recommended retail price (RRP) which leaves the final pricing decision to the distributor but provides a norm;
- Upstream firms can also set minimum retail prices (price floors) or maximum prices (price ceilings) which distributors must respect.

Resale price maintenance is considered unlawful under the FCA. Although a supplier or producer may recommend a resale price it must be clear to the reseller that the recommendation is not binding and that the words "recommended price" must appear next to the stated price.

Agreements that:

- Has the effect of limiting or controlling production, markets, technical development or investment.
- Apply dissimilar conditions to equivalent transactions with other trading partners thereby placing them at a competitive disadvantage.
- Make the conclusion of agreement subject to acceptance by parties other than the offer or of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such agreement.

## Assessment

In assessing an agreement the object and effect of the agreement need to be examined. In cases of vertical and horizontal agreements the Commission needs to balance the pro and anti-competitive effects of the agreement. Both agreements can be anti-competitive when it results in the reduction of competition and when it foreclose the market to rivals. On the other hand agreements can result in pro-competitive efficiency rationales such as avoiding double margin being charged to consumers and preventing a firm from free-riding on investments made by its competitor to offer better services to its customers.



# Cartels

*A cartel is defined as an illegal agreement between businesses not to compete with each other. The agreement is usually reached in secret, could be verbal or in writing and is often informal.*

**A cartel is considered the most serious violation of competition law. A cartel agreement is prohibited under the FCA.**

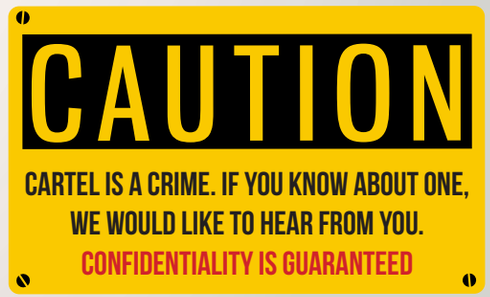
A cartel is primarily directed at:

- Price fixing: Competitors agree on the prices they will charge or the discounts/ credits they will offer to consumers
- Market sharing: Competitors allocate geographic locations and customers between themselves.
- Output restrictions: Competitors agree to limit or control production of goods/ services offered so as to increase prices or to keep prices high.
- Collusive tendering: Competitors decide collectively who should win a contract in a competitive tender process.

## How can you spot a cartel?

"You are generally well placed to notice when your suppliers are deviating from normal competitive practices. There are a number of signs that may indicate that a cartel is operating. Some examples are where suppliers:

- Raise prices by the same amount and at around the same time
- Offer the same discounts or have identical discount structures
- Quote or charge identical or very similar prices
- Refuse to supply a customer because of their location, and
- Use 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 sole aim of cartels is to extract more profit at the expense of consumers. It severely harms consumers by raising prices and restricting supplies to consumers.**

*The presence of these signs do not necessarily mean that a cartel is operating. Some, such as simultaneous price changes or similar prices, can be perfectly consistent with normal competitive responses in the market place. However, you should be particularly suspicious where several of the signs are present."*
*(OFT, UK, 2005)*