

LANGUAGE IN DOCUMENTS: COMPETITION LAW ISSUES

Avoiding the perception of a competition law breach can prevent a great deal of wasted time and money defending the firm against allegations of wrongdoing. Unfortunate language has a strange habit of eventually coming to light – clear and unambiguous language will go a long way to avoiding an issue in the first place.

The use of language is particularly important given the ever-increasing use of email to communicate both internally and externally. Emails often contain informal language, include throw-away comments and tend to become widespread very quickly as they are forwarded on to individuals and whole email groups – increasing the risk that today’s recipient is tomorrow’s disgruntled ex-employee!

GUIDELINES

Adhering to the following guidelines will go a long way to avoiding unnecessary investigations.

- Ensure the intent of documents is clear. For example:
 - If you are seeking support from colleagues to reduce price to maintain market share, say, “we need to reduce price to remain competitive”, rather than, “let’s reduce price to send a message they shouldn’t try and take us on”.
 - Similarly, if a supplier’s sales staff are instructed to discuss recommended resale prices with their retailers, say, “explain to retailers why we think our recommended resale price is appropriate”, rather than, “get them to accept our recommended resale price”.
 - Stick to the facts. Avoid conjecture, exaggeration and emotive words such as “squeezing”, “crushing”, “taking out”, “dominate”, “own the market”, etc.
 - Refer to customers as having been “lost”, rather than “stolen”. Aggressive price cutting should not be characterised as “unethical” or price leaders described as “mavericks”.
 - Express why you think a proposed course of action is appropriate, i.e. “We’ll have the most sought after deal in town upon implementation”.
 - Provide a proper context for comments that may otherwise raise a red flag. If a management report includes post-merger price increases as a sensitivity test, ensure they are clearly stated as such and explain how they have been created.
 - Do not use phrases such as “rational pricing”, “stabilise pricing”, etc. as these can often be interpreted as one firm attempting to signal to a competitor (perhaps via a third party) to raise price or reduce discounts.
 - Do not overstate the significance of a position or course of conduct by using phrases such as, “we’ll own the whole market if we stick to our guns on this one” or, “this could be the final nail in the coffin for firm A”.
- Do not “gild the lily” in management papers/presentations about a merger’s potential to lead to price or margin increases where such increases are unlikely.

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The golden rule is to ask yourself if you’d be happy for your message to end up on the front page of tomorrow’s newspaper.