Cartels and Cover Pricing

Contents

1. What is a business cartel and what are cartel activities?

A cartel exists when rival businesses agree to act together instead of competing. This agreement is usually secret and informal. Cartel activities are forms of anti-competitive behaviour and include:

- **Price fixing** – when two or more rival businesses collude to decide what prices they will charge customers
- **Bid-rigging** – when rival businesses communicate before bidding and secretly agree which one will win a tender
- **Market sharing** – when two or more rival businesses divide markets and agree not to go after the same customers.

These activities can push up the price that customers pay and undermine the quality of goods or services they receive. Honest competitive businesses that offer true value for money can also be put at a disadvantage by cartels and their activities.

2. What is cover pricing?

Cover pricing (also known as cover bidding) is a common form of bid-rigging scheme.

It is used during a competitive tender process as a way of fixing a bid to give an unfair advantage to a specific bidder. The objective is to give the appearance of genuine competition, when in reality the bids are not competing. This means that customers are not getting the best deal, because the bid that appears to be the best or lowest price is often inflated to an artificially high level and the customer is left with little choice as to who to award the contract to.

Cover pricing occurs when companies or individuals agree to do at least one of the following:

- A competitor submits a bid that they know is higher than the bid of the elected winner
- A competitor submits a bid that is known to be too high to be accepted
- A competitor submits a bid with terms they know will be unacceptable.

3. Why are businesses engaging in cover pricing?

Some businesses collude in cover pricing with other businesses involved in a tender process with the intention to artificially influence prices, create an anti-competitive environment and sometimes to receive financial incentives and other benefits.

However, the practice of cover pricing is said to have evolved to address a perception that if a company did not bid for a tender when approached, they would not be invited to submit bids in the future by that client.

Businesses often recognise that they do not have the resources or the skill set for a job or realise they are unlikely to win the tender, and call their competitors to check what their bid is to put in a higher price and avoid winning the tender. However, this practice prevents other firms from being invited to bid and therefore keeps potential competitors out of the market.

4. What is the Competition and Markets Authority?

The Competition and Markets Authority (CMA) is the competition regulator in the UK. The CMA has wide-ranging powers to investigate matters involving anti-competitive behaviour. The majority of the CMA's powers come from civil law; however, the CMA also has the power to bring criminal proceedings and prosecute (together with the Serious Fraud Office) for some offences.

The CMA has a range of investigatory powers and can require the presentation of specific documents and information. The CMA can conduct interviews with individuals and has the power to require individuals to answer questions.

When the CMA has reasonable suspicion that a business has breached competition law, they can enter business premises to carry out any necessary searches and collect evidence. These searches can be undertaken with or without a warrant and can be with or without notice.

5. What is permitted and what is an offence?

The law prohibits agreements and concerted practices between businesses which prevent, limit or distort competition.

Any communication with a competitor, whether or not in good faith, in respect of bidding for a tender is not permitted. Exchange of competitively sensitive information between competitors is also not permitted.

The CMA has sent a clear message that there are no excuses for breaking the law. Best practice is to not engage in any way with a competitor or potential competitor during a bidding process.

6. What are the sanctions and consequences?

The CMA has demonstrated that:

i. It will not turn a blind eye to illegal behaviour and will take action where laws are found to have been broken
ii. It will take action against businesses of all types and sizes (and in various industries) and has previously issued fines to estate agents, Amazon marketplace sellers, and water tank suppliers.

Severe penalties can be imposed on individuals and businesses involved in cover pricing and other anti-competitive activities:

- Businesses can be fined up to 10% of annual worldwide group turnover
- Individuals and directors directly involved in the offence may be sent to prison for up to five years
- Company directors may also be disqualified from acting as a director for up to 15 years.

In addition, a business' reputation could be severely damaged if it has been implicated in anti-competitive behaviour, and customers, suppliers and industry bodies may decide that they no longer wish to work with them.

7. Examples of businesses sanctioned by the CMA for anti-competitive behaviour

In **December 2024**, the CMA launched an investigation into bid rigging after it suspected that multiple companies within the roofing and construction sector illegally colluded to bid for funding from the Department for Education's Condition Improvement Fund. The CMA carried out unannounced inspections at business premises, with the aim of gathering relevant evidence. If it is decided after assessing the relevant evidence that competition law has been broken, the CMA will issue a statement of objections, which should detail its concerns and give the companies under investigation the opportunity to respond. At this stage, it should not be assumed that any competition laws have been broken.

In **2023**, following a lengthy investigation by the CMA, 10 demolition and asbestos removal suppliers were found to have breached competition law by colluding to rig bids, in the form of cover-bidding, on 19 public and private sector projects worth over £150 million. These bids were rigged, deceiving the customer into believing that they were competitive when that was not the case. The fines issued by the CMA totalled almost £60 million, with the highest individual fine being over £17 million. In addition, the CMA has so far secured the disqualification of four directors of companies involved, with the longest disqualification being over seven years.

In **2019**, five office design companies were fined a total of over £7 million for involvement in cover pricing activities between 2006 and 2017. One of the companies was fined over £1.7 million, despite only admitting one offence. When directors were found to be directly involved, the fines were increased. In addition, the CMA secured the disqualification of three directors involved in this case and is continuing to investigate other directors involved.

In **2018**, following a tip-off, the CMA found two of the UK's largest charcoal and coal suppliers had taken part in a market sharing cartel and bid-rigging. The two companies paid a total of £3.4 million in fines, which included a 20% reduction for admitting the infringement and engaging with the CMA.

8. What can you do to prevent involvement in anti-competitive behaviour?

- Directors should understand that they have personal responsibility for ensuring that their businesses comply with competition law, and that disqualification may follow if they fail to do so.
- Businesses should ensure that directors and staff (including contractors, advisors and other representatives and agents acting on their behalf) are clear on competition law and what activities break the law. All directors and staff (including contractors, advisors and other representatives and agents acting on their behalf) should be aware that compliance with the law is a term of their employment or engagement.
- Directors and staff (and where applicable contractors, advisors and other representatives and agents acting on their behalf) should be provided with regular training, and the CMA has a range of short, simple training guides.

- Businesses should conduct regular internal audits and risk assessments and systems should be in place to flag any suspected illegal practices. The CMA has extensive guidance available to help businesses learn to identify bid-rigging and cover pricing, including videos, cases studies and quizzes.
- Businesses must also ensure that they comply with anti-bribery legislation and should put in place training and develop policies for directors and staff (including contractors, advisors and other representatives and agents acting on their behalf) to mitigate the risk of involvement in anti-competitive activities.
- Businesses and individuals that believe they have engaged in anti-competitive behaviour should always seek specialist legal advice.

9. What should you do if you or your business is approached?

If approached to become involved in anti-competitive activities:

- Reject the approach immediately;
- End the discussion or leave the meeting, making clear that you refuse to take part; and
- Never disclose any commercially sensitive information.

Businesses should never agree with rivals to submit a cover bid, even in cases where they do not want to win a tender but want to keep on good terms with clients.

If businesses have witnessed illegal cartel activities or been involved, the CMA encourages reporting and offers possible financial rewards if the information provided leads to an investigation. The financial reward available can be up to £250,000 in exceptional circumstances.

A business that has been involved in cover pricing and other anti-competitive behaviour may receive total or partial immunity if they report the activities. The CMA also has a leniency programme for individuals who report others involved in anti-competitive activities. In most cases the CMA will not give financial reward to businesses and individuals granted immunity under the leniency programmes.

10. Changes to competition law in 2025

The Procurement Act will introduce a new debarment regime under which suppliers may be placed on a public debarment list and prohibited from participating in procurement processes and/or being awarded public contracts. If a supplier is found to have committed a cartel offence, this will be a mandatory ground for exclusion, and an excluded supplier would no longer be eligible to participate in future procurement processes. The Act also introduces discretionary grounds for supplier exclusion based on potential competition law infringement as well as misconduct, dishonesty and impropriety amongst other things.