

## EXPERTS

Why should the corporate world of mergers, cartels and market abuses apply to those teaching and training young people? Lindsay Draffan explains

I was rather surprised by the number of times the words “competition” and “competitors” were used at the recent FAB conference in Leicester.

I didn't expect that. Neither did I expect references to “collaboration”, “market dynamics” or difficulties for new entrants against the relative comfort for more established players.

What was lacking, however, was any mention of competition law as a means to help a) establish a level playing field for those providing educational services and b) choice, quality and innovation, all at a reasonable price for the learner.

**What does competition law have to do with FE?**

In a nutshell, competition law regulates the activities of those offering services (or goods) for the benefit of the consumer. So a training provider offering an FE course for a fee must comply with competition law. To price-fix a course with a competing provider, for example, is a complete no-no.

In exactly the same way, awarding organisations must comply when they carry out their business activities. And those with the good fortune of holding a leading market position, usually 40 per cent or more, must not try to prevent a rival from offering a competing product. That can happen through abusive



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## What FE needs to know about competition law

behaviour in related markets, not just in the award process itself. You might think it's a great tactic to make sure your competitors cannot get their materials to print due to a network of exclusivity with publishers, but it's highly unlikely the competition authorities would agree!

**What are the penalties for anti-competitive behaviour?**

The law penalises anti-competitive agreements with fines based on annual turnover, and the severity and duration of the infringement. The maximum financial penalty is 10 per cent of worldwide turnover, not just that generated in the UK. The same goes for abusing a dominant position.

In addition to unlimited fines, the cartel offence (usually price-fixing between

competitors) also carries potential criminal penalties for individuals of up to five years' imprisonment, and 15 years' disqualification as a director.

“ **Your gut instinct can go a long way** ”

Competition law also includes merger control, where merging or acquiring competitors can be reviewed for approval or prohibition by the Competition and Markets Authority (CMA), should certain turnover or market-share thresholds be met. In the current climate of amalgamation, merger control is highly relevant, although reviews are carried

out in the context of many factors, including market conditions, financial sustainability and sometimes unavoidable “direction” from local government.

**How can we tell if we're breaking the law?**

It is a complex area of law with a firm economic basis that often sits outside the comfort zone of many competent professionals. Nevertheless, when I am asked questions about whether a commercial agreement or behaviour is on the right side of the law, I tend to ask whether an organisation would be happy for their agreements or behaviour (confidentiality aside) to appear in the local or national newspapers. Your gut instinct can go a long way, and so can being transparent, objective and non-discriminatory in your commercial direction and relations with others in the sector, whether they're a competing organisation or active at a different level.

There is, however, no magic remedy other than being compliant. You can't really ask the CMA for help – this has been a self-assessment regime since 2000. You have to make sure you understand as best you can what is and isn't permitted (ask a friendly lawyer for assistance if need be). Compliance is also a useful exercise if you believe your competitors are not playing by the rules.

From the first foray into the price-fixing of school fees many moons ago, to the recent shaming of the Law Society which abused its position as a combined AO and training provider, the competition authorities and courts are more than capable of tackling the education sector. The time has come to educate yourself.