Competition Law Compliance Guidelines

I. RELEVANCE OF COMPETITION LAW

1. What type of conduct does competition law regulate?

The general objective of competition law is to maintain free competition in the marketplace and to protect the interests of consumers.

EU and national competition laws prohibit the following types of conduct.

- agreements, decisions of associations of undertakings (including trade associations) and concerted practices which restrict competition; and

- abuse of a single or collective dominant market position.

Two basic points should be borne in mind:

1. Regardless of the good intentions of the PE100+ Association ('the Association') and/or its members, if the effect of conduct is to restrict competition, this activity may be illegal.

2. Infringement of competition law does not require an actual effect on the market. The mere intention to impede competition is sufficient to infringe competition law.

2. Why is competition law compliance important?

We must ensure that both the Association itself and its members comply fully with EU competition law and applicable national competition laws.

As trade associations are, by definition, made up of competitors, competition regulators, including Directorate-General Competition of the European Commission ('DG Comp'), are particularly alert to the risk of restrictive agreements or concerted practices in this context.

Both DG Comp and national competition authorities (for example, the Office of Fair Trading in the UK) apply and enforce competition law. Competition authorities enjoy wide investigation powers for suspected infringements of competition law, including the power to carry out unannounced inspections ('dawn raids') at Association or members' premises.

Infringement of EU and national competition law, even if inadvertent, can lead to fines, civil liability for damages, and in some countries, criminal liability. Even where no infringement is

ultimately found, investigation by a competition authority of a suspected infringement will require dedication of resources in cooperating with the authority (and, possibly, constructing a legal defence) and may prejudice the credibility of the Association and its ability to retain, or attract new, members.

It is the responsibility of the Association and each of its members individually to ensure compliance with these guidelines.

3. What are restrictive agreements or concerted practices?

EU rules prohibit agreements between competitors whose objective is to restrict or eliminate competition between them in order to increase the prices and profits of the undertakings concerned without producing any objective counterbalancing advantages for customers. Examples are given in Section II.A. below.

A concerted practice is less clear-cut than a restrictive agreement. It involves coordination among firms which falls short of an agreement proper. A concerted practice may take the form of direct or indirect contact between firms whose object or effect is to influence market behaviour or to tacitly inform each other what conduct they intend to adopt in the future.

Associations are a potential forum for restrictive agreements or concerted practices between their members.

4. What are decisions by associations of undertakings?

A trade association may, independently from or in combination with its members, infringe competition through decisions (interpreted to include recommendations to its members) which restrict competition. Examples are where a trade association recommends fixing of prices or that its members deal only with specified service providers or potential customers.

5. Abuse of a dominant position

Companies that have the economic power to act independently and set prices regardless of customers' or suppliers' demands or competitive pressure have a special duty not to restrict competition or exploit their customers. Single firm dominance is assumed where a firm accounts for a dominant share of supply or demand (normally 40% or more). Small companies may be dominant in narrowly defined markets and members should therefore ensure that they are aware of products or services in relation to which they may be found dominant.

Even if individual members may not be dominant, trade association members may be considered collectively dominant in a particular product market if a few of them account for a large share (say, around 80%) of supply and if they have contacts with each other through the trade

association. In such an oligopolistic market, parallel behaviour that restricts competition or exploits customers may be found abusive even in the absence of evidence of active collusion.

As soon as a dominant undertaking's behaviour has an anti-competitive object or effect, without objective justification, it may result in fines and civil liability. Examples of possible abuse of dominance include:

- imposing excessive or discriminatory terms on customers or suppliers;
- offering below-cost prices with the aim of excluding competitors from the market;
- limiting production or technical development;
- refusing to supply parallel traders;
- refusing to supply competitors or customers with products that they need and cannot buy elsewhere; or
- making supplies of a product that a customer needs dependent on the purchase of a product or service that the customer does not want (tying).

II. HOW TO COMPLY WITH COMPETITION LAW

The following guidelines apply to the Association, any Association subgroup and individual Association members, and should be complied with in order to avoid a potential infringement of competition law.

A. Anti-competitive agreements

No Association member should ever discuss, or be involved in, the following types of anti-competitive agreements. Nor should the Association recommend that its members carry out these activities.

- Price-fixing, including the co-ordination of price ranges, discounts or any other element of pricing;
- Market partitioning such as the allocation of customer groups or territories between competitors, or bid rigging;
- Agreements on investment levels or production quotas;
- Exchange of commercially sensitive information (see Section II.D.);

- Agreed restrictions on trade between EU Member States such as export bans, or prohibitions on sales to parallel traders;

- Joint selling, joint buying or other joint negotiations (except after legal review and clearance); or

- Collective boycott or other joint action to exclude competitors or new entrants.

To be prohibited by competition law, an agreement need not be written down or binding. A verbal information exchange or an informal agreement can constitute an infringement even if it is merely a 'gentleman's agreement'.

B. Membership rules

Membership of the Association must not be used as a way of restricting competition.

Accordingly:

- The Association membership criteria must be (and are) precise, objective, non-discriminatory and reasonably necessary for the purposes, and efficient governance, of the Association. The criteria are designed to eliminate any subjectivity in the decision whether to accept or refuse membership. Membership is open to any interested party in the relevant industry sector.

- Any proposed expulsion or rejection of a membership application should be based on objective criteria and the concerned member shall have a right to be heard.

- Membership of the Association does not require members to restrict their individual marketing or promotion activities in any way.

C. Industry standards and standard terms

The Association, and its working groups, may develop and promote industry standards or standard terms and conditions provided that this does not restrict competition. Accordingly:

- Standards should not be used to raise barriers to entry to the market or to exclude competitors.

- Specifications for standards should be publicly accessible and therefore available to non-members.

- The award of certificates or seals of approval is permitted provided criteria are objective and legitimate (for instance, based on verifiable quality levels), and applied on a non-discriminatory basis.

- The use of standard terms and conditions should not be made compulsory. Members should remain free not to adopt such terms or conditions.

D. Information exchange

Members must avoid exchanging commercially sensitive information. They must be particularly careful in discussions with other members who are, or who may become, their competitors. This applies both at formal gatherings and at any informal (including social) meeting.

Typical examples of commercially sensitive information include:

- individual company or industry prices, including matters affecting price such as discounts, surcharges, rebates, etc.;

- individual company costs and profit margins;

- key sales terms and conditions;

- future company plans such as business or marketing strategy;

- matters relating to individual suppliers, distributors or clients (especially boycotting or blacklisting);

- individualised market share or sales volume data; and

- ongoing bids or plans to bid for business.

It should not be necessary to exchange commercially sensitive information in order to achieve the legitimate objectives of the Association.

It is acceptable to discuss public policy, educational and scientific developments, regulatory matters of general interest (including Government-imposed prices or reimbursement policies), demographic trends, generally acknowledged industry trends and publicly available and/or historical information that have no impact on future business.

E. Benchmarking and Market Surveys

Collection of individual participants' data and the preparation of market survey or benchmarking reports should be carried out by an independent third party who is subject to confidentiality undertakings.

Case law of the European Courts has established the following guiding principles regarding such surveys or reports, although appropriate conduct may vary depending on the specific market in question:

- Individual company data must not be disclosed to competitors, either in the published survey or during its compilation, although exchange of 'historic' data more than 12 months old may be disclosed in the report or survey results.

- Data (which is not 'historic') should be disseminated in an aggregated form which does not expressly identify a particular participant or enable identification by 'reverse engineering' of data (for example, by ensuring that the aggregated data includes input from at least three participants).

- The information disseminated should not be accompanied by comment, analysis, observation or recommendation (in particular, on pricing).

- Participants should not discuss the report or survey results, whether at or outside of Association meetings.

Members should avoid participating in studies or surveys which do not adhere to the above rules.

F. Conduct at Association meetings

Members should not attend meetings without a clear written agenda or indication of purpose.

When attending an Association meeting:

- review the agenda of the meeting in advance to identify possible problems;

- ensure that you sign a competition compliance 'do's and don'ts' acknowledgement circulated at the start of the meeting;

- insist on a lawyer/compliance officer being present at meetings where it appears that discussions may be sensitive;

- ensure that meeting discussions stick to agenda items and object if they do not;

- ensure that you make or receive accurate minutes of the meeting;

- be vigilant: if you do not quickly voice your objection to inappropriate discussions or other anti-competitive conduct, it will be difficult to persuade a court or regulator subsequently that you opposed the infringement;

If you attend an association meeting and the conversation turns to unlawful subjects such as anti-competitive practices, you should:

- make clear that you cannot discuss such matters and demand that the discussion stop at once;

- if this is ignored, immediately leave the meeting, making clear why you are leaving and specifically requesting that your departure is recorded in any formal minutes; and

- report the matter to your legal and compliance department and ensure that a note is made for the file.

Remember: merely being present when illegal discussions are taking place may be sufficient to involve you and your company in an investigation by regulators.

G. What to do if you suspect a breach of these guidelines?

If you think that particular conduct (including agreements, discussions or other information exchange between competitors) has occurred which may be anti-competitive, we strongly suggest that you immediately contact both your company counsel and the Association, who will take appropriate steps.