Defined Contribution Investment Forum

Competition Compliance Manual

Introduction: message from Vivek Roy, Chair, the Defined Contribution Investment Forum

Why Competition Compliance is so important

The Defined Contribution Investment Forum (DCIF) aims to exchange ideas and develop initiatives to promote investment excellence in Defined Contribution (DC) pensions in the UK. We do so because we believe that investment excellence is in investors' best interests.

It is important that in doing our work we comply with all of our legal obligations, including those protecting the functioning of competition in the UK and wider EU market. Competition authorities, including the Competition and Markets Authority (CMA) and the Financial Conduct Authority (FCA), increasingly look at the financial services sector for competition law compliance. They also increasingly scrutinise trade and representative bodies such as the DCIF because the nature of their work could enable them to act as a conduit for anti-competitive or collusive behaviour.

Competition law violations can lead to significant fines for the DCIF and/or Members concerned, and third parties who suffer loss as a result of anti-competitive behaviour may bring an action for damages. In addition, entering into anti-competitive agreements can be a criminal offence and lead to fines, director disqualification or even imprisonment for individuals.

Competition investigations and proceedings are expensive and burdensome, and take up valuable resources even when ultimately successful. In addition, mere allegations of wrong-doing can harm the DCIF's reputation and therefore impair our ability to perform our legitimate role as a forum for information on important issues affecting our Members. Our ability to deliver on our mission depends on our voice being heard. We rely on our reputation for this.

What competition compliance means in the context of the DCIF

> *"Competition is a process of rivalry between firms seeking to win customers' business. When competition is effective, clients can choose between suppliers, putting pressure on firms to meet their needs as efficiently as possible. This drives lower prices, increased innovation, better quality and wider choice. It is good for consumers."*
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> Mary Starks, Director of Competition and Economics at the FCA (24 July 2017)

One of the fundamental principles of competition law is that companies should individually determine their own behaviour in their particular market. So, for example, decisions concerning prices, policies, profit margins, investment plans, etc. must be taken independently and not in cooperation with competitors.

The DCIF consists of investment firms and selected other industry participants and furthers its aim through in-depth research papers, thought leadership and round tables. In carrying out these activities, the DCIF often brings together Members which are actual or potential competitors in their respective end markets. It is important that in so doing we prevent or avoid any behaviour that could be considered as collusive, or as facilitating collusion. Any behaviour by a trade body that reflects an intention to coordinate its Members' conduct or facilitates a coordination by Members that can have the effect of preventing, restricting or distorting competition, is prohibited by law.

The purpose of this manual

This manual sets out guidelines for DCIF Members, executives, employees and contractors. It provides an overview of the main rules of UK and EU competition law. It also provides examples of how these rules touch on what we do and sets out guidance on how to deal with common situations in a way which minimises the risk of falling foul of competition rules.

If you have any queries or are uncertain whether competition laws may apply to specific activities, you should contact Vivek Roy (vivek.roy@axa-im.com), who will be able to help you obtain further legal advice where appropriate.

The DCIF Board and management are committed to compliance with the spirit and the letter of UK and EU competition laws, and all Members, employees and contractors should be aware that any infringements of the procedures or guidelines in this manual will be viewed very seriously. You should take the time to read this manual carefully.

Vivek Roy, Chair, the DCIF

Summary of the main rules

As the term suggests, “competition compliance” is simply a method of making sure that we comply with the various legal rules at a national (and where applicable European Union (EU)) level which are designed to ensure that competition within the UK or the wider EU market is not restricted.

Whereas EU competition rules will apply where an agreement or conduct affects trade between EU member states, the UK competition prohibitions will apply where the effect is mainly on trade within the UK. The following discussion focuses on UK law, but it is important to keep in mind that (broadly identical) prohibitions of EU law may also apply.

Under the Competition Act 1998, prohibitions on anti-competitive agreements (Chapter I) and abusive conduct by dominant businesses (Chapter II) came into force which are closely modelled on Articles 101 and 102 of the Treaty on the Functioning of the European Union.

Chapter I prohibition - anti-competitive agreements etc.

The Chapter I prohibition of the Competition Act 1998, which is particularly relevant to an organisation such as the DCIF, prohibits any agreement or concerted practice between two or more businesses that restricts competition in the UK and has an effect on trade within the UK. It is important to note that the text of the Act expressly captures decisions by associations of undertakings. The required effect on trade and competition can be actual or potential.

If, for example, two competitors arrange to fix prices, or to allocate customers or markets, the arrangement will be prohibited by Chapter I. More routine commercial agreements such as distribution agreements can also be caught, if they impose inappropriate restrictions on parties or impair the ability of non-parties to compete in the relevant market.

Both agreements and behaviour are caught by the Chapter I prohibition. Agreements can be either written or oral, and can be informal arrangements such as a ‘gentleman’s agreement’. Thus, a social meeting at which two competitors informally “agree” to share customer information and not to undercut each other’s prices will be caught by the prohibition.

Agreements can also be tacit or implicit. It is fundamental to competition law that companies should individually determine their own behaviour. Thus, a mere exchange of information which enables competitors to align their behaviour, even without an express agreement to

do so, may be caught by the prohibition on concerted practices. In this context, it is often presumed that companies will act on information received unless there is clear evidence to the contrary.

An agreement caught by the Chapter I prohibition is automatically void and unenforceable, and the parties to it may be subject to heavy fines, up to 10% of an undertaking's turnover.

Under the Enterprise Act 2002, the directors of a company found to have infringed the Chapter I or II prohibition may face disqualification for up to 15 years.

Chapter II prohibition - abuse of a dominant position

The Chapter II prohibition makes it illegal for companies with strong market power (referred to as a "dominant position") to exploit their position in a way which may affect trade within the UK, for example, by imposing excessively high or predatorily low prices, or discriminating between customers without justification.

The Chapter II prohibition may also be engaged where several companies collectively are in a dominant position (oligopolistic markets) and exploit that position, whether or not their behaviour is sufficient to also be captured under Chapter I as collusive.

Generally speaking, a company, or group of companies, will be in a dominant position if it can take business decisions without regard to its competitors. Assessing whether a company, or group of companies, is in a dominant position depends on a variety of factors of which market share is only one. However, as a general guide, there is a high risk that companies with a market share of 40% or more would be regarded as dominant.

Cartel offence

The Enterprise Act 2002 made it a criminal offence for individuals to dishonestly enter into an agreement relating to a company's involvement in hardcore cartel activity. This covers agreements to fix prices, share markets, limit production or supply, or to rig bids.

The Enterprise and Regulatory Reform Act 2013 amended the Enterprise Act by removing the requirement that an individual must be acting "dishonestly". It also introduced three defences to the commission of the cartel offence, which broadly require that the individual did not intend the nature of the arrangements to be concealed from customers or the CMA, or that

the individual took reasonable steps to seek legal advice on the permissibility of the agreement.

An individual found guilty of the cartel offence will be liable to a criminal sentence of up to five years' imprisonment instead of, or in addition to, an unlimited fine. This is also an extraditable offence.

‘DOs’ AND ‘DON’Ts’ for DCIF Members and staff

The Chapter I and II prohibitions establish a framework of general principles. This section of the manual describes some of the specific situations that you may come across, and gives guidance on how to deal with them. In cases of doubt, you must refer to Vivek Roy in the first instance, who will be able to help you obtain further legal advice where appropriate.

Because a forum such as the DCIF is, by definition, a joint activity engaged in by persons within the same industry (often actual or potential competitors), special care must be taken to avoid any action that could be questioned under the competition laws as constituting or facilitating coordination between competitors.

In particular, DCIF Members and staff and anyone acting on the DCIF’s behalf should be aware of the following key areas of competition risk. These areas have been identified as potentially problematic, but it is usually possible to overcome the relevant concerns through a considered approach. We do not consider that there is any element of the DCIF’s work which inherently brings us into conflict with competition law.

Conducting meetings or round-tables

Meetings and round tables must not become a channel for sharing competitively sensitive information between Members, or a forum to facilitate discussions of an anticompetitive nature. Discussions by competitors of current or future pricing or price-related intentions or expectations are particularly sensitive, but any discussion which reduces the uncertainty about one competitor’s future behaviour in the market in a way that may influence another competitor’s decision-making is problematic. This may include discussion about product prices, terms of sale, product or marketing plans, or business relations with suppliers or customers (“sensitive information”).

DO

- Follow a pre-set agenda for all DCIF meetings or round tables. Obtain guidance on an appropriate agenda beforehand if necessary.
- Consider including a competition compliance reminder on the agenda document or at the beginning of the meeting, in particular, if discussion covers areas which appear prone to trigger the discussion of sensitive information
- Keep discussions of potentially sensitive areas to a discussion of historical conduct, not current or future, but be aware that even historical information may be

competitively sensitive, where it still has current relevance, and that historical discussions can have the tendency lead to a discussion of future intentions

- Consider anonymising and / or aggregating any data points discussed sufficiently, so that individual competitors' conduct cannot be identified
- Take full and accurate minutes of all meetings or round-tables, or ensure that such minutes are taken
- Distribute minutes to all participants or, where appropriate, to all Members or a wider industry audience
- Halt any discussion which appears to stray towards a discussion of sensitive information. If necessary, leave the meeting.
- Record any concerns and bring them to the attention of [in-house counsel].
- Consider reporting any meeting you believed discussed competitively sensitive information to the FCA or CMA (this can be done anonymously).

DON'T

- Allow "off-the-record" discussions either during or outside of meetings.
- Allow the discussion of individualised, private, current/recent information on sales, prices, discounts, terms of business or other sensitive information with a competitor.
- Allow discussions of historical or aggregated pricing information lead to discussions of future or individual pricing.
- Discuss or suggest any form of coordinated reaction to the business initiatives of any third party or in response to industry pressures or a regulator's intervention (unless the latter is required or limited to discussing the correct understanding of an obligation).
- Have open-ended items on the agenda such as "Miscellaneous".
- Discuss or agree the exact introduction time of new technologies or products several Members are developing independently.
- Having discussions or make plans about how to 'deal' with non-Members.

Conducting research

Conducting research which surveys the industry can give rise to some of the same concerns as the hosting of meetings between industry participants.

DO

- Ensure that any survey or collection of sensitive industry information is managed by an independent third party.
- Ensure that any data shared as part of the research report is appropriately aggregated or anonymised, or of an historical nature, so that it is not suitable to deduce individual competitors' current conduct or future intentions in the market.
- Ensure that where data is aggregate, the number of respondents is sufficient to preclude the identification of individual responses.
- Disseminate research on industry issues broadly, not just to Members.
- Ensure research is a true reflection of the breadth of positions found in the market and is not biased to Members' position.
- Ensure research partners are appointed on the basis of objective grounds, and not for example because they are known to have a view favourable to Members' interests.

DON'T

- Allow Members to act as a conduit for collecting industry data.
- Share the underlying individual responses to any survey.

Membership rules, industry standards, recommendations or best practice

Rules and admission criteria for the forum need to be transparent, proportionate (i.e. the least onerous restriction to achieve a legitimate aim), non-discriminatory and based on objective standards.

Membership of the DCIF is voluntary. Industry participants who are not members should not be compelled to join, nor must they be disadvantaged in the market because they are not members.

Recommendations for best practice or the developing of standards can often be beneficial to consumers by raising the standard of service provision. Because the adoption of uniform standards may restrain competition on the standardised features, however, the process can raise competition concerns.

The forum's rules, or any recommendations it publishes, any best practices it identifies, or any standards it recommends for the industry should not directly or indirectly induce anti-competitive behaviour by limiting competition on certain features of the market or seeking to weaken non-Members' position.

DO

- Seek to reflect the differing interest which may exist in the market in the membership of any [working party] or [committee].
- Make sure that any standards or recommendations or best practices are aimed at objectively improving products and services offered by the industry.
- Afforded all interested parties some opportunity to participate in any process leading to the promulgation of a new standard, recommendation or best practice.
- Make clear that any standards or standard terms or recommendations or best practices are voluntary and are understood by Members to be non-binding.

DON'T

- Impose or threaten sanctions on Members who do not support or follow suggested best practices or recommendations.
- Do not make membership of the forum subject to adopting certain standards in a way calculated to weaken non-Members competitive position or raise barriers to entry to the industry.

Other considerations

Use of language

Consider the language you use in all business communications, whether in writing or in the course of telephone conversations or meetings. A poor choice of words can make a perfectly legal activity look suspect and can be damaging in the context of an investigation or litigation when many internal documents are likely to come under scrutiny.

Assume that all communications may be read or heard by others at some point. This includes emails and voicemail messages, and documents otherwise intended as confidential, such as personal call records or notebooks. In particular, email and voicemail can often contain more damaging statements than letters or memoranda, because they are usually sent or left casually.

Consider whether what you are committing to record is an accurate reflection of what was discussed or of what you are intending to record. Be wary, for example, of any suggestion

that an industry view has been reached on issues such as price or strategy, which may imply coordination or an inappropriate level of information sharing.

Keep in mind that if you identify a potential issue at this point, it is not too late to resolve or at the very least mitigate the issue. Seek advice if in doubt.

Legal Privilege: Communications with in-house and external counsel

Companies are in some circumstances able to prevent the disclosure of communications with their external or in-house lawyers on the grounds that the communications are protected by the right of legal professional privilege, and can therefore be kept confidential.

Privilege under UK law extends not only to communications with external lawyers but also to advice from in-house lawyers. Such communications will be privileged whether or not the legal advice given or sought is closely related to the investigation.

It should be noted that this is different to the position under EU law, where the right to claim privilege does not extend to in-house counsel.

To enable the DCIF to substantiate any claim of legal professional privilege which it may wish to make in order to protect the confidentiality of communications with in-house or external counsel, each request for legal advice should clearly display the name of in-house or external counsel and be marked as “Privileged and confidential”. If you are replying to a request for information from in-house or external counsel, the reply should be marked as “Privileged and confidential. Prepared at the request of in-house / external counsel”. Do not in the same communication also seek in-house counsel’s views on non-legal matters, even if they are related to the request for legal advice.

Document retention and destruction

You should refer to the DCIF’s document retention and destruction policy for general guidance when deciding how long to keep any particular documents or records. In the context of this manual you should note, however, that:

You must not destroy documents or records (which would not otherwise be destroyed in accordance with the company’s usual policy) because you think they contain damaging information. This will damage the DCIF’s standing with the competition authorities if it comes to light in an investigation, and can lead to criminal penalties.

If you are notified that the DCIF is under investigation by the competition authorities, all document destruction in the areas identified by legal counsel must immediately cease until further notice.

Useful resources

The following documents can be found online and may provide further useful context:

- "*Dos and don'ts for trade associations*" CMA 60-second summary, September 2014
- "Trade Associations: are you complying with competition law?" CMA blog post, March 2018
- "*Trade Associations,* Professions *and self-regulating bodies / Understanding Competition Law*" Document OFT408, 2004 — This is guidance originally issued by the Office of Fair Trading, which has since been subsumed by the CMA. The document is dated but remains broadly accurate and has been adopted by the CMA Board without change.

Contact

For any questions relating to this document or its contents, please contact:

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