COMPETITION LAW GUIDE FOR AREF MEETINGS

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This Competition Guide summarises the competition rules that apply to AREF and any meeting participants. It deals with the potential impact on both AREF and meeting participants, as in the event that anti-competitive conduct were to be carried out by participants, this can cause damage to the reputation of the industry as a whole. As AREF is vital in facilitating various meetings, it is important for AREF to remind their members who are participants in such meetings, to assess their respective ability to participate in the meetings in accordance with competition law, and that AREF holds no liability to any participants from facilitating such meetings.

1. COMPETITION LAW

The general aim of competition law is to ensure that competition in a market is open, genuine and fair. This gives consumers the best choice of products and services at the lowest prices.

The two competition law prohibitions (set out in further detail below) ensure that:

- competitors do not: jointly fix prices, share markets, limit provision of goods/services, or rig the outcome of bids/tenders. This also includes sharing sensitive data through a trade association; and

- businesses with high market shares or market power do not abuse their position in relation to suppliers, customers or competitors

2. SUMMARY OF FCA FINDINGS RELATING TO COMPETITION LAW INFRINGEMENTS

In 2019, the FCA took action against three asset management firms for violating competition law, specifically by sharing strategic information by disclosing the price they intended to pay, or accepting such information, or both, in relation to an Initial Public Offering ("IPO") and one placing, shortly before the share prices were set. The sharing generally occurred on a bilateral basis and allowed firms to know the other's plans during the IPO or placing process when they should have been competing for shares. As a result, this reduced uncertainty about how those firms would behave during the IPO process, meaning competitive uncertainty was reduced and their behaviour being treated as anticompetitive conduct. One firm received immunity under the FCA's leniency program for alerting the regulator to the conduct.

The FCA's main allegations against the firms were that separately:

- in 2014, 2 of the firms shared information about the price they intended or were willing to pay for shares in relation to another IPO; and

- in 2015, 3 of the firms had disclosed and/or accepted information about the price they intended to pay for shares in relation to one IPO and a placing; and

This was the first case the FCA brought using its competition enforcement powers.

On 21 February 2019, the FCA decided that 2 of the firms had breached competition law as a result of sharing strategic information during the placing of an IPO in 2015, and were therefore fined £108,600.

Furthermore, the FCA found that as an approved person, one individual fund manager who was involved had failed to observe proper standards of market conduct and that they had acted without due skill, care and diligence was subsequently also fined £32,200.

3. THE FCA'S ROLE IN PROMOTING COMPETITION

One of the FCA's statutory operational objectives is to promote effective competition in the interests of consumers in the markets for regulated financial services and services provided by persons specified as recognised investment exchanges (RIEs) under Part 18 of FSMA (section 1E(1), FSMA). The definition of "consumer" for the purposes of section 1E of FSMA is very wide and includes certain "wholesale" consumers.

Concurrency is a feature of the UK competition regime that gives sectoral regulators (such as the FCA) the power to apply specified competition functions that are also held by the CMA

in respect of their own sectors. In 2015, the FCA was given 'concurrent' competition powers with the CMA, and in 2019 the CMA and the FCA published a Memorandum of Understanding in relation to their competition powers. This means either authority can investigate alleged or suspected breaches of competition law, but only one of the authorities actually will carry out the investigation in practice, with the two bodies often deciding between them who is best placed to do so. The FCA's concurrent competition powers are under sections 234I to 234O of FSMA, which were inserted into FSMA by the Financial Services (Banking Reform) Act 2013 (Banking Reform Act). In respect of financial services, the FCA and the CMA have concurrent powers (and the FCA is a "concurrent regulator") as both bodies have competition powers under the Enterprise Act 2002 and the Competition Act 1998 (the "Competition Act"). The FCA can also make a market investigation reference ("MIR") to the CMA to investigate a particular market or sector in more depth.

The FCA's concurrent powers under the Enterprise Act and the Competition Act relate solely to "the provision of financial services" (sections 234I(2)(b) and 234J(2), FSMA). The term "financial services" is not defined for the purposes of these sections. In its Competition Act guide, the FCA commented:

"The term 'financial services' is not defined but, in our view, includes any service of a financial nature such as banking, credit, insurance, personal pensions or investments. 'Financial services' therefore extends beyond financial services regulated by us or other bodies."

4. INVESTIGATIONS UNDER THE COMPETITION ACT

The investigatory powers that the FCA has under the Competition Act mirror those of the CMA. In its Competition Act guide, the FCA sets out the procedures that it intends to follow in respect of its Competition Act powers. The guide covers:

- the procedures for identifying potential infringements;
- the decision to open an investigation including the use of prioritisation assessments;
- the opening of a formal investigation;
- the conduct of the investigation, including:
- the identity of the decision-makers for key decisions in an investigation;
- the FCA's powers to gather information (including the power to conduct compulsory interviews with any individual connected to a business under investigation as well as enter business premises with or without a warrant); and
- the FCA's powers to take urgent action to prevent significant damage or to protect the public interest;
- the potential outcomes of an investigation;
- the procedures for the FCA to follow when it issues a statement of objections (where its provisional view is that the conduct under investigation amounts to an infringement) and the steps that follow the issuing of a statement of objections including the appointment of a Competition Decisions Committee of at least 3 people;

- penalties imposed by the FCA, including fines, and the FCA's policy on leniency and settlement (involving an admission of anti-competitive conduct, a streamlined procedure leading to an infringement decision but with a reduced penalty); and

- disclosure and use of information by the FCA.

5. WHAT DOES COMPETITION LAW PROHIBIT?

The Competition Act contains two propositions that prohibit agreements, practices and conduct that may damage competition in the UK.

(a) Chapter I Prohibition

The Chapter I prohibition covers anti-competitive agreements and concerted practices between businesses which have as their object or effect the prevention, restriction or distortion of competition within the UK. Article 101 of the Treaty on the Functioning of the European Union (TFEU) covers equivalent agreements or practices which may affect trade between EU member states.

There are three elements to a breach of the Chapter I prohibition:

- there must be some form of agreement, decision or concerted practice between undertakings;

- which may affect trade within the UK (or part of the UK); and

- which has as its object or effect the restriction, prevention or distortion of competition within the UK.

In addition, the effect on competition and trade within the UK must be "appreciable", which is likely to be satisfied where the membership of the association is wide among participants in the market.

Assuming that the offence in question is ‘price fixing’ (a form of horizontal agreement), price fixing consists of an agreement or ‘cartel’ between competitors to fix prices and can take a variety of forms, and may be indirect (for example, an agreement as to the level of discounts to be granted) as well as direct.

(b) Chapter II Prohibition

The Chapter II prohibition, which prohibits the abuse of a dominant market position by one or more undertakings which has or is capable of having an effect on trade within the UK. The Chapter II prohibition is less likely to be relevant to AREF and their meetings.

"Dominant market position" means a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by affording it the power to behave to an appreciable extent independently of its competitors, its customers and ultimately of the consumers. The definition of the market has two essential elements; the relevant product market and the relevant geographic market. The mere holding of a dominant position is not an offence is not unlawful until such position is abused.

Such abuse could be carried out by one undertaking or, in certain circumstances, by more than one undertaking acting together. Common market abuses include:

- excessive pricing;
- predatory pricing;
- margin squeeze, i.e. where an undertaking is active in upstream and downstream markets and it charges a price on the upstream market which, when compared to the price charged by the dominant undertaking on the downstream market, does not allow an as-efficient competitor to trade profitably on the downstream market on a lasting basis;
- discriminatory prices;
- exclusive dealing obligations; and
- tying, i.e. where a supplier agrees to supply particular products or services only if the purchaser agrees to buy other unrelated products or services from the supplier.

(c) Consequences of infringements of competition law

The legal risks of infringing the Chapter I prohibition, the Chapter II prohibition, Article 101 or 102 include the following:

- the parties may be ordered to cease or modify the agreement or their conduct, as applicable;
- the parties may be fined up to 10% of worldwide turnover;
- the restrictions of competition in the relevant agreement (and sometimes the agreement itself) may be unenforceable; and/or
- third parties may bring an action for damages or, in appropriate cases, an injunction in the civil courts.

The FCA also has the power to apply to the court to make a disqualification order against a person who is a director of a company that has committed a breach of competition law (section 9E, Company Directors Disqualifications Act 1986).

6. APPLICATION OF COMPETITION LAW RULES TO AREF

Trade associations, such as AREF, serve a number of valuable pro-competitive functions. For example, they can create necessary or desirable industry standards (e.g. quality and safety standards) and codes of practice. AREF represents members' interests regarding legislation, regulation and policy matters affecting the members as well as lobbying relevant governmental and European Union bodies (e.g. the European Commission).

At the same time, trade associations such as AREF are self-regulatory and may pose certain competition law risks because their membership is usually made up of large numbers of industry competitors (either actual or potential) that may constitute a large part of the market. By the very nature of the association, discussion and co-operation amongst members of AREF (who are competitors) is likely to occur. This creates the possibility of AREF being used, directly or indirectly, as a vehicle for anti-competitive, collusive or abusive activity and any decision, rule or recommendation of a trade association or agreement between its members which has an appreciable effect on competition may fall within Article 81 and/or the Chapter I prohibition, Article 82 and/or the Chapter II prohibition.

It is worth noting that the below rules and guidance in relation to competition law apply equally to both formal and informal meetings, and/or communications at AREF events including seminars, and training and/or any other events etc. Therefore, even where meeting participants may be at a break out session, a lunch, or on a coffee break, this does not mean the rules no longer apply.

Whilst AREF facilitates such communications through committee, working group, taskforce and forum meetings ("committee meetings"), it is for all member participants to assess their respective ability to participate in the meeting and AREF holds no liability to any participants from facilitating the committee meeting process. AREF reminds participants of their obligations under competition law prior to arranged committee meetings.

7. APPLICATION OF THE COMPETITION LAW RULES TO PARTICIPANTS/CHAIRS

As set out above, competition law applies, amongst other things, to agreements and concerted practices between undertakings which have as their object or effect the prevention, restriction or distortion of competition. This includes sharing competitively sensitive information (as discussed further below). There are exemptions to this prohibition, including, broadly speaking, arrangements giving rise to efficiencies which outweigh any restriction on competition. It is the responsibility of each participant to self-assess whether their conduct is excluded from the application of the competition prohibitions, or, if it is not, if it might benefit from an exemption.

Agreements - can be informal or formal and do not need to be in writing. An agreement can be implied from the conduct of AREF and/or its members and it does not need to be binding. If an agreement is anti-competitive, the fact that such an agreement was made under the auspices of a trade association makes no difference, it will still be caught by the prohibition.

Decisions – includes resolutions of the AREF Committee or of the members generally; binding decisions of AREF management or executive Committees, the effect of which are to limit the commercial freedom of action of the members in some in some respect; the IA recommendations, including oral recommendations that members are intended to follow; and the AREF membership rules.

Concerted practices – this is informal co-operation within AREF and/or with members without any formal agreement or decision having been reached. In order for there to be a concerted practice, there needs only to have been a meeting of minds which infers commitment to act in a certain way so replacing the risk of competition with a practical form of co-operation.

In the context of a committee meeting, participants should always be assessing whether the nature of the discussions in a specific committee meeting may be/become competitively sensitive. Depending on the specific facts and market context of a meeting, even discussions that are related to a legitimate topic could fall within the scope of the competition law prohibitions.

Abuse of Dominant Position

AREF is unlikely to infringe this prohibition, but participants should be aware that such an offence exists where a company is in a dominant position in its market and abuses that position, for example by imposing excessive prices or refusing to supply.

8. PARTICIPANT/CHAIR ASSESSMENTS

Before accepting an invitation to participate in a committee meeting, and throughout the process of a committee, participants should consider the following matters in making their competition law assessment (this list is non-exhaustive):

- whether the committee has been convened for a legitimate purpose;
- what the aim of each committee is;
- whether committee meeting attendees are in fact actual or potential competitors on the market. Most members will as asset managers be competitors. Discussions between competitors are not necessarily lawful solely based on the fact that the committee has a legitimate purpose. This is just one relevant aspect of the assessment to determine whether the nature of the discussions in a specific committee may be and/or become competitively sensitive. Depending on the specific facts and market context of a committee, even discussions that are related to a legitimate topic could fall within the scope of the competition prohibitions. This can be a complex assessment and therefore all factors must be considered before reaching a conclusion. A key issue for members will be whether the information shared between competitors will remove competitive uncertainty between them;
- what topics will be discussed at each committee and what record is kept;
- whether the subject-matter of the committees is specific (e.g. to solve specific issues). A key competition risk includes whether discussions stray into competitively sensitive areas i.e. information that is relevant to how firms compete with each other. Participants would need to self-assess for each committee whether the type of information to be shared could be competitively sensitive under the circumstances. For further guidance, it might be helpful to refer to the following materials:
    - the CMA's guidance on horizontal arrangements (paragraphs 3.20 to 3.22 deal with information exchange);
    - the European Commission's guidance on horizontal arrangements (which outlines the general principles on the competitive assessment of information exchange in Section 2); and
    - the FCA's infringement decisions on anti-competitive conduct in the asset management sector (this contains as comprehensive a description as we can give of the applicable legal principles in Sections 8 to 10, including a definition of 'strategic information' in paragraph 8.14;
    - what firm-specific information (if any) is intended to be shared and whether that information is forward-looking/disaggregated and necessary to achieve the aim of the committee;
    - whether firm-specific information will be shared and who receives such information;
    - whether the committee participants intend to cooperate in some way and whether that cooperation is necessary; and

- whether as a participant you would like to appoint a legal representative with knowledge of competition to law to be present with you at each committee meeting to assist with your compliance with competition law requirements.

It is important to note that participants should not hold any bilateral or unilateral discussions in relation to committee meeting subjects, without AREF or Issuer oversight.

9. WHAT SHOULD CHAIRS DO AT COMMITTEE MEETINGS?

As Committee Chair, you are responsible for good governance at those AREF meetings which you chair. You must ensure that the meeting does not stray into anti-competitive discussions. You will have the assistance of AREF's secretariat during the meeting in particular to identify issues as they arise which could be problem. It will then be for you to take action to control the meeting.

It is good practice to open the AREF meeting by reminding participants of their obligations to comply with competition law. We ask that you ensure participants have seen the following statement (usually on the agenda for the meeting) or, if not, read it aloud:

> ***I would like to remind members that all discussions held between us during the course of this meeting, as well as outside it, are subject to the application of competition law. We are required to act in accordance with competition law at all times and we cannot engage in action which contravenes competition law in any way.***

DO

✓ Remind participants what discussions are permitted and what are prohibited and that they should have carried out their own assessment as to whether their participating will comply with applicable competition law;

✓ ensure that the meeting agenda has been circulated in advance. A list of questions for discussion by members can form the agenda – check that these have been vetted in advance;

✓ stick to the agenda and take **particular care** with any new issues introduced at the meeting;

✓ ensure that acceptance letters have been received from all participants who have agreed to attend a committee meeting;

✓ ensure that a list is kept of all participants present and of the arrival and departure of members, any objections made by members and requests by members to end discussions on certain topics or to avoid certain subjects;

✓ **terminate immediately** discussions that may breach competition law, such as discussions on pricing or business strategies or which involve sharing other commercially sensitive information

BEWARE

? Ad hoc or informal discussions or seminars without a written agenda; and

? meetings held for no declared or apparent reason.

DON'T

✘ Permit discussions on prices and fees or customers;

✘ impose obligations on members to use standard terms and conditions or use model documentation;

✘ make recommendations against a particular supplier; and

✘ exclude relevant stakeholders/members from particular projects.

10. WHAT SHOULD MEMBERS DO AT COMMITTEE MEETINGS?

DO

Committee members are able to discuss the following (to the extent that such discussions do not include Commercially Sensitive Information (defined below)):

✓ non-confidential information that is in the public domain (provided that it does not fall into the below definition of Commercially Sensitive Information);

✓ general market trends and publicly available information;

✓ government or regulatory policy;

✓ joint industry lobbying and promotion initiatives;

✓ non-strategic technical or scientific data that results in consumer benefits; and/or

✓ other purely technical/non-commercial issues.

NOTE: It is also possible to collect, share and disseminate certain information, provided that this relates to historical data and is appropriately aggregated and anonymized (discussed further in this note).

AREF, and the committee chair shall implement the following and seek to ensure that its participants adhere to the following rules:

Before a committee meeting:

✓ ensure that an agenda is circulated reasonably in advance of the meeting to allow everyone to review the content beforehand and this will also allow participants time to review the content on the ground of competition rules or otherwise;

✓ ensure that agenda topics are clear and specific and not overly vague;

- ✓ obtain acceptance letters from all participants who have agreed to attend;
- ✓ obtain a list or confirmation of those attending the meeting and ensure that there are no employees attending who are not reasonably needed for the stated purpose of the meeting;
- ✓ ensure that there has not been a refusal of participant applications to the committee without just cause; and
- ✓ before the start of the meeting it should be made clear what discussions are permitted and what are prohibited and participants should be reminded that they should have carried out their own assessment as to whether their participating will comply with application competition law.

During a committee meeting:

- ✓ comprehensive minutes are taken that cover all topics discussed at the meeting;
- ✓ the agenda is not deviated from in any material way;
- ✓ issues not contained in the agenda are not discussed;
- ✓ informal discussions should not take place and neither should 'side conversations' or other informal conversations discussing business matters with other participants;
- ✓ if reasonably appropriate, ensure that counsel attend such meeting (for example if such committee meetings has a history of actual or suspected competition compliance issues); and
- ✓ ensure a member of AREF is in attendance where there will be a significant proportion of the market represented at the meeting;
- ✓ participants should not engage in the conduct if they know or suspect it to be improper;
- ✓ participants should raise the matter directly with the committee chairperson and ask that their concern or objection is noted in the committee meeting minutes;
- ✓ if the improper discussions continue, participants should leave the meeting immediately and have it recorded in the committee meeting minutes that they did so;
- ✓ participants should make a comprehensive note as soon as possible after leaving the meeting of the time the time the issue was raised or a comment made, what was stated (verbatim as far possible), and other participant's comments and/or actions;
- ✓ participants should report any issue matter directly to their organisation's legal or compliance department for further advice and assistance; and
- ✓ participants should let AREF's CEO] know that there was an issue in the meeting and what happened so that AREF can take steps to prevent any similar events occurring.

During a committee meeting the following topics should not be discussed ("Commercially Sensitive Information"):

DON'T

- current, near-past or imminent pricing, costs, discounts, capacity and rates, current or future profit margins or profitability targets;
- future business plans or other strategic information including marketing, business, or operational plans or strategies;
- bidding tactics;
- details of specific customers or clients (inclusion customer lists), territories, market shares or offerings;
- wages, salaries, remuneration paid by participating firms;
- credit terms and discounting arrangements;
- the timing and effect of any planned mergers, takeovers or other significant transactions;
- the timing of any price increases or decreases;
- any actual or potential boycotts, i.e. restricting business; and
- any other commercially sensitive topic or information.

The above is not an exhaustive list, but it is clear that these above items relate to specific and/or numeric data that is not publicly available, i.e. is commercially sensitive and being in possession of such information would reduce competitive uncertainty in the market and/or help inform a competitor's future commercial strategy. As a general rule, it would be advisable to avoid disclosing all information that it, or could potentially be, Commercially Sensitive Information at committee meetings.

11. HISTORICAL COMMERCIAL INFORMATION

Historical commercial information is far less likely to be considered Commercially Sensitive Information for these purposes, especially if an individual businesses' commercial activity cannot be identified from the historical commercial information and where such information would no longer be useful for taking business decisions, i.e. as a general rule the information is at least 12 months old, or longer, depending on the business cycle in the industry concerned, and is aggregated to prevent identification of individual participants.

12. WHAT SHOULD PARTICIPANTS DO TO ENSURE COMPLIANCE WITH COMPETITION LAWS?

AREF, committee chairs and participants should carry out the following to ensure its compliance with competition laws at meetings and in general:

DO

- ✓ committee chairs to remind participants of the rules and ensure they are aware of them in meetings and informal events through this Competition Guide;
- ✓ ensure that any standard contract terms and conditions developed by the IA and the participants are clear, easily understood, in plain language and fair to consumers; and
- ✓ ensure that rules and admission criteria for the association are transparent, proportionate, non-discriminatory and based upon objective standards.

AREF, committee chairs and participants should avoid the following to ensure it is not in breach of competition laws:

DON'T

- × have rules that prevent participants from taking independent commercial decisions;
- × allow AREF to be a channel for, or otherwise facilitate, the sharing of competitively sensitive information between participants;
- × allow participants to discuss competitively sensitive information in or around association events, including in 'unofficial meetings' or at social events;
- × issue formal or informal pricing or output recommendations to other participants;
- × develop association rules or practices that restrict members from advertising their prices or discounts, soliciting for business or otherwise competing with other members;
- × require participants to provide the association with competitively sensitive information, such as information about pricing and/or output intentions;
- × publish messages suggesting that lower prices correlate to lower quality, or messages to that effect;
- × establish irrelevant or arbitrary rules for the admission of new participants;
- × adopt rules that restrict members' advertising and promotional business practices, beyond ensuring such practices are legal, truthful and not misleading;
- × prevent participants from using other contractual conditions from any AREF-developed standard conditions, if they wish to do so.

13. COLLECTION AND DISSEMINATION OF INDUSTRY STATISTICS AND BENCHMARKS

AREF will, from time to time, collect and distribute industry statistics for the interest of its members, but this must be treated with caution. AREF (via a third party or independent trade association staff) must collect the data from members directly and members cannot share the information directly between them. The information collected must be historical information only and be communicated back to the members in aggregation, anonymously and in a manner that ensures that information cannot be attributed to a particular member through its context. In practice, this type of information tends not to be discussed in trade association meetings to avoid any unintentional identification of the data by a member, so it is best that such data is not discussed in committee meetings.