

INNOVATION TO IMPACT

COMPETITION LAW COMPLIANCE GUIDANCE

1. COMPLIANCE WITH COMPETITION RULES

It is the policy of Innovation to Impact to comply with all Anti-trust and Competition laws at all times. These laws prohibit agreements or understandings between organisations that have as their aim or effect the distortion or prevention of competition. This guidance considers the rules that are most relevant to Innovation to Impact, and outlines how Innovation to Impact seeks to ensure compliance in pursuing its activities.

2. POTENTIAL LIABILITY OF INNOVATION TO IMPACT AS A FORUM ORGANISER

The conduct of trade associations and forums has been an issue in a number of recent Competition law investigations; therefore Innovation to Impact must be rigorous in monitoring Competition law compliance given the current climate of heightened interest in the activity of such bodies.

Competition law can expose companies to lengthy and costly administrative investigations. Involvement in an infringement of Competition law may result in financial penalties being imposed on the association itself, its members, or both. Penalties for breaching Competition law include fines of up to 10 per cent of the worldwide turnover. In the most serious cases, in certain jurisdictions (such as the UK) there can also be criminal penalties for individuals including up to five years imprisonment.

3. COMPETITION LAW RULES

There are four key ways in which associations/forums could be held to have breached Competition law, and these exemplify behaviours which Innovation to Impact must avoid when it brings together industry partners:

(i) Anticompetitive decisions or agreements

Under Competition law "undertakings", which can include associations, are prohibited from entering into agreements, decisions or practices with others that have as their object or effect the prevention, restriction or distortion of competition. Therefore, Innovation to Impact should be wary of entering into anticompetitive agreements with members of forums or of incorporating terms of such agreements into any membership rules.

Case study: *Property sales and lettings investigation*

In 2015 the UK competition authority fined an association of estate and lettings agents, three of its members and a newspaper publisher over £775,000 for a cartel that had been **facilitated through the association's membership rules**. The association rules prohibited the members from advertising their fees or discounts. This practice reduced pressure on estate and lettings agents' fees and made it harder for potential competitors to enter the market by using the level of their fees to attract new customers.

What constitutes an anti-competitive agreement?



An anti-competitive agreement does not have to be written; the law applies to agreements in any form and agreements do not have to be formally concluded. Oral agreements and informal understandings are therefore within the scope of Competition law.

Prohibited agreements include any agreements between competitors which limit, or are intended to limit, their freedom to compete. In particular Innovation to Impact should be wary of any agreement between competitors to:

- **fix prices** including both purchase and selling prices and discounts;
- **allocate geographic markets, contracts or customers** between competitors;
- **rig bids**;
- **boycott** customers or competitors or exclude new entrants from the market;
- **limit the production** of goods or services.

(ii) Facilitating agreements between competitors

As a convener/facilitator of industry forums Innovation to Impact would also risk infringing Competition law if it allowed or facilitated commercially sensitive discussions or anticompetitive agreements between its members (**even if it was not directly involved in those conversations**).

To minimise this risk it is prudent for an agenda to be circulated in advance and for minutes to be kept of all meetings where Innovation to Impact is present. This encourages members to keep the discussions focused on areas approved by Innovation to Impact, and provides evidence that meetings are not being used as a forum for unlawful agreements or information exchanges.

Active distancing

Should an infringement of Competition law occur or appear likely to occur at a meeting (or in communications), Innovation to Impact should remind members of the law and, if necessary, terminate the meeting. If members are insistent that they wish to consider the issue in question, any Innovation to Impact representatives present must withdraw from the meeting/discussions and ensure that this withdrawal is minuted.

Remember even a **one-sided** disclosure of information is enough to breach Competition law. If Innovation to Impact is concerned by any members conduct it must take "active steps" to distance itself from the conduct and it is advisable to seek legal advice as soon as possible.

(iii) Information exchange

Associations must not be a forum for the exchange of confidential information, which enable members to see each other's sales, output, or customers. It is, however, permissible to collect statistical information which provides an industry wide general overview of a sector and market trends (e.g. for benchmarking purposes). However, it must not be possible to identify the prices or volumes of an individual competitor.

Types of information that are sensitive include: pricing, costs, margin, output, forecasts, sales business plans and other commercially sensitive issues (e.g. marketing strategies, projections). Additionally, how historic the information is will also impact its sensitivity. For example, recent or current information is more sensitive than information that is several years old. Information relating to future actions is particularly sensitive a significant consideration should be given before exchanging any of this information even in anonymised/aggregated form (e.g. any exchange of future pricing information is unlikely to be acceptable under any circumstances).

To reduce the risk of a Competition law breach:

- information should only be handled by Innovation to Impact and not individual members;
- information, once collated, should only be disclosed to members in anonymised/aggregated form which does not permit individual members to be identified; and
- analyses and recommendations accompanying the data are kept to a minimum. The concern here is that such additional wording may be seen as some form of recommendation from Innovation to Impact encouraging particular common responses from members. In other words, the information or statistics should be left to “speak for themselves”.

Case study: *Private Ophthalmology investigation into anti-competitive information exchange and pricing agreements*

In 2015 the UK competition authority found that CESP Limited, a membership organisation of private consultant ophthalmologists had facilitated the sharing of consultants' future pricing and business intentions such as whether to sign up to a private hospital group's package price.

CESP were **fined £500,000** following a £382,500 fine reduction for settlement.

(iv) Membership criteria

The rules of trade association may indirectly restrict competition where they exclude otherwise qualified businesses from membership. Non-admission or threat of expulsion could be used to ensure compliance with prescribed behaviours, which would be a breach of Competition law. Therefore consideration should be given to the criteria for membership:

- Ideally membership criteria should be transparent, proportionate, non-discriminatory and objective. No competitor should be put at a disadvantage by being refused admission.
- The reasons for rejecting applications should be properly documented.

4. DOS AND DON'TS

Don't

- Have rules that prevent members from taking independent commercial decisions;
- Let the forum be a channel for, or otherwise facilitate, the sharing of competitively sensitive information between members about pricing, customers or output plans;
- Allow members 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 members;
- Develop forum rules or practices that restrict members from advertising their prices or discounts, soliciting for business or otherwise competing with members;
- Require members to provide the forum with competitively sensitive information, such as information about pricing and/or output intentions;

- Publish messages suggesting that lower prices means lower quality;
- Establish irrelevant or arbitrary rules for the admission of new members;
- Adopt rules that restrict members' advertising and promotional business practices, beyond ensuring such practices are legal, truthful and not misleading;
- Prevent members from using different contractual conditions from any association developed standard condition, if they wish to do so.

Do

- Remember that the association itself can be liable for breaches of Competition law, and that a breach can have both financial and reputational consequences for the association;
- Make sure that members are familiar with the competition compliance policy for the forum;
- Forbid members from discussing competitively sensitive information;
- Require members to leave, and to report to the association or the CMA, and meetings with competitors where competitively sensitive information is discussed;
- Ensure that any standard contract terms and conditions developed by the association are clear, easily understood, in plain language and fair to consumers;
- Ensure that rules and admission criteria for the forum are transparent, proportionate, non-discriminatory and based upon objective standards;
- Ensure that the requirements for any quality certification schemes the forum operates are fair, reasonable and are available to all businesses that meet them;
- Take careful minutes, so that there is a complete record of what was discussed at the meeting.