

# FIS COMPETITION LAW GUIDANCE

[The Competition Act 1998](#) is of particular importance to trade bodies and compliance is central to the operation of the FIS.

## 1. INTRODUCTION

- 1.1 This Code sets out the rules and principles of conduct to which Members<sup>1</sup> shall adhere in their dealings in and with the Association in order to prevent the infringement of all relevant competition laws. The provisions of this Code apply to:
- (a) any form of interaction, discussion or co-operation between Members, whether in person or otherwise; and
  - (b) any use, disclosure or review of any information which is or may be commercially sensitive information to any Member and which if disclosed to another Member or Members, could distort competition in the relevant market.
- 1.2 This Code recognises that, to the extent that Members are competitors, they are prohibited by EC and UK competition law (and other national competition laws) from undertaking any form of concerted or collusive behaviour, exchanging commercially sensitive information and undertaking or entering into any other behaviour, agreements, arrangements or practices which have as their object or effect the prevention, restriction or distortion of competition.
- 1.3 The following golden rules should be always adhered to by Members and their employees:
- (a) Any form of concerted and collusive behaviour is prohibited – see point 2 below
  - (b) Any exchange of commercially sensitive information is prohibited – see point 3 below.
  - (c) All meetings held under the auspices of the Association must adhere to strict guidelines – see point 4 below.
  - (d) All other forms of contact between Members must adhere to these guidelines – see point 5 below.

Members should consult their legal departments or the Association's Secretariat if they are in any doubt as to the permissibility of any conduct or activity.

## 2. CONCERTED ACTION

- 2.1 UK competition law as defined by the UK Competition Act 1998 prohibit any agreements, arrangements or concerted practices between undertakings which may affect trade which have as their object or effect the prevention, restriction or distortion of competition.
- 2.2 Agreements, arrangements or practices that may breach the above prohibition include (but are not limited to) those that:
- a) directly or indirectly fix purchase or selling prices or other trading terms; or
  - b) limit or control production, markets, technical development or investment; or
  - c) share markets or sources of supply.
- 2.3 Members must ensure that they do not discuss with each other or reach any understandings or agreements which aim to regulate:
- a) Prices, terms and conditions of sale
  - b) Current or future levels of output or capacity
  - c) Costs, profits, margins or market shares
  - d) The sharing or allocation of markets
  - e) Distribution and supply practices
  - f) Bids, or their intention to bid or not to bid for any contracts or programmes
  - g) Selection, retention of and relations with customers or suppliers
  - h) New products, services or product/service innovations

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<sup>1</sup> 'Members' for the purposes of this document shall include; Member Companies and their employees, representatives and agents, Service Providers, companies on the KickStart scheme, and other individuals attending FIS meetings

- i) Individual business and sales strategy

### 3. Exchange of commercially sensitive information

- 3.1 Competitors should not exchange commercially sensitive information. To do so may constitute a very serious competition law infringement.
- 3.2 Commercially sensitive information is information that, if disclosed, would give to the recipient sufficient confidential and commercial information to allow it to have knowledge of and/or to predict the other party's market behaviour and thus reduce the rivalry and uncertainty which should characterise normal business relations under conditions of competition.
- 3.3 The table below sets out the type of information that may constitute commercially sensitive information. Exchange or disclosure of the information in the left-hand column is likely to give rise to competition law concerns and should be avoided.

Information exchange which is likely to infringe competition law	Information exchange which is unlikely to infringe competition law
The exchange of any information that relates to the <b>commercial behaviour or competitive position and strategy</b> of a company that a company would not normally disclose to any third party.	The exchange of <b>public domain</b> information, but also information which is widely known in the industry.
The exchange of <b>current</b> confidential information is likely to give the receiving party a competitive advantage.	The exchange of <b>historic</b> information is usually innocuous, but only where the information is sufficiently historic so as not to give an indication of current or future commercial strategy.
The communication of <b>specific information</b> – i.e. relating to individual customers or transactions or other information which is very precise.	If the information is in some way <b>general, aggregated or anonymised</b> , it will be more defensible
The provision of any confidential information relating to <b>pricing</b> is likely to be considered anti-competitive. This extends to: <ul style="list-style-type: none"> <li>▪ Information on supply costs or other overhead costs;</li> <li>▪ Customer-facing costs, discounts or rebates;</li> <li>▪ Invoicing practices and payment terms;</li> <li>▪ Margins;</li> <li>▪ Customer-specific pricing strategy or price levels;</li> <li>▪ Pricing negotiations;</li> <li>▪ Current or future pricing trends at the individual level.</li> </ul>	When the information is <b>so historic</b> that it bears no relation to or could give no indication of the current or future commercial and competitive environment or the current or future practices of any party, it is unlikely to give rise to any competition law problems
The communication of information which relates to <b>business development or strategy decisions</b> (existing or future).	Competition law concerns are unlikely to arise where there is a discussion about <b>industry practices, trends or conditions or general market developments</b> in which no company specific information is disclosed

#### 4. Conduct of meetings held under the auspices of the association

- 4.1 The following should be used as Guidance for all Committee Chairs on Competition Issues.
- 4.2 Before any meeting:
- a) Review carefully the contents of any agenda to ascertain whether any information likely to be discussed is commercially sensitive information between any of the participants.
  - b) When finalising an agenda or other materials, ensure that any commercially sensitive information (if disclosure of such information is essential) is anonymised or aggregated to prevent identification.
  - c) Ensure that any reference to minutes of earlier meetings or topics previously discussed is also scrutinised so that specific sensitive information is not disclosed.
- 4.3 During any meeting:
- a) The agenda must be respected and the meeting should not stray beyond those items listed to be discussed. Always ensure that sensitive information which has been identified is not disclosed or discussed. It may be necessary to hold split meetings or ask certain personnel to leave the room if commercially sensitive issues are discussed.
  - b) A minute should be taken of the meeting recording (i) the identity of the individuals participating in the meeting and (ii) all discussions during the meeting.
  - c) If, despite best efforts, clearly competition-sensitive information is being discussed, stop the meeting and ensure that the minutes contain a record of why it has been stopped.
  - d) If a participant wishes to clarify (for competition law compliance purposes) whether he or she can or cannot discuss a particular topic, or if any participant has any doubts about an issue he or she would like to raise for discussion, discussion of the topic should be deferred to enable participants to consult their legal departments.
  - e) If any participant feels uncomfortable with the information or issues being discussed, he or she should immediately inform the meeting that he or she disagrees with the nature of the discussion, leave the meeting and ask that their departure be recorded in the minutes.
  - f) Report any concerns to the Association's Secretariat in the first instance.
  - g) All meetings should reflect the behaviours that underpin the FIS Respect Policy
- 4.4 After any meeting take care that minutes do not contain any commercially sensitive information.

#### 5. Conduct of other communications between members

- 5.1 Commercially sensitive information should not be shared by any means.
- 5.2 Circulation lists for any emails, faxes or letters should be controlled and consistent.
- 5.3 Where appropriate (for instance if there is any doubt as to whether information may be deemed to be commercially sensitive), a lawyer should be asked to review written communications prior to their being sent.
- 5.4 Telephone discussions or email chains should be terminated immediately if any commercially sensitive information or issues are raised.