



Freshfields Bruckhaus Deringer

WORKING GROUP ON EURO RISK-FREE RATES

COMPETITION LAW COMPLIANCE GUIDELINES

Update 17 May 2018



1. INTRODUCTION

These Guidelines are designed to ensure that members and individuals participating in the Working Group and sub-group meetings are aware of obligations that derive from competition law and have received guidance on compliance with competition law when participating in these meetings. Although it may be considered very unlikely given the composition of the Working Group and sub-groups, that competition law concerns would arise, the Working Group does consist of selected credit institutions (and other entities from the private sector) that may qualify as "competitors" and matters discussed in the meetings may have an impact on the sector and on how business is being conducted. Moreover, it is suggested in the Terms of Reference for the Working Group (see *infra*, section 2) that Working Group and sub-group members may be exposed to sensitive and potentially material non-public information in the course of their work. These circumstances mandate that participants in the Working Group and sub-groups are aware of certain safeguards and constraints that competition law may impose.

For this reason, these Guidelines are designed with a view to providing indications as to what is permitted and what is not permitted under the competition rules in the context of the meetings and activities of the Working Group. For the avoidance of doubt, discussions which take place among members on subjects which are not on the agenda (e.g. in informal discussions at or outside official meetings) are also covered by these Guidelines.

These Guidelines do not – and cannot – however cater beforehand for all possible situations. They are therefore to be regarded as general guidance. Ad hoc legal advice, to be obtained from legal advisors of individual members, may be required when there is any doubt in concrete situations, pertaining to particular discussions, decisions or information disclosed in meetings as to whether or not particular conduct is in compliance with the competition rules. Also, it is not possible to provide upfront guidance in terms of the competition law assessment of (envisaged) deliverables of the Working Group and sub-groups. These should be reviewed for competition law compliance by relevant legal advisors of the members when and where appropriate.

2. TERMS OF REFERENCE WORKING GROUP

As the Terms of Reference for the Working Group indicate, the Working Group is an industry group chaired by a representative from the private sector. It will comprise senior officials from major credit institutions with relevant expertise. Representatives from the FSMA, ESMA, ECB and the European Commission will participate in the Working Group as observers and the ECB provides its secretariat.

The Working Group will establish sub-groups on specific aspects, which will report to the Working Group.

Individual members of the Working Group are expected to represent their respective firms. The Working Group's recommendations will not commit individual firms or public authorities to specific actions. The Working Group's recommendations and publications will represent the views of its private sector members only. The ECB will disclose meeting agendas and minutes, once approved, on its public website.

The Terms of Reference indicate that any information disclosed or opinions expressed during Working Group or sub-group meetings will be treated as confidential unless and until the Working Group has authorised their public release. The Terms do further indicate that Working Group and sub-group members may be exposed to sensitive and potentially material non-public information in the course of their work. Any unnecessary involvement of third parties in handling this material is strongly discouraged.

It is further indicated that it is the responsibility of Working Group and sub-group members to ensure that they understand their responsibilities under all applicable competition laws, including to observe the requirements of these Guidelines.

3. GENERAL ASPECTS OF COMPETITION LAW THAT ARE RELEVANT IN THIS CONTEXT

The negative consequences of a breach of competition rules are numerous. The infringement can result in very substantial fines (in the EU, up to 10% of the worldwide turnover) and behaviour and agreements which infringe competition law, are void and unenforceable.

For reference, regulators in the US and Europe have imposed record fines for the LIBOR manipulations (ranging from a total of approx. €350 million to €1.5 billion) and in addition investors are currently examining how to claim compensation. Moreover, the European Commission has fined banks heavily in the Euro Interest Rate Derivatives and Yen Interest Rate Derivatives cases (in total €1,728 million).

The company's reputation and share value can also be severely affected. In addition, those who suffer damage as a result of the breach of competition law by the undertakings involved are entitled to claim compensation from the undertakings involved before national courts, even more so since the entry into force, in December 2016, of the EU Directive on damages claims which encourages complainants to seek damages at national level. In some countries (such as in the US and the UK) a breach of competition law can also result in criminal penalties (including imprisonment), personal fines (such as in the Netherlands) and the disqualification of directors.

The essence of competition law is that competitors do not collude through anti-competitive agreements, informal anti-competitive arrangements or exchanges of competitively sensitive information. It is in particular the unilateral disclosure or exchange of competitively sensitive information, between competitors or via third parties ("hub-and-spoke"), that receives particular attention in the public enforcement of competition law by competition authorities nowadays.

Competition law does not prohibit competitors, like credit institutions that may be competitors, to meet. Indeed, there may be perfectly legitimate reasons to meet and discuss certain aspects that are often linked to public interests. Examples are discussing combatting cybercrime (or other crime), legislative proposals and many other topics that are regularly and legitimately discussed within banking associations or other platforms and gremia.

Developing risk-free reference rates as well as identifying best practices for contract robustness are certainly topics that are of public interest and legitimate to discuss, as



witnessed by the composition of the Working Group (presence and participation of public authorities).

The specific awareness of and compliance with competition law that is required in this context concerns in particular:

- the information that is unilaterally disclosed or exchanged between participating credit institutions (directly or via other participants) when participating in Working Group or sub-group meetings (and in contacts or correspondence surrounding those meetings);
- the information that is contained in documents or is otherwise disclosed in the meetings and which is considered sensitive and potentially material non-public information.

It needs to be monitored and ensured that this information is not competitively sensitive. What can be considered to constitute "competitively sensitive information" cannot be set out with precision or in an exhaustive fashion on beforehand. A case-by-case assessment of the particular information and context is normally required. There is however some good general guidance that can be given on what type of information will generally be considered to be "competitively sensitive". This guidance is contained in the following section.

4. SPECIFIC GUIDANCE ON INFORMATION DISCLOSURE AND EXCHANGE

4.1 Various forms and types of information exchange

Information exchanges can take various forms and occur in different settings. The form can be a direct exchange between competitors that participate in a meeting or an indirect exchange, e.g. by distributing materials or data that contain input from competitors and which are shared among them (either as documents or information sent in advance of meetings, or information communicated during meetings or in the fringe thereof).

The type of information that is being disclosed or exchanged is an important element in the context of competition law compliance. The information may be of a type that is by nature anti-competitive when shared (e.g. information regarding future business behaviour such as pricing or commercial terms in contracts which are relevant for competition between competitors). If this type of information is disclosed or exchanged, it is generally considered "an infringement by object", meaning that it is considered to constitute an act of illegal collusion. If the type of information is not by its nature highly competitively sensitive (like future pricing intentions or the aforementioned commercial terms), it may still be information that could affect competition between competitors. It is then considered "an infringement by effect" to disclose or exchange such information. This could for instance be the case if information regarding customers, certain non-aggregated statistics, individual margins or important cost drivers is exchanged.

If information may potentially affect competition but is not of a type that would constitute a violation "by object", when disclosed, it may be that the exchange or disclosure can be justified if it is demonstrated that the disclosure is providing benefits that outweigh the



competition concerns. This could for instance be the case if information is exchanged in a sufficiently aggregated format and assists in developing an acceptable standard or benchmark. In a situation that it would be perceived useful or even necessary to disclose potentially competitively sensitive information for those purposes, legal advice should be sought beforehand.

4.2 The Golden Rule

The Golden Rule is that information that could be regarded as competitively sensitive, should not be disclosed or exchanged.

- Information relating to intended future business behaviour of a company (credit institution) is competitively sensitive and should not be exchanged.
- Moreover, information with regard to margins or pricing of individual companies, should not be disclosed. Even if pricing may be to some extent in the public domain, due to online offers or other circumstances, it is recommended not to disclose or exchange information that relates to actual or future pricing of products or services.
- It is further recommended not to disclose or exchange information that relates to material (individual/company-specific) cost drivers, intended strategies or measures to lower these costs, or information concerning the intended launch by a company of new services or products.
- In case of any doubt as to whether information might be competitively sensitive and could be disclosed or exchanged, it is important to seek legal advice prior to any disclosure of such information.

4.3 Further Do's and Don'ts

In addition to the Golden Rule, the following do's and don'ts should be applied to the conduct of the Working Group and sub-group meetings.

- **DO** insist that a clear written agenda continues to be circulated prior to each meeting and that the discussions during the meeting follow the agenda. Minutes should be made reflecting all subjects discussed.
- **DO** discuss business and sector developments, and risks pertaining to certain practices or commercial terms, in general terms. Avoid disclosure of individualised business practices or commercial terms, and in any event intended future (individual or collective) business strategies or terms (see 4.2 above).
- **DO** limit information disclosure or exchanges to aggregated, historic and preferably public data or information.
- **DO** seek legal advice from your organisation's legal advisors in case of any doubt as to whether information might be competitively sensitive and could be exchanged.



- **DO** stop a meeting if it appears that individual prices, strategies or intended commercial terms might be discussed and seek legal advice. Leave the meeting if others continue the discussion and have the fact of leaving recorded in the minutes.
- **DON'T** discuss or disclose any information that might be competitively sensitive (see 4.2 above).
- **DON'T** discuss or agree on intended business conduct, in particular conduct relating to prices, components of prices (including rebates, discounts, credit terms, common calculation bases, etc.) or the entering into, amending or termination of contracts with specific customers.
- **DON'T** discuss or agree on collective action with regard to certain or all customers and do not discuss or agree on measures or behaviour that may affect competitors (e.g. market entry).

* *

*