AFME Competition Law Policy Statement

This document sets out AFME’s policy on competition law issues and provides guidance to AFME staff and its members to assist them with ensuring compliance with competition law as it relates to AFME activities.

AFME advocates stable, competitive, sustainable European financial markets that support economic growth and benefit society.

AFME takes compliance with competition law very seriously and it is AFME’s policy to comply strictly in all respects with competition law and to put in place procedures to ensure compliance with the spirit and the letter of the law. AFME will not participate in, sponsor, facilitate or tolerate any activity which does not comply with competition law.

Each member of AFME staff and each member representative participating in AFME business (including meetings, calls, events and other discussions) must be vigilant regarding compliance with competition law.

AFME provides training on competition law issues for all professional staff. In order to further assist AFME staff and member representatives, AFME has engaged external counsel to produce guidance with a particular focus on competition law issues that could arise in the context of AFME’s business. This includes practical guidance which applies to AFME’s activities including committee and working group meetings, online forums and preparation of advocacy materials, consultation responses and supporting studies. The guidance is set out in Annex A to this statement.

External counsel has also put together a “Q&A” document which addresses some more detailed questions regarding competition law issues. The Q&A document is set out in Annex B.

While the guidance and Q&A document provide a high level overview of competition law issues that might be relevant to AFME staff and AFME’s members, it is not possible to anticipate every issue that might arise. Accordingly the guidance and Q&A are not a substitute for specific legal advice and if AFME staff or member representatives have any questions or concerns about competition law issues, they should seek advice from AFME counsel or their own in-house counsel at the earliest opportunity.

AFME
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GUIDANCE FOR AFME ON COMPETITION LAW

This note is a high-level summary of the application of the competition rules to the activities of industry associations such as AFME. It is not intended as a substitute for legal advice on any specific issue.

Competition Law and Industry Associations

Competition law prohibits certain agreements and other forms of conduct, including information exchange, which may prevent, restrict or distort competition. It is important, both for companies and individuals, not to infringe the competition law rules; doing so may result in the imposition of significant fines, reputational damage and, in some cases, criminal penalties for individuals.

Price-fixing, agreements to limit output and allocation of customers or markets generally constitute the most serious forms of anticompetitive agreement. In such cases, it is not necessary for the competition authorities to show anticompetitive effects in order to establish that an infringement has occurred. ‘Price-fixing’ is interpreted in a broad sense to include elements of price, such as the dates of price increases, margins, rebates and agreement on ‘passing on’ industry charges or costs to customers.

Industry associations may attract scrutiny from the competition authorities because anticompetitive agreements between competitors on a market are commonly concluded, implemented and/or monitored through the medium of industry association contact.

Where anticompetitive arrangements arise in the context of industry association contact between competitors, fines may be imposed by the competition authorities on the industry association itself, even though the association is unlikely to be active on the affected market.

Legitimate Activities of Industry Associations

Certain activities of industry or industry associations, such as AFME, do not normally give rise to competition law concerns. Information and activities which are not commercially sensitive in nature, and which as such are unlikely to give rise to competition concerns, may relate to matters including:

- The interpretation of existing or proposed legislation.
- Preparation of representations to governmental bodies on proposed legislation.
- Consideration of, and provision of guidance on, issues of a technical nature concerning the application of a law or regulation, provided such activities are not liable to affect the competitive behaviour of members or third parties.

Commercially Sensitive Information

Commercially sensitive information typically relates to matters such as:

- Prices and other terms of business, including discount and rebate structures.
- Customers and a firm’s engagement with its customers.
- Costs.
- Volume or value of sales.
- Business strategy.
- Bidding intentions.
Potentially Anticompetitive Conduct involving Industry Associations

Activities of industry associations which may give rise to a risk of infringing competition law include:

- Discussions at meetings or in online forums hosted by an industry association which may prompt member firms to consider modifying their terms of business or practices with regard to commercially sensitive matters.
- Adoption of non-binding decisions or recommendations which may in practice lead members to align their competitive conduct on the market.
- Adopting best practices and standard-setting measures which may lead members to align their competitive conduct on the market or ‘shut out’ competitors who do not have access to, for example, a shared technical standard.
- Imposing rules, regulations and/or membership criteria which may have an impact on the ability of operators to compete freely on the market.

Practical Guidance

- Information regarding members that is of a commercially sensitive nature should be maintained separately from information which is not commercially sensitive, to ensure that the former is not inadvertently distributed by AFME among its members in the course of other, legitimate business.
- Meetings should follow a written agenda, prepared in advance, and a written record of topics discussed at meetings should be produced.
- Online facilities permitting bilateral or multilateral communication between members should include an appropriate warning regarding the need to avoid any exchange of commercially sensitive information, and should be periodically monitored for evidence of potentially collusive discussions.
- If there is any doubt regarding whether initially legitimate discussions may be straying, or risk straying, into a commercially sensitive area, such discussions should be terminated and advice sought before continuing with them. The assessment of whether or not discussions regarding a particular topic may continue is likely to depend on the surrounding facts.
- Membership criteria (for membership of both AFME itself and of its committees) should be transparent, proportionate, non-discriminatory and based on objective standards. Proposed expulsion or termination of membership must be supported by reasons, objectively justified and subject to an effective right of appeal.
- Best practices and/or common standards may be procompetitive where they are objectively justified, for example by reference to benefits to end-users. However, such arrangements may infringe competition law where they have the effect of preventing firms from selling products which fail to meet a certain standard, limit technical development or impede imports.
- When conducting industry surveys, information circulated to members should be historical, anonymised and aggregated. Data should not enable recipients to discern competitively sensitive information regarding their competitors’ conduct on the market.
- Studies commissioned by AFME and consultation responses provided by it regarding, for example, proposed legislative changes should not be used as a means of influencing or disclosing sensitive aspects of members’ conduct on the market.
- Document retention is not required by competition law, but destroying, falsifying or altering documents once an investigation or litigation is underway or in contemplation may be an obstruction of justice and constitute a criminal offence. It is advisable to adopt a consistent policy to document retention, having regard to the fact that destruction of documents may make it difficult to apply to one or more competition authorities for immunity or leniency in future, and that documentary evidence may be exculpatory.
COMPETITION LAW Q&A FOR AFME STAFF, COMMITTEES AND WORKING GROUPS

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JURISDICTIONAL SCOPE OF COMPETITION LAW

1 Does the European Commission have jurisdiction in relation to conduct which occurs outside the European Union and/or by firms based outside it?

1.1 Article 101 of the Treaty on the Functioning of the European Union ("TFEU") prohibits agreements, concerted practices and decisions of associations of undertakings (including conduct by trade associations) which have the object or effect of preventing, restricting or distorting competition within the EU. Article 102 prohibits the abuse of a dominant position by an undertaking with substantial market power. The Commission’s assessment of whether EU competition law applies to particular arrangements or practices depends not on where an agreement or practice is concluded or where the parties to it are located, but on where the agreement or practice is implemented. Thus, provided an agreement or practice is implemented within the EU, thereby having an effect (or a potential effect) on inter-State trade within the EU, it must comply with the EU competition rules.

1.2 In addition, a parent company based outside the European Union may be held liable for anticompetitive conduct having effects in the European Union, which is entered into by one or more subsidiary companies over which the parent exercises control. For the purposes of demonstrating ‘control’ by a parent company over its subsidiary in this context, the size of the parent company’s shareholding, its representation on the subsidiary’s board of directors, its ability to influence the subsidiary’s affairs and evidence of actual attempts by the parent company to do so may all be relied upon as evidence. In such circumstances, the parent and subsidiary companies are treated as forming part of a ‘single economic entity’.

2 Are members subject to the national competition law of EU Member States in which they are not present and/or enforcement of EU law by the national competition authorities of Member States in which they are not present?

2.1 With regard to Article 101 TFEU, the national laws of EU Member States are required to mirror, within their own territory, the law at EU level. National competition authorities may not purport to authorise conduct which is unlawful under Article 101, nor may they prohibit conduct which it permits. Thus, in practice the national laws of each Member State with regard to anticompetitive agreements, decisions and concerted practices substantially reflect the wording of Article 101, albeit with reference to the territory of the Member State in question, rather than the EU as a whole.

2.2 The territorial scope of national competition law is a matter for each Member State to determine. However, it is generally the case that, as at EU level, conduct implemented in or which produces effects in a particular Member State is likely to attract the application of the national competition rules of that State. In the United Kingdom, for example, the Competition Act 1998 states that the Chapter I prohibition (which is the equivalent of Article 101 TFEU) applies to any agreement, decision or practice which is (or is intended to be) implemented in the United Kingdom.

2.3 Whenever the competition authorities or courts of a Member State apply their national competition law to agreements, decisions or practices which may affect trade between Member States, they are likewise obliged, under the EU competition rules, to apply Article 101 TFEU. Thus, an undertaking which is the subject of enforcement proceedings before the national competition authority of a Member State may be investigated both on the basis of that State’s national law, and on the basis of EU competition law, unless the effects of the conduct in question are clearly confined to the territory of that Member State. It is important to bear in mind, in this regard, that the Commission adopts a broad interpretation of the ‘effect on trade’ concept, such that even conduct which at first sight appears to be confined within a single Member State may nonetheless be regarded as
affecting (or potentially affecting) inter-State trade, and thereby attracting the application of EU competition law.

2.4 Significantly, with regard to Article 102 TFEU, Member States are free to apply at national level rules in respect of unilateral conduct by dominant undertakings that are stricter than those applicable under EU competition law. Thus, the fact that a particular form of conduct is lawful as a matter of EU competition law will not necessarily prevent it from constituting an abuse of dominance under the national law of one or more Member States.

3 What considerations are relevant when assessing whether a trade association is likely to be fined for anticompetitive arrangements entered into by its members?

3.1 Under Article 101 TFEU, the concept of a ‘decision by an association of undertakings’ is broadly interpreted, and may include:

- A trade association’s constitution;
- Regulations governing the operation of a trade association;
- An agreement entered into by a trade association; and
- Non-binding recommendations made by a trade association, where in practice members generally comply with such recommendations.

3.2 Trade associations tend to attract the scrutiny of the competition authorities because, in practice, anticompetitive arrangements between competitors are frequently concluded, implemented and/or monitored through the medium of trade association contact. In the case of cartels consisting of a large number of firms, the trade association’s role may be essential to enable the participants to achieve their desired anticompetitive outcome.

3.3 Trade associations have on previous occasions been fined by the Commission for their involvement in collusion among members, particularly where the trade association has itself played an important and active role in facilitating cartel conduct. Examples of the types of trade association activity which have previously justified the imposition of a fine on the trade association itself include:

- Implementation of cartel conduct through resolutions passed at trade association meetings;
- Employing an accountant to police compliance with agreed prices, quotas etc.; and
- Financing joint advertising by cartel members as a means of fixing prices.

Information Exchange

4 At what point do discussions concerning cost increases resulting from regulatory changes stray into an illegitimate exchange of information concerning costs?

4.1 The role of trade associations as a forum in which operators within a given industry may exchange views regarding industry initiatives or developments in applicable regulation is a common feature of many industries, and frequently leads to procompetitive efficiencies. However, this role must be balanced against the fact that the exchange of detailed, forward-looking information regarding prices (or factors affecting prices, including costs of business) may be regarded as a means of implementing an anticompetitive agreement, and may also be treated as a breach of the competition rules in its own right.

4.2 Thus, a general discussion of the fact that an increase in the regulatory burden faced by operators on a market is likely to lead to an increase in their costs of business, which may
result in higher prices to customers, is likely to be permissible. However, it is important
that such discussions remain general; any exchange of views which provides the
participants with insight into one another’s individual pricing intentions, or into strategic
measures which one or more participants may implement as a means of off-setting
additional regulatory costs, has the potential to constitute anticompetitive collusion and
should therefore be avoided.

5 Do concerns surrounding discussion of costs extend to future costs, i.e. industry
changes which are proposed but not yet in force?

5.1 Discussions regarding changes which are proposed but not yet in force are necessarily
further removed from the current conditions of competition on the relevant market, and as
such are less likely to have the effect of restricting competition between the participants.
Speculation in general terms concerning the possible impact of potential developments in
the regulatory environment is likely to be permissible but, as in the case of question 4
above, participants are best advised to refrain from sharing specific information regarding
how they might choose to respond to proposed changes in regulation. In the event that
the changes in question are in fact introduced, the exchange of information of this nature
could provide the recipients with insight into the planned strategic conduct of the other
firm(s) in question, with the result that competition on the market is less vigorous than it
might otherwise have been.

6 Is discussion among AFME members regarding how to interpret or deal with
regulatory requirements permissible?

6.1 As noted in paragraph 4.1 above, the role of trade associations as a forum for discussion of
regulatory developments frequently has a beneficial impact on the conditions of
competition within an industry. In the case of regulation which is clearly intended to apply
to or be applied by firms in a uniform manner, the procompetitive efficiencies achieved
through an exchange of views among market participants, designed to arrive at a common
interpretation of the law, are likely to outweigh any resulting restriction of competition,
provided that the information exchanged for this purpose is limited to that strictly
necessary to arrive at a common position.

6.2 However, in the case of regulation which is not necessarily intended to be applied in a
uniform manner (such as in the case of recommendations, quality standards and best
practice guidelines published by a regulatory authority), the decision whether and how to
comply with the relevant regulation should remain a parameter of competition between
operators on the market, which should therefore refrain from discussing or agreeing a
common position with regard to the regulation in question. In such a situation, a firm may
legitimately decide (for example) to lower its prices to customers by offering a product
which does not comply with a non-mandatory quality standard, and should not be
prevented from doing so (as this may restrict consumer choice) as a result of coordination
with other members of the industry regarding compliance with the relevant standard.

7 Is it permissible to discuss legislative proposals if the outcome may lead to
certain members being in an advantageous position vis-à-vis others?

7.1 Regulatory developments frequently have the potential to favour certain operators on a
given market over others. Provided that discussions of such developments do not involve
any exchange of specific information regarding the manner in which one or more firms may
respond, general discussions of the advantageous (or disadvantageous) impact of
developments in regulation on certain categories of firm are permissible.

7.2 Care should be taken to ensure that any submission by AFME in response to a consultation
on proposed regulatory changes has regard to the interests of its membership as a whole,
and does not discriminate without objective justification in favour of some member firms
over others. In certain circumstances, it may be advisable for AFME to refrain from adopting a position with regard to the proposed change, instead setting out in its submission (if any) an assessment of the likely impact of the proposal (or failure to implement the proposal) on the interests of all of its members. Alternatively, it may be appropriate for AFME to adopt a position with regard to regulatory changes that is likely to favour certain of its members over others only following a thorough process of internal consultation to arrive at a majority view. In such a situation, it may be advisable for AFME’s final submission to note that it reflects the view of the majority (but not all) of AFME’s members, and provide an overview of the reasons for opposition of the proposal by a minority of its members.

AFME INITIATIVES

8 Is it permissible for AFME to participate in developing industry best practice?

8.1 Playing a role in developing best practices or quality standards is a normal aspect of trade association activity, which frequently enhances the efficient functioning of the industry overall and improves the quality of goods or services offered to consumers. However, when conducting such activities, it is important that a trade association ensure, as far as possible, that members will remain free to conduct themselves in a manner which fails to conform with the relevant best practices, or offer goods or services which fail to meet the relevant quality standard, should they choose to do so. For example, trade associations should not make observance of their best practices or quality standards a condition of membership or otherwise seek to penalise members for non-compliance, unless compliance by members is objectively essential for the effective functioning of the trade association’s activities.

9 Is it problematic for AFME to commission reports or studies of the market, or respond to consultations by regulatory authorities?

9.1 Commissioning market reports or studies and/or responding to regulatory consultations is a normal and permissible aspect of the activities of AFME and many other trade associations. However, as noted in paragraph 7.2 above, market reports or studies and/or responses to consultations should not be used by AFME (whether expressly or inadvertently) to distort the conditions of competition on the market(s) in which its members operate. Consistent with AFME’s role as a representative of the interests of its members, its submissions in response to consultations should present a view in the interests of all of its members, or (in the case of a position which favours the interests of most, but not all, AFME members) incorporate an appropriate counter-balancing description of the likely harmful impact of proposals on disfavoured members. Alternatively, it may be preferable in such situations for AFME to decline to adopt a position when responding to consultations, and instead to provide a general description of the likely impact of the proposal(s) on the relevant categories of its members.

10 How should AFME go about conducting market surveys?

10.1 Market reports and studies commissioned by AFME should be conducted independently by an appropriately selected third party, who possesses relevant expertise in the area in question and whose interests are not aligned with or unduly influenced by any particular category of AFME member.

10.2 The manner in which AFME commissions market reports or surveys should be neutral vis-à-vis the eventual outcome of the report or survey. It is also advisable for AFME to document appropriately the manner in which it has conducted the commissioning process and its communications with the third party which is to produce the report or survey, as evidence of the independence and impartiality of the final work product. Provided that
market reports or surveys are carried out in the foregoing manner, this aspect of AFME’s activities is relatively low-risk, from a competition law perspective, in particular where the eventual work product is shared with the relevant regulatory authorities as part of a contribution by AFME to the development of the industry in general.

**CONDUCT OF MEETINGS**

11 Would AFME be implicated in arrangements entered into by its members outside the context of AFME meetings?

11.1 Provided that AFME is not itself in any way implicated in anticompetitive collusion among its members, the mere fact that competitors which are members of AFME enter into an anticompetitive arrangement is insufficient to constitute evidence of AFME’s participation in such conduct. However, as noted in paragraph 3.2 above, trade associations have in numerous cases served as a medium for competitors to conclude, implement and/or monitor anticompetitive arrangements, particularly where such arrangements involve a large number of firms. AFME should therefore be alive to the possibility that the competition authorities may seek to implicate it in any anticompetitive agreement or practice concluded or conducted by its members and should ensure, as far as possible, that it is well-placed to resist any attempt to assert that AFME has itself participated in such activities.

11.2 Evidence upon which AFME may seek to rely, for this purpose, includes:

- An internal competition law compliance policy and accompanying documents, explaining applicable competition law and how AFME may comply with it (such as the present Q&A).
- Documentary evidence regarding the conduct of AFME meetings, including written agendas and minutes of meetings (which should record periodic reminders provided to members at meetings of the need to avoid any form of potentially anticompetitive discussion).
- Records of competition law compliance training provided to AFME staff.

12 What should be done if a potentially anticompetitive topic is raised at an AFME meeting?

12.1 AFME should seek to minimise the potential for legitimate discussions to stray into potentially anticompetitive territory over the course of its meetings by circulating a written agenda in preparation for meetings and providing an oral reminder to attendees at the start of each meeting (or as appropriate) to the effect that discussions should be limited to those listed in the agenda and should under no circumstances involve any potentially anticompetitive exchange of information among members.

12.2 AFME representatives responsible for chairing meetings attended by members should be provided with appropriate training with regard to permissible/prohibited topics for discussion and, if in any doubt regarding whether initially-legitimate discussions may be venturing into an area with the potential to influence the conditions of competition among attendees, should bring the discussion to an end and seek advice internally or from external lawyers before proceeding to discuss the matter(s) in question (for example, at the next meeting).

13 What records should be kept of meetings?

13.1 Records should be kept of attendance at meetings of AFME’s committees and working groups.
13.2 Where meetings are held by telephone, steps should be taken to maintain a record of who has participated (for example by taking a roll call at the outset, or by means of electronic records of those joining the call).

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