

## ISLA Competition Law Compliance Policy & Guidelines

### ISLA Competition Law Compliance Policy

The International Securities Lending Association (ISLA) is fully committed to compliance with all relevant laws, including competition law.

Failure to comply with competition law can expose ISLA, its employees and its members to a risk of fines, damages and other implications. It is therefore the responsibility of, and in the best interests of, all employees of ISLA and its members to ensure that they remain at all times committed to the policy of full compliance with the law.

The purpose of this policy is to:

- Set out the responsibilities of ISLA, its employees and its members in observing and upholding ISLA's position regarding anti-competitive behaviour.
- Provide information and guidance to those working for ISLA on how to recognise and deal with anti-competitive behaviour.

ISLA has a zero-tolerance policy towards anti-competitive behaviour. Any employee who breaches this policy will face disciplinary action, which could result in their dismissal for gross misconduct. Any non-employee who breaches this policy may have their contract terminated with immediate effect. This policy does not form part of any employee's contract of employment and we may amend it at any time.

Any questions on the content of this Policy or Guidelines or concerns about any discussions between members should be reported in confidence to Jamila Jeffcoate – Head of Finance & Administration/ Chief of Staff at ISLA and individual members should consider seeking independent legal advice.

Signed:

CEO, ISLA

Date: 25 June 2020



## ISLA Competition Law Compliance Guidelines

### 1. What is competition law and when is it relevant?

#### What is competition law?

- 1.1 Competition law lays down rules on how businesses must behave to ensure fair competition with the ultimate aim of protecting consumers.
- 1.2 The rules cover:
  - 1.2.1 **Anti-competitive practices**  
Agreements or arrangements with other companies which restrict competition
  - 1.2.2 **Abuse of a dominant position**  
The abuse of a dominant position by one company

#### Who enforces competition law?

- 1.3 Competition laws now apply in most jurisdictions around the world, including the UK, EU Member States and in non-EU jurisdictions. These Guidelines concentrate on the UK and EU competition law regimes. The former applies to UK domestic agreements and arrangements, whilst the latter would be relevant in relation to any agreements and arrangements that could have cross-border effects within the EU.
- 1.4 In the UK, the rules are set out in the Competition Act 1998 (the Competition Act) and the Enterprise Act 2002 and are enforced by the Competition and Markets Authority (CMA). The Financial Conduct Authority (FCA) also has concurrent powers to enforce competition law against regulated companies in the UK financial services sector alongside the CMA.
- 1.5 In addition to the rules imposed by individual countries, the Treaty on the Functioning of the European Union (the EU Treaty) contains competition rules that prohibit anti-competitive agreements and behaviour across the European Union (EU). The UK and EU regimes are substantively mirror images of one another. The European Commission enforces the EU rules.
- 1.6 The EU rules apply in circumstances where the agreement or conduct has an appreciable effect on trade between EU Member States and therefore will continue to apply following the UK's departure from the European Union in circumstances where the anti-competitive behaviour could impact trade in EU jurisdictions.
- 1.7 While this policy refers throughout to the CMA, other regulators such as the FCA and European Commission have similar investigation and enforcement powers.

### How are investigations triggered?

- 1.8 The CMA can find out about anti-competitive behaviour in a number of ways. Investigations may be triggered by:
- 1.8.1 The CMA's own suspicions about what is happening in the market from market intelligence or complaints.
  - 1.8.2 Tip-offs from whistle-blowers (e.g. a disgruntled customer or ex-employee).
  - 1.8.3 Another company can "come clean" in return for immunity or large reduction of fines – the so-called "leniency programme".

### Powers of investigation

- 1.9 The CMA has wide powers of investigation. These include the power to:
- 1.9.1 Conduct dawn raids (please **Appendix 1 of Section 1**)
  - 1.9.2 Make written requests for information
  - 1.9.3 Interview employees
  - 1.9.4 Search electronic documents (including e-mails)

### Consequences of breaching competition law

- Fines of up to 10% of the worldwide turnover of ISLA / relevant members' corporate group<sup>1</sup>
- Imprisonment of employees for up to 5 years
- Disqualification of directors for up to 15 years
- Negative publicity
- Damage to ISLA and its members' reputations
- Significant management time and legal costs of dealing with an investigation and the fallout resulting from it
- Court actions for damages (e.g. from customers who may have suffered loss or competitors who have been put out of business)

<sup>1</sup> In the case of trade associations, a fine imposed on the association may be calculated on the basis of the turnover of its members; and it is therefore likely that the association will lack the resources to pay the fine in full. In such a case, the 'corporate veil' is lifted and the members become liable for the association's fine.

### When could competition law apply?

- 1.10 Competition law applies to every aspect of a company's day-to-day activities, including contact between competitors as a result of participation in a trade association such as ISLA.
- 1.11 Competition law applies equally to ISLA and each individual member. While this Policy provides guidance for both ISLA and its members on competition law, this guidance does not concern individual members' independent conduct outside of their participation in ISLA for which they remain individually responsible.

## 2. Anti-competitive Agreements

### Anti-competitive agreements between competitors

- 2.1 Agreements need not be formal or in writing: a verbal "understanding" can also fall foul of competition law.
- 2.2 For example, an anti-competitive "agreement" can be established from:
  - 2.2.1 A single meeting or telephone call or e-mail between competitors
  - 2.2.2 Exchanging information with competitors
  - 2.2.3 Informal contacts and discussions, including a chat in the pub
  - 2.2.4 A "nod and a wink" or a gentleman's agreement

### Cartels

- 2.3 Competition law is primarily aimed at catching "cartels" between competitors. These are the most serious types of infringement of competition law:
  - 2.3.1 **Price-fixing:** Any agreement or understanding with any actual or potential competitor as to the price at which products or services will be provided.
  - 2.3.2 **Market-sharing:** Allocation between competitors of specific territories within markets, distribution channels, customer groups, individual customers; or sources of supply at the purchase level.
  - 2.3.3 **Bid-rigging:** Collusive behaviour in tendering procedures, i.e. including agreements between competitors to withhold/withdraw bids, agreements to allocate bids on a rota basis.
  - 2.3.4 **Output restrictions/quotas:** Allocating between competitors the maximum permissible volume of business, often fixed to the respective market shares.

## Other Agreements

- 2.4 Examples of other activities that are likely to infringe competition laws include:
- 2.4.1 competitors discussing current/future pricing or capacity being offered;
  - 2.4.2 exchanging commercially sensitive business information with a competitor, e.g. on current or future bids, pricing, costs and capacity; and
  - 2.4.3 competitors agreeing not to do business with a third party.

### Case Study: Anti-competitive conduct in the asset management sector

In February 2019, the FCA fined three asset management firms (Hargreave Hale, Newton Investment Management and Mercentile Asset Management) for breaching competition law.

The FCA found that these companies had shared strategic information during a placing and an initial public offering in 2015. During the book building process for a placing, Newton had disclosed the value of its bidding intentions to the other parties. In another placing, Newton disclosed to the other parties that it had subscribed to a certain volume of shares at a price to obtain a certain market capitalisation. These disclosures occurred on the final day of the book building process.

In both cases, the other parties' subsequent actions appeared to reflect the information shared and, in any event, the parties were assumed to have taken this information into account.

## 3. Competition law risks for associations

- 3.1 As mentioned above, trade associations *themselves* can be held liable for competition law breaches, along with their members. There have been numerous cartel cases before the European Commission and the European Courts involving illegal conduct arising from activities and meetings of trade associations. In light of such precedents, competition authorities sometimes regard trade associations with some suspicion.
- 3.2 Infringing conduct does not necessarily have to be the result of an elaborate plan by the members to restrict competition. For example, a meeting can easily change because individual participants unilaterally make suggestions that are deemed to be an attempt to align competitive conduct; and the represented undertakings and the trade association itself may find themselves to have breached competition law.
- 3.3 If members of a trade association reach an agreement or make arrangements that breach competition during a meeting of the association, then the association *itself* (and not just the participating members of the association) can be *fined* for merely providing a "forum" for the infringement or for being seen as having facilitated the anti-competitive agreement or arrangement.

- 3.4 As with most trade associations, many ISLA members and affiliates compete with each other at various levels of the securities lending market across the Europe, Middle East and Africa region. Members include institutional investors, banks, broker-dealers, service providers and alternative investment managers. Therefore, to err on the side of caution, it is prudent for ISLA to apply a competition law compliance programme in which its members are assumed to be at least potential competitors.
- 3.5 ISLA conducts a wide range of activities, including conferences and regional roundtables which give members an opportunity to hear the latest developments and build their networks. ISLA also arranges working groups where industry challenges are raised, issues debated, ideas conceived and solution sought. These events organised by ISLA provide an opportunity for competitors to engage in discussions and therefore can pose a competition law risk.
- 3.6 The main competition law **risks** for *ISLA* as a *trade association* are centred around the following:
- 3.6.1 Coordination of commercial conduct among ISLA members;
  - 3.6.2 Exchanging strategic information between members through ISLA;
  - 3.6.3 Arranging meetings between members, during which competition law is breached;
  - 3.6.4 Recommendations / boycotts of individual companies; and
  - 3.6.5 Membership rules.
- 3.7 These Guidelines set out below in more detail what these risks entail and the relevant '**DOs**' and '**DON'Ts**', where applicable, to reduce the risk of competition law breaches.

#### 4. Coordination of commercial conduct among ISLA members

- 4.1 As mentioned above, ISLA's members and affiliates should be assumed to be at least potential competitors.

##### **DON'Ts**

- 4.1.1 ISLA must not facilitate members and affiliates in engaging in:
- (a) **Price fixing** agreements;
  - (b) **Market sharing** – i.e. agreements to divide up markets or allocate customers;
  - (c) **Output restrictions/quotas** – agreements to impose limits or restrictions on volumes; or
  - (d) **Other co-ordination of commercial conduct** (i.e. supply of products and services in the market), e.g. regarding terms and conditions to apply vis-à-vis common counterparties or customers.

**Case Study: LIBOR/EURIBOR market manipulation**

In 2013 the European Commission fined seven banks and one broker a total of €1.7 billion for their involvement in cartels manipulating short term interest rate benchmarks in Euro and Japanese Yen. Deutsche Bank faced the largest individual penalty with a fine of approximately €725 million.

In these cases, the traders of different banks discussed their bank's submission for the calculation of their benchmark submissions for EURIBOR and LIBOR, as well as their trading and pricing strategies.

The broker, RP Martin, was found to have facilitated one of the infringements by using its contacts with a number of panel banks that did not participate in the infringement with the aim of influencing their LIBOR submissions.

Another broker, ICAP, was also implicated as a facilitator and appealed. In 2019 ICAP's fine was annulled on procedural grounds due to the calculation of the fine, however the infringement was upheld and it is possible a new fine will be imposed.

## 5. Information Exchanges

- 5.1 Sharing of commercially sensitive information between competitors - whether direct *or* through an intermediary, such as a trade association - can give rise to a breach of competition law, particularly if the exchanges are frequent.
- 5.2 Increased transparency in some markets *can be pro-competitive* by e.g. leading to lower prices; and there is no universal rule that prohibits any information exchange (e.g. exchanging historical statistical information and market research is usually permissible, as long as it does not facilitate the sharing of confidential or sensitive business information).
- 5.3 However, sharing of information – even unilateral one-way disclosures where the recipient does not distance himself from the information<sup>2</sup> – is of a particular concern where the information is regarded as “*strategic*”, i.e. information that, when shared, allows a competitor to forecast the other competitor's future conduct on the market and therefore removes too much uncertainty in the market. This includes, in particular:
  - 5.3.1 individualised and non-public data on current/future prices;
  - 5.3.2 capacity and bidding information, e.g. the volume of shares a firm intends to purchase during a book building process; and
  - 5.3.3 marketing or commercial strategies of individual members.

<sup>2</sup> There is a presumption that a company receiving the information from a competitor takes account of the information in determining their conduct on the market, unless it can prove that it opposed it (i.e. publicly distances itself); and, hence, it is assumed to have participated in the infringement.

5.4 The following chart summarises the general rules that apply when assessing information exchanges under competition law. The left-hand column identifies the two principal factors to be taken into account. The right-hand columns highlight those circumstances in which there is a low risk of infringement and those in which an infringement is likely to occur.

Relevant Factors	Lower Risk of Infringement	Higher Risk of Infringement
<u>Market structure</u> within which the information exchange takes place	Information exchanged in a competitive market (note, however, that the exchange can <i>still</i> be an infringement even if the market is competitive and not concentrated)	Information exchanged in a market where a small number of competitors together hold a large market share
<u>Kind of information</u> exchanged and the content of the information	General information that is <i>aggregated</i> across a number of companies to the extent necessary to prevent the possibility of being able to 'reverse-engineer' the data to identify individual companies' data	Detailed information that identifies individual competitors (e.g. customer details, customer numbers, location, prices and other contract information)
	Statistical/ <i>historical</i> information over 12 months old (or at least 6 months, depending on the sensitivity and usefulness of the data)	<i>Current/future</i> information (e.g. on <i>pricing</i> or <i>commercial strategy</i> )
	Other non- or less commercially sensitive information or <i>public</i> data	Other information which normally constitutes a business <i>secret</i>

5.5 There is nothing to prevent the gathering of commercial information on the activities of competitors from independent and public sources such as the trade press (although a record should be kept of where this information was obtained from and care should be taken as regards the language used in relation to such information even where it has been obtained in a perfectly legal manner).

### DOs

5.5.1 The competition law risk resulting from information exchanges can be much reduced if ISLA ensures that:



- (a) the data in question that can be accessed through the information exchange is **anonymous** - i.e. making sure that no ISLA member can access *individual* data concerning another ISLA member;
- (b) data on individual ISLA members is **collected from a sufficiently large number** of companies to ensure anonymity by e.g. an independent contractor, who then **aggregates** it;
- (c) only sufficiently **aggregated** sets of data across a number of ISLA members are accessible to members so as to minimise the possibility of ISLA members being able to disaggregate the data to make it individualised;
- (d) only **historic** data is exchanged (whilst there is no hard and fast rule, data over 12 months old may generally be exchanged); *and*
- (e) the data is kept in an anonymised and aggregated form for **12 months**.

#### DON'Ts

5.5.2 ISLA must not facilitate any sharing of information where the information in question is:

- (a) “**strategic**”, e.g. current or future pricing, capacity and information on bidding; and
- (b) **individualised** and **non-public**.

#### Case Study: Loan products – Royal Bank of Scotland/Barclays

RBS' Professional Practices Coverages Team disclosed generic, as well as specific, confidential future pricing information to their counterparts at Barclays Bank. This related to the pricing of loan products purchased by solicitors, accountancy and real estate firms. In addition, RBS, supplied specific confidential future pricing information in relation to two proposed loan facilities.

These disclosures took place through telephone conversations and contacts on the fringes of **social, client and industry events**.

Even though in this case the disclosure was one-sided, with Barclays not providing any information to RBS in return, a breach of competition law was still found.

Fines of over £28.5 million were imposed on RBS in 2011; Barclays, the recipient, received immunity from fines as it blew the whistle under the OFT's (the CMA's predecessor) leniency policy.

## 6. Meetings

6.1 Organising meetings between its members forms a central and regular part of ISLA's activities and this activity does comply with competition law, as long as some basic precautions are made. Such

precautions are necessary because by arranging and facilitating meetings between actual or potential competitors, trade associations put themselves in a particular competition law risk situation.

- 6.2 Participants should never discuss any issues which could affect competition in a market (such as collusive or exclusionary practices). A non-exhaustive list of clear “no-go” areas are discussions on:
- (a) prices or other terms on which goods or services are currently, or are to be, provided or required from third parties;
  - (b) sharing markets or customers;
  - (c) individual company future strategies/ business plans;
  - (d) limiting the supply of goods or services (to keep the price up); rigging bids or colluding when tendering; and
  - (e) exclusionary measures including any against non-ISLA members.

#### **Best Practice Guidelines for ISLA/the Chairman**

- 6.2.2 All Working Groups must have a Chairman formally appointed who has received competition law training.
- 6.2.3 All meetings must have a clear purpose which is communicated in advance along with an agreed agenda and all meetings should be attended by an ISLA representative.
- 6.2.4 The Chairman must ensure that the meeting keeps to its agenda.
- 6.2.5 A competition compliance statement should be read out at the start of each meeting reminding participants of their obligations under competition law.
- 6.2.6 The Chairman / Vice Chairman / Secretary of each Group should have received training in competition law and be able to identify and prohibit any such discussions.
- 6.2.7 Thorough and accurate minutes of all meetings must be kept in all cases.
- 6.2.8 The agenda and minutes/action notes of each meeting must be kept together with a list of participants.
- 6.2.9 If the Chairman of the meeting or the ISLA representative who is present becomes concerned that discussions are potentially anti-competitive he/she should ask for the subject to be changed at once and this must be reported in the minutes. If the subject does not change, the meeting should be discontinued immediately and that closing of the meeting must be documented in the minutes. These concerns should be reported to as soon as possible to [the Head of Finance & Administration at ISLA].

### Best Practice Guidelines for Members at ISLA meetings

- 6.2.10 Review the agenda ahead of any meeting and, if necessary, express any concerns in advance of the meeting.
- 6.2.11 Ensure they are aware of their obligations under competition law and seek advice if necessary.
- 6.2.12 Discuss matters of general interest that are not confidential or commercially sensitive such as legal updates, best practices in the industry or market trends. Do not discuss pricing, costs, margins, forecasts, business plans or other commercially sensitive issues.
- 6.2.13 Do not speculate about whether an activity is or is not in breach of competition law and, if in doubt about an activity, stop discussing it and take advice. If a discussion is stopped for this reason, this must be separately and clearly documented in the minutes of the meeting.
- 6.2.14 Take care with their language - careless use of language can cast suspicion of collusion on otherwise legitimate discussions. For example, do not use “guilty” vocabulary such as “stitch up the market”, “cartel” or “dominant”.
- 6.2.15 If uncomfortable with any discussions in an ISLA meeting where a competitor is present, make your objections known immediately and leave if discussions do not stop, make sure any objections are recorded in the minutes.

## 7. Recommendations and working groups

- 7.1 One of the core functions of a trade association is to make recommendations, promote best practices and provide certain updates to its members. ISLA can, for example, inform its members of issues or developments that are of specific relevance to the industry or, through its working groups, discuss and promote best practice industry contract terms.
- 7.2 Best practice industry contract terms can produce significant positive effects for both industry participants and their customers. They promote best practice and encourage minimum service standards.
- 7.3 Although this is an important role for ISLA, recommendations and best practice terms may also affect the way in which *commercial* business decisions are made by its members. Mandating the use of standard contract terms which directly lead to the alignment of prices or which are designed to exclude competitors from the market will almost certainly be unlawful.
- 7.4 Equally, ISLA should not impose the use of wording or clauses as a mandatory requirement and, even when a recommendation is labelled as non-binding, ISLA must be careful to avoid this giving rise to competition law issues. Any publication of a recommendation, best practice or standard wording should expressly state that they are non-binding and that members are free to offer different practices or wording to their customers.

- 7.5 Care also needs to be taken that any recommendations do not inadvertently give rise to anti-competitive behaviour. For example, by recommending certain terms for negotiating with customers and counter-parties which could lead to an alignment on prices and other commercially sensitive terms; or where a recommendation concerns a particular trading partner, where the recommendation may cause members collectively to stop conducting business with that party. This may constitute a collective boycott, which would fall foul of competition law.
- 7.6 Working groups discussing best practices and standard wording should be transparent, allowing members and experts to discuss proposed practices and drafting from a technical or legal perspective in an open and constructive manner. Any discussions should adhere to competition law and ensure that the guidance in Sections 5 to 6 above are followed (i.e. ensure that no commercially sensitive information is shared and that the guidelines for meetings between competitors are followed).

### DOs

- 7.6.1 Recommendations *can* be made in areas that are *unlikely* to affect or relate to the members' *commercial* conduct in the market, e.g. encouraging adherence to best practice industry standards in non-commercial areas.
- 7.6.2 Develop and promote industry standards, codes of practice or standard terms and conditions where they improve the quality of members' services.
- 7.6.3 Ensure the recommendations, best practices or standard terms are related to specified legitimate objectives, are no more detailed than necessary and are proportionate.
- 7.6.4 All recommendations, best practices and standard terms should expressly state that they are non-binding and that members are free to offer different practices or wording to their customers.
- 7.6.5 Ensure standard terms and best practice guidelines are available to non-members to use if they wish.
- 7.6.6 Ensure any working group meetings where recommendations, best practices or standard terms are discussed follow the guidance in Section 6 on best practice at meetings with competitors.

### DON'Ts

- 7.6.7 Recommendations should not be made in areas that are likely to concern members' *commercial* conduct in the market and lead to uniform conduct between competitors in the market, e.g.:
- (a) recommendations not to deal with a certain party, where this cannot be objectively justified; and/or
  - (b) recommending prices/charges that members charge to customers.
- 7.6.8 Permit working groups to discuss commercially sensitive information while discussing recommendations, best practices or standard terms.

- 7.6.9 Standard terms must not recommend prices or other commercially sensitive terms.
- 7.6.10 Recommendations, best practices or standard terms should not be mandatory for members.

#### Case Study: Conduct in the modelling sector

In December 2016, the CMA found that 5 modelling agencies and their trade association (the Association of Model Agents or AMA) had breached competition law by colluding on prices.

The parties regularly and systematically exchanged information and discussed prices in the context of negotiations with particular customers. In some instances, the parties agreed to fix prices or agree a common approach to pricing.

In addition, AMA and the agencies sought to influence other AMA member's pricing by regularly issuing circular emails urging members to resist the prices offered by certain customers on the grounds that they were too low.

This conduct occurred in the context of negotiations with a range of customers, including well-known brands, online fashion retailers and high-street chains.

## 8. Membership Rules

- 8.1 Membership of a trade association can sometimes be essential for companies to compete effectively on a specific market. In such cases, membership rules of that association can breach competition law if they are too restrictive without an objective justification, placing non-members at a competitive disadvantage.
- 8.2 Should membership of ISLA be considered essential, care should be taken not to allow the membership requirements to become a barrier to entry.

### DOs

- 8.2.1 Ensure that membership of ISLA is granted on non-discriminatory terms and that membership rules are based on reasonable, objective standards; and
- 8.2.2 Ensure that applications for membership to ISLA (whether as full or associate members) are assessed according to clearly defined, transparent procedures ideally specifying clear deadlines (where appropriate) as well as procedures for suspension and withdrawal of membership (and subsequent appeal if membership is refused).

### DON'Ts

- 8.2.3 ISLA must not refuse to admit an undertaking as a member (or affiliate) unless this refusal can be objectively justified. This also applies to applications for membership; and/or expulsions of a member (or affiliate) from ISLA.

- 8.2.4 Membership rules imposing unreasonable restrictions on the members (e.g. prohibition of membership in an alternative association) should be avoided.

## 9. Abuse of Market Dominance

### When is a company dominant?

- 9.1 Market dominance arises where a business is able to behave independently of its competitors and customers.
- 9.2 As a "rule of thumb", a market share of 40% or more is generally a strong indicator of dominance, but this is not the only basis for establishing dominance. The key test is whether the supplier has a "must have" product or service or there are hardly any alternatives.
- 9.3 Dominance is not in itself unlawful – the competition rules only prohibit a company from abusing its dominant position.
- 9.4 A dominant company owes additional legal duties towards its competitors and customers. Generally, a dominant company should be fair in its dealings with all other players in the market and should not adopt strategies deliberately designed to drive or keep out competitors out of the market or to exploit its customers. For example, a dominant company cannot engage in pricing which is, for example, either excessive (too high) or predatory (too low with the intention of driving out a competitor).

#### Case Study: Socrates Training v Law Society

In *Socrates Training v Law Society* the Law Society of England & Wales was found to have abused its dominant position by requiring member firms of its conveyancing quality scheme ("CQS") to purchase anti-money laundering and mortgage fraud training exclusively from the Law Society. Although the Law Society was the only assessor of CQS from its introduction, the court found that it was only dominant once CQS became the industry standard. In this case the behaviour was abusive because CQS required training that was only provided by the Law Society.

- 9.5 As shown in the case study, it is possible for a trade association or industry body to be dominant. This is more likely to be the case when they are providing certain industry assessment standards or training that they are in a unique position to offer. However, outside of this, it is unlikely that ISLA on its own would hold a dominant position.
- 9.6 It is also possible for individual members of ISLA to hold dominant market positions. This means that those members have a special responsibility to ensure their behaviour does not impact on the market. It is each member's responsibility to assess its own market position and compliance with relevant competition laws.

## 10. Language used in communications

- 10.1 It is important to be mindful of the language used in communications, particularly in written correspondence or internal business documents (e.g. Working Group documents). Unfortunately, careless language could make perfectly legal activities appear suspicious and could prove damaging at a later point in time, particularly in the event of any regulatory inquiries or investigations aimed at, or covering, ISLA.
- 10.2 Such investigations often require a significant amount of internal documents and correspondence becoming subject to disclosure and scrutiny, including those that one would have thought were confidential, such as diaries and telephone call records. Documents in this context are *not* limited to papers, but include any form in which information is recorded, such as computer records, e-mails and voicemail recordings.

### DOs

- 10.2.1 Consider whether the correspondence or report actually need to be in writing – what you write down could be made public one day and if it is a sensitive topic, it may be better to discuss it orally.
- 10.2.2 Avoid indicating that there is an industry view or joint view of ISLA members on issues that are decided individually by each member, e.g. terms and conditions with suppliers or other counterparties.
- 10.2.3 Where possible, avoid keeping several different versions or drafts of the same document in your computer system.
- 10.2.4 State clearly the sources of commercially sensitive information in order to avoid suggesting there has been an inappropriate exchange of such information between ISLA's members.
- 10.2.5 Keep minutes of all ISLA meetings and ensure that legally privileged documents are stored separately.
- 10.2.6 Avoid vocabulary that wrongly suggests either domination or that there are strategies to prevent competition, such as "this will kill competition" or "this strategy will preserve ISLA members' position on the market";
- 10.2.7 Follow the above guidance also when reporting on e.g. notes or memoranda originating from others.

### DON'Ts

- 10.2.8 Do not use guilty vocabulary, such as "delete this after reading it" or "we need to be careful how we word this";
- 10.2.9 Do not speculate in documents about whether certain activities or conduct is illegal or legal – if there is a need to seek legal advice, discuss this orally with [ISLA's Head of Finance & Administration].

## APPENDIX 1

## GUIDANCE ON WHAT TO DO IN THE EVENT OF A DAWN RAID

**What is a dawn raid?**

- Competition authorities have wide powers to investigate companies they suspect of having infringed competition law, including the power to carry out unannounced visits to a company's premises (known as a "dawn raid").
- The investigators can ask to see and examine any information relevant to the scope of the investigation and may conduct interviews of individuals. However, they may not see or take documents that are legally privileged.
- Internal records (including e-mails, documents, telephone records and personal diaries) can be scrutinised. Investigators will usually bring a forensic IT expert to copy emails and documents from the server for review at a later stage. Note that deleted emails will also be retrieved.
- The powers of the investigators depend upon the type of warrant or authority they have obtained and in which jurisdiction the raid is taking place. This means that an in-house or external lawyer should be involved in every dawn raid.

**Key things to remember during a dawn raid****DO NOT:**

- × Destroy or conceal documents (or delete emails) during the course of a dawn raid;
- × Provide false or misleading information; or
- × Obstruct an official carrying out an investigation – if they will not wait for a lawyer to arrive, do not prevent them from carrying out their inspection.

**What to do in the first hour of a Dawn Raid*****When the officials arrive***

- arrange for the most senior company executive and, if relevant, the most senior lawyer on site to meet the officials;
- move the officials into a meeting room that does not contain any files or access to the company's IT system;
- explain that someone will be down to meet them shortly;
- take copies of their inspection mandate and get contact details of the official in charge;



- call external competition lawyers and ask them to attend immediately (see the table below for details of ISLA's external competition law contacts);
- give the external lawyers details of which authority the officials are from, how many officials there are and email/fax to the lawyers a copy of the officials' inspection mandate;
- obtain from the external lawyers an indication of when they are likely to arrive.

### ***Until help arrives***

- The company's senior executive and/or in-house lawyer should check the investigation mandate to see whether the officials are authorised to conduct the investigation;
- try to persuade the officials to delay starting their investigation until external lawyers arrive. Officials will usually be prepared to wait up to an hour for legal advisers to arrive;
- emphasise the company's intention to cooperate;
- try to establish from the officials whether they are also conducting investigations at any of the company's other sites or at the homes of any company employees. If they are, then arrange support for each of those other locations.

### ***Organising the internal team***

- Gather and base in a room away from the officials a team comprising the following:
  - a senior member of the IT staff;
  - a senior employee to act as coordinator;
  - enough employees to act as a "shadow" for each official,
- Circulate mobile telephone numbers for the internal team, external lawyers and the lead official;
- Where possible, the "shadowers" should accompany the investigators and keep a record of the proceedings including all files examined, all documents requested, all questions asked by the investigators and any responses.

### ***External lawyers arrive***

- External lawyers to check the officials' documentation and the investigation mandate;
- Try to persuade the officials to allow the external lawyers and internal team to hold a brief meeting to discuss the company's duties and how the investigation will be monitored;
- Nominate a person from the company and the external lawyers who will handle disputes with the officials.

### ***What powers of search do the officials have?***

- Confirm with the external lawyers whether:

- the officials have the power to search;
- it is a civil or criminal raid;
- it is a raid by the European Commission or by a national competition authority.

### ***What documents can the officials read?***

- Circulate amongst the external lawyers and in-house team a list of the names of external and the company's in-house lawyers who may have sent or received documents that might be seen by the officials;
- Identify where legally privileged documents are kept and whether they are likely to be clearly marked.

### ***What questions can the officials ask?***

- Identify who from the company will be the primary contact point for questions;
- Officials can generally ask simple questions regarding locating and identifying documents;
- Where the officials wish to ask questions of fact, as opposed to requesting explanations of documents, it must first serve a formal notice on the individual and the firm. A response is usually compulsory and there are sanctions on the individual for failing to comply with a formal notice, but answers cannot be used against the interviewee (with limited exceptions). A lawyer should always be present during any interviews.

### **Dawn Raid External Lawyer Contacts**

<b>External lawyer</b>	<b>DDI</b>	<b>Mobile</b>	<b>Fax</b>	<b>Email</b>
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**Pinsent Masons LLP**

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