

Financial Markets Standards Board Limited

FMSB Competition Law Policy

1 General guidance

The Financial Markets Standards Board Limited (“**FMSB**”) is committed to sustaining the integrity of wholesale financial, including, but not limited to fixed income, currencies and commodities, markets. The purpose of FMSB is to define and sustain good practice standards for wholesale financial markets and raise standards of behaviour, competence and awareness across those markets and among participants, thereby contributing to the fairness and effectiveness of those markets.¹

In order to achieve these objectives, FMSB works with Contractual Members and Working Group Participants (collectively “**Participants**”)² and appoints a Standards Board, Advisory Council and Working Groups to produce and maintain Company Publications.³

Participants contribute their common industry expertise and, as a result, are likely to be competitors in certain product areas. Given the inevitable competitor interaction in this context, particular care should be taken to ensure that there can be no suggestion that FMSB facilitates or is a conduit for any anti-competitive behaviour.

Competition law prohibits, among other things, the coordination of competitors’ strategic behaviour such as through agreements (formal or informal) that have the object or effect of restricting competition, and the disclosure/exchange, without objective justification, of competitively sensitive information between competitors.⁴ In broad terms, sharing of competitively sensitive information can reduce strategic uncertainty in a given market by providing an insight as to competitors’ commercial strategy and can lead to an inference that collusion has occurred.

Competition authorities such as the Competition and Markets Authority (the UK competition authority), the Financial Conduct Authority, the European Commission (the EU competition authority) and other global competition authorities can mount investigations on their own initiative, or prompted by a complaint from a third party, provided that they have reasonable grounds for believing that there is a suspected infringement of relevant competition law. The potential penalties for breaching competition laws are significant. Penalties can include fines (of up to 10% of global

¹ Except where otherwise defined in this Policy, all defined terms have the same meaning given to them in Part 1 of the FMSB By-laws.

² “Working Group Participants” are defined in the FMSB Terms of Reference as “in respect of each Working Group, those participants nominated to participate in accordance with either (i) By-law 13.3 (and subject to By-law 13.5) or (ii) By-law 13.4 and shall include the relevant Working Group Chair.”

³ “Company Publications” are defined in the FMSB By-laws as “Standards and Statements of Good Practice approved by the Standards Board for publication on the Company’s website”.

⁴ Note that “agreements” do not have to be in the form of contracts - they can be formed through email, oral arrangements or even a “gentlemen’s agreement”.

net revenues), unenforceable contracts, costly litigation, and significant adverse publicity. For individuals, aside from any disciplinary action they may face within their respective organisations, sanctions can include very large fines and, in some countries, terms of imprisonment (such as the UK, Germany and US).

In light of the above, strict restrictions are required around what information can be shared and what can be discussed between Participants, both at FMSB meetings as well as in other more informal contexts. Furthermore, FMSB will also want to ensure that the Standards it sets (as well as other Company Publications, including Statements of Good Practice) do not have the effect of restricting competition. This policy sets out the Competition Law Policy (“**Policy**”) to ensure that the Participants act in compliance with competition law.⁵ Participants should follow the steps outlined in this Policy to ensure that their conduct is compliant with the relevant competition law.⁶

2 Information exchange - what cannot be shared?

Participants must think carefully about the nature of any information shared with FMSB or other Participants and:

- (i) **Never share or solicit “red flag” information.** Participants must ensure that they never share or solicit competitively sensitive (or “red flag”) information. Red flag information is, in particular, (a) current and forward looking, detailed information that relates to key competitive parameters such as prices (this would include interest rates, fees, commissions and charges), volumes, innovation or strategic decisions; or (b) the elements of Participant’s individual pricing policy, for example discounts, costs, pricing strategies (including terms of trade and rates). Further examples of red flag information are included at **Annex 2** to this Policy. However, the examples provided are not exhaustive and Participants should seek legal advice if they are uncertain as to whether information is potentially red flag information.
- (ii) **Avoid sharing confidential business information.** Participants should generally not share other confidential business information (even if it is not red flag information) with other Participants without first seeking legal advice. This might include historical price information, or confidential information that does not relate to parameters on which Participants compete (such as information about employee disputes).

⁵ As per By-Law 3.4, by completing the Contractual Membership Application Form, Contractual Members agree to adhere to the FMSB Competition Law Policy. Further, as per By-Law 13.4, any non-Contractual Members invited to participate in a Working Group also agree to adhere to the FMSB Competition Law Policy.

⁶ This Policy does not claim to be exhaustive, as competition analysis is often fact-specific, and therefore this Policy is not a substitute for timely advice from competition law specialist (either from FMSB’s standing counsel, Linklaters, or each Participant’s respective internal / external legal advisors). Working Group Participants should therefore be mindful of their competition law obligations and seek legal advice if they have any concerns regarding the competition law implications of their conduct or the conduct of other Working Group Participants.

As a rule of thumb, if Participants consider information to be confidential from a commercial perspective, then it may also be the type of information which Participants should not discuss with competitors from a competition law perspective. In case of doubt as to what can and cannot be shared, Participants should not provide the information and raise the query with their firm's competition lawyer or compliance professional. It should be noted that even appearance of an agreement to share red flag information, even if no information is shared, may give rise to investigation risk or complaints being levied.

Some confidential (but not red flag) information about a Participant's business may need to be shared in order to contribute to the drafting of Company Publications, or for carrying out another of FMSB's functions. If this is the case, information should be limited to what is strictly necessary, it should be collected by a neutral third party, and aggregated/anonymised before being shared with FMSB, and legal advice should be sought before such information is collected.

3 Conduct to avoid

Participation in FMSB, and the Standards set by FMSB (as well as other Company Publications, including Statements of Good Practice), must not limit or reduce competition between Participants or others. To this end **Participants must never engage in any of the following conduct or activities:**⁷

- (i) **Fixing prices.** Participants must never agree between themselves about any element of price (including interest rates, fees, commissions and charges), including discounts (such as whether to offer discounts, or the level of discounts). They should also never reach agreements that could have the effect of fixing prices or discounts, and discussions about these issues should always be avoided. **Any kind of price coordination between competitors is likely to be treated as a serious contravention of competition law and fined accordingly.**
- (ii) **Boycotts.** Participants should not agree to treat a particular individual, company, customer, or group of customers in a prescribed manner, or to boycott any individual, company, customer or group of customers.
- (iii) **Allocation of customers or territories.** Participants should not agree what groups or types of customers they will focus on (or avoid) competing for (for example, agreeing to allocate customers or territories among Participants). Discussions concerning plans to expand into or withdraw from certain geographic or product markets should be avoided.
- (iv) **Strategies and future competitive conduct.** Participants should not discuss or disclose any information regarding their current or future strategies or

⁷ Please note that this list is not exhaustive, and these are examples only. As a general rule, Participants must not reach agreements that would fetter the commercial freedom of action of Participants, or limit Participants' ability to decide independently on the commercial aspects on which the Participants compete.

competitive conduct, as such business decisions must be taken independently. For example, they should not discuss: (a) what suppliers of products or services to use (or not use), or what individuals to hire (or not hire), or what to pay for those products, services or employees; (b) what distributors for supplying products or services will be used (or not used), or what to pay for access to those distributors; or (c) any current or future planned strategic initiatives.

- (v) **Coordination on bids.** Participants should not disclose confidential information with a view to coordinating their individual responses to competitive bids or auction.
- (vi) **Sharing red flag or confidential business information.** As noted at para. 2 above, Participants should never share red flag information and should avoid sharing confidential business information.

4 Conduct subject to analysis

The following activities may or may not be permissible within FMSB, depending on the circumstances. Competition law requires individuals and firms to weigh up the positive and negative aspects of an activity from a competition point of view in order to form an overall view. Formal analysis by a competition lawyer would include considering whether the customer gets a fair share of the benefits and whether the restriction/detriment is necessary and not more restrictive than is necessary to achieve its ends. Care should be taken to ensure that seemingly benign activities do not mask or promote actions that are, or could be, interpreted as anti-competitive. In relation to each of the below activities, Participants are strongly encouraged to seek competition law advice to ensure full compliance with all applicable laws.

- (i) **Implementation strategies for regulatory developments or legislative activities.** While it is not problematic for Participants to discuss future regulatory developments with competitors (and this is a relevant topic in the context of FMSB) it is easy for discussions about future developments to flow into (anti-competitive) discussions on an individual firm's strategies for implementing legislative change and explicit or implicit alignment of future conduct. Participants must not discuss the specific impact of regulatory reform and their planned individual responses to that reform (e.g. how to pass on any increased cost of compliance, or how to modify trading terms as a result of new legislation). Rather, Participants should decide independently how to implement any regulatory or legislative changes.
- (ii) **Standard setting and "best practice" recommendations which coordinate the Participant's behaviour.** Company Publications are capable of infringing competition law, if the underlying intention is to coordinate the behaviour of Participants or if they would have the effect of restricting competition (for example, by preventing any market participant from accessing a sufficient number of retailers/sufficient scale to compete or mandating a specific course

of conduct on areas where the Participants compete such as pricing/discounting). Therefore, Company Publications of FMSB must not relate to any of the elements described at paragraph 3 (“*Conduct to avoid*”), above.

5 Access to Contractual Membership

Company Publications will, among other things, define good practice for wholesale financial markets; and so Contractual Membership may be important for the financial success of a company in the industry; therefore, restrictions on access could have the effect of restricting competition. FMSB should therefore ensure participation in the process of drafting Company Publications and access to Contractual Membership is open to all who meet fair, transparent and objectively justifiable criteria. Depending on the circumstances, it may also be prudent to invite market participants who are not Contractual Members of FMSB (but are nevertheless interested parties) to comment on draft Company Publications (for example, debt management organisations in an auctions context).

To help safeguard against competition law risk and ensure compliance, Participants should:

- (i) **Keep meetings and communication on subject.** Topics of FMSB meetings should be focused on the drafting of Company Publications and approval thereof, or other of FMSB’s functions for which the meeting is gathered. Discussions should not cover the specific activities or plans of Participants each person represents, or their suppliers/customers.
- (ii) **Follow the pre-circulated agenda for meetings.** FMSB meetings should be governed by an agenda that is circulated in advance of the meeting. In accordance with the FMSB By-laws and the Terms of Reference, the Secretariat will produce minutes of meetings of the Standards Board, Advisory Council and Adherence Oversight Committee. The Secretariat will also produce action points arising from meetings of the Working Group.
- (iii) **Ensure an external lawyer is present where necessary.** Where there is a risk of any sensitive information being discussed, FMSB meetings should be attended by an external lawyer.⁸

6 What to do if a concern arises

- (i) **Seek legal advice promptly.** If a Participant has concerns about Company Publications or other FMSB related matters (such as Participant conduct) from a competition law and compliance perspective, legal advice should be sought

⁸ Clause 11 of the FMSB Terms of Reference requires that all Working Group meetings must be attended by competition law counsel.

promptly from their own legal team or from FMSB's standing counsel, Linklaters.

- (ii) **Cease discussions immediately.** If, during the course of an FMSB meeting, a Participant has concerns about discussions from a competition law and compliance perspective, the Participant should make their concerns known and the discussion giving rise to such concerns should cease. If the discussion does not cease, Participants should leave the meeting and ask for their departure to be minuted. Competition law advice should then be taken by respective Participants, prior to the topic being discussed further.

Annex 1 - Do's and Don'ts

Do's	Don'ts
Meetings and communication	
✓ Keep competition rules in mind at all times, particularly when attending meetings with or before communicating with other Participants.	✗ Never reach an agreement or understanding on any element of price, market sharing, territorial divisions, customer sharing, or future competitive conduct. Ensure this is not the object or effect of any Company Publications.
✓ Ensure meetings are governed by an agenda , circulated in advance, containing a competition reminder.	✗ Never talk about red flag information - especially pricing information - at a meeting or in communications with other Participants.
✓ Terminate a discussion or leave a meeting if a Participant thinks there is a risk that red flag information is being shared, or if a Participant considers there is a competition law risk.	✗ Never seek to influence the competitive conduct of other market participants or limit their ability to determine conduct independently (i.e. what suppliers to use, outlets for supplying products or services, etc).
✓ Keep meetings and communications on subject (i.e. focused on FMSB's objectives).	✗ Never attend any 'shadow meetings' with other Participants before or after FMSB meetings.
✓ Always raise any concerns with legal promptly if anything is said at meetings or in communications that a Participant thinks could give rise to a competition law risk.	✗ Never do anything that would fetter the commercial freedom of action of the Contractual Member or non-Contractual Members participating in a Working Group through discussions with competitors.

Collecting and sharing Contractual Member information	
✓ Consider carefully whether information is confidential business information or red flag information before sharing it.	✗ Never request, share or pass on red flag information within FMSB or to other Participants.
✓ Seek legal advice promptly if unsure whether information is red flag or not.	✗ Avoid sharing confidential (non-red flag) information within FMSB (unless it is necessary, and then only after seeking legal advice).
Setting voluntary Standards and issuing Company Publications, including Statements of Good Practice	
✓ If FMSB is concerned that a Company Publication, might reduce competition in any market, seek legal advice promptly .	✗ Do not agree to the publishing of a Company Publication that would have the effect of preventing market participants from competing . Do not agree to Company Publications that would lock up a substantial proportion of the market for a retailer or supplier, preventing other retailers or suppliers from competing.

Annex 2 - Identifying “red flag” information

Examples of “red flag” information
<p>Examples of red flag information include:</p> <ul style="list-style-type: none"> • current or future sales related information particularly relating to prices, price changes, discounts and trade margins; • any price elements (including fees, margins, commission, rebates, pricing formulas, methodologies or trading volumes) of recent or future trades or trading strategy, and other products, or prices at which products or services are supplied or acquired; • the level of any discounts received or offered; • individualised costs and profit margins data; • confidential terms and conditions on which products/services are purchased or supplied; • current or proposed approach to employment or recruitment (such as what individuals to recruit, remuneration, structuring, retention, or benefits packages); • information about current or future strategy or commercial conduct, such as trading strategies, target markets or territories, plans to bid for specific customers or plans to expand into or withdraw from markets; • confidential projections by a Participant’s firm regarding current and future market activity; • current or future customer or supplier information, including their identities or profiles and including information on target customers; • planning information, such as research and development information; • business plans, sales, marketing or investment plans; • information relating to capacity problems or potential expansions/contractions; • the intent to supply, or not to supply, certain customers, products/services or geographic areas; • the identity of particular suppliers used if confidential, including discussing the intent or willingness to purchase only from a particular supplier under any circumstances;

- predictions about what **steps any market participant or other entity might take commercially in response to business, regulatory or legislative developments**; or
- any other **confidential information relating to parameters on which a Participant competes**.