CharlesRussell Speechlys

FIX Protocol: Competition Compliance Training

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CRS EU & Competition

Who are we?

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Paul provides the full range of competition, state aid and public and utilities procurement advice to clients in a significant number of sectors, amongst them ICT-related industries, retail & leisure and construction & engineering.

Paul's previous experience includes working at the European Commission in Brussels, reviewing antitrust and merger control decisions and a secondment in the Law Society's Brussels Office.

Paul is sub-editor of Public Procurement Law Review and widely published in a range of sectoral publications (e.g. Supply Management and Constructions News) and legal journals (e.g. Global Competition Review). Paul is also adept in a range of foreign languages.

"Paul possesses commercial acumen alongside a keen and up-to-date legal mind and a talent for lateral thinking which allows us to achieve our objectives."

Jilly Ward, UK Legal Director, WS Atkins plc, September 2013

Paul Stone

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Paul advises companies on compliance with competition law, assisting companies that are subject to investigation by the competition authorities and providing guidance to companies that may be the target of anti-competitive behaviour. His experience covers a wide range of industry sectors, including technology, media, telecoms, sport, healthcare, retailing, rail and financial services.

Prior to joining the firm, Paul worked in-house as ITV's Head of Legal Affairs, Regulatory and Competition.

Paul has been involved in a number of recent high profile cases in the communications sector in the UK, including BSkyB's stake in ITV and various projects to deliver video-on-demand content through broadband.

'understands the regulatory regime but also understands how his clients think and react'

Legal 500, 2014

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Rory assists Paul and Paul in the EU & Competition team in providing advice on competition law, state aid and public procurement issues as well as on specific areas of EU Regulation and contentious matters.

- In 2013 Rory spent a very productive secondment at the Competition Commission, assisting its policy unit in revising guidance for the formation of the new Competition and Markets Authority in April 2014.
- Rory is also poised to second to a major consumables producer to advise on the Competition aspects of pricing and other strategies.
- Rory has written for legal journals and industry publications, including Public Sector Review, Building and Public Procurement Law Review and regularly contributes to the firms' Compliance Inform newsletter.

What is Competition law?

The rules and how they can become infringed

What is Competition law?

What do the rules try to achieve?

- Competition is a race between companies – “survival of the fittest”
- Competitors should act *independently of one another*
- Advantages of competition:
  - *Increased efficiency*
  - *Lower prices*
  - *New technology*
- Competition Law stops companies “rigging” the market.

What is Competition law?

What does it mean for FIX?

- FIX is a membership organisation and subject to competition law in the same way as any other business
- Each member organisation is treated as a separate competitor - FIX therefore **cannot coordinate the conduct of the FIX members** in relation to pricing or other areas where they compete with one another
- Particular care needs be taken by FIX since it constitutes what is referred to under EU Competition law as an “association of undertakings” (of which trade associations, like FIX, are the most prominent form).
    - Decisions of associations of undertakings are explicitly recognised by EU law as being able to breach competition law and even give rise to a cartel.
    - Indeed, FIX’s rules, regulations and constitution are capable of giving rise to an anti-competitive agreement, as can even any non-binding recommendations that it issues.
    - messaging services and online forums may be seen as enabling illegal information sharing and/or a “concerted practice” between member organisations.

What is Competition law?

Sources of UK / EU Competition law

- Prohibition on anti-competitive agreements (**Art 101 Treaty on the Functioning of the EU / Chapter I UK Competition Act 1998**) – e.g.:
  - Price fixing
  - Market-sharing
  - Bid-rigging
  - Non-compliant distribution arrangements (e.g. ‘passive sales’ bans)

- Prohibition on abuse of a dominant position (c. 40% market share, dep. on market and market structure) (**Art 102 TFEU / Chapter I CA98**) – e.g.:
  - Illegal tying and bundling
  - Predatory pricing
  - Refusal to supply / licence (including ‘constructive’ refusal)

What is Competition law?

Chapter I / Article 101 – conduct to avoid

Entering into any **agreement or arrangement** with another entity (individual/company or partnership) which **prevents, restricts or distorts** competition, in particular by:

- Fixing our prices and/or those of competitors at a certain level
- Dividing up geographical markets
- Allocating customers/contracts
- Agreeing not to supply to a certain customer or a certain type of work

What is Competition law?

What do we mean by an "agreement" or "arrangement"?

"Agreement"

- *Oral or written agreements are caught*
- *Simple understandings*
- *Rules or decisions of a trade association*
- *Agreements in principle that are never acted out*

"Arrangement"

- **Any means** whereby risks of competition are replaced with practical co-operation

  Example:

  Setting up an information-sharing system with competitors

Why does Competition law matter?

Costs and consequences of infringement

Why does Competition law matter?
Consequences of a breach: summary

- **Fines** of up to 10% of worldwide group turnover
- **Orders** to 'cease and desist' practices
- **Agreements null and void** (in part or even whole)
- **Potential criminal sanctions** (certain 'hard-core' agreements can amount to an offence)
- **Disqualification** of company directors for up to 15 years
- **Civil claims** from competitors, customers and supply chain operators (including CLASS actions!)
- **Reputational damage**

Why does Competition law matter?
Penalties for infringement

1. CIVIL: Competition Act 1998 (CA98) / EU Treaty

- Competition and Markets Authority (CMA) is responsible for enforcing the CA98 and can impose:
  - Fines of up to 10% of turnover for preceding year in the market where the infringement took place
  - Highest fine to date: **£112 million (Imperial Tobacco)**
- The EU Commission imposes and collects fines under EU competition law – REMEMBER that to extent FIX cannot pay, the Commission can pursue the member organisations individually on a "joint and several" basis

2. CRIMINAL: Enterprise Act 2002 (EA02)

- "Bid rigging"/"Price fixing"/"Market Division" are now criminal offences (with no need to prove 'dishonesty' where committed after 31 March 2014)
- Punishable by **prison term** ≤ 5 years
- **Director disqualification** ≤ 15 years
- Individuals can be subject to **unlimited fines**

Why does Competition law matter?

Other reasons to comply

- Reputational issues – how will infringements make us look to customers?
- Lawsuits – we could be sued for damages by competitors / customers who lose out
  - Renewed impetus for class-based actions following Consumer Rights Act 2015
  - Private damages actions also boosted by recent EU Directive
- Investigations are highly stressful and unpleasant

Key competition law risks for FIX

Four ‘headline’ risk areas

Key Competition law risks for FIX

Four ‘headline’ risk areas

1. Sharing of information / increased transparency of data (especially as to prices and particularly if forward looking)
2. Market Decisions and non-binding recommendations of FIX:
   a) Potential for ‘cartel-type’ activity
   b) Possible collective ‘boycott’ of customers or suppliers
3. Any possibility of “collusive tendering” or “bid rigging” in tender competition scenarios
4. Unfair or discriminatory access to membership / standards

Key competition law risks for FIX

1. Sharing of Information

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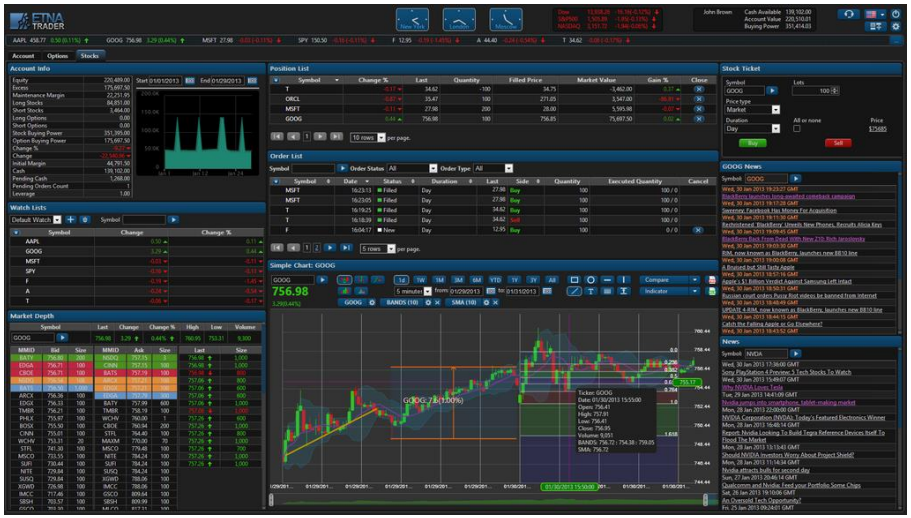
Information exchange can breach competition rules

- Information sharing between competitors can be a serious infringement of competition law
- **Key question: does it reduce strategic uncertainty among competitors?**
- Trading platforms have the potential for illegal data sharing



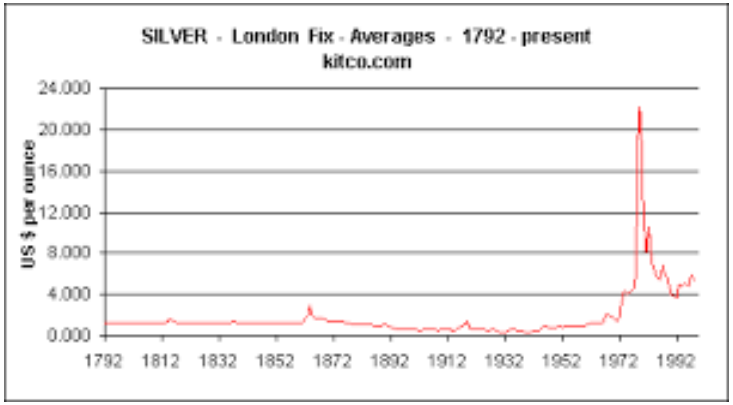
1. Sharing of Information

What do the regulators say…

CMA Guidance:

- The more current or recent any pricing information the more likely a breach of the law
- Purely historical price trends (e.g. to show trading comparison and promote best practice) not an issue
- Aggregated statistics, market research and general industry studies less of a problem

Q: are competitors less likely to behave <u>independently?</u>



CMA
Competition & Markets Authority

1. Sharing of Information

KEY RISK: forward-looking pricing approaches!

- There need not be an actual agreement or 'concerted practice'
- It only takes one competitor to reveal pricing intentions to others for a risk to arise
- Mere receipt is enough to infringe – anyone receiving such info is presumed to have acted on it.
- SO:
  - Try to delete / return the information without it becoming disseminated among members
  - Publicly distance yourself from the information
  - Warn committees and members to avoid reading and taking into account any such information if they have yet to do so

1. Sharing of Information

A warning from recent history – RBS fined ***£28.6m!!***

- RBS committed one-way unilateral disclosure of its future pricing intentions to Barclays (re commercial rates of interest for loans to large professional service firms)
- Through contacts at social, client and industry events and telephone conversations
- Barclays took into account in formulating its own pricing and did not distance itself from this practice
- Barclays eventually approached OFT in March 2008 to apply for leniency – it received immunity from fines, ***but not RBS!!***

1. Sharing of information

RBS pays the price – the OFT's warning!

Ali Nikpay, OFT Senior Director of Cartels and Criminal Enforcement:

"*Any company that discloses* ***confidential future pricing information*** *to its competitors risks a substantial penalty. It is important that companies operating in the UK understand the* ***seriousness of such conduct and ensure effective competition compliance*** *throughout their organisation.*

The case underlines the ***OFT's commitment to protecting competition in the financial services sector****. It also highlights the strong benefits of acting promptly to report anti-competitive conduct to the OFT and of co-operating with such investigations*"

1. Sharing of Information

How to minimise the risk – to you, to FIX and to members

- Ensure that any information that is published via FIX trading platform media is, so far as possible:
  - Aggregated (not individualised);
  - Neither current nor so recent as to positively indicate future pricing trends
- Avoid any decisions or recommendations of FIX Trading which communicate to members up-to-date information on individual members' pricing or commercial strategy (including any that can be reverse-engineered!)
- Record (e.g. through Committee minutes) that FIX and its members distance themselves from any circulation of up-to-date commercial data and especially any indication of forward-looking pricing plans

Key competition law risks for FIX

2. Decisions / recommendations of FIX

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Trade associations can breed ‘cartel-type’ scenario

- Membership organisations can be **vulnerable to indirect information exchange** between competitors
- Again, question of whether info individualised, commercially-sensitive and future-oriented
- Furthermore, Information exchange can enable **concerted practices, even tacit cartels** among association members…
- **Possibly even by providing an open forum for exchange of views – can result in non-independent behaviour**

2. Decisions / recommendations of FIX

Types of recommendations / circulars to avoid

- Detailed price lists
- Any recommendation as to minimum prices / fees from customers
- Which suppliers to use / not use
- Any form of alignment of commercial conduct by members (e.g. joint negotiation, parallel movements in stock trading prices and volumes)

Key competition law risks for FIX

3. Danger of market rigging and ‘collusive tendering’ / ‘bid rigging’

3. ‘Market rigging’

Ensuring that markets work fairly

- In financial services market, it is illegal for traders from different markets to work together to manipulate the market in some way
  - For example, in May 2015, **Barclays, JP Morgan, Citigroup, Royal Bank of Scotland and UBS have been fined a total of $5.7bn for their role in manipulating the foreign exchange markets.**
  - Customers give banks orders to trade at 4pm and if banks know the **trading** positions of their rivals they are able to work out at what price the “fix” will take place. Through chatrooms, traders shared information about their client orders and were able to influence the price.
  - The FCA found the traders at rival banks formed groups through which they shared information.

3. ‘Market rigging’

Ensuring that markets work fairly

- Another example of market manipulation and cartels is the **LIBOR scandal**. Following an inspection of 10 banks, the EU Commission found that:
  - Four had participated in a cartel relating to interest rate derivatives denominated in the euro currency.
  - Six others participated in one or more bilateral cartels relating to interest rate Yen based derivatives.
  - Traders of different banks discussed their bank's submissions for the calculation of the EURIBOR or LIBOR as well as their trading and pricing strategies.
- Total fines were meted out in the sum of **€1.71 billion**
- In some member states, criminal prosecutions followed (one individual sentenced to 14 years in UK for conspiracy to defraud)

3. Collusive tendering / ‘bid rigging’

Ensuring that members bid for work independently

- ‘Bid rigging’ is another ‘hard-core’ cartel offence under competition law
- It can also attract criminal prosecution
- Collusive tendering is where firms competing for contracts in their market / industry (typically, ones being let by a public authority) agree:
  - **when to bid or not bid; and/or**
  - **at what level to bid**
- Bid rigging cases have seen some of the most widespread issuing of fines (e.g. “cover pricing” in the construction industry – **103** companies fined **£129.2 million**)

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3. Collusive tendering / ‘bid rigging’

What to look out for in tendering scenarios

- **Anyone offering or requesting a “cover price”**:
  - ‘Cover price’ sought from one bidder by another
  - Bidder A wants to win, Bidder B wants to participate but not win (but nonetheless show in its pricing that it was ‘serious’ about the opportunity, to stay in contention for future work)
- **Any offer of payment** to not bid / bid at a certain level
- **Any other exchange of commercially-sensitive information** (especially if up-to-date and disaggregated) that might indicate the level at which competing tenderers might bid.

Key competition law risks for FIX

4. Standards setting and providing guidance

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Keeping standards fair and accessible

FIX must take special care when adopting standards, in particular to ensure that:

- unrestricted access for every member to participate in any standard-setting process
- the content of any standards is objective
- no standard intentionally favours or excludes any particular business or group of businesses

4. Standards setting and providing guidance

Keeping standards open and accessible but OPTIONAL

FIX must also ensure that:

- standards are adopted through an entirely transparent procedure.
- access to the standard is provided on fair, reasonable and non-discriminatory (a.k.a. “FRAND”) terms.
- compliance with any standard is optional and not made mandatory.

4. Standards setting and providing guidance

Giving guidance to members but without promoting uniform conduct

- Technical guidance (e.g. re proposed laws and legislation) consultation responses not normally high risk
- However, there IS a risk if any positions, recommendations or views expressed are likely to:
  - prompt uniform conduct; or
  - compromise independence of members' behaviour on the marketplace
- Guidance should **inform, assist and educate** but **NOT advise, instruct** or be tantamount to a direction

How to minimise the risk

Taking care with documents and communications

How to minimise the risk

Contact with competitors

- Employees should not contact competitors without first consulting with a Director
- Employees or Directors contacted by a competitor, report this immediately
- Directors: take extreme care when talking to employees/directors of competitors
- In general, please do not discuss work with competitors
- It is advisable to keep confidential all sensitive tender information (prices, make-up of tender) and never to reveal this outside of work (except to customers)

How to minimise the risk

Taking care with communications

- It is important to take care in your business communications – why?
- Memoranda and emails or letters could be obtained by the CMA (it and Commission now have enhanced powers to request documents and sweep IT servers)
- The CMA now has the power to “listen in” on telephone conversations

How to minimise the risk

Taking care with communications

Even innocent exchanges can look guilty:

- Remember that anything you record may become public one day.
- Always assume the person you are talking to will report the conversation to managers and/or to the CMA!
- When you obtain pricing or tendering information, be careful to record where you got this information from

How to minimise the risk

Mind your language!

What should I avoid?

- Guilty language, *e.g.* "*Please delete/destroy this message*", "*Don't mention this*"
- Speculation as to whether something is legal or illegal – it could be misinterpreted!
- Suggesting that the company's prices are not based on its own judgment
  - "*in line with industry standard*"
- Saying anything suggestive of allocation arrangements
  - "*we don't tender in that area*"

How to minimise the risk

Document retention

- Comply with FIX's document retention policy
- Do not keep different or obsolete versions of the same document
- When recording pricing / trading / tendering or other commercially-sensitive information, be careful to record where the information came from

How to minimise the risk

Contact from competitors

- You may be contacted by competitors who want the company to:-
  - Co-ordinate prices/tenders
  - Withdraw from or not bid for a tender
  - Share markets
  - Allocate contracts
- **REFUSE**, ALWAYS!
- **Record** the contact using the contact form to be provided
- **Report** the contact IMMEDIATELY to a Director
- Report to a Director if you suspect anyone in the company is breaching/has breached competition law

Who enforces the rules? And how?

Who are the regulators and what can they do?

Who enforces the rules? And how?

The EU, UK and 'concurrent' regulators

- European Commission

- UK Competition and Markets Authority
- Concurrent regulators – e.g. Ofcom, Civil Aviation Authority and notably, the **Financial Conduct Authority**
- Businesses and individuals, through the High Court and Competition Appeal Tribunal

CMA
Competition & Markets Authority

Who enforces the rules? And how?

Powers of the regulators…

CMA, Commission and other regulators can:

- Raid office premises and even individuals' properties unannounced to carry out inspections
- "Seize and sift" through cabinets and servers for evidence of suspected competition law infringements
- Impose fines and other orders on infringers – can pursue members of a trade assoc. individually for contributions (i.e. "jointly and severally")
- Issue additional fines for failure to cooperate with an investigation (e.g. €38 m on E-On for breaching a Commission seal on a room in its offices)
- Bring criminal prosecutions for the most serious breaches!

Who enforces the rules? And how?

CMA Powers of investigation

- The CMA has statutory powers to enter premises without notice
- The CMA can take :
  - copies of all electronic or hard documents on the premises (including entire servers)
  - copies of photographs
  - copies of internal memoranda
  - copies of correspondence
  - Computers (if they have a warrant)

Who enforces the rules? And how?

CMA Powers of investigation – documents

- The CMA ***cannot*** take copies of legally privileged documents: store these separately and keep them marked "**Privileged**"

- It is important to **shadow inspectors** so that documents being copied or removed can be monitored and any challenge to its 'relevance' or claim for potential privilege can be recorded

- These documents can then be set aside / kept back for review

Who enforces the rules? And how?

If someone contacts the company regarding an investigation

- Contact a director immediately
- No-one should give any information to any visitor without a Director being present
- Do not let investigators wander around the premises. Stay with them until a director arrives
- Ask to see the investigator's ID and note the time of their arrival
- Call legal advisors to supervise the investigation!

Any questions?

Contact us anytime!

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