

ASSOCIATION DES INDUSTRIES DE MARQUE
EUROPEAN BRANDS ASSOCIATION
EUROPÄISCHER MARKENVERBAND

AIM®

LEGAL COMPLIANCE PROGRAMME

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LEGAL COMPLIANCE PROGRAMME

Any trade association brings together undertakings that are active on the same market and thus are potential or actual competitors. Of course, this does not mean that they are unlawful or inherently dangerous to competition, but there are a number of laws of which the association itself and its members must be aware, and to which they must adhere.

This compliance programme highlights the most important of those laws, and provides some guidance upon compliance with them. It is intended for the guidance of AIM staff, and for members only insofar as concerns AIM activities. However, it is only an overview and must not be taken as a substitute for comprehensive legal advice: **ANY SPECIFIC QUERIES SHOULD BE DIRECTED TO YOUR LAWYERS.**

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A. Relevant Laws

The most important legal rules of which any trade association's staff and members must be aware fall into the basic categories of commercial and competition laws. (Other aspects such as employment law, health and safety rules and environmental law are outside the scope of this programme).

Like any company, a trade association has legal personality, meaning that it can conclude contracts, own property, be held liable for infringements of the law and so forth. The people who are designated as its representatives have the authority to bind the association and can thus incur liability for it: all others should be vigilant in claiming to "represent" or do anything "on behalf of" AIM. When in doubt, refer either to the by-laws of AIM, or to its Director General.

As for competition (or "antitrust") law, its purpose is to regulate the market to ensure the promotion and protection of a competitive economy, safeguard consumer welfare (innovation, choice, price competition etc.) and (in the EU) ensure that artificial barriers to trade are not put up between the Member States, which could affect the smooth running of the single market.

Agreements between independent companies that may prevent, restrict or distort competition in the EU are thus subject to scrutiny. A trade association brings together a number of members who may be, in essence, competitors, so especial care is necessary. Competition law is explored further below.

B. Legal Advice and Privilege

AIM retains the right to retain independent legal counsel as and when it feels necessary.

The general rule is that a lawyer-client relationship is confidential and privileged, meaning that neither party can be forced to divulge communications made for the purpose of obtaining or giving legal advice. However, in European competition law, the relationship between a company and its in-house legal counsel is *not* privileged.

Basically, communications between the company and its *external* (EU-qualified) lawyer are privileged and communications with its *internal* (or non-EU qualified) counsel are not, although an internal summary of advice given by the external lawyer is privileged.

This means that the Commission (and Court) may seize and rely upon communications between the legal department and colleagues in other parts of the company. While this does not directly affect AIM as we do not have a legal department, remember that sensitive issues are more appropriately handled by reference to external counsel.

Documents retained in-house which are legal advice should also be clearly marked (on every page) as privileged and emanating from a member of a bar or law society of a Member State. It is also advisable that the discussion on the issues and the advice itself does not start on the cover page, but that this just states "privileged legal advice" (or similar).

C. Dealings with European and National Officials

No one connected with AIM would ever consider any bribes or other unlawful inducements in the course of their dealings with public officials: remember that these can involve severe sanctions, including imprisonment. However, you must also be careful to avoid less obvious problems: for example, in some countries entertaining a public official at AIM's expense could raise legal issues. When in doubt, please check with a member or lawyer who is cognisant of the local rules.

D. Competition Law

D.1 Introduction

Two systems of competition law exist in tandem in the EU: the national system of the relevant Member State and the pan-European system as set down in the Treaty establishing the European Community (as amended). In general, EC law only applies to an agreement or practice if it has an appreciable effect on trade between the Member States. An explanation of the national laws is outside the scope of this programme but it is important to remember their relevance.

“Horizontal restraints” - restrictive agreements between companies operating at the same level in the market - are usually regarded as the most serious anti-competitive behaviour of all, hence the need for extreme caution in dealings between members. The most blatant infringements would include price-fixing, customer or territory allocation or boycotts.

AIM is inherently pro-competitive but, like any trade association, it could be abused and turned into a vehicle for anti-competitive collusive conduct. Our members are high profile companies whose activities may have an effect on the market, hence their dealings with competitors - such as within AIM - must be conducted according to the highest possible standards. We are under a duty both to them individually and to AIM as a whole to ensure that at all times we act within the law.

“Vertical restraints” - for example, agreements between a manufacturer and a retailer - are also subject to condemnation if they have anti-competitive objects or effects. Attempted (minimum) resale price maintenance is an obvious example.

Bad faith is not a prerequisite for a finding of infringement of EC competition law and neither is it a defence that you did not know you were infringing the law: you just have to have been aware that the object or effect of the practice would restrict competition.

Penalties for infringing EC competition law range from being told to cease the practice in question to a fine of up to 10% of a company’s world-wide annual turnover. Some national jurisdictions may also permit victims of anti-competitive behaviour to claim damages and costs against the offender and some - like the USA, France and the UK - even imprison the responsible company officials. Competition law must not be taken lightly.

Remember, THIS DOCUMENT IS NOT A SUBSTITUTE FOR SPECIFIC LEGAL ADVICE WHICH SHOULD BE OBTAINED BY MEMBERS IN RELATION TO THEIR OWN ACTIVITIES.

D.2 EC Competition Law: Trade Associations Dos and Don'ts

It is clear in the Treaty itself that the practices of trade associations are covered by EC competition law. Article 81 prohibits "agreements between undertakings, *decisions by associations of undertakings* and concerted practices which may affect trade between Member States and have as their object or effect the prevention, restriction or distortion of competition within the common market".

"Decisions" have been held to include the rules of trade associations, decisions binding upon the members and even mere recommendations. In essence, anything that accurately reflects the association's desire to coordinate its members' conduct can be included in the concept of "decision". Any agreement implemented within the framework of an association may be subject to analysis either as a decision of the association or as an agreement between its members.

Case law shows that the association itself may be fined separately from its members, if it is shown to have played a sufficiently independent part in the illicit practice or the association itself entered into an anti-competitive agreement.

Agreements or decisions that may be considered unlawful are not only those evidenced in writing. Gentlemen's agreements, tacit understandings and parallel behaviour can all be condemned, if they have the object or effect of affecting competition. Practices that have been held by the Commission and European Courts to be unacceptable include:

- *Any sort of agreement on prices. Price-fixing is illegal.*

To take a direct quote from the Commission:

"It is contrary to the provisions of Article [81(1)] ... for a producer to communicate to his competitors the essential elements of his price policy, such as price lists, the discounts and terms of trade he applies, the rates and date of any change to them and the special exceptions he grants to specific customers".

Any discussion between members on prices, components leading to prices, discounts, terms or conditions of sale, margins, costs, future pricing policies or timing of price changes, promotions, terms of supply, sensitive details of relationships with customers or on any other commercially sensitive information **MUST NEVER TAKE PLACE**. The general yardstick is that if that information is not publicly available on the open market, you do **NOT** discuss it with your competitors.

Acting in parallel, for example the adoption by a number of companies of the same practices, can equate to unlawful collusion. Defences that you were just reacting to competitive reality or that parallel behaviour is no more than coincidental must be objectively justifiable and proved. It is no defence that you were reacting to market disruption, trying to protect yourselves against powerful customers, trying to prevent over-production or any other apparently justifiable purpose: discussions on prices are **ALWAYS** prohibited.

Any agreement restricting the retailer's freedom to determine his resale prices is a violation of the law - resale price maintenance is prohibited. Suppliers may only give

non-binding recommendations on resale prices without any contractual commitment existing, or pressure exerted. Discussing purchase prices is also generally unlawful.

- *Market Sharing*

Discussions between competitors on the allocation of markets or customers and limiting supply are likewise prohibited and other sensitive areas such as production volumes, costing methods and projected market strategies should be avoided. Any attempt to prevent or restrict parallel imports between the Member States is totally unacceptable, going against the very basis of the single market.

- *Certain certification schemes and mandatory standards.*

Although at AIM we do not confer recognised certifications, we do facilitate and participate in the enunciation of standards, such as principles relating to good business practice.

In establishing any sort of standard, it is important that all interested parties are given the opportunity to input to the work and that objective reasons for the final choices can be shown. In general, parties should be free to diverge from the standards - there must certainly be no sanctions imposed on them for doing so.

- *Exchanges of commercially sensitive information.*

Trade associations may collect and publish industry statistics giving an aggregate picture (without identifying individual companies), jointly compile market research and general industry studies and discuss and lobby authorities on matters of concern to the industry as a whole. They may also publish information on the sales or production of particular undertakings if this is sufficiently historic so as to have no real impact on future behaviour.

However, the information exchanged between members must never relate to the pricing, customer and market data referred to above. In general, information that is in the public domain may be discussed, but if it is a business secret it may not. Examples of condemned information exchanges include breakdowns of deliveries by product or customer and the disclosure of invoices and capacity utilisation.

On a practical level, you should never send price lists to competitors and even exchanges of information between competitors on existing, future and likely increases have been held to be unlawful concerted practices.

Remember: widespread information exchange is one of the main components of a cartel.

- *Refusing access to potential members, where that refusal is not based on reasonable and objective criteria and is discriminatory, without any appeal process.*

The membership rules of an association must always be objective and sufficiently determinate and capable of non-discriminatory application.

Just as any sort of boycott will be regarded as an unlawful concerted practice, unreasonable refusal of membership is unacceptable, especially if the association controls access to an important economic activity. Likewise, conditions for leaving an association must not be unduly restrictive.

- *Recommendations from a trade association to its members, even if they are non-binding, so long as they have the object or effect of influencing the commercial behaviour of those members.*

Note that if a recommendation is followed or even if it just influences the behaviour of the members, this may be seen not only as a decision of the association but also an agreement or concerted practice between the members themselves. Thus there is potential for double liability: the members individually for a prohibited agreement or practice and the association itself for orchestrating the anti-competitive behaviour.

None of the above prevents the lawful cooperation which AIM engenders among the membership. AIM may provide a forum for the development of certain common understandings, standards and models, but their implementation will always be on a unilateral basis on the ground, hence we in no way reduce the tough commercial negotiations between our members and their trade partners. However, it is vital that at all times, no member of staff oversteps, or knowingly allows the members to overstep, the legal boundaries.

The bottom line is remembering our mission statement: “to create for brands an environment of fair and vigorous competition, fostering innovation and guaranteeing maximum value to consumers”. We are in the business of promoting, not attacking, competition.

Guidelines for AIM Meetings

These guidelines are not comprehensive and are designed to serve as a reminder only. They apply to all AIM meetings, including ad hoc working groups, committees and task forces and to informal discussions before, during and after AIM meetings. It is the responsibility of each member to take its own advice on attendance at AIM meetings and what can and cannot legitimately be discussed. AIM staff and members should read and abide by the "Compliance Programme for AIM Officers and Staff", copies of which have been sent to all members and are available for download from the AIM website.

AIM is a membership organisation. Many of its members compete with each other, either because they compete in the same fast-moving consumer goods category or because they compete with one another for listing, shelf space, and positioning within the same retail outlets. Competition is both horizontal and vertical. This means that every activity of AIM must be measured against national and European competition laws which prohibit behaviour that prevents, restricts or distorts competition. Infringements of competition laws are treated very seriously by the authorities and could result in severe penalties (fines and/or damages) both for individual members and for AIM. In some countries individual executives involved in price-fixing or bid-rigging can be given a prison sentence.

Strict compliance with competition law is and always has been the policy of AIM. AIM exercises extreme care to avoid not only infringement, but anything that might raise even a suspicion of possible infringement.

Because AIM's activity often involves input from two or more competitors, great care must be taken to ensure compliance with the competition laws. An action, seemingly innocent when taken by itself, may be viewed by competition enforcers as part of a pattern of activity constituting a competition infringement. AIM must comply with the competition rules even where the objective has been endorsed by an EU, national or other government body, such as environmental or health initiatives.

This means:

- Participation in any AIM activity must be voluntary, and failure to participate shall not be used to penalise any company;
- There shall be no discussion, or sharing, of commercially sensitive information. This includes:
 - price information, for example actual prices charged or paid or pricing intentions and also anything related to costs, discounts and rebates;
 - promotional terms or activities;
 - production volumes or capacity;
 - terms of trade;
 - product or business plans;
 - non-public information regarding suppliers or customers, for example, information on which customers members deal with, the terms on which they deal with particular customers, and information on negotiations with customers;
 - market shares.

- sales in volume or value.
- Discussions between members must not lead to any agreement or understanding regarding geographic markets, or lead to a collective refusal to deal or a boycott;
- Historic data may be provided to the Secretariat for the purposes of agreed work topics but at no time shall such data be available to other members or attributable to any individual member. Tests or data collection shall be governed by protocols developed in consultation with and monitored by counsel;
- Meetings shall be governed by an agenda prepared in advance, and recorded by a summary prepared promptly after the meeting, both of which shall be submitted to legal review prior to distribution;
- Participants in the Association are not limited in any respect in the ways they decide to conduct their business. All actions of members remain voluntary. Each individual member remains free to make independent, competitive business decisions;
- If any participant believes an AIM committee or group is drifting toward impermissible discussion, the topic shall be postponed until the opinion of counsel can be obtained.

At all times each member is responsible for ensuring its own compliance with all applicable legal rules. Members' representatives on all committees (etc.) are strongly recommended to ensure that they have received the correct compliance training from their own legal department/counsel.

Notes for Committee Chairmen:

Compliance

Introduction

Set out below is a caution to be read at the start of each meeting. The aim of this is to serve as a reminder to all participants of the antitrust law requirements. The statement should also be recorded in the summary as indicated below.

Antitrust caution

The Association shall not enter into any discussion, activity or conduct that may infringe, on its part or on the part of its members, any applicable competition law. By way of example, members shall not discuss, communicate or exchange any commercially sensitive information, including non-public information relating to prices, marketing and advertising strategy, costs and revenues, trading terms and conditions with third parties, including purchasing strategy, terms of supply, trade programmes or distribution strategy. This applies not only to discussions in formal meetings but also to informal discussions before, during and after meetings.

Message to new members or people taking part for the first time: Please note that taking part in the Association is subject to having read and understood the antitrust guidelines of the Association. If you have not yet done so, please do so now.

Procedure

The Secretariat will submit the agenda to legal review prior to circulation to the members and meetings shall be conducted only on the basis of the agreed agenda.

All presentations to be given at the meeting by AIM staff or otherwise under the AIM logo shall be submitted to the Secretariat in good time prior to the meeting to allow for legal review.

Every agenda shall contain, as its first item, a statement in the terms set out above. The chairman of the meeting shall read such statement at the start of each meeting, and the summary shall so record.

A comprehensive summary of all meetings shall be taken and shall be submitted to legal review prior to circulation.

The summary shall be circulated to all members of the relevant committee or group as soon as possible after the meeting. Any comment or request for amendment shall be notified to the chairman and Secretariat as soon as possible following receipt of the summary.

The above is the joint responsibility of the chairman and Secretariat. If a meeting is held away from AIM and a member of AIM staff is not present, it is the responsibility of the chairman of the relevant committee to ensure compliance.