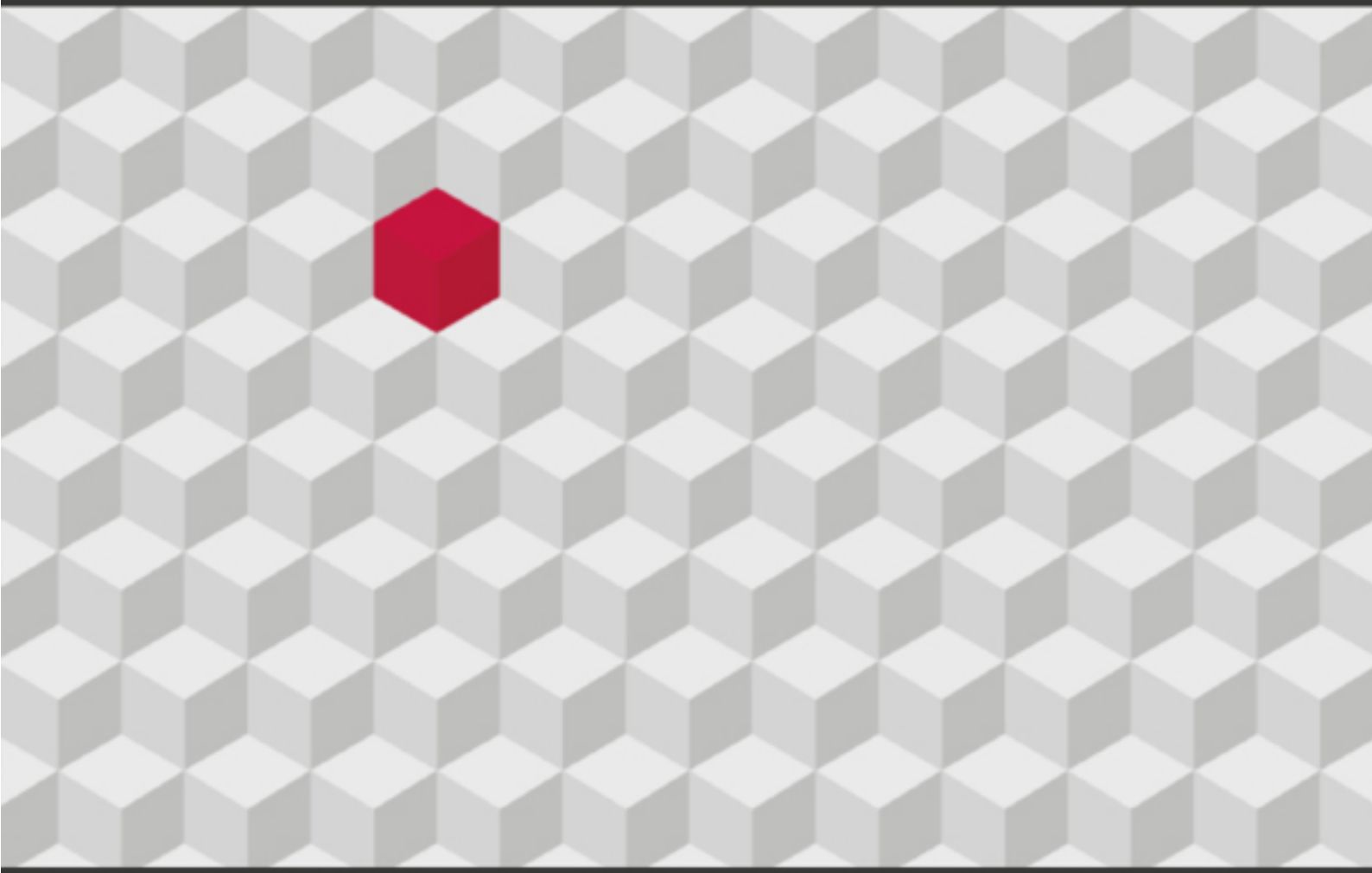
Facilitating a better future

lmalloyds.com



Competition Law Guidance

Updated May 2021

1. COMPLIANCE WITH COMPETITION RULES - INTRODUCTION

It is the policy of the LMA to comply with competition law at all times. Competition law prohibits agreements or understandings between organisations that have as their object or effect the distortion or prevention of competition to a material degree. This guidance considers the competition law rules that are most relevant to the LMA, and outlines how the LMA seeks to ensure compliance in pursuing its activities.

This guidance has been updated to reflect the UK's departure from the EU following the end of the Brexit transition period on 31 December 2020. Since 1 January 2021, EU competition law has ceased to apply in the UK - apart from cases initiated before the 31 December 2020. While there is conceivably now scope for UK competition law to diverge from EU competition, this is unlikely to happen in the near future – indeed, most principles of EU competition law are reflected in UK national legislation. Whilst the UK has left the EU, EU competition law continues to apply to UK companies trading in the EU. Therefore, many agreements between underwriters or involving the LMA that could affect trade in the EU will continue to be subject to EU competition law. Accordingly, this guidance covers both UK and EU competition law. As the substance of UK competition law is similar to that of EU competition law, for the purposes of this guidance, references to UK competition law are generally equally applicable to the EU competition regime.

The European Insurance Block Exemption Regulation ('IBER') lapsed on 31 March 2017 and since then, normal competition law rules have applied to insurance agreements. These include the Commission's guidance on the application of EU competition law to horizontal co-operation agreements (the Horizontal Agreement Guidelines or 'HAGs').[1] Over recent years, the insurance sector has been subject to significant competition law scrutiny. In the EU, for example, the European Commission opened in October 2017 (and later closed on "priority reasons") an antitrust investigation into the aviation and aerospace insurance and reinsurance industry over the alleged sharing of commercially sensitive information. In the UK, the Financial Conduct Authority ('FCA') recently published in September 2020 its market study into general insurance pricing practices. It can therefore be anticipated that competition law scrutiny of the insurance sector is set to continue.

This guidance has been produced for LMA members, in particular those who participate on LMA or other market committees, panels or working parties, and for LMA staff. By accepting a place on any LMA or joint LMA/IUA committee or panel, or other market committee or working group, a member agrees to comply with the terms of reference for the group in question and with this guidance.

This guidance has been revised in March 2021 for the LMA by its external legal advisers, Cooley (UK) LLP. Any queries in relation to this guidance or any competition law issues that arise during the course of committee, panel or working group meetings should be addressed to the LMA's Director of Legal and Compliance in the first instance.

[1] Commission, *Guidelines on the application of Article 101 TFEU to horizontal co-operation agreements*, OJ C11 of 14 January 2011.

2. COMPETITION LAW COMPLIANCE GUIDANCE

2.1 THE FRAMEWORK OF UK AND EU COMPETITION LAW

Competition law is aimed at preventing conduct that restricts competition and thereby raises prices, reduces innovation or limits the extent to which goods or services are produced or provided. This is primarily achieved by controlling restrictive agreements, preventing the abuse of significant market power and prohibiting anticompetitive mergers.

The area of competition law of most direct relevance to LMA members is the control of restrictive agreements. In the UK, section 2 of the Competition Act 1998 ('CA98') prohibits agreements that have the object or effect of restricting competition within the UK, and which affect trade within the UK, unless such restrictions are objectively necessary to deliver desirable efficiencies (in which case the agreement is 'exempt' from the prohibition, by virtue of section 9 CA98). The structure of competition law in the UK closely mirrors the EU regime, with the equivalent of section 2 CA98 being Article 101 (1) of the Treaty on the Functioning of the European Union ('TFEU'), except to the extent that Article 101 TFEU applies only if it affects trade in the EU.

In one respect, however, UK competition law is significantly more punitive than EU law, namely in the application of criminal law to cartel activity by individuals (the 'cartel offence').[2] The cartel offence is committed when two or more individuals enter into an agreement to implement the following arrangements between competitors:

- price-fixing;
- limiting the production or provision of goods or services;
- customer/market sharing; or
- bid rigging.

Certain exclusions and defences are available that potentially remove such conduct from the offence. The application of these is complex and beyond the scope of this guidance.

This guidance addresses both the prohibition of restrictive agreements and the cartel offence.

It is possible that certain activities carried on within the LMA may fall outside the law as being 'de minimis', in other words, having only a minor market impact. However, this exception is notoriously difficult to apply, particularly because it relies on the assessment of parties' market shares, which may not be straightforward in this sector. There is, in any event, no 'de minimis' exception for the most serious infringements, such as price-fixing and customer/market sharing. Accordingly, it is safer to proceed on the basis that competition law will apply to agreements and specialist advice should be sought where an adverse effect on competition is possible. This issue is considered further at paragraph 2.2.9 below.

[2] As set out in section 188 of the Enterprise Act 2002.

2.2 COMPETITION LAW OF PARTICULAR RELEVANCE TO THE LMA AND ITS MEMBERS

2.2.1 RESTRICTIVE AGREEMENTS

Both UK and EU competition law may need to be considered, as clearly many agreements between underwriters or involving the LMA could affect trade in the UK and in the EU. Competition law applies to agreements in any form and they do not have to be formally concluded. Oral agreements and informal understandings are therefore within the scope of the law.

The important question is what kinds of agreement are affected by these prohibitions. Generally, agreements between competitors which limit their freedom to compete individually (or are intended to achieve this), or which lead to the exchange of non-public business information between competitors, are the kinds of agreement that will fall within competition law. This is discussed in further detail in the Best Practice Guidelines for Members, set out below.

2.2.2 CARTELS

While the cartel offence is not intended to catch legitimate business conduct by employees of the LMA or its members, the way in which the statutory provisions have been drafted means that it cannot be excluded that certain conduct could come within its scope. Care should therefore be taken over any conduct that could be caught by the offence, for example, the alignment of rates in respect of a particular type of risk, particularly if the existence of an agreement is not apparent to the insured party.

2.2.3 INFORMATION EXCHANGE

The exchange of commercially sensitive information between competitors may distort competition. Such an exchange may take place directly or indirectly through a shared intermediary, such as a broker or coverholder. For competition to work effectively, each competitor must independently determine the way in which it will conduct itself on the market. EU competition law condemns the exchange of commercially sensitive information between competitors on the grounds that it materially reduces uncertainty as to their future market behaviour and thereby reduces their decision-making independence. Information is viewed as commercially sensitive if it is not public and is strategic, in the sense that its possession by a competitor reduces strategic uncertainty, thereby reducing competition. Exchange of the most commercially sensitive categories of information, such as individualised future pricing intentions, will almost always infringe competition law.

Information exchange need not be mutual to raise concerns and there is a legal presumption that a company that receives commercially sensitive information will act on it. As a result, unilateral disclosure of such information to a competitor may be sufficient to create an infringement by both parties, unless the recipient expressly rejects it. It is also unnecessary for the information exchange to persist over a period of time – a single exchange of information at one meeting is sufficient.

The IBER protected certain forms of information exchange from EU competition law, including the preparation of compilation tables and risk studies. Although this automatic protection ceased with the expiry of the IBER, it should be possible to justify the continuation of similar arrangements on the grounds that they either do not restrict competition or that they deliver efficiencies and are therefore exempt.

Other forms of information exchange, which is typically coordinated through trade associations, may raise concerns. Competition law recognises that trade bodies are often a valuable source of industry information and that such information can be collected and disseminated without raising competition concerns. In order for this to comply with competition law, data need to be aggregated and anonymised, so that the information relating to any undertaking remains hidden from competitors. In addition, the more historic the data that are disseminated, the less likely they are to affect the conduct of competitors and therefore amount to an infringement of competition law.

Historic data is less likely to restrict competition than future data. However, what is genuinely "historic" is decided on a case-by-case basis and will depend on a number of factors, including the relevant market. In the past, the Commission has found that data exceeding one year was historic[3], however, this should not be regarded as a pre-determined threshold; it will very much depend on the facts in each case. What is clear, however, is that under no circumstances should insurers exchange data regarding future prices or quantities.

As noted above, some forms of information exchange may be exempt by reference to the efficiencies they create. For example, the sharing of certain types of information may make it easier to assess risk levels, ensure more competitive pricing and/or make it easier for customers to switch insurer. Care needs to be taken to ensure that any information exchange is limited to what is absolutely necessary to deliver the claimed efficiency benefits. Additional safeguards, such as data aggregation, may also be required. The necessity of the exchange and its purported benefits will need to be demonstrated by reference to the specific facts of each case, with the burden of proof resting on the parties.

However, where the information exchange is categorised as a restriction of competition "by object" (e.g. the exchange of future pricing or quantity information), it is highly unlikely to benefit from such an exemption.

2.2.4 MEMBERSHIP CRITERIA

While the rules of trade associations are unlikely directly to restrict competition, they may well do so indirectly where, for example, they exclude certain otherwise qualified businesses from membership. Non-admission to the 'club' or the threat of expulsion could be a means of reinforcing certain trading behaviour, such as avoiding significant rate cuts. For this reason, competition law has intervened on a number of occasions to ensure that, where trade associations represent a significant number of industry members, they

[3] Case IV/31.370, *UK Agricultural Tractor Registration Exchange*, paragraph 50, available here.

must adhere to various criteria so as to ensure that membership applications are considered on the basis of objectively justified criteria.

Guidance can be drawn in this area from the Commission's investigation of the operation of the International Association of Classification Societies ('IACS') in 2008/2009.[4] The essence of the Commission's concern was that the IACS members collectively enjoyed an extremely powerful market position and that, through a number of IACS decisions, providers of similar services that were not IACS members suffered considerable competitive disadvantages.

In order to meet the Commission's concerns, IACS was obliged to reform its membership criteria and to agree to apply them in a uniform and non- discriminatory manner. Further, it was required to permit classification societies that were non-IACS members to participate in its technical working groups. All current and future IACS resolutions, together with their related background documents had to be made available to non-members, and an independent appeal board was established to deal with any disputes.

In line with these principles, membership in the LMA is open to all Lloyd's managing agents as full members and to organisations or individuals who trade with, or advise, Lloyd's underwriting businesses as associate members.

2.2.5 LAPSE OF IBER / RELEVANCE OF HAGS

As noted above, the Commission allowed the IBER to lapse on 31 March 2017, meaning that from 1 April 2017, normal competition law principles applied to all insurance arrangements. The lapse of the IBER did not mean that arrangements previously covered by its safe harbour were automatically unlawful. Rather, going-forward, such arrangements had to be individually assessed for compliance with competition law.

The HAGs provide general guidance on the application of competition law to common forms of coordination between competitors, including information exchange. Although the HAGs do not take account of the specific circumstances of insurance markets, they provide helpful guidance for insurance undertakings carrying out such a self-assessment of their arrangements.

As far as the collection and distribution of data is concerned, for example, the HAGs note that information exchange is less likely to raise concerns if information is publicly available, aggregated (not individualised) and historic rather than current (especially where information relates to pricing). The exchange of information should also not go beyond what is necessary to achieve the parties' legitimate aims in exchanging it.

While the appropriate framework may depend on the facts of the case, Commission staff take the view that risk pooling arrangements are a form of joint production that may be efficiency enhancing. The HAGs note that joint production agreements are unlikely to restrict competition if the parties' combined market share does not exceed 20%. As a

[4] Commission decision of 14 October 2010, case 39416, *Ship Classification*, OJ C2 of 6 January 2010.

result, the 20% threshold should generally be adopted for the self-assessment of pool arrangements.[5]

2.2.6 DELEGATED UNDERWRITING

Delegated underwriting authority arrangements ('DUAs') have the potential to lead to the alignment of commercial behaviour, including premiums, through insurers' use of a common intermediary. Whether such arrangements should be viewed as giving rise to a restriction of competition will depend on their terms and the specific market context. (For example, an exclusive appointment of an intermediary for all business in a certain class may raise concerns, especially if the intermediary has market power and the exclusivity lasts longer than the term of the DUA.)

As noted above, except in the most serious cases, competition law is unlikely to apply if the combined market share of parties to a DUA is below 20%. This raises the difficult question of how the relevant market should be defined in the context of a DUA. While market definition will always need to be assessed on a case by case basis, by reference to the specific market context, as a general guide EU precedent suggests that product markets should be defined by reference to the class of insurance offered (e.g. professional liability insurance or motor insurance), rather than the means by which cover is provided (e.g. under a DUA or through subscription). While assessing market shares may also be challenging, particularly where the relevant geographic market is also unclear, Lloyd's market data may be a useful starting point for assessment of total market size, against which the parties' shares may be calculated.

Appendix 1 contains a high-level structure to assist with carrying out a self-assessment of common forms of DUA (pools, lineslips, consortia etc.). Appendix 2 contains specific guidance on competition law issues relating to subscription underwriting, published by the LMA as a stand-alone guide for underwriters in 2011.

2.2.7 RELEVANT COMPETITION AUTHORITIES AND THEIR POWERS

Competition law scrutiny of insurance arrangements can arise from public enforcement or as a result of litigation brought by a third party affected by allegedly anticompetitive behaviour (also known as private enforcement). In the UK, the CMA is responsible for the enforcement of competition law. Sector specific authorities such as the FCA[6] and the Payment Systems Regulator ('PSR')[7] have concurrent competition enforcement powers. The FCA also has a specific mandate under the Financial Services and Markets Act 2000 to promote competition in UK financial markets, whilst one of the objectives of the PSR is the promotion of effective competition in the market for payment systems.

---

[5] Commission, *Staff Working Document Impact Assessment HT.4012 IBER* , paragraph 107 and annex 8.

[6] On 21 February 2019, the FCA issued its first competition law decision, fining three asset management firms for exchanges of confidential, strategic information regarding their bidding intentions during an IPO. In September 2020, the FCA published a market study on "General insurance pricing practices".

[7] The PSR has focused its competition powers on market reviews, assessing the market for payment infrastructure and proposing remedies as well as the market for card acquiring services.

Consistent with this mandate, the FCA Handbook provides that supervised firms must notify the FCA if they have or may have committed a significant infringement of applicable competition laws (SUP 15.3.32R – SUP 15.3.35G). This makes the self-assessment of potentially restrictive arrangements particularly important for regulated firms in the insurance sector.

2.2.8 PENALTIES

Penalties for the infringement of either UK or EU competition law include:

- criminal fines and imprisonment for individuals participating in cartel arrangements;
- unenforceability – an agreement that breaches competition law will be unenforceable in the courts;
- civil fines – infringing companies may be fined up to 10% of world-wide group turnover; and director disqualification – a UK company director who actively participates in or facilitates an infringement may be disqualified from acting as a director for a UK company for up to 15 years.

Even if no penalties are imposed, the waste of management time and damage to reputation resulting from an investigation can be very harmful.

Claims by third parties that have allegedly suffered harm as a result of an infringement are becoming more common in the UK and raise the prospect of significant liabilities for infringers.

2.2.9 AGREEMENTS OF MINOR IMPORTANCE

Although competition law imposes strict controls on restrictive agreements, the law recognises that the market impact of some arrangements may be too small to have an appreciable effect on competition. The EU 'De Minimis Notice'[8] (the principles of which apply by extension in UK law[9]) provides accordingly that, that if the combined market share of parties to a restrictive arrangement falls below certain thresholds, the arrangement will be deemed to fall outside the scope of competition law due to the likely absence of an anticompetitive effect.

The market share thresholds (which are more stringent than the HAGs' safe harbour) are:

- 10% for agreements between competitors; and
- 15% for agreements between non-competitors.

---

[8] Commission, *Notice on agreements of minor importance which do not appreciably restrict competition under Article 101(1) TFEU*, OJ C291 of 30 August 2014.

[9] See CMA's *Guidelines on Agreements and Concerted Practices* (OFT401) and CMA's *Guidelines on Vertical Agreements* (OFT419).

Inherently anticompetitive conduct such as price fixing, customer/market sharing arrangements and the exchange of highly sensitive information will never be regarded as insignificant in competition law terms and is thus likely be viewed as unlawful, regardless of the parties' market shares.

Similarly, this principle does not apply to the criminal cartel offence so that, for example, even a minor example of price fixing between competitors can amount to a criminal offence.

3. CLAIMS HANDLING

To support the efficient handling of claims in a subscription market, Lloyd's operates a claims scheme which sets out the principles and arrangements for the determination of all in scope subscription market claims made on policies underwritten by two or more syndicates (with some limited exceptions). The scheme is designed to streamline the claims agreement process for claims with multiple Lloyd's insurers on risk whilst ensuring that each claim is determined by the appropriate number of agreement parties dependent on its complexity and financial value.

The latest Scheme, the Lloyd's Claims Scheme (Combined) (the 'Scheme'),[10], was issued on 30 September 2011 and contains in Part II, the 2010 Claims Scheme, which applies to all in scope subscription market claims in the Lloyd's market; Part I of the Scheme no longer applies to any claims. Subject to certain limited exceptions, the application of the Scheme is mandated for all Lloyd's syndicates by the Lloyd's Franchise Board[11] using its powers under paragraph 12 of the Underwriting Byelaw, which itself is made effective through the Council's powers set out in the Lloyd's Act 1982.

Under the terms of the Scheme, a "standard claim" (i.e., claims of typically less than £250,000) is determined by the managing agent of the leading Lloyd's syndicate on behalf of the leading Lloyd's syndicate and each of the following Lloyd's syndicates. For more "complex claims" (i.e., claims of typically less than £500,000), a claim is determined by the managing agent of the leading Lloyd's syndicate in agreement with the managing agent of the second Lloyd's syndicate (i.e., the second syndicate, in slip order, to underwrite the insurance or such other Lloyd's syndicate nominated on the slip, or in the relevant section of the slip, as the second Lloyd's syndicate).[12] As an addendum to the Scheme, the LMA has prepared model clauses in the form of the Single Claims Agreement (**SCAP**) and the Co-Lead Claims Agreement (**CLCA**) for cross-market claims agreement delegation. These model clauses are non-binding and can be amended to suit particular commercial requirements, allowing for faster decision making and payments due to the streamlined agreement process.

---

[10] Lloyd's Claims Scheme (Combined): https://assets.lloyds.com/assets/pdf-claims-scheme-claims-scheme-combined-with-legacy-phase-3-sched-5/1/pdf-claims-scheme-Claims-Scheme-Combined-With-Legacy-Phase-3-Sched-5.pdf

[11] On 1 June 2020, the Franchise Board merged into the Council of Lloyd's to create a single governing body for the Lloyd's market and the Corporation of Lloyd's.

[12] Due to challenging market conditions caused by COVID-19, the Scheme requirements were amended to empower the managing agent of the leading Lloyd's syndicate to handle a greater volume of claims. See Claims Handling – Immediate Operational Guidance: https://www.lmalloyds.com/LMA/News/LMA_bulletins/LMA_Bulletins/LMA-20-016-LE.aspx

The delegation of claims handling to a single lead/co-lead gives rise to a number of efficiency gains. Notably:

- it reduces the touchpoints in the claims assessment process, enabling claims to be handled more efficiently and quickly;
- by enabling a single lead/co-lead to determine claims on behalf of the following syndicates, it leads to faster decision making and payments;
- by centralising the processing and settlement for all syndicates on risk, it significantly reduces the administrative burden linked to the settlement of claims by individual syndicates;
- it benefits the policyholder by guaranteeing the recovery of the full share of the Lloyd's placement where they have a valid claim. It also avoids the time and expense of having to deal separately with a number of syndicates; and
- lower claims costs ultimately benefit policyholders by reducing the cost of insurance.

However, the delegation of claims handling to a single lead or to a co-lead could give rise to competition law concerns insofar as it leads to the potential alignment of commercial behaviour and/or the exchange of competitively sensitive information between syndicates. It is therefore imperative that the following best practice guidelines are followed during the claims handling process and, in particular, the procedure for determining claims:

3.1 INSURERS SHOULD INDEPENDENTLY DECIDE WHETHER OR NOT TO PARTICIPATE IN THE INSURANCE OF INDIVIDUAL RISKS

Insurers must individually analyse and decide whether they wish to insure a particular risk or participate in the insurance of a group of risks (for example, by way of a lineslip or consortium). They must not coordinate this decision with other insurers and/or reach any agreement or understanding with any insurer in deciding whether to insure a risk.

3.2 INSURERS SHOULD INDEPENDENTLY DECIDE THE TERMS ON WHICH THEY CONTRACT WITH CUSTOMERS

Insurers must individually analyse and decide whether, and on which terms, they will contract with customers. No agreement should be reached by insurers on any of the terms upon which insurers contract with customers, including premiums, when underwriting individual risks.

3.3 NO EXCHANGE OF COMMERCIALLY SENSITIVE INFORMATION

There should be no exchange of commercially sensitive information amongst insurers regarding the policy terms and coverage of any individual risk. Insurers should not share commercially sensitive information or reach any agreement or understanding with other insurers regarding a proposed risk. Where co-leads are required to determine a 'complex

claim', there should be no exchange of competitively sensitive information between the two managing agents, which could have potential 'spill over' effects on other parts of their business, including the pricing of risks.

3.4 INFORMATION EXCHANGED BETWEEN MANAGING AGENT(S) AND FOLLOWING SYNDICATES SHOULD BE LIMITED TO WHAT IS STRICTLY NECESSARY

The flow of information between the managing agent(s) and following syndicates should be limited to what is absolutely necessary for the managing agent of the leading Lloyd's syndicate (and where appropriate, the managing agent of the second Lloyd's syndicate) to determine claims. Commercially sensitive information that is provided by one following syndicate to a leading managing agent, for example, should not be shared with the other following syndicates.

3.5 MANAGING AGENTS SHOULD HAVE A CLEAR ALLOCATION OF RESPONSIBILITIES

The Scheme sets out a clear framework for the determination of claims, the processing of claims payments and the resolution of disputes amongst managing agents, as well as the resolution of conflicts of interest and the role of the managing agent. Managing agents should seek independent legal advice for matters beyond the scope of the Scheme which could give rise to potential competition law concerns.

3.6 ALL PARTICIPANTS SHOULD BE FAMILIAR WITH COMPETITION LAW AND THE RISKS OF BREAKING IT

All Lloyd's members should be familiar with the terms of this Competition Law Guidance and attend regular training events to ensure compliance with the rules. There should be regular training for all members, with training delivered in a range of formats.

4. CATASTROPHE CLAIMS

The exchange of information between insurers relating to catastrophic events or market-turning events may generate various types of efficiencies. For example, the exchange of legislative information and public local data that could have an impact upon the capacity, availability or capability of claims services or a claims handling practice is in the common interest of both insurers and policyholders. By exchanging local information that is public and non-commercially sensitive, it will be possible for insurers to improve their knowledge of events and to settle claims quickly. It may also lead to cost savings for insurers and give smaller insurance companies access to time-critical information which they may otherwise not have access to. For the ultimate policyholder, it also means obtaining payment of claims as quickly as possible, the process of which would be negatively impacted without this exchange of information.

There is a concern, however, that an exchange of information between insurers could facilitate coordination (i.e. alignment) between insurers and result in restrictive effects on competition. For example, the exchange of information about an insurer's future intentions regarding the settlement of a catastrophe claim (such as a proposed settlement agreement with a policyholder) could lead to other insurers reaching the same decisions on a particular claim. Such an alignment on commercial terms would be a form of cartel, the most serious restriction of competition and very unlikely to be exempted.

To prevent any concerns that an exchange of information could fall foul of competition law, the following principles should be followed:

- no sharing of commercially sensitive information between insurers regarding the settlement of individual claims. This includes information on: (i) exposure estimates (e.g. early loss estimates); (ii) settlement payments; (iii) policyholder information; (iv) specific coverage; and (v) investment or business plans.

- publicly accessible information, with sources clearly identifiable, should be used as much as possible. Where this is not possible, information should be sufficiently aggregated and anonymised so that information relating to one policyholder or the commercial terms of a managing agent are not ascertainable. For example, it is possible to use a market framework to support the response to a catastrophe event provided that the information shared under the framework relates to public, non-commercial information such as legislative and regulatory developments.

- insurers are at all times responsible for their own catastrophe response. Under no circumstances should there be any alignment or agreement with other insurers on a claim decision including, for example, the amount payable under a claim or the denial of coverage. Managing agents should not exchange information regarding future strategic intentions on claims' decisions.

- any attendance by insurers at market groups or committees to discuss the generic response to a catastrophe event should be attended by appointed counsel, suitably trained and qualified to practice in at least UK/EU competition law to ensure the guidance is adhered to during each market group or committee activity.

- market group or committee activity should ensure that the collection and sharing of information/data conforms with applicable competition laws and other applicable laws and regulations.

- Where appropriate, adopt a CAT Response Framework that follows these principles and is competition law compliant.[13]

The table below provides some further practical examples of the types of information that can/cannot be exchanged between insurers:

Permissible Exchanges	**Unlawful Exchanges**
Exchange of satellite imagery and geospatial data	No sharing of specific policyholder information
Sharing of local market conditions	No sharing of individual exposure estimates (e.g. early loss estimates)

[13] The LMA has produced a generic CAT Response Framework but there are other sector-group CAT frameworks including the BASCG CAT Response Framework, LRCG CAT Response Framework and the Property Insurance Claims Group (PICG) Catastrophe Co-ordination and Planning Framework.

Permissible Exchanges	Unlawful Exchanges
Exchange of (emerging) legislative and regulatory developments and challenges	No sharing of individual DCA disaster recovery plans
State guidelines on claim timelines	No discussions during a market symposium, forum or committee regarding individual policy claims
Aggregated and anonymised total volume of open claims by DCA, including the aggregation and anonymisation of claims performance and exposures	
Market generic, non-confidential information from brokers and/or adjusters	
Exchange of generic trends, issues or challenges emanating from a major loss or catastrophe event within a particular territory. For example, access issues and state (public) level reporting	

5. BEST PRACTICE GUIDELINES FOR LMA CHAIRMEN AND SECRETARIAT

Meetings at which the LMA is present or which are organised by the LMA should not be the occasion for exchanges of confidential information or the conclusion of prohibited agreements. This does not prevent typical industry association activities of gathering and disseminating information but if this is to occur in relation to commercially sensitive information, the LMA must ensure that:

- information is handled only by the Secretariat and not individual members and that individual members do not have access to it;
- information, once collated, is in anonymised form which does not permit individual members to be identified; and
- analysis and recommendations accompanying the data are kept to a minimum. The concern here is that such additional wording may be seen as some form of recommendation from the LMA encouraging particular common responses from members. In other words, the information or statistics should be left to “speak for themselves”.

Where policy conditions are under discussion the Chairman and Secretary should consult and comply with the Best Practice Guidelines for Wording Groups set out below.

Should an infringement of competition law occur or appear likely to occur at a meeting, the Chairman and/or Secretary present must remind members of the law and, if necessary, terminate the meeting. If members are insistent that they wish to consider the issue in question, any LMA representatives present must withdraw from the meeting and ensure that this withdrawal is recorded in the meeting’s minutes.

It is prudent for an agenda to be circulated in advance and for minutes to be kept of all meetings where the LMA is present. This encourages members to keep the discussions focused on areas approved by the LMA, and provides evidence that meetings are not being used as a forum for unlawful agreements or information exchanges.

Membership of the LMA and its committees or panels, and their operation should be determined in accordance with the relevant Terms of Reference for the group in question. The Chairman and Secretary should also have regard to their responsibilities for the conduct of meetings as set out in those Terms of Reference.

It is crucial that membership of the LMA and its committees or panels are determined on the basis of fair, transparent and objectively justifiable grounds, and the Chairman and Secretary should have regard to these general principles at all times.

6. BEST PRACTICE GUIDELINES FOR MEMBERS

It is vital that the compliance of the LMA is not compromised through the activities of its members, and consequently this section provides guidance on high risk areas which members should avoid. This section identifies those areas of competition law that may be relevant. It focuses particularly on the activities of underwriters given that their activities would seem to pose the greatest risk from the competition law perspective.

Some agreements that members enter into are unlikely to affect competition between them. For example, an agreement to comply with certain technical requirements when exchanging claims data would be unlikely to concern the competition authorities.

On the other hand, agreements that might directly affect competition would include agreements between members:

- not to deal with a particular undertaking such as a broker;
- as to premiums or any other element of price such as surcharges that each will charge;
- to deal with other parties, e.g. loss adjusters, only on certain conditions;
- to appoint a common underwriting agent by way of a DUA, including where members appoint the same agent (including another insurer) by way of separate agreements on the same terms; and
- to underwrite only on specific terms.

In addition, members should be aware that the cartel offence may be relevant to their activities in certain circumstances. An example would be an agreement between underwriters such that one underwriter agrees not to make an offer to participate in a particular insurance programme, perhaps on the basis that the other underwriter will in turn not make an offer in respect of a future opportunity. If this arrangement is kept hidden from the broker/ insured, this could amount to bid rigging for the purposes of the legislation.

Information exchange is another area in which members should exercise caution. The law prohibits exchanges of commercially sensitive information between competing undertakings. Consequently, exchanging information as to the rates underwriters have each recently quoted for particular risks, or as to the rates for risks which are currently being underwritten, would be likely to infringe competition law. This prohibition applies irrespective of whether the exchange of information leads to actual price co-ordination between the underwriters in question.

As a result of the above, members should be aware of the implications of attending meetings where information is to be exchanged. Even though it is the policy of the LMA to avoid the discussion of commercially sensitive information, it is always possible for a member who has not fully understood the requirements of competition law to stray into higher risk areas. A typical case is where leading competitors in a particular class discuss trends in relation to rates and conclude, even in non-specific terms, that rates need to increase. If such exchanges of information take place, fellow members (in addition to the Chairman and Secretary) should make them aware that the discussion risks infringing competition law and should end immediately. Members should make sure their objection is noted in the minutes, and if the discussion continues, they should remove themselves from the meeting. It will not be sufficient to continue participation at the meeting and remain silent.

None of the above precludes members from using model agreements, where they so wish, as prepared by the LMA or other organisations, for example, the managing agency/ broker model TOBA, the model binding authority agreement, the model TPA agreement, the model SCAP, the model CLCA and standard form instructions to loss adjusters. The very purpose of such agreements, prepared for voluntary use, is to enhance market efficiency.

7. BEST PRACTICE GUIDELINES FOR WORDING GROUPS

The HAGs provide some guidance on the potential competition law risks associated with standard policy conditions, noting in particular that they can reduce product choice and innovation. Mandating the use of standard policy conditions which directly lead to the alignment of commercial premiums or which are designed to exclude competitors from the market will almost certainly be unlawful.

Wording groups can continue to carry out these activities provided certain high-risk areas are avoided and a number of safeguards remain in place. Such standard clauses must not however seek to exclude the possibility of variants. Individual underwriters are free to accept, reject or vary the terms of model wordings, and must avoid any agreement or understanding as to the use to be made of model wordings in practice.

Equally, no panel should impose the use of wordings or clauses, nor should it recommend their use. Any publication of wordings and clauses should expressly state that they are not binding and that all Members are free to offer different policy wordings and clauses to their customers. This has been the LMA’s standard practice for many years.

Where proposals are expected to be controversial and where there are clearly identifiable representatives of insureds who will be affected by proposed wordings, consideration

should be given to consulting potentially affected industry participants on proposed wordings and clauses prior to their official publication, and offering them the opportunity to comment. Even where no specific consultation is carried out, it may be helpful for wording groups to make wordings, clauses (and consultation drafts of these if this approach is adopted), and minutes of meetings available on the LMA's website.

Wording groups should be transparent, allowing members and experts to discuss proposed drafting from a technical or legal perspective in an open and constructive manner.

Wording groups will only propose drafts or publish wordings or clauses that comply with competition law. Consequently, wording groups will not produce clauses which:

- contain any indication of the level of commercial premiums;
- indicate the amount of cover or the part which the policy holder must pay himself (the "excess");
- impose comprehensive cover including risks to which a significant number of policyholders are not simultaneously exposed;
- allow the insurer to maintain the policy in the event that it cancels part of the cover, increases the premium without the risk or the scope of the cover being changed (without prejudice to indexation clauses), or otherwise alters the policy conditions without the express consent of the policyholder;
- allow the insurer to modify the term of the policy without the express consent of the policyholder;
- impose on the policyholder in the non-life assurance sector a contract period of more than three years;
- impose a renewal period of more than one year where the policy is automatically renewed unless notice is given upon the expiry of a given period;
- require the policyholder to agree to the reinstatement of a policy which has been suspended on account of the disappearance of the insured risk, if he is once again exposed to a risk of the same nature;
- require the policyholder to obtain cover from the same insurer for different risks;
- require the policyholder, in the event of a disposal of the object of insurance, to make the acquirer take over the insurance policy; or
- exclude or limit the cover of a risk if the policyholder uses security devices, or installing or maintenance undertakings, which are not approved in accordance with the relevant specifications agreed by an association or associations of insurers in one or several Member States or at the European level.

Further, the Panel will only propose drafts or publish wordings that comply with the BIPAR (European Federation of Insurance Intermediaries) high level principles for

placement of a risk with multiple insurers. In particular, the Panel will not draft 'best terms and conditions' clauses or clauses which have the same effect. The European Commission has defined such clauses as:

> *'any stipulation, whether written or oral, introduced at any stage of the negotiation of a reinsurance contract, by means of which a (re)insurer A obtains, seeks to obtain or acquires the right, under certain circumstances, to obtain an alignment of its proposed or agreed terms and conditions, in particular the premium, to the terms and conditions ultimately obtained by any other (re)insurer B participating in (re)insuring the same (re)insured as A, in the event that the latter terms are more favourable to the (re)insurer, than the terms and conditions which A offered or subsequently agreed.'*[14]
>
> The Panel will comply at all times with Lloyd's guidance with regard to these principles.

[14] Commission, *Staff Working Document accompanying the Sector Inquiry under Article 17 of Regulation (EC) No 1/2003 on business insurance*, pages 21-22.

APPENDIX 1 - SELF-ASSESSMENT CHECKLIST

Example self-assessment checklist for delegated underwriting authority arrangements involving two or more insurers, including binding authorities, MGAs, broker facilities, consortia, lineslips and pools

Question Number	Information Sought	Explanation
1.	Estimated share of the market in which coverholder/lineslip/consortium/MGA underwrites by class of business of (a) coverholder/lineslip/consortium/MGA and (b) each participating insurer (where available, on a worldwide, EU-wide and national basis).	The likelihood of an agreement giving rise to competition concerns is generally linked to the market power of the parties, which is in turn usually related to market shares. Reflecting this, the Commission's De Minimis Notice (the principles of which apply by extension in UK competition law) provides that an agreement between competitors is unlikely to raise competition law concerns if the parties' combined market share is below 10%. The Commission's HAGs provide a higher market share threshold for joint production agreements (which are the closest analogy to collective (re)insurance agreements for these purposes) of 20%. As a first step, therefore, it is necessary to assess whether the parties' combined share of any potential relevant market (taking account of their sales within and outside any collective arrangements) exceeds the 10% threshold. If it does not, then the De Minimis Notice should apply. If the parties' combined market share is between 10% and 20%, the HAGs indicate that an anticompetitive effect is still unlikely (applying the threshold for joint production agreements). If the parties' combined market share exceeds 20%, then further analysis will be required.

Question Number	Information Sought	Explanation
		If this is the case, the next step is to assess whether any party (whether a single insurer or intermediary) could be viewed as potentially dominant on a relevant market, as this would subject it to more stringent competition law rules and may make it harder to impose contractual terms that would be unproblematic if imposed by a non-dominant company. Dominance is possible if a company's market share is persistently above 40%. Defining relevant economic markets for insurance products and services can be very difficult. That said, a party's share of Lloyd's market premiums for underwriting a particular class of insurance in the most recent year is a good starting point for the analysis, as the relevant economic market is likely to be no narrower than this. If parties' combined share of such premiums is lower than the thresholds set out above, concerns are highly unlikely to arise on any alternative market definition. If the thresholds are exceeded, then further analysis may be required to assess whether the economic market is in fact broader than this, whether in terms of types of insurance covered (e.g. liability insurance) or geographic scope (e.g. London market, EU or worldwide).
2.	Terms of binder/lineslip/consortium/underwriting agency agreement: a. Who determines (i) premium (ii) terms of policies?	This information is relevant for the assessment of competitive effects. As well as aiding understanding of the commercial context, the information helps to show the potential for alignment of premiums (particularly if the underwriting agent is required to use rating tables agreed by all participants), the extent and duration of any market impact, the assessment of barriers to entry and the potential for anticompetitive foreclosure.

Question Number	Information Sought	Explanation
	b. Are there exclusivity clauses, for example requiring exclusive use of a single intermediary for a certain period? c. Are participants otherwise prevented from insuring the same or similar risks elsewhere? d. Who handles claims? e. How long is the duration of the agreement and how is it renewed on expiry? f. What are the termination provisions? g. What is the geographical scope? h. Is business written directly or through brokers? i. Is there any communication between insurers regarding terms or premium? j. Is the underwriter a leader or a follower?	The (now expired) Insurance Block Exemption Regulation provided a safe harbour for pools only on condition that participating (re)insurers remained free to (re)insure outside the pool, i.e. that the pool was not exclusive for participants. While the automatic legal consequences of the adoption of exclusivity ended with the expiry of the Block Exemption, the fact that the Commission included this provision indicates the potential for exclusivity to be viewed negatively by a competition authority.

Question Number	Information Sought	Explanation
3.	Do participating insurers underwrite the same class(es) of business other than through the coverholder/lineslip/ consortium/MGA? If so, describe how (e.g. through own underwriters, coverholders, lineslips or consortia).	This also goes to the assessment of the extent of any competitive effects of an agreement, by examining the potential for parties to offer insurance outside the collective arrangement. Further analysis may be needed to assess the extent to which activities that take place on the same market beyond the collective arrangement remain unaffected by the coordination that takes place under it.
4.	To the extent that participating insurers underwrite by other means, how do they obtain any necessary expertise required to underwrite the relevant risk?	The ability to take advantage of another party's expertise when underwriting may be one benefit of a collective arrangement. To the extent that underwriting is carried out outside the collective arrangement, this question helps with the assessment of this benefit and hence the necessity of the collective arrangement. It may also help with the assessment of barriers to entry.
5.	Is business underwritten on standard terms across the market?	The market-wide use of standard terms can restrict competition, to the extent that variation in terms would otherwise enable parties to vary their offering in a way that would have a meaningful impact on customers' purchasing decisions or otherwise affect the competitive process.
6.	Does the coverholder/lineslip/consortium/MGA underwrite on standard terms?	Even if the use of standard wording is not market-wide, the use of standard terms by all parties to an agreement may amplify any restrictive effect and raise concerns, particularly if it cannot be objectively justified.

Question Number	Information Sought	Explanation
7.	Describe the benefits of the arrangement. Does it for example (a) bring additional capacity to the market, (b) enable insurers to participate in a market where they do not currently have expertise or geographical access, or (c) reduce underwriting expense for participating insurers?	This information is necessary for the assessment of whether a restrictive agreement is exempt from the Article 101(1) TFEU prohibition by delivering counterbalancing efficiencies that could not be achieved in a less restrictive way.

Cooley (UK) LLP

APPENDIX 2

SUBSCRIPTION UNDERWRITING AND COMPETITION LAW

The Business Insurance Sector Inquiry

In the final report from the EU Commission on its inquiry into the business insurance sector (published in September 2007), concerns were raised about the compatibility of certain subscription underwriting practices with EU competition law. The Commission challenged the insurance industry to reform these practices so as to avoid potential breaches of competition law. In response to that challenge, BIPAR, the representative body of European insurance intermediaries, adopted a series of principles that brokers are to observe in the subscription process, published at http://www.bipar.eu/en/library/principles.

This note provides guidance from the underwriters' perspective on competition law in relation to the placing process and supplements previous guidance issued by Lloyd's on 29 April 2008 as Market Bulletin Y4153.

The Legal Background

EU law contains a broad prohibition on agreements, arrangements and practices whether written or unwritten which have as their "object or effect" the "prevention, restriction or distortion" of competition. How this provision applies has been the subject of many decisions by the European Commission, national competition authorities and the European and national courts. Two of the most serious restrictions of competition which have been identified are:

- agreements between competitors on prices to be charged to third parties; and
- the sharing of competitively sensitive information between competitors relating to price or other terms of business.

The principles which underlie this prohibition are that it is for each competitor independently to determine its commercial position on any particular matter and anything which interferes with this independence may potentially restrict competition and therefore cause harm to consumers.

Principles to be observed in the underwriting process

Care therefore needs to be taken to ensure that the communication of information which occurs during the subscription process and the procedures for completing the slip do not fall foul of competition law.

1. *Underwriters should independently decide whether or not to participate in the insurance of individual risks presented to them by brokers and whether or not the proposed structure of underwriting is acceptable.*

   The BIPAR principles stress the role of the broker in presenting alternative potential underwriting structures to its client and also stress the ability of the client to choose the structure that best fulfils its needs. Underwriters should not obstruct this process and must independently analyse and decide on whether or not they wish to underwrite the insurance risk in question using the method proposed by the broker. They must not coordinate this decision with other underwriters.

2. *Underwriters approached by brokers as potential leaders or as leaders of existing facilities should neither confer nor reach any agreement or understanding with other underwriters in deciding whether or not to underwrite and as regards the terms of any proposed underwriting, including premium*.

   Any prior consultation, collaboration or sharing of information between underwriters in these circumstances is very likely to be viewed as collusive. If so, it would be a serious breach of competition law.

3. *Underwriters approached by brokers to underwrite a risk at a particular premium as followers should neither confer with nor reach any agreement or understanding with any other underwriter in deciding whether or not to underwrite the risk in question or, where the decision is taken to underwrite the particular risk, as to the terms of the proposed underwriting, including premium.*

   While the Commission has indicated that it accepts the need for the leader's price to be revealed to the followers, the requirement of independent commercial behaviour prevents underwriters from sharing competitively sensitive information or reaching any agreements or understandings with other underwriters regarding the proposed underwriting.

4. *Underwriters should not, as a condition of any agreement to underwrite, require the upward alignment of premium nor should they initiate any such upward alignment should any subsequent underwriter require or secure a higher premium in order to participate in the underwriting.*

   The legal status of "best terms" requirements by individual underwriters remains unclear but the Commission is hostile to the use of such terms and the BIPAR principles also require brokers not to accept any term leading to the upward alignment of premium.

5. *Following underwriters should neither expect nor require brokers to pass on to them details of the terms (including premium) on which other following underwriters have underwritten or offered to underwrite the risk.*

   The exchange of competitively sensitive information directly between competing underwriters is not permissible.

   It is equally impermissible for brokers to be used by underwriters as a channel for the communication of information to other underwriters.

   This does not preclude a broker from revealing the terms of other underwriters (including premium) where the broker is using this as a bargaining device to obtain the best terms for its client.

Prepared by Cooley (UK) LLP