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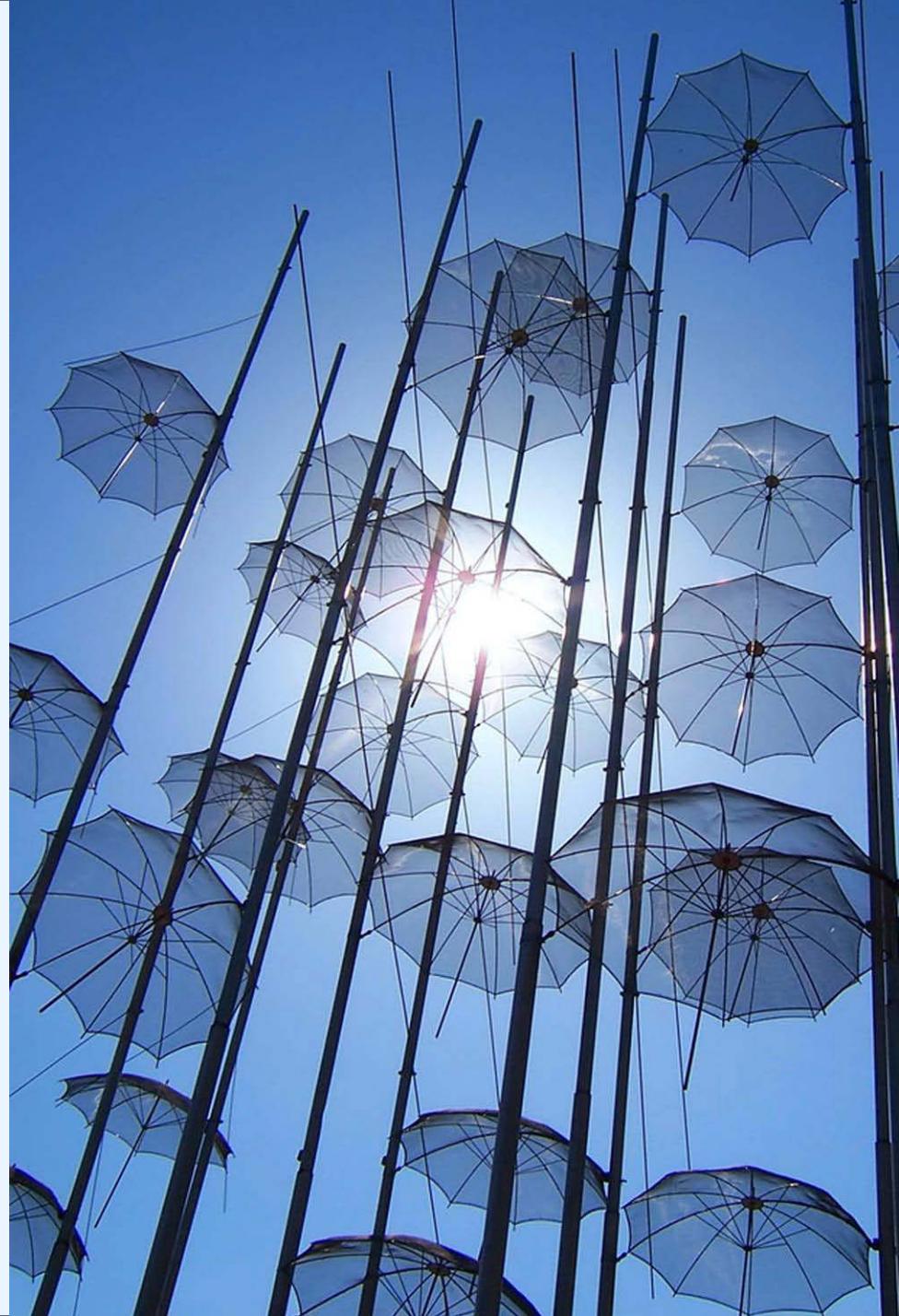
Institute  
and Faculty  
of Actuaries

## Keeping within the boundaries of competition law

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Freshfields Bruckhaus Deringer LLP



# What areas are we going to discuss?

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**Why does competition law compliance matter?  
Risks for the IFoA and its members**

2

**Agreements and arrangements between competitors**

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**Information sharing and benchmarking**

4

**Good conduct of meetings**

# Why does competition law compliance matter? Risks for the IFoA and its members

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# Introduction: why are we talking about competition law?

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## Action against trade associations and professional bodies

- May 2013: UK Asbestos Training Association agrees to change practices after competition law investigation
- April 2013: fine on Portuguese Association of Chartered Accountants for anticompetitive behaviour upheld by European Courts
- May 2012: Italian competition authority fines trade associations for facilitating shipping cartel
- April 2011: laundry powder cartel members fined by European Commission for price coordination under auspices of trade association
- April 2004: OFT takes action against ABI in relation to “General Terms of Agreement”
- November 2002: OFT action against General Insurance Standards Council

# Introduction: why are we talking about competition law?

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**IFoA members  
work in sectors  
that have been  
under scrutiny  
from  
competition  
authorities**

- Competition Commission market investigation into “Big 4” audit firms - ongoing
- Competition Commission market investigation into motor insurance - ongoing
- Office of Fair Trading market study into workplace pensions - ongoing
- FCA thematic review into annuities - ongoing

# Risks for industry bodies like the IFoA and its members

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## Fines for the IFoA and members

- Up to 10% of global turnover of IFoA
- Members may bear fine if IFoA unable to pay
- Similar liability for companies

## Individual criminal liability

- UK criminal cartels regime
- Up to five years' imprisonment
- “Dishonesty” requirement recently removed
  - New defences established, but highly formal and also relies on prosecutorial guidance

## Damages claims

- Damages claims by affected consumers now commonplace
- EU and UK proposals for class actions

## Wider harm

- Dawn raids and enforcement action highly disruptive
- Investigations can last for several years
- Reputational risks for profession and businesses



# An effective approach to competition law compliance

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**“Companies must ensure that employees who do attend trade association events or who otherwise have contact with competitors have been properly trained in how to behave in such situations in terms of competition law compliance, as well as what to do if competition law risks (such as any form of discussion of prices or other commercially sensitive matters) arise.”**

Office of Fair Trading, *How your business can achieve compliance with competition law*, June 2011

- Implications:

1

Competition law needs to be taken seriously by the IFoA and its members

2

But, with the appropriate rules in place, it should not inhibit projects in line with the IFoA's goals and role

# The basic concepts in competition law

Concept	Legal provisions	Key elements
<b>Rules on anticompetitive agreements and arrangements</b>	<b>“Article 101” (EU)</b> <b>“Chapter 1” (UK)</b>	<ul style="list-style-type: none"><li>• Cartel behaviour (e.g. price-fixing, bid rigging)</li><li>• Agreements with competitors and customers/suppliers</li><li>• Information exchange</li></ul>
<b>Rules on abuse of a dominant position</b>	<b>“Article 102” (EU)</b> <b>“Chapter 2” (UK)</b>	<ul style="list-style-type: none"><li>• For dominant companies:<ul style="list-style-type: none"><li>• action that excludes competitors (e.g. unfair rebates, bundling)</li><li>• action that harms customers (e.g. discriminatory prices)</li></ul></li></ul>

These core rules are policed by the Office of Fair Trading (Competition & Markets Authority from April 2014) and the European Commission. Note that FCA can (and must) also consider competition in its own regulatory activities



# Agreements and arrangements between competitors

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# Agreements and arrangements between competitors

“Agreements or concerted practices that prevent, restrict or distort competition”

**What’s an agreement or concerted practice?**

- No need for formal agreement - can cover informal discussion or social chat
- Can cover even unilateral and one-off disclosure
- Can cover agreeing on guidelines or best practice
- No need for implementation

**When might competition be restricted?**

- What is the effect on commercial behaviour?
- Much wider than classic “cartel” concepts like price fixing or bid rigging

**But what if there’s a good public policy reason for cooperation?**

- Rules do take account of the benefits (or “efficiencies”) of cooperation
- Effectively impossible to justify hardcore behaviour
- Important to agree on, and document, your objectives



# A related risk: signalling

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**“...[ ] told us that premiums were currently unsustainably low and would have to rise by 5% in the next year”**

- The IFoA’s publications could be used by members as a mechanism for “signalling” – i.e. using public means to indicate to the market that you intend to raise prices
- Competition authorities may well regard as a breach of competition law: it decreases the uncertainties that companies face when thinking about pricing, and so tends to lead to price rises

# Case studies

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The IFoA sets up a working party to consider....

**...recent development of life insurance premiums in light of emerging risks**

Proposal to recommend premium increases as current premiums not reflecting mortality and morbidity risks

Proposal to share data among IFoA members only to allow better risk assessment and premium setting

**...long term care proposals**

Conclusion that government proposals unlikely to be effective and should be boycotted by industry

Proposal to adopt industry standard approach to expected death rates

# Practical guidance

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## What's the risk?

Would this arrangement tend to align market participants' commercial behaviour?

Could any market participants or consumers be disadvantaged as a result of this arrangement?

What is the public policy or end consumer justification for this arrangement?

## Some practical steps

Agenda and minutes for all meetings

Consider in advance: does this issue go to market participants' commercial behaviour?

Consider inviting a lawyer to attend if you foresee any risk

# Information exchange

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# Information exchange

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- Could cover both:

- Exchange of information within an expert group
- Exchange of information to competitors through the publication of the work of an expert group

<b>1</b>	<b>How commercially sensitive?</b>	<ul style="list-style-type: none"><li>• Information going to pricing is the most sensitive</li><li>• But other “strategically significant” information also covered</li><li>• Would it alter commercial behaviour?</li><li>• Sensitivity may be industry-specific</li></ul>
<b>2</b>	<b>What level of aggregation?</b>	<ul style="list-style-type: none"><li>• Can company-specific information be discerned?</li><li>• Anonymisation may assist but commonly may not be enough</li><li>• Do relatively few data points mean that readers can backward-calculate?</li></ul>

# Information exchange

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**How current/  
historic?**

- The more current the information, the more sensitive it is likely to be
- Has it ceased to be strategically significant?
- Limited case law used 3 year period, but in fact likely to be data-specific and context-specific

4

**How public is  
the source?**

- Internal, confidential company-specific information is of highest sensitivity
- But even apparently “public” information can cause concerns
- Would exchanging firms bear material costs to collect the information?
- Does its exchange reduce pro-competitive uncertainty?



# Case studies

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The IFoA sets up a working party to consider....

**...development of motor insurance premiums and relationship with whiplash claims**

Members from insurance firms share individual expectations for claims development

Members propose to benchmark number of staff employed to assess validity of whiplash claims and publish detailed results

**...annuity pricing**

Proposal to share details of business written as open market options

Proposal to publish anonymised data for five participant member firms



# Practical guidance

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## What's the risk?

Would this arrangement tend to align market participants' commercial behaviour?

Could any market participants or consumers be disadvantaged as a result of this sharing of information?

What is the public policy or end consumer justification for this arrangement?

## Some practical steps

Use "clean teams" or indirect exchange where possible (i.e. exchange via IFoA Executive team)

Keep a record of all information exchanged

Check that the level of detail and disaggregation is no more than absolutely necessary

# Good conduct for meetings

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# Good practice for meetings

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1

Circulate an agenda in advance and stick to it

2

Keep minutes of what is discussed

3

Raise an objection if you have concerns, and have your concern minuted

4

Leave the meeting if you continue to have concerns and have your departure minuted

5

Invite a lawyer to “police” the discussion if you know the topic will be sensitive



# Contacts

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