

# IOGP Competition Law Guidelines

IOGP needs to ensure that all its activities are conducted in strict compliance with applicable competition law.

These Guidelines should be read before attending IOGP meetings.

The “Dos and Don’ts in IOGP Meetings” checklist, annexed to these Guidelines, should be detached for quick reference during IOGP meetings.

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# IOGP Competition Law Guidelines

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# Introduction

Trade associations and other industry gatherings such as IOGP which bring competitors together attract a high level of attention by competition authorities. As such, whenever competitors meet together or communicate, attention needs to be given to compliance with competition laws. In the case of IOGP, UK national law is directly applicable, and the European Commission may also have jurisdiction depending on the markets affected by IOGP's activities. Indeed, in respect of a global market, the antitrust laws of the United States and other countries could be applicable if there is a substantial effect on trade in the relevant jurisdiction.

While trade associations generally seek, quite properly, to promote understanding and co-operation among their member companies, activity conducted by or through a trade association may be just as vulnerable to challenge under competition law as if the same companies were meeting or acting together without the medium of an association.

These Guidelines must be supported by the actions of member companies and the Secretariat, and particular care is required from representatives who serve on IOGP committees and other working groups who should be conversant with applicable competition laws to avoid actions or discussions within IOGP that might raise compliance questions. The main purpose of these Guidelines is to help members recognise what is, or might become, a compliance issue. Some actions or discussions by a trade association or its members are clearly illegal; many others are wholly legal and proper; and there is a sizeable "grey area" in between that is sometimes vague and uncertain, and open to interpretation if taken out of context.

IOGP's policy is not only to avoid actual violations of law, but also to avoid creating any appearance of impropriety which might invite investigation by any enforcement authorities. To meet these requirements, IOGP has adopted and observes several basic policies:

1. it has well-defined vision, mission and objectives and constructive objectives and programmes which are designed to promote the overall interests of the industry and the public;
2. it is structured so that technical work is carried out by committees (including hereafter task forces, work groups and the like) with specific terms of reference and limited functional purposes, which ultimately report back to the Management Committee; and
3. it has approved the issue of these Competition Law Guidelines and "Dos and Don'ts in IOGP Meetings" to help member companies, their representatives and the Secretariat comply with applicable competition laws.

## The applicable laws

IOGP and its member companies must ensure compliance with all applicable competition laws. These include:

- UK competition legislation – in particular the Competition Act 1998, Enterprise Act 2002 and Enterprise and Regulatory Reform Act 2013 which give the Competition and Markets Authority (**CMA**) extensive investigative powers in respect of anti-competitive practices and includes a criminal offence for individuals engaged in certain types of cartel agreements. Individuals who are convicted of offences under the Enterprise Act may face imprisonment;
- EU legislation – in particular Article 101 of the Treaty on the Functioning of the European Union which prohibits any practice which has the object or effect of preventing, restricting or distorting competition within the European Union.

The fundamental principle of all competition or antitrust laws is that it shall be unlawful for two or more competitors to enter into any form of agreement or arrangement regarding the supply of goods or services which has the object or effect of preventing, restricting or distorting competition, either between themselves or with others. The clearest examples of this are agreements between competitors which have the object or effect of restricting competition as regards:

- pricing;
- terms and conditions of purchase or supply;
- division of territories or customers;
- restrictions on production quantities or types of goods to be produced, supplied or acquired; and
- limiting quality, investment, innovation or research.

Any communications regarding pricing or commercially sensitive matters create the greatest risk of investigation under competition laws. However, it is not only pricing information that is potentially sensitive. In a number of cases in Europe it has been found to be a breach of competition law for companies to exchange with actual or potential competitors, either directly or indirectly, information which has the object or effect of influencing market conduct of competitors; disclosing market conduct; and/or results in an artificially transparent market. If member companies use a trade association (including IOGP) as a forum for such dialogue with competitors, or other anti-competitive behaviour, the trade association may itself infringe competition law as cartel facilitator.

Both formal and informal agreements and arrangements fall within the scope of these prohibitions; they do not in any way presuppose some form of written formal agreement. An informal agreement, a common understanding, and in some cases merely a “concerted practice”, may be regarded as falling within the ambit of competition laws. A “concerted practice” is a form of co-ordination, without a formal agreement or decision, by which undertakings reach a tacit understanding to avoid competing with each other. Direct or indirect communication between competitors, such as the exchange of commercially sensitive information in trade associations, has in certain cases been found to be a sufficient “plus factor” to sustain an allegation of a cartel.

# Participation in IOGP committee meetings

Unintentional violation of competition laws is most effectively avoided if all IOGP meetings are conducted in strict compliance with the procedures set out in these Guidelines.

## Supervision and procedure

The chairman of the committee must ensure that the meeting complies with the requirements of these Guidelines. In particular, an appropriate agenda must be prepared that clearly sets out the subject and intended scope of the meeting. This should be circulated well in advance of the meeting to enable representatives to satisfy themselves that only legitimate issues will be discussed. "Any Other Business" items shall not be included on the agenda. If any additional item for discussion is raised for inclusion on the agenda, its inclusion must be agreed by all attendees before there is any discussion on the matter. If there is any doubt as to the inclusion of an item from a competition law perspective, such item will be removed from the agenda and shall not be discussed until legal advice has been sought. It is incumbent on the chairman to then ensure, during the meeting, that only matters on the agenda are discussed. In addition, a member of the IOGP Secretariat should normally be present at every meeting.

## Recordkeeping

Following each meeting an accurate and complete written report of the attendance and proceedings should be prepared. Draft minutes should be circulated as soon as possible after the meeting and representatives should take time to review and, if necessary, comment on the draft minutes. The minutes should then be approved at the next scheduled meeting by the relevant committee, and then posted on IOGP's extranet site.

All agendas, minutes and other important documents should be reviewed before dispatch.

## Vigilance and topics to avoid

It is the responsibility of all representatives to ensure their participation in committee meetings will not give rise to any suspicion of non-compliance with competition law. Thus, even when carrying out approved and legitimate activities, representatives must be careful to avoid discussions or exchanges of information on any subject not appropriate to IOGP's objectives and procedures, since such discussions or information exchanges might give rise to inferences of an agreement or restrictive activity. As examples, any discussion of, or exchanges of information on, the following should be avoided in all cases.

- a. Pricing or related information, such as:
  - member company or industry prices, price changes, price differentials, mark-ups, margins, discounts, allowances, credit terms, rebates, commission rates, terms of sale including enforcing resale prices, etc.;
  - member company plans or data on costs, production, capacity, investment, inventories, sales, etc.;
  - production or sales volumes and/or capacity utilisations;
  - plans of member companies concerning the specification, production, distribution or marketing of particular products, including proposed territories or customers;
  - changes in industry production capacity or inventories; and
  - overhead or distribution costs, cost accounting formulae and methods of computing costs.



b. Market related information, such as:

- member company bids and procedures for responding to bid invitations;
- matters relating to actual or potential individual suppliers or customers, or to business conduct towards them;
- the identity of suppliers or customers;
- territorial allocations or the concept of “home” markets;
- investment, divestment and future plans (for example, capacity closure, expected use of production capacity, expansion plans or market entry or exit), unless that information is already in the public domain;
- intentions to bid or not bid;
- intentions to enter or not enter certain markets; and
- distribution or marketing of particular products, including new customers.

Regardless of subject matter, no representative should participate in a meeting which addresses issues outside the committee’s terms of reference, or which otherwise fails to conform to the procedures in these Guidelines.

It is the duty of representatives during meetings to request that discussions on the sensitive topics above, along with any activity which may infringe competition law, be stopped so that the appropriate legal reviews can be undertaken. Representatives should then disassociate themselves from any such discussions or activities, which may include leaving the meeting (and having this minuted).

## Authorised topics

Representatives are largely free to discuss non-confidential and non-commercial technical and/or scientific issues relevant to the industry. For example, tax, legislation, health, HSE, corporate social responsibility and regulatory compliance would all be valid topics. In addition, representatives are free to engage on industry-institutional relations, general promotional opportunities and public relations activities. Nevertheless, representatives must always remain vigilant that discussions of authorised topics do not stray into commercially-sensitive areas.

## Confidential data

Before disclosing any confidential data at an IOGP meeting, ensure that (i) the data does not reveal the identity of individual contributors and (ii) the data is in aggregated form that does not permit the data of any individual representative to be deduced.

## Information exchanges

Information exchanges typically comprise the gathering of statistical information, market research, the exchange of opinion or experience, assessment of the overall economic situation in the industry and benchmarking. This can lead to increased transparency in the market, which can be beneficial but could also reduce uncertainty regarding the competitive conduct of participating companies.

Exchanging current or future price information in a concentrated market generally is a per se violation, and detailed supply information (e.g. for petroleum products) is considered almost as dangerous.

Generally, if there is any possibility that the information could reduce uncertainty about how a company will conduct itself on a market or influence another party's competitive behaviour, the proposed exchange should be avoided.

Considerable caution should be observed before any information is exchanged between competitors through or involving IOGP. The questions which should always be asked are:-

- i) is there a legitimate purpose for the proposed exchange? and
- ii) could the proposed exchange have any anti-competitive effect?

Although legal advice should always be sought before member companies enter into arrangements to exchange information, the following tips will help to reduce the risk that any proposed exchange of information may be unlawful:

- where possible, structure the exchange in a written format;
- even with safeguards in place, some information is not appropriate for exchange with competitors (for example, prices, plans to increase or decrease capacity or production, market positions, or information on or about specific customers or suppliers);

- on the other hand, information in relation to certain areas will usually be permissible (for example, environmental or safety practices, organisation structures and procedures used to accomplish specific tasks);
- the submission of information on a confidential basis to an independent third party collection agency which produces aggregate data from which individual representatives' data is not identifiable raises fewer concerns. The third party should not provide any conclusions or recommendations with the distribution of the data back to representatives;
- if disaggregated data is supplied to the IOGP Secretariat by member companies to enable the creation of aggregate data, the Secretariat must keep the disaggregated data confidential;
- the exchange even of disaggregated data which is sufficiently historical to be of no competitive use may be permissible, but great care is required in examining the historical nature of the data, together with the purpose and effect of such exchange;
- the greater the freedom of any interested party in an industry to participate in the exchange of information, the better;
- the higher the combined market share of the member companies, the more closely the proposed exchange should be scrutinised;
- the more regular and/or frequent the exchange, the more closely the proposed exchange should be considered;
- the more the information being exchanged would normally be regarded as commercially confidential, the greater the risk; and
- any information exchange should be past statistical, rather than current or forecast information.

## Improper discussions

It is important to avoid discussions on subjects which may raise competition law concerns, not only at formal IOGP committee meetings, but also at social or other gatherings connected with those occasions. Therefore, limit discussions at social gatherings to social rather than business issues. If any improper discussions start in your presence you should protest. If the discussion continues, you should promptly excuse yourself from the group and communicate your protest to the Chair of IOGP's Legal Advisory Panel.

Even if you do not take part in any improper discussions, your presence without participation could still involve you and your member company in an infringement of competition law. Be sensitive to appearances created through contact with competitors and, if you have any doubts as to whether a particular subject may be discussed with competitors, you should consult your member company's legal advisers or the Chair of IOGP's Legal Advisory Panel.

## Production of documents

Care must be taken to avoid wording any documents, including reports or notes from committee meetings, in a way that might be interpreted as indicating, contrary to fact, the existence of any anti-competitive discussions or decisions. Every memorandum, letter, e-mail, or other document should be written with the assumption that it will one day be examined for competition law implications. Enforcement cases may be based on documents which are in reality innocent but have been written in a way which creates suspicion and requires explanation. Such documents may include personal notes based on recollection, or taken at IOGP meetings, which record personal impressions rather than the facts of what transpired.

Competition authorities may require the production of documents, including information held in electronic form, and discovery of documents may also be required in civil proceedings. Normally, the only ground of resistance to such demands for documents is legal professional privilege which may protect from disclosure certain communications with legal advisers. Before any document is disclosed, legal advice should be taken. Suitable internal procedures are put in place in case such demands are made. It should also be remembered that the European Commission does not recognise the privilege attaching to communications with in-house lawyers. Therefore, if an investigation is conducted under EU law, the only legal privilege the Commission will recognise is in respect of legal advice provided by external counsel admitted to a European bar.

EU and UK authorities may carry out on the spot investigations without prior notice on business and residential premises. During such a “dawn raid” investigating officers may require any person on the premises to:

- produce any document that the officers consider relevant;
- provide an explanation of any such document;
- state where any such document can be found; and
- produce any information held on a computer or electronic device in a form in which it can be read and taken away.

The investigating officers can then take copies or extracts from any of these documents (or the original documents in some cases).

Anyone who hinders an investigation or fails to comply with the requirements of the relevant competition authorities may themselves commit a criminal offence punishable with imprisonment and/or a fine. Examples of such obstructive behaviour include:

- unreasonable failure to answer questions or provide information or documents;
- making false or misleading statements; and
- destroying, concealing or falsifying documents relevant to an investigation.

# Application of competition laws to IOGP trade association activities

The recognised and proper activities of IOGP and its committees and other working groups can be accomplished effectively if member companies, their representatives and the Secretariat are alert to the prohibited types of behaviour and react quickly when the inappropriate topics or signals appear.

It goes without saying that activities should be conducted in such a way as to avoid any possible misinterpretation of agreement among member companies which might reasonably be regarded as restricting competition, especially with respect to prices, terms and conditions of purchase or sale, controlling production or sales, division of territories, or refusals to deal in any form whatsoever. Further tips are given here to highlight potential danger zones to be avoided. If a danger zone appears, legal advice should be obtained for specific guidance.

- IOGP's role is clearly defined by its stated vision, mission and objectives. This is consistent with the requirements of competition law provided IOGP's activities do not impinge upon or seek to affect the commercial interests or practices of member companies. Examples of what is acceptable include representations to governments on fiscal or energy policies which might affect the industry as a whole, or the promotion of common standards in the fields of environmental health and safety. Conversely, it is not acceptable for there to be any action, or even exchange of information, on a member company's commercial practices such as pricing or terms and conditions of sale; nor is it acceptable for member companies to act in a concerted manner.

- It always has to be borne in mind that boundaries can be easily overstepped. The chair of each IOGP committee needs to ensure that any discussions remain within legitimate boundaries.
- An ostensibly lawful programme or activity runs a great risk of raising suspicion if its scope is not clearly and restrictively defined. That is the main reason why IOGP operates primarily through committees and imposes limitations on the subject matter and duration of any ad hoc committees dealing with matters concerning a particular problem or issue.
- As a representative in an IOGP committee, you and your member company may be held responsible for any improper acts that may occur which you know about (or should know about), and if you fail to protect or disassociate yourself from them.

## Secretariat

When making press releases or communications on behalf of IOGP and its member companies, the Secretariat (or anyone communicating on behalf of IOGP) must ensure commercially sensitive information is not disclosed. This will require particular vigilance when press releases are followed by question and answer sessions.

## Conclusion

It is hoped that these Guidelines will help you to understand how this important area of law applies to trade association activities, and assists you to carry out your role at IOGP in full compliance with these laws and with IOGP policies.

Please remember that these Guidelines are not exhaustive. Specific problems related to IOGP work can be raised through the Secretariat, with the Chair of the Legal Advisory Panel, or with your member company's legal advisers.

# Annex: Dos and Don'ts in IOGP Meetings

## DOs

**Before attending IOGP meetings make sure that you have read the Competition Law Guidelines, and have this checklist at hand for quick reference at any meeting.**

### Supervision/Procedure for meeting

- Consult in advance the written agenda describing the subject(s) of the meeting;
- All agendas should be available to all member companies well in advance of the meeting;
- A staff representative of IOGP should normally be present at each meeting;
- Limit meetings discussions to topics on the agenda. There should not be "Any Other Business": if further topics need to be added to the agenda, this should be accommodated where possible and a revised agenda circulated before the meeting;
- Consult with Secretariat and/or chair of the Legal Committee if you have questions in relation to competition law.

### Recordkeeping

- Ensure that minutes accurately reflect attendance and the matters dealt with;
- Draft minutes should be developed and circulated to attendees before the next meeting and please take time to review and comment on them;
- Ensure the relevant body (e.g. Task Force, action group, committee) approves the minutes formally at the next meeting, following which they can be posted on the IOGP's Members' site;
- All agendas, minutes and other important documents should be reviewed in advance of dispatch.

### Vigilance

- Ask for discussions about sensitive matters such as suppliers, contractors or customers or individual participant company strategies (see over) to be stopped, so that appropriate legal reviews can be made;
- Ask for any meeting activities that appear to violate the Competition Law Guidelines or this checklist to be stopped, again so that appropriate legal reviews can be made;
- The chair of the meeting should consider carefully any objections raised about inappropriate discussion topics and ensure that discussion is stopped accordingly and the matter duly minuted;
- Leave any meeting in which any such discussions would continue (and if possible have it minuted);
- At breaks or meals outside of the formal meeting, continue to limit discussions to authorised topics set out below and do not stray into discussing pricing or market-related information set out opposite;
- Before disclosing any confidential data to IOGP, ensure that (1) these data do not reveal the identity of individual contributors and (2) they are in an aggregated form that does not permit data of any individual contributor to be deduced.

### Authorised topics

- You are free to discuss non-confidential and non-commercial technical and/or scientific issues relevant to industry (tax, legislation, quality, health, HSE, corporate, social responsibility, regulatory compliance);
- You are free to exchange about industry institutional relations, general promotional opportunities and public relations activities.

## DON'Ts

**Do not, in fact or in appearance, discuss or exchange information which would not be in compliance with competition law, including for example:**

### Pricing or related information

- Individual company or industry prices, price changes, price differentials, margins, price mark-ups, discounts, allowances, credit terms, rebates, commissions rates, price changes, terms of sale including enforcing resale prices;
- Individual company data on costs, production capacity, inventories, sales;
- Costs and production, including:
  - Plans of individual companies concerning the design, production, distribution or marketing of particular products, including proposed territories or customers;
  - Changes in industry production capacity or inventories;
  - Overhead or distribution costs, costs accounting formulae, methods of computing costs;
  - Profits, margins, strategies, investment plans and general market conditions on these factors.

### Market related information

- Participant Company bids and procedures for responding to bid invitations;
- Matters relating to actual or potential individual suppliers or customers or to business conduct of firms toward them;
- The identity of customers or suppliers, which may not be authorised by your company;
- Territorial allocations or the concept of 'home' markets;
- Investment, divestments and future plans;
- Information relating to the future plans of individual companies concerning investments or divestments (such as, capacity closure, expected use of production capacity, expansion plans or market entry or exit) unless that information is already in the public domain;
- Intentions to bid or not to bid;
- Intentions to enter or not certain markets;
- Distribution or marketing of particular product including new customers.

This checklist is not exhaustive. Any queries or doubts about this checklist or about whether a particular course of action might infringe competition law should be checked again against the full Competition Law Guidelines. If in doubt they should be referred to the Secretariat and/or to the Chair of the Legal Committee.

**Registered Office**

City Tower  
Level 14  
40 Basinghall Street  
London EC2V 5DE  
United Kingdom  
T +44 (0)20 3763 9700  
reception@iogp.org

**Brussels Office**

Avenue de Tervuren 188A  
B-1150 Brussels  
Belgium  
T +32 (0)2 790 7762  
eu-reception@iogp.org

**Houston Office**

15377 Memorial Drive  
Suite 250  
Houston, TX 77079  
USA  
T +1 (713) 261 0411  
reception@iogp.org

| [www.iogp.org](http://www.iogp.org)

