

COMPETITION LAW AND TRADE ASSOCIATIONS

aimm competition law compliance programme

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creating the conditions for growth in micropayments

The Granary, 1 Waverley Lane,
Farnham, Surrey GU9 8BB
Telephone: +44 (0) 1252 711 443

Web: www.aimm.co
Email: info@aimm.co
Twitter: [@aimmtweets](https://twitter.com/aimmtweets)

Facebook: facebook.com/aimm.co
VAT Number: 934 7184 06
Company Registered No: 06520758

Overview



Trade associations perform useful, legitimate and pro-competitive functions. However, since they bring together companies that are actual or potential competitors, Competition Law concerns may arise.

Trade associations have on several occasions in the past been scrutinised by competition authorities due to suspicions that they are acting as a conduit for anti-competitive behaviour between their members.

Any breach of Competition Law rules may carry serious consequences. A trade association and/or its members may be fined up to 10% of their total turnover. The individually infringing parties may also have to pay damages and may suffer the financial costs of dealing with an investigation, as well as the potential loss of reputation. In some Member States, senior executives may face criminal charges and imprisonment.

Neither negligence nor bad faith is required for Competition Law to be infringed. It is therefore crucial to be aware of the main areas of Competition Law risk and to be able to identify situations where such a risk may arise.

This document (aimm Compliance Programme) addresses the main issues under Competition Law and provides general guidance on minimising infringement risk and avoiding violations.

Other than UK, the national Competition Laws of individual Member States are not covered by this Compliance Programme.

This Compliance Programme does not constitute and is not a substitute for legal advice on any particular facts of any specific situation.

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Introduction to aimm

The Association for Interactive Media and Micropayments (aimm) is a trade association, with the objective to assist the interactive media and micropayments industries to operate as a whole; responsibly towards consumers, to encourage innovation and business development, to abide by laws and regulations and to work with governments and statutory bodies to ensure barriers to economic growth are minimal and consumer choice and value is achieved.

The successful work of aimm requires that aimm and its participants regularly meet in person or via telephone or internet conferences in order to exchange their views on industry or consumer affecting topics.

aimm will also organise meetings between competitors and regulators or government bodies and between competitors and other entities that may supply goods, services or telecommunication facilities to those companies.

aimm conducts all meetings, mindful of Competition Law concerns and details of how we manage all types of meetings is discussed in this document.

Competition Law

One of the fundamental principles of Competition Law is that companies should individually determine their behaviour on their market.

Decisions concerning prices, capacity, policies, profit margins, investment plans, etc. must be taken independently and not in cooperation with competitor companies.

When carrying out its activities, in particular its working groups where competitors meet, aimm exercises a great deal of care to avoid or prevent behaviour that would potentially be considered to be collusive.

Any action on the part of a trade association that reflects an intention to coordinate its members' or participants' conduct that can have the effect of preventing, restricting or distorting competition is prohibited under law. Actions or activities which result in industry based standards/common ways of working also have to be carefully managed to ensure certain companies aren't unfairly excluded from benefiting from/getting access to them.

This applies not only to the decisions of the trade association, but also to its rules, regulations, recommendations, codes of conduct and other non-binding acts that may be

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Farnham, Surrey GU9 8BB
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implemented by any of its members. All these aspects of a trade association and its conduct must comply with Competition Law rules.

Competition Law concerns may even arise when there is no actual effect on competition: a potential effect may be sufficient for a competition authority to intervene, even if that potential effect is not intended.

Notwithstanding the above, Competition Law does however allow for the majority of activities that aimm sets out to achieve by weighing up the benefit of the activities. Details on Competition Law prohibitions and sensitive activities are detailed below.

Accountability

This Compliance Programme is intended for aimm Executive, aimm members, representatives, participating companies/persons and consultants insofar as they are engaged in aimm activities.

Members and participating companies are individually responsible for their compliance with the law. They should obtain their own legal advice in respect of their activities before joining any project or event organised by aimm.

Consultants that carry out specific assignments within aimm projects are also individually responsible for their compliance with Competition Law rules. aimm will not accept advice from consultants, experts or other third parties which violates the Competition Law rules or puts aimm at risk of violation.

If any aimm member, representative, participant or consultant becomes aware of a situation that might have Competition Law implications for aimm or themselves, it should immediately notify aimm through regulatory@aimm.co and in particular the relevant Chairman (if a working group) or general meeting.

Membership and participation

aimm's member recruitment policy complies with the following rules:

- Membership of aimm is voluntary although fee based.
- Companies are not compelled to join in order to be able to enter the market or to trade with aimm members.
- Membership of aimm shall be open to any interested party in the relevant industry.
- In the rare event that aimm refuses membership (governed by a Board decision), the excluded company will be provided with access to an independent arbitrator who will

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provide a decision based on representations from both sides and their decision will be final

- Rules of admission are transparent, proportionate and based on objective criteria and are available from the aimm website.
- Participation in any of aimm's activities is open to any company that fulfils the objective criteria in the call for participation and is able to make a valid contribution to the specific project.

Membership:

Trade association membership criteria may give rise to concerns under Competition Law if the effect of excluding an undertaking from membership may be to put it at a competitive disadvantage. This may occur where association membership conveys advantages such as increased access to or knowledge about markets.

For the above reasons, aimm ensures that its rules for admission (and expulsion) of members are transparent, proportionate, based on objective criteria, enforced in a non-discriminatory way and subject to an appeal mechanism. All membership is approved by the Board and is subject only to the commitment of the potential member to abide by aimm's code of conduct towards each other and towards consumers.

This code of conduct only applies restraint on business that is operating in an unethical manner, creates industry damage or creates consumer harm.

Participation:

In addition to aimm members, a number of other individuals and entities participate in aimm's activities. aimm is open to any stakeholder active at any position of the value chain for interactive media and micropayments. aimm members generally contribute positively to aimm's activities and drive industry growth with new products and services for consumers.

aimm also relies on the contribution of consultants and legal advisors.

aimm works in close co-operation with other trade associations to facilitate the spread of market intelligence, broaden business horizons, or collaborate on certain themes that otherwise would constrain opportunities.

Procedures for meetings

One of aimm's strengths is that it facilitates discussions amongst members either through regular working groups or through special topic meetings. Referred to in this document as Projects.

aimm also runs social events for its members.

In any of these meetings, there may be companies present who compete with each other. aimm's Board is made up from representative companies across the value chain and is highly likely to contain competitors. Each Board member represents the interests of their segment of the value chain and therefore will need to liaise with their own competitors on aimm matters to facilitate knowledge transfer.

Accordingly, the aimm Executive seeks to conduct and oversee every meeting to ensure that potential Competition Law breaches do not emerge and that meetings are carefully managed to minimise inappropriate discussions.

aimm will undertake the following:

- aimm will ensure that Board members and all chairs of working groups have read this Compliance Programme
- aimm keeps this Compliance Programme on its website (www.aimm.co) so that members and participants to have access to it
- aimm will circulate the a Competition Law statement for aimm meetings together with the agenda prior to every meeting
- At the beginning of every aimm project, aimm will make sure that all participants are aware of aimm's Competition Law compliance policy, its implementation and the fact that all aimm meetings will comply with it
- Written agendas for each aimm meeting will be drafted and circulated prior to the meeting and will have been approved by the General Manager and Chairman
- Every meeting will contain, as its first item, a Competition Law caution in the terms set out below. The chairman of the meeting will read this caution and will be recorded in the minutes of the meeting
- All meetings will be recorded to create notes and retain a record of all conversations, Notes of each meeting will be placed on the aimm website along with the agenda
- Any comment or request for amendment will be notified to the meeting chairman and to aimm as soon as possible following availability of the meeting notes
- A list of participants in each meeting will be circulated prior to the meeting and at the beginning of each meeting all participants will announce their name and company. The list will be detailed on the meeting notes
- aimm will keep agendas, minutes and attendance lists of every meeting classified by group and chronologically
- If during the course of a meeting, anyone is concerned that an anti-competitive discussion is taking place and objects to it, this will be noted in the minutes and the discussion will be terminated immediately. The Chairman of the meeting should inform

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the aimm General Manager about the discussion and request advice as soon as possible.
Legal counsel may be sought

Informal aimm events

Social events must be conducted with caution as inappropriate discussions about commercially sensitive information may be more likely to occur than at formal meetings. Discussions may subsequently be referred to in written communication or a participant may decide to report them to the relevant authorities. The same care that is taken at aimm formal meetings with regard to inappropriate discussions should, therefore, be applied in social events.

Information exchange

As set out above, aimm may compile and circulate statistical data and/or an information exchange provided certain guidelines are respected and advice from legal counsel is sought. In the event that aimm facilitates any information exchange, it will obtain prior specific Competition Law advice.

Requirements gathering meetings

aimm occasionally organises “requirements gathering” meetings where one segment of aimm membership will meet with another segment to discuss requirements from one of the segments. This will enable the other segment to develop their technology, react to market changes, create new products for consumers or enhance their regulatory compliance. As these meetings will contain competitors even though they are designed for efficiencies with derivable consumer benefit, they will be run with the same caution as below.

Competition Law caution

The following caution will accompany every invitation to an aimm event.

“aimm will not enter into any discussion, activity or conduct that may infringe, on its part or on the part of its members and participants, any applicable Competition Laws. By way of example, members and participants shall not discuss, communicate or exchange any commercially sensitive information, including non-public information relating to prices, marketing and advertisement strategy, costs and revenues, trading terms and conditions and conditions with third parties. This applies not only to discussion in formal meetings but also to informal discussions under the framework of aimm before, during or after meetings.

If any participant in an aimm event has any reason to believe that Competition Law infringements may be occurring, they must notify the General Manager immediately and the Chairperson of the meeting if relevant.”

Message to new members, participants and/or people taking part for the first time:

Please note that taking part in aimm's activities is subject to having read and understood aimm's Competition Law Compliance Programme available from www.aimm.co

Competition Law Considerations

This section highlights the principal Competition Law considerations faced by any trade association.

There are certain types of activity amongst competitors and trade association members that will always be considered to be similar to activities of a **Cartel**. These are explained in the section "Clear Prohibitions" below. Other less clear-cut restrictions which may arise within the context of normal aimm activities or discussions are dealt with in the "Sensitive Activities" section.

Note that if it can be proved that a trade association played an independent role in an infringement or itself entered into an anti-competitive agreement, fines may be imposed on the trade association itself, independently of and separately from any fines on its members.

Clear prohibitions

This section explains the areas that aimm will not support or endorse through any of its activities and will advise any members if the Executive or Board feels that this may have occurred outside of aimm's activities but amongst aimm's members.

Price fixing

Price fixing is one of the most serious violations of Competition Law. The prohibition covers not only straightforward agreements on prices to be charged, but also the coordination of other pricing elements, including discounts, bonuses, surcharges, accounting procedures or profit margins. Such activities **MUST NEVER TAKE PLACE**.

Resale price maintenance is also illegal. A supplier (e.g. network) must not fix (whether directly or indirectly) the prices at which its independent distributors (e.g. aggregators and merchants) resell its products. However, it may impose a maximum resale price and it may recommend a resale price - as long as it is a pure recommendation and no adverse consequences are suffered by distributors that choose not to follow the recommendation.

Some of aimm member collaborative activities may on first sight, look like price fixing, but can fall outside this rule based on certain criteria:

- Development of new products that are designed for consumer benefit where the retail price is governed by the merchant promoting and selling the product.
- Establishing the maximum resale price of products (e.g. RRP) as long as this does not restrain trade
- Establishing a consistent price charged across networks by allowing the sales commission to be independently negotiated to prevent network mark-up on the retail price
- Separation of promoted merchant pricing and network mark-up to provide pricing clarity for consumers
- Development of identical network operator products only when the network can determine their own pricing

In providing the environment for consumer products to be developed and priced transparently, supervision of competitor agreements by aimm can alleviate Competition Law issues that could emerge through competitor agreements developed in isolation.

Market sharing

Market sharing is a serious violation of Competition Law. Any agreement or practice between market operators that allocates customers or territories among them or divides out business by product type is **prohibited**.

Agreements between members that could restrict one type of business from fully operating where another type would remain unrestricted, without justification for that restriction (e.g. protection of minors) would be likely to be considered to be a violation and will not occur under aimm stewardship.

aimm's role in facilitating discussions that may include division of products by type is to ensure that the correct motives are in place, that it is evidence led, that it is non discriminatory and that there are tangible consumer benefits that outweigh the anti competitive behaviour. All discussions and agreements will be documented for subsequent inspection.

Output restrictions

Any arrangement that restricts the output of and/or imposes production quotas on market participants constitutes a **Cartel**. By reducing output, the parties may maintain prices at a higher level.

Certain activities undertaken by competitors acting as a whole that restrict trade and have the effect of forcing a price increase will be considered to be acting as a Cartel and aimm will not endorse or participate in these activities.

In the event that this occurs across membership, aimm will notify the appropriate legal representatives of the members concerned.

Sensitive activities

Technical and operational standards and certification schemes

Technical standards and certification schemes generally contribute to ensuring that products and services are of high quality and safe, and therefore benefit consumers. The same applies to schemes for consumer payment facilities.

They may nonetheless give rise to Competition Law concerns if they potentially foreclose the market to competing suppliers. The risk of a Competition Law violation will be reduced if only a small share of the market concerned is affected by certification/standardisation and/or where the certification process is open, transparent, based on objective qualitative criteria, and access is available on fair, reasonable and non-discriminatory terms, with refusal of access being subject to an appeal mechanism.

Recommendations by a trade association

A recommendation by a trade association, even if not binding on its members, may constitute an agreement caught by Competition Law rules.

In particular this will be the case for recommendations that may influence the commercial behaviour of members with respect to factors that affect competition, such as prices, discounts, profit margins, etc.

If a recommendation is followed by or has an influence on the behaviour of the trade association's members, competition authorities may find that an agreement or concerted practice exists. The recommendation may also constitute a decision of an **association of undertakings**. As a result, both the trade association and its individual members may be liable if the recommendation gives rise to an infringement of Competition Law rules.

This does not prevent aimm from providing a forum in which members may develop common understanding, standards and models, as long as their implementation remains voluntary, is subject to a unilateral decision by each member and does not impact on sensitive areas from a Competition Law perspective.

As an example, aimm may make recommendations to its members that may restrain their trade but is proven to resolve a particular identified issue either to the members operating environment or to consumers. Members may voluntarily adopt the recommendation. If any member requires aimm to make a recommendation that is not proven to be beneficial but has

a restraint on trade, then aimm would need to reject the request to avoid being part of an **association of undertakings**.

Codes of conduct and best practice issued by trade associations

A collective code of conduct that seeks to introduce best practice into an industry will normally benefit consumers or the industry or both. It is unlikely to raise significant Competition Law concerns provided that the structure of the market is competitive and the code does not deal with prices or any other parameters that significantly affect competition (e.g., payment terms, warranty terms, etc.).

Nevertheless, aimm may choose to seek legal advice in light of the specific facts related to the codes of conduct.

Information exchange in trade associations

Trade associations should not be used as a forum for the exchange of confidential or otherwise competitively sensitive business information between competitors.

Trade associations frequently set up arrangements that allow the regulated exchange of business information about the marketplace. Although such exchanges can contribute to improvements in efficiency, they can also produce anti-competitive effects or help to facilitate cartel-like practices.

It is aimm's responsibility to ensure that the information exchange does not risk coordination in the commercial conduct of the undertakings concerned.

Certain information which should **never** be exchanged includes:

- Individualised data about sales, capacity, wholesale agreements etc. It is also important that such data is not exchanged in relation to specific competitors (e.g. the top performing merchants).
- Pricing and price-related data. This includes planned or implemented price increases (whether or not a precise amount of the increase is included), the dates of planned price increases or announcements, mark-ups, rebates, allowances, credit terms, promotions, or any other data that would have a bearing on price (e.g., costs, volumes, capacity, sales). This does not apply to prices that are in the public domain e.g. networks supported price points for PSMS
- Identities and activities of individual customers.
- Forecasts of market evolution or business strategy unless already available elsewhere e.g. from an analytical company.
- Information about contract tenders or the corporate procedures for responding to tenders.

- Customer credit risk. Any exchange of customer data can give rise to Competition Law concerns.

aimm may compile and circulate statistical data and/or engage in information exchanges provided the following conditions are respected and where appropriate, legal advice is sought:

- Information should be gathered, aggregated and circulated by a neutral third party (e.g. a market research firm under confidentiality contracts).
- Only aggregated data is circulated to participants. Individual company data must not be circulated and it must not be possible to derive individual company data from the aggregated data circulated (i.e. to disaggregate it). For this reason, all data circulated should aggregate information from at least 3 separate undertakings in each category (in certain circumstances, even greater levels of aggregation may be necessary if there is otherwise a risk that individual data may be extracted).
- Only historical data should be circulated to participants. Typically, data will become historical once it is somewhere between 6 months and 1 year old - however this depends crucially on circumstances of the particular market and the rate at which data ceases to be competitively sensitive.

The results of any data exchange between competitors **cannot** be discussed among aimm members, no forecasting can be done and no recommendations can be made on the basis of the data exchanged.

Circulation of statistical data/information exchange that does not meet all these conditions does not necessarily raise Competition Law concerns. However, such arrangements require an individual analysis based, *inter alia*, on the market structure and the type of information exchanged.

When determining whether the information exchanged may infringe Competition Law rules or not, there is no rule of thumb, every case and every exchange requires individual analysis.

Before establishing any statistical data analysis scheme, legal advice will be sought

aimm will **never** allow its members to disclose information that could be considered confidential or commercially sensitive without the express approval of their organisation to place this information into the public domain

aimm Executive may receive information that is confidential or commercially sensitive under confidentiality undertakings. aimm does not pass any of that information to any other member but may develop technical or operational capability matrixes (with permission) to assist other aimm members.

aimm Executive will use the table below as a short form checklist for this compliance programme.

aimm Executive checks
Identify clearly the specific legitimate purpose of each aimm project.
Submit meeting agendas for review in at least one week in advance of the meeting.
Ensure that Competition Laws are respected at all events.
Read the Competition Law caution at the beginning of every meeting.
Object to any discussion, activity or conduct that may infringe Competition Law rules. If necessary, suspend the meeting.
Stop any meeting when the participants insist on discussing matters that may lead to violations of Competition Laws.
Keep a record of all agendas, attendance lists and summary notes of meetings, plus retain recordings for one year.
Avoid discussion on topics that are not on the agenda or agreed in advance or record the discussions and take notes.
Remember that commercial parties are responsible for their own compliance with Competition Law rules.
Gather competitive information only from legitimate sources, do not disclose commercially confidential information to other parties and do not allow the exchange confidential or commercially sensitive information.
Don't give a false impression that aimm is a party to any anti competitive agreement.
Do not give any impression that one or more aimm participants are being granted special treatment other than detailed in the membership criteria.
Be mindful that aimm could be seen to be a conduit for Competition Law violations and report any activities that cause concern.
Do not allow aimm participants to engage in discussions or activities that may lead to violations of Competition Law rules.

Short form guidelines for members

Do's and Don'ts for aimm members
Do ensure that Competition Law rules are respected at all aimm events that you may attend.
Do remember that you are responsible for your own compliance with Competition Law rules.
Do object to any discussion, activity or conduct that may infringe Competition Law rules and notify the Chair of the meeting if you have concerns. Request that your objection is entered in minutes.
DO inform aimm of any activities at or relating to aimm meetings that may have violated Competition Law rules.
Don't give a false impression that aimm is a party to any anti competitive agreement.
Don't exchange confidential or commercially sensitive information.
In meetings, avoid discussing topics that are not on the agenda or agreed in advance.
Don't use aimm as a venue to engage in conduct that could be construed as intended to exclude competitors from the market, create a barrier to market entry or restrain trade.
Don't under aimm remit, enter in agreements with your competitors that restrict any party in its freedom to set prices, choose trading partners, decide product ranges or otherwise manage sales to consumers.
Don't under aimm remit or during aimm events, in either fact or appearance, discuss or exchange information regarding: <ul style="list-style-type: none"> (a) Individual company prices, price changes, price differentials, mark-ups, rebates, allowances, credit terms, or related financial issues, data relevant to price, market shares etc. (b) Industry pricing policies, price levels, price changes, differentials, and the like unless already in the public domain or on published lists. (c) Changes in industry volumes, capacity or inventories. (d) Bids on contracts for particular products and procedures for responding to tender invitations. (e) Individual company plans concerning the design, production, distribution or marketing of particular products, including proposed territories or customers. (f) Matters relating to individual suppliers or customers that might have the effect either of excluding them from any market or of influencing the business conduct of firms towards such suppliers or customers.
Don't under aimm remit or during aimm events, exchange confidential or commercially sensitive information. You are in the best position to judge what is, and what is not, commercially sensitive or confidential.
Don't remain silent when topics that raise Competition Law concerns are discussed.