

OASIS LOSS MODELLING FRAMEWORK ('Oasis')

COMPLIANCE WITH UK AND EU COMPETITION RULES

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

The insurance sector has come under significant scrutiny in recent years, in part through the European Commission's business insurance sector review and in part because the Commission has been considering the future of the European legislation that for many years has exempted certain insurance market activities from the competition law prohibitions.

Oasis has adopted general guidance for its personnel and members relating to competition law compliance. This document sets out that guidance.

By accepting a place on any Oasis 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 drawn up for Oasis by K&L Gates LLP. Any queries in relation to this guidance or any competition law issues that arise during the course of Oasis committee, working group or panel meetings should be addressed to Dickie Whitaker in the first instance. He will then decide whether to involve external lawyers.

COMPETITION LAW COMPLIANCE GUIDANCE

1. THE FRAMEWORK OF EU AND UK COMPETITION LAW

Competition law seeks to preserve free and fair competition by, for example, prohibiting conduct which raises prices or limits the extent to which goods or services are produced or provided, or conduct which leads to the acquisition of market power which could have such consequences.

The area of competition law of most relevance to Oasis and its members is the prohibition of anti-competitive agreements. The specific provisions of UK and EU competition law are set out in the Appendix to these guidelines. The structure of competition law in the UK under the Competition Act 1998 broadly mirrors that applicable in the EU. One particular difference however is that EU law applies where an agreement has an "effect on trade between

Member States", whereas UK law applies when an agreement has an effect on "trade within the UK". Further, UK law provides that EU competition law principles (including case law and European Commission decisions) should be followed when considering issues under UK law.

In one important respect, UK law is different to EU law, namely in making it a criminal offence for an individual knowingly to engage in cartel activity. Cartel activity is defined as:

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

This note addresses both the prohibition on restrictive agreements and the cartel offence.

2. COMPETITION LAWS OF PARTICULAR RELEVANCE TO OASIS AND ITS MEMBERS

2.1 Restrictive Agreements

Both UK and EU law need to be considered as agreements between (re)insurers or involving Oasis could affect trade between Member States or within the UK. The law applies to agreements in any form: oral agreements and informal understandings may therefore infringe competition laws.

The kinds of agreement which are affected by these prohibitions will generally be agreements between competitors which limit their freedom to compete individually (or are intended to achieve this). This is discussed in further detail in the Best Practice Guidelines for Members, set out below.

2.2 Cartels

The cartel offence applies to individuals and not companies. It is therefore important for all individuals either engaged directly by Oasis or being an employee, director or owner of one of Oasis's members to be aware of the cartel offence and take steps to avoid any conduct which might lead to an infringement.

2.3 Information Exchange

Other activities may have a more indirect effect on competition, such as the exchange of commercially sensitive information. For competition to work effectively, each competitor must independently determine the way in which it will conduct itself on the market. The exchange of commercially sensitive information is considered materially to reduce uncertainty as to the behaviour of competitors and thereby compromises such independence, potentially leading to an alignment of competitors' behaviour. For these purposes, information is viewed as commercially sensitive if it is of such a nature that one would not normally wish to disclose it to a competitor.

Oasis may ultimately be regarded as a valuable source of industry information and the law makes specific provision for such information gathering to occur. In order for the collation and sharing of data to comply with competition law, the data needs to be aggregated and anonymised, so that the information relating to any one undertaking remains hidden from competitors. In addition, the more historic the data that is disseminated, the less likely it is to affect the conduct of competitors and therefore amount to an infringement of competition law.

2.4 Membership Criteria

Membership criteria should be objective and applied in a uniform and non-discriminatory manner. In addition, all Members should generally be permitted to participate in working groups and future Oasis resolutions.

2.5 Penalties

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

- unenforceable contracts - an agreement that breaches competition law will be unenforceable in the courts;
- investigation and prohibition - even if no fines are imposed, the waste of management time and damage to reputation resulting from a breach of the law and the ensuing investigation can harm an organisation;
- fines up to 10% of worldwide group wide turnover even where the agreement does not amount to a cartel;

- third party suits for injunction and damages - such claims are becoming more frequent and raise the prospect of significant liabilities for infringers;
- fines on individuals and possible imprisonment in respect of cartel arrangements (UK law only);
- competition disqualification orders - directors of companies which have infringed competition law may be disqualified from acting as a director for up to 15 years (UK law only).

2.6 Agreements of Minor Importance

Although competition law imposes strict controls on restrictive agreements, the law recognises that some practices, whilst in contravention of the law, are too small to have a detrimental effect on the wider economy. As a result, if the parties to an arrangement that would otherwise be subject to competition law fall below certain thresholds, any anti-competitive activities they engage in will be deemed to fall outside the scope of competition law. These exclusions do not apply to price fixing or market sharing, or to the criminal cartel offence so that, for example, even a "minor" example of price fixing between competitors can amount to a criminal offence.

The de minimis market share thresholds under both UK and EU law are:

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

3. GENERAL BEST PRACTICE GUIDELINES FOR OASIS CHAIRMEN AND MEMBERS

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

- information, once collated, is in anonymised form which does not allow individual members to be identified; and
- analysis and recommendations accompanying the data are kept to a minimum. Oasis should avoid commenting itself on any data - in

other words, the information or statistics should be left to "speak for themselves".

It is prudent for an agenda to be circulated in advance and for minutes to be kept of all meetings. This encourages members to keep the discussions focused on areas approved by Oasis, and provides evidence that meetings are not being used as a forum for unlawful agreements or information exchanges. Presentation materials which contain commercially sensitive information should be checked in advance of the relevant Oasis meeting by the Chairman.

In addition, a legal monitor may attend Oasis meetings when deemed appropriate by the Chairman to confirm that the discussion is compliant with competition law. Should an infringement of competition law occur or appear likely to occur at a meeting, the Chairman and/or Secretary present (or the legal monitor) must remind members of the law and, if necessary, terminate the meeting.

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

4. GENERAL BEST PRACTICE GUIDELINES FOR MEMBERS

It is vital that Oasis' competition compliance is not compromised through the activities of its members. 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.

Some agreements that members enter into are unlikely to affect competition between them. For example, an agreement to comply with certain technical requirements (e.g. to submit in a certain format or via a certain channel) 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 e.g. a particular supplier of CAT Modelling software;

- 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; and
- to underwrite only on specific terms.

In addition, members should be aware that the cartel offence may be relevant to individuals in their organisations 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 party, 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 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 Oasis 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 and aspirational terms, that rates need to increase. If such exchanges of information take place, fellow members (in addition to the Chairman and Secretary) should make the speakers aware that the discussion risks infringing competition law and should end immediately.

Neither Oasis nor any working group will discuss or make formal/informal agreements regarding:

- (a) policy premiums or any other element of price;

- (b) the amount which the policy holder must pay him/herself (the excess);
- (c) standard terms or conditions;
- (d) whether or not to offer insurance for particular risk categories;
- (e) marketing or advertising campaigns or policies;
- (f) any upcoming bids/tenders;
- (g) which areas of their business are doing well/badly; and
- (h) any other commercially sensitive market information unless discussed in advance with me and/or a legal advisor.

In particular, Oasis will not provide or recommend "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 (re)insurance 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."

5. BEST PRACTICE FOR INPUTTING DATA INTO THE FRAMEWORK

The collection of data will be administered by Oasis personnel, who should not have any affiliation with individual members. Other members should not be copied on data submissions. Data available from the Framework relating to other members will be anonymised.

Data which is appropriate to be inputted into the Framework includes:

- the number of claims made during a reference period;
- the number of individual risks insured in each risk year of the chosen period;

- the total amounts paid or payable in respect of claims that have arisen during the said period;
- the total amount of capital insured in each year during the reference period;
- breakdowns of any of the above into different categories.

Data which should not be inputted into the Framework includes:

- elements for contingencies;
- income deriving from reserves;
- administrative or commercial costs;
- fiscal or parafiscal contributions;
- revenues from investments;
- anticipated profits.

In cases of uncertainty, legal advice should be sought **prior to** data being gathered and disseminated (including in aggregated and anonymised form).

June 2012

APPENDIX

Article 101 of the Treaty on the Functioning of the European Union states:

1. The following shall be prohibited as incompatible with the common market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market, and in particular those which:
 - (a) directly or indirectly fix purchase or selling prices or any other trading conditions;
 - (b) limit or control production, markets, technical development, or investment;
 - (c) share markets or sources of supply;
 - (d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage; and
 - (e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.
2. Any agreements or decisions prohibited pursuant to this Article shall be automatically void.

The 'Chapter I Prohibition' set out in section 2 of the Competition Act 1998 states:

1. Subject to sub-section 3, agreements between undertakings, decisions by associations of undertakings or concerted practices which:
 - (a) may affect trade within the United Kingdom; and
 - (b) have as their object or effect the prevention, restriction or distortion of competition within the United Kingdom, are prohibited unless they are exempt in accordance with the provisions of this Part.

2. Sub-section 1 applies, in particular, to agreements, decisions or practices which:
 - (a) directly or indirectly fix purchase or selling prices or any other trading conditions;
 - (b) limit or control production, markets, technical development or investment;
 - (c) share markets or sources of supply;
 - (d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage; and
 - (e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.
3. Subsection 1 applies only if the agreement, decision or practice is, or is intended to be, implemented in the United Kingdom.

The 'Cartel Offence' - section 188 of the Enterprise Act 2002 states:

1. An individual is guilty of an offence if he dishonestly agrees with one or more other persons to make or implement, or to cause to be made or implemented, arrangements of the following kind relating to at least two undertakings (A and B).
2. The arrangements must be ones which, if operating as the parties to the agreement intend, would:-
 - (a) directly or indirectly fix a price for the supply by A in the United Kingdom (otherwise than to B) of a product or service,
 - (b) limit or prevent supply by A in the United Kingdom of a product or service,
 - (c) limit or prevent production by A in the United Kingdom of a product,

- (d) divide between A and B the supply in the United Kingdom of a product or service to a customer or customers,
 - (e) divide between A and B customers for the supply in the United Kingdom of a product or service, or
 - (f) be bid-rigging arrangements.
3. Unless subsection 2(d), (e) or (f) applies, the arrangements must also be ones which, if operating as the parties to the agreement intend, would:
- (a) directly or indirectly fix a price for the supply by B in the United Kingdom (otherwise than to A) of a product or service,
 - (b) limit or prevent supply by B in the United Kingdom of a product or service, or
 - (c) limit or prevent production by B in the United Kingdom of a product.
4. In subsections 2(a) to (d) and 3, references to supply or production are to supply or production in the appropriate circumstances (for which see section 18g).
5. **'Bid-rigging arrangements'** are arrangements under which, in response to a request for bids for the supply of a product or service in the United Kingdom, or for the production of a product in the United Kingdom:-
- (a) A but not B may make a bid, or
 - (b) A and B may each make a bid but, in one case or both, only a bid arrived at in accordance with the arrangements.
6. But arrangements are not bid-rigging arrangements if, under them, the person requesting bids would be informed of them at or before the time when a bid is made.
7. **'Undertaking'** has the same meaning as in Part 1 of the 1998 Act

Competition Disqualification Orders – section 9A of the Company Directors Disqualification Act 1986 inserted by the Enterprise Act 2002 states:

1. The court must make a disqualification order against a person if the following two conditions are satisfied in relation to him.
2. The first condition is that an undertaking which is a company of which he is a director commits a breach of competition law.
3. The second condition is that the court considers that his conduct as a director makes him unfit to be concerned in the management of a company.
4. ...
5. For the purpose of deciding under subsection (3) whether a person is unfit to be concerned in the management of a company the court—
 - (a) must have regard to whether subsection (6) applies to him;
 - (b) may have regard to his conduct as a director of a company in connection with any other breach of competition law;
 - (c) ...
6. This subsection applies to a person if as a director of the company—
 - (a) his conduct contributed to the breach of competition law mentioned in subsection (2);
 - (b) his conduct did not contribute to the breach but he had reasonable grounds to suspect that the conduct of the undertaking constituted the breach and he took no steps to prevent it;
 - (c) he did not know but ought to have known that the conduct of the undertaking constituted the breach.
7. For the purposes of subsection (6)(a) it is immaterial whether the person knew that the conduct of the undertaking constituted the breach...