This guidance updates previous guidance issued by ISBA and the ISC on compliance with competition law. It is intended to serve as a timely reminder of the key principles, following a letter from the Competition and Markets Authority (CMA, formerly known as the OFT) expressing some concern that certain schools may not be complying with the law.

The potential sanctions, and adverse publicity, flowing from a breach of the competition rules are severe. If schools are in any doubt as to whether they have acted, or propose to act, unlawfully, we recommend that they seek legal advice.

**For the avoidance of doubt, the Covid-19 pandemic does not excuse schools from complying with competition law**.

**Competition Law in a nutshell**

The Competition Act 1998 applies to "undertakings". Any natural or legal person which engages in an economic activity – whether or not profit-making – will be classified as an undertaking. Thus, the competition regime applies to charities and other non-profit bodies as well as commercial trading companies. Independent schools will therefore be regarded as “undertakings” by the authorities.

There are two "prohibitions" under the Competition Act 1998. The first prohibits agreements, decisions or “concerted practices” which may affect trade within the UK or part of it and which have as their object or effect the prevention, restriction or distortion of competition.

An agreement does not need to be a formal, legally binding written contract. Decisions of umbrella bodies may, for these purposes, be agreements, as may minutes of meetings. Oral agreements and understandings are also caught by the prohibition. Even the simple one-way disclosure to a competitor of confidential pricing information will fall foul of the rules, unless that disclosure is firmly rejected.

Many cases concerning concerted practices relate to the direct or indirect exchange of price (or other commercially sensitive) information between competitors so that they can regulate their commercial conduct in the knowledge or expectation that their competitors will act in a particular way.[[1]](#footnote-1)

Competition law is particularly concerned about price competition. Collusion over prices is universally regarded as anti-competitive by object (regardless of whether it has an actual anti-competitive effect) and one of the most serious competition law breaches.

The second prohibition outlaws unilateral conduct on the part of one or more undertakings that amounts to an abuse of a dominant position in a market if it may affect trade within the UK (or part of it). This prohibition is unlikely to apply to any of the independent schools as no one of them has a dominant position (which usually requires the undertaking to enjoy at least 40% market share).

Finally, the Enterprise Act 2002 enacted the criminal cartel offence into UK law. It is a criminal offence for individuals to agree that two or more undertakings will engage in price-fixing and other forms of cartel activity.

**General Principles affecting Independent Schools**

1.           There is an economic market for the provision of independent education services.

2.           The fees which a school charges are meant to be worked out independently on the basis of the school's costs and what the market will bear. Schools should set prices (which obviously includes discount or fee reduction arrangements) independently of the other schools in the market.

3.           As a result, to comply with competition law, schools are restricted in relation to certain exchanges of confidential information, in particular prospective fees and major prospective costs such as salaries.

4.           Where schools operate as a single undertaking, the schools may exchange information between themselves. (We consider that very few schools are likely to be in this position).

**Information Exchange**

Sharing information amounts to a concerted practice where it reduces uncertainty about the conduct of competitors on the market, such that the benefits of co-operation/collusion are substituted for the risks of competition. This is most likely to be the case where such information exchange relates to future prices but may also be the case where the information is current.

For the purposes of the independent education services market, the schools do compete with each other and it is not open to them to collude with each other without risking action by the CMA under either the Competition Act or, potentially, the Enterprise Act.

Whilst practices that can be said to amount to 'price-signalling' or other exchanges relating to the prospective exchange of commercially sensitive information are clearly at risk under the competition regime, other practices – such as bench-marking, the exchange of information unrelated to price or important costs, and the exchange of historical information – may not be objectionable.

Where information does not relate to current or future fees or cost bases (or does not otherwise enable a competitor to glean pricing policies), where it is promulgated by an trade association rather than the competitors themselves and where it is being shared for the purpose of promoting best practice, it is unlikely to affect competition and therefore likely to be permissible.

The table below sets out different categories of information which schools may want to exchange and sets out the competition risks of doing so.

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| --- | --- | --- |
| **Must not be exchanged at all, even in an informal context** | Commercially sensitive/ quantitative data. |     current/ proposed fees or discounts      current/proposed level of scholarships      significant costs (e.g. staff salaries, costs of "extras", school trips, significant running costs)      parent contracts (unless no quantitative element)      terms for payment of school fees in instalments |
| **Consider before exchanging** | Information which could influence other schools’ commercial decisions if exchanged on a regular basis, in which case the risk of competition law infringement will be reduced if it is provided on a historic, aggregated, anonymous basis. |     Less significant costs or income (deposits/ registration fees; catering costs; insurance premiums; IT costs; utility costs)      terms and costs for hire of school facilities to other organisations during holidays      historic information on cost bases - best to disclose as part of a bench-marking exercise |
| **May be exchanged** | Non-Commercial/ Qualitative data |     Best practice      Know-how (e.g. Fund-raising methods)      General policies re employment, medical, life insurance, pensions, holidays, health & safety, fire etc      Legislation updates |

Where information is in the public domain (available from guides/websites) the information can be obtained from that public source by other schools. Schools may also unilaterally obtain information from other schools, but this must not be concerted (e.g. by mystery shopping).

If another school requests information falling into one of the first two categories in the table above, such request should be given to the Head or Bursar, and the school may wish to seek legal advice before responding.

Finally, schools may wish to engage in joint procurement of certain items, with a view to extracting better terms from suppliers. This will normally be permissible under competition law. Such joint procurement will only be risky where it relates to a significant part of the schools’ cost bases.

**School Uniforms**

The issue of school uniform prices has been on the CMA’s radar for some time. In 2015, it published an [open letter](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/468358/School_uniform_open_letter.pdf) to schools and suppliers, warning them that exclusive supply arrangements which have the effect of keeping prices higher than they would be on the open market might fall foul of competition law. The letter stated:

*“As a Head teacher & governing board you need to ensure that you take on board parents’ and carers’ views on school uniform policy and that you prioritise providing value for money when selecting your school uniform suppliers and retailers. In addition we strongly recommend that you call for a review of your school’s current uniform arrangements with any exclusive supplier or retailer with a view to ensuring that future school uniform policy looks to drive competition between suppliers and retailers, whether by appointing several outlets, or where there is a specific justification for not doing so, ensuring that the sole outlet is subject to a competitive tender on a regular basis.”*

One justification for appointing an exclusive supplier or retailer may be that it would be impossible to persuade suppliers/retailers to make/sell the uniform unless they receive such protection, given the small quantities of uniform in question. There would, however, need to be a factual basis for such an assertion.

In view of the CMA’s position, we consider it advisable for schools to:

* Consider whether exclusivity is genuinely necessary in order to ensure that uniform will be manufactured and/or sold in retail outlets;
* If so, organise regular competitive tenders for such exclusive supply;
* prepare an explanation as to why they require uniforms to be bought from nominated suppliers (e.g. quality, smart appearance), just in case there is an enquiry from a parent; and
* check that the terms of their agreements with such suppliers (as with any commercial agreement) do not contain anti-competitive provisions (such as fixing the supplier's retail prices or preventing them from supplying uniforms for other schools).

**Benchmarking & Role of Professional Bodies**

Benchmarking surveys by definition are compiled using historical data and typically comprise aggregated and anonymised data. On this basis, such surveys are usually accepted as not being capable of distorting competition. Similarly, the exchange of historical information on costs is unlikely to be offensive where it is benchmarked and is not attributable to specific schools.

When benchmarking, it is preferable if an independent organisation collates the data. If being undertaken through ISC or ISBA, care will need to be taken to ensure that the information does not disclose the identities of the participants when disseminated so that any commercially sensitive information cannot be linked to particular schools.

It will be easier for schools to assert that exchanges of information are intended to promote best practice rather than distort competition if those exchanges are genuinely industry-wide and carried out by either the umbrella organisations or independent organisations. The converse is true if the exchanges are confined to a small group of schools brought together because they cover a specific segment of the overall market, be it regional or by some other peer-group connection.

**Meetings**

Regular meetings between schools to discuss best practice and developments in the sector should continue although care will need to be taken to ensure that the information discussed does not affect competition and is largely qualitative. If a member of staff attending a meeting has concerns over the proposed agenda, he or she should seek the advice of the Head or Bursar before attending the meeting.

This note has been revised and updated by Paul Jones, Partner of Farrer & Co, and Christopher Brown, a competition law barrister at Matrix Chambers.

This publication is a general summary of the law. It should not replace legal advice tailored to your specific circumstances.

1. It should be noted that ‘vertical’ agreements (such as distribution or supply agreements) can also fall foul of competition law. See the section of this guidance on school uniforms for further information. [↑](#footnote-ref-1)