COMPETITION LAW COMPLIANCE MANUAL

Issued: July 2013

Updated: January 2024

Why compliance with competition law is important: a message from the Managing Director

FP McCann needs to act (and be seen to act) in a manner that, whilst being competitive and results orientated, is also fair.

That means that, as a Company, we need to comply with the various legal rules at a UK and EU level. These ensure that competition in the markets in which we operate is not restricted.

There are a number of key risks under these rules including:

- The Competition and Markets Authority (CMA) has wide-ranging powers of enforcement including the right to carry out on-the-spot investigations (dawn raids) at a company's premises (and in some cases, the homes of individuals)

- Where a company is found to have breached competition law, it may face significant fines (of up to 10% of worldwide group turnover) and its Directors may also be fined, and/or disqualified

- Businesses found in breach of the competition law rules can also be liable to third parties for damages for loss suffered by them as a result of the infringement

- Individual employees can face criminal prosecution for their involvement in anti-competitive activity, with the risk of up to 5 years' imprisonment and/or unlimited fines.

Failure to comply with the competition rules can therefore have serious consequences for you personally and for our Company.

What you need to do

This manual provides an overview of the competition rules and how they apply to our Company. It also sets out the procedures which you must follow in your day to day business activities.

You have a duty as an employee of FP McCann to report infringements or suspected infringements of competition law to the Company. If you have any queries or suspicions, or are concerned whether competition law may apply to specific activities, you should **telephone FP McCann's Compliance Officer, Thomas Donaghy.**

The Board of FP McCann is committed to ensuring compliance with competition law and all employees should be aware that any infringements of the procedures or guidelines in this manual will be viewed very seriously and may result in disciplinary action being taken. You should take the time to read this manual carefully. Compliance with competition law is in all our interests.

Signed:____
Hugh McCann
Managing Director

Reviewed:	**12 January 2023**
Last Reviewed:	**21 January 2022**
Next Review:	**January 2024**

EC PRIVILEGED LEGAL ADVICE FROM EXTERNAL COUNSEL – FOR INTERNAL USE ONLY

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1. WHAT IS COMPETITION LAW AND WHEN IS IT RELEVANT?

1.1 What is competition law?

Competition law lays down rules on how businesses must behave to ensure fair competition with the ultimate aim of protecting consumers.

The rules focus on:

- *Anti-competitive practices*

  Agreements or arrangements with other companies which restrict competition

- *Abuse of a dominant position*

  The abuse of a dominant position by one company

1.2 How are investigations triggered?

In the UK, the Competition and Markets Authority (CMA) enforces the rules.

The CMA can find out about anti-competitive behaviour in a number of ways, so take care!

Investigations may be triggered by:

- The CMA's own suspicions about what is happening in the market
- Tip-offs from whistleblowers (e.g. a disgruntled customer or ex-employee)
- Another company can "come clean" in return for immunity/large reduction of fines – the so-called "leniency programme"

1.3 Powers of investigation

The CMA has wide powers of investigation. These include the power to:

- Conduct dawn raids (please see **Appendix 1** and the separate **Dawn Raid Manual** for more details)
- Make written requests for information
- Interview employees
- Search electronic documents (including e-mails)

1.4 Consequences of breaching competition law

- Fines of up to 10% of the worldwide turnover of the FP McCann group
- Imprisonment of employees for up to 5 years
- Disqualification of directors for up to 15 years
- Negative publicity
- Damage to the FP McCann brand and reputation
- Wasted management time and costs of dealing with an investigation and the fallout resulting from it
- Court actions for damages (e.g. from customers who may have paid too much or competitors who have been put out of business)
- Possible exclusion from future contracts by FP McCann's customers

1.5 When could competition law apply?

Competition law applies to every aspect of your day-to-day activities, and in particular, every time you have contact with a competitor.

2. ANTI-COMPETITIVE AGREEMENTS

2.1 Anti-competitive agreements between competitors

Agreements need not be formal or in writing: a verbal "understanding" can also fall foul of competition law.

For example, an anti-competitive "agreement" can be established from:

- A single meeting or telephone call or e-mail between competitors
- Exchanging information with competitors
- Informal contacts and discussions, including a chat in the pub
- A “nod and a wink” or a gentleman's agreement

2.2 Cartels

Competition law is primarily aimed at catching "cartels" between competitors. These are the most serious types of infringement of competition law:

- **Price-fixing** - do not directly or indirectly agree to fix prices or discounts
- **Market-sharing** – do not allocate markets or customers between you and a competitor
- **Bid-rigging** – do not rig bids – see section 3 on tendering procedures below
- **Collective boycott** - do not agree with competitors to boycott customers, competitors or builders' merchants, including any new entrants to the market

2.3 Agreements with builders' merchants or suppliers

Anti-competitive arrangements can also arise between businesses at different levels of the supply chain (e.g. FP McCann and a supplier) – see **section 5** below.

AVOID ANTI-COMPETITIVE CONVERSATIONS!

Prices

X DO NOT agree, or even discuss, with a competitor:

- Current or future prices (including the timing or extent of future price rises) or costs
- Any individual elements of prices or costs (including profit margins, raw material costs, etc) or anticipated future changes to these costs

Terms and Conditions

X DO NOT agree, or even discuss, with a competitor:

- Discounts or rebates granted, or to be granted, to particular customers or customers in general
- Any other terms and conditions applied, or to be applied, to customers or by suppliers (such as delivery terms, extent of warranties etc)
- To deal with customers or suppliers only on certain terms

Markets

X DO NOT agree, or even discuss, with a competitor:

- Carving up or allocating territories, customers or work types: all markets must be fully open to all competitors
- Ways in which to keep new competitors out of the market or restrict opportunities for existing competitors
- To boycott certain customers or suppliers

Tendering

X DO NOT agree, or even discuss, with a competitor:

- The prices that each of you will bid with a view to ensuring a particular winner
- That one or other of you will submit no bid at all
- To give or receive 'covers', 'cover bids' or 'cover prices', i.e.:
    - seeking assistance from another bidder to bid a price that will not be successful
    - giving assistance to another bidder to submit a losing price

Strategy

X DO NOT agree, or even discuss, with a competitor of FP McCann's:

- Investment decisions (e.g. mergers or acquisition of new businesses or divisions, land and buildings investments, investment in new technologies)
- FP McCann's specific target markets, target customers, business methods, research etc i.e. information which is commercially sensitive

(It would however be possible to discuss high-level research methods used across the industry or the promotion of concrete generally within the auspices of a trade association or professional body - see **section 4.5** on Trade Associations for more details).

3. TENDERING

3.1 Overview

FP McCann often bids to supply products to builders' merchants under "term deals" or framework contracts. Sometimes these term deals will be to supply a specific customer, such as Balfour Beatty, Carillion, Costain or Morgan Sindall.

It is a serious breach of competition law to collude with competitors in responding to tenders. This practice is known as **bid-rigging** and it can take several forms including:

- **Cover pricing**: exchanging an artificially high bid price with a competitor with a view to one or other of you winning or not winning the tender
- **Bid suppression**: agreeing with other contractors who should withhold or withdraw a bid and who should proceed with a bid with a view to one of you winning the tender
- **Bid rotation**: agreeing with competitors who should not/should not submit bids on a rotating or other systematic allocation basis

Case study: Cover pricing in the construction industry in England

In September 2009, 103 construction companies were fined over £129million for engaging in cover pricing. This is where one company (A) contacts another company (B) to find out what price B will be bidding at, in response to a tender process. Company A then submits a "cover price", which is higher than Company B's price as Company A wants to deliberately lose the tender.

It would be no defence if Company A submitted a cover price as it does not want to win the tender process, for example, because it does not have the resources to carry out the contract. It was also no defence that this was a widely recognised practice used across the construction industry.

If, in this example, Company A had instead decided on its own to submit an inflated bid, this would not have breached the competition rules as A would have reached this decision without contacting B. However, as best practice, FP McCann should return a tender where it does not/is unable to price it and should not discuss this decision with anyone else.

3.2 Guidelines

When bidding to supply builders' merchants or customers, you **must follow the guidelines below**:

√ Ensure that FP McCann always bids for contracts independently from, and without any agreement or arrangement with, competitors

√ You may take into account "**market gossip**", e.g. from sources such as suppliers, trade associations and trade press. However, do not try and check or verify such "market gossip" with that competitor.

√ If you refer to any "market gossip" in writing (including in e-mails), then make sure that you include a reference as to the source of this information (i.e. a customer or supplier). This is so that FP McCann could, if necessary, demonstrate to a competition authority where the information came from.

X You should not discuss upcoming bids with competitors. This includes discussing details of:

- Whether or not FP McCann or the competitors is intending to bid for a contract (this is the case even if that competitor has been asked by a client to attend a joint site visit or briefing - see **section 3.4** below)
- The price either of you is intending to submit
- The terms and conditions either of you is intending to submit
- Any other aspect of each other's bidding strategy

X Do not seek to influence the future bidding behaviour of a competitor

X Do not discuss with competitor(s) each other's relationship or strategy with respect to actual or potential clients

X Do not agree with competitors to collude in tendering for contracts, whether those contracts concern works and services for the public or the private sector

X Do not exchange information on the prices or other key terms of bids with competitors after you have submitted your bid

3.3 Joint bidding with competitors

The general rule is that FP McCann should not discuss bids with competitors. This includes discussing details of whether it is intending to bid for a contract, the price it is intending to submit, or any other aspect of its bidding strategy.

However, there may be circumstances in which it is permitted to bid jointly with a competitor, for example where FP McCann could not credibly bid on its own. Legal advice should be sought in these cases.

3.4 Joint site visits/meetings with competitors

It is perfectly acceptable for FP McCann to attend joint site visits or meetings hosted by clients or potential clients. It is often the case that at such meetings, FP McCann may be encouraged to share "best practice" with its competitors or discuss partnering arrangements. These are seen by those in the industry as a key method of improving performance through better supply chain communication.

Guidelines

It is not problematic for FP McCann to attend these types of joint visit or engage in such discussions provided that:

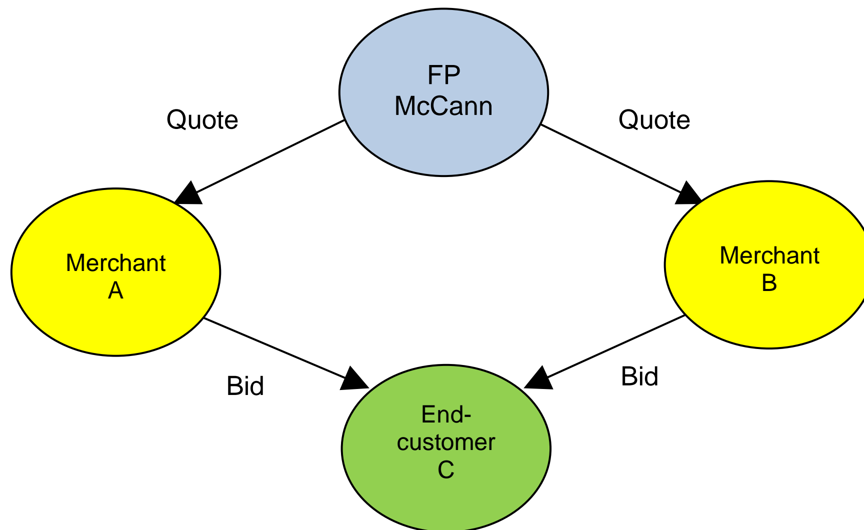
- Where the discussions are about a specific contract, the client is present
- Where the discussions are about best-practice, they are kept to a high-level without discussing specifics
- Care is taken to ensure that they do not stray into anti-competitive territory (see the section *"Avoid anti-competitive conversations"* above).

3.5 Tendering to supply builders' merchants as their customer

FP McCann may sometimes provide quotes for one or more builders' merchants who are each competing to win a contract to supply an end-customer.

Assuming that FP McCann is not dominant (see section 7 below), FP McCann can provide different quotes to each of the builders' merchants for the same product (if it wishes to). In other words, it would be legitimate from a UK/EU competition law perspective for FP McCann to provide its *preferred* builders' merchant with a more competitive price.

However, FP McCann must take care to ensure that it does not act as a "post box" and inadvertently share information it receives from one builders' merchant to the other (see section 4.3 below):



For example, where builders' merchants A and B are competing to win a tender from an end-customer, C (and A is FP McCann's preferred supplier):

- FP McCann provides a quote to a builders' merchant, A;
- FP McCann subsequently provides a quote to builders' merchant B, which is higher than the one provided to A (as A is FP McCann's preferred supplier). B then volunteers to FP McCann that it will be pricing the tender on the basis of it only making a margin of 5%;
- FP McCann then chooses to revise the quote it provides to A and lower the quote so that A has a better chance of winning the contract from C (calculated so that A may earn a margin of less of than 5% but without disclosing that information to A)...

...then FP McCann must communicate with A in such a way that does **not** reveal the information it has learnt from B (i.e. with no reference to B, the price quoted to B or B's intended margin).

4. INFORMATION EXCHANGE

4.1 Exchanging information directly with competitors

An agreement need not be written for there to be a breach of competition law. An oral agreement or a mere understanding may be sufficient. Even if there is no overt agreement between competitors, there is a risk that **any sharing of information** could lead to an understanding between those companies as to each other's competitive strategy going forward. Competition law breaches have been found even as a result of just **one meeting** of competitors as explained in the case study below:

Case study: *T-mobile and others*

In *T-Mobile*, five mobile operators got together to discuss the reduction of commission payments made to dealers for the sale of mobile phone contracts to consumers. The meeting was convened at the request of one operator for the purposes of discussing a proposal for fraud prevention. There was no evidence of an ongoing system of information exchange being agreed or undertaken.

The mobile phone operators exchanged confidential details of their arrangements with dealers and future intentions but neither discussed the prices that the dealers would charge to consumers, nor the subscription tariffs that would apply under the contracts which subscribers entered into with a chosen mobile operator. Together they were fined **€52million.**

This case demonstrates that, even where there is no express agreement, **where information is exchanged, competition authorities can presume that the parties involved have taken account of the information received** from their competitors in subsequently operating on the market. This is even if the information is passed just one way. It is possible to rebut this presumption but this is difficult and it is better not to be on the back foot to start with.

As the next case study shows, even a **one-sided** disclosure of information is enough to breach competition law unless you take "active steps" to distance yourself from the receipt of that information.

This is because, where Company B receives strategic data from a competitor, Company A, Company B, will be *presumed* to have taken this information into account when determining its market conduct unless it can be shown that Company B sent a clear statement to Company A that it did not wish to receive such data.

In the *RBS* case below, Barclays did not take such steps and was also found to have actually taken the information received from RBS into account, when determining its own pricing.

Case study: Loan products - *Royal Bank of Scotland/Barclays*

RBS' Professional Practices Coverages Team disclosed generic, as well as specific, confidential future pricing information to their counterparts at Barclays Bank. This related to the pricing of loan products purchased by solicitors, accountancy and real estate firms. In addition, RBS supplied specific confidential future pricing information in relation to two proposed loan facilities.

These disclosures took place through telephone conversations and contacts on the fringes of **social, client and industry events**.

Even though in this case the disclosure was one-sided, with Barclays not providing any information to RBS in return, a breach of competition law was still found.

Fines of over **£28.5million** were imposed on RBS in 2011; Barclays, the recipient, received immunity from fines as it blew the whistle under the CMA's leniency policy.

4.2 Guidelines:

Competition authorities are therefore suspicious of any form of contact or discussion between competitors, so FP McCann should always be acting (and be seen to be acting) independently.

Anything you discuss or agree with a competitor which impacts on your or their future business behaviour has the potential to be problematic.

It does not matter if that agreement has no effect, e.g. an attempt between competitors to raise prices can be anti-competitive even if that attempt fails or was never actually implemented in practice.

You should therefore follow these guidelines:

X Avoid getting drawn in to conversations with competitors on any commercial matters which could lead to an understanding or agreement on prices, or even the competitor volunteering sensitive information to you which you may subsequently act on when making a business decision.

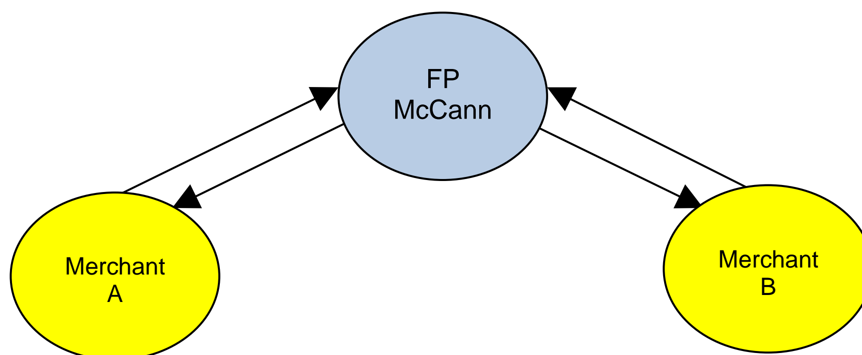
X Do not use a third party, such a supplier or subcontractor, as a "post box" for passing information to and from a competitor.

X Remember that even sharing competitively sensitive information loosely with FP McCann's competitors (for example, on prices or costs) is always problematic i.e. even if it is with a friend or old work colleague and even if the discussion happens in a social context. FP McCann's strategy should be kept within FP McCann!

X Don't speak to competitors unless you would be comfortable giving a full account of the conversation at a later date to the competition authorities

4.3 Indirect price-fixing between competitors

FP McCann must also take care to avoid being implicated in "indirect" price-fixing agreements. For example, where FP McCann is supplying stock to two different builders' merchants (A and B), FP McCann must take care not to act as a "post box" for information exchange between A and B:



In the scenario above, if

- Merchant A complains to FP McCann about Merchant B's discounting of FP McCann's stock below recommended retail price (RRP);
- FP McCann then speaks to Merchant B about this; and
- As a result, Merchant B raises the price of its stock to RRP, then...

....there will be price-fixing between merchants A and B which incriminates FP McCann (a three-way arrangement). This is because there is an assumed expectation on the

part of A that FP McCann will speak to B. B's action then results in a price increase to its customers down the supply chain. This also benefits A, as it means that it will not lose out on sales to B as their prices will be the same/more similar (at RRP).

Therefore, whilst FP McCann may negotiate with builders' merchants on an individual basis and agree the price and terms on which FP McCann will sell stock to that builders' merchant, FP McCann must **not** share information on the prices or terms offered by it to other builders' merchants.

4.4 Market intelligence and customer feedback

There is nothing wrong with receiving customer feedback or gathering market intelligence in principle. After all, this can enable us to measure our performance against that of our competitors.

This information may enable us to survive in an extremely competitive marketplace, and respond more effectively to that competition. But this practice becomes problematic where it enables us to gain an accurate picture of our competitors' future strategy on the market and vice versa.

4.5 Guidelines

√ It is generally permissible to receive feedback on competitors (including a competitor's prices) from customers. For example, a builders' merchant or customer may volunteer that FP McCann's price is not the most competitive compared to others received. This is not problematic in itself. However, do not seek to verify the accuracy of that information with the competitor.

X It may be permissible to receive feedback on competitors from suppliers, however this can be problematic, for example where you may be taken to know that the competitor has provided the supplier with information in the knowledge that it will be passed to you, and vice versa. This should therefore be avoided where possible.

√ Where confidential or commercially sensitive information is received about a competitor from a third party and you refer to it in writing, you should also make reference to the source of the information.

√ Adopt the same approach where quotations are received from suppliers or clients that include references to prices charged to other competitors.

4.6 Trade Associations

Trade associations, working groups, industry councils and bodies or round table discussions can serve a useful and legitimate function. Such meetings are not of themselves anti-competitive and FP McCann has an important role to play in many such groups.

However, care should be taken because they can present an opportunity for discussions between competitors that stray beyond what is permitted, for example, discussions, or disclosures of data or documents, relating to confidential or commercially sensitive matters.

Even though FP McCann will wish to comply with competition law, others attending the meetings may take a different view. You must take care not to unwittingly become involved in other people's non-compliance.

Case study: Steel industry

The CMA investigated three trade associations for imposing terms on their members which restricted their commercial freedom and customer choice. This included a provision preventing them from offering certain terms (retentions) to their customers, in breach of the competition rules. The trade association subsequently agreed to amend its terms to ensure they were compliant.

4.7 Guidelines

When attending trade association meetings, you must follow the guidelines below:
You should:

√ Adopt a written constitution setting out the objectives of the trade association (to be reviewed by the Compliance Officer in advance).

√ Draw up an agenda for meetings and circulate to all members in advance of the meeting. Meetings must be open to all members.

√ Take accurate minutes of all meetings and circulate these to all members.

√ Discuss matters of general interest that are not confidential or commercially sensitive such as:

- the general merits of concrete pipe compared to plastic pipe and promotion of the same;
- market trends;
- best practice within the industry; and
- health and safety issues.

√ Ensure that no individual responses are circulated to members. Any data circulated centrally should be sufficiently historic, anonymised and aggregated to a sufficiently high level so that it cannot be reverse-engineered and attributed to any particular competitor

√ Seek advice from the Compliance Officer before any confidential information is disclosed to the trade association

√ Circulate a reminder of competition law Do's and Don'ts at the start of each meeting

√ Terminate discussions/leave a meeting if these guidelines are violated and promptly inform the Compliance Officer

√ Do contact the Compliance Officer if you have any questions or concerns

Do not:

X Discuss pricing, costs, margin, output, forecasts, sales business plans and other commercially sensitive issues (e.g. new research development, marketing strategies, projections etc)

X Allow, encourage, or participate in any breakout or 'shadow' meetings before or after the main meeting during which individual competitors exchange commercially sensitive information

X Publish, exchange or otherwise disclose any data which allows the practices or marketing behaviour of individual members to be easily identified including through any benchmarking exercises. Do not annotate such data with comments or observations

X Do anything to influence the conduct of a competitor (other than your normal, legitimate, commercial activities)

X Adopt any rules or recommend any conduct which could have the object or effect of preventing or distorting competition e.g. price fixing, market sharing

X Assume that you have to follow recommendations of the trade association or assume that others will

X Use ambiguous or grey language in minutes of meetings which could be in danger of being misinterpreted if read by competition authorities at a later date

4.8 Social Events

Social events involving contact with your competitors are a potential hazard as the same rules apply even if the contact is of a personal or social nature.

Case study: *Replica football kits*

In a competition case involving Allsports, Allsports held a golf day for those involved in the sportswear business. This was followed by a dinner at which Allsports' MD sat at a table with representatives of sportswear suppliers, including Umbro, Manchester United, Adidas and Nike. In the course of the dinner, Allsports' MD berated the "brands" for their treatment of Allsports in relation to discounting by other retailers, in particular the discounting of "statement products".

The Competition Appeal Tribunal observed that *"it shows a singular lack of awareness of the risks being run under competition laws if a group of competing suppliers are placed at the same table at a social function and the host, a retailer, then seeks to commence a discussion of retail prices with a view to limiting price competition by other retailers".*

4.9 Guidelines

You should therefore follow these guidelines in relation to your attendance at social events:

- Do not assume that because discussions may take place outside of an office environment that such conversations will not in future be the subject of incriminating evidence which may be used against the business

- Try and avoid attending functions where the attendees at a particular table are other third party competing suppliers. A simple seating plan may raise a presumption that potential common interest discussions took place and arrangements agreed on

- The informality of the function may mean that discussions can be over-heard and misinterpreted by other competitors (or potential competitors) or third parties
- It should be remembered that personnel in large businesses constantly change. Any discussions allegedly held on a "confidential basis" for "your ears only" may later come back to bite you when people move on to competing businesses or different customers

4.10 Competitor contact reports

Every time that you come into contact with a competitor at a formal or informal event, be it at a meeting, social event in the context of business or on a telephone call, please complete the Company's contact report form. This can be found on the CRM system.

This should be completed within **3 working days** of the contact taking place.

If you have any queries, then please telephone the Compliance Officer before completing your report.

5. SUPPLY ARRANGEMENTS WITH BUILDERS' MERCHANTS

5.1 Overview

As well as supplying directly to end-customers itself on the "spot market", FP McCann will also:

- Supply stock to builders' merchants on the basis of a recommended price list. The builders' merchants will in turn sell FP McCann's products to end-customers; and

- Supply products to a builders' merchant under a 1-2 year "term deal" for a specific customer (such as Balfour Beatty, Carillion, Costain or Morgan Sindall) where the price is agreed upfront between FP McCann and the end-customer.

5.2 Resale price maintenance

It is illegal for FP McCann to directly or indirectly fix the price level at which a builders' merchant will resell FP McCann's products. This is known as **resale price maintenance** (RPM).

Therefore, where FP McCann has not agreed a price upfront directly with the end-customer (as it does on "term deals" or with direct-to-site goods) and, FP McCann instead supplies stock to the builders' merchant for the merchant to on-sell to the end-customer as the merchant sees fit, you must follow these guidelines:

Do not agree with the builders' merchant that:

X It will resell the products to end-customers at a particular price

X It will resell the products to end-customers above a minimum level

X It may not discount the products or may not grant discounts of more than a certain amount when reselling the products to end-customers

You may however:

√ Recommend resale prices or RRPs to; or

√ Impose a maximum resale price on;

the merchant in relation to FP McCann's products

Indirect RPM is also illegal. This can take many forms, for example:

X Agreements fixing the builders' merchant's margin

X Linking the resale price of FP McCann's products to the resale prices of competitors

X Threats, intimidation, warnings or penalties where a level of resale pricing is not respected by a builders' merchant (i.e. discouraging discounting)

X Delaying or suspending deliveries, or terminating contracts, if a given level of resale pricing is not observed by the builders' merchant

X Making the grant of rebates or reimbursement of other costs subject to the builders' merchant reselling at a particular price level

5.3 Other trading terms

As well as the price at which you are supplying to a builders' merchant, you also need to consider on what terms you are supplying to it.

Agreements on other trading terms are **generally** permissible under UK/EU competition law provided that:

- FP McCann's share of the relevant market is not material (30% or less);
- The builders' merchant's share of the relevant market is not material (30% or less);
- The duration of the arrangement is short (for a fixed term of 5 years or less);
- The agreement does not involve any element of RPM or other restrictions which are anti-competitive.

This applies to the following arrangements with builders' merchants:

- A requirement that the builders' merchant will source its stock exclusively from FP McCann
- A requirement that the builders' merchant stocks FP McCann's full-range of products;
- A requirement that the builders' merchant will purchase a minimum volume of stock from FP McCann
- Agreeing that FP McCann will be the preferred supplier to the builders' merchant
- Incentivising the builders' merchant through a discount/rebate scheme to concentrate its purchases with FP McCann
- Agreeing that FP McCann will supply to the builders' merchant exclusively

Even if either party's market share thresholds are more than 30%, or the agreement is longer than 5 years, this **does not mean that the agreement is automatically illegal.** Instead, **legal advice should be sought** before entering the agreement as there may be an objectively justifiable and pro-competitive reason for it. The agreement must not however contain any "hard-core restrictions" (i.e. price-fixing, bid-rigging or market-sharing restrictions).

5.4 Active/passive sales restrictions

FP MCann cannot generally restrict the end-customers to whom builders' merchants sell its products.

However, provided that the 30% market share thresholds above are not exceeded, it is possible for FP McCann to prevent a merchant from "actively" selling to an end-customer where FP McCann has decided that either:

- FP McCann will itself exclusively supply to that end-customer directly; or
- FP McCann has appointed another merchant to exclusively supply to that end-customer.

"Active sales" in this sense means actively approaching end-customers including visits and the sending of unsolicited e-mails.

Notwithstanding this, FP McCann **cannot** prevent builders' merchants from generally selling products via the Internet or responding to unsolicited requests from end-customers seeking to purchase product from them (known as **"passive sales"**).

(There are further rules on Internet sales – please seek legal advice in this regard).

5.5 Competing for term deals with builders' merchants

FP McCann also supplies products to builders' merchants under 1-2 year "term deals" for a specific customer (such as Balfour Beatty, Carillion, Costain or Morgan Sindall) where the price is agreed upfront between FP McCann and the end-customer.

FP McCann's general policy is to actively compete for **all** term deal opportunities which arise. It should not discuss or agree with competitors which builders' merchants they will each supply to.

Remember, in these situations:

√ You may have certain builders' merchants who you prefer to deal with (this is fine provided that you are not dominant and this decision has been taken by FP McCann unilaterally)

√ You may offer different builders' merchants different terms of supply or prices (provided that you are not dominant – see section 7 below), for example, based on the extent to which the merchant stocks FP McCann's products or based on the likelihood of FP McCann winning the term deal (i.e. where there is little or nil chance of success you may not wish to submit a price)

√ You should make it clear in any internal or external communications that the decision has been taken independently by FP McCann

X Do not discuss or agree with a competitor as to which builders' merchants you will each supply to (as this would be customer-sharing or market-sharing)

X Do not threaten or decide not to use a particular builders' merchant for a term deal because you do not agree with their pricing strategy, for example, where they are discounting your stock on resale (as this would be RPM – see above)

X Do not decide to not compete for a term deal because you are concerned that a competitor may retaliate and "steal" a customer from you (tit-for-tat behaviour)

6. CROSS-SUPPLY ARRANGEMENTS WITH COMPETITORS

In some circumstances, FP McCann may need to purchase products from a competitor. Any such arrangements with competitors must be for legitimate reasons (for example, FP McCann is unable to supply to a particular geographic location) and be performed on an arms' length basis.

Any information provided to a competitor in their role as a customer must be limited to that strictly necessary to perform the cross-supply arrangement and should not be part of a wider customer or market-sharing arrangement.

Example 1: *Stanton Bonna is a customer of FP McCann for pre-cast drainage products. It also competes with FP McCann to supply pre-cast concrete drainage products.*

Stanton Bonna's civil engineering division places an order for pre-cast drainage products from FP McCann, as Stanton Bonna's pre-cast drainage products division has insufficient capacity to meet an order from one of its customers.

Answer: *Where FP McCann quotes a price for pre-cast drainage products to Stanton Bonna, FP McCann should make it clear that this information is being provided purely in the context of Stanton Bonna's civil engineering division being FP McCann's customer and should not be shared with Stanton Bonna's pre-cast drainage products division.*

Example 2: *FP McCann and Stanton Bonna both supply 450 pipe.*

One day, FP McCann receives an order from Stanton Bonna for a load of 450 pipes. FP MCann learns that the order has been placed as one of Stanton Bonna's machines has broken down and it will take 2 weeks for Stanton Bonna to receive a replacement part.

Can FP McCann take this information into account when FP McCann quotes another of its customers for an order of 450 pipe the next day (including increasing FP McCann's quote (as it knows that one of its competitors will not be able to fulfil the order in the short-run)?

Answer: *Yes, FP McCann is entitled to unilaterally act on this information as it is "market intelligence" as this has been received in the context of FP McCann supplying 450 pipe to a customer (which just happens to be Stanton Bonna). This is provided that there is no understanding reached with Stanton Bonna on the price that FP McCann will quote to the new customer.*

Example 3*: The civil engineering division within the FP McCann group needs to purchase ready-mix concrete (RMX) in order to fulfil a customer order. FP McCann's RMX division cannot supply it for geographic reasons. The civil engineering division therefore approaches Company A and receives a quote from it.*

Can the civil engineering division check with the RMX division to bench-mark whether the quote received from Company A is reasonable?

Answer*: Yes, as this is essentially market intelligence that the civil engineering division has received in its capacity as a customer of Company A. This is provided that there is no understanding with Company A that the civil engineering division will be passing this quote onto FP McCann's RMX division. This information should also be provided on an anonymous basis so that the name of Company A cannot be identified by the RMX division.*

In addition, any written correspondence on the matter between the two divisions should make it clear that the quote (from Company A) has been obtained by the civil engineering division in its capacity as a customer (of Company A).

7. ABUSE OF MARKET DOMINANCE

**Companies which have a so-called "dominant position"
are prohibited from using their market power in an anti-competitive way**

7.1 When is a company dominant?

Market dominance arises where a business is able to behave independently of its competitors and customers.

As a "rule of thumb", a market share of 40% or more is generally a strong indicator of dominance, but this is not the only basis for establishing dominance. The key test is whether the supplier has a "must have" product or service or there are hardly any alternatives.

Dominance is not in itself unlawful – the competition rules only prohibit a company from abusing its dominant position.

A dominant company owes additional legal duties towards its competitors and customers. Generally, a dominant company should be fair in its dealings with all other players in the market and should not adopt strategies deliberately designed to drive or keep out competitors out of the market or to exploit its customers. For example, a dominant company cannot engage in pricing which is, for example, either excessive (too high) or predatory (too low with the intention of driving out a competitor).

7.2 How does this apply to FP McCann?

7.2.1 FP McCann as a supplier

In order to determine the relevant geographic and product market on which a company may be dominant, the UK/EU competition authorities would start by looking at the relevant product, together with any substitutes for it. This is on both the demand-side (from the perspective of the end-customer buying the product) and on the supply-side (from the perspective of a supplier switching production to start making it). The extent to which switching would take place geographically would also be considered i.e. how far would the customer travel to buy the product

In previous cases, although the CMA has not come to a firm conclusion, the CMA has considered the market to be wide to include the **supply of all drainage products** which would include plastic, clay and concrete products.

Therefore, even though FP McCann's market share for pre-cast *concrete* drainage products is high, it would face competition from substitute products such as *plastic* drainage products. This suggests that the relevant market is wider than pre-cast concrete drainage products. On a wider market definition, FP McCann's market share is well below 40%.

FP McCann is therefore unlikely to be dominant on any relevant market for competition law purposes. As competition law analysis is dynamic, this should be kept under review.

7.2.2 FP McCann as a customer

In addition, the rules on abuse of dominance may be *used* by FP McCann as a negotiating tool in commercial negotiations.

FP McCann could challenge the behaviour of (potentially) dominant suppliers to FP McCann, for example, where the supplier is:

- Refusing to supply a product or service to FP McCann;

- Supplying the product or service to FP McCann at a price that is excessive and/or significantly more than the price it is being provided to FP McCann's competitors; or

- Imposing unrelated conditions in order to supply the product to FP McCann e.g. requiring FP McCann also to take supplies of other products or services.

If you have any questions about how FP McCann could use the competition rules to challenge suppliers in this way, **please seek legal advice.**

8. GENERAL ISSUES

8.1 Think before you speak

When speaking to a competitor, do not reveal, or discuss revealing, any commercially sensitive information about FP McCann.

Remember, competition law can be breached at social events, e.g. golf days and industry dinners.

- If a competitor does share commercially sensitive information with you, you must "actively distance" yourself in the following way:
  - (a) Stop the discussion immediately
  - (b) Explain that the information should not have been shared and that it may breach competition law
  - (c) Make a note of exactly what was said
  - (d) Inform the Compliance Officer
- Do not assume that, just because you are not taking a note of the conversation, your competitor is not doing so, perhaps after the event. Competitors might take a note to protect their interests and subsequently report the conversation to a competition authority.
- Personnel in large businesses constantly change. Any discussions held allegedly on a "confidential basis, or for "your ears only", may later come back to bite you when people have moved on, for example, there may be an internal e-mail giving details of your conversation.
- Do not assume that, because discussions may take place outside of an office environment, that such conversations will not in future be the subject of incriminating evidence.

8.2 Creating documents

Many documents are likely to be scrutinised during an investigation by the competition authorities. Communications internal to FP McCann are just as likely to be scrutinised as external correspondence. This will include diaries, telephone call records and personal notebooks. It includes also information recorded in any form, such as computer records, databases and e-mails.

Take care with the language you use in all business communications, whether written, in meetings or over the telephone. Careless language can make a perfectly legal activity look suspect.

X Avoid any suggestion that an "industry view" has been reached on a particular issue

X Do not use "guilty vocabulary" (e.g. "please destroy/delete after reading")

X Do not speculate about whether an activity is legal or illegal

X Do not write anything which implies that prices are based on anything other than FP McCann's independent business judgement

√ State clearly the source of any pricing or other commercially sensitive information (so it does not give the false impression that it came from discussions with a competitor)

√ Keep accurate notes of all meetings with competitors

√ If you think it might be a sensitive area, seek legal advice first

√ If you seek legal advice mark your document "LEGALLY PRIVILEGED: REQUEST FOR LEGAL ADVICE" and store this separately from other correspondence

Avoid e-mails like this…

"…this is a great initiative that you and Neil have instigated!!!!!!!!! However, a word to the wise, never ever put anything in writing, it's highly illegal and it could bite you right in the arse!!! Suggest you phone Lesley and tell her to trash? Talk to Dave. Mike"

This email was relied on by the CMA in its fining decision against Hasbro, Argos and Littlewoods for price-fixing.

8.3 Document Retention

Always comply with FP McCann's document retention policies.

You must not destroy documents or records because you think they contain damaging information.

This will damage FP McCann's standing with the CMA should it come to light in a future investigation, and could also lead to additional penalties being imposed on the company and personal criminal liability for individuals.

You should also bear in mind that:

- Deleted e-mails can almost always be recovered from the main server or the hard drive of a PC
- Destroying a document may not prevent its discovery, as there may be more than one copy (e.g. at a competitor's offices)

If FP McCann is investigated by a competition authority, please note that the destruction of documents can have very serious implications for the individual concerned – all document retention policies are suspended in the event that FP McCann is investigated.

Case study: *Replica football kits*

A key piece of evidence against Allsports was the diary of its Managing Director which included entries such as "arrange sports trade cartel". The diary had not been produced to the CMA apparently because it was not thought "relevant". When it was finally produced before the Competition Appeal Tribunal, attempts had been made to obliterate incriminating entries with a biro and in some cases with a black marker pen.

The CMA sent the diary for forensic examination, which revealed the content of the incriminating entries. The Tribunal made a point of stressing the importance of this piece of evidence in its findings against Allsports. Allsports was the **only company to have its fine increased** by the Tribunal in this case

DO'S AND DON'TS IN THE EVENT OF A DAWN RAID

The Competition and Markets Authority (CMA) have the power to mount **civil** dawn raids where they suspect the competition rules have been broken.

The CMA and Serious Fraud Office (SFO) also have power to raid where individuals are suspected of having committed the **criminal** cartel offence.

For more details on what to do in the event of a dawn raid, please consult the separate **Dawn Raid Manual. In the event of any queries, please call the Compliance Officer.**

Here are some of the key things to remember on the day of a raid:

√ Do follow the instructions of senior management and external lawyers on the site – they are there to help you

√ Be courteous and co-operative to the competition authority officials e.g. by allowing access to rooms, cupboards and desks and producing on request relevant documents

√ Do continue working as normal

√ Do seek legal advice from the attending lawyers before answering any substantive questions – you can however answer simple factual questions (e.g. where is the photocopier?)

X Do not destroy/delete/conceal any document etc, however routine – FP McCann's usual document retention policy will be immediately suspended

X Do not discuss the visit with colleagues on the premises (conversations at the coffee machine could easily be overheard by the officials)

X Do not tip-off! i.e. discuss the visit with colleagues located at the premises of other companies or with anyone outside the group. The officials may demand at a later date to see phone records from the day of the raid, looking for evidence of contact between cartel participants. Any evidence of tipping off may attract a significant increase in any eventual fine for the substantive infringement.

X Do not disclose legally privileged material to the competition authorities – ask the attending lawyers if you are in doubt

Pinsent Masons LLP