

STM (International Association of Scientific, Technical and Medical Publishers)

Competition and Antitrust Compliance Policy

April 2024

## Foreword

At STM we support our members in their mission to advance trusted research worldwide. Our more than 140 members collectively publish 66% of all journal articles and tens of thousands of monographs and reference works. As academic and professional publishers, learned societies, university presses, start-ups and established players, we work together to serve society by developing standards and technology to ensure research is of high quality, trustworthy and easy to access. We promote the contribution that publishers make to innovation, openness and the sharing of knowledge and embrace change to support the growth and sustainability of the research ecosystem. As a common good, we provide data and analysis for all involved in the global activity of research.

To achieve these goals, it is essential that STM and its members collaborate and exchange information and experiences, but we must conduct these exchanges in compliance with the spirit and letter of competition and antitrust laws. It is the policy of STM to comply with all applicable competition and antitrust laws both substantively and with respect to the appearance of our collaborations, since appearances of improper behavior can constitute adequate basis for government enforcement agencies or private plaintiffs to instigate legal proceedings. Compliance is the responsibility of all STM members, officers, staff, and consultants. Good faith, fairness, and respect for the rule of law are tenets by which STM operates. This policy does not constitute legal advice, but it seeks to provide some general information, along with some high-level dos and don'ts, to help STM stakeholders understand and act in accordance with competition and antitrust law.

We thank you for your attention to this policy so that STM can continue to undertake its work to serve our member publishers.

**Caroline Sutton** 

Carlin Sur

CEO

April 2024

# **Introduction and Objective**

STM is compliant with all relevant laws, including competition and antitrust laws. The goal of competition and antitrust laws is to promote fair competition, which is a goal that STM champions. As a trade association, STM plays an important role in promoting its members' interests. By the same token, STM understands the gravity of its role as a convenor of its members, who are competitors in the marketplace, and seeks to ensure that neither it, as an association, nor its members, individually, engage in anti-competitive behavior or activities. The purpose of this Policy is to help ensure that all STM members are aware of their own obligations when interacting with STM and with each other. It highlights some examples of behavior that are unacceptable under competition and antitrust laws, and also highlights some examples of behavior that are generally acceptable.

Any legal case will depend on the specific facts and circumstances. Assessments of behaviors in light competition and antitrust laws, in particular, are highly dependent on the circumstances at hand, such as market structure. As such, this Policy does not constitute legal advice. It aims to provide some general guidance and serves the corollary purpose of informing STM's members that vigilance of competition and antitrust laws rests both with STM, as a trade association, and with individual STM member publishing houses.

# Competition and Antitrust: The Basics and the Relevant Legal Frameworks

While some competition and antitrust regimes, such as those applicable in the European Union, are harmonized, they are often domestic in nature. Most countries refer to "competition" law, while the United States refers to "antitrust" law. Each jurisdiction maintains its own body of law and, depending on the set of facts, more than one jurisdiction's laws could be applicable to a given situation. Because STM is an international trade association, this policy will describe the legal discipline generally, while noting that individual countries' (or supranational unions') laws have broad similarities and occasional important differences.

These bodies of law broadly prohibit competitors from restraining competition among themselves with respect to price, quality, or distribution of any products or services, by abusing a dominant market position or coordinating market behavior in an anti-competitive manner. These laws also forbid competitors from acting jointly to restrict the competitive capabilities or opportunities of their competitors, suppliers, or customers. Certain practices are, under these laws, categorically (or "per se") presumed to be unreasonable and are thus considered illegal. Such illegal practices include entering into or facilitating any agreement among competitors a) on prices or fees charged to customers; b) on distribution, or sales practices, or territories; c) refusing to use or purchase a particular product, or d) refusing to patronize a particular service provider.

These illegal agreements do not need to be formal or even memorialized in writing. They can be informal and understood by way of conversation, where the course of discussions among competitors or even when their mere conduct (in the absence of actual correspondence) forms the basis for antitrust enforcement agencies or private plaintiffs to allege a that a collective decision has been made. Other anticompetitive activities need to be scrutinized more closely before they are deemed illegal; in the United States, for example, a "rule of reason" analysis will apply. The cornerstone of this analysis is whether the challenged activity, on balance, promotes or suppresses competition.

Trade associations across the globe have a long history of providing valuable, procompetitive, and entirely lawful benefits by way of promoting economic development and consumer welfare. That said, because trade associations provide a forum for competitors to interact with one another, and therefore potentially reach the type of prohibited agreements described above, it is especially important that the association and its members commit to learning about competition and antitrust laws and remain vigilant about red flag behavior that could jeopardize the positive relationships we build and maintain. It is thus vital that all meetings and activities of STM be conducted so as to avoid even the appearance of improper conduct. STM Counsel should be consulted in advance of undertaking any activity that raises potential competition or antitrust law concerns.

If at any time during the course of any meeting or activity, an STM staff or member believes that a sensitive topic under competition or antitrust laws is being discussed, or is about to be discussed, he or she must alert the relevant individuals, attempt to cease the problematic discussion, and leave the discussion if it continues (ideally ensuring that the objection and departure have been captured in meeting notes). Voicing concerns of this nature is vital. All such events and circumstances must be documented and reported to STM Counsel. Observance of these laws and practices is the joint responsibility of all STM staff and membership.

# **Special Considerations for Trade Associations**

As mentioned above, trade associations across the globe are generally understood to bolster competition or at least to operate in a neutral manner which neither benefits nor hinders competition. As the U.S. Federal Trade Commission notes:

Most trade association activities are procompetitive or competitively neutral. For example, a trade association may help establish industry standards that protect the public or allow components from different manufacturers to operate together. The association also may represent its members before legislatures or government agencies, providing valuable information to inform government decisions. When these activities are done with adequate safeguards, they need not pose an antitrust risk. <sup>1</sup>

<sup>&</sup>lt;sup>1</sup> United States Federal Trade Commission, Spotlight on Trade Associations, <a href="https://www.ftc.gov/advice-guidance/competition-guidance/guide-antitrust-laws/dealings-competitors/spotlight-trade-associations">https://www.ftc.gov/advice-guidance/competition-guidance/guide-antitrust-laws/dealings-competitors/spotlight-trade-associations</a>.

But because the activities of trade associations necessarily convene horizontal competitors, there are also inherently more opportunities for anticompetitive behavior to occur. Trade associations, despite their probable pro-competitive activities, do not enjoy anything like blanket immunity from competition and antitrust scrutiny by government agencies or private litigants.

In the context of general advice, associations of undertakings may not disseminate information about prices, market divisions, customers, or other competitively sensitive information. Recommendations by an association of undertakings on components of prices, such as whether or not to apply discounts, advice on minimum required margins and maximum prices, and recommendations on pricing increases, constitute prohibited pricing recommendations. That said, calculation schedules, drawn up by an association of undertakings, which only show which items and factors are important in calculating prices, do not restrict competition. Such schedules leave sufficient freedom for a company to determine its own commercial policy and pricing and do not eliminate the normal uncertainty about market behavior.

Likewise, when a trade association undertakes a data gathering exercise from among its members, those exercises must be focused, on a highly aggregated level, and should be aimed at providing insight, transparency, and information on trends. It should never be characterized as guidance or advice on commercial policy or pricing. For example, a highly aggregated set of data is unlikely to be usable to deduce pricing strategies or even pricing averages for individual types of products. Similarly, so long as competitors are unable to draw conclusions (even by deduction or extrapolation) upon which they might base their commercial policy and pricing strategy, a trade association has room to provide its members with aggregated information, and the association generally has an opportunity to remove or obfuscate any data, already collected, that could lead to anticompetitive activity, as outlined above.

### Takeaways

Trade associations, like STM, have the privilege of convening their members to help steer and offer support and guidance to their respective industry members. With that privilege comes the responsibility to ensure that STM staff and STM members understand their responsibilities with respect to competition and antitrust laws. Breaching these laws can cause dire financial and/or reputational harm to the trade association itself, in addition to individual members of the association. STM will not tolerate any kind of retaliation against members who come forward with concerns about behavior that potentially runs afoul of competition or antitrust laws. STM requests that all its officers, staff, and members keep the following in mind:

#### Meetings

- Meetings of any STM committee, forum, or group must benefit from an agenda that is circulated in advance of the meeting.
- Any meeting must be documented by way of aide-mémoire (minutes) and that
  document should then be approved by the relevant committee, forum, or group, in
  due course, usually at the next regular meeting of that set of individuals.
- The Chair or leader of any meeting, when relevant, must read aloud a set of guidelines outlining that a) STM complies with competition and antitrust laws; b) anyone present who has concerns with respect to such laws should object to any conversations that touch on sensitive information or exchanges; and c) instructs those individuals to leave those conversations if their objections are not addressed. A sample pre-meeting guideline paragraph can be found below.

## **Conduct**

- STM members should not contact competitors to exchange individual, confidential, current or recent information on sales, prices, figures on planned production, discounts, terms of business, or contractual terms directly with a competitor.
- STM members should not discuss supply arrangements with a competitor to better understand prices in the market or to understand the prices of materials that both purchase to conduct business.
- STM members should not share or allocate markets between competitors in respect of territories, lines of business, products, customers, or sources of supply.
- STM members should not share or receive from competitors specific and detailed information about prices, rebates, discounts, supply chains, profit margins, cost structures, calculation practices, distribution practices, market shares, territories, customers, figures on planned production, or other sensitive information during any STM meetings, or otherwise.
- When gathering information to support STM positions with respect to proposed legislation or regulation, STM members should adhere to the rules above. However, in certain circumstances, when it would be beneficial to provide a holistic view of the industry, certain information may be gathered, under appropriate procedures, e.g., by way of a voluntary survey, and it may be presented by STM in proper aggregate form without disclosing individual members' information.
- STM and its members, when working on such projects to share information among competitors, must ensure that shared data is historical (not current); that data with relevant competition parameters is sufficiently obfuscated (for example by presenting rough indications, rather than hard data points); that data comes from a sufficient number of sources (such that the data could not be reverse engineered to gain an understanding of any individual competitor's information); and that shared

statistics are sufficiently aggregated such that no participant could discern the data of any other participant.

Individual Houses should consider adopting a competition and antitrust policy of their own. This STM Policy does not substitute for individual Houses' compliance with the law.

### <u>Language to be read aloud prior to meetings of STM committees and forums:</u>

STM is committed to complying with applicable Competition and Antitrust Laws. If a discussion occurs that any member believes involves competitively sensitive information or might raise issues under applicable laws, that member should interrupt to point out their objections and to request that the conversation cease and leave the meeting if it does not.

### Language to be read aloud prior to STM webinars:

STM is committed to complying with applicable competition and antitrust laws. Please refrain from disclosing or asking about competitively sensitive information. If a panelist or audience member believes any such information is being disclosed or sought, that individual should interrupt to point out their objections and to request that such activity be stopped and leave the webinar if it does not.

# <u>Informational Links</u>

U.S. Department of Justice list of links to country-specific competition agencies: <a href="https://www.justice.gov/atr/antitrust-sites-worldwide">https://www.justice.gov/atr/antitrust-sites-worldwide</a>.

European Commission competition rules: <a href="https://commission.europa.eu/business-eu/competition-rules">https://commission.europa.eu/business-eu/competition-rules</a> economy-euro/doing-business-eu/competition-rules en

OECD Recommendations and Best Practices on Competition Law and Policy: <a href="https://www.oecd.org/competition/recommendations.htm">https://www.oecd.org/competition/recommendations.htm</a>