

ECSDA Competition Law Compliance Policy

PRELIMINARY

This competition law compliance policy (the “Competition Policy”) was adopted by the ECSDA Board after due and careful consideration on 30 September 2021, and a copy was circulated to all the members of ECSDA (the “Members”).

INTRODUCTION

ECSDA plays a critical role for the European Central Securities Depository industry. Its activities result in important benefits for its Members and their customers. For instance, given its exchanges of best practices, industry research studies and joint discussion with European and Global authorities, ECSDA promotes market developments, innovation and corporate social responsibility. The ECSDA activities are aiming supporting Central Securities Depositories in enhancing safety and efficiency of financial markets, including by developing views on the requirements that can be supportive of these objectives, agreeing on common standards at an international level and a harmonised way of implementing those.

ECSDA regularly circulates reminders on competition law policy and, as a minimum, organises competition law sessions after the election of new Board members for their new mandate every 3 years. It promotes a culture of attention to competition law among its Members.

COMPLIANCE CULTURE

Compliance with competition law is of primary importance to ECSDA. As such, ECSDA aims to comply with all applicable competition laws in the relevant jurisdictions of the Association’s activities, including but not limited to such laws and regulations enacted in the European Union. This Competition policy is particularly inspired by Articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU). The TFEU Articles and their interpretation are provided in the Annex to the Policy.

The Board recognises that breach of competition law could expose ECSDA and/or its Members to the risk of heavy fines, court orders, significant costs and reputational damage. Members and individuals may also face criminal sanctions based on the investigations of relevant national authorities. This is why failure to comply with competition law or with this Compliance Policy is a serious matter. Non-compliance with this Policy by any Member may result in a reconsideration of Member’s membership within the Association.

PROHIBITED AGREEMENTS & UNDERSTANDINGS

For competition law purposes, decisions or recommendations of trade associations are treated as agreements between its Members. Competition law may be breached even when the decisions or recommendations of trade associations are not binding on the Members.

ECSDA does not serve as a forum for market coordination of its members on commercial policies and avoids discussing commercially sensitive information.

Members shall not pursue within any ECSDA forum to discussion in relation to any of the following matters:

- i. Agreements with the object or effect of fixing prices, restricting discounts or rebates;
- ii. Agreements limiting output or production, allocating markets or customers;
- iii. Agreements to exchange current and specific information on price, costs and other commercially sensitive information¹;
- iv. Collective boycotts or other coordinated measures intended to eliminate competitors; and
- v. Coordinated measures that slow technical development or otherwise exploit markets.

Article 101(3) TFEU provides for an exemption to the above-mentioned prohibition, where it improves the distribution, the product(s) or service(s) and benefits to consumers (detailed text of exemption is provided in the Annex to the Policy). Most common cartel practices (e.g. price fixing, customer allocation, market sharing) are not exemptible.

PREVENTIVE MEASURES

To limit situations where competition law issues may arise, the Secretariat will ensure a pre-screening process of the agendas of the Association's meetings. The control will be evidenced, by a statement put on an agenda when it is reviewed from a competition law perspective and approved either by the ECSDA Chairman of the Board – for General meetings, Board and Executive Committee, or by the Secretary General – for the working groups and other events where a competition law concern may arise.

The Competition policy will be part of ECSDA internal procedures circulated to the ECSDA Board Directors applying for the position and annexed to the Working Groups' Terms of Reference.

WHAT TO DO IF A COMPETITION LAW CONCERN ARISES?

ECSDA Members acknowledge the ultimate importance of avoiding any discussion (or action) on price fixing, production limitations, market allocation, exchange of sensitive information or other which have as their object or effect to prevent, restrict or distort competition.

Should an ECSDA Board Member, Secretary General, Employee, Contractor or Member of ECSDA working groups or other committees perceive that a discussion or an action may have as objective or effect to distort competition between Members, or between clients of Members, or between ECSDA and other trade associations, their duty is to:

- i. intervene in the discussion by explaining the reasons for their competition law concern and, if needed, asking to stop the conversation;
- ii. if other Members do not share their point of view, participants are free to leave the discussion or decide not to participate in the activity;
- iii. they are asked to inform the ECSDA Chairman of the Board and/or the ECSDA Secretary General (in writing) who will consider the follow-up actions with regard to the incident and will keep Members aware of those. The reporting individual or company will not be disclosed publicly, unless consenting, and protected as a whistle-blower.

¹ Secretariat and Members should consider competition law matters amongst others when collecting or providing data. For more information on the competition law points of attention in that context, please see Annex I point C.

ANNEX I

AREAS OF SPECIFIC RELEVANCE TO ECSDA

A. Terms of Membership within ECSDA

Rules on admission of Members to ECSDA are transparent, proportionate, non-discriminatory and based on objective standards documented in Article 5 of the ECSDA Articles of Association, its by-laws² and Board decisions.

The procedure for expelling Members is described in Article 8 of ECSDA Articles of Association. The decision should be based on reasonable and objective grounds.

B. Commercial Negotiations

ECSDA should not engage in joint buying or selling on behalf of Members. Coordination on buying and selling is only permissible in competition law when the combined market share of the parties is very low.

ECSDA may engage in discussions on behalf of its Members that are merely consultative or that do not involve negotiation on the parameters of competition such as price or quantity.

ECSDA can engage in buying products and services that are of interest and use to its members on its own behalf.

C. Data Collection and Information Exchange

Information relating to the parameters of competition, such as price, capacity or costs should not be exchanged between Members unless it is sufficiently historic or aggregated.

ECSDA can however collect information on its members for the purposes of research, or studies about the role and importance of the industry, avoiding prices, costs and other commercially sensitive data. Exchange of historic data does not in principle breach competition law. The exchange of information which is already in the public domain or that does not relate to the parameters of competition is permissible.

D. ECSDA Members' Terms and Conditions

Issuing proposals of (parts of) terms and conditions may also affect competition by creating coordination on other elements of competition, reducing Members' ability or incentive to compete on non-price factors.

Standard terms and conditions that benefit customers (CSD participants), for example by making it easier for them to compare terms offered by Members, may be issued. But in no case must the standard terms and conditions be more restrictive than necessary to achieve a legitimate objective.

E. Discussions on Legislation, Standards and Codes of Conduct

Coordination activities of ECSDA (both as between Members and between ECSDA and other trade associations) are unlikely to raise competition law concerns to the extent that the sole object and effect of this coordination is the achievement of technical cooperation, the implementation of technical agreements or standards and regulations. Likewise, coordination that relates to the implementation of other standards will not usually infringe competition law, when no discussions on price, capacity or any other parameter of competition are discussed.

Similarly, the monitoring of compliance with standards or the analysis of the basis for possible harmonisation and standardisation is unlikely to cause competition law problems.

² <https://ecsda.eu/about-ecsda/governance>

Trade Associations are allowed to participate in discussions with Global, European and national Competent authorities. They can discuss their views on the national or international legislation, can issue joint position papers and participate in joint lobbying. ECSDA is a registered Association in the EU Transparency Register.

F. Coordination with other Associations on Terms of Membership

ECSDA must not coordinate with other associations or similar bodies where its members are present its membership fees, services offered to members or any other terms of membership liable to affect competition between associations. Discussions that take place between associations must avoid such commercially sensitive subjects.

ANNEX II

Excerpt from the Treaty on the Functioning of the European Union³ with regard to Competition law

Article 101 TFEU

1. The following shall be prohibited as incompatible with the internal 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 internal 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;
- (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.

3. The provisions of paragraph 1 may, however, be declared inapplicable in the case of:

- any agreement or category of agreements between undertakings,
- any decision or category of decisions by associations of undertakings,
- any concerted practice or category of concerted practices,

which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:

- (a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;
- (b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

Article 102

Any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be prohibited as incompatible with the internal market in so far as it may affect trade between Member States.

Such abuse may, in particular, consist in:

- (a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;
- (b) limiting production, markets or technical development to the prejudice of consumers;
- (c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
- (d) making 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 <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A12012E%2FTXT>

ANNEX III

Useful information in the context of EU Competition law rules

1) Which entities are under the scope of Article 101 TFEU?

- (i) Undertakings
- (ii) Associations of undertakings: groups of undertakings in various types of organisations, these include:
 - a. Federations
 - b. Trade Unions
 - c. Trade Associations

2) Agreement between undertakings, decisions by associations of undertakings and concerted practices

A) What qualifies as an ‘agreement’? Broad concept:

- (i) Written contracts, oral arrangements –
- (ii) Gentleman’s agreements / mutual understandings –
- (iii) Information exchange.

B) What qualifies as a ‘decisions by associations of undertakings’

Broad concept: key consideration is whether the object or effect of the decision, whatever form it takes, is to influence the conduct or coordinate the activity of the members.

C) Not only agreements, but also a ‘concerted practice’?

Practices which, whether with or without a formal agreement being concluded between the parties, are anti-competitive. Contact between companies whose intention is to either influence the conduct of the market or to disclose intended future behaviour to competitors. Three key components to a concerted practice: concertation; subsequent conduct on the market; and a relationship of cause and effect between the two.

3) Exemptions

Article 101(3) TFEU provides for an exemption to the above-mentioned prohibition, if the concerned agreement meets the following cumulative conditions:

- (i) it contributes to improving the production/distribution of goods or to promoting technical/economic progress;
- (ii) it benefits consumers;
- (iii) the restriction of competition is indispensable to the achievement of these objectives; and
- (iv) the restriction does not prevent competition in respect of a substantial part of the products in question.

4) Object and Effect?

Object: If there is an agreement that by its very nature harms competition, regardless of any negative effects on competition.

Effect: an analysis that entails a deep factual investigation of the market, the economic consequences of the action, and the effect of partitioning the market.