

# The Digital TV Group

## Competition Law Compliance Manual

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## 1. Introduction

The Digital TV Group (“DTG”) is committed to acting, and encouraging its Members to act, in compliance with EU and UK competition law. As the industry association for digital television and related technologies in the UK, DTG draws together organisations involved in the development and marketing of such technologies worldwide for the benefit of consumers, many of whom may be competitors of one another at various levels of the digital technology value chain.

Given that industry associations, such as the DTG, frequently hold meetings which involve detailed discussions between members (e.g. DTG Council, Technical Council and D-Book Working Groups), it is important that every effort is made to ensure that business and meetings are conducted properly and in a manner that does not give rise to unnecessary risks or the appearance of non-compliance with competition law.

This Manual provides a brief description of competition law (also known as “antitrust law”), outlines the types of conduct that are prohibited and provides guidelines for DTG Members to follow in order to ensure that the DTG acts in accordance with the requirements of competition law. It also highlights some of the recent enforcement decisions taken by the UK’s Competition and Markets Authority against other industry associations in the UK.

Whilst special emphasis is given to UK competition law in this Manual, EU competition law is also likely to be relevant given that many DTG Members are international businesses. For most practical purposes, UK and EU competition law can be regarded as the same. This Manual is not intended to provide a complete list of potential competition law problems, nor is it a “do-it-yourself” lawyer’s course. Nevertheless, in order to protect DTG and its Members, the Manual does outline the way in which DTG intends to conduct its business and meetings and Members are required to adhere to the provisions detailed in this Manual when engaging in DTG business and meetings.

## 2. DTG’s Policy Statement on Competition Law Compliance

**It is the policy of DTG to:**

- **comply fully with the requirements of competition law and avoid even the appearance of unlawful conduct;**
- **provide periodic guidance regarding compliance with competition law to DTG Council;**
- **inform DTG Members that business and meetings of DTG will be conducted in accordance with competition law; and**
- **co-operate fully with all reasonable requests from government authorities for information and documents in connection with any investigation of conduct that may violate applicable competition laws.**

## 3. What is competition law?

Competition law is the set of laws governing market behaviour and designed to prevent the restriction of competition. The general purpose of such laws is to ensure that businesses, consumers and governments can obtain goods and services at the lowest possible prices.

Both UK and EU competition law prohibit:

- anti-competitive agreements; and
- the abuse of a dominant position.

This Manual focuses on the prohibition of anti-competitive agreements in the UK as this is likely to be a key concern for DTG.

### 3.1 *Anti-competitive agreements*

Chapter I of the UK's Competition Act 1998 prohibits agreements and concerted practices between and amongst undertakings and decisions by associations of undertakings which restrict, distort or prevent competition in the UK. Agreements amongst Members of DTG and decisions of DTG, for example relating to the specifications contained in the D-Book or the testing activities carried out through DTG Testing, will potentially come within the purview of Chapter I.

An anti-competitive agreement can take many forms. It need not be, and rarely is, in writing or the product of a formal meeting or communication. An anti-competitive agreement can be oral and vague and can arise out of a casual conversation. An informal "gentlemen's understanding" can be just as unlawful as a formal written agreement.

Since competition laws also apply to concerted practices, the companies involved need not actually reach an agreement to infringe competition law. A concerted practice might be found, for example, where one company "signals" to its competitors a future price increase and that company and its competitors then increase prices at, or about, the same time.

**When DTG Members take actions which are unilateral in nature, the best way to avoid any inference of concerted action is for them to make business decisions on the basis of independent judgement and commercial self-interest without prior discussion with third parties, such as competitors.**

The types of agreements and practices between competitors which are likely to be prohibited under competition law include those which directly or indirectly:

- fix the prices of goods or services (e.g. at a minimum level);
- limit or reduce competition in relation to products or services made available to customers;
- divide markets (e.g. by allocating contracts, customers or technologies);
- seek to boycott suppliers, customers or competitors (e.g. agreeing not to supply to or purchase from them); and/or
- impose other non-price terms or discriminatory conditions on, for example, customers or DTG Members (e.g. when applying rules on the admittance or expulsion of Members).

#### *Price agreement and communications*

An agreement or practice regarding price, i.e. "price-fixing," is the most serious violation and is the most common type of activity to raise competition law problems. As a general matter, price-fixing is considered to be so inherently wrong that no business justification for such an agreement or practice can save it from constituting a violation.

Unlawful price-fixing generally consists of any agreement or practice between competitors to "fix" or stabilize prices, i.e. to set prices within a general range or at particular levels (including floor or ceiling prices), whether those levels are higher, lower or the same as prices already being charged. It may also involve an agreement or practice to maintain a differential or "handicap" between prices charged or regarding the timing of pricing actions.

Price is a very broad concept, encompassing any element of pricing such as minimum prices, discounts, promotions, rebates, distribution charges, contract terms and pricing formulae. Any agreement, however arrived at, by which personnel of competitors coordinate any element of price, can be unlawful.

A recent example concerns the association of estate agents, which was fined by the CMA in April 2015 for allowing its estate agent members to enter into an agreement not to advertise their fees and discounts in a local newspaper. The CMA fined the association itself on this occasion, but indicated in the press release that where infringements take place within the context of a trade association, the members themselves can also be found to have breached the law.

#### *Non-price agreements and conduct involving competitors*

Other types of agreements and practices involving competitors that should be avoided include:

- dividing markets or allocating customers or technologies;
- agreeing other non-price terms and conditions to apply to customers or agreeing to apply discriminatory conditions;
- agreeing not to supply to, or purchase from, a third party; and
- enforcing supplementary obligations on parties to contracts which bear no relation to the subject of the contract.

#### *Information sharing*

The sharing of commercially sensitive information between competing DTG Members may give rise to competition concerns because it may be used to facilitate anti-competitive practices or it may dampen competition through reducing uncertainty as to rivals' business plans and strategies.

Commercially sensitive information is information that is of competitive value and is not already in the public domain. Such information includes (but is not limited to) current or future prices, costs, capacity, customer details, margins, marketing activities and strategic/business plans.

A recent example concerns the association for consultant eye surgeons, which was found in August 2015 to have facilitated the sharing of commercially sensitive information (in the form of future prices and other business intentions) amongst its consultant members. The CMA said this enabled the members to align their independent business conduct accordingly. A fine of £382,500 was imposed on the association.

**It is important to remember that exchanges of commercially sensitive information can arise in the context of any kind of discussion between DTG Members. For example, discussions between DTG Members as to the future direction of the digital television industry in the UK, along with DTG's place in it, could easily result in unlawful exchanges of commercially sensitive information as to Members' current or future plans.**

### *3.2 Abuse of a dominant position*

Chapter II of the Competition Act 1998 prohibits an abuse by one or more undertakings of a dominant position within the UK or a substantial part of it.

To the extent that DTG Members active in the same product markets have a combined market share of around 40% or more in all or part of the UK, it is possible that DTG and those Members will be considered to be collectively dominant. This means that decisions of DTG will be decisions that could potentially fall foul of the Chapter II prohibition. The kinds of behaviour that amount to an abuse under Chapter II are those that have the effect of excluding competitors or exploiting customers.

#### 4. Why does competition law matter?

The implications for DTG and its Member companies of breaching competition law are serious and may include:

- substantial fines of up to 10% of worldwide group turnover for the preceding business year (a fine can be imposed on both DTG and its Members);
- the agreement or decision which violated competition law will be void and illegal;
- DTG and its Member companies could be the subject of civil actions involving damages claims from third parties that have been affected by an infringement;
- investigations and any resultant legal proceedings would be extremely expensive and take up a lot of management time; and
- being found to have infringed competition law could have severe consequences on the reputation of DTG and its Member companies.

In addition, in some jurisdictions (including in the UK) criminal sanctions can be imposed on an individual / employee that has been involved in a competition law breach, including:

- an unlimited fine and imprisonment for up to five years; and
- if the employee is a director, disqualification as a director of any company for up to 15 years.

#### 5. Guidance on conducting DTG business

##### 5.1 General guidance

Members must not use DTG or DTG meetings or events to exchange information or data, or enter into an agreement with a competitor or multiple competitors, regarding:

- current or future prices or any component of such price, including discounts, promotions, or any other component;
- the processes or formulae by which prices are set;
- past, current or projected future performance, including revenues and market shares in specific markets or market segments;
- costs;
- current or future marketing or sales plans or promotions;
- business plans and strategy, including plans to enter or exit markets and output plans;
- allocation or division of markets, sales territories or customers; and
- relations with third parties, including any agreement not to do business with a third party or to restrict the amount of business done with a third party.

##### 5.2 Discussions at DTG meetings or events

If you are chairing or attending a DTG meeting, you must follow the current **Guidelines for Chairs of DTG meetings**, which include:

- circulate an agenda in advance and keep to the agenda;
- ensure that full minutes of the meetings are taken;
- retain copies of documents, records or data which are received or exchanged in meetings;

- if a Member starts to discuss or exchange commercially sensitive information:
  - ask him / her to stop the discussion and record this request in the meeting minutes;
  - if the discussion or exchange does not stop, ask the relevant Member to leave the meeting and record his / her departure in the minutes; and
  - if you are the Chair, remind attendees of DTG's policy to comply strictly with the requirements of EU and UK competition law when engaging in DTG meetings; and
  - report the issue to the DTG Council.

Do not assume that a certain practice or conduct is lawful because others have done it in the past or because it is industry standard.

If you are concerned that unlawful discussion or exchange of information has occurred at **any type of industry event or meeting**:

- do not continue with, or attempt to cover up, conduct which you are concerned may violate competition law;
- do not destroy any documents relating to the matter;
- keep records of all conversations concerning the matter; and
- report the issue to your legal advisor or, if it concerns another DTG Member or DTG matters, report the issue to the DTG Council.

### 5.3 *Guidance in relation to documents*

When you are creating DTG documents in any format (including emails, file notes, memos, presentations and business plans) you should comply with the following rules:

- avoid language which could imply competitor collusion or which could suggest secretive behaviour (e.g. *"competitor x is not complying"*, *"this is in accordance with industry agreement"*, *"please destroy after reading"*, *"this is for your eyes only"*);
- do not write anything that implies that DTG is used as a forum to discuss prices or reduce uncertainty in the market;
- do not speculate on or exaggerate the market strength of DTG Members (e.g. avoid using words such as *"dominate"* and *"monopolise"*);
- if you think the subject matter might be of a sensitive nature as regards competition law, speak to the DTG Council before committing it to paper; and
- documents created in connection with legal advice should be identified as such (e.g. *"prepared for the purpose of obtaining legal advice"*).

Regarding documents and data relating to DTG matters, please bear in mind:

- in connection with competition investigations and private lawsuits, companies are often required to locate and produce huge amounts of documents and data. In the event of such an investigation or lawsuit, DTG Members must preserve and maintain all documents and data that may be relevant. This applies even to documents and data that may be subject to automatic destruction or "overwrite" programmes or to policies requiring the destruction of documents or data after a certain period of time;
- it can be a criminal offence to destroy documents or data that are relevant to a competition investigation once an investigation has commenced. Therefore, please ensure that you do not

destroy or delete any such documents or data and take affirmative steps to exclude such documents and data from any automatic destruction programmes or policies; and

- DTG email must be used in respect of all business-related email from the DTG, except under circumstances where the DTG Business Continuity plan has been activated or where normal DTG email is unavailable. There is no DTG policy in place to delete business emails, which are retained indefinitely.

#### 5.4 *Guidance in relation to dawn raids*

Officials from a competition authority may call at your premises to investigate possible anti-competitive practices. They can do this if they have a reasonable suspicion of an infringement. In many instances, the suspicion will arise as a result of a tip-off, a complaint or a whistle-blower. The law obliges all organisations and individuals concerned to cooperate.

The following do's and don'ts are designed to help you at the outset of any such visit being made:

<b>DO</b>	<b>DON'T</b>
Immediately notify your legal advisers	Refuse admission or otherwise be obstructive to officials
Make a copy of the written authorisation or decision upon which the investigation is based and the identity document of each official	Tell anyone outside the company what is happening except your external lawyer
Ensure that a document preservation programme is activated (e.g. immediate block on deletion / sending of emails, no removal of any materials from the premises)	Hide, delete or destroy any records or materials
Answer questions if asked by officials. Keep a record of your answers	Volunteer more information than you are asked for
Make copies of all documents copied by the officials (and separate legally privileged documents)	Create any new documents relating to the investigation
Ensure officials are accompanied at all times	