NCVO AND BWB GUIDANCE PAPER ON
COMPETITION LAW FOR CHARITIES AND
SOCIAL ENTERPRISES WORKING TOGETHER
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NCVO/BWB guidance paper on competition law for charities and social enterprises working together

1. Introduction

1.1 The purpose of this paper is to highlight the extent to which the regulation of anti-competitive behaviour needs to be considered in relation to legitimate and appropriate collaboration by charities and social enterprises in the course of providing their public benefit objects. There are different ways that public benefit organisations (together “PBOs”) can collaborate without breaching competition law. We seek to explain that, to ensure compliance and to avoid competition law being perceived to be a barrier or obstacle to PBOs working together. In particular, the paper will emphasise the importance of PBOs not sharing commercially relevant information that would have the intent or effect of restricting price competition or otherwise restricting competition when those PBOs are carrying out competitive economic activities.

1.2 This issue arises for PBOs because, collaboration and cooperation in furtherance of their public benefit objects may take place within some form of competitive market. This could sometimes mean anti-competitive activity may inadvertently be present, or appear to be present and be overlooked. The important point is for there to be awareness of the regulatory requirements and effects of competition law, but not to be put off legitimate and appropriate collaborative engagement.

1.3 PBOs which collaborate do so to realise substantial social and economic benefits including improvements and innovation in the provision of goods or services to beneficiaries and, the general rationalisation of provision. In addition, a collaborative approach within public service markets can enable PBOs to bid for and deliver larger contracts whilst sharing risk and cost.

1.4 Competition law is a complex area and any case where it does have application could in practice require analysis of the relevant service, and the relevant market and the economic effects of any collaboration.

1.5 However, the basic requirements are that PBOs must not restrict markets by: revising prices to be fixed; dividing territories or customers, or otherwise limiting the free supply of services, which restrict competition to the detriment of consumers. Competition law mainly protects against purchasers of goods and services being disadvantaged by market restrictions in favour of suppliers.

1.6 To discuss any of the points raised in this paper in more details, please contact: Julian Blake (Partner and Joint Head of the Charity and Social Enterprise Department) and Thomas McNeil (Associate in the Charity and Social Enterprise Department), at law firm Bates Wells Braithwaite.

2. Competition law

Overview of competition law for collaboration

2.1 Competition law under applicable European and UK law (in common with comparable jurisdictions around the world), prohibits certain practices that will or may have the effect of...
reducing competition between competing ‘undertakings’. Whether a PBO is an ‘undertaking’ for the purposes of competition law will be discussed in more detail below. The law exists to prevent anti-competitive practices because it is considered axiomatic that competition between undertakings in competitive markets is of economic and social benefit. It prohibits price fixing, restrictive practices and monopolistic behaviour.

2.2 Competition law essentially works on the basis of balance between the undesirable effects of anti-competitive behaviour and the desirable effects of collaboration through setting principles and requiring interpretations of cause and effect by reference to those principles. There are clear cases where activities would be wrongfully anti-competitive (or at least be deemed to be so). There are others, provided by safe-haven exceptions to the general principles, where collaboration would not be challengeable. There is a significant interpretation zone in between where the particular factors and circumstances will need consideration. PBOs will naturally tend to operate in non-competitive circumstances, or, to the extent behaviour may be anti-competitive, where a pro-collaboration safe-haven will apply. They will rarely be at risk of hard core anti-competitive behaviour, such as deliberate price fixing. However, they will often fall into potentially risky territory where non-recognition of competition law principles could lead to wrongful behaviour and where proper negotiation of the principles will allow appropriate management of the issues and compliance with the law.

2.3 It is very important to realise that competition law does not just regulate actual restrictive or potentially restrictive agreements whether written or unwritten, but extends to any ‘concerted practices’ which may similarly be of restrictive effect, such as the sharing of information which will allow competitors to collude. Concerted practices are explained further below under paragraph 2.16.

2.4 It is equally important to realise that regulation is not limited to conscious or deliberate anti-competitive behaviour or actual anti-competitive effects. A concerted practice with the possible unintended effect of restricting competition could be unlawful.

The law

2.5 Under EU law, there are two important categories of competition law under the Treaty on the Functioning of the European Union that affect organisations directly: anti-competitive agreements under Article 101 and abuse of a dominant market position under Article 102.

2.6 Under Article 101, all agreements (formal and informal) between undertakings, or associations of undertakings, and concerted practices which may affect trade between Member States are prohibited if their object or effect is the prevention, restriction or distortion of competition within the internal market.

2.7 In particular, there are certain types of agreements which are considered to be serious breaches of competition law. In summary, these are agreements which directly or indirectly fix prices; limit or control production, markets, technical development, or investment; share markets or sources of supply; place trading parties at a competitive disadvantage by applying dissimilar conditions to equivalent transactions; or require a party to comply with an obligation which, by its nature, has no connection with the subject of the contract.

2.8 Article 101 can capture agreements that are both horizontal and vertical. The former relates to those agreements where organisations are at the same level of the supply chain, such as
the relevant organisations all being retailers. The latter relates to organisations at different levels of the supply chain, such as a wholesaler and a retailer. Vertical agreements are generally considered less likely to negatively impact on competition as compared to horizontal agreements. This is because an upstream organisation (such as a supplier of goods) will normally have an incentive not to impose unreasonable/restrictive terms on the downstream organisation (such as a retailer of goods) due to its reliance on that downstream party being commercially successful. Therefore unless a party in the supply chain has significant market power, vertical agreements are generally considered less problematic. Conversely, where parties are horizontal, and can compete with each other, there is an incentive to coordinate behaviour and agree restrictions by, for example, fixing prices or sharing markets so that prices can be increased to the consumer's detriment.

2.9 It is important to note that an agreement or practice (whether horizontal or vertical) that has the potential to affect competition under Article 101 may not actually be deemed to do so if it falls into one of the permitted exemptions. Of particular relevance is the general exemption under Article 101(3). An agreement or practice will not be deemed to breach Article 101 if it satisfies all of the following under Article 101(3):

(a) contributes to improving the production or distribution of a particular good or service; or promotes technical or economic progress;

(b) allows consumers a fair share of the resulting benefit;

(c) does not impose restrictions which are not indispensable to the attainment of those objectives; and

(d) does not eliminate competition.

2.10 There are further exemptions which may be available, for example vertical agreements may be deemed exempt from Article 101 if the parties’ combined market share does not exceed certain thresholds. This is provided agreements between do not seek to do things such as stipulating that the upstream organisation is permitted to set the prices charged by the downstream organisation (known as retail price maintenance); this is deemed a 'hard core restriction'. Each agreement, with an actual or potential restrictive effect, may need to be assessed on a case by case basis in order to determine whether an exemption is available.

2.11 Under Article 102, abuse by one or more undertakings of a dominant position within the EU or in a substantial part of it is prohibited in so far as it may affect trade between Member States. Such abuse may take the form of directly or indirectly imposing unfair prices or other unfair trading conditions; limiting production, markets or technical development to the prejudice of consumers; placing trading parties at a competitive disadvantage by applying dissimilar conditions to equivalent transactions; or requiring a party to comply with an obligation which, by its nature, has no connection with the subject of the contracts.

2.12 Competition law within only the United Kingdom largely mirrors EU competition law. However, the terminology varies slightly because UK competition law is only subject to agreements which may affect trade within the United Kingdom, not between Member States, and a dominant position is only by reference to a dominant position in the UK, not the EU.
2.13 This paper is mainly concerned with Article 101 and its UK equivalent which, in the context of PBO collaboration in the UK, is the area of competition law most likely to be relevant.

Other forms of competition law

2.14 This paper discusses competition law in the context of collaboration, rather than considering other distinct areas of competition law such as state aid (governing the extent to which EU states can provide grant aid or other subsidy within competitive markets) and public procurement rules (governing the principles of transparency and non-discrimination in public sector contract commissioning processes).

2.15 There is also a distinct area of competition law known as merger control. This paper does not seek to consider the impact of UK or EU merger regulation, which can under certain circumstances require merging parties to notify the Competition and Markets Authority or European Commission for clearance. Broadly speaking, merger regulation will apply in the UK where a merger between undertakings carrying out the same or similar activities passes a certain size threshold and involves the organisations in question ceasing to be distinct from each other and being brought under common ownership or control. This can in certain circumstances include establishing a joint venture.

Examples of anti-competitive practices

2.16 As mentioned above, an anti-competitive practice may exist as a result of an explicit agreement between parties. It can also develop as a result of informal co-operation between undertakings, which is referred to as a concerted practice such as sharing information without coming to a formal agreement to, for example, price fix.

2.17 Here we provide key examples to illustrate what the law is usually trying to prevent:

2.17.1 Bid Rigging - where competition is restricted in the procurement of contracts to ultimately prevent the customer from achieving a fair price).

This may be the result of the deliberate or inadvertent sharing of information on what price each organisation will bid which may lessen competition.

This may occur where two organisations discuss the procurement before it has commenced.

This may take the form of ‘cover pricing’ where one or more bidders in a tender collude to arrange for an artificially high price to be put forward by a competitor. The competitor may then receive a compensation payment from the successful bidder;

2.17.2 Price fixing - where suppliers agree to set prices at a certain rate, for example, supermarkets and dairy producers were found to have been in breach of competition law when retail pricing intentions were exchanged via the dairy producers. This allowed them to co-ordinate increases in the prices consumers paid for dairy products;

2.17.3 Limit pricing - where suppliers agree to set pricing far below the market average as a deterrent for new suppliers to enter the market or as a way of making it too difficult for a smaller competitor to remain in the market and thus reducing competition for the long term);
2.17.4 Resale Price Maintenance - where resellers, such as retail outlets downstream from wholesalers, have no autonomy over the setting of prices which may result in prices being kept artificially high;

2.17.5 Exclusive dealing - where a retailer/wholesaler is forced by contract to only purchase from a particular supplier; and

2.17.6 Sharing of markets - where two companies agree to operate in particular areas with the aim of reducing competition in those areas.

For example, in 2014 three pharmaceutical companies were found to have acted in breach of competition law when it was found that two of the companies had agreed not to supply prescription medicines to each others’ care home customers. This had the effect to reducing competition for the supply of medicine to some care homes.

2.18 The list here is not exhaustive of all practices and so when parties collaborate they should consider the competition law principles to help them work within the legal framework.

2.19 There will often be the question of whether the parties working together are actually competitors or not and whether the above practices could apply to their collaboration. For instance, if both parties carry out different activities (such as supplying different goods or services), there is a lesser risk that an agreement between them could be seen as anti-competitive. However, the law looks to consider all relevant factors such as whether the parties could theoretically become competitors very easily (i.e. one of the party’s activities are sufficiently similar whereby they could compete or whether they have the resources, motivations and expertise to become competitors easily), such that the competition law framework should be sensibly navigated. Likewise, the number of competitors that there are in any one market and/or how easy it would be for other organisations to enter that market are relevant considerations for organisations to consider when carrying out their own assessment of the risks.

Case study 1 – investigation into independent schools

2.20 There are a few real life examples that are helpful for looking at how certain public benefit organisations can or cannot operate when taking competition rules into account.

2.21 One of the most notable examples of a sector engaging in collaboration without thinking it would be caught by competition law, was the independent school sector. Between March 2001 and June 2003, the Bursar of Sevenoaks School circulated a survey to 50 other fee paying independent schools, all of which were charities. The purpose of the survey, and the information circulated subsequently by the participating schools, was to exchange information on those schools’ intended fees and fee increases for boarding and day-pupils. These fees are set annually and the timing of the information exchange meant that the participating schools received information on their competitors’ fees early on in the budgetary cycles.

2.22 The information that was shared was therefore commercially sensitive information regarding each school’s pricing intentions. This information was not shared more widely with the parents of pupils at the participating schools or generally to the public.

2.23 It was held that there had been a clear intention to share confidential information in order to prevent, restrict or distort the schools’ competition on fees. In addition, it was implicit that
there was a ‘gentleman’s agreement’ between the schools that the increases in fees would accurately reflect actual future fee levels on the basis that it was intended that the information should be reasonably reliable. This gave competitors confidence that if they increased prices by a certain level, that they would not be undercut and therefore out competed.

2.24 The participating schools were found to be party to an agreement and/or concerted practice the object of which is the prevention, restriction or distortion of competition in breach of competition law. It was therefore held that this was a serious breach of competition law. This highlights the fact that charities are subject to competition law, just as any other type of organisation.

2.25 Importantly, this case does not mean independent schools cannot collaborate with each other. What it means is that they have to acknowledge competition law principles, despite being charities, and avoid anti-competitive practices such as price fixing. They would not be stopped from, for example, working together on a project to promote an online platform designed to help child safeguarding, as many other examples of public benefit identify.

Case study 2 – collective agreement for the living wage

2.26 This case is a good example of collaboration working well within the context of competition law. Fair Wear Foundation (“FWF”) is an independent, not-for-profit organisation that works with companies and factories to improve labour conditions for garment workers. Its member companies represent over 160 brands which are based in ten European countries. FWF seeks to promote a number of labour standards, one of which is payment of a living wage to workers employed in the factories used by its members.

2.27 FWF obtained a legal opinion to assess whether it and/or its members would be exposed to competition law risk as a result of FWF seeking to facilitate an agreement or series of agreements among members in order to introduce a living wage.

2.28 Some of FWF’s members had concerns about competition law because of the proposed method to ensure factory workers are paid a living wage. The proposal, broadly, is that members should use shared factories in order to have collective leverage on factory owners to pay a living wage and maintain fair working conditions.

2.29 The opinion concluded that as FWF does not intend to facilitate inappropriate co-operation between competitors or provide a forum for exchange of competitively sensitive information, even though the agreements could be interpreted as restrictive in this effect, by increasing cost to producers and so potentially price to consumers.

2.30 Therefore while competition law had the potential to apply, a proper analysis showed that this form of collaboration had as its object the public benefit, and that the effect of the arrangement would not unlawfully restrict competition.

Ramifications of breaching competition law

2.31 While this guidance seeks to give PBOs confidence in collaborating, it is important to recognise that the ramifications of breaching competition laws are serious. The Competition and Markets Authority (which replaced the Competition Commission and the Office of Fair Trading) is the principle UK regulator for competition law and is responsible for ensuring that markets are competitive and deliver the best deal possible for consumers. Among other
powers, the CMA has the power to impose financial penalties, bring criminal prosecutions against individuals and seek director disqualification orders against any directors involved in competition law breaches. Likewise the European Commission also has considerable power to investigate and take action for competition law infringement across EU borders.

3. **Legal ways of collaborating**

3.1 Competition law is not there to stop organisations working together. PBOs can properly collaborate in a variety of ways. Some relevant examples highlighted by NCVO are discussed in turn below.

*Loose network of entities*

3.2 PBOs may work together, share ideas and good practice without entering into a formal agreement. The parties may not even consider this to be a collaboration arrangement and more a nature of the relationships which may be more likely to occur between charities and PBOs. In such circumstances it is important to understand the extent to which information can be shared, discussed below.

*Managing agent*

3.3 The Managing Agent bids for a contract on behalf of other collaborative organisations. It then manages delivery through collaborative subcontractors. This model may be referred to as the ‘prime contractor’ model.

3.4 There are many examples where larger national charities have partnered with smaller charities to bid for a contract. On winning the bid, the work is then subcontracted to those smaller charitable partners. 4Children is a national charity that partnered with a range of organisations to secure a bid to offer children’s services in Hampshire. The charity and its partners secured a deal to run 7 children’s centres in Hampshire. This collective approach is designed to pool expertise and offer an integrated method by which to offer the best possible service.
3.5 ‘Uniting Care’ is another example of a service provider vehicle through which different entities collaborate in order to bid for or service a contract. ‘Uniting Care’ is a partnership of three NHS Trusts offering integrated care services to older people and the adult community. The partnership’s supply chain also involves many voluntary care organisations.

Managing provider

3.6 This scenario varies from the Managing Agent scenario because the entity with the contract delivers some of the contract and only subcontracts delivery of specialist aspects of the contract. This model was commonly used within the private-sector Work Programme.

The Work Programme transfers the task of securing work for the long-term unemployed from state organisations (such as Jobcentre Plus) to private and third sector organisations. As such, the services are delivered by a range of private, public and voluntary sector organisations. The providers offer support and training to those on Jobseeker’s Allowance and Employment and Support Allowance.

Within the Work Programme, there are prime providers. These providers are committed to five-year contracts in order to build long-term relationships with their local providers and other partners. These “Primes”, 90% of which are from the private sector, manage networks of sub-contractors who deliver some or all of the employment support services on their behalf.

Super-provider

3.7 This term has been developed by NCVO where voluntary sector entities have collaborated by establishing a separate legal entity which will be the bidding vehicle. The voluntary sector entities (“VSE”) will own the bidding vehicle through a membership structure and exercise control through positions on the board.

3.8 The Charity Commission has issued guidance on the experiences and benefits of charities joining together as a consortium to provide public services. Although detailed arrangements are required, an integrated approach of this kind can result in major benefits to suppliers and beneficiaries of services. The guidance sites examples such as:
(a) The Birmingham Disability Consortium ("BDC") – with a membership of six charities, BDC supports disabled people back into employment in five areas in Birmingham. The contract is worth £2.6million to the Consortium;

(b) Rotherham Children, young people and Families’ Consortium ("CYPFC") – CYPFC has 35 full consortium members and three community-based associate members. The Consortium has won multiple large contracts with its overall aim being to improve the services offered to children by the voluntary sector; and

(c) Sheffield Well Being Consortium ("SWC") – SWC operates in the city of Sheffield and focuses on the quality of the health providers in the PBO sector in that geographical location. The Consortium has been successful in securing a range of contracts and grants, one of which was a contract to place counsellors in member organisation with Sheffield Health and Social Care Trust for Increasing Access to Psychological Therapies.

More information can be found [here](#).

3.9 There are plenty of other examples of the voluntary sector working together collaboratively, including Greater Together (Lancashire) which won a £4m domestic abuse contract. The partners were able to co-design the processes, develop a joint ‘Theory of Change’ and jointly deliver the services.

3.10 A special purpose vehicle will in principle operate similarly to a ‘super-provider’ although it is not restricted to collaboration by PBOs. It is a special purpose vehicle which allows a group of providers to come together by setting up a new entity (normally a company) to bid for and/or service a contract.

3.11 A clear example of a special purpose vehicle can be seen in the provision of services under the Government’s programme for the management of offenders in England and Wales, “Transforming Rehabilitation”, as the programme is named, created an alternative environment for voluntary sector organisations whose focus is on the delivery of services to
offenders both in prison or the local community. Interserve, an outsourcing firm, set up a special purpose vehicle with various voluntary sector organisations and successfully won bids for Community Rehab Company contracts.

4. How this applies to undertakings

4.1 As stated briefly above, competition law only applies to ‘undertakings’ and so the first consideration for PBOs is to consider whether they are “undertakings” and whether competition law is applicable to them. Often, on an assessment of the facts, a PBO will not be operating as a commercial operator within a competitive market and will not be an undertaking.

What is an undertaking?

4.2 An ‘undertaking’ covers any natural or legal person, regardless of its legal status and the way in which it is financed, engaged in ‘economic activity’ (i.e. any activity which consists of offering goods or services on a given market).

4.3 Therefore, undertakings can include companies, firms, businesses, partnerships, individuals operating as sole traders, associations of undertakings (for example, trade associations), PBOs (incorporated, unincorporated charities and not for profits) and (in some circumstances) public entities.

What is economic activity?

4.4 The European Court of Justice has defined ‘economic activity’ as any activity consisting in offering goods or services on a given market which could, at least in principle, be carried out by a private entity in order to make profits. The definition is very general and consequently there has been case law on this matter but it is often very fact specific.

4.5 A further important consideration very relevant to PBOs is that an entity may carry out some activities which are considered to be an economic activity for the purposes of competition law and others which are not. Therefore, it is important that each activity that the PBO wishes to pursue is considered on a case-by-case basis in order to establish whether an...
entity is engaged in an economic activity for the purposes of the collaboration project being considered.

4.6 Asking the following (non-exhaustive) questions can assist PBOs in analysing whether its activities are ‘economic’ marking it an ‘undertaking’ and subject to competition law for a particular activity. Of course, the fact a PBO may be considered an ‘undertaking’ need not be a cause for concern – only that they need to recognise it is within the competition law framework.

4.6.1 *Is the activity commercial in nature?*

If a PBO provides goods or services on a ‘commercial’ basis then this will constitute economic activity. If a PBO carries out an activity in direct competition with other providers then the activity will be an economic activity and the PBO will be an undertaking.

4.6.2 *Could the activity potentially be carried out by a private sector or PBO?*

The fact that a private sector entity does not carry out the activity may not mean it could not feasibly do so and that the activity is not in nature competitive.

Medical aid organisations which provide emergency transport and patient transport services (effectively ambulances) for remuneration were held to be undertakings. In this scenario the organisations charged users for the service where costs were not otherwise covered by public funding. The organisations who provided the services at the time were PBOs however the service had previously been provided by private undertakings with a view to making a profit. The service did not necessarily need to be carried out by a public entity and is therefore an economic activity.

4.6.3 *Is the activity a profit-making activity or could it possibly be a profit-making activity?*

The fact that an entity does not seek to generate surplus or profit from its activity does not mean that the activity is not an economic activity for the purposes of competition law. A public employment agency which provided its services free of charge was an undertaking because employment agency services can also be provided by a for-profit entity.

Therefore if no charge is made for goods or services, this does not mean that the activity could not be an economic activity. A clear market abuse would be zero pricing for a period to undercut and remove competitors from the market.

4.6.4 *Is the charity/PBO carrying out the activity in competition with a private sector entity?*

If a PBO carries out an activity in competition with a private sector entity then the activity is an economic activity and the organisation an undertaking.

4.6.5 *Does the charity/PBO’s trading subsidiary carry out economic activity? Does the PBO exercise control over the management of the trading subsidiary?*

A PBO may still be an undertaking if its trading subsidiary carries out the economic activity and the charity or PBO exercises control over the subsidiary.
4.6.6  *Does the PBO’s parent entity (based outside the internal market (i.e. the EU)) have an agreement that could be considered an economic activity taking place within the internal market? Or, does the parent entity exercise control over the management of the PBO?*

An international PBO, based outside the internal market, may still be an undertaking.

4.6.7  *Is the charity/PBO carrying out a public service?*

When a PBO is entrusted with the provision of a public service (i.e. statutory duty or function of the state) then that activity may or may not be an economic activity. This will be determined specifically by the facts.

It is clear public sector bodies themselves, in fulfilling their essential functions are not subject to competition law, but once there is any out-sourcing competing law becomes relevant, because a competitive mutual situation may have been created.

4.6.8  *Is the charity/PBO carrying out an activity which is exclusively social?*

If an activity is exclusively ‘social’ then it is unlikely to be an economic activity. Where the nature of the activity is such that the private sector, properly analysed, will not engage (rather than the private sector happening not to engage at the moment), no ‘market’ for the activity exists.

4.6.9  *Is the charity/PBO purchasing goods or services which will be used for an economic activity?*

In determining whether an entity is acting as an undertaking in relation to the purchase of goods or services in a market, the economic or non-economic nature of that purchasing activity may depend on the end use to which the entity puts the goods or services.

5.  **Guidelines on information sharing for undertakings**

*Overview*

5.1  It may be the case that after considering the questions above, PBOs wishing to collaborate will consider themselves economic ‘undertakings’. Often it will be appropriate and entirely lawful to share certain types of information. For example, discussing general legal and economic information would normally be permitted. The same is true of market research and general industry studies that do not provide current specific price/customer data but which help the parties discussing better adapt to the relevant market.

5.2  The sharing of such information may in fact stimulate or promote competition and so be “pro” rather than “anti” competition. For example it may serve to highlight the potential for new technological advances, service improvements, best practice and product or service innovation or market opportunities.

5.3  However collaborating parties must also be careful not to share certain types of information that might have an anti-competitive intention or effect. This will allow them to work together within the competition framework.

5.4  Information sharing can take many forms. Information may be shared directly between entities or it may be shared indirectly through, for example, a trade association (which is a
particular danger area) or a supplier. The types of information that may apply also take many forms. If the sharing of information is likely or intended to have an effect on competition then such action may be anti-competitive.

**Sharing strategic data**

5.5 Sharing of strategic information (i.e. information that reduces uncertainty in the market such that competitors can do things like fix higher prices because they are or are ‘more’ certain that their competitor will not undercut them and thus out-compete them) is more likely to be considered anti-competitive. Strategic information can include prices and pricing strategy, terms and conditions, market strategy and other information that a competitor would not normally be able to discover. This could include pricing information, details regarding quantities, geographic data (such as where an organisation focuses or intends to focus its business), research intentions (such as by suggesting to competitors product/service areas which they will or will not prioritise to establish a tacit agreement not to compete) and any other type of information that is commercially sensitive. This was the practice for which the independent schools were caught as discussed above.

**Sharing aggregated data**

5.6 The sharing of genuinely aggregated information is unlikely to breach competition law. Such information normally does not show organisation specific information (such as turnover information attached to a particular region that is not broken down by specific area, customer or product and which does not include details regarding specific input costs or profit margins) and therefore cannot be used to affect competition. Instead, such information may give a broader understanding of the economic environment in which many organisations are operating. However, to avoid the risk of being accused of sharing information, PBOs should ensure that the aggregated data is widely disseminated so that it is not only available to a narrow group. This is so it is not seen as being an indirect way of coordinating behaviour.

**Historic information**

5.7 The sharing of historic information is less likely to be in breach of competition law because the information is less likely to influence a competitor’s future action.

5.8 It is not possible to specify when information becomes historic and will depend on the facts of any one specific case. However, an indication of historic data may be where data is several times older than the average lengths of typical relevant contract.

**Publicly available**

5.9 If information is genuinely publicly available then the sharing of that information is unlikely to breach competition law. However such information must be equally accessible (in terms of costs of access) to all competitors and customers. Of course, parties should consider this factor on a case by case basis. For instance, where a competitive market only has a few competitors, publicly sharing information could possibly serve as a basis for those parties to coordinate prices even without there being an agreement to fix prices. The key is to consider the potential impact of publicly sharing and moderate as appropriate. Conversely, where information is shared privately between competitors, one might infer collusion.

**One offs**
5.10 Exchanging of non-sensitive information, such as good practice, is to be encouraged. However, it is important to note that even limited exchanges of information from one entity to another in a single meeting can be in breach of competition law. A PBO may be told strategic information in an email, on the phone or in a meeting. An organisation may be presumed to have reacted in a collusive way to information it receives without a clear legitimate reason. If a PBO thinks that it has received commercially sensitive information it needs to ensure that there is a record of the legitimate reason for receipt or take action to be able to demonstrate no illegitimate use was made of the information. Likewise, if a PBO is represented at a meeting in any form where sensitive information is being shared, that representative should leave that meeting immediately stating why they are leaving and ensuring the fact of their leaving is recorded.

Precautionary action steps

5.11 There are other precautionary steps relating to legitimate forms of information exchange that can be put in place by PBOs wishing to collaborate. For instance, parties can:

5.11.1 appoint an individual with whom information is shared in the first instance. This helps ensure that individuals working for the organisations are not sharing information with multiple individuals, which can make it hard to control what is or is not being shared. This will also allow that appointed individual to be responsible for considering whether the information being shared is sensitive.

5.11.2 adopt a compliance policy and guidelines to ensure competition law risk management is built into internal processes; and

5.11.3 provide general or project specific training before entering into collaboration discussions to ensure everyone involved understands the competition framework.
EXAMPLES OF ACCEPTABLE INFORMATION SHARING

- INFORMATION SHARED BETWEEN TWO OR MORE PARTIES THAT OPERATE AT DIFFERENT LEVELS OF THE ‘PRODUCTION CHAIN’ (VERTICAL AGREEMENTS), I.E. THEY ARE NOT DIRECT COMPETITORS. THIS IS PERMITTED, PROVIDED THAT ONE PARTY DOES NOT HOLD A SIGNIFICANT SENSITIVE INFORMATION PASSING BETWEEN CURRENT OR POTENTIAL COMPETITORS. THIS IS THE GREATEST RISK AND IS MOST STRICTLY CONTROLLED.

- SENSITIVE INFORMATION PASSING BETWEEN SUPPLIER AND BUYER IN RELATION TO THE SUPPLIER’S COMPETITORS. THE SHARING OF
PROPORTION OF THE MARKET SHARE WHICH MAY ALLOW THEM TO USE THE INFORMATION TO EFFECT COMPETITION AT THEIR OWN LEVEL, AND THE AGREEMENT DOES NOT CONTAIN CERTAIN RESTRICTIONS WHICH MEAN THE AGREEMENT IS ANTI-COMPETITIVE.

- INFORMATION THAT IS AGGREGATED TO THE EXTENT THAT A COMPETITOR’S INDIVIDUAL INFORMATION BETWEEN A SUPPLIER AND BUYER ITSELF IS NOT INHERENTLY ANTI-COMPETITIVE. HOWEVER IF THAT INFORMATION REFERS, FOR EXAMPLE, TO THE PRICES CHARGED BY THE SUPPLIER’S COMPETITORS THIS IS ANTI-COMPETITIVE BEHAVIOUR AND MUST BE AVOIDED.

- THE SHARING OF INFORMATION AS PART OF A WIDER AGREEMENT TO PRICE FIX OR APPORTION THE
FINANCIAL STATISTICS ARE NOT ASCERTAINABLE IS LIKELY TO CARRY A LOW RISK IN TERMS OF COMPETITION LAW.

- COMPANIES FROM UNCONNECTED INDUSTRIES MAY WISH TO EXCHANGE INFORMATION FOR A RANGE OF PURPOSES, FOR EXAMPLE BENCHMARKING OF CERTAIN INPUTS. THIS PRACTICE IS UNLIKELY TO BE DEEMED ANTI-COMPETITIVE MARKET. THE SHARING OF INFORMATION IN THIS SCENARIO FACILITATES ANTI-COMPETITIVE PRACTICE.

- THE SHARING OF INFORMATION THROUGH A THIRD PARTY THAT MIGHT HAVE THE EFFECT OF REDUCING COMPETITION. FOR EXAMPLE, SHARING INFORMATION ABOUT PRICES, SUPPLIERS, MARKET STRATEGY OR PRODUCTION LEVELS WITH A TRADE ASSOCIATION MAY
PROVIDED THE COMPANIES EXCHANGING THE INFORMATION ARE AWARE OF THE PURPOSES FOR WHICH THE INFORMATION IS BEING USED (AND THOSE PURPOSES DO NOT AFFECT COMPETITION).

• IN RETAIL CREDIT MARKETS, THE CREDITWORTHINES S OF BORROWERS CAN BE SHARED AMONGST BANKS WHICH ULTIMATELY RESULTS IN BETTER ACCESS TO CREDIT FOR GOOD CUSTOMERS. THIS ULTIMATELY HAVE AN ANTI- COMPETITIVE EFFECT.
STEMS FROM RECOGNITION THAT A LEVEL OF TRANSPARENCY OF INFORMATION IN CERTAIN CIRCUMSTANCES CAN ENABLE A BETTER UNDERSTANDING OF THE MARKET RESULTING IN BENEFITS TO THE CONSUMER.

- IN THE INSURANCE MARKET, THE SHARING OF CERTAIN STATISTICS ALLOWS FOR IMPROVED RISK ASSESSMENT, WHICH MAY LEAD TO INCREASED
COMPETITION AND OPENS UP THE MARKET TO POTENTIAL ENTRANTS.

6. Specific information for voluntary sector consortia

6.1 Whether a consortium will be legal will always depend on an assessment of the specific facts of any one case. Very often consortia will be legal and will be considered a good thing as the parties coming together actually helps improve a service – whether by improving service quality (the parties might bring different types of expertise to the table which could improve services to how they are currently delivered) or making efficiency savings that consumers/customers can benefit from (for example the parties may be able to benefit from economies of scale allowing them to charge lower prices for consumers).

6.2 A consortium could very well be problematic:

- when there are not very many competitors in a particular market (whereby if they join together it is easier for them to set prices as there won’t be as many competitors to undercut them/compete on service quality);
- where the collaboration is not done openly and transparently;
- where it is not clear what the service improvements/efficiencies will be by parties joining together (i.e. does it really look as though the main advantage is to the undertakings being able to reduce competition and increase prices);
- the parties appear to be collaborating permanently so that competition will be reduced between them indefinitely (this may trigger merger control rules); and/or
are the parties sharing commercially sensitive information so that they able to reduce the competition between each other now and/or going forward – this is not the same things as legitimately discussing how a collaboration may improve services/efficiencies provided sensitive information is not shared.

7. Conclusion: summary of key steps to consider

7.1 The first step is to consider if a PBO and its activity could be subject to the competition framework. The default presumption should be that competition law is relevant.

7.2 The precautionary steps mentioned above should be considered.

7.3 Wherever there is co-operative, collaborative engagement with other organisations there should be a proportionate assessment of the risk of an agreement or practice being anti-competitive in object or actual or potential restrictive effects.

7.4 The possibility should be considered of the pro-competitive benefits being present and being of greater importance than anti-competitive effects that may be alleged.

7.5 Any risk of anti-competitive activity must be identified and properly managed, most appropriately in accordance with a formal practical and proportionate policy.