Guidelines on Compliance with Antitrust Rules

I. Introduction

FEhS - Institut für Baustoff-Forschung e.V. (Institute for Construction Materials Research) in Duisburg (hereinafter referred to as the **"FEhS Institute"**) is engaged in research, testing and consulting in relation to ferrous slag, construction materials and fertilisers. As a state-of-the-art service provider, its experts, network and Construction Competence Forum make it a desirable partner for its members and customers.

In the interest of the FEhS Institute and its members, these guidelines are aimed at providing its organs, members and employees with instructions, in particular on how to deal with meetings, topics, recommendations and information of the Institute, to be observed in all activities in order to prevent questionable conduct under antitrust law. Compliance with the rules is binding for all persons involved in the work of the FEhS Institute and serves to protect the Institute and its members.

These guidelines equally apply to Fachverband Eisenhüttenschlacken e.V. (Technical Association for Ferrous Slag), Gütegemeinschaft Eisenhüttenschlacken e.V. (Ferrous Slag Quality Control Association), Gütegemeinschaft Metallhüttenschlacken e.V. (Non-Ferrous Slag Quality Control Association) and EUROSLAG (European Slag Organisation), hereinafter jointly referred to as the “associations".

II. Principles

According to its articles of association, the object of the FEhS Institute is the promotion of scientific work in the field of the development and use of ferrous slag and the solid residues generated in the process of iron and steel production. This includes, in particular, the following tasks:

- Initiate and control research projects in the precompetitive area;
- Communication of the results through publications and activities, such as the participation in conferences and symposia, seminars and website, to make them available to users;
- Support of and cooperation with scientific institutions, in particular university institutes, in the selection and handling of research projects to ensure certain practical relevance;
- Participation in standardisation committees on a German and European level.

The associations strictly base their activities on the compatibility with German and European antitrust law. The members as well as its natural representatives in the work committees and groups are required to take into account the recommendations and specifications of these guidelines.

It is in the nature of collaborative association work that representatives of different and also competing companies come together to exchange information on topics, experience and projects of common interest within the associations. Basically, this is permissible and desirable since associations pool information and interests of their members and represent the common interests with one voice towards the general public, politicians and public authorities.

However, activities must not have the effect of restricting or eliminating competition between companies or operating to the detriment of third parties. The associations use all capabilities to ensure that the meetings of the organs and work committees are not used for practices other than those intended and, in particular, do not provide an occasion for discussing topics and activities not permissible under antitrust law. The member companies support the associations in this effort. The present guidelines address all those involved in the work of the associations. They apply to any event and other activities as well as to the cooperation of the associations in other national or international institutions.

III. Legal framework

The legal framework conditions result from the Treaty on the Functioning of the European Union (TFEU) and the German Act against Restraints of Competition (GWB). They read:

Art. 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.

Section 1 GWB:

Agreements between undertakings, decisions by associations of undertakings and concerted practices which have as their object or effect the prevention, restriction or distortion of competition are prohibited.

IV. Impermissible conduct under antitrust law

To avoid the risk of an antitrust infringement from the outset, certain types of conduct within the framework of association and research activities - even outside of official events - are prohibited, in particular in the cooperation between competing member companies:

The provisions cited above make clear that antitrust infringements may be committed in various forms. Apart from express contracts or agreements or formal decisions, acts prohibited by antitrust law often take the form of so-called concerted practices. According to a definition of the European Court of Justice, the concept of a concerted practice refers to any form of coordination which, although not leading to the conclusion of a contract in the strict sense, knowingly substitutes practical cooperation for the risks of competition.

Even the exchange of information may be prohibited as a concerted practice if undertakings share strategic information or sensitive data. For suspecting an infringement through concerted practice, it is irrelevant whether several undertakings have exchanged sensitive information or only one undertaking has disclosed the intended conduct in the market. This also applies to situations on the fringes of committee meetings or at informal gatherings. The threshold between (permitted) autonomous and (prohibited) concerted parallel behaviour can be very low.

The (non-exhaustive) examples below depict practices, strategic information or sensitive data that are not compatible with antitrust law:

1. In associations:

- Resolutions of associations unjustifiably restricting their members in their competitive behaviour;
- Actual unilateral actions of an association (e.g. press releases) in areas of relevance to competition, which may be interpreted as recommendations of the association;
- Association recommendations suited to influence the competitive behaviour of members;
- Comments and forecasts suggesting a certain market behaviour to the member companies;
- Organisation of market information systems or statistics allowing market participants to draw conclusions about the market behaviour of individual market participants;
- Passing on current and sensitive, e.g. company-specific, data (including information on prices, price components, quantities, capacities, stocks and stock coverage, sales figures, turnover) to member companies, to third parties or to the general public;
- Discussing or commenting current or future prices or price components, forecasts of future prices, price components and price trends;
- Communication of calculating schemes or individual costing elements if they may lead to a standardisation of competition parameters;
- Supplier evaluations, which may lead to a uniform demand behaviour of the members;
- Call for boycott measures not to do business with certain suppliers or customers;

- Organisation of voluntary commitments by the industry, unless such commitments are justified on a case-by-case basis to promote a higher priority objective (e.g. environmental protection, technical or economic progress);
- Exchange of experience between members, leading or suited to lead to uniform market behaviour;
- Participating in or facilitating or coordinating any infringement of competition law by companies, in particular those listed under item 2 below.

2. Between companies:

- Agreements on or coordination of prices (list prices, market prices, minimum prices, quoted prices, price increases or price reductions, including price components, price calculations, costs and transitory items) and other price-relevant factors, e.g. price mark-ups, rebates, discounts or other contract terms, e.g. payment terms, delivery periods, transport conditions, warranties and guarantees;
- Exchange and disclosure of information on individual market data to the extent related to data which is normally kept confidential, including without limitation, capacity utilisation, delivery volumes, quotations, prices, price-relevant factors, costs, stocks, stock coverage, delivery times, sales and turnover, customers, market shares, investments, and provided that such exchange of information is near-time or capable of influencing future market behaviour;
- Benchmarking if such comparisons of competitors allow conclusions to be drawn about prices or other parameters of competition (e.g. production volume, product quality, product variety and innovation);
- Agreements on or coordination of market share(s) or quotas for production or supply;
- Agreements on or coordination of the sharing of markets (by region or product) or customers;
- Agreements on or coordination of capacities, investments or closures;
- Coordination of manufacturing programmes;
- Agreements on or coordination of restrictions on production or supply;
- Submission agreements (submission of concerted bids for tenders).

3. Specific conditions in the field of joint research

- Joint awarding of research contracts to third parties does not affect the current market behaviour of companies and, hence, is basically not problematic under antitrust law;
- In particular, precompetitive basic research may also be jointly supervised in project-accompanying committees;
- Activities within the framework of project-accompanying committees must not be used for extraneous purposes, in particular not for practices in contravention to antitrust law as listed under IV. 1. and 2.;
- Research results should be made available to all companies in a non-discriminatory manner;
- When dealing with research results, any further cooperation is generally prohibited: Questions such as product design, pricing or the marketing of research results must basically be answered autonomously by companies.

V. Duties and conduct of chairpersons, participants of meetings and employees

Each employee of the associations, each participant in meetings of committees or other meetings and, in particular, the chairperson of meetings have to ensure that no violations of antitrust rules can occur in the course of or in connection with the work of the associations.

The associations issue written invitations to meetings of committees, draw up a detailed agenda and prepare minutes of the meetings, which accurately reflect the essential course of the meeting.

At the beginning of a meeting, the chairperson of the meeting points out compliance with antitrust rules. If the chairperson of the meeting or any other employee of the associations finds that a violation of antitrust rules is imminent in the course of a meeting, he/she shall inform the participants of such inadmissibility and work towards ending the critical behaviour. If there are doubts about the admissibility under antitrust law, such work shall also be ceased immediately.

Regarding any statement - whether written or oral - care must be exercised as to ensure that it cannot be misunderstood and give the impression of dealing with issues in a way inadmissible under antitrust law.

VI. Consequences of cartel infringements

For years, the cartel authorities have constantly tightened their practice of prosecuting restraints of competition and encouraged the uncovering of cartels through so-called leniency programmes. Nowadays, the fines imposed on participants in cartels often reach sums of hundreds of millions of euros. Economic operators injured by a cartel may also claim damages.

Apart from the enforcement by the European Commission, European antitrust law is also applied in a decentralised manner by the competition authorities of the Member States. Parallel competences of the authorities of several Member States may also arise where a cartel affects several Member States. The procedure used by the Member States in enforcing European antitrust law depends on their national law, which may considerably vary from one country to another. Public authorities of the Member States may also impose sanctions based on their own law; in several Member States even prison sentences are possible. Also the Commission may impose fines, i.e. in the case of infringements committed by associations amounting up to 10% of the total turnover of the members operating on the market affected by an infringement, while in the event of an insolvency of the association its members are liable for payment of the fine imposed on the association.

VII. Boundary between prohibited cartels and permissible cooperation

Associations fulfil an important function in the economic and political spheres. It is not always easy to determine the boundary between what is prohibited under antitrust law and the permitted cooperation of companies in associations. German and European law expressly provides that, under certain conditions, the ban on cartels may not apply. The assessment of whether such conditions are met is the responsibility of those companies or associations wishing to benefit from the exemptions.

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