Guidelines on compliance with antitrust regulations

I. Introduction

The FEhS – Institut für Baustoff-Forschung e.V. in Duisburg (hereinafter "**FEhS Institute**") is active in research, testing and consulting on ferrous slags, building materials and fertilisers. As a modern service provider, it is a valued partner for its members and customers with its experts, its network and the KompetenzForum Bau.

In the interests of the FEhS Institute and its members, these guidelines are intended to provide the bodies, members and employees with information, in particular on the handling of meetings, topics, recommendations and information of the Institute, the observance of which is intended to avoid behaviour that is questionable under antitrust law in all activities. Compliance with the rules is binding for all those involved in the work of the FEhS Institute and serves to protect the Institute and its members.

These guidelines also apply equally to the Fachverband Eisenhüttenschlacken e.V., the Gütegemeinschaft Eisenhüttenschlacken e.V., the Gütegemeinschaft Metallhüttenschlacken e.V. and EUROSLAG (European slag organisation), hereinafter all referred to collectively as "*associations*".

II. Principles

According to its statutes, the FEhS Institute has the purpose of promoting scientific work in the field of the development and utilisation of iron and steel slags and the solid residues resulting from iron and steel production. This includes the following tasks in particular:

- Initiate and manage pre-competitive research projects;
- Communication of the results through publications and activities such as participation in specialist conferences and symposia, seminars and websites for the utilisation of users;
- Support and co-operation with scientific institutions, in particular university institutes, in the selection and implementation of research projects in order to ensure a certain practical relevance;
- Participation in standardisation committees at German and European level.

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

It is in the nature of joint association work that representatives of different and even competing companies come together to exchange information on topics, experiences and projects of common interest within the framework of the associations. This is generally permissible and desirable, as associations pool information and interests of their members and represent the common interests with one voice vis-à-vis the public, politicians and authorities.

However, the activities must not result in competition between companies or to the detriment of third parties being restricted or excluded. The associations make every effort to ensure that the meetings of the bodies and working groups are not used for inappropriate behaviour and, in particular, do not provide an opportunity to discuss topics and activities that are not permitted under antitrust law. The member companies support the associations in this endeavour. The existing guidelines are aimed at all those involved in the work of the associations. They apply to all events and other activities as well as to the associations' involvement in other national or international institutions.

III. Legal framework

The legal framework is based on the Treaty on the Functioning of the European Union (TFEU) and the German Act on Restraints of Competition (GWB). They are as follows:

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 be declared inapplicable 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. Conduct prohibited under antitrust law

In order to avoid the risk of a breach of antitrust law from the outset, certain types of behaviour are prohibited within the scope of association and research activities – even outside of official events – particularly in the case of cooperation between competing member companies:

It is clear from the provisions cited above that violations of antitrust law can be committed in various forms. In addition to explicit contracts or agreements or formal decisions, acts prohibited under antitrust law often also take the form of so-called *concerted practices*. According to a definition by the European Court of Justice, the concept of a concerted practice refers to a form of coordination between undertakings which, without being taken to the stage where an agreement properly so-called has been concluded, knowingly substitutes for the risks of competition practical cooperation between them.

The exchange of information may also be prohibited if companies exchange strategic information or sensitive data, i.e. information that is likely to reduce uncertainty about future market behaviour. On the other hand, the exchange of information is permitted if the information is exchanged in aggregated form, making it impossible to attribute it to a specific company, or if the data is aggregated across a number of different product groups, particularly if the products have different characteristics or belong to different markets. The exchange of so-called historical data is also generally unobjectionable under antitrust law. In principle, the older the information is, the less objectionable its exchange is. However, it depends on the specific characteristics of the relevant market, the frequency of the exchange of information in the relevant industry and the age of the information that is usually relied upon in the industry when making business decisions.

For the assumption of an infringement through a concerted practice, it does not matter whether several companies have exchanged sensitive information or only one company has disclosed the intended market behaviour. This also applies to situations on the fringes of committee events or at informal meetings. The threshold between (permitted) autonomous and (prohibited) concerted parallel behaviour can be very low.

The following are (non-exhaustive) examples of behaviour, strategic information or sensitive data that are incompatible with antitrust law:

1. For associations:

- Decisions by associations that unjustifiably restrict their members in their competitive behaviour;
- Unilateral actual actions by an association (e.g. press releases) in areas relevant to competition that can be interpreted as recommendations by the association;

- Association recommendations that are suitable for influencing the competitive behaviour of members;
- Comments and forecasts that suggest certain market behaviour to member companies;
- Organisation of market information systems or statistics that enable market participants to draw conclusions about the market behaviour of individual market participants;
- Disclosure of current and sensitive, e.g. company-specific, data (including information on prices, price components, quantities, capacities, stock levels and stock ranges, sales figures, turnover) to member companies, third parties or the public;
- Discussion or commentary on current or future prices or price components, forecasts of future prices, price components and price trends;
- Communication of calculation schemes or individual calculation elements if they can lead to a standardisation of competitive parameters;
- Supplier assessments, which can lead to uniform demand behaviour among members;
- Call for boycott measures, not to do business with certain suppliers or customers;
- Organisation of voluntary commitments by industry, unless these voluntary commitments are justified in individual cases to promote a higher-ranking objective (e.g. environmental protection, technical or economic progress);
- Exchange of experience between members that leads to uniform market behaviour or is likely to do so;
- Participation in or facilitation or coordination of any antitrust law infringements by companies, in particular those listed in section 2 below.

2. Between companies:

- Agreements, consultations or exchanges on prices (list prices, market prices, minimum prices, offer prices, price increases or decreases, including price components, price calculations, costs and transitory items) and other price-relevant factors such as price surcharges, rebates, discounts or other contractual terms such as payment terms, delivery periods, transport terms, warranties and guarantees;
- Exchange of information on non-price-related competitive parameters and disclosure of information on individual market data, provided that it relates to data that is usually kept secret, such as in particular capacity utilisation, delivery quantities, offers, prices, price-relevant factors, costs, inventories, stock levels, delivery times, sales figures and turnover, customers, market shares, investments, plans to enter or exit a market or other important elements of a company's strategy, and the exchange of information is timely or can influence future market behaviour;
- Benchmarking, if such comparisons of competitors allow conclusions to be drawn about prices or other competitive parameters (e.g. production volume, product quality, product variety and innovation);
- Agreements or votes on market share(s) or quotas for production or deliveries;
- Agreements or consultations on the division of markets (by region or product) or customers;
- Agreements on or coordination of capacities, investments or closures;
- Coordination of manufacturing programmes;
- Agreements or consultations on production or delivery restrictions;
- Submission agreements (submission of coordinated offers in the context of tenders).

3. Special features in the area of joint research and development ("R&D")

- In particular, pre-competitive basic research, i.e. experimental or theoretical work that primarily serves to acquire new basic knowledge, may also be jointly supervised in project-accompanying committees;
- Activities within the framework of project-accompanying committees may not be used for extraneous purposes, in particular not for the implementation of behaviour contrary to antitrust law listed under IV. 1. and 2;
- Research results should be made available to all companies in a non-discriminatory manner;
- Joint utilisation of research results is generally unobjectionable under antitrust law if they are essential for the production of the contract products or the application of the contract technologies and are protected by intellectual property rights or constitute know-how;
- If there is no joint utilisation, each party must be given access to the other party's existing know-how if this is essential for the utilisation of the results;
- The exchange of information within the framework of an R&D agreement that complies with antitrust law is not subject to the ban on cartels, provided that it is an ancillary agreement that is objectively necessary for the implementation of the agreement and is proportionate to its objectives.

4. Special features in the area of sustainability agreements

- Sustainability agreements in which competitors undertake to adopt and comply with certain sustainability standards are generally unobjectionable under antitrust law if they do not have a negative impact on competitive parameters such as price, quantity, quality, choice or innovation.
- The process for developing the sustainability standard must be transparent and ensure non-discriminatory access for all interested competitors – including at a later date – without obliging them to participate;
- The participating companies must be free to apply higher standards, although binding minimum requirements may be imposed with regard to compliance with the agreed standard; the participating companies may not exchange sensitive business information that is not objectively necessary for the development, application, adoption or amendment of the standard;
- The sustainability standard must not lead to a significant price increase or a significant reduction in the quality of the products concerned or the combined market share of the companies involved must not exceed 20% in any relevant market affected by the standard;
- Sustainability agreements may not serve to conceal any of the anti-competitive behaviour listed under IV. 1. and 2. and may not serve the purpose of price coordination, the exclusion of alternative products, production processes or methods or the exclusion or discrimination of certain competitors.

V. Duties and behaviour of meeting chairpersons, meeting participants and employees

Every employee of the associations, all participants in committee meetings or other meetings and in particular the chairpersons of meetings must ensure that no violations of antitrust regulations can occur in the context of or during the work of the associations.

The associations shall issue written invitations to committee meetings, draw up a detailed agenda and prepare minutes of the meetings that accurately reflect the main course of the meeting.

At the beginning of a meeting, the chair of the meeting shall emphasise compliance with antitrust regulations. If the chairperson of the meeting or another employee of the associations discovers that a violation of antitrust regulations is about to occur during a meeting, they must inform the participants of the inadmissibility and work towards ending the critical behaviour. The relevant work must also be stopped immediately if there are doubts as to whether the behaviour is permissible under antitrust law.

In all statements – whether written or verbal – care must be taken to ensure that they cannot be misunderstood and that they do not give the appearance of dealing with topics that are not permitted under antitrust law.

VI. Consequences of antitrust violations

For years, the antitrust authorities have been constantly tightening up their practice of prosecuting restrictions of competition and encouraging the detection of cartels through so-called leniency programmes, among other things. The fines imposed on participants in cartels – depending on the turnover of the cartel participants – now often run into the hundreds of millions. Furthermore, economic operators damaged by a cartel can claim damages.

In addition to enforcement by the European Commission, European antitrust law is also applied in a decentralised manner by the competition authorities of the member states. This can also lead to parallel responsibilities of the authorities of several Member States if a cartel has an impact in several Member States. The procedure used by the member states to enforce European antitrust law is based on the respective national law, which can vary greatly from state to state. The authorities of the Member States may also impose sanctions in accordance with their own law; in several Member States even prison sentences are possible. The Commission can also impose fines, in the case of infringements by associations up to 10% of the total turnover of the members active on the market affected by an infringement; if the association is insolvent, its members are liable for payment of the fine imposed on the association.

VII. Boundaries between prohibited cartels and authorised cooperation

Associations fulfil an important function in the economic and political area. It is not always easy to recognise the boundary between what is prohibited under antitrust law and what is permitted cooperation between companies in associations. German and European law expressly stipulates that the ban on cartels may not apply under certain circumstances. It is the responsibility of the companies or associations that wish to make use of the exceptions to assess whether these conditions are met.

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