January 2013

Guidelines on Adherence to Cartel-Law Regulations

I. Principles

The associations of organisations of the steel industry in Germany promote and protect the general economic and technical/business interests of the steel industry taking account of the overall interests of the industrial sector. The nature of association work is such that representatives from competing undertakings get together and exchange information on topics and experiences of mutual interest and on association objectives. This is admissible and desirable in principle, because associations pool information and focus the interests of their members and represent the shared concerns with one voice vis-à-vis the public, politicians and authorities.

However, the work done by the joint organisations of the steel industry may not lead to a situation where competition between steel undertakings is restrained (or excluded) to the disadvantage of its customers or suppliers. The associations of organisations do everything in their power to ensure that the committee meetings or other get-togethers organised by them are not exploited for purposes alien to the association, in particular not to create or promote opportunities to discuss matters inadmissible under cartel law. For this reason, one employee of the association is obliged to attend all association events and must ensure jointly with all persons attending the meeting that cartel-law rules are adhered to. Anti-competitive acts must be prevented by all available means. Member undertakings support the associations of organisations in these endeavours.

The following Guidelines are aimed at all those who participate in the combined efforts of the steel-industry associations. They apply to all events, whether these are committee meetings or other get-togethers or other activities of the association. They apply equally to the involvement of the association in other national or international organisations.

II. Duties and conduct of association members, attendees and chairpersons of meetings

Every association member, all attendees at committee meetings or other get-togethers and the chairpersons especially must take great care to ensure that, in the course of or on the occasion of association work, no breaches of cartel-law provisions take place.

The association sends invitations to committee meetings in writing, proposes a detailed agenda and prepares minutes of the meeting that appropriately reflect the essential course of the meeting.

At the beginning of a meeting, the chairperson or association employee will remind the attendees that the meeting is held in compliance with the cartel-law regulations. If the meeting chairperson, an association member or other attendee should discover, during the course of the meeting, that a breach of cartel-law regulations is manifesting itself, that person must draw the attention of the other attendees to such inadmissibility and make efforts to end the critical conduct. The association member must inform the Legal Department without delay. Also in case of doubt as to admissibility under cartel law, the relevant work must cease without delay and legal advice must be obtained from the Legal Department. At the request of a meeting attendee the Legal Department, after examining the matter, will ensure – if necessary – the attendance at the next meeting of an external lawyer specialising in cartel law.

Care must be taken to ensure that all statements made, whether in writing or verbally, are not capable of being misunderstood and do not give the impression of dealing with matters inadmissible under cartel law.

III. Overview of cartel-law regulations

The most important provisions for associations are:

Article 101(1) Treaty on the Functioning of the European Union (TFEU):

"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."

Sec. 1 German Act against Restraints of Competition (Gesetz gegen Wettbewerbsbeschränkungen (GWB)):

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

There are practically no differences between European and German cartel law, at least as far as the activities of associations are concerned.

IV. Acts that are incompatible with cartel law

It can be seen from the previously cited provisions that breaches of cartel law can be committed in a variety of different ways. As well as express contracts or agreements or formal resolutions, acts prohibited by cartel law often take the form of concerted practices. According to a definition by the European Court of Justice, 'concerted practices' cover all forms of coordination that do not lead to the conclusion of a contract in the true sense, but which consciously allow practical cooperation to take the place of competition with its associated risks.

An exchange of information may also be prohibited as a concerted practice if companies exchange information or data which are strategic or sensitive. For the assumption of a breach by a concerted practice, it is not a matter of whether several companies have exchanged sensitive information or just one company has disclosed its intended market conduct. This applies also to situations on the sidelines of committee events or informal get-togethers. The boundary between (admissible) autonomous and (prohibited) concerted practices can sometimes be very narrow.

Examples (that are not exhaustive) of modes of conduct, strategic information and sensitive data which are not compatible with cartel law now follow:

1. For associations:

- Resolutions by associations that limit their members in their competitive behaviour to an unjustified extent;
- Unilateral acts by an association (e.g. press statements) in areas of relevance for competition that could be interpreted as being a resolution of that association;
- Association recommendations that are capable of influencing the competitive behaviour of the members;
- Organisation of market-information systems or statistics that allow conclusions to be drawn about the market behaviour of individual market operators;
- Forwarding of sensitive data, e.g. individual company data (including information on prices, components of prices, quantities, capacities, warehouse stocks and days of inventory, sales figures, sales) to member undertakings, third parties or the public;
- Issue of calculation schemes or individual elements of calculation, if they could lead to the uniformity of competition parameters;
- Supplier evaluations that could lead to uniform demand behaviour of the members;
- Calls for boycotts, i.e. not to do business with certain suppliers or customers;
- Organisation of self-commitments of the industry, unless such self-commitments are justified to serve a higher purpose in individual cases (e.g. environmental protection, technical or economic progress);
- Exchanges of experiences between members that lead to, or could lead to, uniform market behaviour;
- Cooperation in or permitting or coordinating all or any breaches of competition law by undertakings, including but not limited to the breaches listed in Article 2 below.

2. Between undertakings:

- Agreements or collusion on prices (list prices, market prices, minimum prices, bid prices, price rises or price reductions, also price components, price calculations, costs and transitory items) and other price-related factors like, for example, price surcharges, discounts, rebates or other contractual terms like, for example, terms of payment, delivery deadlines, transport conditions, warranties and guarantees;
- Exchange of information about individual market data if such data are normally kept secret, in particular, data such as capacity utilisation, delivery quantities, bids, prices, price-related factors, costs, warehouse stocks, days of inventory, sales figures and sales, customers, market shares and such exchange of information occurs at a sensitive point in time or is able to influence future market behaviour;
- Benchmarking, if such comparisons allow conclusions to be drawn about prices or other competition parameters (e.g. production quantity, product quality, product variety and innovation);
- Fixing of market shares or quotas for production or deliveries;
- Division of markets (according to regions or products) or customers;
- Agreements on capacities, investments or closures;
- Coordination of manufacturing programmes (specialisation);
- Agreements on production or delivery restraints;
- Bid-submission agreements (submission of concerted bids as part of tenders).

V. Consequences of breaches of cartel law

Since expiry of the ECSC treaty, the cartel law of the TFEU and the German Act against Restraints of Competition (GWB)) applies without restriction also to the steel industry. The coming into force of the European cartel regulation no. 1/2003 has led to extensive changes in procedural law but also in substantive law. Cartel authorities have become increasingly strict in prosecuting restraints on competition over the years and they encourage the exposure of cartels by leniency programmes. The fines imposed on members of cartels are meanwhile frequently reaching sums on a scale of hundreds of millions. Moreover, a market operator harmed by a cartel can bring claims for compensation for damages.

As well as enforcement by the European Commission, European cartel law has also been applied nationally by the competition authorities of the Member States. Authorities in other Member States may have simultaneous jurisdiction if a cartel operates in several Member States. The procedure applied by Member States to enforce European cartel law is determined by the relevant national law, which may differ to a very great extent from one Member State to another. The authorities of the Member States may also impose sanctions available under their own legal system; in several Member States, prison sentences are even possible. The Commission can also impose fines, in the event of breaches by associations, of up to 10% of the total turnover of the members operating on the market affected by the breach. In the event that the association is unable to pay, its members are liable for payment of the fine imposed on the association.

VI. Boundaries between prohibited cartels and admissible cooperation

Associations perform a vital role in the economic and political sphere. The boundaries between what is prohibited by cartel law and admissible cooperation between undertakings within associations are not always easily recognised. German and European Law makes express provision for certain circumstances in which the prohibition under cartel law cannot be applied. The assessment of whether these conditions are satisfied lies within the area of responsibility of the relevant undertaking or association wishing to take advantage of the exemptions. In all cases where employees of associations of organisations of the steel industry are unsure about whether they are acting within the boundaries of what is permitted by cartel law, they should consult the Legal Department of the German Steel Federation (Wirtschaftsvereinigung Stahl) without delay.

German Steel Federation (Wirtschaftsvereinigung Stahl)
Department of Law, Tax and Insurance

Ms Schäfer Tel.: +49 (0)211 6707-881
Mr von Lieres Tel.: +49 (0)211 6707-879