



EASE Compliance Guidelines

European Association for Storage of Energy

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I. Principles

Trade associations like **EASE** pursue legitimate objectives. They provide a valuable service for their members. They represent and promote common interests of members towards government and administrative bodies, political and social groups and the public. They may conduct market research programmes and track current industry issues. Such activities do not raise antitrust concern. Though coordinated with or among members, they do not relate to members' market activities. "Joint lobbying" is no antitrust offence. On the contrary, trade associations act in the public interest because they collect and bundle information from members and enable them to speak with one voice.

Trade associations like **EASE** also serve as a communication centre where statistical data, e.g. to be used in projections regarding global or EU market situation at macro level, are collected and distributed and where members exchange general information. Such exchange is in principle not objectionable.

However, trade associations are composed of a group of competitors. The association could be used by its members as a platform to coordinate members' market behaviour in their quality as undertakings. Such coordination would qualify as an infringement of Art. 101 of the Treaty on the Functioning of the European Union (TFEU)ⁱ, and/or of equivalent provisions in national competition laws, where applicable.

EASE is committed to comply with European Union and national antitrust laws. **EASE's** activities must on no account lead towards a restriction of competition between members (either by object or by effect), nor must meetings of members organised or supported by **EASE** be used by members to discuss or coordinate future market behaviour resulting in a restriction of competition. More generally, the platform offered by **EASE** to its members must not be misused for activities prohibited by the antitrust rules.

Accordingly, **EASE** is not allowed to provide detailed information concerning the operational or commercial activities of its member companies, which is a direct consequence of its Compliance Guidelines and its policy concerning the confidentiality of its member company data. The objectives of **EASE** are the co-operation amongst the national federations and companies in all matters that contribute to the development of the European energy industry and the representation of the common interests of its members vis-à-vis third parties, notably the European institutions and other international organisations. Within this framework there is no role whatsoever for **EASE** in any commercial transaction.

These Guidelines are addressed to all persons involved in the activities of **EASE**, its officials and members in particular.

II. Summary of applicable antitrust rules

1. Basic Rules

The most important competition rule to be observed in the conduct of **EASE**'s activities is Article 101 of the TFEU. Art. 101 TFEU prohibits agreements between undertakings, decisions by associations of undertakings and concerted practices which have as their object or effect an appreciable restriction of competition. This prohibition applies without limitation to all hardcore agreements between undertakings (such as price-, quantity-, customer- or territorial agreements). Other restrictive agreements may not be caught by the prohibition if they lack an appreciable effect (de-minimus rule). Subject to the exception of the hardcore restrictions set out above, the EU Commission considers restrictive agreements not to be appreciable when the parties' joint share on the relevant market does not exceed 10% (agreements between competitors), 15% (agreements with suppliers or customers), or 5% (cumulative effect of agreements). Likewise, it can be the case that restrictions in agreements between small and/or medium-sized undertakings are not appreciable. By way of exception, even appreciable restrictive agreements will be exempted from the prohibition if they fulfil certain conditions contained in Art. 101 TFEU. Such exemption no longer depends on an explicit decision adopted by the European Commission but applies automatically once the conditions of Art. 101 TFEU are being met ("legal exception"). Undertakings therefore must assess by themselves whether their agreements produce appreciable effects on competition and fulfil the conditions of the exemption.

As regards horizontal agreements in general and the exchange of information between competitors in particular, please refer to the guidance issued by the European Commissionⁱⁱ.

Generally speaking the Commission considers that *"... the exchange of market information may also lead to restrictions of competition in particular in situations where it is liable to enable undertakings to be aware of market strategies of their competitors. The competitive outcome of information exchange depends on the characteristics of the market in which it takes place (such as concentration, transparency, stability, symmetry, complexity etc.) as well as on the type of information that is exchanged, which may modify the relevant market environment towards one liable to coordination. Moreover, communication of information among competitors may constitute an agreement, a concerted practice, or a decision by an association of undertakings with the object of fixing, in particular, prices or quantities. Those types of information exchanges will normally be considered and fined as cartels. Information exchange may also facilitate the implementation of a cartel by enabling companies to monitor whether the participants comply with the agreed terms. Those types of exchanges of information will be assessed as part of the cartel"*ⁱⁱⁱ.

With regard to trade associations, the European Court of Justice (ECJ) interprets Art. 101 TFEU in permanent case law to be addressed not only to the association's member undertakings, but also to the association itself in order to prevent the prohibition of restrictive agreements and concerted practices to be circumvented by decisions of the association. Art. 101 TFEU thus applies to associations of undertakings wherever their own

activity or the activity of their members purports to produce consequences which Art. 101 TFEU wishes to prevent.

Art. 101 TFEU applies directly in the EU member states. A similar rule is applicable in the European Economic Area (EEA). In the member states, national competition legislation has been enacted which is similar to EU antitrust law.

2. Sanctions

Antitrust offences are subject to severe sanctions. Restrictive agreements are unenforceable. The Commission may by decision impose fines on undertakings and associations of undertakings which either intentionally or even negligently infringe Article 101 TFEU. Finally, under the laws of EU member states, third parties may raise claims in private actions before national courts for damages suffered through infringements of Article 101 TFEU.

Generally speaking, according to the European Commission's guidelines (published in the Official Journal of the EU – 2006/C 210/02), fines will consist of a basic amount set at a level of up to 30% by reference to the value of the undertaking's sales in the market to which the infringement relates. This basic amount can be increased or reduced subject to aggravating or mitigating circumstances.

Moreover, (i) for each undertaking and association of undertakings participating in the infringement, the fine shall not exceed 10 % of its total turnover in the preceding business year; (ii) where the infringement of an association relates to the activities of its members, the fine shall not exceed 10 % of the sum of the total turnover of each member active on the market affected by the infringement of the association; (iii) when a fine is imposed on an association of undertakings taking account of the turnover of its members and the association is not solvent, the association is obliged to call for contributions from its members to cover the amount of the fine. Where such contributions have not been made to the association within a time-limit fixed by the Commission, the Commission may require payment of the fine directly by any of the undertakings whose representatives were members of the decision-making bodies concerned of the association. After the Commission has required payment, where necessary to ensure full payment of the fine, the Commission may require payment of the balance by any of the members of the association which were active on the market on which the infringement occurred. However, subject to the fact that evidence is available, the Commission shall not require payment from undertakings which show that they have not implemented the infringing decision of the association and either were not aware of its existence or have actively distanced themselves from it before the Commission started investigating the case.

Finally, the financial liability of each undertaking in respect of the payment of the fine shall not exceed 10 % of its total turnover in the preceding business year.

(See Art. 23 par. 2, 3, 4 of Council Regulation No. 1/2003)

In some countries, certain national antitrust infringements are treated as criminal offence

and can lead to imprisonment and/or fines for individuals.

III. Examples of activities caught by Art. 101 TFEU

Infringements against Art.101 TFEU can be committed not only by agreements or decisions but also by concerted practices. According to the case law of the ECJ, a concerted practice is a form of coordination not formalised through the conclusion of an agreement but which substitutes practical cooperation for the risks of competition. An illegal concerted practice between competitors of their future market behaviour may include such situations as signals given by a participant of a meeting and expected and understood by the other attendants.

1. Trade association activities

The activities of trade associations like **EASE** may lead to situations where antitrust issues could arise. Some examples are being specified here–below.

- Decisions adopted by trade associations:
Trade associations adopt decisions which may relate to members' future competitive conduct and thereby produce or be aimed at illegal restrictions. Art. 101 TFEU will apply to such decisions irrespective of the nature of their adoption (by the association's executive body under its statutory provisions or by members in meetings).
- Trade association recommendations which may have the effect of influencing the competitive conduct of members.
- Market information systems or collection and distribution of statistical data organised by trade associations. Such data exchange can under certain circumstances constitute an antitrust infringement (see below in more detail: Market Information Systems).

For instance:

- Distribution of sensitive price information to trade association members or to the public.
- Information exchange suitable to produce coordinated purchasing by trade association members.
- Exchange of views and experience among members organised or supported by a trade association which may result in coordinated or uniform market conduct (see below in more detail: Product Committees).
- Any coordination, cooperation or assistance by trade association management with regard to antitrust infringements committed by member undertakings as specified here–below.

2. Prohibited topics in EASE meetings or activities

Neither **EASE** nor EASE members must on no account support or assist or get involved in anti-competition activities, such as, but not limited to:

- Agreements or coordinated behaviour with regard to prices (list prices, transaction prices, minimum prices, price elements such as extras, surcharges, rebates) or other factors with price relevance (business terms and conditions such as delivery deadlines, conditions of transport, warranties and guarantees, payment terms).
- Coordinated advanced price increase announcements used as a price signalling mechanism followed by alignment of competitors.
- Agreements or coordinated behaviour with regard to capacity utilisation.
- Agreements or coordinated behaviour with regard to market shares, production or delivery quotas, sharing of geographical markets, customers or customer groups.
- Agreements or coordinated behaviour with regard to investments or closures.
- Agreements or coordinated behaviour with regard to production programs (specialisation).

IV. Examples of EASE activities that may be allowed under Art. 101 TFEU

Typically, trade associations like **EASE** collect and distribute statistical data, e.g. to be used in projections regarding global or EU market situation at macro level, from and to their member undertakings and support meetings of member undertakings active on the same product market.

1. Market Information Systems

Both the European Commission and the ECJ repeatedly dealt with Market Information Systems with regard to their compliance with EU competition law. Resulting from various decisions of the European Commission, and confirmed by the ECJ case law, Market Information Systems do not appear to restrict competition if they meet the following criteria:

- Trade associations are free to collect any kind of data which their members are ready to provide. However one must be aware that such data may only be used in accordance with applicable law, including anti-trust law.
- Data may be subdivided by product, quality, dimension, market and period in a manner which differs from or exceeds the scope of official statistics, as long as it cannot be attributed to a specific company or transaction.
- Disclosure of data is subject to strict compliance with Art. 101 TFEU. Exchange of information among association members will be seen as an antitrust offence when it relates to individual market data usually considered as confidential (such as capacity utilisation, production and deliveries, bookings, prices, costs, stocks, customer relations, market shares) and where the exchange refers to current data. Current data may only be disclosed in aggregated form. With regard to deliveries, aggregation applies to markets of destination. Within the EU, deliveries may be shown for

individual national markets, as long as they cannot be attributed to a specific company or transaction.

- Disclosure of aggregated data is, however, prohibited where the aggregated figures relate to less than three operators. The number of operators shall be adapted on an individual basis so as to always prevent the identification of an individual operator.
- Individual data of member undertakings may only be disclosed after a minimum period of 12 months after the reporting month. Exceptionally, the disclosure of individual monthly data is considered not to restrict competition where the number of producers of the product concerned is very high (“atomised markets”).
- As the details of any Market Information System are crucial for its compliance with the applicable competition laws, EASE and/or its members will set up such a system only after it has been thoroughly checked by an antitrust lawyer that this compliance is given.

2. Product Committees

The establishment of product committees within a trade association is no antitrust offence provided that the rules explained above under II and the Code of Conduct are observed. The activity of such product committees is considered as legitimate by the European Commission. This applies in particular to general information exchange and discussion of market developments (e.g. regulatory framework for energy storage facilities).

3. Other Committees

Trade associations like **EASE** may be used to establish or support a range of other committees which in view of their nature and objective give less rise to antitrust issues, but which must remain attentive to strict compliance with the rules of competition (e.g. Technology and Strategy as well as Communications Committees).

V. Responsibilities of EASE representatives, chairpersons and meeting attendants

EASE representatives as well as chairpersons and meeting attendants from member undertakings and associations are under a duty to pay attention to strict adherence to the antitrust rules by everyone concerned in the framework of **EASE**'s activities.

With special regard to meetings, the attending **EASE** representative and the chairperson are required to recognise situations where antitrust issues arise, and to immediately react to potential offences through appropriate indications and references, and by bringing the potentially illegal behaviour to an end. Where this cannot be achieved, the **EASE** representative is required to leave and the chairperson is to end the meeting. This must be recorded in the minutes of the meeting concerned. Moreover, if it is the case that even one single undertaking discloses strategic information to its competitor(s), each one of the other participants has a specific obligation to clearly state that it does not want to receive this type of information, which must be reported in the minutes and the meeting must come to an

end^{iv}.

ⁱ **Article 101 TFEU states that:**

“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.”

ⁱⁱ *“Communication from the Commission — Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements”, OJ C 11, 14.1.2011, p. 1.*

ⁱⁱⁱ *Op. Cit.* Points 58–59.

^{iv} *“Communication from the Commission — Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements”, OJ C 11, 14.1.2011, p. 1.*