1.3 Noting of Competition Law Compliance Guidelines

The Board to note that a review of the Competition Law Compliance Guidelines below are in process (refer section 6.8 of this Board Pack for more details).

Introduction

The following Competition Compliance Guidelines are designed to govern all activities engaged in by the staff and directors and Membership of the World Coal Association ("WCA"). They are designed to ensure compliance with the anti-trust laws of the United States and the competition laws of the EU and the UK, since the World Coal Association is in the UK. They go beyond the minimum requirements of those laws and set a high standard for the Association. The Association is committed to ensuring that its staff and Membership adhere rigorously to the letter and spirit of these guidelines and to the competition laws of all nations*. Even the cost of successfully defending civil and criminal anti-trust actions can be severe. Thus, conduct at all Association related functions must be so clearly beyond question as not even to invite any challenge. The legal penalties and impact on the Association and its Members that can result from a violation of competition laws are severe. Any deliberate breach of these guidelines will result in the expelling of an Association Member or, in the case of an Association staff Member, termination of employment. If you have ANY question about the application of these guidelines to an Association activity, you should contact the Secretary who will seek legal advice on behalf of the Association.

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* This guide was prepared solely for the use of the staff and Members of the Association with respect to Association activities and only considers US anti-trust and EU competition laws. If any Member of the Association is aware that any other competition laws applying to it could have an extra-territorial effect which could influence the operations of the Association, it is asked to draw this to the attention of the Secretary. It is not intended to serve as a competition law guide for a Member's individual business operations. Members should seek advice of counsel with respect to individual compliance programs.

1. Basic Principles of US and EU Competition Laws

The jurisdictional reach of competition laws can be broad and, particularly in the case of the United States, national law is often applied extra-territorially based on effects on US commerce.

A. The Basic US Statutes

The Sherman Act, Clayton Act and Federal Trade Commission Act are the basic US anti-trust and trade regulation laws.

The Sherman Act prohibits, among other things, contracts, combinations, and conspiracies in restraint of trade. It is enforced by the Anti-trust Division of the US Department of Justice and by private litigants. The Act may be enforced by criminal penalties. Corporations may be fined as much as the greatest of $10 million, twice the pecuniary loss of the victims or twice the pecuniary gain of the wrongdoer. Individuals found to be in violation may be liable to serve up to three years in prison and be fined up to the greatest of $350,000, twice the pecuniary loss of the victims or twice the pecuniary gain of the wrongdoer. The Act may also be enforced by a civil suit seeking an injunction to prevent the continuation of a practice prohibited by the Act. Private parties are permitted to bring

suits under the Sherman and Clayton Acts. These statues award a successful plaintiff three times its actual damages, plus attorneys' fees.

The Federal Trade Commission Act empowers the Federal Trade Commission (an agency of the US Government), to prevent unfair methods of competition and unfair or deceptive acts or practices. A finding that a respondent has violated the law may result in a cease-and-desist order, which places extensive governmental restraints on the activities of a company, its officers and directors, or on an Association and its Members. Continued violations may be subject to civil penalties of up to $10,000 per day.

Violation of these laws through trade Association activities may subject not only the Association to these penalties and remedies, but individual Members and their directors and officers as well.
Under US law, anti-trust problems can be divided into two broad categories - those activities that are considered illegal in and of themselves (**per se** violations) and those activities that may, under certain circumstances, be held to impose unreasonable restraints upon competition or acts of unfair competition (rule of reason analysis).

1) Per Se Violations

Certain basic provisions and principles of US anti-trust law prohibit the Association from being a medium whereby:

- Members agree to raise, lower or fix prices or other terms.
- Members agree to control or limit production or capacity.
- Members agree to divide or allocate customers or territories among themselves. This is known as market allocation and is prohibited
- One or more Members agree with another to refuse to deal with any customer or class of customers. Collective boycotts or refusals to deal against suppliers, customers or competitors are illegal.
- Members exchange information on their respective company's future regarding pricing, production or capacity utilisation.

To be illegal, an agreement concerning any of the above topics does not have to be signed or made formally. Any type of understanding or informal arrangement concerning any of the above topics is illegal. A wink of an eye or a knowing glance can be as unlawful as a formal document where an understanding concerning a common course of action was implicitly reached.

2) Activities Governed by the Rule of Reason

In addition to activities that are per se illegal, such as price fixing, limitations of production or division of markets, the US anti-trust laws also prohibit other activities, which, upon considering all pertinent factors, are found to unreasonably restrain trade. Many activities that can have legitimate and pro-competitive purposes also may be found to violate the anti-trust laws under certain circumstances. The anti-trust "rule of reason" governs, among other things, membership policies, statistical reporting, joint research, and development and lobbying or other attempts to influence governmental or international bodies.

B. The Basic EU Competition Laws

The basic EU provisions governing competition are set out in Articles 81 and 82 of the EC Treaty. Previously coal companies were subject to special competition rules contained in the European Coal and Steel Community (ECSC) Treaty. The ECSC Treaty expired on 23 July 2002 and the old regime is no longer valid. Now all coal undertakings are subject to the general competition provisions contained in the EC Treaty.

Article 81 prohibits 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 common market. Article 82 prohibits the abuse by one or more undertakings of a dominant position within the common market, or in a substantial part of it, in so far as it may affect trade between Member States.
Certain non-hardcore agreements used to be notified to the Commission for exemption or confirmation that Article 81 did not apply to them. However, this will change when Regulation 1/2003 comes into force on 1 May 2004. The Regulation will remove the current non-binding procedure, replacing it with a system of self-regulation by undertakings. The Regulation will also allow joint enforcement of the EU competition rules by the EC, the national competition authorities and national courts. This means that more agencies will have the ability to investigate suspected breaches of the Treaty.

Each of the EU Member States also has its own national competition laws, which generally contain similar provisions to Articles 81 and 82. Even if anti-competitive conduct is not caught by the EU rules, it may be found to infringe the competition laws of one or more of the Member States. In the UK, the competition provisions (contained in Chapters I and II of the Competition Act 1998) generally follow Articles 81 and 82. However the Enterprise Act 2002 has introduced a criminal offence for individuals who dishonestly enter a cartel agreement. A person found guilty of the offence may be imprisoned for up to five years or fined or both.

Article 81 does not preclude the foundation of trade Associations which do not by their very nature influence competition. Consultations were in fact held with the Commission prior to the foundation of the Association to obtain confirmation from the Commission that it did not object to the foundation of the Association, and this confirmation was duly received. While this confirmation was given in the context of the ECSC Treaty and is therefore strictly no longer valid, it should nonetheless continue to provide sufficient comfort for the operations of the Association (to the extent of the notified operations have not changed).

Article 81 also applies to the practical operation of the Association and here it covers informal co-operation as well as formal agreements; in relation to Associations of undertakings, its scope is accordingly not limited to formal decisions taken under the constitution of an Association and binding on its Members but extends to mere recommendations, if these aim or tend towards determining or influencing Members' competitive behaviour. The prohibition includes agreements, etc., tending:

- To directly or indirectly fix or determine prices.
- To limit or control production, technical developments, or investments.
- To share markets or sources of supply.

An infringement by the Association of the EU competition laws could result in financial penalties being imposed on the Association itself, or on its Members, or on both. The European Commission may impose fines of up to 10% of worldwide group turnover on any undertaking that infringes Articles 81 or 82. Between 2001 and 2003 the Commission has adopted 25 decisions against cartels that infringed Article 81 and imposed approximately €3.2 billion in fines. The Commission has imposed fines in many different industries. For example, in the steel industry, the Commission found that 17 European steel undertakings and their trade Association Eurofer had participated in a series of agreements, decisions and concerted practices designed to fix prices, share markets and exchange confidential information on the Community market for steel beams. The Commission then imposed on 14 of those undertakings' fines exceeding €104 million in total.

The Commission may also impose on undertakings and Associations of undertakings periodic penalty payments not exceeding 5% of their average daily turnover in the preceding business year per day and calculated from the

date appointed by the decision, in order to compel them to put an end to an infringement, comply with an interim order or commitment, or supply information or submit to an inspection.

Member States may also impose fines for breaches of their national competition laws.
Consequently, strict adherence to the letter and spirit of these guidelines is of paramount importance.

2. The Compliance Guidelines

A. Association Meetings

The following rules apply to each Association meeting to minimise potential liability under US or EU competition laws:

1) Agendas. A detailed agenda must be prepared for each meeting of the Association or any of its Committees or sub-Committees and circulated in advance to participants. Agendas must be reviewed in advance of circulation by legal counsel for competition law implications. Discussions at meetings must be confined to the topics on the agenda. Where an oral presentation is made at meetings, this must be made based on guidelines settled with Counsel and any discussion in such report must be in accordance with these guidelines. The topics of the oral presentations should be approved beforehand by Counsel where practicable.
2) Minutes. Minutes must be kept of all meetings and must accurately report what actions, if any, were taken. Minutes must be approved by counsel before adoption. To avoid fragmentary reports, Members should not keep their own minutes.
3) Informal Meetings. While it is recognised that lunches, dinners and like social functions may precede or follow Association meetings, Members must be aware that these guidelines apply during such functions. Anti-trust violations occurring at social functions carry the same legal impact as those occurring at formal meetings.
4) Literature or Handouts. Whether prepared by the Association staff, individual Members or guest speakers, the topics of any literature or handouts, and where practicable the literature or handouts themselves, should be reviewed by Counsel in advance of distribution for possible competition law implications.
5) Prohibited Topics. The following are examples of topics of discussion that must be avoided at all Association meetings and other functions:
    a) Past, current or future prices of individual coal producers (even the general price level of coal, for example, as compared to other fuels, should not be discussed without prior guidance from counsel);
    b) What constitutes a "fair" profit level;
    c) Elements of price, costs or methods of constructing prices;
    d) Discounts, credit terms or other conditions of sales;
    e) Individual company's market shares or the allocation of markets or customers;
    f) Refusals to deal with any supplier or customer;
    g) Confidential individual company statistical data or competitive plans or forecasts.

In the event a subject is raised at any meeting at the Association which causes an anti-trust concern to an attending Member, that Member should immediately draw his or her concern to the attention of a Member of the Association's staff (and/or counsel if in attendance) and request that the discussion be discontinued until such time as the Member is satisfied as to its propriety.

Guidelines relating to collection and dissemination of information are dealt with in the following pages.

B. Membership Policies

Restrictions upon which firms can become Members of a trade Association have competition law implications, since denial of Membership, with its attendant benefits, could place the applicant at a competitive and economic disadvantage vis a vis Association Members. Unreasonable Membership criteria, attempts to deny Membership to qualified applicants, attempts to expel qualified Members for reasons other than those laid down in the Association's Articles of Association, and attempts to deny non-Members access to important Association services or information can all constitute competition law violations.

The following Guidelines should govern the Association's Membership policies:

1) Membership requirements for applicants who comply with the qualifications laid down in the Association's Articles of Association must be applied without discrimination by the Board of Directors;
2) No bona fide competitor should be excluded from Membership;
3) Procedures for expelling Members must be uniformly and fairly applied by the Board of Directors in accordance with the Association's Articles of Association;
4) Information or services offered by the Association must be made available to non-Members (including customers) for a reasonable fee;
5) Denial of any Membership application, termination of a Member or any refusal to provide a non-Member with Association information or services should first be reviewed with counsel.

C. Statistical Information Programmes

The US and EU competition laws recognise that the collection and reporting of statistics by a trade Association, when properly done, is a permissible and competitively valuable activity. However, in some circumstances, the exchange of information among competitors can facilitate collusion on prices, other terms and conditions of sale, division of markets, or limitation of production and is under those circumstances prohibited. While each proposed statistical programme must be evaluated on its own, the following are the guidelines the Association applies in its statistical reporting programme:

1) With respect to each Association statistical information programme, there must first be established a legitimate, pro-competitive purpose for the collection and dissemination of that information such as to inform and facilitate individual decision making;
2) Except where specifically authorised by counsel, data collected should be of past transactions or activities:
    a) The Association should not, as a general matter, collect or disseminate, in any form a) unpublished current price information or terms or conditions of sale (discounts, warranties, credit terms, allowances and the like);
    b) unpublished current information on production or capacity utilisation, unless such information is already in the public domain and its collection and dissemination is authorised by counsel. The Association should never collect or disseminate information concerning any Member's intentions or forecasts as to the foregoing unless such information is already in the public domain and its collection and dissemination is authorised by counsel.

3) Where possible, information should be collected from public sources. In cases where it is decided to collect information (other than that already in the public domain) directly from the Members, individual Member information should be collected by an independent third party, such as an outside accounting firm, or by outside counsel. Such information should be aggregated before it is delivered to the Association and individual Member data should not be available to the staff or the Association's Members. Given that some countries may have only one producer, in some cases where the information is not already in the public domain it will be necessary to aggregate data by regional geographic areas;

a) When data is collected and disseminated, even in aggregate form, it should be as factual as possible. The extent of permissible analysis depends on the type of information collected e.g. the more sensitive the data, the less accompanying analysis that is appropriate. Under no circumstances should the Association make suggestions or recommendations as to common business strategies to be undertaken by Members in matters such as future pricing, capacity utilisation or other elements of competition among Members;
b) Discussion or exchange of or comment on any confidential individual Member's statistical data must always be avoided at meetings. Even with respect to discussion of previously published data or of composite statistical information collected by the Association, counsel should be alerted in advance to any anticipated discussion to consider whether it is appropriate. Discussion must be carried on in such a way as to avoid even the appearance of suggesting any future common business course of action among competitors;
c) Participation in any statistical gathering programme must be voluntary for Members;
d) Any information gathered and compiled must be made available both to all Members and non-Members (including customers) with valid business reasons for the information; non-Members can be charged reasonable fees (sharing of the costs) for access to the information. Reports may be withheld, however, from Members and non-Members who are eligible to provide information for the statistical gathering programme but choose not to do so;
e) Properly structured cost study programmes are acceptable where not used for an illegal purpose (leading to price fixing, price raising or stabilising agreements). Such programmes may include collection of cost data intended to educate Members in costing principles and systems adopted in the industry, and programmes to permit individual Association Members to compare their costs and benefits with industry averages. Any such studies should be done on a historic basis only and released in aggregate (composite) form so as not to identify costs of individual Members. There must be a clear and legitimate purpose for such a statistical gathering programme, particularly if the Association intends to collect, aggregate and disseminate current or future costing information from individual Members. All such programmes should be carefully organised with advance guidance from counsel;
f) The Association has developed a programme for gathering and disseminating statistical data based on the foregoing guidelines, attached hereto as Annex A.

D. Joint Research and Development

Joint research and development proposals invariably raise issues under US and EU competition laws.

The US Justice Department, in its 1980 Anti-trust Guide Concerning Research Joint Ventures, sets out a three-step analysis to determine whether a research joint venture violates anti-trust laws. These involve examination of the legality of the joint venture itself (for example, whether it unreasonably restricts competition or is used to disguise illegal cartel behaviour among competitors), an examination of whether there are collateral restraints regarding the joint venture (including price and any territorial restriction on use of research results) and whether the restraints are reasonable, and finally an examination of the possible impact upon competitors or any limitations on access to the venture or its developments. The criterion in respect of a joint venture is whether its purpose and effects are reasonable and more pro-competitive than anti-competitive.

In October 1984, the National Co-operative Research Act was passed, which provides that the anti-trust acceptability of joint research ventures is to be judged by the rule of reason analysis. Congress amended the Act in 1993, renaming it the National Cooperative Research and Production Act of 1993. With respect to RandD activity, the Act exempts such activity from treble-damage suits, if the participants in the research joint venture have made certain disclosures to the Department of Justice and the Federal Trade Commission pursuant to a voluntary notification procedure.

The approach of the EU to joint research and development programmes was clarified as a result of Commission Regulation (EC) No. 2659/2000 and the Commission Notice – Guidelines on the application of Article 81 of the EC Treaty to horizontal cooperation agreements (2001/C 3/02). The Regulation provides a block exemption from the application of Article 81 to RandD agreements where the combined market share of all parties to an agreement does not exceed 25%. The Guidelines complement the Regulation and are applicable to RandD agreements not covered by the block exemption. The Guidelines set out the general approach which should be followed when assessing horizontal RandD cooperation agreements.

The rules under both US and EU law are complex, and if the Association were to decide to get involved in research and development programmes, close consideration would need to be given to the terms of any collaboration. It is possible to state in general terms, however, that the Association should be able to undertake joint research and development programmes provided that the arrangements relating to such programmes do not restrict the exploitation of arising technology by those financing them, and permit licensing to third parties.

E. Lobbying

In general, any Association efforts to influence the "passage or enforcement of laws" in the United States - whether before executive, legislative or judicial bodies - are immune from anti-trust challenge. This immunity is based on the right of each person to petition the US Government under the First Amendment to the US Constitution.

There are two important exceptions to this rule. The Association's efforts to influence US governmental action would NOT be immune from anti-trust challenge if its lobbying were a mere "sham" or, in some jurisdictions, if the lobbying related to governmental functions that are purely commercial in nature.

The United States Department of Justice and most courts in the United States are of the general view that it is also protected activity for Associations to lobby governments other than the United States government. The issue is not completely free from doubt, however, and there is no direct precedent under US law concerning whether a trade Association may lobby international or multilateral agencies, such as the World Bank. Even when not directly exempt from application of the anti-trust laws, however, such activities are permissible where they do not unreasonably restrain trade.

There are no specific rules in the EU relating to lobbying and it is generally permitted. Clearly, however, any joint activity of this nature would not be permitted to have any aims or effects which are inconsistent with the EC Treaty. Since the Treaty also imposes obligations on governments, it would not be permissible to undertake lobbying activities aimed at asking Member States to break their direct Treaty obligations.

To minimise the possibility that the Association's lobbying or other governmental work would be subject to anti-trust challenge:

1) None of the Association's activities should be for the purpose of deterring others from using any governmental or administrative process;
2) Association activities must not be designed to influence the decisions of governmental or administrative officials acting in a purely commercial or proprietary rather than governmental capacity;
3) Where lobbying before governments other than the United States or lobbying before multinational bodies is to be considered, counsel to the Association should be consulted prior to undertaking such activities.

F. Association Business

It is important that the Association should be able to demonstrate that its activities are not being used as a cover for anti-competitive practices among its Members. Copies of all communications among Members concerning Association business should be sent to the Association.

G. Report All Possible Violations of these Guidelines

Those who violate any of these guidelines are dangerous, not only to the Association and themselves, but to other Members as well. Thus, if any Member hears or learns of any conduct which violates these guidelines, or is even questionable, it should be reported to counsel for the Association so that it can be dealt with for the protection of all Members. No substantive response should be made to any inquiry received from a law enforcement agency, private attorney or anyone else raising matters of legal concern relating to the Association. Counsel for the Association must be contacted in the first instance and should prepare or approve all responses to such inquiries. No documents should be inspected by or released to any enquirers without the approval of counsel for the Association.

Note: These guidelines are intended for use only by Members and staff of the Association and are not to be relied upon by any other person. The description of the laws as set out herein is current as of the date of publication. Advice on EU, UK and US anti-trust laws has been provided by Shearman and Sterling LLP, London (contact: John Schmidt) and is current as of February 2004.

Annex A

World Coal Association
Statistical Reporting Programme

1) Reports from national or regional Members (and non-Members) MAY cover the following matters:
   a) General demand for coal. This may involve collection of public and non-public information regarding i) past production, ii) existing reserves and production capacity, iii) current stocks and inventories at the producer, distributor, and user levels, and iv) current and future demand for hard coal;
   b) General factors affecting demand which are external to the coal industry. This refers to general economic trends, technical developments and so on;
   c) General developments in labour relations;
   d) New government or intergovernmental initiatives or actions (or inactions) impacting the coal industry;
   e) Development in environmental matters including new laws and regulations (and proposals for change) and pressures for change;
   f) Reports on new research and development endeavours, developments or discoveries that are non-confidential.

Discussion of these matters is permitted within the guidelines set forth above for Association meetings.

2) The following information relating to different parts of the world (including individual countries) may (if desired) also be included in a report, but only if it is public knowledge such as having been established by independent or government investigation or otherwise made public by companies. The source of the information or of its publication should be stated:
   a) Historic or current production information (including production by non-Members);
   b) Historic or current coal consumption information (this should not include consumption by individual customers except where the customer has a monopoly of a particular type of consumption - e.g. electricity generation);
   c) Historic or current coal import and export information;
   d) Overall historic production costs or future projections for such costs on a per tonne or gigajoule basis.

The information referred to above may relate to an individual Member only in cases where such Member has an effective monopoly of production in a particular country. There should be no discussion of the above information.

3) Reports SHOULD NOT cover information regarding individual Members such as:
   a) Current production or exports or imports (unless permitted under paragraph (2));
   b) Future production, export, import and marketing plans;
   c) Past, current or future contracts, prices or terms of sale;
   d) Any production cost figures not permitted under paragraph (2);

The foregoing applies even if such information is in the public domain.

4) If a Member has any doubt about the category into which any particular information may be included in a report, he should consult Counsel to the Association before including it in his report.