



GUIDELINES FOR COMPLIANCE WITH EU COMPETITION RULES

COGEN EUROPE

These guidelines aim to assist COGEN EUROPE and association members in identifying the situations in which it may wish to take action against anti-competitive behaviour by its members and reduce the risk of infringing the competition rules. Please read them carefully.

Disclaimer: The attached Guidelines do not constitute legal advice. Information exchange is an area of difficulty in practice since compliance depends upon a detailed analysis of the precise nature of the information exchanges and the characteristics of the relevant market where competitors operate. As a general rule, therefore, the more concentrate a market, the more likely it is that competition will be found to be restricted by information exchange. Please consult a qualified lawyer for legal advice on any specific matter.

Exchange of company-specific information between competitors is generally contrary to competition law

- ❑ Members of COGEN EUROPE should be aware that exchange of company-specific information between competitors is potentially violating EU competition rules. Each member should feel free to interrupt any potentially unlawful discussion or document distribution. The interruption and/or expression of concerns should be duly enacted in the minutes of the meeting.
- ❑ Any violation of the competition rules may lead to substantial fines.
- ❑ Members should be aware that personal notes may be taken and used as evidence by the Commission and/or national competition authorities during investigations.
- ❑ COGEN EUROPE premises, Members offices as well as Private domiciles of Directors may be visited and searches by the Commission and/or national authorities in the framework of a cartel investigation.

Members must in particular be reminded that it is strictly prohibited for competitors to:

- Agree or give any concrete recommendations or conclusions in such a form that they induce competitors to behave in an identical manner
- Allocate customers or territories among themselves
- Influence competitor's business decisions
- Co-ordinate pricing, production or other competitive practices, decisions or strategies
- Exchange commercially sensitive company-specific information

In particular, exchanges of information or discussions between Competitors are normally prohibited but may be authorised:

Prohibited company-specific topic include:	It is permissible to:
<ul style="list-style-type: none"> <input checked="" type="checkbox"/> sale or purchase prices <input checked="" type="checkbox"/> terms and conditions of trade <input checked="" type="checkbox"/> market shares <input checked="" type="checkbox"/> current and forecast production, output, sales or orders <input checked="" type="checkbox"/> anticipated supply <input checked="" type="checkbox"/> current and forecast production capacity 	<ul style="list-style-type: none"> <input checked="" type="checkbox"/> exchange sufficiently aggregated anonymous and historical data <input checked="" type="checkbox"/> assess key economic factors affecting industry structure <input checked="" type="checkbox"/> report on technology trends in key markets/product areas <input checked="" type="checkbox"/> develop common projects in relation to industry standards or EU policies

<input checked="" type="checkbox"/> anticipated downtime <input checked="" type="checkbox"/> marketing or product plans <input checked="" type="checkbox"/> raw materials or product composition <input checked="" type="checkbox"/> customers or bids <input checked="" type="checkbox"/> general business strategy <input checked="" type="checkbox"/> any information which would enable competitors to make forecasts of their future market behaviour	
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Preparation of lawful statistics

Statistics need to meet the following conditions to be deemed acceptable from a competition law perspective:

Historical data

Exchanges of information which relate to sensitive areas may be permitted subject to the overriding conditions that the data in questions relates to past market conditions and cannot therefore be used by competitors to determine the future conduct of rivals.

Anonymous data

Information which relates specifically to an individual company will immediately raise concerns.

Aggregated data

Information should be in summary form so that accurate figures for individual producers are not available. This means that data may either be collated according to groups of factories /countries or else based on multiple machine capacity classes. Whether or not the information is sufficiently aggregated will depend on the number of producers which are active in the market in which the information exchange takes place. It is important that no producer should be able to obtain detailed information about a competitor's business, not otherwise available to it, by "reverse engineering" the statistics (for example, by subtracting its own data from aggregated statistics).

Data should be independently compiled

Responsibility for compilation and dissemination of information should be entrusted to an independent person, rather than one of the companies involved, since questions may be raised as to the efficacy of any safeguards used within a participating company as a means of preventing leakage of confidential information. Data must not be compiled by a producer or representative or a member of staff of a producer, but by an individual or a firm that is independent from any producer. The same goes for a member who is a National Association. No representative of the National Association member of COGEN EUROPE should have direct access to the company-specific information if he or she is, directly or indirectly, or has in the recent past been engaged in a subordination link to one of the producers.

Data should be public

Publication of a statistics report does not render the exchange of data lawful. However, the fact that the results of an information exchange are made public (and so are available, for example, to customers as well as suppliers in the case of a supplier information exchange) has been taken into account by the Commission as a factor leading to the conclusion that an exchange was permissible.

If the data used in the statistics are made available publicly through an individual producer's website or annual report, but can still be considered commercially sensitive, e.g. capacity utilisation or output, this does not make the dissemination of statistics automatically lawful. Even if the publicity of this sort of information is common practice in the industry, it is not advisable to encourage such company-specific information exchange.

If the data used in the statistics was made available through public channels, e.g. official customs or trade office reports, it is useful to make it clear in the statistics report what the source is.

It is also advisable to send a copy of the reports to the Commission's Directorate General for Industry, Environment and/or Competition whenever possible.

Handling meetings

In order to avoid any unlawful discussions at meetings, it is advisable to:

- Distribute or refer to the compliance guidelines at every meeting and in particular at every board, general assembly meetings, statistics and market research meetings.
- Avoid any discussions on the topics listed above under the Exchange of Information section.
- Invite a competition counsel to attend the meetings whenever useful, or at random, to ensure compliance remains a priority.
- Interrupt any potentially unlawful discussions or document distribution (this applies for the Chairman, the Managing Director or any member present).
- Make sure that the interruption and/or expression of your concerns have been duly enacted in the minutes.
- COGEN EUROPE must carefully draft meeting minutes and, whenever necessary, have the minutes reviewed by a competition counsel to avoid any potential language misinterpretation issue.

Drafting safe correspondence

- All correspondence with external counsel is covered by legal privilege and as such, cannot be seized by the competition authorities for evidence purposes.

Correspondence with in-house counsel may be covered by legal privilege in limited circumstances and this is still the subject of debate in most Member States of the EU. This is why it is generally not recommended to insert

confidential information in correspondence with in-house counsel or with members' in-house counsel.

- All correspondence between COGEN EUROPE and members concerning company-specific data should be saved on a safe server/file and hard copies should be kept in a locked cabinet to which no other producer representative could have access.
- Please note that the competition rules in force since 01.05.04 make it possible for competition authorities to search the private homes of company's management and to interview company staff.

Fair rules for participation and membership

- Where national producers are not represented by a national association – which would normally render the data anonymous since the same competition rules apply to them – these national producers should not have access to company-specific data from competing producers.
- Where membership of a trade association is an essential precondition to admission to a particular market, admission rules should not discriminate between nationals of different Member States or set up selection criteria which would not be objective.

Dealing with competition authorities

Showing utmost co-operation is the best way to deal with competition authorities. This does not apply to the extent that self-incrimination is required. When in doubt it is recommended to get legal advice.