FGW compliance guidelines on commitment to fair competition and German and European antitrust law

This document was adopted at the FGW'S general assembly on 13 June 2013 and released for publication on the FGW website [Link].

A. General preliminary remarks on the FGW

The association FGW e.V. – Fördergesellschaft Windenergie und andere Dezentrale Energien, whose aim is it to promote wind energy and other decentralised energy options draws up the Technical Guidelines of the FGW and promotes research projects in the context of its work on guidelines as a neutral engineering platform. The FGW also assumes fiduciary responsibilities in connection with the FGW regulations, for example storing power curves and publishing reference yields. Delegates from members (institutions), regional or national public authorities and territorial authorities as well as guest participants together with representatives of the FGW secretariat are active in the FGW's panels. This group is referred to as delegates in the text below. The FGW is committed to the rules of the market and fair competition to establish a consensus between all interest groups and to gain the necessary trust in its work.

These Compliance Guidelines on antitrust law were drawn up in particular for new FGW members and delegates to make them aware of facts relevant under antitrust law with regard to the activities of the FGW as a basis for the work of the FGW panels.

B. General information on antitrust law

Any 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 (Section 1 German Act against Restraints of Competition - GWB) are prohibited. In addition, the European rules on competition under Article 101 (1) (ex Article 81 TEC) of the Treaty on the Functioning of the European Union apply, if trade between Member States may be affected.

According to the latter, antitrust law forbids agreements on prices, trading conditions etc. This requires neither express nor written declarations. An agreement may also be concluded through so-called conclusive behaviour. However, antitrust law also forbids so-called concerted practices between undertakings, which lead to a similar outcome.

Infringements can be punished by the antitrust authorities e.g. with fines against companies, managers and individuals as well as prison sentences.

C. Consequences for the work of the FGW

The FGW as an association is an institution that is required to formulate and implement technical solutions and agreements as part of the aims of the FGW from the perspective of association and industrial policy, which were incorporated in its statutes [Link]. FGW's approach is laid down in the FGW Rules of Procedure of the panels [Link].

The FGW's responsibilities are:

1. The bodies of the FGW and their responsibilities are described in the FGW statutes. Members of the FGW Board and employees of the FGW secretariat represent the interests of the association within the framework of these statutes. This includes in particular maintaining the neutral position of the bodies towards the interest groups involved in the FGW panels as well as complying with the Rules of Procedure. If members of the Board are involved in the work of FGW's panels at the same time, they can represent the interests of the institution which seconded them there.
2. The FGW secretariat supports the work in the panels and monitors compliance with the FGW statutes, Rules of Procedure and the present code of conduct. The responsibility of the individual delegates to comply with these rules and regulations remains unaffected by this. The FGW will inform the member institutions about these rules and regulations when they join and subsequently about all the updates via its website.
3. The FGW secretariat as well as members of the FGW Board will not disclose or provide access to any information about FGW members which is not in the public domain to other FGW members or delegates outside the FGW Board.
4. A member of the secretariat will attend the meetings of all FGW panels or the responsibilities described here will be assumed by the responsible chairpersons (see Responsibilities of FGW members).
5. Within the framework of the guideline work of the FGW, the Board, secretariat and the chairpersons of the panels are required to fulfil the conditions for guideline work that is free of discrimination, transparent and open, as well as making the committee work and the guidelines accessible to the public under appropriate conditions. The Technical Guidelines of the FGW should be limited to terminology and nomenclatures, questions of compatibility, interoperability, security and the practical implementation of systems and procedures.
6. Guests attending the panels of the FGW for the first time will be informed about the Compliance Guidelines in advance of the meeting and in every invitation by a link and are obliged to comply with these when they attend meetings of FGW panels.

Responsibilities of FGW members:

1. The delegates represent their own interests in the guideline work within the framework of the FGW statutes, the Rules of Procedure and these Guidelines on the commitment to fair competition in the FGW working panels. It is the responsibility of the member institutions to ensure that all their delegates in the FGW panels are familiar with these rules and regulations. The current version of the respective documents can be viewed on the FGW website [Link].

2. Should this not be possible owing to other responsibilities, e.g. in the event of several panels meeting at the same time, then the relevant chairpersons will assume these responsibilities. If the chairperson is prevented from doing so, the meeting can be held only if at the start of the meeting a temporary chairperson can be appointed for this meeting.
3. Minutes are to be taken including an agenda and a list of participants for the panel meetings, which are to contain all the results of all votes during the meeting or refer to separate documentation (e.g. lists of comments).
4. FGW members and their delegates are not permitted to make any information relevant to competition accessible to other participants or exchange it with the latter or reach agreements with the latter, which cannot be obtained easily from publicly accessible sources regarding prices, price components, margins, intended price increases, customers, sales territories, distribution channels and strategies, market shares, turnover and sales expectations. The possibility of making such information accessible to members who are not competitors by using NDAs remains unaffected by this.
5. If an exchange of information or an agreement in accordance with Point 4 is considered necessary by one or more members or their delegates, then the permissibility of this under antitrust law is to be clarified and the evidence of its harmlessness is to be provided in a written declaration to the FGW Board via the FGW secretariat. (The permissibility may for example depend on the market affected, the market shares of those involved, the competitive situation and the relevant agreements that need to be reached)

D. Examples of "Dos and Don’ts" regarding the correct behaviour under antitrust law

The following overview refers to German and European aspects of antitrust law using practical examples and recommends behaviour that complies with competition law. The recommendations were drawn up on the basis of a list made available to the FGW with the helpful support of the German Association for Supply Chain Management, Procurement and Logistics (BME) . These "Dos and Don’ts" cannot satisfy the complexity of antitrust law. They should not be regarded as conclusive.

FGW Compliance Guidelines
Revision 1

signed on 15 June 2017
Jens Rauch

Behaviour which is not recommended:	Recommended behaviour:
1. Fixing purchase or selling prices:	
Do not reach any agreement with competitors on prices, price components and trading conditions, which you use for customers or suppliers. Do not agree any joint pricing policy - also not for individual price components, calculations or cost positions. This is a serious infringement of competition law, which the antitrust authorities punish particularly severely. This also applies to verbal and/or informal agreements ("gentlemen's agreements") and to concerted practices as well as to confidential private discussions.	Make sure that your market behaviour is not determined or influenced by informal contacts or by exchanges of information with your competitors. Set your prices and trading conditions autonomously.
2. Division of market and customer protection:	
Do not divide up the market with competitors by regions or products. A division of markets by customers or suppliers is also forbidden. In particular do not conclude any "no-challenge pacts" or agreements to protect "home markets" or customers. Such a division of the market is regarded as a particularly serious infringement of competition law.	Do not disclose decisions about new products or planned launches in new markets to your competitors until you have communicated these decisions publicly. Make decisions on winning over or supporting customers and the selection of suppliers without the involvement of your competitors. Customer protection clauses may be permitted by law with regard to subcontractors under certain circumstances. Therefore always submit collaboration and subcontractor contracts to the Legal Department before they are concluded.
3. Exchange of information:	
Do not exchange any confidential information with competitors, which is relevant to the market. For example do not talk about how you set prices or calculate margins. Also do not exchange information about current, planned or recently applied prices, discounts or calculation methods.	In addition to publicly accessible sources of information about your competitors, you can also use details you receive from non-competitors, in particular customers and suppliers, to make market- and competition-related decisions. This does not apply if is there is a systematic exchange of confidential, market-relevant information between competitors via the non-competitor (circumvention).
Do not disclose the business conditions for purchasing or selling products, costs, sales volumes/transport volumes, names of and details on customers, capacities, marketing or investment plans to your competitors. This also applies as part of so-called benchmarking procedures. For example you must not inform your competitors that special agreements exist with	Data relevant to competition may for example be transmitted to the FGW and used for benchmarking if it is aggregated and depersonalised by the office collecting the data so that no conclusions can be drawn about the individual market behaviour of other companies involved. Should you receive unsolicited confidential commercial information from competitors,

certain business customers and suppliers and what the conditions are (discounts, payment terms). This also applies to information on utilisation/production volumes.	please reject this information and give the reasons for this in writing.
Do not agree your business strategy with competitors.	Maintain confidentiality towards your competitors regarding your business strategy, above all regarding the expansion of your business activity in other sectors or regions or products, until you have communicated this information publicly.
Do not inform your competitors about planned price adjustments and amendments to trading terms.	Notify planned amendments to trading terms, price increases or reductions to your current or potential customers without informing your competitors in advance.
4. Contact with competitors:	
Do not participate in "secret circles" or "secret meetings" with competitors, which might deal with the exchange of market-relevant information or agreements restricting competition.	Contact with competitors should be for a specific reason. The purpose of the meeting should be clearly defined and the agenda should be specified in advance. Expect at least one participant to take notes of the discussion and that antitrust authorities may become aware of the content of the discussions.
Do not tolerate any violation of antitrust law in your presence.	Make your doubts clear, insofar as you have concerns about the permissibility of the subject of the discussions or the purpose of the discussions. If the discussions continue, leave the meeting and ensure that both your concerns and the fact you have left the meeting are noted in the minutes. In these cases also take your own minutes.
Do not use any ambiguous wording, which might indicate behaviour violating antitrust law. This applies both to correspondence with competitors as well as to internal correspondence regarding contacts with competitors.	Distance yourself in writing if a competitor comes to you with a proposal which violates antitrust law. Also do not allow your behaviour to be interpreted as a violation of antitrust law by competitors. Make certain in every case that a company complying with the law is not involved in agreements which violate antitrust law.
Source: Compiled on the basis of the recommendations of the German Association for Supply Chain Management, Procurement and Logistics (BME), Sebastian Schröder, Attorney	