



## INTERNATIONAL WROUGHT COPPER COUNCIL

### GUIDELINES FOR PARTICIPANTS IN ANY MEETING OF IWCC MEMBERS INCLUDING JOINT MEETINGS

#### Introduction

This note is especially aimed at those who are participating in an IWCC Meeting for the first time. It does not aim to give professional advice in respect of any particular jurisdictions, but describes generally the constraints imposed by the anti-trust laws of both the United States and the EU. The note aims to give general guidelines with a view to continuing the well-established good conduct of these Meetings.

All IWCC meetings follow an Agenda. Minutes of Meetings are issued afterwards, having been checked by the Chairman of the Meeting. Approval of the Minutes of the previous meeting is an item on the agenda for any meeting.

Delegates will be aware that the individual companies represented at IWCC meetings are usually in a competitive relationship with each other. Special care should therefore be taken not to disclose or discuss the confidential commercial positions or practices of individual companies.

#### Guidelines

As will be seen from the explanatory notes which follow, the types of activities which are subject to challenge by anti-trust authorities are varied and manifold. No simple listing can cover all the possible activities which may be challenged. What follows, therefore, are general guidelines, compliance with which during an IWCC meeting will minimise the risks to participants at the Meeting.

1. Competitors should never discuss or communicate with each other about prices of their respective products, past, present or future. Moreover, they should have no communications with respect to anything that might affect the price of their products, such as costs of production, discounts, terms of sale or profit margins. Under EC competition law, the exchange of information within a trade association is subject to certain limitations. The European Commission has developed and articulated strong objections to the exchange of certain detailed information among competing firms such as price and sale figures, particularly in a concentrated market and wherever such exchange enables the participants to identify the prices, sales, deliveries or production of any one other participant.
2. Competitors should never discuss plans to increase or decrease production of their respective products. This would include discussing plans for a particular country or geographic area, for a particular product market, or with respect to particular customers.
3. Competitors should not make public pronouncements about the level of or the future course of their own prices, or the price of their competitors, at any meetings. This prohibition is not limited to formal sessions but includes social occasions between formal sessions and even casual meetings while the formal sessions are underway. In this connection, price also includes terms and conditions of sale.
4. Competitors should never disclose to others, either at meetings or otherwise, any competitively (commercially confidential) sensitive information.

If any questionable activities occur during the Meeting, the Chairman will exercise his discretion in ensuring that these guidelines are observed. The cooperation of the

individuals present is requested to avoid intervention in the proceedings by the Chairman. Alternatively, if any competitively sensitive subjects are raised, participants should state that they will leave if the discussions continue and leave if they do not cease.

These precautions should not necessarily be taken as precluding references to terminal markets, such as the LME, and their quotations and mechanisms. However, discussions concerning the operation of these markets should not be particularised to the past, present or future experience or practices of individual companies.

The Secretariat of the IWCC is at the disposal of any delegate who wishes to discuss any of these points.

## **Explanatory Notes**

### ***US Anti-trust Laws***

United States anti-trust laws, in general, are aimed at preserving a free, competitive economy not only within the United States but also in the trade and commerce between the United States and other nations. The primary objective of the EU's competition policy is to promote the integration of the economies of the Member States into a single market and to eliminate practices which restrict competition in the EU.

Certain activities under US law are condemned by the courts regardless of their purpose or effect and are termed "per se" violations of the law. When reviewing *per se* violations, courts have held that proof of the activity itself may be sufficient if the activity can be shown to be the result of an agreement. The agreement can be inferred, for example, from proof of meetings between competitors followed by price or marketing changes that do not appear to result from natural market forces.

Those areas in which per se violations of the US anti-trust laws have been found by the courts involve

1. price fixing between competitors (which would include establishing maximum or minimum prices);
2. agreements to divide territory;
3. agreements to divide customers or products;
4. agreements to limit production;
5. collective refusals to deal against suppliers, customers or competitors, and
6. bid rigging which competitors agree, whether formally or informally, among themselves with respect to bidding on contracts, whether with government or private parties.

Under US antitrust rules, information exchanges between competitors who are part of a trade association should be handled with care. Companies can manage antitrust risks by ensuring that information exchanges with competitors are "reasonable" – that is, not likely to harm competition. A company contemplating an information exchange might first ask whether the purpose or likely effect of the exchange is to promote or rather to hinder competition, and whether adequate safeguards have been put in place to avoid anticompetitive data exchanges.

The US antitrust agencies have identified a “safety zone” within which data exchanges are highly unlikely to raise substantial concerns. In general, the agencies will not challenge a data exchange if:

1. the exchange is managed by a third-party, like a trade association;
2. the information provided by participants is more than three months old; and
3. at least five participants provide the data underlying each statistic shared, no single provider’s data contributes more than 25% of the “weight” of any statistic shared, and the shared statistics are sufficiently aggregated that no participant can discern the data of any other participant.

An exchange of information that falls outside the safety zone may still be lawful, but only if, taking account of likely anticompetitive effects and any procompetitive justifications, the exchange promotes competition. In the event the sharing of information among competitors results in an agreement to fix prices or limit output, that agreement may be unlawful *per se*, and could lead to criminal charges.

### ***EC Competition Law***

The cornerstones of EC competition law are Article 101 and 102 of the Treaty on the Functioning of the European Union. The articles prohibit all anti-competitive practices made by a group of entities acting together or by a dominant firm abusing its market power. Agreements do not have to be in writing to be prohibited. EC competition law also governs mergers involving companies that have a certain, defined amount of turnover in the EU, and also addresses state aid given by Member States of the EU to companies. The policy on state aid is unique to the EU law regime, as it is made up of independent member states.

There are some types of agreement that are anti-competitive by virtue of their “object” and such agreements are analogous to *per se* infringements under US anti-trust law. These include agreements between competitors to:

1. fix prices;
2. share markets/allocate customers;
3. limit output;
4. limit sales;
5. exchange commercially confidential information, such as customers, prices or levels of production;
6. engage in collective exclusive dealing.

The activities of trade associations must comply with Articles 101 and 102. The same basic principles apply to competitors using trade associations to co-ordinate their commercial activities as govern all anti-competitive arrangements between competitors. Article 101(1) expressly prohibits “decisions by associations of undertakings” and, in practice, most cases brought against trade associations by the EC competition authorities have been against cartel-type activities in breach of Article 101(1).

### ***Penalties***

The penalties for violating anti-trust laws are severe.

In the US, persons found guilty can be fined substantially and individuals may be sentenced to prison. EC authorities have the power to impose fines up to a maximum of 10% of the total worldwide turnover of each of the businesses participating in the infringement. As with US anti-trust laws, it is not necessary for arrangements violating

EC competition rules to be concluded in the territory of the EU; practices, transactions or meetings between companies and/or trade associations located outside of the EU may infringe the EC competition law rules if competition within the EU is distorted as a result. Further, under Modernisation Regulation 1/2003, the EC is no longer the only body capable of public enforcement of competition law, and thus individual countries may now enforce EC law within their own courts.

Last edit date: June 3, 2020