European Clean Hydrogen Alliance

Kick-starting the EU Hydrogen Industry to achieve the EU climate goals

Guidelines for Competition Law Compliance within the European Clean Hydrogen Alliance

The European Clean Hydrogen Alliance[1] ("the Alliance") is a voluntary collaboration of private and public stakeholders across the hydrogen value chain, open to participation by any company or organisation that meets the membership criteria[2] and signs the European Clean Hydrogen Alliance Declaration ("Declaration")[3].

Working towards the objective of climate-neutrality in the EU by 2050, the European Clean Hydrogen Alliance aims at deploying hydrogen[4] as a viable and competitive energy carrier in Europe. To this end, it will build up a pipeline of viable investment projects along the hydrogen value chain for an ambitious deployment of renewable and low-carbon hydrogen technologies and solutions until 2030. Where relevant to its work in identifying and building up a pipeline of viable investment projects, the Alliance can flag obstacles and bottlenecks for the scaling up of clean hydrogen and provide suggestions for how to address these.

Members of the Alliance join forces to promote, develop and deploy hydrogen as a viable and competitive energy carrier in Europe, and accordingly engage in discussions and dialogue, data exchange and collaboration in order to fulfil the activities as described in the Alliance Declaration.

In view of those activities and the risk of both, intentional and inadvertent competition law infringements that they may pose, the Alliance operates under the following guidelines and instructions to ensure that the Alliance members take particular care to ban any form of anti-competitive behaviour from their participation and activities in the Alliance, and comply with EU competition law and relevant national competition laws (hereafter the "competition laws").[5]

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[1] https://ec.europa.eu/growth/industry/policy/european-clean-hydrogen-alliance_en

[2] Notably: Type of activity and geographic origin (https://ec.europa.eu/growth/industry/policy/european-clean-hydrogen-alliance_en)

[3] https://ec.europa.eu/docsroom/documents/43526

[4] This includes hydrogen produced from renewable sources and, during a transition period, low-carbon hydrogen (fossil-based with carbon capture as well as electricity based hydrogen) with significantly reduced full life-cycle greenhouse gas emissions compared to existing hydrogen production. The priority for the long term will be to develop renewable hydrogen.

[5] Alliance members are also encouraged to visit the dedicated webpage of the Commission's DG Competition, which provides information on compliance with EU competition law: https://ec.europa.eu/competition/antitrust/compliance/index_en.html.

1. Competition risks in industry alliances

Alliance members must always take into account that alliances may be exposed to certain anti-trust and competition law risks including – but **not limited to** – the following considerations[6]:

- ✓ One single verbal or non-verbal exchange of commercially sensitive information (*e.g.* related to price levels) can violate the competition laws;
- ✓ Conversations between members at both formal and informal (including social) meetings may turn to commercially sensitive information being unlawfully exchanged;
- ✓ A court or regulator may use competitor meetings in the context of an alliance, together with other factors suggesting collusion, as evidence of a cartel or an anti-competitive agreement in the industry;
- ✓ Rules of an alliance or its members on *e.g.* standard setting, if any, may be deemed to restrict competition;[7] and
- ✓ EU competition law provides that fines imposed on an alliance may be collected from any of its members unless that alliance or signatory can prove that it was not involved in the anti-competitive infringement (effectively reversing the burden of proof).[8]
- ✓ The involvement of the European Commission, notably in the context of Alliance meetings, does not exonerate participants from the application of competition law.

The Commission has issued several sets of guidelines that can help undertakings assess the compatibility of their business arrangements with EU competition law (see notably Communication from the Commission — Notice — Guidelines on the application of Article 81(3) of the Treaty (OJ C 101, 27.4.2004, p. 97) ("Guidelines on Article 101(3)"), the 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) ("Horizontal Guidelines") and Commission Notice – Guidelines on Vertical Restraints (OJ C 130, 19.5.2010, p. 1) ("Vertical Guidelines"). See also Commission Regulation (EU) No 1217/2010 of 14 December 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to certain categories of research and development agreements (OJ L 335, 18.12.2010, p. 36) ("R&D Block Exemption Regulation"), Commission Regulation (EU) No 1218/2010 of 14 December 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to certain categories of specialisation agreements, (OJ L 335, 18.12.2010, p. 43) ("Specialisation Block Exemption Regulation"), Commission Regulation (EU) No 316/2014 of 21 March 2014 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of technology transfer agreements (OJ L 93, 28.3.2014, p. 17) ("Technology Transfer Block Exemption Regulation"), Commission Regulation (EU) No 330/2010 of 20 April 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices (OJ L 102, 23.4.2010, p. 1) ("Vertical Block Exemption Regulation").

[6] See footnote 4.

[7] See also 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) ("Horizontal Guidelines").

[8] Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (Text with EEA relevance); OJ L 1, 4.1.2003, p. 1–25; in particular Article 23(4).

2. Information exchanges to avoid

Under EU competition law, exchanges of certain types of information can amount to a restriction of competition. The likely effects of an information exchange must be analysed on a case-by-case basis, as the results of the assessment depend on a combination of various case specific factors. Whether or not an exchange of information will have restrictive effects on competition depends on both the economic conditions on the relevant markets and the characteristics of information exchanged.[9]

Alliance members must not have formal or informal discussions, in particular with other Alliance members who are or may become competitors, relating – but not limited to – the following types of information capable of amounting, according to the principles of EU competition law, to commercially sensitive information. [10] A non-exhaustive list of examples of what *could* constitute commercially sensitive information includes:

- ✓ Current or future individual company or industry pricing or any matters likely to have an impact on current or future prices such as competitive strengths and weaknesses, price changes, profit margins, discounts, rebates, surcharges, credit lines offered or other terms of sale;
- ✓ Individual company cost information including any cost components such as, depending on the specific cooperation and the market conditions, production or distribution costs, cost accounting formulas and cost computing methods;
- ✓ Individual company sales or production information including sales volumes, sales revenues, market share, production volumes, production capacity, capacity utilisation, stock levels and supplies, bid amounts and terms, and any limits on sales; current and future company plans and business strategy relating – but not limited – to bidding, investment, marketing and advertising, production, purchasing, sales or technology;
- ✓ Any matters relating to individual customers, distributors or suppliers such as, for example, boycotting or blacklisting; and
- ✓ Salaries and wages, or limitations on hiring a competitor's employees.

(Note: Should the limited, temporary and objectively necessary exchange of sensitive commercial information be warranted in the context of the proposed alliance, additional principles and guidelines may be required.)

3. Allowed Information exchanges

To the extent that they do not amount, in the sense of competition law, to commercially sensitive information, Alliance members may have formal or informal discussions, and exchange of information, on the following subjects:

[9] See in particular Chapter 2 of the Horizontal Guidelines.
[10] See in particular Chapter 2 of the Horizontal Guidelines.

- ✓ Public policy and regulatory matters of general interest;
- ✓ Non-confidential current or historical information that is in the public domain;
- ✓ Non-confidential technical issues relevant to the industry in general such as standards or health and safety matters;
- ✓ General, non-proprietary technology and related issues such as the characteristics and suitability of particular equipment (but not a particular company's proposals regarding the adoption of specific equipment or technology);
- ✓ General promotional opportunities such as possible new markets for, or new uses of, a product (but not a particular company's promotional plans);
- ✓ Non-strategic educational, technical or scientific data that results in consumer benefits; and
- ✓ Industry public relations or lobbying initiatives.
- ✓ Information of which exchange is needed to build new business partnerships between the European Clean Hydrogen Alliance members

4. Appropriate conduct at Alliance and Alliance roundtables meetings

As a general matter, it should be highlighted that just being present when illegal discussions are taking place may be sufficient to consider a company liable for a competition law infringement, even if that company and/or its representative(s) did not proactively engage in those discussions.

Transparency, notably through the documentation of all exchanges in the context of the Alliance meetings is essential. Alliance members should therefore, when attending Alliance meetings, always:

- ✓ Be fully familiar with the contents of the current guidelines for competition law compliance within the Alliance ;
- ✓ Carefully review the agenda and purpose of meeting in advance for possible problems under the competition laws and seek advice from the members legal department if necessary;
- ✓ Insist on legal counsel being present at meetings where there is a possibility that commercially sensitive information may be discussed;
- ✓ Be vigilant to ensure that discussions at meetings stick to the agenda items and object if they do not making sure such an objection is reflected in the meeting minutes; and
- ✓ Ensure that they make or promptly receive detailed, accurate minutes of meetings and immediately voice any objections to the minutes.

5. How to address competition law related problems?

If while present at a formal or informal meeting of the Alliance or with representatives of competitors the conversation turns to prohibited anti-competitive subjects, Alliance members should:

- ✓ Immediately and expressly state that they cannot be party to discussions on the subject at issue due to competition law concerns and ask that the subject be changed at once;
- ✓ If their objection and request is ignored, immediately leave the meeting in a manner that makes the reason for their departure apparent to all present;
- ✓ Ensure that their departure be recorded in any formal minutes or, if there are no such minutes, record that departure in their own notes of the meeting; and
- ✓ Promptly report the matter to members legal department and ensure that a note is made thereof for the file.
- ✓ The presence of a Commission representative does not release participants from liability should the exchange of sensitive information occur.

In addition, Aliance members should, if they become aware of a competition law infringement or are uncertain whether particular conduct within the Alliance is allowed under the competition laws:

1. Immediately inform their company legal counsel and/or compliance officer, and if concerns are confirmed;
2. Report the anti-competitive conduct to the Alliance secretariat who can then inform competition authorities about this.
3. In addition, you can make use of the Anonymous Whistleblower Tool, available here: http://ec.europa.eu/competition/cartels/whistleblower/index.html.

Lastly, Alliance members should always keep in mind that any failure to take the above actions promptly will make it difficult to later convince a court or regulator of their opposition to an infringement.

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