

EPMA Antitrust Compliance Guidelines

The European Powder Metallurgy Association (EPMA) is an international trade association with high public visibility. The Members of EPMA represent most of the European powder metallurgy supply chain players. It is the policy of EPMA to govern its activities by the standards of the strictest and most developed antitrust principles, principally those of the European Union.

The purpose of these Guidelines is to ensure that the conduct of EPMA, its staff and its Members, does not raise antitrust issues in any relevant jurisdiction. Also, various antitrust authorities have recognised that a strong antitrust policy and compliance guidelines can serve as factors in determining whether to pursue investigations. Thus it is the obligation of each Member and of EPMA staff to be familiar with these Guides and to abide by them.

To assure compliance with these Guidelines EPMA staff members are responsible for antitrust compliance at EPMA meetings. No EPMA meetings or conferences are permitted without the presence of EPMA staff. General assembly meetings are sound and video recorded as well as the plenary session during Euro and world congress. Those movies are then available on public websites.

Why is antitrust compliance so important?

Antitrust law is concerned with monopolisation and concerted activity (“conspiracies”) that substantially affect competition. Importantly, trade association activities are presumed to constitute concerted conduct and, where members are in competition to any degree, concerted conduct among competitors. Thus, EPMA, with a membership of leading powder metallurgy companies in the world, must be particularly antitrust sensitive. Because the activities of EPMA are evaluated as concerted conduct, conduct that is permissible for individual Members or independent consultants may not be permissible or advisable for EPMA as a trade association. This is the important antitrust legal distinction between concerted activity and unilateral conduct.

It is fundamental that none of the foregoing should deter membership in EPMA, or discourage Members from participation in trade association activities. The courts and antitrust enforcement authorities have recognised that legitimate trade association activities can promote competition and efficiency. Furthermore, they can provide industry and public benefits, such as ensuring safety and protecting the environment. In addition, trade association activities can create a better and more informed marketplace, permitting individual Members to determine what makes business sense for themselves, the industry and the public at large. In sum, trade associations can promote the exchange of ideas and vital market information that individual Members could not accomplish on their own.

The European Powder Metallurgy Association as a voice for the international Powder Metallurgy industry

One of the prime missions of EPMA is to inform its Members, governments, and the public on international developments and statistics relating to the Powder Metallurgy industry. Trade associations routinely issue industry-relevant bulletins or newsletters. Importantly, given a significant industry issue, trade associations can serve as the “voice” of their industries by presenting position papers and testimony, and by petitioning and lobbying on their industries’ behalf before governmental bodies, antitrust agencies, and the public.

Unilateral decision-making versus concerted conduct

As noted, EPMA activities are legally presumed to constitute joint conduct among competitors. Such conduct is very different in legal terms from unilateral decisions made by individual Members based on legitimate information provided by EPMA. EPMA does not make “recommendations” or “suggestions” or “disguised inferences” to its Members on competitively sensitive topics. Rather, it serves to educate its Members and others on facts and statistics relating to the international Powder Metallurgy industry. Individual Members make their own unilateral business decisions based on this information, or information from other sources they deem appropriate. EPMA and its Members do not agree to take joint industry action on any competitively-sensitive issue.

Practical examples / code of conduct in meetings

Trade associations and their members, and even individuals, have at times been prosecuted more for what appears to be a “conspiracy”, rather than what the actual facts may be. Conspiracies can be legally inferred from ill-advised statements, notes or documents made at trade association meetings. The classic example is a statement: “I don’t care what others may do. I am raising prices next week.” These types of statements have been found to constitute conspiratorial conduct where similar price rises by competitors have followed. Such statements can also be viewed as “invitations to collude”.

Thus, comments at trade association meetings, or notes made or e-mails sent, however well-intentioned, can be misinterpreted or misused. A good rule of thumb is to view any comments or notes made at trade association meetings, or discussions at attendant social activities, from the standpoint of a sceptical government investigator unwilling to give the benefit of the doubt, or, if you were under oath at a deposition.

Specific guidelines for statistic and data collection activities

Before addressing potential guideline violations, an important caveat is the misuse of legitimate trade association information and functions. Even the best of trade association conduct and intentions can be subverted. Thus, EPMA must recognise that legal trade association activities may be viewed as a “disguise” or “front” for anticompetitive ancillary activities not consistent with the antitrust laws. For example, subject to specific guidelines, EPMA may make industry forecasts. Such forecasts are generally global or multi-regional, and have little prospect for competitive abuse. However, antitrust authorities have cautioned that industry forecasts can be misused to implement or monitor cartel behaviour. Thus, it is fundamental to EPMA antitrust policy that otherwise legal activities can never be used to mask or implement anticompetitive conduct. No forecasts are permitted unless in accordance with these safeguards. EPMA’s safeguards include: the use of a third party or EPMA staff in creating such forecasts; limiting access to data; preserving the confidentiality of submitters; “homogenising” (aggregating) data such that the identity and information of submitters is not disclosed; and utilisation of publicly available information, such as that compiled by regional trade associations and industry consultant services.

Antitrust – sensitive areas

Theoretically many forms of otherwise neutral conduct could be used to implement a conspiracy to restrain trade. However, the major antitrust-sensitive area for trade associations is *per se* (no defence or justification) violations of the antitrust laws. These areas must be totally avoided and are subject to civil and criminal prosecution, as well as competitor and consumer lawsuits, including class actions. Such conduct is deemed illegal in itself, and applies whether the perpetrators are large or small or, indeed, could realistically bring about the anticompetitive results.

These basic violations are agreements that, directly or indirectly, fix or artificially distort: (a) prices charged to customers, or any component of price (e.g., discounts or payment terms); (b) capacity; (c) production or output; (d) geographical or product markets; and (e) customers or classes of customers. As a precaution, EPMA follows these rules: (1) current or future Powder Metallurgy prices are not discussed by Members at EPMA functions; and (2) any discussions of present or future capacity or production is not permitted except if monitored or approved by EPMA or appropriate legal counsel. These principles apply both at EPMA meetings and social events.

Supplier and customer relations

The antitrust laws also apply to dealings between Powder Metallurgy companies and (i) suppliers, and (ii) their customers. The antitrust considerations here are different and less clear. Business interests of Powder Metallurgy companies and their suppliers and customers may well differ. Moreover, Members may have equity interests or supply agreements (“vertical relationships”) with certain suppliers. These companies must consult their individual legal counsel concerning such relationships. Some legal observations are relatively clear. First, to date, the difference in bargaining power between suppliers and buyers has been deemed legally irrelevant. Given time, this may change: antitrust scholars and economists have questioned this premise.

Second, concerted conduct by customers against suppliers, such as prices paid, terms of payment, or boycotting suppliers, is highly suspect. (Supplier-imposed terms of dealing may be legitimate industry topics, but must be monitored by a Legal Counsel). Third, there is a significant exemption from the antitrust laws based on free speech and government petitioning principles. This exemption permits competitors to address suspected illegal activities affecting them, and what remedies to pursue. The application of this exemption is complex, and subject to guidance by a legal counsel. Importantly, Members can never agree to “pass on” increased raw material or other costs to customers. Each Member must unilaterally decide what is appropriate in dealing with their customers.

Petitioning governments

EPMA is globally recognised as a vital representative for presenting common Powder Metallurgy industry issues. Petitioning governmental bodies, such as international forums, courts, or government agencies, is an important exemption from the antitrust laws. This exemption permits trade associations to approach and present industry positions to inform governments, and seek aid or redress on important industry issues.

Membership in the European Powder Metallurgy Association

Nothing in these Guidelines should in anyway discourage Members from actively participating in EPMA activities. Quite the contrary, EPMA has adopted these Guides and other safeguards to assure that Members can feel comfortable in attending EPMA meetings and participating in leadership and Committee work. Further, EPMA recognises that EPMA meetings frequently serve as an occasion for individual Members and attendees to conduct legitimate business with each other. Nothing in these Guidelines prohibits Members from engaging in bona fide commercial transactions. Finally, Members are free and encouraged to consult with the EPMA Executive Director as to any question relating to antitrust. There are no “foolish” questions.

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