AFIXGROUP
COMPLIANCE POLICY

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ANTI TRUST LAW

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CONTENT

GUIDANCE NOTE – ANTI TRUST LAW

The role of antitrust law in an open and free economy is to protect free competition. It aims in particular at preventing anticompetitive agreements or concerted practices between companies which have a detrimental effect on other competitors or customer and suppliers of the participating companies. Violations of antitrust law may have severe consequences under civil law and lead to severe sanctions under criminal and/or administrative law for both the company and the individuals involved in the conduct.

1. INTRODUCTION

The purpose of this Guidance Note is to inform employees of the Afix Group on the basis of the **Group Competition Policy Statement** about the most important principles of antitrust law. The Guidance Note is based on the German and European competition laws. However, it also covers the essential principles applicable in many other jurisdictions in which Afix Group is active. Nevertheless, it cannot be excluded that in specific cases the **applicable national laws provide for more stringent or different rules** than those described in the Policy Statement or this Guidance Note. Furthermore, this Guidance Note is only meant to provide an **initial guidance**. It can never replace the necessary case-by-case analysis. In cases of doubt – also regarding the applicable national laws – a Compliance Officer of Afix Group NV or the legal department has to be contacted.

The ban on cartels applies to a wide variety of anticompetitive conduct. It covers well organized and contractually bound syndicates as well as loose and cursory coordination, e.g., mere gentlemen`s agreements or meetings of the minds. It is irrelevant for the legal assessment of a cartel whether it is based on a written, oral, formal or informal agreement or on concerted behavior. It is sufficient that a restriction of competition is intended or even that the conduct is merely capable of restricting competition.

The conclusion of an anticompetitive agreement itself generally constitutes an illegal cartel. It is immaterial whether competition has actually been restricted, i.e., whether the agreement has been implemented or not.

The often used argument that cartels are a necessity in difficult times, in particular in times of crisis does not justify an anticompetitive agreement. Even in times of crisis such agreements that may seem necessary in the view of the participants in order to combat the (actual or supposed) crisis (in particular agreements to limit production, on capacity, supply quotas, price agreements, etc.) are prohibited. Contacts with competitors are, however, not per se illegal from an antitrust law point of view. Such contacts may, however, lead to an assumption of wrongdoing, i.e., that a permissible behavior of a company (e.g., implementation of a unilateral price increase) is insteadr the result of an anticompetitive coordination. Therefore, the formal requirements set out in the Guidance Note of trade association activities and conduct in meetings with competitors at association meetings have to be observed with regard to all contacts with competitors in addition to the rules set out in this Guidance Note.
The distinction between admissible and anticompetitive behavior can often be difficult. In cases of doubt about a legal situation, including the applicable market definition, the identification of market shares, the existence of actual or potential competition (both are relevant), as well as the legality of statistics, market information systems or benchmarking a Compliance Officer of Afix Group NV or the legal department has to be contacted.

2. PROHIBITED CONDUCT

One has to distinguish between anticompetitive conduct between competitors („cartels") and conduct between customers and suppliers.

2. 1. Restraints of competition between competitors

Cartels are strictly prohibited.

Agreements or concerted practices that concern the following topics will usually amount to a violation of the applicable antitrust laws:

» **Prices and price building information**
(e.g., list prices, minimum prices, specific offers, also individual price components/calculations/ costs as well as transitory items and other price building factors such as surcharges, discounts or other ancillary services)

» **Market allocation**
(e.g., the allocation of regional markets (e.g., protection of the „home market"), allocation of customers, definition of market shares, coordination of manufacturing (e.g., specialization, limitation of product ranges, definition of the composition of basic materials for the manufacturing of specific products), limitations regarding import or export, „buy-out" of competitors (agreements to decommission plants or activities), bid rigging (coordination of conduct in public or private bids), joint purchasing, joint marketing/sales, non-competition clauses)

» **Limitation of capacities**
(e.g., limitation or expansion of production, limitation of market saturation with a specific product, limitation of production or sales volumes or future investments)

» **Other relevant contractual terms and conditions**
(e.g., payment terms, granting of credits, terms of delivery or transport, guarantees and warranties, after-sales services)

» **Boycotts**
(e.g., agreements not to have dealings with specific customers or suppliers)

» **Research and development**
(unless the specific situation concerns a permissible cooperation regarding research and development; in cases of doubt about a legal situation a Compliance Officer of Afix Group NV or the legal department has to be contacted)

Cooperation among competitors such as joint marketing, production, sales purchasing or research and development **are only permissible under clearly defined circumstances**. Due to the complex legal case-by-case analysis, difficult market definition or questions regarding market shares or actual

or potential competition (both are relevant) such cooperation agreements have to be coordinated with a Compliance Officer of Afix Group NV or the legal department in advance.

On occasion **industry trade associations** are used by cartels (e.g., to monitor the compliance with an agreed quota), used as a forum for a cartel or to moderate an agreement. Likewise, coordination of future market behavior among competitors can occur during informal ad-hoc meetings, e.g., parallel to an industry or trade association meeting. The mere participation in such meetings of competitors can lead to the appearance of coordination. More specific rules of conduct for these situations are contained in the Guidance Note on trade association activities and conduct in meetings with competitors at association meetings.

The principles described in this Guidance Note are also applicable, if a **competitor is also a customer or supplier** for a specific product. It is not per se illegal to source from or supply to a competitor. However, due to the existing competitive relationship these situations have to be examined very closely. In particular, in such situations one has to clearly limit any agreements or exchange of information to the specific customer/supplier relationship. Any additional agreements or exchange of information has to be avoided. If in doubt, contact a Compliance Officer of Afix Group NV.

2.2. Exchange of information

The **exchange of competitively relevant information** (in particular the information specified under Section II.1) **is prohibited**, if it enables the **coordination of the market behavior** of individual companies. In this context it is irrelevant whether the exchange of information takes place directly between competitors, through a common institution (e.g., trade association) or through a third party, such as a market research institute. However, if a customer or supplier freely and of his own volition provides you with information about a competitor (e.g., to intensify competition), you may clearly use this information. You should clearly document your source in such cases in order to avoid the appearance that the information was received directly from a competitor.

The mere discussion of these topics among competitors can lead to the appearance of wrongdoing, i.e., that a generally admissible conduct of a company (e.g., the implementation of a unilateral price increase) is instead the result of an anticompetitive coordination. Due to the accompanying risk that a competition authority initiates an official investigation, **you should never talk with competitors about these topics**!

In addition to the direct exchange of information the following types of exchange are problematic and can potentially create the appearance of wrongdoing. If in doubt, these types of conduct have therefore avoided or reviewed by a Compliance Officer of Afix Group NV in advance:

» Exchange of price lists
The direct exchange of price lists between competitors can create the appearance of an illegal coordination. Consequently, Afix Group companies may not send their own price lists directly to competitors. If a Afix Group company receives a price list directly from a competitor, a Compliance Officer of Afix Group NV has to be notified.

» Signaling
Open or indirect signals by a company towards its competitors to change prices or other market conditions in the future, can already create the appearance of an illegal coordination in the form of a so-called "signaling". According to the view of the competition authorities in particular in concentrated oligopolistic markets even a one-sided exchange of information can be sufficient in order to reduce the uncertainty about future market conduct and thus create the risk of a restriction of competition. Typical problematic cases concern press releases or interviews regarding business related topics, press conferences addressing quarterly or annual statements, analyst calls covering announcement regarding future market behavior, in particular price increases, if these statements are made in the (discernible) expectation that the competitors will fall in line.

» Exchange of other competitively relevant data
(e.g., order intake, stock, costs, etc.)

The following types of exchange of information are not per se illegal but may lead to the appearance of illegal coordination. The legality of such conduct has to be analyzed on a case-by-case basis. If in doubt about the legal situation, a Compliance Officer of Afix Group NV has to be involved.

» Market information systems/statistics/benchmarking
The participation in and use of such systems are problematic, if the information exchanged through these systems between competitors concern data that is usually considered to be a business secret of the companies involved, in particular information concerning capacity utilization, supply volumes, offers, prices, customers, market shares (market share lists) and if the exchange occurs promptly (1) and if the individual participants are identified or at least can be easily identified (2). It is immaterial who organizes executes the system (third party provider, industry associations, etc.). Market information systems are generally viewed by competition authorities as a strong indication of coordinated behavior.

» Benchmarking
The comparison between competitors is problematic, if it allows the participants to draw conclusions regarding prices or other competitive parameters of the other participating companies.

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(1) There is no predetermined threshold when data becomes historic, that is to say, old enough not to pose risks to competition. Whether data is genuinely historic depends on the specific characteristics of the relevant market and in particular the frequency of price re-negotiations in the industry. Data that is older than one year are usually considered to be historic.

(2) Data is usually considered to be „not identifiable", if it is used in aggregated or anonymized form and if conclusions regarding the data of individual companies can only be drawn with considerable difficulty. The exchange is usually considered to be problematic if one of the following criteria is met: (i) number of participating companies < 5, (ii) few participating companies with high market shares, (iii) data is broken down to a high level of detail according to product groups or with a limited number of transactions (< 10).

2.3. Restraints of competition between customers and suppliers

In many jurisdictions (e.g., the European Union) certain types of agreements between customers and suppliers that are capable of restricting competition are prohibited or only permissible under very specific circumstances.

In particular, the following are **prohibited**:

» Agreements between suppliers and their customers, whereby the freedom of the purchaser to independently determine prices and other conditions for resale is restricted (e.g. resale price and terms maintenance);

The following conduct is **problematic** and only permissible under very specific conditions:

» Agreements whereby customers are restricted to a specific territory in selling on the purchased goods (restriction of sales territories);

» An obligation on the customer to sell on certain products only to a certain group of customers (restriction of customers);

» Exclusivity agreements (e.g. exclusive delivery to just one customer; obligation of customers to purchase their entire requirements from a single seller) under certain circumstances;

» Under certain conditions also "most favored nation clauses" (restriction of the freedom to set prices) which for example limit suppliers in setting their prices to a third person in such a way that the purchaser cannot be granted any better conditions than the "most favored" customer (true most favored clause) or which obligate a supplier to grant earlier customers the most favorable terms that the manufacturer grants to later purchasers.

In cases of doubt about a legal situation a Compliance Officer of Afix Group NV or the legal department has to be contacted.

2.4. Abuse of a dominant position

The so-called abuse of a dominant position is prohibited. A company that has lawfully obtained a dominant position may not abuse this power to the detriment of competitors, customers or suppliers. A dominant position exists, if a company is able to behave independently in the market from its competitors and/or customers. As a rough indication, such a position usually exists if the market share of a particular competitor is above 40%. In some countries, in particular in Germany, the existence of a dominant position may be assumed as soon as the market share is above 1/3. In some countries these restrictions even apply if a company only holds a strong – even if not yet dominant – position.
The existence of a dominant position depends in a particular on the definition of the relevant product and geographic market. This assessment is complex and should in case of doubt be carried out together with a Compliance Officer of Afix Group NV.

Generally there is a distinction between the following kinds of abuse of a dominant market position:

» "Exploitation abuse":
A market dominating undertaking offers its products or services to its own advantage on more favorable terms than it could obtain if there were fair competition, e.g. inflated prices.

» "Obstruction abuse":
A market dominating undertaking tries to drive remaining competitors out of the market ("predatory pricing") or deter potential competitors from the market.

Exploitation and obstruction abuse mainly occur in the following forms:

» Refusal to deal (A market dominating undertaking can be obligated to supply to a customer if the customer has no alternative source),

» Refusal to buy from certain suppliers,

» Discrimination between different customers or suppliers,

» Loyalty rebates (mere volumes discounts are permissible, however),

» Tie-in agreements, package deals and "bundling" (a market dominating supplier may not link the conclusion of contracts to the customer purchasing additional goods which are not part of the object of the contract), insofar as these arrangements cannot be objectively justified.

If you are not certain if a Afix Group company holds a dominant position in a particular product area, or if one of your business partners is abusing a dominant position to the detriment of Afix Group, contact a Compliance Officer of Afix Group NV.

3. SANCTIONS

3.1. Fines

Cartel violations usually lead to very significant fines for the companies involved. In Europe, for example, the fines can amount to up to 10% of the company's total worldwide turnover. In particular the fines set by the European Commission in the last few years have reached a magnitude that can severely endanger the future existence of a company. Furthermore, there is a tendency among the competition authorities to increase their fines even more. This is evidenced by the following examples of decisions by the European Commission of the past years:

		€ million
Microsoft (3) decision of March 24, 2004, July 12, 2006 and February 27, 2008	total of	**1,677**
Car glass cartel decision of November 12, 2008	total of	**1,384**
Gas cartel decision of July 8, 2009	total of	**1,106**
Intel (3) decision of May 13, 2009	total of	**1,060**
Elevator cartel decision of February 27, 2007	total of	**832**
Air freight cartel decision of November 9, 2010	total of	**799**

(3) Fine for abuse of a dominant position.

High fines are also imposed in other countries. For example, in June 2012 the Competition Commission of India has imposed a collective fine of approximately € 930 million on eleven cement manufacturers.4 Furthermore, on July 5, 2012, the German Federal Cartel Office has imposed a collective fine of € 124.5 million on four manufacturers and suppliers of rails for anticompetitive agreements to the detriment of the Deutsche Bahn AG. Among those companies was the Afix Group Group company Afix Group GfT Gleistechnik GmbH, which alone was fined € 103 million.

In some countries, such as Germany, the competition authorities may also fine the individuals involved in the cartel. These fines can in some cases even exceed the annual salary of the individuals involved.

3.2. Criminal law sanctions

Cartel violations are also covered by criminal law in a number of jurisdictions. For example in Germany bid rigging is a crime according to Sec. 298 of the Criminal Code. Anticompetitive conduct can also qualify as "general" criminal offense against property (e.g., fraud or breach of trust, etc.). The consequences can reach from fines to probation and even longer prison sentences.

3.3. Civil law

» Nullity
Under most national laws, agreements violating the law are null and void; consequently the parties to such agreements cannot successfully rely upon or enforce them. They have to be aware of the fact that in a critical situation their partners will assert that the agreement is null and void and refuse to [continue to] perform it.

» Damages
The participation in illegal cartel agreements as well as the conduct of concerted practices may give rise to claims for damages by third parties (for example, for the amount of an overcharge if inflated prices were paid). Claims for damages are gaining in significance. Sometimes the claims can be as high as the fines imposed by the competition authorities or even exceed them.

3.4. Employment related consequences

The participation in anticompetitive conduct will lead to employment related consequences for the acting individuals as well as the individuals with a duty of supervision. Such conduct represents a violation of the employee's duties to their company.
Depending on the seriousness of the offense, the consequences may range from a warning to dismissal or, for members of the executive board/managing board to cancellation of their appointments. Claims by the company against such individuals for reimbursement are not excluded.

(4) Pending appeal.

4. ANTITRUST LENIENCY PROGRAMS

Increasingly, the antitrust authorities are employing so-called amnesty programs (leniency program/crown witness regulations), to break hard-core cartels. These programs reward the cooperation of individual cartel participants in the discovery of violations, particularly if they cooperate at the earliest possible stage of proceedings. These programs range from complete waiver of a penalty to a "discount" – depending on the level of cooperation and the stage of proceedings at which cooperation is tendered.

The combination of high fines and the possibility of a reduction of the fine in case of a voluntary notification of a cartel increase the risk that an anticompetitive agreement is discovered. This is evidenced by the fact following the introduction of the leniency programs that the majority of the cartels were discovered on the basis of a notification by one of the participants in the cartel.

Consequently, a Compliance Officer of Afix Group NV should be informed immediately if there are any indications for anticompetitive agreements.

EXPERT IN SMART SCAFFOLDING SOLUTIONS

AFIXGROUP NV
Durmelaan 20, 9880 Aalter – Belgium

+32 9 381 61 01
info@afixgroup.com

AFIX GROUP.COM