

ASI Antitrust Compliance Policy

This Policy was adopted by the ASI Board as a By-Law on 19 September 2017 and is available at: <https://aluminium-stewardship.org/about-asi/legal-finance-policies/>

Introduction

The mission of the Aluminium Stewardship Initiative Ltd (“ASI”) is to recognise and foster the responsible production, sourcing and stewardship of aluminium. The members of ASI consist of producers, suppliers and users in the global aluminium value chain as well as non-governmental organisations (NGOs). ASI brings these diverse stakeholders together to build a consensus on “responsible aluminium”, in particular through its standardisation and certification programs. ASI is registered as a non-profit public company limited by guarantee and as a charity in Australia.

ASI is committed to respect all applicable laws that relate to both its and its members’ conduct. In particular, ASI strictly complies with all competition/antitrust laws. The aim of this Policy is to ensure that nothing done by ASI and/or its members raises concerns under competition laws. Nothing in this Policy is intended to discourage membership of or participation in ASI. To the contrary, a robust competition policy is essential to ASI’s success as it ensures that members are comfortable attending meetings and sharing legitimate information when involved in ASI initiatives.

Who is covered by this Policy?

This Policy is relevant to **every person involved in the activities of ASI including employees from both ASI and its members**. It is the obligation of all such persons – irrespective of whether that person is working for a company, civil society or association member of ASI – to be familiar with this Policy and to abide by it at all times. Any violation of this Policy may result in immediate suspension from participation in ASI activities.

What is competition/antitrust law?

The purpose of competition/antitrust law is to ensure that markets are free and fair by prohibiting distortions of competition. The precise scope of competition law depends on the relevant country or jurisdiction.

In general, competition laws strictly prohibit cartels whereby competing enterprises collude together on commercially sensitive matters. Typical “hard-core” restrictions between enterprises that are prohibited by competition laws include price fixing, production limitation and market sharing (by customer or territory). These restrictions are prohibited irrespective of their actual effect upon the market.

Competition laws also typically prohibit restrictive agreements between enterprises that have an anti-competitive effect. This assessment usually involves a complex legal and economic analysis. A restriction is more likely to have negative effects upon competition where the parties individually or jointly have some degree of market power. For example, a restriction imposed by enterprises with a high combined market share may have a restrictive effect upon competition whereas the same restriction imposed by two small enterprises may have a negligible impact. Particular care is, therefore, required where an agreement involves a number of enterprises on the same or closely-related markets in order to ensure that there are no anti-competitive effects.

In addition to tackling restrictive agreements between enterprises, competition laws usually prohibit an enterprise in a dominant market position or enterprises in a collective dominance position from abusing that position (e.g. by selling below cost in order to eliminate a new competitor).

Why is compliance important?

Compliance is very important as competition rules are strictly enforced worldwide. Competition authorities have wide-ranging powers of investigation and can seize any documents relevant to their investigation (e.g. diaries, emails, minutes of meetings, personal notes and even in-house legal advice in some jurisdictions).

A breach can result in severe consequences for the enterprises and persons concerned including:

- Significant fines (e.g. up to 10% of worldwide group annual turnover in the EU); and/or
- Custodial sentences (notably in the USA but also in some EU countries); and/or
- Illegal agreements being declared void and unenforceable; and/or
- Director disqualification; and/or
- Damages being awarded by the courts (in particular in the USA and EU) to those harmed by the illegal conduct.

How competition law applies to ASI

Competition law applies to a broad category of enterprises. Any entity engaged in an economic activity (i.e. offering goods or services on a given market) should comply with competition law regardless of its legal status and the way in which it is financed.

It goes without saying that many ASI members are subject to competition law due to their commercial activities. Consequently, they must take precautions when meeting competing enterprises in organisations such as trade associations or standardisation bodies like ASI. This is particularly the case because competition law applies not only to written contracts between enterprises but also to a broad category of agreements including any secret conspiracy, decision, “gentlemen’s agreement”, arrangement, mutual understanding, concerted practice or any other form of coordination.

In addition, competition law applies to associations of enterprises such as trade associations and industry standardisation bodies – even when the decision of the association relates to responsible business conduct. For this reason, ASI works under a general assumption that its own certification and standardisation activities are also subject to competition law (separate to any responsibility of its individual members).

ASI’s Constitution states that it has the following objectives:

- (a) *to define globally applicable ASI Standards for sustainability performance and material chain-of-custody for the aluminium value chain;*
- (b) *to promote measurable and continual improvements in the key environmental, social and governance dimensions of aluminium production, use and recycling;*
- (c) *to develop a credible assurance and certification system that both mitigates the risks of non-conformity with ASI Standards and minimises barriers to broad scale implementation of ASI Standards; and*
- (d) *to become and remain a globally valued organisation advancing programs for sustainability in the aluminium value chain, which is financially self-sustaining and inclusive of stakeholder interests.*

These **objectives of ASI are legitimate** and should **not** give rise to any competition/antitrust concerns. Indeed, competition authorities such as the US Department of Justice have been supportive of responsible business conduct initiatives. Nevertheless, there is no room for complacency when it comes to competition law compliance.

Golden Rules for Competition Compliance at ASI meetings and events

To ensure competition compliance, ASI requires that the following **Golden Rules** are respected at all times:

- (i) Members should always make their own **unilateral educated decisions**, whether on the basis of information provided by ASI or on the basis of information from other sources.
- (ii) It is strictly prohibited to discuss any of the following commercially sensitive matters at an ASI meeting or event:
 - previous, current or future prices;
 - capacity and production information or forecasts;
 - previous, current or future sales information;
 - purchasing prices or trading terms with suppliers;
 - previous, current or future negotiations with individual customers including bidding strategies for public or private contracts.
- (iii) It is strictly prohibited to discuss individual costs of compliance with ASI Standards (e.g. labour costs, raw materials, environmental compliance costs etc.) in the absence of antitrust legal advice to ASI on the subject.
- (iv) It is strictly prohibited to discuss passing on the cost of compliance with ASI Standards to customers (e.g. through a premium for ASI certified products). For example, the EU imposed significant fines totalling EUR 2.9 billion upon truck manufacturers for, amongst other matters, agreeing to pass on to customers the costs of new emissions technologies.
- (v) It is strictly prohibited to discuss any boycott or limitation on the purchase of any raw materials, semi-finished products, equipment, services or other supplies from any supplier that does not meet ASI Standards.

Conduct of ASI Meetings

ASI has put in place the following best practices for the conduct of its formal meetings in order to ensure compliance with competition laws:

- A written invitation shall be sent together with an agenda to participants at each ASI meeting. Discussions during meetings should reflect the agenda. Minutes of each ASI meeting should be drafted accurately and comprehensively to reflect the discussions that took place at the meeting.
- The agenda for ASI meetings shall start with the following notice:

Attendees are kindly reminded that ASI is committed to complying with all relevant antitrust and competition laws and regulations and, to that end, has adopted an Antitrust Policy, compliance with which is a condition of continued ASI participation. Failure to abide by these laws can have extremely serious consequences for ASI and its participants, including heavy fines and, in some jurisdictions, imprisonment for individuals. You are therefore asked to have due regard to this Policy today and in respect of all other ASI activities.
- The presence of an ASI Secretariat representative is essential during all ASI meetings including committee meetings – and ASI meetings must not take place in their absence. The only exception to this is where the ASI Board discuss administrative matters relating to the ASI where the attendance of an ASI employee would not be appropriate (notably relating to ASI personnel performance) in which case the temporary absence of the ASI representative will be recorded in the minutes.
- At all meetings, the ASI Secretariat representative has the right to react immediately to potentially inappropriate discussions by giving suitable guidance (i.e. indicating that such discussion is not permitted in ASI meetings) and by bringing any potentially illegal behaviour immediately to an end. Where this cannot

be achieved, the ASI Secretariat representative has the right to end the meeting. This shall be recorded in the minutes of the meeting concerned.

- If in doubt on the legality of a particular topic, the ASI Secretariat representative or any of the attendees at a meeting may ask for the discussion to be put on hold until external legal advice has been sought.

Remember!

Social gatherings attended by competitors also present a risk under competition law.

For antitrust enforcement, it is irrelevant that the illegal agreement was reached at an informal setting rather than in a formal meeting.

It is therefore crucial that ASI members and staff respect competition law and avoid commercially sensitive subjects during social gatherings just like at formal meetings.

Statistics

ASI undertakes market research relating to responsible aluminium in which it collects, distributes and publishes statistical data originating from its members. Competition laws acknowledge that **the collection and distribution of certain statistical data by trade associations is legitimate and useful**, provided there are **strict safeguards** in place. To this end, ASI applies the following safeguards to ensure compliance:

- It is strictly prohibited for ASI members to exchange confidential information (such as capacity utilisation, production and deliveries, bookings, prices, costs, stocks, customer relations, market shares).
- Current data that is relevant for the ASI statistics shall only be disclosed in **aggregated form** so market participants are not identifiable. This is usually the case where there are at least three operators though in some markets further precautions may be necessary.
- The collection and aggregation of information relating to compliance with the ASI Chain of Custody standard is conducted by the ASI Secretariat in accordance with the **ASI's confidentiality and IT policies**. The collection and aggregation of other data shall be prepared by an independent external party or, in appropriate cases, by the ASI Secretariat pursuant to appropriate confidentiality standards.
- The exchange of historical data (i.e. 12 months after the reporting month) or publicly available data is not usually problematic but such information should only be exchanged with ASI's prior permission and, if necessary, following antitrust legal advice.
- No other information exchange is allowed within ASI in the absence of legal advice.

ASI Standardisation and Certification Programme

ASI is developing an independent third party certification programme to ensure sustainability and human rights principles are increasingly embedded in aluminium production, use and recycling.

Standardisation agreements have as their primary objective the definition of technical or quality requirements with which current or future products, production processes, services or methods may comply. In general, competition authorities recognise that standardisation agreements produce significant positive effects for consumers by lowering costs, ensuring compatibility and promoting economic interpenetration. For this reason, ASI's standardisation initiative on responsible aluminium should generally comply with competition laws.

However, standardisation agreements can give rise to competition concerns, notably where there is: (i) restriction in price competition; or (ii) foreclosure of innovative technologies; or (iii) exclusion of, or discrimination against, certain companies by prevention of effective access to the standard. To avoid such competition issues, ASI adheres to the following best practices with respect to the development of ASI Standards:

- **Participation in standard-setting is unrestricted:** ASI commits to open and transparent processes for standard setting with opportunities for broad stakeholder review and input. ASI consults not just members but a broad range of stakeholders in designing its standards.
- **Audits undertaken by an independent organisation:** ASI's certification program is designed on a model of independent, third-party certification.
- **Due process in the determination of the standard and transparent procedure for adopting the standard:** ASI has published its standard-setting procedure on the ASI website, which follows good practice principles for standards-setting articulated by the ISEAL Alliance.
- **Must not have the effect of boycotting or excluding competition or withholding production:** ASI Standards aim to promote responsible production, sourcing and stewardship of aluminium. The development of common sustainability standards for the aluminium value chain is not intended to limit any company's freedom or discretion to make its own business decisions, to prevent the manufacture or sale of any product not conforming to such a specified standard, or to have the effect of restraining competition.
- **No obligation to comply with the standard:** ASI membership, and hence compliance with ASI Standards, is voluntary.
- **Access to the standard on fair, reasonable and non-discriminatory (FRAND) terms:** ASI Standards are publicly available in a range of languages. There is a membership fee to cover development, implementation and oversight of the program. However, there is no additional charge for ASI Standards (other than the cost of obtaining an audit from an external auditor approved by ASI).
- **Standards reflect existing technology and are kept current and adequately upgraded to allow for technical innovation:** ASI's Standards are regularly reviewed, at least every 5 years or more frequently as required.

Communication of ASI Competition/Antitrust Policy

ASI will take the following steps to communicate and support the implementation of this Policy:

- ASI aims to ensure that this Policy is made known to all individuals and groups participating in ASI activities. This Policy is publicly available on the ASI website.
- This Policy has been adopted as a By-Law and will be referenced in membership agreements with ASI as well as in ASI Standards.
- ASI will provide regular training to the Board and Standards Committee on this Policy and its implications for ASI's work programs and risk management.

Please feel free to ask questions about the scope and application of this Policy. It is better to ask than to run the risk of breaching the rules due to a lack of knowledge. ASI will try to assist where it can. Queries may be directed to the ASI Chief Executive Officer or by email to: info@aluminium-stewardship.org

Disclaimer: No provision of legal advice

Although ASI carefully designs and reviews its Policy to ensure its conformity with competition/antitrust principles, each ASI member is individually responsible for complying with both the letter and spirit of the competition laws in each jurisdiction. The information contained in this Policy is not, therefore, intended to constitute legal advice and ASI does not warrant or guarantee to any person the accuracy, completeness, adequacy or currency of the information contained in this Policy. In this respect, each ASI member is responsible for obtaining its own legal advice on applicable competition/antitrust laws with respect to its involvement with ASI.

Revision history

Version 1 – adopted 23 April 2015

Version 2 – adopted 24 May 2016

Version 3 – adopted 19 September 2017 (this version)