

manufacturers sets a standard and pressures third parties not to market products that do not comply with that standard.

Standardization agreements may have the effect of restricting competition where they impinge upon the parties' freedom to develop alternative standards or products. Standards that are not accessible to third parties may discriminate or foreclose the market, and it is necessary to consider on a case-by-case basis the extent to which such barriers to entry may be overcome. In the context of the telecommunications market, the Commission investigated arrangements proposed by the European Telecommunications Standards Institute ("ETSI"). In that case, there was a risk that the application of a European standard could be undermined if the standard incorporated proprietary technology and the owner of that technology was not willing to license it to the manufacturers of products complying with the standard. The Commission issued a 'negative clearance' comfort letter after ETSI had introduced procedures designed to minimize the risk.

In respect of Article 81(3), the Guidelines state that the Commission generally takes a positive approach to agreements that promote economic interpenetration in the common market or encourage the development of new markets and improved supply conditions. For the benefits of standardization agreements to be realized, the necessary information to apply the standard must be available to those wishing to enter the market and an appreciable proportion of the industry must be involved in the setting of the standard in a transparent manner. Standards must not limit innovation. All competitors in the markets affected should have the opportunity to be involved in discussions on the standards, unless it can be shown that this would give rise to important inefficiencies or unless there are recognized procedures for the collective representation of interests, as in the case of formal standards bodies. As a general rule, there should be a clear distinction between the setting of the standard and the parties' actual behavior on the market. Where the result of a standardization agreement is the establishment of an industry standard, access to the standard must be possible for third parties on fair, reasonable and non-discriminatory terms.

SECTION 3. INTELLECTUAL PROPERTY RIGHTS.

The Commission acknowledges the benefit of licensing intellectual property rights and has established a new block exemption for patent and know-how licensing (Regulation No. 240 / 96), which describes the type of clauses which are permitted in a licensing agreement and those which are prohibited under EU competition rules. The most important of these are set out below:

Permitted clauses:

- An obligation on the licensee not to divulge the know-how communicated under the license;
- An obligation on the licensee not to grant sub-licenses or assign the license;
- An obligation on the licensee to observe minimum quality specifications, including technical specifications; and,

- An obligation on the licensee to pay a minimum royalty or produce a minimum quantity of the licensed product.

Prohibited clauses:

- Restrictions on the determination of prices, components of prices or discounts of the licensed products;
- Restrictions on the licensee competing in the EEA with the licensor;
- Limitations on the quantity of licensed product that the manufacturer sells; and,
- The licensor and/or licensee are required without any objectively justified reason either to refuse to meet orders from users or resellers in their respective territories who would market products in other territories in the EEA, or to make it difficult for users or resellers to obtain the products from other resellers within the EEA.

SECTION 4. DISTRIBUTION AGREEMENTS

The Commission's Block Exemption on Vertical Restraints ("**Block Exemption**") and its accompanying Guidelines on Vertical Restraints are relevant to the analysis, in competition law terms, of distribution agreements.

The Guidelines suggest that vertical agreements can be grouped into four categories: a single branding group; a limited distribution group; a resale price maintenance group; and a market-partitioning group. The single branding group consists of agreements that have as their main element that the buyer is induced to concentrate its orders for a particular product on one supplier. An agreement not to purchase competing products, agreements that force or induce customers to purchase all or most of their products from one supplier and tie-in transactions fall within this group. The limited distribution group consists of agreements that have as their main element that the manufacturer sells to one or a limited number of buyers. Exclusive distribution, exclusive customer allocation and selective distribution agreements fall within this group. The resale price maintenance group consists of agreements which impose minimum, fixed, maximum or recommended resale prices, and the market-partitioning group consists of agreements the main element of which is that the buyer is restricted as to where it buys or resells a particular product.

Given the breadth of the Block Exemption, it is not necessary, in many cases, to decide whether an agreement infringes Article 81(1). The Guidelines on Vertical Restraints suggest that there is no need to consider the application of Article 81(1) to an agreement within the "safe haven" of the Block Exemption and therefore exempt under Article 81(3).

The Guidelines on Vertical Restraints point out that agreements of minor importance and agreements between small and medium-sized undertakings fall outside Article 81(1) altogether. Vertical agreements entered into by undertakings with a market share of less than

10% are usually regarded as *de minimis*, although a restriction such as an export ban may infringe Article 81(1) even if below this threshold.

The combined effect of the *de minimis* doctrine and the block exemption is that most vertical agreements where the supplier's market share is below 10% fall outside Article 81(1) and that most vertical agreements, even if they are caught by Article 81(1), will be block exempted, provided that the supplier's market share is below 30% and that the agreement does not contain any of the black-listed provisions in Article 4 of the Block Exemption. Where the supplier's market share exceeds 30%, it may be that it has a dominant position, in which case restrictions in its vertical agreements may amount to an abuse of a dominant position contrary to Article 82. Agreements containing blacklisted provisions are unlikely to be granted individual exemption.

The Block Exemption will apply to exclusive distribution agreements provided that the supplier's market share is less than 30% and provided that there are no 'hard-core' restrictions contrary to Article 4. In particular, there should be no restrictions on passive sales to other territories; where there is a combination of exclusive distribution and selective distribution, there must be no restrictions even of active sales by retailers to end users, and there must be no restrictions on sales between authorized distributors.

Exclusive customer allocation is discussed in the Guidelines on Vertical Restraints. This is treated much the same way as exclusive distribution, although the Commission makes the point that in the case of exclusive customer allocation, individual exemption is unlikely where the market share of exceeds 30%.

Selective distribution agreements may benefit from the Block Exemption, if the producer's market share is below 30% and contains no 'hard-core' restrictions. However, the Guidelines state that where a selective distribution system benefits from the Block Exemption, but produces minimal efficiency-enhancing effects, for example because the product is not suitable for this form of distribution, the Commission may withdraw the benefit of the Block Exemption. The Commission would consider so doing where there is a cumulative effect problem, which, it states, is unlikely to arise when the market share covered by the selective distribution is below 50%, or where this is exceeded but the market share of the five largest suppliers is below 50%.

PRACTICAL GUIDELINES FOR DAY-TO-DAY FUNCTIONS

A. GENERAL RULES FOR ANTITRUST COMPLIANCE IN CONNECTION WITH CONSORTIA FUNCTIONS

The following rules and procedures are recommended for all Consortia Participants in all circumstances, without exception, except as noted specifically below. Any failure to adhere to these rules may result in suspension or expulsion from membership, or in the prohibition of an entity or person from participating in some or all Consortia activities:

1. Neither the Consortia, nor any of its Committees, nor any Participant in connection with its Consortia activities shall attempt to bring about any anticompetitive or illegal understanding or agreement, written or oral, formal or informal, express or implied,

among competitors with regard to prices, terms or conditions of sale, distribution, volume of production, production planning, production or other costs sales territories or customers;

2. Neither the Consortia, nor any of its Committees, nor any Participant in connection with its Consortia activities shall discuss, communicate, or engage in any other information exchange with any competitor with regard to prices or pricing methods, restrictions on output, or allocation of sales territories or customers terms or conditions of sale, distribution, volume of production, production planning, production or other costs sales territories or customers;
3. Neither the Consortia, nor any of its Committees, nor any Participant in connection with its Consortia activities shall undertake any activity that involves exchange or collection and dissemination among competitors of any information regarding prices or pricing methods;
4. Neither the Consortia, nor any of its Committees, nor any Participant in connection with its Consortia activities shall undertake to collect cost data from individual Members or to disseminate any compilation of such data, without a plan for such collection of data or its dissemination having first received prior written approval of Consortia's legal counsel;
5. Neither the Consortia, nor any of its Committees, nor any Participant in connection with its Consortia activities shall participate in any discussion of costs, or any exchange of cost information, for the purpose or with the probable effect of increasing, maintaining or stabilizing prices, or reducing competition in the marketplace with respect to the range or quality of products or services offered;
6. Papers published by the Consortia or presented in connection with Consortia programs may generically refer to average costs, provided such references are not accompanied by any suggestion, express or implied, to the effect that prices should be adjusted or maintained in order to reflect such costs. Whenever possible, confidential information will be collected anonymously, will relate to historical data, and will be disseminated by an appropriate Consortia official, or an independent outside organization. All papers containing cost information must be reviewed by Consortia's legal counsel for possible antitrust implications prior to publication or presentation;
7. No Consortia activity or communication shall include any discussion which might be construed as an anti-competitive or illegal attempt to prevent any person or business entity from gaining access to any market or customer for goods or services, or to prevent any business entity from obtaining a supply of goods or otherwise purchasing goods or services freely in the market;
8. No Consortia activity or communication shall include any discussion of costs for the purpose or with the probable effect of promoting agreement among competing firms with respect to their selection of products other than materials used in cooperative research;

9. The Consortia shall not make any effort to bring about the standardization of any product for the purpose or with the effect of preventing the manufacture or sale of any product not conforming to a specified standard.
10. The Consortia, any of its committees, or any Participant in connection with its Consortia activities will only meet after an agenda has been created and distributed in advance of the proposed meeting. Discussion at meetings will be limited to topics on the meeting agenda, which can be amended at the meeting by a majority vote. If any member has a question about the agenda, that member should consult with antitrust counsel before attending the meeting.
11. The Consortia shall not require as a condition for membership that a Member shall not associate or do business with a non-member or in connection with a competing technical specification product.
12. Neither the Consortia, any of its committees, or any Participant in connection with its Consortia activities shall make derogatory remarks on behalf of Consortia about a competitor or its products, nor make unfavorable comparative statements about a competitor's products unless there is specific documented proof that such statements are true.
13. All members of the Consortia have an obligation to comply with the antitrust laws in connection with their Consortia activity and will advise an appropriate Liberty official of any violation of these Guidelines. The appropriate body will investigate any such report and shall be responsible for determining the appropriate discipline. Discipline of those who report questionable conduct and who are themselves involved in the violation will be decided on a case-by-case basis, depending on the degree of culpability, but the fact of "self-reporting" will always weigh in that person's or entity's favor.

B. DO'S AND DON'T'S FOR CONSORTIA MEETINGS AND OPERATIONS

All Consortia Members are advised to follow the following guidelines with regard to Consortia activities:

1. DO prepare and distribute an agenda for all meetings and abide by the agenda
2. DO stop any conversation that appears to be leading to:
 - a. Discussion of prices or pricing policy; or
 - b. Other restraints on competition of any kind
3. DO advise all meeting attendees to observe these Guidelines in informal conversations as well as formal Consortia activities.
4. DO NOT undertake any activity involving collection or dissemination of prices or pricing methods.

5. DO NOT undertake any activity invoicing collection of cost data from individual Members or dissemination of any compilation of such data without prior approval of Consortias legal counsel.
6. DO NOT set a numerical limit on committee size unless participation in the committee is rotated on a regular and reasonable basis. You may set a numerical limit on the maximum number of representatives per Member.