Legal

VDMA

Compliance Programme Impact of Competition Law on Association Activities

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Table of contents

A. The objectives of the VDMA Compliance Programme

For VDMA and its membership, adherence to the law is a matter of course and an integral part of their entrepreneurial activities. Adherence to competition law is the aspect that matters most for VDMA when it comes to compliance: VDMA's services include providing a platform for companies that may also be competitors. VDMA, among other things, compiles information on specific markets and draws up and represents matters of common interest. These activities and the provision of association services for its membership must be in line with the rules that ensure undistorted competition. For VDMA, this is more than the mere adherence to a statutory obligation: Being a leading industry association, VDMA advocates free and fair competition, and its member companies successfully meet these challenges day by day.

To ensure that its activities fulfil all the requirements of competition law, VDMA formulated a comprehensive compliance programme as early as in 2004. Adherence to these rules serves the purpose of protecting member companies and association work, this is in the own personal interest of the employees of VDMA and its member companies: Competition law violations may be subject to severe punishment and adversely affect participating companies, employees, and associations. The competition watchdogs are also getting more and more critical when it comes to co-operation between competitors, inside or outside of associations. This is why VDMA tracks changing agency behaviour and new case law to adapt the compliance programme if necessary. VDMA has its compliance programme reviewed regularly by external law offices and also conducts talks with German and European competition agencies and the compliance departments of its member companies.

The objective of the present compliance programme is to ensure that neither VDMA nor any member companies participating in the association work would violate competition law. At the same time, it is meant to provide hands-on advice and allow maximum leeway for association work, which is, in principle, also highly welcomed by the competition authorities, without infringing on the law. VDMA may hence provide their members with a legally secure environment for their meetings, and thus offer them a significant added value. It is crucial that companies can rely on a well-controlled workflow of association activities, and the present compliance programme offers just that.

A compliance programme, however, can only provide general guidance of how to act in competition-law sensitive fields of association work. Each individual case or industry may necessitate another assessment. If in doubt, contact VDMA Legal Services in good time. In addition, Legal Services offer regular employee training courses that do not only provide general information on competition law issues in association work, but also a forum to address situations occurring in the day-to-day business of association employees. To warrant seamless implementation of important competition-law aspects, all VDMA staff also undergo mandatory on-line training and a test.

This compliance programme will surely not cover each and every aspect in the individual case; it is rather meant to increase awareness among staff in their daily work. Any rules stipulated in the compliance programme are obligatory for each member of staff; non-adherence to the compliance programme may have serious consequences.

The Compliance Programme is also part of VDMA's internal "Code of Conduct for the Cooperation of VDMA and its Divisions" and can be consulted by employees in the Workplace or publicly on the VDMA website (https://www.vdma.org/compliance).

B. Competition-law issues in association work

I. Association meetings

1. Formal rules to be adhered to at association meetings

(a) General

Participants in VDMA meetings can also be competitors. Against this background, it is not only necessary to develop a basic understanding for the provisions of competition law. **It is also required to comply with specific, formal rules when organising and/or hosting association meetings that are permissible under competition law. In this respect it is crucial that the VDMA event is actually accompanied by a VDMA member of staff to ensure that the compliance programme is adhered to.** This applies, as mentioned earlier, to telcos and internet meetings and means that **facilities can only be provided by VDMA if and when VDMA staff is present.**

Prior to any association meeting, the competent VDMA employee has to send out an official calling notice, together with the agenda. The agenda has to describe in sufficient detail all the items that will be discussed. The competent VDMA employee ensures that the agenda does not contain any aspects that may be non-compliant with competition law. In this context, great value has to be attached to a clear and unequivocal wording of the document. Hence, items such as “Miscellaneous”, “Any other business”, and other equally unspecific references must be avoided. If it is still deemed necessary to include such items, please make sure that the calling notice already mentions what they actually refer to (e.g. dates for upcoming events, items to be discussed at next meeting, etc.). Should even this be impossible, at least the minutes of the meeting must specify the items transacted in this respect. It is recommended to agree upon the topics that will be discussed under the item right at the start of the meeting and mention this in the minutes. An inappropriate choice of words may create the inappropriate impression that a thoroughly neutral item was actually relevant in the light of competition law. This is why it is so important to choose the right words. Words like “prices”, “discounts”, “recommend”, “concerted”, “arrange”, etc. should be used exclusively in the correct context to avoid ambiguity. In the case of doubt, VDMA Legal Services will have to be consulted.

Already prior to association meetings, the competent VDMA employee should ponder whether the subjects to be discussed and/or the expected circle of association members represented may give rise to questionable situations from an anti-trust point of view. It is advisable to **review all contributions** (e.g. slides, etc.) of members and external parties **in advance** and to point out to speakers that the rules of competition law must be observed.

Without exception, invitations to association gatherings must be supplemented with the "**Code of Conduct**" ("Do's and Don'ts") that is attached as an annex to the present compliance program as necessary attendee information. The Code of Conduct is also available in English and is (as all the compliance-related documents) stored on VDMA Workplace and may be consulted by members on the VDMA homepage (https://www.vdma.org/compliance).

(b) Instructions to be given at the beginning of the meeting

When the meeting starts, participants should be advised that they have to act in a neutral manner with respect to competition law. In this context, the following reference should be made and included in the minutes:

> *"We would like to draw your attention to the provisions of European and national competition law pursuant to which it is not allowed to discuss competition-related topics, such as prices or discounts, or to otherwise exchange sensitive company data in the course of association meetings. Forecasts of future business development are particularly critical in this instance, and can only be made in aggregated form through VDMA.*
>
> *Furthermore, it is not permissible to agree on industry-related patterns of behaviour and/or pass resolutions and make arrangements in this respect. Doing so all the same, would be subject to severe fines that have to be paid by the association and its member companies. This is why these rules have to be adhered to without exception.*
> *For any queries, please do not hesitate to approach the responsible officer in your company, your contact person at VDMA or VDMA Legal Services.*
>
> *Additional information can be found in the "Do's and Don'ts" (Code of Conduct). Please request your own copy of the VDMA Compliance Programme."*

In addition, participants in association meetings should be advised that the rules of competition law are also applicable during fringe activities, such as breaks or social events.

(c) Action in questionable situations

If, due to spontaneous remarks that sometimes have their very own momentum, a situation occurs that is critical from a competition-law point of view, the competent **association employee has to intervene immediately**. The following ways of action are suggested:

- Where the discussion, despite all compliance efforts, drifts into the area of inadmissible topics, a reference must first be made to the inadmissibility of a specific topic under competition law ("**call to order**"). In all likelihood, these topics are then avoided, as only the impact of the exchange in question had been misjudged. After the topic has been abandoned, the meeting will go on and deal with the next item.

- Yet, the chairperson may equally suspend the discussion for the time being and suggest that matters be addressed at a later date. This applies in particular when there is uncertainty of whether or not a specific conduct is permitted. In addition, the chairperson should communicate that critical aspects of the matter will be settled with VDMA Legal Services by the next meeting.

- Should it come to spontaneous exchange of sensitive company data, e.g. prices or price components, the chairperson should refer to the available market intelligence tools of VDMA, particularly to the statistics. The chairperson should consult and identify with the member companies what ways there are to collect data anonymously in the future and forward the aggregated content to the companies without any potential infringement of competition law.

- As a last resort, it is recommended to suspend or, if appropriate, altogether close the meeting.

(d) Contents of the minutes

Resolutions passed at a meeting always have to be summarised in the minutes so that the discussions become understandable also in retrospect. First, this helps to avoid the impression that the association meeting constituted some kind of closed shop. Second, detailed minutes can be used to prove the actual course of the meeting in the case of an investigation. This may help VDMA and its member companies to exonerate themselves from charges of anti-competitive behaviour. Also in this context, great value has to be attached to a clear and unequivocal wording, as in the calling notice, and the course of the meeting has to be reflected correctly.

Finally, no informal discussions on subjects that would be critical from a competition-law perspective can be pursued “outside the agenda”. This applies also – as already mentioned above – to e.g. breaks and evening events. VDMA staff is obliged to make this absolutely clear to participants.

Adherence to the rules must be insured prior to, during and after the association meeting. This is the only way to ensure constant adherence to competition law.

(e) Guided tours

Where VDMA meetings are not held on VDMA premises, they often take place at the invitation of member companies at their respective locations. This is basically unproblematic and offers the inviting companies the opportunity to present themselves and their products. However, the overriding principles remain the same: Competition law and the requirements of the Compliance Programme must be observed, also and especially with regard to company data of the host company that is critical under competition law.

As frequently hosts are happy to show their guests around, this should be arranged with the hosts in advance: Companies should be made aware of the fact that competitors may also be present at the meeting and that business secrets should therefore be protected in their own interest (this applies in particular against the background of the new Trade Secrets Act), e.g. by obliterating delivery schedules, customer information, technical solutions, etc. that may otherwise be visible during such a tour.

(f) Technical working groups, research

Part of the VDMA's range of services includes working groups with a strong technical orientation, whether as an exchange of experience or within the framework of research projects, etc. However, such working groups are also subject to competition law (on standardization: see VII.).

First, it must thus be ensured that the information exchanged does not in itself contain any data that is critical under competition law. For example, the disclosure of technical information that is relevant to a company's strategy may enable a competitor to adapt its own market behaviour accordingly, ultimately leading to a violation of the secret competition required under competition law. In addition, care must be taken to ensure that the standards already described above are observed, even in connection with technical issues (e.g.: inadmissible discussions in relation to specific customers, information sensitive to competition, etc.). Moreover, self-commitments aimed at restricting the freedom of action of the competing parties are inadmissible in the technical field, e.g. if it is agreed that only certain technologies will be used or only certain developments will be promoted (see also III.). **Competition relating to innovation and technical solutions must not be restricted under any circumstances!**

As far as research and development projects are concerned, it must be ensured that they take place **only in a pre-competition stage**. For example, it is plausible and common practice that research bodies are commissioned to research certain (technical) solutions to problems affecting the entire industry and in this context also use the experience/cooperation of member companies. Usually, this will not result in an industrial property right (patent, utility model, etc.). Legal Services must be consulted if the pre-competitive area is left, an industrial property right is created, or if there is even a joint exploitation of research results.

Technical work groups or work groups focused on research and development are also subject to competition law. Restrictions of competition in innovation or other agreements are also prohibited in these areas!

2. Subject-matter(s) of an association meeting

It is a VDMA core activity to host meetings, working groups or experience-sharing events, where member companies can get together. Yet, from a competition-law perspective, so-called restrictive practices may result when competitors meet and convene, inside or outside an association network, and that therefore they have to be instructed first and be made aware of the legal context. To avoid any impression of restrictive behaviour from the onset, VDMA assess carefully what topics can and cannot be discussed at a meeting.

It has to be noted that e.g. information on general economic data, industry overviews and discussions on current legislation projects or lobbying activities of VDMA are, in principle, admissible subjects at association meetings. It is equally certain that it is forbidden, without exception, to exchange information or make arrangements regarding prices, price components (e.g. discounts), price strategies, allocation of markets, or terms of delivery and payment. Similarly, decisions or concerted practices involving the coordination of behaviour towards third parties (in particular boycotts) violate competition law and must therefore be avoided at all costs. Apart from an arrangement or a decision, already the exchange of sensitive data and strategies may distort competition.

At the same time, the information gain is for many companies one of the factors why they decide to become a member in the first place and, indeed, this frequently results in efficiency gains, which competition law expressly encourages. Therefore, a general distinction between permitted and forbidden behaviour is often pointless.

Association meetings may not only be held as face-to-face events on the premises. Therefore, please note that the VDMA compliance rules also apply to all other contacts of members organised by VDMA and that the rules must be enforced by VDMA staff: This applies, for example, to events held outside VDMA premises, telephone

conferences, online meetings, etc. as well as to the establishment of online forums, messengers and other online-based groups, etc.

3. In particular: Exchange of company information at association meetings

(a) General

The individual exchange of information between competitors is subject to particularly stringent requirements under competition law. Such a gathering must not deal with the exchange of sensitive corporate data or information that would enable competitors to draw conclusions as to a company's strategy or potential future behaviour (**information that is sensitive to/relevant for competition**). This applies even if only data are exchanged and no further arrangements are made. These are the reasons: According to the competition agencies' view, companies would usually not find it necessary to communicate sensitive data to competitors: The theoretic concept of "secrecy of competition" applies. If, albeit, companies choose to do so, they create a level of market transparency that is undesirable from a competition-law perspective. Already the fact that such information is exchanged creates a risk of uniform behaviour and/or unification of price levels.

In the individual case it may be particularly difficult to determine what information can be rightfully exchanged and at what stage the association or the member company already ventures into a legal limbo and potentially violates competition law. In the case of sensitive data, this does not necessarily mean that the information cannot be made accessible in other ways, e.g. through an aggregated procedure (see Section II below). During association meetings, however, individual data sets should not be disclosed.

b) Dealing with the formal exchange of information

An exchange of information in a VDMA meeting can sometimes be supported by slides, etc. to help structure the meeting and the exchange of information. If such means are used in the course of an information-sharing event in e.g. printed form (handout), it must be ensured that these are not in an overly detailed format with various columns and frames (e.g. in Excel). Tables that can be filled in are also unsuitable, and unnecessary, because usually nothing has to be filled in prior to or at a meeting. This is why a form should be chosen that does not provide for columns/lines "to be completed".

Furthermore, all handouts concerning an exchange of information within the scope allowed by competition law (see para (c) below) have to contain **a mandatory note regarding the exchange of information on each document concerned** (e.g. page/slide). It is important that this note can actually be seen when the page in question is looked at/printed out/stored. In this context, the following reference may be used:

"We would like to draw your attention to the provisions of European and national competition law pursuant to which it is not allowed to discuss competition-related topics, such as prices or discounts, or to otherwise exchange sensitive company data in the course of association meetings. Forecasts of future business development are particularly critical in this instance, and can only be made in aggregated form through VDMA.

Furthermore, it is not permissible to agree on industry-related patterns of behaviour and/or pass resolutions and make arrangements in this respect. Doing so all the same, would be subject to severe fines that have to be paid by the association and its member companies. This is why these rules have to be adhered to without exception.
For any queries, please do not hesitate to approach the responsible officer in your company, your contact person at VDMA or VDMA Legal Services.

Additional information can be found in the Code of Conduct. Please request your own copy of the VDMA Compliance Programme."

(c) Possible contents of information exchange

As far as the contents of the actual exchange of information is concerned, the following applies:

A retrospective exchange on the business development (sales/order income) of the past period is possible. Yet, it has to be taken into account that the **indications refer to the overall company and/or a broad range of products and not to individual products/product groups**. The reporting period should be at least 6 months. In the case of companies that only pursue business in one product group, exchange of individual company information is not possible. In such a case, the secretariat may collect the information from the companies in advance and provide the aggregated figures at the meeting.

- The competition agencies are **particularly critical** when it comes to the exchange of **forecasts regarding the future business development between competitors**. From the perspective of the competition authorities there is, as a rule, no sensible reason why a company would want to communicate own individual data with high strategic value to a competitor. This is why any exchange of information at a meeting regarding e.g. business expectations (incoming orders/sales) of individual companies for the current or forthcoming year **must not** take place. What can be done, however, is that the competent VDMA secretariat makes a **(written) enquiry** among the companies regarding the individual forecasts for a specific period (of at least six months) and presents the results in an aggregated format at the meeting.

- **Ad-hoc enquiries** during a meeting regarding future business developments **with the help of technical devices (e.g. PowerVote, etc.)**, via remote control or **use of**

specific websites (e.g. Mentimeter, etc.), are, in principle, admissible in the case of the kinds of statistics mentioned in Section II. b. Yet, also in this case measures must be taken to ensure that identification of individual replies is impossible and that a sufficiently high degree of aggregation or anonymity is achieved.

Charts from which it could be easily inferred that a certain company was to expect growth in the amount of x % (e.g. because of prior, admissible talks about past developments) would classify as identifiable and would hence be inadmissible. Yet, it would be admissible to aggregate ad-hoc responses (i.e. to combine all responses) or only present results in line with the usual compliance rules so that the companies partaking cannot be identified at all. Another approach would be to collect views on rough expectations (negative, neutral, positive) for the overall market (not for individual companies), if appropriate supported by an anonymous enquiry about actual forecasts conducted after the meeting, which could subsequently be sent (e.g. together with the minutes) in the usual aggregated and anonymized form to the members.

Beyond these aspects, it is not possible to exchange further sensitive data individually, including profit-sales ratios and capacity utilisation, without prior consultation with Legal Services: In this scenario, there is a particular risk that strategic deliberations regarding future conduct is exchanged and/or disclosed between competitors, even if this is done unintentionally. Also in these cases anonymous and aggregated statistics may be appropriate.

During an association meeting, it is also necessary to try and prevent that companies jointly estimate data relating to companies not participating in the venue. First of all there is a risk that sensitive data has to be exchanged in order to make an estimate possible in the first place. Second, additional, illegal arrangements may ensue. Alternatively, it is possible to provide for a system where every participant enters its own estimate through an anonymous reporting procedure made available by VDMA. From the estimates received, an average mean value can be computed and made available to the participants.

An exchange of documents that are also available to the public (e.g. company brochures) is possible to the extent that such brochures are indeed publicly available, can be otherwise easily obtained by the competitors and do not contain any price references. Such **exchange of price lists must be avoided**: Any exchange of prices and price components runs the risk of being considered as a restrictive practice, irrespective of whether the price lists are documents that are accessible to the public or not. It is true that the companies can obtain such lists also from other lawful sources. As already mentioned above, this would be more complicated and time-consuming than the off-the-cuff communication of important pricing information. The competition watchdog would consider such behaviour as an artificial impact on the competitive environment.

Ensure that only admissible contents and information are discussed and/or exchanged during association meetings, at any time. The use of technological devices is no substitute for adherence to the provisions of the compliance programme, including in particular the requirements applicable to market intelligence procedures. Identification of companies reporting sensitive company information must be ruled out, whatever the circumstances.

II. Statistics

(a) General

Market intelligence, especially when expressed in the form of statistics, is highly important for VDMA member companies, because they base their economic decisions also on these data. To source this information, several member companies cooperate and exchange relevant market data through VDMA and use it as an institutional reporting office. VDMA internally evaluates the data received, aggregates them and then forwards the results to the participating companies, rendered anonymous and taking into account the **secrecy obligations towards members and third parties** (VDMA staff are contractually obliged to do so and have signed individual declarations to this effect). VDMA never collects data publicly, but through specifically described channels (email, fax, letter, online portal).

From the competition agencies' perspective, it is usually deemed improbable that the exchange of anonymised, aggregated data from which no conclusions can be drawn as to individual, specific company data would have a restrictive effect on competition. In the case of a relatively concentrated market this may be different, because then such an exchange of information, according to the agencies' view, may indeed be suitable to provide the reporting companies with information on the market position and the strategies pursued by their competitors, thereby significantly distorting the existing competitive environment. Whether the risk of company identification exists or not in particular depends on the structure of the market, especially the number of suppliers, the topicality of responses and the products to which the individual statistics refer.

Yet, when assessing statistics in the light of competition law, there are no uniform rules that provide for a specific number of reporting companies that would make statistics legal, or illegal if such number is not attained. In this context the facts of the individual case have to be assessed carefully, not from a legal perspective, but much more according to an economic analysis of the relevant market and market participants. It is therefore not possible to simply apply a formula; it is much more important to analyse the individual market conditions in order to be able to make a somehow reliable assessment of the statistics with respect to anti-trust restrictions. If in doubt, please contact Legal Services.

(b) Statistical minimum requirements

To ensure some degree of legal certainty in the daily work with statistics, the **following rules** apply to the procedures underlying existing and/or future association statistics: **Each report category must contain at least 5 positive entries from companies that are not affiliated to another. When calculating the minimum number of reporting entities it has to be ensured that the reporting entities are legally independent from one another. Furthermore, none of the reporting entities must have a market share of 70% or higher in the respective category. It is not allowed to disclose responses (e.g. after one year).** VDMA Legal Services have to be consulted **and** the statistics' scope has to be expanded if these minimum requirements cannot be adhered to.

The names of the companies participating in statistics must not be mentioned for the following reasons: Already as a matter of principle, it must be impossible to identify submissions, but it is nevertheless advisable to keep the participating members secret, further improving anonymity. In principle, there are no objections to disclosing the number of participating companies.

Beyond these minimum requirements, it is necessary to contact Legal Services in specific cases (especially when new statistics are to be introduced) if through the individual structure of the statistics there might be a risk that companies can be identified: This might be the case when the reporting interval is shorter than a quarter (e.g. monthly report), the geographic scope does not refer to the entire German territory (e.g. federal states) or if it is theoretically possible to recalculate prices and yields for product groups (e.g. because turnover or quantities are reported that are available in other statistics or otherwise publicly available). Legal Services also have to be consulted when statements regarding capacity utilisation are made, unless the aggregated figure specifically refers to the entire subdivision of the association ("*Fachverband*").

(c) New/leaving reporting entities

If only a relatively small number of entities participate in the statistics and the market concerned is subject to a relatively uniform development, there is a risk that data provided by new participants become easily traceable. By comparing statistics prior to and after their accession, individual company data might become obvious. To avoid this situation, it is recommended to wait until several new participants are available and then include them collectively in the statistics. The same is true if an entity no longer partakes. Also in this case not one single reporting entity, but only several together, should be removed from the statistics.

If it is not possible to include several new reporting entities simultaneously into the statistics, the following pragmatic approach is recommended: A new reporting entity should not be included immediately with its entire reporting volume, but successively, e.g. with 20% of its

total data for the first reporting period, 20% in the second reporting period, and so on. What percentage to apply requires some intuition and experience. The other participants in the statistics should just only receive a notification that a new reporting entity will be successively included. VDMA, in its capacity as reporting office, should neither communicate the percentage applied nor the time when the new data will be fully consolidated.

When a reporting entity is removed from the statistics, it may be possible to refrain from including such company data immediately. It is however advisable to estimate the corresponding value for such company for some time.

(d) Reference to process / Handling of data collected by reporting office and reporting entity

When members provide data for surveys and/or statistics, we endeavour to offer maximum safety and clarity regarding the handling of statistics and to do so it is necessary that responses and any accompanying letters make reference to the fact that all data submitted will only be published in an anonymised and aggregated format and that the reporting office itself and the reporting entities are subject to the provisions of the compliance programme.

Such reference might read as follows:

> *"Data submitted are published exclusively in an anonymised and aggregated format. The reporting entity and the reporting office are subject to the provisions of the VDMA Compliance Programme that can be accessed on the VDMA website."*

For many members, VDMA statistics represent a particularly valuable tool for assessing their own economic activities on the market. The figures of VDMA serve as a guide in this respect, but do not in any way represent a recommendation by the association to act on these values. To make this clear, statistics that contain, for example, aggregated costs or similar price-determining components should contain a note to this effect. Such note may read as follows:

> *"The collection and dissemination of these data by VDMA does not imply any recommendation to the member companies to apply the (average) values or to follow them; an individual analysis is absolutely essential for each individual company."*

(e) Access to statistics

Competition law does not in principle prescribe a general, indiscriminate access to statistics. Access to statistics that are collected and reported in the above-mentioned framework can therefore be restricted exclusively to members. The decision on access to statistics is therefore reserved for VDMA. Exceptions may, however, apply due to the issue of the right to deny a company membership in VDMA in general (see IX.).

Statistics must never allow identification of individual reporting entities, taking into account all aspects of the individual case.

III. Voluntary Commitment

The competition agencies have general regulatory concerns regarding voluntary declarations formulated by the industry, especially if they pursue political or other aims that would usually be obtained otherwise, through appropriate laws and regulations. As a rule, this type of obligation is deemed prohibited if it **unduly limits the participants' freedom to act** and/or if it has a significant impact on third parties.

This is why e.g. an agreement between companies in which they agree on the use of a new material in order to increase product safety also constitutes a contractual restriction, because the previous material would no longer be required. The voluntary declaration would first limit the liberty of the participating companies to choose their materials freely and determine the features of their products accordingly. Second, a uniform use of the new material would limit the range of products among which the consumer could choose.

From the competition agencies' perspective, the initial aim pursued, i.e. product safety, would not necessarily outweigh the reduced choice of purchasers ensuing from the introduction of the new material. Another problem is that, due to the voluntary declaration, a new supplier of the previous material had in fact no chance of participating in the relevant market, because its product would not be chosen as a result of the voluntary declaration. The voluntary declaration would then constitute an inadmissible barrier to enter the market.

The same will also be assumed in other cases of voluntary commitment, for example with regard to the **use of (new) technologies**, etc. In addition to the possible restrictions of the parties' freedom of action and the effects on third parties already mentioned above, it may be possible to assume that this constituted an unlawful restriction of **innovation competition** under competition law. In other words: The voluntary commitment may deprive the market of better, more innovative, safe technologies in an unlawful manner, which will often be prohibited under competition law.

The question whether a voluntary declaration is prohibited or not must hence be settled with VDMA Legal Services first. In any case, it must never be publicized using a VDMA logo, because it is no declaration by VDMA, but a declaration by the participating companies.

Voluntary obligations declared by companies are subject to particularly stringent assessment under competition law.

IV. Standard Business Terms

VDMA regularly publishes general conditions and terms of business that can be used by the individual member companies. It would, however, violate competition law if the members of the association were under the obligation to use these conditions. Even if there was no such obligation, the use of general conditions may be critical under competition law if they were to fix prices or similar aspects. With a view to the current version of the above conditions, which have been reviewed by Legal Services, it can be assumed that their contents are neutral as regards competition law and can be used safely by the member companies; from their very nature, they have to be adapted to the individual case (see guidance below). New drafts for general conditions have to be submitted to VDMA Legal Services for review. In the past, there had been the possibility to have conditions exempted by the German Federal Cartel Office, which is no longer possible, and this is why an own review has become so important.

When reference is made to contractual conditions, e.g. terms of payment, in VDMA publications, it is necessary to avoid the impression that these provisions were customary practice that have to be used "as is". In particular, there is a risk that a participating VDMA member company might introduce its preferred clauses and try to enforce them with respect to its customers more easily, because the company could make reference to a VDMA publication. Against this background, it is recommended to amend such guides by the following or a similar note:

> *"The clauses contained in the present publication reflect only non-binding examples that have been shared by VDMA member companies. The fact that they have been included in this guide gives no indication as to whether they are customary in the industry or not. This is why the clauses cannot be used as boilerplate text.*
>
> *Especially with respect to warranty, liability and terms of payment, many other variants and alternatives could be possible. It is rather the individual contract and the facts of the individual case that have to be assessed in order to be able to make a sound decision on what clauses can be used at all and how they have to be amended."*

Also contractual provisions are subject to assessment under competition law.

V. Press releases and warning notices

The various offices and secretariats publish press releases and/or association circulars regularly, or in view of a special occasion. These publications must not contain any statements that could be interpreted as uniform behaviour and/or arrangements between member companies as a reaction to developments on a specific market. Similarly, VDMA must not give recommendations to such effect. Against this background it has to be taken into account that press releases and/or information circulars may describe developments on a given market in

an objective manner, but must refrain from suggesting specific economic reactions. It is also necessary to avoid the impression that a specific type of behaviour is agreed within individual associations. It is permissible to describe alternative ways of reaction to a given market development. But also in this respect, the association cannot simply promote one approach alone.

VDMA must be particularly careful with regard to "warnings" against using certain products, entering into business relationships or using certain services: This not only poses the risk of violating competition law rules ("boycott calls"), but also possibly very expensive legal disputes with affected companies. Whereas forwarding official warnings is by its very nature unproblematic, the sending of other "warnings" must under all circumstances be cleared first with Legal Services.

Check your press releases for content that is inadmissible under competition law and, above all, try to avoid ambiguity.

VI. Position papers and guides

It is not only prohibited for member companies to make arrangements or agree on concerted practices. It is also against competition law if such recommendation is made by an industry association. A recommendation may be deemed to exist e.g. in the case of a position paper creating the impression among the companies addressed that it would contain rules the companies are advised to adhere to. Basically, each member company is, and must be free to, fix e.g. its own strategies, market behaviour, prices and conditions, etc.
Yet, an association must not make a recommendation that would induce all members to follow suit and generate the same effect as an arrangement between the companies themselves. Finally, it has to be ensured that the position paper gives a comprehensive picture of the market situation and does not only rely on the data submitted by individual member companies that regularly take part in association meetings.

For these reasons, it is recommended to start a publication with an explanatory note, e.g.:

> *“This publication is only for guidance and gives an overview regarding the assessment of ... [e.g. risks inherent to the development and design of specific machinery]. It neither claims to cover any aspect of the matter, nor does it reflect all legal aspects in detail. It is not meant to, and cannot, replace own knowledge of the pertaining directives, laws and regulations. Furthermore, the specific characteristics of the individual products and the various possible applications have to be taken into account. This is why, apart from the assessments and procedures addressed in this guide, many other scenarios may apply.”*

Ensure that no impression is created suggesting that the recommendations would be binding. Point out that the publications are meant to give only non-binding guidance.

VII. Standardisation and VDMA Uniform Sheets ("*Einheitsblätter*")

(a) Standardisation

Standardisation work and/or the determination of particular technological or quality requirements for products, processes, etc. must be reconciled with the requirements of competition law. This is based on the fact that also uniform rules and/or standards may, in particular circumstances, adversely affect competition for different solutions and/or approaches.

This is why the respective rules and principles of the standardisation organisations have to be observed in the international, European and national standardisation efforts, including in particular:

- International standardisation: ISO/IEC Directives, Part 1 Consolidated ISO Supplement - Procedures specific to ISO;
- European standardisation: CEN/CENELEC Internal Regulations, Part 2 - Common Rules For Standardization Work;
- National standardisation: Standards series DIN 820 and the Guidelines for Standardisation Committees within DIN.

(b) VDMA Uniform Sheets ("Einheitsblätter")

The term "standard" within the meaning of competition law is a relatively broad one. It includes harmonisation of various fields of technology, quality rules, production processes, safety requirements, interfaces, etc. VDMA Uniform Sheets may hence also be caught by them as a kind of "industry-wide work norm".

And also the preparation of the VDMA Uniform Sheets must adhere to the requirements of competition law. The following, essential requirements are guided by the above standardisation rules and principles and have to be taken into account when preparing a Uniform Sheet:

- all companies and organisations possibly affected by the standards ("interested circles") have the opportunity to fully partake in the standardisation process, and the adoption process of the individual VDMA Uniform Sheet is transparent, objective and non-discriminatory;

- a draft is submitted to the public, including interested circles and companies outside VDMA, for assessment and comment and a reasonable objection period is set;

- as part of the procedure of preparing the Uniform Sheet, the actual market situation at large is duly reflected, and not only the input of individual (member) companies;

- effective access to the VDMA Uniform Sheet is ensured at fair, reasonably tolerable and non-discriminatory terms, and participants (to the extent that their intellectual property should become an integral part of the VDMA Uniform Sheet) have to sign an irrevocable declaration that they will grant third parties licences with respect to these rights at fair, reasonably tolerable and non-discriminatory conditions ("FRAND Voluntary Commitment"); and

- **the application of VDMA Uniform Sheets is voluntary.**

Guidance in this respect is available from the German "*Leitfaden VDMA-Einheitsblätter – Grundlagen und Verfahren*" (www.vdma.org/normung), specifying detailed rules and principles for the preparation and drafting of VDMA Uniform Sheets.

Standardisation work and/or standardisation-like association activities are subject to specific rules of competition law. Do make sure that the above aspects are taken into account any time.

VIII. Exhibition policies

Exhibition policies are particularly important for the member companies and VDMA. VDMA has the right to promote and/or support leading trade shows. In this context, it is possible to give general information on the concept of the preferred exhibition and also highlight the particular advantages of its concept, as long as the information is correct.

Yet, if VDMA does support a particular exhibition, this must not lead to, or be interpreted as, a call for boycott with respect to competing events. The assumption of a boycott does not require that the other event is specifically mentioned. It is already sufficient if the member companies addressed are able to identify the affected event with some certainty. Targeted criticism of an event may already be interpreted as a call for boycott. This applies even more if the association makes derogative comments on other events, particularly if made in a non-objective manner with a defamatory purpose. Of course, also critical facts can be communicated with respect to an event – as long as the information is limited to the communication of true and publicly available facts. Any additional negative assessment should be omitted.

Furthermore, it is not possible that companies participating e.g. in an information event of the association make a decision or arrangement to attend only one specific exhibition in the future.

And equally, VDMA must not make recommendations suggesting companies to no longer attend or participate in a competing event for one or the other reason. Albeit VDMA may support a particular trade show, the companies must be free to partake in any other relevant events. This is why it is already critical (and exhibition contracts must be assessed together with Legal Services in advance) if VDMA makes a binding commitment to an exhibition company to focus its entire efforts on a trade show the member companies and/or the association prefer.

With respect to association events where exhibition policies play a role, it has to be taken into account that competition law does not only prohibit member companies from making specific agreements or express resolutions to no longer attend a particular event. A concerted practice may also exist through actual market behaviour, if e.g. a large number of companies that had hitherto participated in an event for many years, suddenly no longer do so. The tangible impact on the exhibition market already suggests that there might have been anti-competitive arrangements. Also an association circular, press release or interview describing an event in a negative light may be interpreted as a preliminary step to an illegal arrangement between association members. This is why, also in this context, no enquiries should be made at association meetings into who intends to partake in a specific event or not. The disclosure of important or various companies to partake or not could exercise some pressure on the others.

Yet it is possible to make an anonymous enquiry so that the association can have an impression, or to ask member companies what they like or dislike about a specific tradeshow concept.

Non-adherence to trade-show policies may have far-reaching consequences under competition law and civil law. In addition to fines that may be imposed, there is also the risk of substantial claims for damages e.g. based on loss of exhibitors.

IX. Refusal to admit new member companies

Sometimes, working groups and associations face the problem of whether there is a duty to accept a potential VDMA member after it has filed its application. According to most of the rules of procedure, a company “may” become a member, which suggests that there is some leeway in the decision.

Yet, the decision must be made on a non-discriminatory basis. The non-discrimination rule according to competition law provides that economic groupings are not allowed to refuse to accept the application of a company if such refusal would constitute an objectively unjustified unequal treatment, leading to an unreasonable competitive disadvantage for the company.

It is therefore only allowed to refuse to accept the applicant if there is an objectively justified reason. In this context, the interests of the applicant in the membership and the interests of the

group in the non-admission of the applicant have to be weighed up against each other. The unequal treatment on which the refusal is based can be justified for two types of reasons:

First, because the applicant does not fulfil the conditions for acceptance pursuant to the statutes as they are applied in practice by the group. Second, exclusion and/or non-admittance are possible if there are reasons related to the individual characteristics of the applicant which would make an admission impossible. Such a reason would e.g. exist, if the acceptance of a specific company would harm the reputation of the association.

This might also potentially apply if the admission would result in significant distortions within the individual VDMA division. Yet, in this context, it is not sufficient if the admission of the new member would be only unwelcome for existing members. A reason would qualify as a valid reason if e.g. the activities of the working group and/or association would factually come to a stop, because hitherto communicated, permitted information would be retained by other members, thus making participation in company meetings unattractive. Also in the individual case, if a large number of companies threatened to leave the association, a valid reason might be deemed to exist.

There must be an objective justification for the rejection of an application for membership. **It is forbidden to refuse to accept a new member just because there is particularly extensive competition between member companies.**

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