Law

VDMA

Compliance Programme
Aspects of Association Work relevant Under Competition Law

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A. Aim of the VDMA Compliance Programme

For VDMA and its member companies, compliance with applicable laws is a matter of course and forms an essential part of entrepreneurial activity. For VDMA, compliance with competition law is at the heart of "compliance": Part of VDMA's service offering is to provide a platform for companies that may also be competitors. VDMA, *inter alia*, also compiles information on markets and formulates and represents common interests. These activities and the provision of association services to members must be in line with the rules that ensure undistorted competition. For VDMA, this is more than just fulfilling a legal obligation: as a leading trade association, it is committed to free and fair competition, and the VDMA member companies successfully face this competition daily.

To ensure that the VDMA's work meets all the requirements of competition law, VDMA committed itself back in 2004 to a comprehensive compliance programme. Compliance with these "rules of the game" serves to protect the member companies as well as the association's work and is in the personal interest of VDMA's employees of and its member companies: Infringements of competition law can lead to significant sanctions against participating companies, employees, and associations. The competition authorities are also taking an increasingly critical view of cooperations between competitors in particular – both outside and within associations. Therefore, VDMA continuously takes into account the changing practice of the authorities and case law and adjusts the compliance programme if necessary. VDMA's compliance programme is regularly reviewed by external law firms; there are also talks with the German and European competition authorities as well as compliance departments of the members.

The aim of this compliance programme is to ensure that neither VDMA nor the member companies involved in association activities commit infringements of competition law. At the same time, it is also intended to clarify how to act in a legally permissible manner using specific proposals for action and thus to continue to ensure room for the important association work which is in principle also desired by the competition authorities. VDMA can thus offer its members a secure framework for meetings that creates great added value for the companies. It is therefore extremely important that companies can rely on an orderly process for the association's work – for which this compliance programme provides the appropriate framework.

However, a compliance programme can only provide general behavioural guidelines for areas of association activity relevant under competition law. The specifics of the individual case or the industries concerned may require a different assessment. Doubtful cases should therefore be discussed with the VDMA legal department at an early stage. In addition, the legal department regularly offers staff training sessions, which – in addition to general information on competition law issues in association work – also provide the opportunity to discuss specific issues the employees are facing. To guarantee a thorough understanding of the important competition

issues, all VDMA employees are also required to complete the online training programme including a test.

The compliance programme does not aim to be exhaustive but is intended to sensitise employees to the daily work of the association. The specific requirements of the compliance programme are binding for every employee; infringements of the compliance programme can have far-reaching consequences.

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

B. Aspects of Association Work Relevant Under Competition Law

I. Association Meetings

1. Formal Rules to be Observed at Association Meetings

a) General Considerations

VDMA meetings may also bring together competing companies. Against this background, it is not only important to develop a basic feel for substantive competition law. **It is also necessary to comply with certain formal rules to organise or hold association meetings that are compliant with competition law. It is essential that a VDMA event is in fact accompanied by a VDMA employee who monitors compliance with this compliance programme.** This also applies to telephone or web-based meetings. This also means that **VDMA premises must not be made available without a VDMA employee present!** Therefore, so-called break-out sessions are also only permissible insofar as the break-out rooms are each accompanied by a VDMA employee.

Before each association meeting, the responsible VDMA employee must send an official invitation with an agenda attached. This agenda must list all items for discussion in as much detail as possible. The respective VDMA employee must ensure that the agenda does not contain any aspects that are questionable under competition law. In this context, it is important to use clear and unambiguous wording. The agenda item "Miscellaneous", "Other Points of Business" or similar open formulations are therefore to be avoided. If such an agenda item is nevertheless considered necessary, care should be taken to ensure that the invitation already contains sub-items (finding a date, topics for the next meeting, etc.). If this is not possible either, at least the minutes of the meeting must contain the topics discussed under the open item. Here it is advisable to determine the topics for the agenda item already at the beginning of the meeting and to note them in the minutes. Furthermore, it must be avoided that agenda items which are

neutral under competition law have the appearance of being illegitimate due to an unfortunate choice of words, *e.g.*, by using “agreement” instead of “discussion” as an agenda item. Therefore, great care should be taken with appropriate wording. Terms such as “prices”, “discounts”, “recommend”, “arrange”, “agree” etc. should be used in the correct context to avoid misunderstandings. Cases of doubt are to be discussed with the VDMA legal department.

Already in the run-up to association meetings, the responsible VDMA employee should consider to what extent the topics to be addressed or the group of expected association members could lead to situations that are questionable from a competition law perspective. It is advisable to **review all contributions** (*e.g.*, slides, etc.) by members and external speakers **in advance** and to point out to speakers that they must comply with competition rules.

When inviting members to association meetings, the “Do’s and Don’ts” (**Code of Conduct**), which can be found in the appendix to this compliance programme, must **always** be enclosed for the information of the members. The Code of Conduct is also available in English and (like all compliance-relevant documents) is stored in the VDMA Workspace and available to members on the VDMA homepage (https://www.vdma.org/compliance).

b) Instruction at the Beginning of the Meeting

At the beginning of a meeting, the participants should be instructed that they must behave in in compliance with competition law. In this regard, it is recommended that the following notice be communicated and recorded (The German-language version can be found in the German-language version of the compliance programme and on the intranet or internet.):

> *“We would like to draw your attention to the provisions of European and national competition law which prohibit the discussion of competitively sensitive topics, such as prices or discounts and to otherwise exchange sensitive company data during association meetings. Forecasts of future business development are particularly critical in this regard and can only be made in aggregated form through VDMA.*
>
> *Similarly, it is prohibited to agree on common behaviours in an industry and/or to pass resolutions or make arrangements in this respect. Such actions may 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). We are happy to send you a copy of the VDMA Compliance Programme.”*

Participants should also be made aware that the competition rules also apply in the "general vicinity" of the association meeting, *i.e.*, breaks or evening events, for example, are also covered.

c) Reactions in Concerning Situations

If nevertheless spontaneous statements, which can often develop a certain momentum of their own, create a situation that is questionable under competition law, the responsible **association employee is required to intervene immediately.** The following counter-reactions are conceivable:

- If, despite all compliance efforts, the discussion develops into the area of inadmissible topics, first, it should be informed that a certain topic is inadmissible under competition law ("**call to order**"). Experience shows that in such a case only the implications of the exchange are misjudged and usually the call to order ends the discussion. After leaving the topic, the meeting continues with the following agenda item.

- The chairperson of the meeting may also suspend the discussion and adjourn it to a later date. This applies in particular if there is uncertainty about the admissibility of certain conduct under competition law. In addition, the chairperson should communicate that he or she will clarify the problematic aspects of this matter with the VDMA legal department before the next meeting.

- Should there be a spontaneous exchange of sensitive company data, *e.g.*, prices or price components, the chairman of the meeting shall refer to the relevant market information procedures of VDMA, in particular the statistics. He should discuss with the member companies which possibilities exist to collect data anonymously in the future and to pass it on to the companies in aggregated form without coming into conflict with competition law.

- As a last resort, it is recommended to temporarily suspend or completely stop an association meeting.

d) Requirements Regarding Meeting Minutes

Decisions taken at the meeting must always be recorded in the minutes so that the discussions can be retraced. On the one hand, this avoids the impression that the association meeting was a "secret meeting" " or a "closed shop". On the other hand, detailed minutes can prove what actually happened during the meeting in the event of an investigation being initiated. This may help VDMA or its member companies to exonerate themselves from the accusation of anti-competitive behaviour. In this context, too, clear and unambiguous wording should be used in the same way as in the invitation letter, and the content of the meeting must be truthfully reproduced.

Finally, no informal discussions on competitively sensitive topics may take place "outside the agenda". This also applies – as already mentioned – to, *e.g.*, breaks and evening events. If applicable, the VDMA employees must make this unequivocally clear to the meeting participants.

Compliance must be ensured before, during and after the association meeting. This is the only way to ensure full compliance with the competition law requirements.

e) Company Tours

Where VDMA meetings do not take place on VDMA premises, they are often held at the invitation of member companies at their respective sites. This is generally unproblematic and offers the host companies the opportunity to present themselves and the company's products. However, the same applies here: Competition law and the requirements of the compliance programme must be observed, also and especially regarding the host company's competitively sensitive data.

For this reason, a tour of the company premises, which is often offered, should therefore be discussed with the hosts in advance: The companies should be made aware that competitors may also participate in the meeting and that – already in their own best interests – business secrets should therefore be protected (this applies in particular against the background of the Act on the Protection of Trade Secrets), *e.g.*, by concealing delivery schedules, customer information, technical solutions, *etc*., which could possibly be identified during such a tour.

f) Technical Working Groups, Research

VDMA's range of services includes working groups with a strong technical focus, be it as an exchange of experience or within the framework of research projects, etc. Such working groups are also subject to competition law (regarding standardisation: see VII.).

On the one hand, it must be ensured that the information exchanged does not contain any competitively sensitive data. For example, the disclosure of technical information that is a relevant part of the company's strategy may enable the competitor to adjust its own behaviour in the market accordingly, which may lead to an infringement of the secrecy of competition required under competition law. In addition, it must be ensured that the usual requirements already described above are complied with, even if they arise in connection with technical topics (for example: inadmissible discussions regarding specific customers, competitively sensitive information, etc.). On the other hand, self-commitment declarations in technical areas are inadmissible if they aim to restrict the freedom of action of the participants, *e.g.*, if there is an agreement that only certain technologies will be used, or only certain research will be advanced (cf. on this also under III.). **Competition for innovations and technical solutions must not be restricted under any circumstances**!

Regarding research and development projects, it must be ensured that these take place **purely in the pre-competitive area.** For example, it is conceivable and common practice that research institutes are commissioned to research specific (technical) solutions for sector-wide problems and rely on the experience/cooperation of member companies. In many cases, there will be no intellectual property right (patent, utility model, etc.). Consultation with the legal department is mandatory if the pre-competitive area should be left behind, if intellectual property rights are created, or if there are plans for a joint exploitation of research results.

Technical or research and development-oriented working groups are also subject to competition law. Restrictions on innovation competition or other agreements are also prohibited in these areas!

2. Topics of an Association Meeting

The coming together of member companies at meetings, in working groups or at experience exchange events is a central activity of VDMA. From a competition law perspective, however, there is a possibility that, without appropriate awareness of competition law requirements, a meeting of competitors inside or outside an association may result in conduct that restricts competition. To avoid even the impression of conduct restricting competition, VDMA must always carefully consider which topics can be discussed in a meeting.

***E.g.*, information on general economic data, an overview of the industry as well as the discussion of current legislative projects or lobbying activities of VDMA are among the regularly permissible topics of an association meeting. It is also clear that it is not permissible under any circumstances for information to be exchanged or agreements to be reached on prices, price components (*e.g.*, discounts), pricing strategies, division of markets, delivery and payment terms, quantities, costs, capacities, salaries and planned investments. In the same way, decisions or concerted practices which involve the coordination of behaviour towards third parties (in particular boycotts) violate competition law and must therefore be avoided at all costs. Besides an express agreement or decision, however, the exchange of sensitive data and strategies can endanger competition.**

At the same time, a gain in information is the decisive added value of VDMA membership for member companies and also frequently leads to efficiency gains desired under competition law. In this area in particular, an oversimplified distinction between permissible and impermissible conduct is largely not adequate.

Association meetings cannot only be held as face-to-face events on the premises. Therefore, please note that VDMA's compliance programme also applies to all other meetings of members organised by VDMA and must be ensured by a personally present employee: This applies to, *e.g.*, events outside VDMA premises, telephone conferences, online meetings, etc., as well as when setting up online forums, messengers and other online-based groups, etc.!

3. In Detail: Exchange of Company Information at Association Meetings

a) General

An individual exchange of information between competitors is subject to particularly strict competition law requirements. In particular during association meetings, it is prohibited to exchange or unilaterally disclose sensitive company data or information that allows a competitor to draw conclusions about company strategies or possible future behaviour (**competitively relevant or sensitive information**). This applies even if there is only an exchange of data and no further agreement is reached. This is for the following reasons: In the view of the competition authorities, there is normally no need for companies to share sensitive data with competitors: The ideal of "secret competition" applies. If they do so anyway, the companies create a market transparency that is unwanted from a competition law perspective. The exchange of sensitive information already creates the danger of uniform behaviour or the harmonisation of a price level.

In individual cases, it can be extremely difficult to determine which information may still be permissibly exchanged at association meetings and when, as an association or as a member company, one is already moving into an area critical under competition law. If the data is sensitive, this does not necessarily mean that the data cannot be made accessible in another way, *e.g.*, via an aggregated statistic (see under II.). However, individualised communication must then be refrained from at association meetings. In this respect, round table discussions or debates on admissible statistics must also be avoided, as these carry a particular danger of spontaneous statements that allow to attribute data to individual companies although it has been anonymised and aggregated before.

b) Dealing with Formalised Information Exchanges

An exchange of information in a VDMA meeting can sometimes be accompanied by slides, etc. to structure the meeting and the exchange of information. If such a format is used during an exchange of information, *e.g.*, in printed form ("printed survey"), care must be taken that it is not produced in a detailed format with numerous columns and divisions to be filled in (*e.g.*, Excel). In addition, to this table format with the possibility of filling it in is inappropriate and superfluous, since generally nothing is filled in before or at a meeting. Therefore, a format should be chosen that does not specify columns or rows "to fill in".

In addition, any “printed survey” accompanying an exchange of information within the scope of the content permitted under competition law (see c) below) must contain a **mandatory notice on the exchange of information on the respective document** (*e.g.*, the page/slide).

It is important that this notice is actually visible when viewing/printing/storing the specific page. The text can be found in the English version of the compliance programme and on the intranet or internet:

> *“We would like to draw your attention to the provisions of European and national competition law which prohibit the discussion of competitively sensitive topics, such as prices or discounts and to otherwise exchange sensitive company data during association meetings. Forecasts of future business development are particularly critical in this regard and can only be made in aggregated form through VDMA.*
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> *Similarly, it is prohibited to agree on common behaviours in an industry and/or to pass resolutions or make arrangements in this respect. Such actions may be subject to severe fines that have to be paid by the association and its member companies. This is why these rules must be adhered to without exception.*
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> *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). We are happy to send you a copy of the VDMA Compliance Programme.”*

c) Possible Content of the Exchange of Information

Now, as far as the specific content of the actual exchange of information is concerned:

A retrospective exchange about the business development (turnover / incoming orders) of a past period is possible. However, it must be ensured that the **information refers to the entire company or a broad product range and not to individual products / product groups**. The reporting period should cover at least half a year. In the case of companies that are only active in one product group, no exchange of company specific information is possible. In such cases, however, VDMA can request the information from the companies in advance and present the aggregated figures at the meeting.

- The competition authorities are **particularly critical** of the exchange of **forecasts about future business development between competitors**. From the point of view of the competition authorities, there is usually no reason – legitimate under competition law – to share this strategically valuable information about one’s own company with one’s competitor.

  Therefore, an exchange at a meeting, *e.g.*, about the business expectations (incoming orders / turnover) of an individual company for the coming or current year, must be

avoided. Instead, before a meeting, the respective VDMA office can conduct a **(written) survey** with the companies about the company specific forecast for a time period of at least half a year and then present the results in aggregated form at the meeting.

- **Ad hoc surveys** on future business development in the meeting **by means of technical devices (*e.g.*, PowerVote, etc.)**, such as by remote control or by **using special websites (*e.g.*, Mentimeter, etc.),** are in principle permissible according to the prerequisites mentioned under II. b for statistics. However, it must also be ensured here that it is **not possible to identify individual responses** and that a sufficient degree of aggregation and anonymisation is achieved.

Charts that show, for example, that an identifiable company (*e.g.*, based on previously conducted, permissible discussions about past development) expects growth of x % are identifying and thus impermissible. In contrast, it would be permissible to aggregate the ad hoc reports (*i.e.*, combine all reports) or to present only results that comply with the usual compliance requirements, *i.e.*, that in no case reveal the reporting companies. Alternatively, the rough expectation (negative, neutral, positive) for the market as a whole can be queried (and not for the individual company), if necessary, supported by a downstream, anonymous query of the specific forecasts after the meeting, which can then be passed on to the members (*e.g.*, with the sending of the minutes) in the usual aggregated and anonymised form.

Beyond these points, an individual exchange about additional competitively sensitive data, especially about return on sales and capacity utilisation, is not possible without prior consultation with the legal department: Here there is a particular risk that strategic considerations regarding future behaviour will be exchanged between competitors or (perhaps also unconsciously) disclosed. Here, too, anonymised, and aggregated statistics may be considered.

In the context of an association meeting, it should also be prevented that the companies jointly estimate the data of companies not participating in the meeting: On the one hand, there is the danger that sensitive data must be exchanged in order to make a corresponding estimate. On the other hand, it can lead to further inadmissible agreements. Alternatively, however, it is possible for each participating respondent to transmit his own estimate into an anonymised reporting procedure within VDMA. An average value can then be formed from the incoming estimates and passed on to the respondents.

The exchange of publicly available documents (*e.g.*, company brochures) is possible if the brochures are actually publicly available, can also be obtained elsewhere by competitors without major effort and do not contain price information. An **exchange of price lists must be avoided**: The exchange of prices and price components runs a great risk of constituting an anti-competitive measure per se, irrespective of whether the price lists are publicly available documents or not. It is true that in many cases companies can also permissibly obtain such

lists from other sources. However, as already mentioned, this would be more complicated and time-consuming than spontaneously communicating important price information. The competition authorities would consider such an approach to artificially alter the conditions of competition.

Always ensure that only permissible content and information is discussed or exchanged during association meetings. The use of technical solutions does not exempt you from observing the other requirements of the compliance programme, especially regarding the requirements for market information procedures. It must not be possible under any circumstances to identify companies reporting sensitive information!

4. Collaboration Platform

The VDMA Collaboration Platform facilitates cooperation between member companies in the respective trade associations and working groups outside of committee meetings. The same competition requirements apply on the Collaboration Platform. Therefore, companies are not allowed to exchange or disclose information on the collaboration platform that they are not also allowed to exchange in traditional association meetings. In this respect, the provisions of sections B.I. 2. and 3. apply mutatis mutandis. The users of the Collaboration Platform are automatically made aware of the Compliance Rules when they log on to the platform for the first time and can always access them in the tab “Compliance Notice”.

The **group moderators must regularly check the contributions in their groups**. In case of absences, it must be ensured that these tasks are taken over by substitutes. The contributions on the collaboration platform are also checked by an automatic tool for keywords relevant to competition law.

In the event of (suspected) infringements of the compliance rules, the respective contribution must be reported immediately to the legal department. Reports can be made via the reporting function on the compliance platform as well as e-mail and telephone. The legal department will then support and advise on the decision on how to proceed.

Report suspected compliance infringements to the legal department. Delete relevant posts only after prior consultation with the Legal Department.

II. Statistics

a) General

Market information procedures, especially in the form of statistics, are extremely important for VDMA member companies, as they often serve as basis for their economic decisions. To obtain this information, several member companies cooperate by exchanging the relevant market data via VDMA as an institutionalised reporting office. VDMA evaluates the data internally,

summarizes it and passes it on to the participating companies – in anonymised and aggregated form and taking into account **confidentiality obligations vis-à-vis the members / third parties** (VDMA employees are subject to confidentiality obligations under their employment contracts and have signed a separate declaration to this effect vis-à-vis VDMA). VDMA will never request the data publicly, but via separately described channels (e-mail, fax, letter, online portal, etc.).

From the perspective of the competition authorities, it is generally unlikely that the exchange of anonymised and aggregated data, which do not allow conclusions to be drawn about individual company-specific data, will lead to restrictive effects on competition.

However, this may be different in a relatively concentrated market because, there, such an exchange of information is, in the view of the competition authorities, likely to provide the responding companies with information on the market position and strategies of their competitors and thus appreciably affect the remaining level of competition. Whether there is such a risk of identifying individual companies depends in particular on the structure of the market, the number of suppliers, the timeliness of the reports and the products covered by the respective statistics.

However, in the assessment of statistics under competition law, there are no clear rules in the sense that if the number of respondents is X, the statistics are generally admissible and that they become inadmissible as soon as the number falls below this value. In this context, a case-by-case assessment is applied that is less concerned with the legal assessment of the facts than with an economic analysis of the relevant markets and market participants. A schematic application of a formula is therefore not possible; rather, it is necessary to analyse the specific market conditions in each individual case to be able to make a reasonably reliable statement about the statistics from a competition law perspective. In case of doubt, please contact the Legal Department.

b) Minimum requirements for statistics

In order to achieve a certain degree of certainty for the daily work with statistics, the **following rules** apply to the implementation of existing and the introduction of new association statistics: **Each reporting category must contain at least 5 positive responses from non-affiliated companies. Therefore, care must be taken to ensure that the respondents are independent under company law when calculating this minimum number of respondents. Furthermore, no respondent may have 70% or more market share (among the respondents) in the respective category. Also, there must be no disclosure of the responses (*e.g.*, after one year).** If these minimum requirements cannot be met, it is necessary to contact the VDMA legal department **and to** further aggregate the statistics.

Out of precaution, the participating companies in a statistic must not be named: Already according to general principles, an identifiability of the responses must be excluded, nevertheless

it is advisable to keep the participating members secret for further anonymisation. In principle, there are no objections to naming the number of participating companies.

Beyond these minimum requirements, consultation with the legal department is also necessary under certain conditions (especially if a new statistic is to be introduced) if there could be a risk of identifying companies due to the specific structure of the statistic: This may be the case if the reporting frequency is less than one quarter (*e.g.*, monthly output), the geographic breakdown is smaller than an indication for Germany (*e.g.*, federal states) or it is theoretically possible to calculate prices or margins for product groups (*e.g.*, because sales values and quantities are reported, are available in other statistics, or are publicly available). The legal department must also be consulted if statements are made about capacity utilisation - the only exception to this is a statement for the trade association as a whole (aggregated).

c) Inflow/Outflow of Respondents

If there is only a small number of participants in a statistic and the development of the market concerned is relatively uniform, there is a risk that the data of new participants in the statistic will easily become transparent. By comparing the statistics before and after the new entry, the individual company data may become apparent. To avoid this, it is advisable to wait until there are several new participants and then include them in the statistics at the same time. The same problem exists with regard to departures: Here, too, not individual but only several respondents should be removed from the statistics at the same time.

If it is not possible to include several new reporters in the statistics at once, the following pragmatic solution is recommended: A new respondent should not be included in the statistics immediately with his entire reporting volume, but only step by step, for example within the first reporting period with 20% of his total data, in the second reporting period with another 20%, and so on. The selection of the percentage requires a certain “tact”. It should at most be communicated to the other participants in the statistics that the gradual inclusion of a new respondent will take place. However, VDMA as the reporting office should under no circumstances communicate the percentage distribution and the reporting period over which this will be the case until complete inclusion.

When a respondent leaves the statistics, it may be possible to immediately dispense with further responses from the company. However, the corresponding value for the company should still be estimated over a certain cooling off period.

d) Note on Procedures / Handling of Collected Data for Reporting Office and Respondents

In order to provide members with the highest possible level of security and clarity regarding the handling of statistics when reporting data in surveys or statistics, response forms or the accompanying cover letters must include the information that all reported data will only be

published in anonymised and aggregated form and that both the reporting office itself and the respondents are subject to the requirements of the compliance programme.

Such a note could read as follows:

> *"The reported data will only be published anonymously and in aggregated form. The requirements of the VDMA Compliance Programme, which is available on the VDMA website, are mandatory for both the reporter and the reporting office."*

For many members, VDMA statistics are a very valuable contribution to assessing their own economic activities in the market. VDMA's data is an aid to orientation, but in no way represents a recommendation by the association to use these values as a guideline. In order to make this clear, a corresponding note should be made in statistics which contain, for example, aggregated costs or similar price components. Such a note may read as follows:

> *"The collection and dissemination of this data by VDMA does not imply any recommendation to member companies to adopt or follow the (average) values – an individual assessment is absolutely essential for each company."*

e) Access to Statistics

In principle, a general, indiscriminatory access to statistics is not required by competition law. Access to the statistics – collected and reported within the above-mentioned framework – can therefore remain restricted to members. The decision on access to statistics is therefore reserved for VDMA. Restrictions may, however, arise from the question of the possibility of generally refusing membership in VDMA to companies (see IX.).

A statistic – taking into account all surrounding circumstances – must in no case allow the identification of the individual responses.

III. Declarations of Voluntary Commitment

The competition authorities have fundamental regulatory concerns about voluntary commitments of industry companies, at least if they pursue political or other goals which are otherwise regularly achieved by enacting corresponding industry standards or laws. Commitments are regularly considered inadmissible if the **freedom of action of the parties involved is restricted in an inadmissible manner** or if there are noticeable effects on third parties.

For example, an agreement between companies to use a new material in the interest of product safety is at the same time a contractual restriction, as the material used so far would no longer be purchased. First, the declaration of voluntary commitment restricts the possibility of the companies involved to choose their own materials and thus to determine the characteristics of their products. In addition, the uniform use of the new material would limit the customers' choice.

From the point of view of the competition authorities, the objective of product safety pursued in the present example does not necessarily outweigh the reduction of customers' choice associated with the introduction of the new material. Another problem is that due to the commitment a new supplier of the old material would de facto have no chance to enter the relevant market, because its product would not be bought due to the commitment. The commitment would then constitute an inadmissible barrier to market entry.

The same can be assumed in other cases of self-commitment, *e.g.*, regarding the **use of (new) technologies,** etc. In addition to the above-mentioned possible restrictions on the freedom of action of the participants and the effects on third parties, it may be possible to see a restriction of **innovation competition** that is inadmissible under competition law. In other words, the voluntary commitment may inadmissibly prevent better, more innovative, and safer technologies from entering the market, which in many cases will be inadmissible under competition law.

The question of whether or not a declaration of a voluntary commitment is permissible must therefore always be discussed with the VDMA legal department. Under no circumstances may it be circulated using the VDMA logo, as it is not a declaration by VDMA but a declaration by the participating companies.

Voluntary commitments by companies are subject to particularly strict scrutiny under competition law.

IV. General Terms and Conditions

VDMA regularly publishes general terms and conditions of sale and delivery which can be used by the individual member companies. However, it would constitute an infringement of competition law if the association members were to commit themselves to using these terms and conditions. Even if the adoption of the terms and conditions is voluntary, the use of terms and conditions can be relevant under competition law if prices or similar conditions are fixed therein. However, with regard to the currently published terms and conditions, which have also been reviewed by the legal department, it can be assumed that these are neutral in terms of competition law and can be used by member companies without hesitation, although they must naturally be adapted to the individual case (see note below). Newly drafted terms and conditions must be submitted to the VDMA legal department for review. Historically, terms and conditions could be approved by the Federal Cartel Office, but this option no longer exists, so that the in-house examination of these terms is of high priority.

If you refer to contractual terms, such as payment conditions, in VDMA guidelines, you must not create the impression that these contractual clauses are customary in the industry and cannot be deviated from in practice. In particular, there is a risk that the VDMA member companies involved will introduce their "desired clauses" in order to be able to enforce them more

easily against their customers by referring to a printed publication by VDMA. Against this background, it may be advisable to supplement such a guideline with the following or similar wording:

> *"The clauses listed in this publication are merely non-binding examples provided by VDMA member companies. Their inclusion in the guide does not imply that their use is customary in the industry. The clauses can therefore not be adopted as sample formulations without further ado.*
>
> *A multitude of other constellations are conceivable, especially with regard to warranty, liability and payment modalities. Rather, it is necessary to check if the clauses can be used at all or with modifications in the context of the specific contract and the facts underlying the individual case.*

Contractual terms are also subject to competition law scrutiny.

V. Press Releases, Warnings

Many divisions of the association publish press releases or association circulars in view of current events or on a regular basis. These statements must not contain any formulations that could be interpreted as uniform behaviour or collusion between member companies in response to developments in a particular market. Nor may VDMA make corresponding recommendations. Against this background, care should be taken to ensure that press releases or circulars describe developments in the respective market in an objectively accurate manner, but do not call for specific business reactions. Also, the impression must not be created that there has been a joint agreement within the individual trade associations about a certain course of action. It is permissible to present alternative ways of reacting to market developments. Here too, however, the association must not propagate only one possible course of action in a one-sided manner.

VDMA must be particularly careful with regard to “warnings” before using certain products, entering into business relationships or using certain services: Here, there is not only the threat of an infringement of competition rules (“calls for boycott”), but also possibly of a very expensive legal dispute with the companies concerned. Naturally, forwarding of official warnings is unproblematic, but the sending of other “warnings” must be discussed with the legal department.

Check press releases for admissibility under competition law and in particular avoid misleading statements.

VI. Position Papers and Guidelines

Not only agreements or concerted practices between member companies are illegal. It is also contrary to competition law if a corresponding recommendation is made by a business association. Such a recommendation can be a position paper which gives the impression to the addressed companies that these are guidelines to which the companies must adhere. In general, each member company must be free to determine its own strategies, market behaviour, prices and conditions, etc.

A trade association must not make recommendations that lead to all members following it and thus achieve the same result as an agreement between the companies. Finally, it must be ensured that a position paper comprehensively reflects the actual market situation and is not limited to the data of a few member companies that regularly attend the association meetings.

For these reasons, it is advisable to place a clarifying note at the beginning of such a publication, such as the following:

> *"The guideline is only indicative and provides only an overview for the assessment of ... [e.g., risks in the design and construction of certain machinery]. It makes no claim to exhaustiveness or to the exact interpretation of existing legislation. It must not replace the study of the relevant directives, laws and regulations. Furthermore, the special features of the respective products, as well as their different possible applications, must be taken into account. Therefore, a multitude of other constellations are conceivable besides the assessments and procedures addressed in the guide."*

Avoid giving the impression that the recommendations are binding. Point out that the publications are only non-binding guidance.

VII. Standardisation and VDMA Specifications (*VDMA Einheitsblätter*)

a) Standardisation

Standardisation work or the specification of certain technical or qualitative requirements for products, processes, etc. must be brought into line with competition law requirements. The reason for this is that even uniform standards or norms could, under certain circumstances, restrict competition for different solutions or approaches.

Therefore, the respective rules and principles of the standardisation organisations for international, European and national standardisation work must be observed in this context, 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: DIN 820 series of standards and the guideline for standards committees in DIN.

b) VDMA Specifications (*VDMA Einheitsblätter*)

The term “standard” in the sense of competition law is relatively broad. It includes standardisations for numerous technical fields, quality specifications, manufacturing processes, safety requirements, interfaces, etc. This may also include VDMA Specifications as a type of “intercompany standard”.

The preparation of VDMA Specifications must also be aligned with competition law requirements. The following essential requirements are based on the above-mentioned rules for standardisation and must be observed when drawing up VDMA Specifications:

- There is the possibility of full participation for all foreseeably affected companies and organisations (“interested parties”) in the drafting process and the procedure for the adoption of the VDMA Specification concerned is transparent, objective and non-discriminatory.
- A draft is submitted to the public for review and comment, which also includes interested parties and companies outside VDMA, and a reasonable objection period is allowed for this.
- The process of producing a Specification ensures that it comprehensively reflects the actual market situation and is not limited to information from individual (member) companies.
- Effective access to the VDMA Specification is guaranteed on fair, reasonable and non-discriminatory terms, and the parties (if their intellectual property rights are to become part of the VDMA Specification) must give an irrevocable written undertaking to grant licences for these rights to third parties on fair, reasonable and non-discriminatory terms (“FRAND commitment”).
- **The application of the VDMA Specifications is voluntary.**

The publicly available “Guideline for VDMA Specifications – Fundamentals and procedures” (www.vdma.org/normung) contains detailed rules and principles for the development and production process of VDMA Specifications.

Standardisation work or standardisation-like association activities are subject to special competition rules. Ensure that the above points are respected at all times.

VIII. Trade Fair Policy

Trade fair policy is of particular importance for member companies and VDMA. It is permissible for VDMA to promote or support a trade fair. In this context, general information about the

concept of the favoured trade fair can also be provided and it is perfectly possible to highlight particular advantages of its concept, as long as this is done in a factually correct manner.

However, the support of a specific trade fair by VDMA must not lead to or be understood as a call for a boycott regarding competing trade fairs. For the assumption of a boycott, it is not necessary that this other trade fair is expressly named. It is sufficient that the member companies addressed can determine the trade fair concerned with sufficient precision. Also, the specific criticism of a trade fair can be interpreted as a call for a boycott. This applies even more if the association makes derogatory statements about other trade fairs in a non-objective manner with the aim of defamation. Negative facts concerning a trade fair may indeed be communicated if the information is limited to the communication of true facts that are accessible to everyone. However, any additional negative judgment should be refrained from.

Further, companies, who are, *e.g.*, participating in an information event organised by the association, must not decide or agree to exhibit only at a certain trade fair in future. VDMA may neither recommend that companies should not attend or exhibit at a competing fair for certain reasons. Despite VDMA's endorsement of a trade fair, companies must remain free to participate in all relevant trade fairs. For this reason, it is already critical (and must be clarified in advance with the legal department in trade fair contracts) if VDMA undertakes vis-à-vis the trade fair company to exclusively promote only the trade fair favoured by the member companies or by itself.

When organising events at which trade fair policy plays a role, it must be taken into account that not only specific agreements or express decisions of member companies not to exhibit at a certain trade fair violate the ban on cartels. A coordination of behaviour can also occur through actual market behaviour, *e.g.*, if many companies that have exhibited at a trade fair for years suddenly no longer do so. In this case, the recognisable effects on the trade fair market allow to conclude that there may have been a coordination contrary to competition law. An association circular, a press release, or an interview in which a trade fair is portrayed negatively can also be regarded as a preliminary stage of an illegal agreement between the association members. In this context, too, it should therefore be refrained from asking during an association meeting who intends to participate in certain trade fairs and who does not. Disclosing the willingness of important or numerous companies to participate could put corresponding pressure on the others.

On the other hand, it is possible to carry out an anonymous written survey so that the trade association can form an appropriate picture, or to ask for an opinion poll on the extent to which member companies are satisfied with a particular trade fair concept.

Infringements of trade fair policy requirements can have far-reaching consequences under competition and civil law. In addition to fines, high claims for damages may be possible, *e.g.*, due to the absence of exhibitors.

IX. Refusal to Admit a New Member Company

Occasionally, the question arises in working groups and trade associations if there is an obligation to admit a company as VDMA member after it has submitted a corresponding application. According to most rules of procedure, a company “may” become a member, which indicates a certain degree of discretion.

However, the decision must be made in a non-discriminatory manner. Competition law prohibits discrimination – it stipulates that trade associations may not refuse to admit a company if the refusal would constitute an unequal treatment without objective justification and would lead to an unfair competitive disadvantage for the company.

A refusal is therefore only permissible if there is an objective justification. In this context, the interests of the applicant in membership must be weighed against the interests of the association in not admitting the applicant.

As such, the unequal treatment inherent in the refusal may be justified on two types of grounds:

First, because the applicant does not fulfil the admission practice, or the admission requirements laid down in the association’s statutes. Second, exclusion or non-admission would be justified if there are reasons that lie in the individual characteristics of the applicant and stand in the way of admission. There would be such a justification, for example, if the admission of a certain company may damage the reputation of the association.

It is also conceivable that admission would lead to considerable discord within VDMA or its sub-divisions. In this context, however, it is not sufficient that the admission of the new member is merely disagreeable to the existing members. Rather, it would be necessary for the activities of the working group or the trade association to be *de facto* blocked, because, for example, admissible information previously communicated would be withheld in view of the new member, thus making participation in association meetings unattractive. Also, if a large number of companies threaten to leave, this might be considered as justification in individual cases.

A rejection of an application for membership must be objectively justified. A rejection of a new member on the basis of mere, sometimes very intense, competition between members is not permissible.

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