

ETSI Guidelines for Antitrust Compliance

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A Introduction

ETSI, with over 650 member companies from more than 51 countries, is the leading body for globally applicable standards for telecommunication and other electronic communications networks related services. ETSI's European Norms (EN) are the basis for harmonized standards adopted in European legislation

ETSI's position as a recognised European standardisation body does not exempt it, its members or its activities from the application of competition law. ETSI is, among other things an association of public and private companies and recognizes the importance and impact of competition laws. As it is important for ETSI and its members to strictly comply with all laws that relate to the conduct of their activities, the ETSI Guidelines for antitrust compliance have been prepared and shall apply for all ETSI's activities.

The following Guidelines consist of three parts:

- The first part is providing some non-exhaustive background information of competition law in general and possible antitrust implications for ETSI and its members (see below Section B).
- The Guidelines for antitrust compliance as such are subject of the second part (see below Section C).
- The third part is providing some short and easy instructions of "do's" and "don'ts" as a mnemonic device for the participants in ETSI Technical Committees and working groups (see below Section D).

Note that the overview of competition law, as well as the following Guidelines cannot address every potential area of concern in the field of competition law for ETSI and its members. Nor do these documents seek to serve as a substitute for obtaining legal advice from a participant's own legal counsel. In case of any doubt, one should therefore seek the assistance of legal counsel experienced in competition law matters.

B Overview of competition law and possible implications for ETSI and its members

B.1 What is competition law?

Competition law is aimed at allowing firms to compete on level playing field. It ensures that competition in the market is not distorted and that markets operate as efficiently as possible. It encourages economic efficiency by creating a climate favourable to innovation and technical progress and ultimately safeguards the welfare of consumers. Competition law hereby covers different areas, including rules on antitrust (i.e. rules on restrictive agreements and concerted practices and rules on abuses of dominant position), merger control, liberalization and State aid.

In Europe antitrust rules are contained in various legal instruments. The basic provisions on the Community-level are contained in Articles 81 and 82 of the Treaty establishing the European Community (EC)¹⁰. A number of implementing Regulations have later been adopted, either by the Council or the European Commission.

¹⁰ These provisions have been reproduced in Articles 53 and 54 of the European Economic Area (EEA) and are therefore applicable in all States of the EEA.

The provisions of Article 81 and 82 EC can be briefly summarized as follows:

Article 81 EC prohibits agreements or concerted practices between undertakings as well as decisions of associations of undertakings which restrict competition subject to some limited exceptions.

Article 82 EC prohibits any abuse of a dominant position by one or more undertakings which may affect trade between Member States of the European Union (EU).

B.2 Article 81 of the Treaty establishing the European Community (EC)

B.2.1 What is Article 81 EC dealing with?

Article 81 EC prohibits agreements between companies which have the objective or effect to reduce competition within the EU.

Article 81 EC applies to both horizontal and vertical agreements. Horizontal agreements are agreements between actual or potential competitors, i.e. between undertakings at the same stage in the production or distribution chain. Vertical agreements are agreements between two or more undertakings each of which operates, for the purpose of the agreement, at a different stage of the production or distribution chain.

The wording of Article 81 EC is as follows:

"Article 81

1. *The following shall be prohibited as incompatible with the common market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market, and in particular those which:*

(a) directly or indirectly fix purchase or selling prices or any other trading conditions;

(b) limit or control production, markets, technical development, or investment;

(c) share markets or sources of supply;

(d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;

(e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

2. *Any agreements or decisions prohibited pursuant to this article shall be automatically void.*

3. *The provisions of paragraph 1 may, however, be declared inapplicable in the case of:*

- any agreement or category of agreements between undertakings,

- any decision or category of decisions by associations of undertakings,

- any concerted practice or category of concerted practices,

which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:

- (a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;*
- (b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.*

B.2.2 Why is it important for ETSI to pay attention to the rules of Article 81 EC?

The aim of ETSI is to encourage its members to place in common their resources in order to produce standards. This objective has been endorsed by the European Union.

However, it must be borne in mind that, while being an official standardization body, ETSI is at the same time an association of undertakings within the meaning of Article 81 (1) EC. In addition, it constitutes a forum in which competitors interact with each other. Therefore, the competition law rules apply to the decisions which are adopted by the Institute as a standardization body as well as with regard to the activities of Members within ETSI.

Acting as a standardization body, the members of ETSI should not abuse their attendance at ETSI meetings to establish or further restrictive agreements (e.g. relating to the fixing of prices, sharing of markets, and exclusion of particular third parties).

B.2.3 What entities are subject to Article 81 EC?

The prohibition of Article 81 EC applies to "agreements between undertakings, decisions of associations of undertakings and concerted practices".

The term "undertakings" is a wide term which extends to almost any legal or natural person regardless of their legal status or the way they are financed. It includes companies, partnerships, trade associations, sole traders and State corporations. Whether the undertaking is profit making is immaterial, provided it carries out commercial activities. The argument according to which the employee was not acting in representation of its senior management is not a defence.

Accordingly, all members of ETSI are subject to Article 81 EC and thus capable in principle of incurring into anti-competitive behaviour. Furthermore, ETSI itself as an "association of undertakings" is subject to competition law.

B.2.4 What forms of agreements are prohibited and must be avoided?

The form of the agreements between the competitors is not relevant. Even an unwritten agreement can be considered as illegal under Article 81(1) EC. Gentlemen's agreements and any other type of informal unwritten agreements between competitors are found to meet the requirement. The existence of an anti-competitive agreement may even be inferred from all the circumstances.

B.2.5 What do anti-competitive agreements consist of?

All types of agreements, whose aims or effects are to restrict competition, might in principle fall under the prohibition provided for Article 81(1) EC.

The following constitute a few examples of horizontal and vertical anti-competitive practices which might in principle arise in the context of ETSI's activities:

a) Horizontal anti-competitive practices

The following constitute a few examples of horizontal anti-competitive practices which in principle arise in the context of ETSI's activities:

- (i.) Price fixing**
Price fixing with competitors is one of the most serious infringements of competition law. Technology pools, where the technologies in the pool compete with each other, may give rise to price fixing issues.

- (ii.) **Market and customer allocation**
An agreement between competitors that results in an allocation of markets between them, whether by territory product or customer, would be anti-competitive. Article 81(1) is therefore infringed if two members of the same category of members agree to keep out of each other's territories or establish quotas.
- (iii.) **Restrictions in licenses of intellectual property rights**
Obligations of bi- or multilateral exchanges of intellectual property rights might in some specific cases come under Article 81(1) EC. In cases where such exchanges of intellectual property rights evolve to a patent pool, Article 81 (1) EC can become even more relevant. However, specific rules in the form of block exemptions have been adopted for certain categories of licensing agreements (see below 2.6).
- (iv.) **Boycotts**
Agreements between competitors with the object of either preventing new entrants to enter the market or excluding an existing player from the market would be anti-competitive. One way of enforcing a collective boycott would be by entering into a concerted refusal to deal with a specific player.

An unjustified refusal to admit a new party in an agreement or an association could also be assimilated to a boycott. Therefore, it is recommended that the rules of admission to membership of ETSI must be based on clear, neutral and objective criteria.

Generally, no activity of ETSI shall encourage anyone to refrain from purchasing any product, equipment or services from any supplier or from dealing with any supplier.

b) Vertical anti-competitive practices

As stated above, Article 81 EC also applies to vertical agreements. Article 81 EC covers, among others, e.g. the vertical practice of so called resale price maintenance. As a result of the application of an ETSI standard, a distributor cannot be forced by its supplier to respect certain resale prices or certain sales conditions.

B.2.6 What are the limited exceptions?

Article 81(3) EC provides some limited exceptions to the principle that agreements which restrict competition are illegal. Agreements which are neutral or pro-competitive agreements, i.e. agreements which have more positive than negative effects on competition are allowed.

To specify in more detail, the conditions to be fulfilled by certain typical categories of agreements, the European Commission has adopted so-called block exemption regulations (e.g. the Commission Regulation on the application of Article 81(3) of the Treaty to categories of technology transfer agreements applying to licensing of patents, know-how and software copyright (Regulation (EC) No 772/2004) or the Regulation (EC) No 2659/2000 on the application of Article 81(3) EC to categories of research and development agreements). Restrictive agreements that fulfil the conditions of a block exemption regulation are allowed under Article 81.

In addition, the European Commission has published Guidelines setting out e.g. the principles for the assessment of technology transfer agreements under Article 81 EC (2004/C 101/02) or the applicability of Article 81 EC to horizontal cooperation agreements (2001/C 3/02), which both includes paragraphs on standardisation.

B.3 Article 82 of the Treaty establishing the European Community (EC)

B.3.1 What is Article 82 EC dealing with?

Article 82 EC prohibits the abuse of the dominant position of a company which negatively affect the trade between Member States.

The wording of Article 82 EC is as follows:

"Article 82

Any abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it shall be prohibited as incompatible with the common market in so far as it may affect trade between Member States. Such abuse may, in particular, consist in:

- (a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;*
- (b) limiting production, markets or technical development to the prejudice of consumers;*
- (c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;*
- (d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts."*

B.3.2 When does Article 82 EC apply?

A practice is prohibited under Article 82 EC when all the following criteria are fulfilled:

- the company enjoys a dominant position on the market which means that it is capable of behaving independently from its' competitors and customers in this market,
- the company abuses its dominant position on this market,
- trade between Members States is negatively affected as a result of the behaviour of this company, and
- the practice is not objectively justified

The dominance of a company is evaluated with regard to various elements. A company owning products which are not interchangeable with other products on the market is likely to be in a dominant position. The reference to the market share of the company for a specific product is also a relevant element. The possession of a technical advantage to lead a product development, or the ownership of an intellectual property right might be an important contributory factor to establishing dominance even if they are not sufficient in themselves.

NOTE: It is not because ETSI is not in itself in a dominant position that its' members will never be considered as abusing their dominant position in ETSI Committees. Some caution must therefore be taken in this respect in order to avoid problems which would be prejudicial for these members and for ETSI. Moreover, separate companies have been found by the Commission to be "collectively" dominant when they are "participants" in a tight oligopoly.

The evaluation of an abuse of a dominant position is a question of fact and degree. The "normal industry practices" serve as references to evaluate the abuse. Abusive behaviour results in weakening the degree of competition, through recourse to methods different from those which condition normal competition in products or services.

B.3.3 What are the prohibited practices under Article 82 EC?

A few examples of abuse of dominant position are set out below¹¹:

¹¹ It should be noted that the European Commission begun in 2005 a reflection on the policy underlying Article 82 and that the approach to what constitutes an abuse under Article 82 EC is currently under review.

a) Abuses on pricing

Imposition of unfairly high prices or predatory low prices is generally considered to be abusive.

b) Granting of fidelity rebates

Rebates granted by dominant companies conditional on customers buying all or most of their requirements from the dominant supplier may constitute an abuse under Article 82 EC.

c) Abuse of intellectual property rights

The mere existence of a patent, trademark or copyright is not sufficient to establish a dominant position. However, the refusal by an undertaking which holds a dominant position and owns an intellectual property right to allow access to a product or service protected by an intellectual property right by granting a licence to use that intellectual property right may in some cases be regarded as abusive, if

- the granting of the license is indispensable for companies to enter a market, and
- the refusal to license is such as to reserve to the owner of the intellectual property right the market for the products and services concerned by eliminating all competition on that market, and
- as a consequence of the refusal to license the offer of new products or services for which there is a potential consumer demand is prevented because those products or services are not offered by the owner of the intellectual property right, and
- the refusal is not justified by objective considerations.

d) Tying clauses

Practices whereby a dominant supplier agrees to supply particular products or services only if the purchaser agrees to buy other unrelated products or services from the supplier may constitute also an abuse.

e) Other types of abuse

The imposition of discriminatory and unfair conditions by the dominant company, to any categories of users, or any other company having contractual relationships with the dominant company, is abusive.

B.4 Consequences of infringements of Articles 81 and 82 EC

B.4.1 Who enforces competition law?

Where it suspects an infringement, the European Commission enjoys a number of investigative powers to enforce the rules of the Treaty establishing the European Community. These powers of investigation include written requests for information and surprise inspections of business and non-business premises. Such investigations can be burdensome and time-consuming for the companies involved.¹²

The Member States' competition authorities are entitled alongside the Commission, to apply all EU antitrust rules as well as their national rules and impose penalties for breaches. Furthermore, national courts can rule on the legality of agreements and impose penalties for breaches of the law. They can also hear claims for damages by consumers and companies that have been harmed by restrictive practices resulting from the infringement of Article 81 and Article 82 EC. The European Commission

¹² The decisions of the European Commission can be referred to the European Court of Justice for appeal. The EFTA States are supervised by the EFTA Surveillance Authority (ESA) and subject to judicial review by the EFTA Court.

and the national competition authorities regularly liaise to ensure that EU competition law is applied consistently across the EU.

B.4.2 What are the consequences?

The most obvious consequence of infringement of Article 81 and 82 EC is that very often such infringements would be brought to the attention of the national competition authorities, national courts or the European Commission via a complaint or another means.

If the relevant practice constitutes an agreement, it will be considered unenforceable. Both the European Commission and national competition authorities can impose significant fines (of up to 10% of annual worldwide turnover) if an infringement is found on undertakings that violate EU antitrust rules. In addition, national courts can impose damages against the infringer.

C Guidelines for Antitrust Compliance

In order to minimize the aforementioned risks of anti-competitive behaviour whilst setting standards in ETSI, the following Guidelines shall be observed and all participants in the standardization process in ETSI (i.e. Members, ETSI staff, experts, etc.) shall abide by these Guidelines:

C.1 Membership

C.1.1 Admission to the ETSI Membership should be based on clear, neutral and objective criteria, and open to all interested parties on reasonable terms and conditions without unfair restrictions.

C.1.2 Every refusal of ETSI Membership must be justified and the person/company excluded should always have to be given an opportunity for explanation.

C.2 Participation in the technical work

C.2.1 The participation in the technical work of ETSI should be open, so that all ETSI members that may potentially be affected by a proposal should have the opportunity to participate in the working process under the conditions as set forth in Section 1.4 of the ETSI Technical Working Procedures.

C.2.2 The rules and procedures applicable for the work in ETSI should be transparent, i.e. sufficiently specified, clear and detailed. In particular, people participating in the work of the Technical Committees need to be aware of the procedures applicable for adoption of decisions (whether in a meeting or otherwise). In case of any doubt, a clarification on the procedure should be made.

C.2.3 It is ETSI's objective to create standards and technical specifications that are based on solutions which best meet the technical objectives of the European telecommunications sector, as defined by the General Assembly.

C.3 Meetings

C.3.1 The Chairman and/or the Secretary of a meeting shall prepare each meeting following the provisions as set forth in Section 1.5 of the ETSI Technical Working Procedures and a particular attention should be given to the agenda which shall be distributed and/or made available to all participants prior to the meeting (see Section 1.5.2 of the ETSI Technical Working Procedures). The meeting shall follow the prepared agenda and only matters included on the agenda can be discussed. Amendments to the agenda at the meeting can be performed only following the principles of decision making as set forth in Section 1.7.1 of the ETSI Technical Working Procedures.

C.3.2 Concise minutes of the meeting shall be kept and reports of each meeting shall be prepared pursuant to Section 1.9.3 of the ETSI Technical Working Procedures.

C.4 Activities in ETSI

C.4.1 Discussions, communications or any other exchange of information in all ETSI meetings, on the edge of all ETSI meetings (e.g.: informal discussions, social gatherings, corridor talks etc.) as well as during any activity in ETSI should not have as their subject matter the following topics, discussion of which (among other things) is prohibited by competition law:

- pricing strategies or product pricing,
- terms and conditions of sale including discounts and allowances, credit terms, etc.
- production levels or capacity,
- limitation of technical development or investment,
- allocation of sales territories, markets or customers,
- market shares,
- submitted bids or intentions to bid,
- preventing anybody from gaining access to any market or customer for goods and services,
- refusals to deal or do business with competitors, vendors or suppliers and
- ongoing litigation or threatened litigation.

Even the appearance of any discussion, communication or exchange of information that appears to be leading to restraints on competition of any kind should be carefully avoided.

C.4.2 Voluntary, unilateral, public, ex ante disclosures of licensing terms by licensors of essential IPRs, for the sole purpose of assisting members in making informed (unilateral and independent) decisions in relation to whether solutions best meet the technical objectives, are not prohibited under ETSI Directives. It is therefore not prohibited for members of an ETSI Technical Body to inform the Technical Body of the availability of such licensing terms in compliance with Section 4.1 of the ETSI Guide on IPRs. Where any such disclosures are made, any discussion and/or negotiation of any licensing terms, including any price term, shall not be conducted in ETSI.

C.4.3 In the event that a participant becomes aware of any discussion, communication or exchange of information that appears to be leading to restraints on competition of any kind, such participant should raise the issue, seek to terminate such discussion, communication or exchange of information or separate from it.

C.5 Other

C.5.1 Knowledge of the existence of Essential IPRs is required as early as possible within the standards making process. The compliance with Clause 4.1 of the ETSI IPR Policy (Annex 6 of the ETSI Rules of Procedure) is therefore of high relevance.

C.5.2 ETSI documents produced as the result of an ETSI work item (i.e. ETSI Standard, European Standard (Telecommunication Series), ETSI Group Specification, ETSI Technical Specification, ETSI Technical Report, ETSI Guide or ETSI Special Report) need to be available for everyone on reasonable terms. Any conditions pertaining to the use of such ETSI documents have to be visible in ETSI documentation.

C.5.3 Nobody should be coerced to adopt any ETSI document produced as the result of an ETSI work item (i.e. ETSI Standard, European Standard (Telecommunication Series), ETSI Group Specification, ETSI Technical Specification, ETSI Technical Report, ETSI Guide or ETSI Special Report), nor should any efforts be undertaken that are intended to prevent the manufacture, sale, or supply of any product or services not conforming to any such adopted ETSI document.

C.5.4 In the event of inconsistency between these Guidelines and the Antitrust Laws, the Antitrust Laws shall control.

D "Do's" and "Don'ts" for participants in ETSI Technical Committees and Working Groups

The following instructions are intended to provide only a supplementary guidance in form of as a mnemonic device for the participants in ETSI Technical Committees and working groups and are not replacing the above detailed Guidelines:

D.1 Please do:

- D.1.1 Use best reasonable efforts to comply in all respects with the competition laws in connection with all ETSI activities.
- D.1.2 Comply with the rules and procedures when chairing a meeting as well as when attending and participating in a meeting.
- D.1.3 Focus any discussions or any exchange of information in ETSI on standardization issues only.
- D.1.4 Be mindful that standards development activities at ETSI should promote competition and benefit consumers.
- D.1.5 Create Standards and Technical Specifications based on solutions which best meet the technical objectives of the European telecommunications sector.
- D.1.6 Comply with Section 4.1 of the ETSI Guide on IPRs and Section 4.2 of the above Guidelines for antitrust compliance if you decide that you wish to disclose price and terms for licensing your Essential IPRs, but remember that you do not have to disclose and that your decision not to make any such disclosures is not creating any implication under the ETSI Directives.¹³
- D.1.7 In case of any concern, consult with the ETSI Legal Adviser and/or your own legal counsel as appropriate.

D.2 Please do not:

- D.2.1 Engage in activities intended to restrain competition or harm consumers.
- D.2.2 Attempt to set or control price or terms of product, service or license fees in the course of any ETSI activity.
- D.2.3 Discuss any disclosure of licensing price or terms, product or service price or terms, pricing methods, profits, profit margins, cost data, production plans, market share or territories in the course of any ETSI activity.
- D.2.4 Attend meetings where procedural rules are not followed.

¹³ Note that ETSI takes no position and is not responsible for determining whether the licensing terms disclosed ex ante are fair, reasonable and non discriminatory.