



Germany

Global Standards – Connecting Business

GS1 Germany GmbH | Postfach 30 02 51 | 50772 Köln

European Commission  
Directorate General For Competition  
Antitrust Registry,  
Ref: HT.1402 HT1407  
1049 Bruxelles  
BELGIQUE

Date: 24. June 2010  
Ref.: jp  
Phone: 0221 94714-100  
Fax: 0221 94714-190  
E-mail: pretzel@gs1-germany.de

Dear Madam or Sir,

**We hereby submit the statement of position of GS1 Germany GmbH concerning the *Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements.***

#### 1. General considerations

GS1 Germany is an independent company that develops and implements open standards applicable across numerous industries worldwide; in so doing we offer our clients custom solutions that allow for trouble-free product and data flows.

Using these standards as a basis, we also develop and recommend process and efficiency-improvement solutions for clients from a great variety of industries and help clients to implement these solutions, showing them ways to create more value. We are a member of the global GS1 network and are the second largest of the GS1 organisations in more than 120 countries around the globe.

We welcome the issuance of the new version of the *Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements* (hereinafter referred to as the "Guidelines"), as well as the fact that the European Commission has taken this opportunity to define general principles on the competitive assessment of information exchange between enterprises. Such assessments under European and national cartel laws have long been a knotty problem for companies doing business in the EU. Errors, combined with lack of clarity, concerning the admissibility and boundaries of information exchange have resulted in the imposition of stiff fines by the European Commission and particularly by Germany's Federal Cartel Office (Bundeskartellamt).

...



Germany

Global Standards – Connecting Business

In our view, the Commission's having taken a position, in the Guidelines, concerning the admissibility under competition law of agreements concerning standards is a step in the right direction. As an enterprise that develops standards in cooperation with the economic operators concerned, particularly in the consumer goods sector, and that elaborates efficiency improvement solutions for such companies, it is crucial for us to have a robust legal framework in respect to standards related agreements.

## 2. Specific considerations

### 2.1 Information exchange

We agree with the following view expressed by the Commission in no. 69 of the Guidelines: "The likely effects of an information exchange on competition (...) must be analysed on a case-by-case basis as the results of the assessment depend on a combination of case specific factors."

No. 83 of the Guidelines states as follows: "In general, exchanges of genuinely public information are unlikely to constitute an infringement of Article 101. *Genuinely public information* is information that is equally easy (i.e., costless) to access for everyone. (...) For information to be genuinely public, obtaining it should not be more costly for buyers and companies unaffiliated to the exchange system than for the companies exchanging the information. A possibility to gather the information in the market, for example to collect it from clients, does not necessarily mean that such information constitutes market data readily accessible to competitors."

Unfortunately, these stipulations do not fully square with the reality of the business world; for making the criterion for "genuinely public information" that the information be available free of charge is completely inconsistent with how things work in the real world.

For example, market research organisations that have been in business for decades and that conduct studies on consumer products routinely make current information available for a fee concerning sales, prices (of varying kinds) and other detailed data. These organisations charge for providing this information, and in so doing set their prices in such a way that virtually all consumer product manufacturers regularly purchase such information concerning the products they manufacture.

There can be no doubt that information thus compiled by these market research organisations and made available to businesses is "public information" within the meaning of no. 82 of the Guidelines. Nor can there be any doubt that businesses that exchange information that was obtained from market research organisations and that any other business is free to purchase in a standardised form from such organisations are exchanging public information and in so doing are not infringing antitrust laws.



Germany

Global Standards – Connecting Business

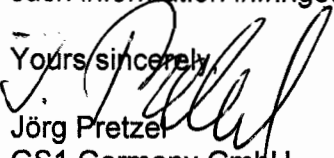
## 2.2 Age of the information in question

No. 86 of the Guidelines stipulates as follows: “The exchange of historic data is unlikely to lead to a collusive outcome as it is unlikely to be indicative of the competitors' future conduct or provide a common understanding on the market. (...) Whether data is genuinely historic depends on the specific characteristics of the relevant market such as the frequency of contract renewals (...). For example, data can be considered as historic if it is several times older than the average length of contracts in the industry.”

These stipulations are likewise at odds with reality, notably in the fast moving consumer goods sector as far as the contract term is concerned. Twelve-months-contracts tend to be the norm in the consumer goods sector. But if businesses are only allowed by law to share information after three years, such information will be of no use whatsoever to them. However, the reality in this domain is completely different. Market research organisations throughout the EU routinely provide their clients with public information (within the meaning referred to above) that is anywhere from two to four weeks old.

Hence in our view the mention of “frequency of contract renewals” should be deleted from no. 86, since the customary length of purchase agreements has no bearing upon whether market operators reach a collusive outcome. The appropriate stipulation in this regard would be that the information being exchanged must relate to the past and must not be forward-looking (i.e., it should not have a bearing on actions that either party intends to take at any time in the future). In other words, any historical data should be generally considered unobjectionable in assessing whether exchanging such information infringes antitrust laws.

Yours sincerely,

  
Jörg Pretzel

GS1 Germany GmbH



Germany

Global Standards – Connecting Business

GS1 Germany GmbH | Postfach 30 02 51 | 50772 Köln

European Commission  
Directorate General For Competition  
Antitrust Registry,  
Ref: HT.1402  
1049 Bruxelles  
BELGIQUE

Datum: 24. Juni 2010  
Zeichen: up / rö  
Telefon: 0221 94714-229  
Telefax: 0221 94714-7229  
eMail: roehrig@gs1-germany.de

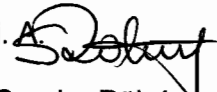
Dear Madam or Sir,

Referring to our letter of 18th June 2010 please find enclosed our statement translated to English.

If you have any questions, please do not hesitate to contact us.

Yours sincerely,

GS1 Germany GmbH

i.   
Sandra Röhrig