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## **NORMAPME position on**

- The proposed revision of the “Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements” – Chapter 7. Standardisation agreements

The European Commission DG Competition has decided to review the rules for the assessment of horizontal cooperation agreements under EU competition law, including the standardisation agreements and potential restrictions of competition they may cause.

NORMAPME mostly welcomes the initiative taken by the European Commission and is pleased that the Commission has recognised the importance of improving the assessment procedures to be used when evaluating horizontal co-operation agreements in the field of standardisation.

With regards to the above we wish to submit to the European Commission some recommendations and comments on the proposed revised standardisation chapter of the guidelines.

In this position paper, “SMEs” stands for micro, small and medium enterprises, including crafts manufacturing custom made products.

### **1. Competition problems caused by voluntary standards**

This paragraph elaborates on competition problems that arise from standardisation agreements even when the standards are formally **voluntary**.

According to the proposed revised guidelines the voluntary character of a standard is to be considered as a “guarantee” that the standard cannot give rise to restrictive effects on competitions.

It is said in the guidelines that “(...) *standardisation agreements which set no obligation to comply with the standard, and provide access to the standard on fair, reasonable and non-discriminatory terms do not restrict competition within the meaning of Article 101 of TFEU* ” (paragraph 277), or “*Whether standardisation agreements may give rise to restrictive effects on competition depends, among other factors, on the extent to which the members remain free to develop alternative standards or products that do not comply with the agreed standard*” (paragraph 269).

We would recommend the European Commission to further specify the above general principle, with a deeper analysis of the standardisation system and its functioning. This in order to avoid that

a number of actual restrictions of competition occurring within the drafting of “de facto” compulsory standards are considered out of the scope of Article 101.

Indeed, most of the cases of market distortion that we have experienced deal with standards “de jure” defined as **voluntary**.

### 1.1. European harmonised standards (hEN)

This is the case, for instance, of European harmonised standards (hEN) developed according to New Approach Directives.

Although hEN are not mandatory and alternative paths are always possible, nonetheless manufacturers have an obligation to prove that their products comply with the essential requirements set out in the Directives. Products manufactured in conformity with hEN are presumed to be conformant to these essential requirements.

European harmonised standards constitute a “pillar” of the Internal Market and they remain the preferred path to prove conformity to the essential requirements.

In fact, the *de iure* voluntary character of harmonised standards has to be assessed taking into consideration the “**cost of deviation**”, that is the cost companies have to bear in order to follow alternative schemes of compliance with the essential requirements set forth by European directives. Such **cost of deviation** is usually related to the cost of acquiring a certification from a Notified Laboratory, which carries out specific tests and impact assessment analysis of the products and attests conformity with the essential requirements of the applicable Directives.

If such cost of deviation is higher than the cost of compliance to harmonised standards and has a significant impact on the sales price of the product, **the cost of not applying the harmonized standard becomes an actual barrier to entry in the market**. Thus the harmonised standards become *de facto* compulsory.

In order to understand the above, one should consider the case of SMEs that manufacture in small series or unique products (e.g. house windows, bicycles, etc). For such producers the cost of compliance cannot be spread on a wide number of produced units and, hence, has a significant impact on the products price. Even if consumers are often prepared to pay an extra price for such *special* products, if the cost of deviation has an excessive impact on the price, the latter will become no longer competitive on the market.

The above given, it can be easily understood that horizontal agreements between competitors occurring within the technical committees in charge for the elaboration of hENs may be capable of hindering European antitrust rules.

Several sectors have undergone a process of concentration due to standardisation agreements that have *de facto* created too high costs of compliance for manufacturers that do not have sufficient production capacity.

Some examples are presented in this position paper, like those of windows, lifts and building anchors. There are reasons to think that a similar process has occurred in other sectors subject to standardisation and may soon recur in others (e.g. furniture).

## 1.2. The construction sector – Standardisation agreements within EOTA

As far as the construction sector is concerned, we wish to **extend the above considerations** to the standardisation agreements occurring within the European Organisation for Technical Approvals (EOTA). This comprises the Approval Bodies nominated according to the Construction Product Directive to issue European Technical Approvals (ETAs) by EU Member States and EFTA States who have contracted to the European Economic Area Agreement.

A European Technical Approval (ETA) for a construction product is a favourable technical assessment of its fitness for an intended use. It is based on the assessment that this product fulfils the six Essential Requirements, as stated in the Directive and in the relevant European Technical Approval Guidelines (ETAG), for the construction works in which the product is installed.

A construction product with an ETA, satisfying the Attestation of Conformity provisions, can carry CE marking and can be placed on the market in any of these EEA countries.

### Cases:

#### Building anchors

The work of EOTA determines the rules for CE marking of building anchors under the Construction Products Directive (CPD). Therefore, the requirements set in the European Technical Approval Guidelines (ETAGs) are extremely important for the existence of SME producers.

Next to the large multinational producers, SMEs have approximately half of the market of building anchors.

Due to the conflicts of interests inside the working group (approval bodies are technical specifications developers and certifiers) and to the overwhelming presence of experts coming from multinationals within EOTA, the testing requirements provided for by ETAGs are very costly for SMEs. Therefore the standardisation work determines the profitability of approval bodies and large companies.

There are several ETAGs under development, out of which the testing requirements for anchors in seismic areas is the most important one at the moment.

Multinationals' influence at EOTA level may endanger fair competition and SMEs' position in the market.

## 1.3. Other “*de facto*” compulsory standards

The same problems may occur if voluntary standards are *de facto* perceived as compulsory by economic operators. This could happen for instance when public authorities refer to **national marks** which are perceived by the market as connected with national voluntary standards, thus having the effect of conferring on technical specifications a more binding effect than they would otherwise have by virtue of their private and voluntary nature.

## Cases:

### German DVGW standards

The *Deutsche Vereinigung des Gas- und Wasserfaches e.V* (DVGW) is a German standardisation and certification body operating in the gas and water sector.

A number of German decrees and other national provision directly or indirectly oblige the economic operators to use the DVGW conformity mark or provide for a presumption of conformity to the acknowledged state of the art for products bearing the DVGW mark. See, among others, Article 12 section 4 of the Regulation on General Conditions for Water Supply “AVBWasserV” (“*compliance is also assumed if the product or device bears the symbol of an accredited industry certifier, and in particular DIN-DVGW or DVGW marking*”).

Since DVGW mark is exclusively released by the body to products complying with DVGW technical standards, as a result DVGW standards are *de facto* mandatory for companies wishing to sell their products in the German market.

## 2. IPRs and standardisation

The proposed revised chapter 7 of the guidelines mostly focuses on standardisation agreements involving intellectual property rights (IPRs) and relevant competition problems deriving from abuses of dominant position by IPR owners.

NORMAPME welcomes the thorough analysis conducted by the European Commission as to the treatment of IPRs within standards as it represents a complex and sensitive subject.

However, NORMAPME believes that a wider debate should be opened on the issue of IPR policy in standards setting organisations.

In particular, we are convinced that FRAND, while being the most appropriate approach in many cases, should not become the only mandatory option. A wider choice of policies, including for instance Royalty Free terms, should be considered on a case by case basis depending on the standardisation scenario and on the sector concerned.

Furthermore, we submit that the enforcement of FRAND should not be exclusively left over to the members of the standardisation organisations. Indeed, there is only very limited ability of Standardisation organisations to police anticompetitive conduct by opportunist participants.

Another important matter that should be considered as regards the IPR policy in standardisation is the “ex ante disclosure” of IPRs.

NORMAPME welcomes the Commission’s clarification that ex-ante disclosures of licensing terms, including the maximum royalty rates, will not lead to a restriction of competition within Article 101(1) TFEU (Paragraph 287 of the Draft Horizontal Guidelines). Indeed NORMAPME is convinced that prior to any standardisation process all parties involved should disclose the existence of patents and declare the royalties they expect to charge. This proposal, known as “mandatory ex ante disclosure”, is transparent and cost effective. Moreover, it may result in less litigation and allows faster access to the market for new entrants.

Besides, NORMAPME would encourage the Commission to clarify that joint ex- ante royalty negotiations or discussions do not automatically imply an infringement of antitrust rules but should

be considered on a case by case basis under Article 101(3) TFEU. Indeed, this type of joint discussions could mitigate the market power of essential IPR holders conferred by a standard.

### **3. Competition distortions not directly linked to IPR holders' abuses**

Over the last ten years of activity, the majority of cases faced by NORMAPME where standardisation appears to have been used as a means to restrict competition do not involve abuses by IPR holders.

Instead, NORMAPME has been involved in cases where preference given to a particular technological solution has restricted competition in the market.

#### **3.1. SMEs proposing innovative products within markets dominated by few large competitors**

Standards may be used by large competitors to exclude innovative products developed by SMEs from the market.

The usual scenario for this kind of anticompetitive behaviour is the following:

An innovative technology is proposed by one SME or a small group of SMEs. These SMEs are typically new entrants in markets dominated by a small number of established large players. As a reaction to the commercial threat of the innovative SME, the dominant market players agree on standards that discriminate against the new technology.

In these cases, our experience proves that standard setting procedures turns out to be a means to control and limit innovation and technical development. The large market leaders are obviously also predominant within the standardisation technical committees where they use their force to possibly exclude new products from the scope of the standards under development. They achieve this aim, *inter alia*, by including *ad hoc* tests or requirements in the standard that cannot be passed or met by the innovative technologies they wish to exclude, or they push in order to choose only some categories of products or some characteristics to be standardized. In this way, large firms erect additional barriers to entry that perpetuate (and enhance) the existing market structure and prevent entry by SMEs with innovative technologies. Consumers are ultimately harmed because innovation is stifled when SMEs are effectively blocked from bringing innovative technologies to market.

#### **Cases:**

#### **CEN TC 89 “Thermal performance of buildings and building components” / Multifoil insulation materials**

The TC 89 “Thermal performance of buildings and building components” concerns the standardisation in the field of energy performance of buildings, including in particular energy transfer through building components and thermal insulation of installed equipment in buildings. 13 Working Groups are active in this TC. The Working Group 12, Reflective insulation products, has been launched in 2007.

NORMAPME has been alerted to some problems for SME manufacturers resulting from the developments both in EOTA and CEN TC 89 WG 12 concerning the **tests** for thin **multifoil** insulation products. These insulators, which are **exclusively produced by SMEs**, are an **innovative type of insulation** made of layers of reflective foils spaced with synthetic wadding and foams. They insulate primarily through radiation, as opposed to traditional bulk insulation products (such as mineral wool or polyurethane foams) which operate through low conductivity.

The two associations of SME-manufacturers of these products, namely EMM and SFIRMM, represent 70% of sales of this class of materials. The market of insulation materials is, yet, largely dominated by traditional conglomerates i.e. glasswool, mineralwool and polyurethane produced by large chemical companies.

Manufacturers of thin **multifoil** insulation products claim that their products have a thermal performance comparable or better than traditional materials.

CEN TC 89 has chosen a thermal performance test that is inadequate for multifoil insulation products, while it gives a net preference to traditional materials.

On 16th April 2007 NORMAPME organised a scientific colloquium to publicise research results for thin multi-foil reflective insulation products and to launch a research programme on these products. Several notified body's laboratories presented their results on multifoil insulation material testing which were compared to standardised tests. According to BM Trada (UK), SFIRMM (Syndicat Français des Isolants Reflecteurs Minces Multicouches - Associate member of NORMAPME - FR), Sheffield University (UK) and the laboratory IBP Fraunhofer Institut (Germany), thin multifoil insulation products insulate better. Their results confirm that traditional tests are applicable to conventional products but not to innovative products based on reflection and not conduction.

Despite these findings, EOTA and CEN TC 89 seem to refuse to accept this new scientific evidence, most probably in order to favour large manufacturers producing traditional insulation products.

This is a case where the standardization process seems to have been used by large multinationals to transfer commercial competition to the standardization field. As a matter of fact, SMEs have been excluded from participating in the work of their interest and testing methods that are patently inappropriate to describe the performance of the emerging multifoil technology, have been unanimously voted.

### **CEN TC 133/WG8. Copper and Copper Alloys/ Fittings.**

This committee is developing the European harmonised standard hEN 1254-7 "Copper and copper alloys. Plumbing fittings. Part 7. Fittings with press ends for metallic tubes". It is composed more than 70% of commercially co-operating partners, both producers and certifiers. These have rejected repeatedly the proposals of an innovating Italian small company, FRABO, bringing on the market a product unifying gas and water piping connectors (copper press-fittings) by insisting on the application of a testing method which cannot be passed by the innovative product.

The above testing method concerns the durability of the elastomeric seal included in the fitting. It should be noted that the elastomeric seal of the innovative product developed by the Italian SME already complies with all the requirements of an existing European harmonised standard (hEN 681 -1) and is CE marked accordingly. The durability test proposed by big competitors would thus be an additional test to those already provided by hEN 681-1.

Despite scientific evidence brought by FRABO to the attention of the TC, the majority of the experts in the group have always refused to consider a different test method, which would be suitable to all products.

Such evidence includes the fact the FRABO products comply with the Italian standard UNI 11065 – *Copper and Copper alloy press-fittings for water and gas – Minimal requirements*.

### **3.2. Anticompetitive agreements against traditional technologies**

Another common scenario that we have experienced shows that once a new technology developed by multinational companies is introduced in the market, standardisation can be used as a pretext to exclude from the market those enterprises (often SMEs ) which choose not to adopt such a new technology because they operate in a rather traditional fashion. In this respect, the standard becomes a *de facto* requirement, without which a company cannot compete. The result is less choice for consumers and a less competitive landscape.

#### **Cases:**

#### **ISO TC 178 Energy performance of lifts: calculation methods**

Technical committee ISO TC178 is working on the future standard on energy performance of lifts, ISO 25745-2. The initial proposal for energy classification of lifts was supported by large manufacturers but was considered dangerous and discriminatory by SMEs of the lifts sector. According to this proposal in fact, lifts should be classified similarly to typical household appliances, i.e. according to their energy consumption calculated during a work cycle. This calculation is, however, independent from the environment in which lifts are installed. Indeed, the actual consumption of lifts is mostly determined by factors like type and frequency of use; for instance, in the case of residential buildings, energy spending during stand-by mode may contribute to the most significant part of their overall annual consumption. As a consequence, energy spending calculated only during one work cycle fails to give any realistic indication of the actual efficiency over life time.

In addition, if the above proposal was approved by ISO, it would pose a **serious threat to SMEs' business model** and cause a **progressive reduction of their market share**. According to this proposal, hydraulic lifts produced by SMEs, despite being highly energy efficient during a standard period of time, would be labeled as worse performing than the machine room less electric lifts manufactured by multinationals. Indeed, energy consumption during stand-by mode is significantly lower in hydraulic lifts than in the electric ones. SMEs voiced their concerns on the above proposal during the last ISO TC178 meeting in June 2009. In addition, they presented an alternative method of calculation of energy consumption and submit a counterproposal. ISO TC 178 has decided to put on hold the above proposal.

### **3.3. Agreements among certifiers (laboratories and consultants)**

Separately, product variety and the composition of the market can also be negatively affected where there is an overwhelming presence of certifiers within technical committees. Certifiers' interests may often conflict with the interests of the industry as they are incentivised to encourage further tests, more certifications and more complex conformity assessment procedures into the standards.

The effects of the influence of certifiers, laboratories and consultants within technical committees can lead to an excessive increase of the cost of products for the consumers. This particularly for products manufactured on a small-series basis where the cost of compliance to the standards, i.e. the cost of certification, has a stronger impact on the cost of the product. Small enterprises usually do not produce on mass scale and their products may have specific characteristics. Imposing a high number of tests significantly increases the price of their products.

Furthermore, the standard writers should check who can perform any given test and avoid as far as possible favouring a test that leads to or reinforces monopolistic or dominant positions.

#### **Cases:**

##### **CEN/TC 33 WG1&2 Windows**

The market of windows consists mainly of a few large companies and many thousand SMEs and craft enterprises. About 58 millions windows units are manufactured in Europe per year. 82 % of all windows are manufactured by SMEs all over Europe. This concerns 150.000 SMEs which are mostly non-series or small-series producers.

In order to be CE marked all windows have to be submitted to a huge number of tests. Not less than 6 characteristics are to be tested for each window: Resistance to wind-load, Thermal resistance, Load bearing capacity of safety devices, Acoustics, Air permeability, Water tightness. This amount of **tests** has been **imposed by certifiers** who are present in the TC 33 and who may be interested in obliging firms to submit their products to tests.

This implies a disproportionate costs burden on crafts and SMEs, which risk to be squeezed out of the market. If custom made windows had to be fully tested in the same way as series production, a single small window would cost more than 5 000€.

#### **3.4. Agreement with effects in the after-sales market**

This is another case of standardization agreements where multinational competitors manage to control market shares abusing of their dominant position in the after sales market.

#### **Cases:**

##### **CEN TC 10 Lifts - PESSRAL**

An important and recent standardization item dealt with by CEN TC10 is PESSRAL (Programmable Electronic Systems in Safety Related Applications for Lifts),. Maintenance and repair of PESSRAL-equipped elevators requires proprietary diagnostic tools and software. Without these tools, complete maintenance is simply not possible. However, the current amendment to the European standard on safety rules for the construction and installation of lifts (Amendment A1 to standard EN81-1 and 2), does not oblige the manufacturers to supply the necessary information and equipment needed to adjust, maintain and repair the lift. As a consequence, house tenants have only one possible partner to turn to for total system maintenance and inspection: the original installer.

Through NORMAPME, both the European Federation of Elevator SME's (EFESME), and the European Lifts Components Association (ELCA), have voiced their concerns with these practices to the European Commission SME envoy. The current version of the amended European Standard allows for lifts fitted with PESSRAL devices that can only be correctly

serviced and repaired by their original manufacturers, thus preventing independent and local companies from providing these services. As a consequence:

- House tenants will face higher costs of service contracts: they no longer have a choice of service partner for the regular maintenance and repair of their systems;
- SME's in the after sales market might not have access to these proprietary tools, or could be forced to purchase these tools at an unfair price, a cost which in turn will have to be charged to the client;
- A vast number of SMEs who are active in the after sales market, will simply disappear;
- The EU Commission has already detected and successfully brought fines against cartel practices in the installation sector, where a limited number of lift manufacturers hold 80% of the market; the same practices could emerge in the aftermarket.

### **CEN TC10 Lifts – Two-way means of communication**

One of the essential requirements of Directive 95/16/EC (4.5 of Annex I), provides that *“cars must be fitted with two-way means of communication allowing permanent contact with a rescue service in case of people trapped in the cabin”*.

The EN 81-28:2003 generally provides for the characteristics of the devices and the operation methods of these “remote alarms for lifts”. Among other aspects, paragraph 4.1.6 of the standard (“Identification”) requires that the device should be designed in order to allow emergency services to correctly identify the plant. However, according to the current applicable standards, the installer is not obliged to supply information as to the functioning of the above devices.

Actually, the majority of the devices installed by large companies uses digital transmission and digital identification of data so that emergency centres other than those of the large companies cannot identify the plant and consequently cannot comply with the above requirement of the standard.

As from 1999 over 1.2 million new lifts have been installed in Europe with a two-way voice communication system. Considering the market share of the large multinationals of the sector, at least half of the installed devices may actually represent an obstacle to competition in the services market, as they work properly only if the rescue service is carried out by the same company which installed the devices.

## **4. Unrestricted and transparent participation and adoption procedures – assessment of possible negative effects on competition**

The proposed revised Guidelines provides that *“where participation in standard setting, as well as the procedure for adopting the standard in question is unrestricted and transparent, standardisation agreements (...)do not restrict competition within the meaning of Article 101”*(paragraph 277).

In order to guarantee the openness of the standardisation system it is of paramount importance to achieve a balanced representation of interests at European and national level.

The ability of strong stakeholders to coordinate their interventions at European level is not compensated by the same coordination on the side of weaker stakeholders such as micro and small enterprises. As a consequence, the principle of balanced representation at national level may not be sufficient for ascertaining a balanced representation of interests at European level.

According to the above, the actual transparency of affiliation of members should be strictly enforced and verified case by case. A system of verifications undertaken also at European level on the composition of Technical Committees and Working Groups should therefore be established.

## **5. Conclusions**

NORMAPME would strongly recommend that an analysis of the market structure is carried out before starting any standardisation activities. Such analysis would contribute to identify the relevant market players which would then be entitled to take part in the standardisation process, as well as the variety of products actually existing in the market.

In addition, prior to the formal adoption of standard, and upon requests of one of the parties, an impact assessment taking into consideration possible negative effects on competition caused by the standard should also be undertaken. The assessment whether the standard restricts competition should focus on the extent to which barriers to entry are likely to be overcome by competitors in the relevant market.