CIMAC
INTERNATIONAL COUNCIL ON COMBUSTION ENGINES

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Compliance Programme

Impact of Competition Law on CIMAC's Activities

2nd edition

This CIMAC document is based on the VDMA Compliance Programme as of January 2017. The content of the VDMA Compliance Programme was completely adopted, except for those paragraphs dealing with matters which are irrelevant for CIMAC and its membership.

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Content

Objectives of the CIMAC Compliance Programme

For CIMAC and its membership, adherence to the law is a matter of course and an integral part of their entrepreneurial activities. Adherence to competition law is the aspect that matters most for CIMAC when it comes to compliance. CIMAC's services include providing a platform for companies that may also be competitors. CIMAC, among other things, draws up and represents matters of common interest. These activities and the provision of services for its membership must be in line with the rules that ensure undistorted competition.

To ensure that its work fulfils all the requirements of competition law, CIMAC adopted the comprehensive compliance programme from VDMA as a basis for their own programme. Adherence to these rules serves the purpose of protecting member associations and companies, it is in the own personal interest of the employees of CIMAC and its members: Competition law violations may be subject to severe punishment and adversely affect participating companies, employees, and associations. Various decisions of the European Commission resulted in the levying of substantial fines on companies and associations, with sometimes devastating economic impact. Anti-trust authorities are also getting more and more critical when it comes to co-operation between competitors – inside or outside of associations. This is why the VDMA tracks changing agency behaviour and new case law to adapt the compliance program if necessary. The most recent amendments include the European Commission's guidelines on horizontal co-operation at the end of the year 2010. The VDMA has its compliance program reviewed regularly by external law offices and also conducts talks with German and European competition agencies. CIMAC will adapt this programme when necessary, taking into account the further revisions of the VDMA, if any.

The objective of the present compliance program is to ensure that neither CIMAC nor any member companies or member associations participating in the association work would violate competition law. At the same time, it is meant to provide hands-on advice and allow maximum leeway for association work, without infringing on the law. A compliance programme, however, can only provide general guidance of how to act in competition law sensitive fields of association work. Each individual case or industry may necessitate another assessment. In case of doubt, always contact VDMA Legal Services in good time. In addition, Legal Services offer regular employee training courses that do not only provide general information on competition law issues in association work, but also offer a forum to address situations occurring in the day-to-day business.

1 CIMAC meetings

1.1 Subject-matter of a CIMAC meeting

It is a core activity of CIMAC to host meetings, working groups or experience-sharing events, where CIMAC members can get together. Yet, competition law fears that so-called restrictive practices may result if competitors meet and convene, inside or outside a association network. To avoid any impression of restrictive behaviour from the onset, CIMAC has to assess carefully what topics can and cannot be discussed at a meeting.

It has to be noted that e.g. information on general economic data, industry overviews and discussions on current legislation projects or lobbying activities of CIMAC are, in principle, admissible subjects at meetings. It is equally certain that it is forbidden to exchange information or make arrangements regarding prices, price components (e.g. discounts), price strategies, allocation of markets, terms of delivery and payment. Violations also include decisions or concerted practices regarding coordinated behaviour with respect to third parties (including, without limitation boycott), these have to be avoided without exception. Apart from an arrangement or a decision, already the exchange of sensitive data and strategies may distort competition.

At the same time, the information gain is for many companies one of the factors why they decide to become a CIMAC member in the first place and, indeed, this frequently results in efficiency gains, which competition law expressly encourages. Therefore, a general distinction between permitted and forbidden behaviour is not easy to make.

1.2 In particular: Exchange of company information

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

In the individual case, it may be particularly difficult to determine what information can be rightfully exchanged and at what stage the federation or the member company already ventures into a legal limbo and potentially violates competition law. In the case of sensitive data, this does not

necessarily mean that the information cannot be made accessible in other ways, e.g. through an aggregated procedure. During federation meetings, however, individual data sets should not be disclosed.

1.2.1 Room documents/hand-outs management

When information is exchanged during a CIMAC meeting, this does not necessarily have to be accompanied by hand-out (or presentation chart); yet, often this is made to provide the meeting and the exchange of information with a particular structure. If hand-outs are used in the course of an information-sharing event, it must be ensured that these are not used in a way to exchange any sensitive data. While there is no exchange of market information at CIMAC meetings, it has to be considered that also technical information may include sensitive data with regard to competitors. Thus, in case of usage e.g. of tables to collect technical information, the questions to be completed have to be carefully prepared.

Furthermore, all hand-outs concerning an exchange of information within the scope allowed by competition law (see para 1.2.2 below) have to contain a **mandatory note regarding the exchange of information** on the document concerned (e.g. the first slide of a presentation). It is important that this note can actually be seen when the page in question is looked at/printed out/stored. We suggest that the following text be used:

"The CIMAC Compliance Programme is committed to fulfilling all the requirements provided for by competition law. Competition law violations may lead to substantial punishment for participating companies, employees, and associations. Thus, to protect your own personal interests, those of your company, and the overall CIMAC activities, compliance with the existing competition rules is key. In this respect, particularly stringent laws apply to the targeted exchange of information between and among competing companies. In consequence, the CIMAC Compliance Programme prohibits, among other things, the exchange of data ***for specific products or markets****. Information communicated must refer to the entire company or a general range of products. Any additional or further exchange of specific company data that may be relevant from a competition-law point of view is not possible.*

For any queries, please do not hesitate to approach the responsible officer in your company, your contact person at CIMAC or VDMA Legal Services. Please request your own copy of the CIMAC Compliance Programme."

1.2.2 Possible contents of information exchange

As to the actual contents, both of the hand-out and the exchange of information itself, the following applies:

- A respective exchange on the business development (sales/order income) of the past

period is possible. Yet, it has to be taken into account that the **indications refer to the overall company and/or a broad range of products and not to individual products/ product groups**. The reporting period should cover six-month periods or longer. In the case of companies that only pursue business in one product group, exchange of individual company information is not possible.

- The competition agencies are **particularly critical** when it comes to the exchange of **forecasts regarding the future of business development between competitors**. From the perspective of the competition authorities there is, as a rule, no sensible reason why a company would want to communicate own individual data with high strategic value to a competitor. This is why any exchange of information at a meeting regarding e.g. business expectations (incoming orders/sales) of individual companies for the current or forthcoming year **must not take place**.

Beyond these points, it is not possible to exchange data individually, including without limitation profit-sales ratios and capacity utilisation, and Legal Services has to be contacted without exception. Here, there is a particular risk that strategic deliberations regarding future conduct is exchanged and/or disclosed between competitors, even if this is done unintentionally. Also in these cases anonymous and aggregated statistics may be appropriate.

During a CIMAC meeting, it is also necessary to try and prevent that companies jointly estimate data relating to companies not participating in the venue. First of all there is a risk that sensitive data has to be exchanged in order to make an estimate possible in the first place. Second, also additional, illegal arrangements may ensue.

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

Having said this, however, it shall be stated that the aim of CIMAC meetings is to promote exchange of scientific and technical information, but no economic data. On the other hand, association meetings provide in principle a platform for companies that may also be

competitors. Moreover, the above stated does not only refer to exchange of economic but also technical information. Therefore these statements must be taken into account for all CIMAC meeting.

1.3 Formal rules to be adhered to

Participants in CIMAC meetings can also be competitors. Against this background, it is not only necessary to develop a basic understanding for the provisions of competition law. It is **also required to adhere to specific, formal rules when organising and/or hosting association meetings that are permissible under competition law. In this respect it is crucial that the CIMAC event is actually accompanied by a CIMAC member of staff, or at least a trained chair person, to ensure that the Compliance Program is adhered to.**

Prior to any meeting, the competent CIMAC employee or the chair person respectively, has to send out an official calling notice, together with the agenda. The agenda has to describe in sufficient detail all the items that will be discussed. The competent CIMAC employee or the chair person respectively ensures that the agenda does not contain any aspects that may be non-compliant with competition law. In this context, great value has to be attached to a clear and unequivocal wording of the document. An agenda item “Miscellaneous”, “Any other business”, or other equally unspecific references should be avoided. If it is still necessary to include such items, please make sure that the calling notice already mentions what they actually refer to (e.g. place and date of or items to be discussed at next meeting). Should this be impossible, too, at least the minutes of the meeting must specify the items transacted in this respect. It is recommended to agree upon the topics that will be discussed under the item right at the start of the meeting and mention this in the minutes.

Furthermore it should be avoided that an inappropriate choice of words could create the – incorrect – impression of illegal content. This is why it is so important to choose the right words. Words like “prices”, “discounts”, “recommend”, “concerted”, “arrange”, etc. should not occur. In the case of doubt, VDMA Legal Services will have to be consulted.

Already prior to a meeting, the competent CIMAC employee or the chair person respectively should ponder whether the subjects to be discussed and/or the expected circle of members represented may give rise to questionable situations from an anti-trust point of view.

1.3.1 Instructions at the beginning of the meeting

When the meeting starts, it may be appropriate to instruct the participants that they have to act in a neutral manner with respect to competition law. Hence the following note can be read out and included in the minutes of the meeting:

“We would like to draw your attention to the provisions of European and national competition

law pursuant to which it is not allowed to discuss competition-related topics, such as prices or discounts, or otherwise exchange sensitive company data in the course of CIMAC meetings. Furthermore it is not permissible to agree on industry-related patterns of behaviour and/or pass resolutions and make arrangements in this respect. Doing so all the same, would be subject to severe fines that have to be paid by CIMAC and its members. This is why these rules have to be adhered to without exception."

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

1.3.2 Action in questionable situations

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

- The chairperson suspends the discussion for the time being and suggests that the matter be addressed at a later date. This applies in particular when there is uncertainty of whether or not a specific conduct is permitted. In addition, the chairperson should communicate that critical aspects of the matter will be settled with VDMA Legal Services up until the next meeting.
- Should it come to spontaneous exchange of sensitive company data, e.g. prices or price components, the chairperson shall interrupt the discussion immediately. The chairperson should consult and identify with the members what ways there are to collect data anonymously in the future and forward the aggregated content to the companies without any potential infringement of competition law.
- As a last resort, it is recommended to suspend or, if appropriate, altogether close the meeting.

1.3.3 Contents of the minutes

Resolutions passed at a meeting always have to be summarised in the minutes so that the discussions are understandable. On the one hand, this helps to avoid the impression that the meeting was some kind of conspiratorial gathering. On the other, detailed minutes can be used to prove the actual course of the meeting in the case of an investigation. This may help CIMAC and its members to exonerate themselves from charges of anti-competitive behaviour. Also in this context, great value has to be attached to a clear and unequivocal wording, as in the calling notice, and the course of the meeting has to be reflected correctly.

And, finally, no informal discussions on subjects that would be critical from a competition-law

perspective can be pursued “outside the agenda”. CIMAC staff is obliged to make this absolutely clear to participants.

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

2 Voluntary declaration. Example: Uniform use of new material

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

This is why e.g. an agreement between companies in which they agree on the use of a new material in order to increase product safety also constitutes a contractual restriction, because the previous material would no longer be required. The voluntary declaration would first limit the liberty of the participating companies to choose their materials freely and determine the features of their products accordingly. Second, a uniform use of the new material would limit the range of products among which the consumer could choose. From the competition agencies’ perspective, the initial aim pursued, i.e. product safety, would not necessarily outweigh the reduced choice of purchasers ensuing from the introduction of the new material. Another problem is that, due to the voluntary declaration, a new supplier of the previous material had in fact no chance of a participating in the relevant market, because its product would not be chosen as a result of the voluntary declaration. The voluntary declaration would then constitute an inadmissible barrier to enter the market.

Apart from this aspect of competition law, also product liability has to be considered in this instance. In the event that the companies participating in the voluntary declaration overtly promote that the new material was significantly safer than the old one, this may result in a duty to point this fact out to customers with previous products and, if appropriate, refit products that have already been put into circulation with the new material. If damage occurs with respect to a product that has been put into circulation and if the damage is attributable to the previous material, then the company affected could hardly be relieved from its liability because the company itself had already referred to the improved state of the art and the existing safety issue.

The question whether a voluntary declaration is prohibited or not has to be settled with VDMA Legal Services without exception. In any case, it must never be printed with a CIMAC

letterhead, because it is no CIMAC declaration, but a declaration of the participating companies.

3 Press releases

CIMAC Central Secretariat publishes press releases and/or association circulars regularly or in view of a special occasion. These publications must not contain any statements that could be interpreted as uniform behaviour and/or arrangement between member companies as a reaction to developments on a specific market. Similarly, CIMAC must not give recommendations to such effect. Against this background it has to be taken into account that press releases and/or information circulars do describe developments on a given market in an objective manner, but clearly refrain from inducing specific economic reactions. It is also necessary to avoid the impression that a specific type of behaviour is agreed within individual associations. It is permissible to describe alternative ways of reaction to a given market development. But also in this respect, CIMAC cannot simply promote one approach alone.

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

4 Position papers and guides

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

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

“This publication is only for guidance and gives an overview regarding the assessment of ... [e.g. risks inherent to the development and design of specific machinery]. It neither claims to cover any aspect of the matter, nor does it reflect all legal aspects in detail. It is not meant to, and cannot, replace own knowledge of the pertaining directives, laws and regulations. Furthermore the specific characteristics of the individual products and the various possible

applications have to be taken into account. This is why, apart from the assessments and procedures addressed in this guide, many other scenarios may apply.

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

5 Standardisation and CIMAC Recommendations

Standardisation work and/or the determination of particular technological or quality requirements for products, processes, etc. must be reconciled with the requirements of competition law. This is based on the fact that also standards may, in particular circumstances, adversely affect competition for different solutions and/or approaches. This is why the respective rules and principles of the standardisation organisations have to be observed in the international, European and national standardisation efforts.

The term “standard” within the meaning of competition law is a relatively broad one. It includes unification documents for the various technical fields, quality specifications, manufacturing processes, safety requirements. etc. As a rule, also the CIMAC Recommendations fall into this category as “industry-wide work standards”.

Standardisation work is usually compatible with the provisions of competition law. It needs to be ensured that all companies and organisations possibly affected by the standards (“interested circles”) have the opportunity to fully partake in the standardisation process and that the adoption process of the individual standard is transparent, objective and non-discriminatory.

This requirement may also be fulfilled e.g. by submitting a draft to the public, i.e. to interested circles and companies outside CIMAC, and request their review and comments within an appropriate objection period. It is also important that within the course of the procedure of preparing the Recommendation the actual market situation is duly reflected, and that it does not only rely on the input of individual member companies.

Furthermore, CIMAC must warrant an effective access to the standard at fair, reasonable and non-discriminatory conditions. It also has to be taken into account that the use of the standard has to be, and remain, non-binding; a note similar to the one in the preceding chapter may be appropriate.

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

6 Exhibition policies

CIMAC has the right to promote and/or support leading trade shows. In this context, it is possible to give general information on the concept of the preferred exhibition and also highlight the particular advantages of its concept, as long as the information is correct.

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

Furthermore, it is not possible that companies participating e.g. in an information event of CIMAC make a decision or arrangement to attend only one specific exhibition in the future. And equally, CIMAC must not make recommendations suggesting companies to no longer attend or participate in a competing event for one or the other reason. Albeit CIMAC may support a particular trade show, the companies must be free to partake in any other relevant events. This is why it is already critical (and exhibition contracts must be assessed together with Legal Services in advance) if CIMAC makes a binding commitment to an exhibition company to focus its entire efforts on a trade show CIMAC or its members prefer.

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

7 Refusal to admit new member companies

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

Yet, the decision must be made on a non-discriminatory basis. The non-discrimination rule according to competition law provides that economic groupings are not allowed to refuse to accept the application of a company if such refusal would constitute an objectively unjustified unequal treatment, leading to an unreasonable competitive disadvantage for the company. It is therefore only allowed to refuse to accept the applicant if there is an objectively justified reason. In this context, the interests of the applicant in the membership and the interests of the group in the non-admission of the applicant have to be weighed up against each other. The unequal treatment on which the refusal is based can be justified for two types of reasons:

First, because the applicant does not fulfil the conditions for acceptance pursuant to the statutes as they are applied in practice by the group. Second, exclusion and/or non-admittance are possible if there are reasons related to the individual characteristics of the applicant which would make an admission impossible. Such a reason would e.g. exist, if the acceptance of a specific company would harm the reputation of CIMAC. This might also potentially apply if the admission would result in significant distortions within the Association. Yet, in this context, it is not sufficient if the admission of the new member would be only unwelcome for existing members. A reason would qualify as a valid reason if e.g. the activities of the Working Group and/or Association would factually come to a stop, because hitherto communicated, permitted information would be retained by other members, thus making participation in company meetings unattractive. Also in the individual case, if a large number of companies threatened to leave CIMAC, a valid reason might be deemed to exist.