

APDEX ALLIANCE ANTITRUST COMPLIANCE GUIDELINES

INTRODUCTION..... 2

Chapter I. PRACTICAL GUIDELINES FOR APDEX ALLIANCE DAY-TO-DAY FUNCTIONS..... 4

 A. GENERAL RULES FOR ANTITRUST COMPLIANCE IN CONNECTION WITH APDEX ALLIANCE FUNCTIONS..... 4

 B. DO’S AND DON’T’S FOR APDEX ALLIANCE MEETINGS AND OPERATIONS..... 5

Chapter II. U.S. ANTITRUST LAWS..... 6

 A. OVERVIEW OF THE U.S. ANTITRUST LAWS..... 6

 Section 1. The Sherman Act..... 6

Contracts, Combinations and Conspiracies in Restraint of Trade 6

Monopolization..... 7

 Section 2. The Clayton Act 7

 Section 3. The Federal Trade Commission Act 8

 B. ENFORCEMENT OF THE U.S. ANTITRUST LAWS..... 8

 C. U.S. ANTITRUST GUIDELINES RELEVANT TO THE POTENTIAL ACTIVITIES OF THE APDEX ALLIANCE..... 8

 Section 1. FTC and Department of Justice Antitrust Guidelines for Collaboration among Competitors 8

 Section 2. Guidelines concerning Joint & Jointly Sponsored Research Activities..... 9

Department of Justice Antitrust Guide Concerning Research Joint Ventures 9

National Co-operative Research and Production Act..... 10

 D. APPLICABILITY OF THE U.S. ANTITRUST RULES TO POTENTIAL AREAS OF ACTIVITY OF APDEX ALLIANCE..... 11

 Section 1. Marketing and Promotional Activities 11

 Section 2. Certification..... 11

 Section 3. Membership Criteria, Policies and Procedures 12

 Section 4. Information-Sharing 12

Chapter III. EU ANTITRUST LAW..... 13

 A. OVERVIEW OF THE EU ANTITRUST LAWS..... 13

 Section 1. Article 81 EC Treaty 13

 Section 2. Article 82 EC Treaty 14

 Section 3. Exemptions for infringements of Article 81(1)..... 15

 Section 4. Extraterritorial Scope of Articles 81 & 82 16

 Section 5. Enforcement of Articles 81 & 82 16

 B. APPLICABILITY OF ARTICLES 81 & 82 TO POTENTIAL AREAS OF ACTIVITY OF APDEX ALLIANCE 18

 Section 1. Commercialization Agreements 18

 Section 2. Standardization Agreements 19

 Section 3. Intellectual Property Rights..... 20

 Section 4. Distribution Agreements 20

INTRODUCTION

The Antitrust Compliance Guidelines (the “**Guidelines**”) are intended to assist the members in complying with the antitrust laws and rules of conduct that may apply to the alliance’s activities. These Guidelines are intended to accomplish two objectives:

- To ensure that the Initiative and its individual members do not violate the antitrust laws in the course of activities; and
- To prevent conduct that might give the appearance of an antitrust violation to someone unfamiliar with the Initiative’s functions and purposes.

The Guidelines are therefore designed to protect the Initiative, its members, and their respective employees, officers, directors and agents from any accusation of wrongdoing arising out of the activities. (All of those members, and their respective employee, officers directors and agents that are participating in the activities of the Initiative are referred to in these Guidelines as “**Initiative Participants**”.)

Accomplishment of these objectives is everyone’s responsibility. Apdex Alliance urges all Apdex Alliance Participants to keep these Guidelines handy and to refer to them whenever any questions may arise about the antitrust implications of any activity that may be undertaken under the auspices of Apdex Alliance. It is Apdex Alliance’s policy that the Management Board will make these Guidelines available to all Apdex Alliance Participants.

Any questions you or your company’s legal counsel may have concerning Apdex Alliance’s antitrust compliance program should be directed to an Officer of Apdex Alliance.

STATEMENT OF ANTITRUST POLICY

Apdex Alliance is organized to promote, develop and define open security specifications. Apdex Alliance is not intended to, and will not, play any role in the independent and competitive decisions of its participants or in any way improperly restrain competition in any markets whatsoever.

Apdex Alliance’s members (the “**Members**”) unequivocally support the policy of competition served by the antitrust laws and it is the policy of the Apdex Alliance to ensure that it, and its Members, comply in all respects with those laws.

The Management Board will furnish Apdex Alliance Participants and others that participate in Apdex Alliance activities with a copy of these Guidelines to assist them in recognizing situations that may raise the appearance of antitrust problems. Apdex Alliance Members are advised that these Guidelines apply only to them in connection with their involvement in the Apdex Alliance, and that their conduct outside of the Apdex Alliance may also be subject to antitrust regulations.

Antitrust compliance is the responsibility of every Apdex Alliance Participant. A violation of the antitrust laws can be a serious crime and can result in substantial criminal or civil fines

and penalties for the Apdex Alliance or for any member that authorizes or participates in improper conduct. Individuals may even be imprisoned for violation of the antitrust laws. Criminal and civil antitrust litigation is extremely burdensome, expensive and time-consuming for all concerned, even if the outcome is ultimately favorable. In addition, the reputation of the Apdex Alliance may be seriously affected through adverse publicity, which normally accompanies antitrust litigation. Any violation of the antitrust laws or these Guidelines may be cause for suspension or expulsion from membership in the Apdex Alliance.

Chapter I. PRACTICAL GUIDELINES FOR APDEX ALLIANCE DAY-TO-DAY FUNCTIONS**. GENERAL RULES FOR ANTITRUST COMPLIANCE IN CONNECTION WITH APDEX ALLIANCE FUNCTIONS**

The following rules and procedures are recommended for all Apdex Alliance Participants in all circumstances, without exception, except as noted specifically below. Any failure to adhere to these rules may result in suspension or expulsion from membership, or in the prohibition of an entity or person from participating in some or all Apdex Alliance activities:

1. Neither Apdex Alliance, nor any of its Committees, nor any Participant in connection with its Apdex Alliance activities shall attempt to bring about any anticompetitive or illegal understanding or agreement, written or oral, formal or informal, express or implied, among competitors with regard to prices, terms or conditions of sale, distribution, volume of production, production planning, production or other costs sales territories or customers;
2. Neither Apdex Alliance, nor any of its Committees, nor any Participant in connection with its Apdex Alliance activities shall discuss, communicate, or engage in any other information exchange with any competitor with regard to prices or pricing methods, restrictions on output, or allocation of sales territories or customers terms or conditions of sale, distribution, volume of production, production planning, production or other costs sales territories or customers;
3. Neither Apdex Alliance, nor any of its Committees, nor any Participant in connection with its Apdex Alliance activities shall undertake any activity that involves exchange or collection and dissemination among competitors of any information regarding prices or pricing methods;
4. Neither Apdex Alliance, nor any of its Committees, nor any Participant in connection with its Apdex Alliance activities shall undertake to collect cost data from individual Members or to disseminate any compilation of such data, without a plan for such collection of data or its dissemination having first received prior written approval of Apdex Alliance's legal counsel;
5. Neither Apdex Alliance, nor any of its Committees, nor any Participant in connection with its Apdex Alliance activities shall participate in any discussion of costs, or any exchange of cost information, for the purpose or with the probable effect of increasing, maintaining or stabilizing prices, or reducing competition in the marketplace with respect to the range or quality of products or services offered;
6. Papers published by Apdex Alliance or presented in connection with Apdex Alliance's programs may generically refer to average costs, provided such references are not accompanied by any suggestion, express or implied, to the effect that prices should be adjusted or maintained in order to reflect such costs. Whenever possible, confidential information will be collected anonymously, will relate to historical data, and will be disseminated by an appropriate Apdex Alliance official, or an independent outside organization. All papers containing cost information must be reviewed by Apdex

- Alliance's legal counsel for possible antitrust implications prior to publication or presentation;
7. No Apdex Alliance activity or communication shall include any discussion which might be construed as an anti-competitive or illegal attempt to prevent any person or business entity from gaining access to any market or customer for goods or services, or to prevent any business entity from obtaining a supply of goods or otherwise purchasing goods or services freely in the market;
 8. No Apdex Alliance activity or communication shall include any discussion of costs for the purpose or with the probable effect of promoting agreement among competing firms with respect to their selection of products other than materials used in cooperative research;
 9. Apdex Alliance shall not make any effort to bring about the standardization of any product for the purpose or with the effect of preventing the manufacture or sale of any product not conforming to a specified standard.
 10. Apdex Alliance, any of its committees, or any Participant in connection with its Apdex Alliance activities will only meet after an agenda has been created and distributed in advance of the proposed meeting. Discussion at meetings will be limited to topics on the meeting agenda, which can be amended at the meeting by a majority vote. If any member has a question about the agenda, that member should consult with antitrust counsel before attending the meeting.
 11. Apdex Alliance shall not require as a condition for membership that a Member shall not associate or do business with a non-member or in connection with a competing technical specification product.
 12. Neither Apdex Alliance, any of its committees, or any Participant in connection with its Apdex Alliance activities shall make derogatory remarks on behalf of Apdex Alliance about a competitor or its products, nor make unfavorable comparative statements about a competitor's products unless there is specific documented proof that such statements are true.
 13. All members of the Apdex Alliance have an obligation to comply with the antitrust laws in connection with their Apdex Alliance activity, and will advise an appropriate official of any violation of these Guidelines. The appropriate body will investigate any such report and shall be responsible for determining the appropriate discipline. Discipline of those who report questionable conduct and who are themselves involved in the violation will be decided on a case-by-case basis, depending on the degree of culpability, but the fact of "self reporting" will always weigh in that person's or entity's favor.

DO'S AND DON'T'S FOR APDEX ALLIANCE MEETINGS AND OPERATIONS

All Apdex Alliance members are advised to follow the following guidelines with regard to Apdex Alliance activities:

1. DO prepare and distribute an agenda for all meetings and abide by the agenda
2. DO stop any conversation that appears to be leading to:
 - . Discussion of prices or pricing policy; or
 - . Other restraints on competition of any kind
3. DO advise all meeting attendees to observe these Guidelines in informal conversations as well as formal APDEX ALLIANCE activities.
4. DO NOT undertake any activity involving collection or dissemination of prices or pricing methods.
5. DO NOT undertake any activity invoicing collection of cost data from individual Members or dissemination of any compilation of such data without prior approval of Apdex Alliances legal counsel.
6. DO NOT set a numerical limit on committee size unless participation in the committee is rotated on a regular and reasonable basis. You may set a numerical limit on the maximum number of representatives per Member.

Chapter II. U.S. ANTITRUST LAWS

. OVERVIEW OF THE U.S. ANTITRUST LAWS

The principal U.S. antitrust laws are the Sherman Act, the Clayton Act, the Federal Trade Commission Act and the Robinson-Patman Act. There are also a number of other statutes that set forth special prohibitions, regulations and exemptions from the antitrust laws and which provide for enforcement procedures and remedies. Those statutes are not discussed in these Guidelines. Each Apdex Alliance Participant should, however, on an on-going basis, consult with its own antitrust counsel to ensure its continued compliance with all applicable U.S. antitrust laws.

Section 0. The Sherman Act

The Sherman Antitrust Act prohibits both unreasonable restraints upon and monopolization of trade.

Contracts, Combinations and Conspiracies in Restraint of Trade

Section 1 of the Sherman Act is the most important and most frequently applied of all of the U.S. antitrust laws. It provides in part:

“Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.”

Section 1 applies if the following three conditions are met:

First, there must be a contract, combination or conspiracy. It is, therefore, necessary for at least two persons or entities to agree or to act in concert for there to be a violation of Section

1. The contract, combination or conspiracy need not be formal or written; a “knowing wink” or, under certain circumstances, a consistent, parallel course of conduct between competitors can form the basis for an illegal agreement.

Second, the contract, combination or conspiracy must be in restraint of interstate or foreign commerce. The term “interstate commerce” is construed liberally to include restraints within a single city or state, if those restraints have a significant impact upon commerce between states.

Third, the contract, combination or conspiracy must be an “unreasonable” restraint on competition. Experience has revealed that some restraints, such as price fixing, are always unreasonable; other restraints, such as assigning distributors specific marketing territories, are examined on their facts to determine their reasonableness. Promotional and consumer awareness activities, which the Apdex Alliance may conduct, are generally analyzed under the rule of reason, unless the activities constitute a pretext for an anti-competitive purpose.

As noted above, certain acts are always viewed as unreasonable and in violation of Section 1 of the Sherman Act regardless of their effect on competition. These are called “*per se*” offenses, and include activities such as: price fixing with competitors; division or allotment of sales or customers with competitors; division of territories with competitors; agreements with competitors to limit production; and group boycotts (agreements with competitors not to buy from or sell to other companies). Individuals can be imprisoned for three years or fined up to \$350,000, or both, and corporations can be fined up to \$10,000,000, for *per se* offenses.

Monopolization

Section 2 of the Sherman Act states:

“Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony.”

Section 2 does not prohibit a company from being large or having a dominant position in a market. What is prohibited, rather, is the possession of monopoly power together with the willful acquisition or maintenance of such power through anticompetitive, predatory or exclusionary conduct. Even where the power of a firm in a particular market falls short of monopoly, predatory or anticompetitive conduct there may exist an unlawful attempt to monopolize if there is a specific intent to monopolize together with a dangerous probability of achieving monopoly power. Conspiracy to monopolize requires the existence of a combination or conspiracy, an overt act in furtherance of that conspiracy, and a specific intent to monopolize. For example, the exercise of power to control the prices in or to foreclose access to a market. Markets are defined in terms of both product markets and geographic markets. Both types of markets may be narrowly drawn to apply to only specific product lines or to relatively small geographic territories.

Section 0. The Clayton Act

The Clayton Act is a much more detailed and specific statute than the Sherman Act. For the most part, the Clayton Act’s prohibitions, such as those against certain mergers and interlocking directorates, do not apply to organizations such as Apdex Alliance. The Clayton Act does, however, contain general prohibitions against a company’s conditioning the sale of a commodity upon the buyer’s agreement: (i) to accept another item sold by the seller (to “tie”

the sale of one product to the sale of another); or (ii) not to buy products from competitors of the seller. Such arrangements can also be challenged under the Sherman Act.

Section 0. The Federal Trade Commission Act

The Federal Trade Commission Act (“FTCA”) is a broadly worded statute that prohibits “unfair or deceptive” trade practices. The FTCA supplements court enforcement of the antitrust laws through a Commission staffed by experts experienced in the field of trade regulation.

The FTCA gives the Federal Trade Commission and the courts power to deal with most forms of trade restraints that are prohibited by the Sherman Act. For example, price fixing is covered by the FTCA. The FTCA goes even further, however, and permits the Commission to proceed against conduct that might develop into a violation of the Sherman Act.

. ENFORCEMENT OF THE U.S. ANTITRUST LAWS

The U.S. federal government can proceed against suspected antitrust violations through criminal suits, civil actions or administrative proceedings. The two U.S. agencies principally responsible for the enforcement of the U.S. federal antitrust laws are the U.S. Department of Justice Antitrust Division (referred to in these Guidelines as the “*Antitrust Division*”) and the U.S. Federal Trade Commission (the “FTC”). Most states have antitrust agencies or divisions of their Offices of Attorneys General dedicated to the enforcement of state antitrust laws.

Individuals may be sentenced to prison for up to three years and fined up to \$350,000, and corporations may be fined up to \$10,000,000 for criminal violations of the Sherman Act. In the case of hard-core antitrust violations such as price fixing, the Antitrust Division regularly obtains prison sentences for individuals and large corporate fines.

Civil actions may also be brought by the Antitrust Division and administrative proceedings by the FTC, depending upon the specific statutes and conduct involved.

Private persons are also permitted to sue alleged antitrust violators for treble damages, injunctions and their attorneys’ fees. Huge recoveries in treble damage actions have been obtained in many cases. Further, the magnitude of the potential liability which trebling provides, and the expense of defending against such claims, frequently forces defendants, even when they believe their conduct was entirely lawful, to settle cases without the risk of going to trial.

. U.S. ANTITRUST GUIDELINES RELEVANT TO THE POTENTIAL ACTIVITIES OF THE APDEX ALLIANCE

Section 0. FTC and Department of Justice Antitrust Guidelines for Collaboration among Competitors

In April 2000, the FTC and the Antitrust Division issued Antitrust Guidelines for Collaborations Among Competitors (the “**Antitrust Guidelines**”). It is Apdex Alliance’s policy to follow the Guidelines to the fullest extent applicable. Apdex Alliance encourages all Apdex Alliance Participants to become familiar with the Antitrust Guidelines, which are available on the FTC’s and the Antitrust Division’s internet sites. See www.ftc.gov or www.doj.gov/atr/index.html.

Specifically, the Antitrust Guidelines note their applicability to the activities of organizations stating that “[i]nformation sharing and various trade association activities also may take place through competitor collaborations.” The Antitrust Guidelines make clear that, except for certain hard-core activities such as price fixing, most competitor collaborations will be analyzed under the so-called “rule of reason.” As the Antitrust Guidelines explain, under the rule of reason, the “central question is whether the relevant agreement likely harms competition by increasing the ability or incentive profitably to raise price above or reduce output, quality, service, or innovation below what likely would prevail in the absence of the relevant agreement.” The Antitrust Guidelines also stress that “rule of reason analysis entails a flexible inquiry and varies in focus and detail depending on the nature of the agreement and market circumstances.”

The Antitrust Guidelines also discuss the risk of information sharing posed by competitor collaborations, and note that, in considering whether a competitor collaboration will be regarded as legal under the rule of reason, the FTC and Antitrust Division:

“ . . . evaluate the extent to which competitively sensitive information concerning markets affected by the collaboration likely would be disclosed. This likelihood depends on, among other things, the nature of the collaboration, its organization and governance, and safeguards implemented to prevent or minimize such disclosure. For example, participants might refrain from assigning marketing personnel to an R&D collaboration, or, in a marketing collaboration, participants might limit access to competitively sensitive information regarding their respective operations to only certain individuals or to an independent third party....In general, it is less likely that the collaboration will facilitate collusion on competitively sensitive variables if appropriate safeguards governing information sharing are in place.”

As discussed in greater detail below, it is Apdex Alliance’s policy that exchanges of information in connection with Apdex Alliance activities be limited to information necessary to accomplish the lawful, pro-competitive purposes of Apdex Alliance. To ensure compliance, wherever practicable, Apdex Alliance and Apdex Alliance Participants should implement safeguards such as those described in the Antitrust Guidelines to ensure that competitively sensitive information is not disclosed between members.

Section 0. Guidelines concerning Joint & Jointly Sponsored Research Activities

Department of Justice Antitrust Guide Concerning Research Joint Ventures

The Antitrust Division of the Department of Justice has published an “Antitrust Guide Concerning Research Joint Ventures” (the “**Guide**”). It is Apdex Alliance’s policy to adhere to the Guide to the fullest extent applicable. In general, the Guide makes it clear that a properly structured joint research organization is legal under the antitrust laws. The Guide also states that joint research efforts conducted in accordance with the following principles are normally legal:

- 1. “Reasonable ancillary restraints” may be imposed which are necessary to the principal lawful purpose of the joint research, e.g., a commitment of a certain amount of a company’s research resources or manpower;”*
- 2. “Results of related research undertaken previously by the participating companies may be exchanged;”*

3. *“Independently gathered technical information directly relevant to the success of the project, even if developed during the time of the joint research, may also be exchanged;” and*
4. *“Different aspects of the joint research may be divided among the participants.”*

The Guide states that to the extent that antitrust issues arise in the joint research field, those issues most often occur because:

“joint research may involve or create market-dominating technology, may be conducted by competitors or potential competitors, or may involve restrictive agreements concerning the use of the research.”

Types of joint research activities that are likely to be viewed as illegal by the Antitrust Division include the following:

- Restrictions on individual companies’ research.
- Unnecessary restrictions on production and marketing of inventions resulting from the joint research.
- The exchange of confidential information, such as information relating to cost of productions or other similar matters, that is not necessary to the joint research endeavor.
- Agreements that are in fact designed to thwart research rather than to promote it.
- Any agreement to limit the introduction of new products or to discontinue old products that compete with products of joint research.
- Any agreement to pool patents not reasonably necessary to the operation of the joint venture.
- An overall pattern of restrictive agreements that has anti-competitive purposes or effects.

To the extent that the Guide applies to Apdex Alliance, Apdex Alliance and Apdex Alliance Participants should place no restraints on either the research activities conducted by Apdex Alliance Participants or the uses to which the results of Apdex Alliance’s research are put.

National Co-operative Research and Production Act

To encourage joint research, Congress enacted the National Cooperative Research Act of 1984 (“**NCRA**”). In connection with the passage of that statute, the Antitrust Division released a statement about the NCRA in which it noted that:

“cooperative research and development efforts may improve productivity, bring better products to consumers sooner and at lower cost, and enable American business and

industry to keep pace with foreign competitors in a world increasingly dependent on technological innovation.”

The NCRA was amended by the National Cooperative Research and Production Act of 1993 (“NCRPA”) that extends the coverage of the NCRA to production, as well as research and development joint ventures. (The NCRA, as amended by the NCRPA, is referred to hereafter as the “NCRPA.”). The NCRPA provides limited protection from antitrust civil suits for joint research ventures that submit proper notification of the venture to the U.S. Attorney General and the FTC. Where such notification is properly filed, treble damages may not be awarded against the venture, and attorneys’ fees and costs may be awarded to participants in the venture that successfully defend any antitrust suits, if it is shown that the plaintiff’s conduct during the litigation of the claim was “frivolous, unreasonable, without foundation, or in bad faith.”

To the extent that the NCRA applies to Apdex Alliance’s activities, the pro-competitive conduct encouraged by the NCRA should inform Apdex Alliance’s activities.

APPLICABILITY OF THE U.S. ANTITRUST RULES TO POTENTIAL AREAS OF ACTIVITY OF APDEX ALLIANCE

Section 0. Marketing and Promotional Activities

Trade shows and other marketing and promotional events may generally be sponsored and organized by groups such as Apdex Alliance. As discussed below, Apdex Alliance will consider carefully whether excluding competitors from such events is lawful under the specific circumstances of a given event. Generally, providing access to such events to non-members is not required unless the nature of the event or the structure of the industry makes participation reasonably necessary to compete in the industry. Where non-members participate in such events, Apdex Alliance will not discriminate between members and non-members (with the sole exception of possibly charging non-members a reasonable fee, or a reasonably increased fee, to defray the costs of the event).

The FTC and the Antitrust Division regard trade shows and similar events as dangerous opportunities for competitors to exchange competitively sensitive information such as information regarding prices, costs, customers and marketing plans and practices. Such exchanges of information can result in price-fixing agreements or other unlawful collusion that can be prosecuted criminally, as discussed above. Apdex Alliance Participants should carefully avoid the discussion of pricing or other considerations of sale at any trade shows or similar events sponsored by Apdex Alliance.

Section 0. Certification

Apdex Alliance may certify products of its Members as being Apdex Alliance Compliant (“**Certification**”). Apdex Alliance may develop, implement and enforce policies and procedures regarding the granting or denial of Certification. To ensure that the Certification process is in compliance with antitrust laws, such policies and procedures will be neutral, fair, reasonable, and, whenever practicable, based on objective criteria.

Apdex Alliance may register Certification language and related logos as registered service marks. Apdex Alliance may develop, implement and enforce policies and procedures

regarding the permissible uses of the marks and permissible references to the Certification. Such policies and procedures will be enforced in a non-discriminatory manner.

Section 0. Membership Criteria, Policies and Procedures

Exclusion from membership in joint organizations can, under certain circumstances, result in an antitrust violation. Such exclusions can even be considered *per se* violations when undertaken with an anti-competitive purpose or effect. Generally, however, ordinary limitation of membership in joint organizations will be reviewed under the rule of reason, unless the organization possesses market power or exclusive access to an element essential to effective competition. Apdex Alliance will comply with all applicable antitrust laws in the development and implementation of its membership criteria, policies and procedures.

Apdex Alliance may develop written membership criteria. Such criteria will be written and administered in compliance with the relevant antitrust laws. Apdex Alliance may develop written policies and procedures regarding application for membership, including standard forms for consideration of membership. Such policies and procedures will be written and administered in compliance with the relevant antitrust laws.

Apdex Alliance may develop written policies and procedures regarding suspension or expulsion from membership, or prohibition of members or certain of their employees or agents from participating in some or all Apdex Alliance activities. These policies will also be written and administered in compliance with the relevant antitrust laws.

Section 0. Information-Sharing

In connection with joint research, specification development, promotional activities and other activities, it will be necessary and appropriate for Apdex Alliance and its Members to share certain information. All Apdex Alliance Participants must ensure that such sharing of information is limited to the information necessary for Apdex Alliance's purposes.

Chapter III. EU ANTITRUST LAW

. OVERVIEW OF THE EU ANTITRUST LAWS

The principal provisions of the EU competition laws that are relevant to the activities of Apdex Alliance are Articles 81 and 82 of the EC Treaty. The scope and nature of each of these provisions is summarized briefly below.

Section 0. Article 81 EC Treaty

Article 81(1) EC Treaty prohibits:

“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”

Article 81(1) applies to agreements satisfying the following criteria:

First, there must be an agreement, decision or concerted practice. Article 81(1) applies not only to formal written agreements, but also to oral understandings, ‘gentlemen’s agreements’ and informal cooperation. Parallel conduct not accompanied by any agreement or tacit understanding is not covered by Article 81.

Second, there must be two or more undertakings. Purely intra-company agreements, e.g., between parents and subsidiaries or affiliates in the same economic group, are not covered.

Third, the agreement, decision or concerted practice must affect trade between Member States.¹ However, conduct in only one Member State or imports and exports between Member States and third countries may also infringe Article 81(1) if they have appreciable effects on trade between Member States (see below).

Fourth, the agreement, decision or concerted practice must have as its object or effect the prevention, restriction or distortion of competition in the common market. Where the agreement’s purpose is to restrict competition, the Commission need not show that it has adversely affected on competition. If the agreement does not aim to restrict competition, but may have some restrictive effects, the agreement’s compatibility with the common market will be judged in light of its effect on actual and potential competition.

Types of conduct prohibited under Article 81(1) include the following:

- **Price Fixing.** Price fixing is prohibited not only with direct competitors, but also with distributors or retailers.

¹ The Member States comprise: Austria, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, Netherlands, Portugal, Spain, Sweden and the United Kingdom.

- **Limitation of Production, Markets, Technical Development and Investment.** This applies to direct or indirect attempts at market sharing and price control by ensuring the maintenance of a status quo or regulating any move away from it.
- **Market and Customer Allocation.** It is generally illegal to agree with another undertaking not to sell or buy from any particular supplier / customer in a particular group or class. Sharing along national lines (e.g., “We will not sell to German consumers if you do not sell in the United Kingdom”) is considered to be a particularly serious offence.
- **Discrimination.** It is illegal to discriminate against certain customers by blacklisting or agreeing to give special terms to particular categories of customers. Article 81 does not, however, prevent supplies to different customers at different prices if these are the result of normal arms’ length negotiations (e.g., quantity or prompt payment discounts).
- **Tying.** Article 81 prohibits the making of the conclusion of certain contracts subject to supplementary obligations that have no connection with the principle contract. A simple test for applying this principle is that if the products can sensibly be sold separately, then the respective contracts should not be tied together.
- **Exchanging Information.** Undertakings may not exchange information, directly or indirectly, with their competitors in respect of their prices, price changes, discounts, rebates, price calculations, costs, production, production planning, areas of sale or promotional activity, exchange of customer database, transport charges, terms of sale (including warranties), the adoption of new technology, research and development, new products or launch dates for new products. The competition rules may apply even to the exchange of published information and in some cases even to information concerning the past.

Article 81(2) declares that any provisions of an agreement which infringes Article 81(1) are automatically void and therefore unenforceable. Moreover, depending on the severability of the infringing provisions, the entire agreement may in fact be void.

Section 0. Article 82 EC Treaty

Article 82 provides that:

“ 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 insofar as it may affect trade between Member States ”.

Article 82 applies if the following conditions are satisfied:

First, the undertaking(s) involved must have a dominant position on particular product and geographic market(s). In determining whether a dominant position exists, the Commission will consider a number of factors, including the market share of the undertaking(s) and its competitors, its customers’ market power and other relevant characteristics of the market. A market share of 40% or greater gives rise to a presumption of dominance, although an undertaking may, in certain circumstances, be dominant with a market share as low as 25%.

Second, there must be an abuse of the dominant position. Simply acquiring or maintaining a dominant position does not violate Article 82. Conduct by a dominant undertaking that may be considered to constitute an abuse within the meaning of Article 82 includes:

- **Long-Term Supply Contracts.** Long-term supply contracts for a large proportion of a customer's needs may infringe Article 82 if they are far too long a duration. The answer to what is too long will depend on the nature of the product concerned and the proportion of the customer's needs which are satisfied under the contract. A contract that is automatically renewable does not infringe Article 82 provided that the minimum period before which the parties can next terminate by reasonable notice is not too long.
- **Fidelity and Loyalty Rebates.** While rebates or discounts which are linked to the quantities of the product sold or other factors reflecting cost savings are legal, rebates or discounts which are linked to a particular customer's requirements may infringe Article 82 since they constitute a form of price discrimination.
- **Meet or Release Clauses.** Clauses which provide that a customer may purchase its products from an alternative third party source, subject to the provision that the dominant supplier has an opportunity to match the third party's offer, may be considered unfair since such clauses allow the dominant supplier to reinforce its position as the customer is forced to disclose the third party's offer to the dominant supplier, allowing the dominant supplier to match the offer and retain the business.
- **Discriminatory Prices.** Discriminatory prices as between different customers which do not reflect some objective cost savings are unfair, particularly if the discrimination is geographical and reflects a national division of the EEA.
- **Tying Clauses.** Tying sales of products together (see Article 81(1) discussion above).
- **Refusal to Supply.** As a general rule, a dominant undertaking cannot refuse to supply without an objectively justifiable reason and it cannot stop supplying a long-standing customer that abides by regular commercial practice. This does not mean that where products are in short supply, everyone must be treated the same, but there must be objective reasons for making a particular decision.

Section 0. Exemptions for infringements of Article 81(1)

As noted above, provisions of an agreement that infringe Article 81(1) are void and unenforceable (Article 81(2)). However, a provision which falls within the scope of Article 81(1) is permissible if it qualifies for an exemption under Article 81(3). No exemptions are available for infringements of Article 82.

Article 81(3) provides that an agreement that falls within the scope of Article 81(1) qualifies for an exemption if it:

- results in an improvement to the production or distribution of good and promotes economic or technical progress;

- Provides consumers with a fair share of the economic benefits;
- Only contains restrictions that are indispensable to the achievement of the economic benefits that are the objectives of the agreement; **and**
- Does not eliminate competition in respect of a substantial part of the products concerned.

An agreement may benefit from an Article 81(3) exemption either on individual notification to the Commission or by falling within the scope of one of the Block Exemption Regulations that have been adopted by the Commission.

Section 0. Extraterritorial Scope of Articles 81 & 82

Agreements concluded outside the European Economic Area (“**EEA**”)² may, nonetheless, be covered by EC competition rules if they affect trade between EEA Member States. For example, the following activities outside the EEA would violate applicable EU competition laws:

- A sales joint venture between a Japanese and U.S. company dividing up the worldwide market and, thereby, excluding the Japanese company from selling its products in the EEA;
- An export ban in a distribution agreement concluded in the U.S. which prevents passive sales into the EEA; and,
- A price fixing agreement concluded between Japanese companies in Japan relating to the selling prices of their subsidiaries in the EEA.

Section 0. Enforcement of Articles 81 & 82

Both the European Commission and national competition authorities are competent to enforce Articles 81 and 82.

Agreements that infringe Article 81(1) are void and unenforceable unless they qualify for an exemption under Article 81(3). Moreover, the Commission has the power to impose the following sanctions for violations of Article 81 and Article 82:

- Fines of up to **10%** of an infringing firm’s group turnover in the preceding financial year;
- Orders requiring an undertaking to terminate infringements; and
- Interim measures.

² The EEA comprises the EU Member States plus Norway, Iceland and Liechtenstein.

Furthermore, private parties may bring a cause of action for damages or injunctive relief relating to alleged infringements of the EU competition rules, although issues relating to standing, procedure and the amount of damages are governed by national law.

APPLICABILITY OF ARTICLES 81 & 82 TO POTENTIAL AREAS OF ACTIVITY OF APDEX ALLIANCE

The purpose of this section is to summarize the applicability of Articles 81 and 82 to certain areas of activity that are likely to be relevant to Apdex Alliance in the light of the relevant Block Exemption Regulations, as well as the Commission's Guidelines on the applicability of Article 81 to horizontal cooperation agreements ("**Article 81 Guidelines**"). The practical implications arising from the issues discussed in this section, and in Chapter 1, are summarized in Chapter 3 of these Guidelines.

Section 0. Commercialization Agreements

The Article 81 Guidelines deal with commercialization agreements, i.e. cooperation between competitors in the selling, distribution or promotion of their products. Distribution agreements are, in general, covered by the legislative framework relating to vertical agreements, however, where competitors distribute one another's products, horizontal issues arise as well, and the Article 81 Guidelines will be applicable.

Commercialization agreements between non-competitors do not create competition problems of a horizontal nature and will not, therefore, be caught by Article 81(1). The commercialization agreements most likely to give rise to concern under Article 81(1) are those that result in price fixing. The Commission states that joint selling is likely to have as its object and effect the coordination of the pricing policy of competing manufacturers. However, this may not be the case where the market power of the parties is particularly weak.

Where joint commercialization falls short of joint selling, the Commission identifies two possible concerns that might lead to a restrictive effect on competition. One is the exchange of commercially sensitive information, particularly in respect of marketing strategy and pricing. The other is a possible high commonality of costs, which might affect the extent to which the parties can compete on price when they take their products to the market. In the case of distribution agreements between competitors, the Commission is particularly concerned about the possibility of market partitioning.

Commercialization agreements that do not extend to price fixing are unlikely to infringe Article 81(1) where the parties market shares are below 15%, and would be likely to satisfy the terms of Article 81(3) even if they were caught by Article 81(1). Where the parties market share exceeds 15%, market concentration has to be considered.

In relation to Article 81(3), the Article 81 Guidelines state that price fixing can generally not be justified "*unless it is indispensable for the integration of other marketing functions, and this integration will generate substantial efficiencies*". Any efficiencies must result from the integration of economic activities and must be clearly demonstrated.

Section 0. Standardization Agreements

The Article 81 Guidelines deal with agreements that have as their primary objective the definition of technical or quality requirements with which current or future products, production processes or methods may comply. Standardization agreements may have effects in three markets: the market for the product itself; the service market for the setting of standards; and the market for testing and certification.

Where participation in the setting of standards is unrestricted and transparent, standardization agreements do not restrict competition. Standards adopted by recognized standards bodies based on non-discriminatory, open and transparent procedures would not be caught, nor would agreements having no appreciable effect on the market.

Standardization agreements aimed at excluding actual or potential competitors from the market would, in general, be caught, for example where a national association of manufacturers sets a standard and pressures third parties not to market products that do not comply with that standard.

Standardization agreements may have the effect of restricting competition where they impinge upon the parties' freedom to develop alternative standards or products. Standards that are not accessible to third parties may discriminate or foreclose the market, and it is necessary to consider on a case-by-case basis the extent to which such barriers to entry may be overcome. In the context of the telecommunications market, the Commission investigated arrangements proposed by the European Telecommunications Standards Institute ("ETSI"). In that case, there was a risk that the application of a European standard could be undermined if the standard incorporated proprietary technology and the owner of that technology was not willing to license it to the manufacturers of products complying with the standard. The Commission issued a 'negative clearance' comfort letter after ETSI had introduced procedures designed to minimize the risk.

In respect of Article 81(3), the Guidelines state that the Commission generally takes a positive approach to agreements that promote economic interpenetration in the common market or encourage the development of new markets and improved supply conditions. For the benefits of standardization agreements to be realized, the necessary information to apply the standard must be available to those wishing to enter the market and an appreciable proportion of the industry must be involved in the setting of the standard in a transparent manner. Standards must not limit innovation. All competitors in the markets affected should have the opportunity to be involved in discussions on the standards, unless it can be shown that this would give rise to important inefficiencies or unless there are recognized procedures for the collective representation of interests, as in the case of formal standards bodies. As a general rule, there should be a clear distinction between the setting of the standard and the parties' actual behavior on the market. Where the result of a standardization agreement is the establishment of an industry standard, access to the standard must be possible for third parties on fair, reasonable and non-discriminatory terms.

Section 0. Intellectual Property Rights.

The Commission acknowledges the benefit of licensing intellectual property rights and has established a new block exemption for patent and know-how licensing (Regulation No. 240 / 96), which describes the type of clauses which are permitted in a licensing agreement and those which are prohibited under EU competition rules. The most important of these are set out below:

Permitted clauses:

- An obligation on the licensee not to divulge the know-how communicated under the license;
- An obligation on the licensee not to grant sub-licenses or assign the license;
- An obligation on the licensee to observe minimum quality specifications, including technical specifications; and,
- An obligation on the licensee to pay a minimum royalty or produce a minimum quantity of the licensed product.

Prohibited clauses:

- Restrictions on the determination of prices, components of prices or discounts of the licensed products;
- Restrictions on the licensee competing in the EEA with the licensor;
- Limitations on the quantity of licensed product that the manufacturer sells; and,
- The licensor and/or licensee are required without any objectively justified reason either to refuse to meet orders from users or resellers in their respective territories who would market products in other territories in the EEA, or to make it difficult for users or resellers to obtain the products from other resellers within the EEA.

Section 0. Distribution Agreements

The Commission's Block Exemption on Vertical Restraints ("**Block Exemption**") and its accompanying Guidelines on Vertical Restraints are relevant to the analysis, in competition law terms, of distribution agreements.

The Guidelines suggest that vertical agreements can be grouped into four categories: a single branding group; a limited distribution group; a resale price maintenance group; and a market-partitioning group. The single branding group consists of agreements that have as their main element that the buyer is induced to concentrate its orders for a particular product on one supplier. An agreement not to purchase competing products, agreements that force or induce customers to purchase all or most of their products from one supplier and tie-in transactions

fall within this group. The limited distribution group consists of agreements that have as their main element that the manufacturer sells to one or a limited number of buyers. Exclusive distribution, exclusive customer allocation and selective distribution agreements fall within this group. The resale price maintenance group consists of agreements which impose minimum, fixed, maximum or recommended resale prices, and the market-partitioning group consists of agreements the main element of which is that the buyer is restricted as to where it buys or resells a particular product.

Given the breadth of the Block Exemption, it is not necessary, in many cases, to decide whether an agreement infringes Article 81(1). The Guidelines on Vertical Restraints suggest that there is no need to consider the application of Article 81(1) to an agreement within the “safe haven” of the Block Exemption and therefore exempt under Article 81(3).

The Guidelines on Vertical Restraints point out that agreements of minor importance and agreements between small and medium-sized undertakings fall outside Article 81(1) altogether. Vertical agreements entered into by undertakings with a market share of less than 10% are usually regarded as *de minimis*, although a restriction such as an export ban may infringe Article 81(1) even if below this threshold.

The combined effect of the *de minimis* doctrine and the block exemption is that most vertical agreements where the supplier’s market share is below 10% fall outside Article 81(1) and that most vertical agreements, even if they are caught by Article 81(1), will be block exempted, provided that the supplier’s market share is below 30% and that the agreement does not contain any of the black-listed provisions in Article 4 of the Block Exemption. Where the supplier’s market share exceeds 30%, it may be that it has a dominant position, in which case restrictions in its vertical agreements may amount to an abuse of a dominant position contrary to Article 82. Agreements containing blacklisted provisions are unlikely to be granted individual exemption.

The Block Exemption will apply to exclusive distribution agreements provided that the supplier’s market share is less than 30% and provided that there are no ‘hard-core’ restrictions contrary to Article 4. In particular, there should be no restrictions on passive sales to other territories; where there is a combination of exclusive distribution and selective distribution, there must be no restrictions even of active sales by retailers to end users, and there must be no restrictions on sales between authorized distributors.

Exclusive customer allocation is discussed in the Guidelines on Vertical Restraints. This is treated much the same way as exclusive distribution, although the Commission makes the point that in the case of exclusive customer allocation, individual exemption is unlikely where the market share of exceeds 30%.

Selective distribution agreements may benefit from the Block Exemption, if the producer’s market share is below 30% and contains no ‘hard-core’ restrictions. However, the Guidelines that where a selective distribution system benefits from the Block Exemption, but produces minimal efficiency-enhancing effects, for example because the product is not suitable for this form of distribution, the Commission may withdraw the benefit of the Block Exemption. The Commission would consider so doing where there is a cumulative effect problem, which, it states, is unlikely to arise when the market share covered by the selective distribution is below 50%, or where this is exceeded but the market share of the five largest suppliers is below 50%.