

A guide to anti-trust law
Open Source Automation Development Lab (OSADL) eG
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Contents

1. Introduction.....	1
2. What can an antitrust violation mean?.....	2
3. Antitrust prohibitions.....	2
3.1 As a general rule: What is prohibited?.....	2
3.1.1 Ban on cartels.....	2
3.1.2 Ban on abusive practices.....	3
3.2 As an undertaking participating in an OSADL project, what must I avoid doing?.....	4
3.2.1 General.....	4
3.2.2 Specifics.....	5
3.3 What is unobjectionable?.....	5
3.4 Finally: Note on merger control.....	6

1. Introduction

“Open Innovation” of the kind facilitated by OSADL eG, stands for joint, project-related research and development activities by companies in the field of the automation industry and, more generally, embedded systems. Such joint activities, in some circumstances by competitors as well, nurture the innovation and improvement process and are desirable for this reason.

However, because direct competitors are able to cooperate in the context of an OSADL project, there is a risk of antitrust violations occurring which could have serious consequences for both the participating undertakings and for OSADL eG. For this reason it is important when selecting topics for an OSADL project, but also when administering projects and putting project output to real use, to avoid doing certain things.

The purpose of this guide is to sharpen the reader's awareness of the issues involved and to draw her or his attention to potential risks, as well as to activities which must at all costs be avoided. Please send any questions to OSADL at office@osadl.org.

2. What can an antitrust violation mean?

Antitrust violations can have considerable legal consequences:

- Antitrust violations may be punished by German and European authorities with substantial seven-figure fines. What is more, stakeholders (such as competitors) may also be entitled to make claims for compensation. Fines may not only be imposed on those directly involved, but also on OSADL eG if the latter has colluded in a violation in any way. Depending on the facts of the case, OSADL eG will be entitled to claim compensation from its members, which will apply to the affected members.
- Alongside these quite considerable financial consequences, such cases can also be damaging to the parties' image given that antitrust investigations seldom go unnoticed by the general public.
- Contracts which require conduct which violates antitrust law are also null and void for all parties; this creates a state of limbo for all those involved, which is an equally undesirable state of affairs.

The priority, then, must be not to break the law at all. This guide therefore outlines the general prohibitions which exist in this area, points out possible risk scenarios and provides OSADL members the information they need to avoid violating antitrust law.

3. Antitrust prohibitions

Antitrust law prohibits two types of conduct which may be punished as described above: Restrictive agreements and the abuse of dominant positions.

3.1 As a general rule: What is prohibited?

3.1.1 Ban on cartels

Of most relevance to Open Innovation is the ban on cartels. The ban on cartels in sec. 1 of the German Act against Restraints of Competition (GWB) and Art. 101 of the Treaty on the Functioning of the European Union (TEU) prohibits "agreements restricting competition". Whether undertakings engaging in concerted practices in this way operate at the same level in the market (in other words, are direct or potential competitors for the same customers or suppliers), or in two different markets (so that one is a supplier and the other a manufacturer, for example) is of no importance in this respect.

The law regards any agreement between undertakings as restrictive which has a noticeably negative impact on the conditions of competition in the relevant markets, i.e. by restricting competition. A classic example of such practices is price fixing, when one

company is deprived of its competitive freedom to set its own market prices for its products and services independently of third parties.

3.1.2 Ban on abusive practices

The ban on abusive practices is less relevant, but can nonetheless be a serious matter, in settings such as that in which OSADL eG operates. This prohibition is intended to prevent dominant undertakings exploiting their paramount market position for their own benefit. An undertaking is presumed to hold a paramount market position if, owing to its market share, it can act without taking account of its competitors. This seemingly abstract criterion can in fact be expressed in terms of actual market share. Any undertaking with a market share of 40% or more is presumed in law to dominate the market. Below this threshold, it is assumed that there is high probability of an undertaking holding a paramount market position if the undertaking is the biggest in the market.

Market dominance relates to relevant product, geographic and, in some cases, temporal markets. This means that an undertaking may hold a paramount market position in one market in which it is active, but not in another. Several undertakings may hold a paramount market position together if they do not compete with each other but do compete with other undertakings.

The “abuse” of such paramount market positions is prohibited. Abuse is considered to be any behavior which is only possible as a result of a paramount market position and which disadvantages other undertakings operating in the market. The law cites the following examples:

- directly or indirectly unfairly hindering another undertaking or, in the absence of facts justifying such differentiation, treating another undertaking directly or indirectly in a manner different from that accorded to similar undertakings;
- demanding consideration or other business terms that deviate from those which would result in all probability if effective competition existed with particular reference to the conduct of undertakings in similar markets in which effective competition exists;
- demanding less favorable consideration or less favorable other business terms than are demanded from similar buyers on comparable markets by the market-dominating undertaking, unless there is a factual justification for such differentiation;

- refusing to grant another undertaking access for appropriate payment to own networks or other infrastructure facilities if, for legal or actual reasons, it would be impossible for the other undertaking to operate in the upstream or downstream market as a competitor of the undertaking holding a paramount market position without sharing such undertaking's networks or facilities; this does not apply if the undertaking holding the paramount market position proves that it would be unreasonable or impossible for operational or other reasons to allow such networks or facilities to be shared;
- exploiting market position to invite or cause other undertakings to grant advantages without any objective justification.

3.2 As an undertaking participating in an OSADL project, what must I avoid doing?

3.2.1 General

Cooperation in research and development of the kind which takes place at Open Innovation can be problematic from an antitrust perspective given that it can restrict competition for innovation (which, alongside price competition, is one of the most important aspects of competition)—either on the basis of agreements reached by or one-sided measures taken by large undertakings participating in such cooperation. This is particularly so if competitors which would be able to undertake the relevant research activities on their own, in other words without the support of other undertakings, decide to cooperate with each other.

It is particularly important to avoid any concerted action which clearly has a restricting impact on competition, such as

- fixing prices,
- limiting production,
- partitioning markets (either geographically or for specific products or services) and/or
- restricting access of one or several of the participating undertakings to research findings.

In addition, the participating undertakings must continue to be free throughout the duration of the project to engage in their own research and other activities in the relevant field.

3.2.2 Specifics

Undertakings engaging in joint research must comply with the following key points throughout the project in order to avoid breaching antitrust law:

(1) Selection of OSADL projects

The first step in avoiding the risks described here is to take due care when selecting the projects for an OSADL program. Innovations which may be of relevance to the competitive position of the undertaking making the selection should remain within the undertaking. This applies in particular to innovations which distinguish the relevant undertaking from other undertakings operating in the market; in other words, innovations which are relevant to the products being offered.

(2) Project performance

During the OSADL project itself it is important to ensure that participants do not discuss any internal company information which is relevant to competition. This also applies to information which does not, or does not immediately, relate to the actual research project, in other words a company's price policy or plans to expand in particular markets. Communication within a project should be limited to the project itself.

(3) Exploitation of project output

All the undertakings participating in a project must have equal access to project output. This means it must be possible for all the participating undertakings to make use of such product output. In most cases agreements to restrict the exploitation (i.e. to use project output for production and commercial purposes) to specific undertakings, possibly the largest companies involved, are illegal.

The participating undertakings must also refrain from colluding in the pricing of research output or partitioning the fields in which such output can be put to commercial use. It goes without saying that post-project nonaggression agreements of any kind are prohibited.

3.3 What is unobjectionable?

Cooperation on research between non-competitors as well as between undertakings which would not, on their own, be able to carry out such research and development activities are often entirely unproblematic in antitrust terms.

Cooperation on pure research and development which does not involve any further collaboration on the commercial use or marketing of the output is not normally subject to antitrust law.

Many cooperation agreements in the field of research and development are also subject to a so-called block exemption (No. 1217/2010, "R&D BER"); these agreements do not restrict competition and are not illegal. Deciding whether or not particular activities are exempt is initially left to the participating undertakings. However, such undertakings should not make such decisions without taking legal advice. The activities described above under 3.2 are almost all core restrictions for which no exemption is possible.

3.4 Finally: Note on merger control

In some circumstances, research cooperation may be considered tantamount to a merger within the meaning of German and European merger control, particularly if a joint venture with independent business functions is created. Mergers of this kind must always be notified to the antitrust authorities and are then assessed for their impact on competition.

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