

# GORDON DADDS

SOLICITORS

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Your ref:

The Directors  
European Federation of Tanker Cleaning Organisations  
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Sent by email: [secretary@eftco.org](mailto:secretary@eftco.org)

## PRIVILEGED LEGAL ADVICE

Dear Sirs/Mesdames

We have been asked to advise on the competition law implications of the "Rules for the use of the European Cleaning Document by the National Cleaning Associations" (Rules) which were reissued in April 2012 by the European Federation of Tanker Cleaning Organisations (EFTCO). Our advice has been requested in the light of a complaint to EFTCO by a Portuguese undertaking, Gomez & Severino (G&S), which has made unsuccessful attempts for a number of years to obtain access to the European Cleaning Document (ECD).

The effect of the inability of G&S to obtain access to the ECD is that it is precluded from entry to the international tanker cleaning market. The risks associated with the use of a standardisation system such as is embodied in the Rules have been the subject of previous legal advice given by Van Alsenoy & Partners of Brussels in 2005 and by Ms Tina Rañales-Cotos of the English Bar in 2009, copies of which we have seen.

In general terms, the relevant law is contained in what is now article 101 of the Treaty on the Functioning of the European Union, which prohibits (among other things) agreements and decisions of undertakings that may restrict competition and affect trade between EU member states to an appreciable extent. The EU Commission has considered the application of article 101 to standardisation agreements in its Horizontal Competition Guidelines of 2011, under which the Rules (and the use of the ECD) fall to be considered. In short, the Commission's view (which will be followed by a court of law) is that, whilst standardisation agreements usually produce significant positive economic effects, they may fall within the prohibition of article 101 where there is exclusion of, or discrimination against, certain companies by prevention of effective access to the standard (paragraphs 264 and 277).

To ensure that article 101 is not infringed (a) participation in standard-setting must be unrestricted; (b) the procedure for adopting the standard in question must be transparent;

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(c) there must be no obligation to comply with the standard; and (d) access to the standard must be available on fair, reasonable and non-discriminatory terms. Although we have not conducted an in-depth analysis of the application of these conditions to the complaint made by G&S, it would seem that the Rules have not been applied to it on a fair, reasonable and non-discriminatory basis, in particular because of the additional requirements that have been imposed by the national association, including what appears to be a demand for a disproportionately large payment, despite its qualification under the Safety Quality Assessment System (SQAS).

In this context one has to consider the legal status of the ECD itself, which is the subject of a European Community registered design by EFTCO, which on the face of it gives EFTCO the exclusive right to authorise its use, notwithstanding that the information relative to the ECD is in fact publicly available. However this alone cannot be used as a justification for preventing undertakings from access to the market, and indeed there have been cases where collective refusal to license a necessary right has been held to be anti-competitive in such circumstances.

We have considered the proposal that there should be an alternative means of access to the ECD, provided the applicant satisfies the SQAS process, whereby an applicant which prefers not to join the relevant national association may still have access to the ECD upon paying a reasonable fee for printing costs. We agree that this would go a long way to ensuring that the Rules were operated on a fair, reasonable and non-discriminatory basis. In addition, in our view it is essential for these purposes that national associations do not impose their own additional requirements, in order to ensure a "level playing field".

We are bound to mention that failure by EFTCO to ensure that the Rules, and their application by national associations, comply with EU competition law could have serious implications, including fines being imposed on the association and its members, as well as legal claims for compensation, which in the case of EFTCO (as a UK company) could be commenced in the English courts. We are bound to add that, for these purposes, the fact that legal advice has been given but not followed could be an aggravating factor in determining the level of any fines.

We are at your disposal for any further advice required.

Yours faithfully



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