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POTENTIAL PRO-COMPETITIVE AND ANTICOMPETITIVE ASPECTS OF TRADE/BUSINESS ASSOCIATIONS

-- Background note by the Secretariat --

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POTENTIAL PRO-COMPETITIVE AND ANTICOMPETITIVE ASPECTS OF TRADE/BUSINESS ASSOCIATIONS

1. Trade/business associations play an important role in modern economies. In most instances, trade associations serve legitimate purposes, such as the preparation of industry studies, advocacy before government entities to bring to their attention industry-specific interests, the development of guidelines for product standardisation, the dissemination of aggregate market information to help firms make investment decisions, the dissemination of good industry practices, and the like. Trade associations can also educate members about proper antitrust compliance. On the other hand, because trade associations offer opportunities for repeated contacts between direct competitors, they may also serve as a vehicle for activities that restrict competition. A fair number of the cartel cases brought by competition agencies around the world directly or indirectly involve a trade association. A trade association may itself organise, orchestrate and enforce naked antitrust violations, or may simply facilitate them.

2. This Background Note explores the complex role of trade associations in modern economies and the risks that trade association activities may raise under competition laws. After an overview of the historical role of trade and professional associations as private industry regulators in the United States and in Germany at the beginning of the 20th century, this Note will discuss the notion of 'association' for antitrust purposes before focussing on some of the most important immunities and exemptions from antitrust laws that may apply to trade associations and their activities. The last part of this Note discusses the application of substantive competition rules to trade associations, particularly the competition rules on horizontal hardcore restraints, such as price fixing, customer allocation and bid-rigging, and to consequences of antitrust infringements for trade associations and their members. Particular emphasis is also given to potentially restrictive practices, which typically arise in a trade association context and which are viewed as possibly facilitating collusion. Membership rules, information exchange programs and standard-setting are amongst the practices that are subject to closer scrutiny by competition agencies.

1. Trade Associations and Antitrust Laws – Introductory Remarks

3. Trade associations have been inextricably related to the enforcement of antitrust rules since the very early days of antitrust law. While competition is certainly based on each market player pursuing its individual profit maximisation objective, there are activities and functions which cannot be pursued efficiently by single firms on their own but are better suited for a collective effort. These activities, which in many instances advance consumer welfare, can be pursued collectively by market players in the context of trade and professional associations. Product standardisation, harmonisation and promotion of good business practices, support of business interests before governments and public agencies, the determination of ethical rules for professions, etc. are examples of functions that can only be pursued if businesses cooperate and collaborate.

4. Cooperatives and trade groups can be traced back to the merchant guilds of the middle ages[1]. Since then, trade and business associations have played a key role in the development of professions and trading activities around the world and have contributed to the wealth and success of many economies. It is particularly in the nineteenth century, however, that trade associations played a key role in shaping the industrialisation process. In both liberal-oriented and in state-governed markets, many associations were created to react to the roughness of free market capitalism or to the invading presence of the state in the economy. Businesses started organising themselves to promote self-regulation and mutually agreed rules of

[1] References to trade groups can be found in the Bible and in manuscripts of the Roman Empire. Business associations were also common in ancient Asian civilisations such as India, China and Japan. It is with the medieval guilds, their business guidelines and their code of conduct that corporatism and the pursuance of individual interests through a corporation became part of the Western way of organising businesses. See Butler. D. Shaffer, *Trade Associations and Self Regulation*, 20 Sw U.L. Rev. 289 (1991) and E. Bissocoli, *Trade Associations and Information Exchange under US and EC Competition Law*, World Competition 23(1), 79-106, 2000.

conduct to compensate for shortcomings of the market or to pre-empt public intervention in the economy. Over time, associations became real service providers to their industry. Such tight cooperation, however, often favoured explicitly cooperative agreements between competitors which limited the ability of individual market players to determine their business strategy autonomously. These restrictions, which were often established and enforced by trade associations, eliminated the normal risk associated with business activity as it concerned prices, quantities and other competitive factors and raised considerable concerns in governments as they were seen as an incentive to collusion to the ultimate detriment of consumer welfare.

5. Many of the first competition laws were enacted as a reaction to this trend towards industry-wide cooperation, in an effort to control 'combinations' and 'trusts' of businesses (hence the word 'antitrust'), which pursued joint profit maximisation through coordinated industry-wide conduct. The adoption in the United States of the Sherman Act in 1890, for instance, is a good example of a government reacting to this trend in order to preserve the competitive process and channel it along socially productive lines. The business combinations or trusts of the late 19th century were viewed by Congress as artificial devices to control markets, restrict competition and ultimately exploit consumers[2]. Similarly, many years later, the drafters of the competition provisions in the Treaty of Rome were well aware of the possible risks for competition posed by trade associations' activities and have extended the scope of Article 81 EC on anticompetitive agreements to include *"[…] all agreements between undertakings, decisions by associations of undertakings and concerted practices […]"*[3].

2. An Historical Overview of the Development of Trade Associations

6. Modern trade associations are direct descendents of the 19th century trusts and business associations, but have lost the negative association with conspiracies and illegal activities which had tainted them for almost 200 years[4]. Today, the importance of trade and professional associations in performing a great number of functions, which are extremely valuable not just to the associations' members but to society in general, is widely acknowledged by the business community and government agencies alike. Trade associations and their activities are viewed as the expression of economic, social and political freedoms, which are often constitutionally protected. In many countries, the right of association is expressly protected as one of the fundamental rights of both individuals and corporations. Other constitutionally recognised freedoms and rights, such as the freedom of speech, the freedom of association and the right to petition the government, apply directly to a number of trade associations' activities and may represent a limit to the enforcement of antitrust rules.

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2 US Congressional Record at 3151-53 (1890).

3 Article 81(1) EC Treaty, emphasis added.

4 The general mistrust towards trade associations which were viewed primarily as an opportunity for conspirators to meet can be traced back to the famous quote from Adam Smith's The Wealth of Nations (1776): "*People of the same trade seldom meet together, even for merriment and diversion, but the conversation ends in a conspiracy against the public, or in some contrivance to raise prices. It is impossible indeed to prevent such meetings, by any law which either could be executed, or would be consistent with liberty and justice. But though the law cannot hinder people of the same trade from sometimes assembling together, it ought to do nothing to facilitate such assemblies; much less to render them necessary*". Traces of the role of trade associations as market regulators, exercising a degree of control over the key factors of competition can still be found today. According to the Encyclopaedia Britannica Online, a trade association is a "*voluntary association of business firms organised on a geographic or industrial basis to promote and develop commercial and industrial opportunities within its sphere of operation, to voice publicly the views of members on matters of common interest, or in some cases to exercise some measure of control over prices, output, and channels of distribution*" (emphasis added).

7. The next sections will briefly review the early days of modern trade associations in two important countries, the United States and Germany, whose history demonstrates the importance that trade associations had for the socio-economic and political development of modern economies and to a certain extent explains the scepticism that antitrust systems have towards the activities of these organisations.

2.1 Trade associations in the United States in the first half of the 20th century

8. Although the roots of corporatism can be traced back to ancient times, modern trade associations appeared in the US only around 1850, not becoming a wide spread phenomenon until the second half of the 19th century. These early associations, very much like the old middle age guilds, were self-contained organisations which represented the will of the dominant members of the trade and had the power to regulate the industry and impose restrictions on trading practices to all their members[5]. Most of the activities of these early trade associations would have fallen within the scope of modern competition rules and most likely would have been found to be anticompetitive.

9. It is around the time of the two World Wars that the number of trade associations grew significantly in the United States. In both war periods, corporatism was favoured by the government wishing to ensure control over prices and output in difficult economic times. During World War I, the War Industries Board (WIB) played a central role in the regulation of economic activities and price fixing and other trade limiting practices were favoured by the government to secure the production of needed commodities and to prevent social unrest by checking prices and wages and by stabilising market conditions[6]. After the war and the dissolution of WIB, trade associations fought to retain the favourable working conditions obtained under the WIB direction. Arguments were made that cooperation and self-regulation had improved economic and social conditions in the country, while the previous system of competition implemented through the Sherman Act had caused dissipation of vast financial resources[7].

10. In the decade that followed World War I, American industrialists were occupied with mitigating aggressive competitive practices by reducing the threat of substantial economic loss to firms unable to meet competition from other firms[8]. This concept was labelled 'business cooperation' and the emerging spirit of industry-wide cooperation was characterised as 'industrial self-regulation'. One of the principal tools employed in the self-regulation of businesses was the trade association. The scope of the association's activities extended from efforts to create a 'cooperative' attitude among competitors to the enunciation of specific 'codes of ethics', to proposals for formal intra-industrial regulations (or cartel-like arrangements) like those that were promoted in the National Industrial Recovery Act[9] in 1933 by the Roosevelt administration to help the US economy recover from the Great Depression.

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5 See Butler. D. Shaffer, *Trade Associations and Self Regulation*, 20 Sw U.L. Rev. 289 (1991).

6 See Lewis H. Haney, *Price Fixing in the United States During the War*, Political Science Quarterly, Vol. 34, No. 3 (Sep., 1919), pp. 434-45.

7 See Eddy, *The New Competition* (1916); Baker, *Automotive Industry* (1926); and Taeush, *Policy and Ethics in Business* (1931). Early cases of enforcement of the Sherman Act against trade associations are *United States v. Trans-Missouri Freight Association*, 166 U.S. 290 (1897), and *United States v. Joint Traffic Association*, 171 U.S. 505 (1898). These judgments contain language suggesting that a mere restriction on the autonomy of traders by a trade association would suffice to establish that an agreement restrained trade within the meaning of the Act.

8 See Butler. D. Shaffer, *Trade Associations and Self Regulation*, 20 Sw U.L. Rev. 289 (1991).

9 National Industrial Recovery Act, ch. 90, 48 Stat. 195 (1933). The National Industrial Recovery Act was part of President Franklin Delano Roosevelt's New Deal. It authorised the President to regulate businesses in the interest of promoting fair competition, supporting prices and competition, creating jobs for unemployed workers, and stimulating the United States' economy to recover from the Great Depression.

11. Until the Great Depression, the main economic concern had always been scarcity. So reformers looked at the experience of World War I to figure out how the government could increase production through planning. Future President Hoover was the champion of the trade association movement in the 1920s and made extensive use of his powers as Secretary of Commerce to promote economic rationalisation and limit 'destructive' competition[10]. Trade associations represented the vehicle for implementing a system of cooperation and self-regulation. Members of trade associations were not only encouraged to exchange information but also to abide by ethical codes and codes of fair competition. Such codes were designed to limit aggressive market strategies and to promote cooperation and protection of existing market players. A great deal of attention was paid by these ethical codes to pricing practices, particularly those with a tendency to lower prices, which contributed to create an all-too-common impression of 'price wars', 'price cutting', and 'cutthroat competition', as symptoms of 'unethical' business behaviour[11].

2.2 German trade associations in the period 1900-1930

12. The emergence of the first large trade associations in Germany closely followed the developments of the German national economy in the second part of the 19th century. It was primarily the heavy industries (in particular coal, iron and steel) that first developed the most advanced trade associations, which would dominate German industrial politics until the mid-1920s[12]. The first associations were established in the second half of the 19th century (e.g. the VdESI, the German Association of Iron and Steel Industrialists was founded in 1873) in the Prusso-German political environment which combined weak parliamentary institutions with an authoritarian executive and offered corporate self-government and socio-economic concessions to powerful industrial groups in return for political support. This context was extremely favourable to the development of interest groups and trade associations.

13. A number of characteristics in Germany's heavy industries, such as the concentrated nature of these markets, the geographic proximity of the companies, a certain homogeneity of the products and high fixed costs, favoured cartelisation. The trade associations were at the heart of this phenomenon: they promoted vertical expansion, high prices and common terms and conditions. With the advent of World War I, trade associations had a significant impulse as they were mandated by the government to perform important functions in difficult economic times: the organisation of raw materials allocation, war contracting and other wartime economic functions. This sub-contracting of public functions to trade associations represented a resourceful way for the government to leverage talents and efficient

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The law created a National Recovery Administration, an executive agency exercising powers which Congress had delegated to it, to promote compliance on the part of corporations. The National Industrial Recovery Act fostered the activities of trade groups but many practices were clearly anticompetitive and caused the intervention of the Supreme Court, which ultimately declared the Act unconstitutional (*Schechter Poultry Corp. v. United States* (295 U.S. 495, 1935)). See E. Bissocoli, *Trade Associations and Information Exchange under US and EC Competition Law*, World Competition 23(1), 79-106, 2000.

10 President Hoover discussed the motivations of the business community to regularise competitive practices as follows: "*Ever since the factory system was born there has been within it a struggle to attain more stability through collective action. This effort has sought to secure more regular production, more regular employment, better wages, the elimination of waste, the maintenance of quality or service, decrease in destructive competition and unfair practices, and ofttimes to assure prices or profits*" (The Nation's Business, June 5, 1924, at 8).

11 See Butler. D. Shaffer, *Trade Associations and Self Regulation*, 20 Sw U.L. Rev. 289 (1991).

12 These paragraphs are a synthesis of the evolution of the largest trade associations in early 20th century Germany as reported in G. D. Feldman and U. Nocken, *Trade Associations and Economic Power; Interest Group Development in the German Iron and Steel Machine Building Industries, 1900-1933*, The business History Review, Vol. 49, No. 4, Winter 1975, p. 413-445.

organisations in the private sector to achieve public goals. Export control, through compulsory syndicates, is a good example of how the government used trade associations to improve the German balance of payments and to strengthen the mark on international markets. As a consequence, the number of trade associations multiplied significantly. For instance, between January 1914 and January 1918, the number of members in the VDMA (the Association of German Machine Builders) rose from 246 to 814[13].

14. With the end of World War I, trade associations emerged greatly strengthened by the wartime organisational efforts that left them both prepared and willing to assert their independence and superiority to the bureaucracy and political parties and to claim a special primacy in guiding the socio-economic and even political development of the country. The political weakness of the Weimar Republic (1919-1933) only intensified the inclination of industrial organisations towards self-assertiveness. Trade associations increasingly undertook public functions on the basis of private agreements among themselves. In turn, this triggered a process of expansion and complication of their organisational structures. Despite some attempts to get rid of this over-organisation, which proved unable to meet the different conditions of the post-war depression, and to destroy the whole system of cartels and other restrictive organisations, the Nazi regime decided to keep in place the basic structure, but rationalised it by eliminating duplication and competing organisations, laying the foundation of the system which was inherited by the German Federal Republic[14].

3. Defining 'associations' for antitrust purposes

15. Competition laws generally apply to any legal or natural person engaged in an economic or commercial activity. It is irrelevant if the legal or natural person is engaged in a profit or non-profit activity. The private or public nature of the entity involved is equally irrelevant. Therefore, competition rules apply not only to the conduct of limited liability companies, partnerships, individuals operating as sole traders, state-owned corporations and non-profit-making bodies, but also to the activities of associations of individuals or companies such as trade associations, professional associations and other industrial self-regulating bodies. Often, activities of trade or professional associations, by their very nature, constitute a 'contract', a 'combination' or an 'agreement' so that the minimum threshold for the application of competition rules on horizontal restraints is easily met. In some cases, competition rules apply expressly to decisions of associations, as is the case in the European Union[15] and in all those jurisdictions whose provisions on cartels mirror those of the EU, or have specific provisions regulating trade associations' activities, as it is the case of Japan[16].

16. The term 'association', however, is very wide and includes many forms of cooperation and interaction between individuals and companies. It generally refers to all sorts of organisations which pursue the common interest of their members, regardless of whether that interest has an economic nature. The term association hence includes all sorts of unions, alliances, societies, fraternities and groups in all fields of human interest (such as art, literature, philanthropy, charity, etc.). However, not all these

13 *Id.* at p. 422.

14 *Id.* at p. 444.

15 See Article 81 of the Treaty of Rome.

16 See Chapter III of the Japanese Act Concerning Prohibition of Private Monopolisation and Maintenance of Fair Trade of 1947 as amended in 2005. In addition, the Japanese Fair Trade Commission has published a set of Guidelines Concerning the Activities of Trade Associations. The Japanese Antimonopoly Law prohibits certain practices by trade associations even when they do not constitute a 'substantial restraint of competition'. This special treatment for trade associations has historical reasons, as Japanese trade associations traditionally have played a central role in organising anticompetitive practices among their members. The Antimonopoly Law also sets the conditions for an association to be treated as a 'trade association' for antitrust purposes.

combinations of individuals and/or legal entities qualify as associations for antitrust purposes. In the absence of a legal definition of 'association' for antitrust purposes, the notion of 'association', as with the notions of 'undertaking' or 'business entity', is generally defined in actual enforcement cases by the antitrust agencies or by the courts and it is generally interpreted widely.

17. In order for competition law to apply to an association two elements should be present:

- The structural/organisational element: An association must have some lasting corporate structure. The presence of a corporate structure is relevant in two respects. First, it distinguishes the association (and its antitrust liability) from that of its members. Second, the corporate structure is a factor that distinguishes an association from a mere joint activity of competing companies (such as an agreement). The legal form of the association is, however, irrelevant as it is irrelevant if the association has legal personality, or if it is a profit-making organisation. Similarly, the public nature of the functions performed by the associations has no bearing on the applicability of competition rules[17]. Competition rules equally apply to associations of associations (so-called second degree associations).

- The functional element: An association must have the ability to affect an economic activity. It is not required that the association itself is active on a market, but its activities must somehow have an effect on competition[18]. Many associations perform functions that have no direct or indirect effect on the market, such as charities or cultural organisations. In this case, the association and its activities fall outside the scope of application of the competition rules.

18. Associations should also be distinguished from other combinations of businesses, such as mergers and joint ventures. Although this may not always be true, a trade association is normally not an active player on a market but provides services only to its members. Unlike trade associations, mergers and joint ventures have an effect on the structure of the market in which the merging parties are active. In addition, the founders and the members of a trade association retain an independent market significance which is not the case in a merger setting[19]. Unlike trade associations, the main activity of a typical joint

17 However, decisions of associations required to perform statutory functions may escape the application of competition rules if they are limited to what is required in the statute and do not extend to the pursuance of commercial interests of the members.

18 For this reason, trade unions are in general not considered to be associations subject to competition law. Dependent labour cannot be considered an economic or commercial activity if the employees do not bear the risk of the commercial activity but act under the supervision and instruction of the employer. If employees cannot be qualified as economic entities, trade unions or other associations representing employees are not 'associations' for purposes of antitrust law. There are certainly circumstances where activities of trade unions could be subject to competition rules. This is the case if the trade union is not acting as a mere agent of its members but it is acting on its own merit and the activities under scrutiny have an economic nature. For the treatment of employees and trade unions under EC competition law, see the opinion of the Advocate General Jacobs in Case C-67/96, *Albany International BV v. Stichting Bedrijfspensioenfonds Textielindustrie,* [1999] ECR I-5751. In the US, collective bargaining enjoys several exemptions under the antitrust laws. Most importantly, there is a non-statutory labour exemption to the antitrust laws for unions to pursue legitimate subjects of collective bargaining (see *Detroit Auto Dealers v. FTC*, 955 F.2d 457 (1992)). Associations and their members often bargain together with labour unions. So long as they are collectively bargaining with unions, courts have recognised the labour exemption, but improper labour negotiations can run afoul of the antitrust laws.

19 See P. E. Areeda, *Trade Associations and Concerted Rule Making*, in Antitrust Law – An Analysis of Antitrust Principles and Their Applications, Volume 7, paragraph 1477.

venture is research, production and distribution on its own right. The joint venture's market role may be separate from that of its parents and is more like that of an ordinary firm[20].

19. Generally, there are three main categories of associations which have an antitrust relevance: trade associations; professional associations and other self-regulating organisations[21].

20. Trade associations are the most common form of associations. According to the American Bar Association, a 'trade association' consists of "*individuals and corporations with common commercial interests who, under the auspices of the organization, join together in order to take joint actions that further their commercial or professional goals*"[22]. In modern economies, there are trade associations in almost every sector of the economy. In addition, many companies and many trade associations are members of international trade associations. In most cases, trade associations do not sell products or services on the market in which their members are active and do not deal directly with customers, rather they are a service provider to their members. With their activities, trade associations provide benefits to their members – especially to the smaller members – but they may also be beneficial in increasing the efficiency of the market system as a whole.

21. The functions of trade associations in furthering the commercial interests of their members and of society as a whole are various and can be divided in three broad categories:

- Activities for the members. The principal function of a trade association is to provide services to its members, including the organisation of seminars and training activities in areas such as legal, marketing and product development; the organisation and sponsoring of fairs and trade shows; the publication of newsletters and trade journals; and the like[23]. Trade associations also collect, aggregate and disseminate statistical information and industry data, and prepare regular industry reports on developments in the market.

- Economic and regulatory functions. Trade associations have an important 'industrial policy' function, as they take an active role in shaping the way their industry works. In particular, they promote product standards and best practices for their industry; they define and promote standard terms and conditions of sale; they publish and enforce codes of ethics and in some cases they formulate and enforce industry self-regulation; they issue recommendations to their members on a variety of commercial and non-commercial issues.

- Political and lobbying functions. Trade associations also have a 'political' function which consists in promoting, representing and protecting the interests of members on legislation, regulations, taxation and policy matters likely to affect them. The extensive scope of government economic regulations has made it increasingly important for businesses to participate in the

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20 *Id.*, at 1478.

21 See Office of Fair Trading, *Trade Associations, Professions and Self-Regulating Bodies*, Competition Law Guidelines, December 2004.

22 American Bar Association, Section of Antitrust Law, *Antitrust and Trade Associations: How Trade Regulation Laws Apply to Trade and Professional Associations*, 1996, p. 2.

23 In this category one can also include one of the functions which is traditionally performed by Japanese trade associations: the *shinboku* or the "promotion of friendship". *Shinboku* is a rather broad term and refers to any social events for the members' employees and executives to discuss issues of common interest. Unfortunately, the *shinboku* may well include those activities that Adam Smith had in mind when he observed that businessmen rarely meet for merriment alone. See U. Schaede, *Self-Regulation, Trade Associations and the Antimonopoly Law in Japan*, 2000, Oxford University Press.

planning and in the implementation of such regulations. There are many ways in which trade associations get involved in lobbying public entities. One can distinguish at least two types of associations. The associations which represent a forum for the exchange of ideas within the industry and those which have been given a specific public policy role by the government to self-regulate the industry (e.g. setting access conditions to the profession). While the first type of associations interact with government entities occasionally in order to promote or to oppose a given piece of legislation or regulation, the second category enjoys a quasi-governmental role.

22. Professionals (e.g. lawyers, doctors, architects, auditors, accountants, etc.) are usually organised into professional associations, which often enjoy official recognition and benefit from a close relationship with the government[24]. These associations frequently intervene in the establishment and implementation of rules which affect their profession and in the elaboration of new regulations to be endorsed by public regulatory authorities. Generally, professional associations lay down the educational and experience qualifications required for practising the profession, they keep a register of the members of the profession, they promulgate standards of conduct to be maintained by members, and enforce these standards through a complaints and disciplinary procedure. Similarly to trade associations, a professional association represents the interests of its members *vis-à-vis* governments and other public bodies and the media. In many instances, professional associations act as self-regulating bodies for their profession and find their legitimacy in statutes deferring the regulation of the profession to the profession itself. While in general the public nature of the tasks assigned to a professional association has no bearing on the applicability of competition rules, there may be instances where the activities of a professional association benefit from an exemption from the competition regime[25].

23. Finally, there are other self-regulating bodies that fall outside the field of trade or professional associations. Examples of self-regulating bodies are the industry boards on advertising practices which devise and enforce the adherence to self-imposed advertising codes or boards supervising Internet self-regulation concerning on-line sales, e-mailing self-governance codes, on-line advertising, etc. The essence of any system of self-regulation is that the conduct of the adhering members is subject to a degree of monitoring and control by its representative body, or an organisation set up by that body or its members, to ensure that users or consumers are protected from unethical or otherwise unacceptable behaviour[26].

24. While this Note focuses primarily on the activities of trade associations, many of the remarks that will be made apply to professional associations and other self-regulating bodies as well.

4. The boundaries of trade associations' activities subject to competition rules

25. The important role played by trade associations in modern economies is widely recognised. Many of the activities of trade associations are protected as an expression of fundamental rights of individuals and corporations, such as the right to form an association in the first place or to join an existing one, the right to express one's views and opinions and the right to freely petition the government. The exercise of these rights and freedoms however may collide with the main objective of competition laws, which is to promote competition for the benefit of consumers[27]. In order to prevent conflicts between these

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24 For a general discussion on the application of competition rules to liberal professions see OECD, Roundtable on Competition in Professional Services, Background Note by the Secretariat, DAFFE/CLP(2000)2.

25 See further below.

26 See Office of Fair Trading, *Trade Associations, Professions and Self-Regulating Bodies*, Competition Law Guidelines, December 2004, p. 21.

27 As the United States Supreme Court observed, "*ultimately competition will produce not only lower prices, but also better goods and services. 'The heart of our national economic policy long has been faith in the*

fundamental rights and competition policy objectives, courts around the world have carved out a number of trade association activities from the application of competition rules[28]. Non-competition values are important and, when constitutionally mandated, require deference by competition enforcers. However, competition agencies and courts have always interpreted these exemptions and/or indemnities narrowly, because accommodating these values may sometimes also impose costs on consumers.

4.1 The associational privacy doctrine in the United States

26. A fundamental right of individuals and corporations is the right to associate freely or to join an existing association. An important consequence of the associational privacy doctrine is that membership and participation in the activities of a trade association should not be viewed as a violation of antitrust rules or as sufficient evidence to prove an antitrust conspiracy. Trade associations and their members cannot be held liable under the antitrust statutes simply for exercising a fundamental and constitutionally protected right. This is so even if active participation in a trade association may provide the 'opportunity' for unlawful agreements.[29] Hence antitrust enforcement should not have the effect of depriving individuals of their rights (i.e. to prevent individuals and companies from creating an association or joining an existing one), but should rather scrutinise only those activities of the association which may have anticompetitive effects and harm consumers. As Areeda & Hovenkamp put it: "*to imperil reasonable and procompetitive collaborations would be inconsistent both with the purposes of the antitrust laws and with well-established Supreme Court permission for many kinds of collaboration among competitors*"[30].

27. As a consequence, courts have recognised that trade associations enjoy a constitutional privilege which protects individuals and groups from having to disclose private information concerning their association. If such privileges were not to be recognised, the right of association would be endangered particularly in those instances where the interests advanced by associations pertain to political, religious and economic matters. In the United States, for example, this constitutional privilege is rooted in the First Amendment[31] to the Constitution and includes the protection of the identities of the association's members

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value of competition" (*National Society of Professional Engineers v. United States*, 435 U.S. 679, 695 (1978) (quoting *Standard Oil Co. v. FTC*, 340 U.S. 231, 248 (1951)).

28 This section will not deal with the many statutory exemptions that apply to trade/professional associations and/or to their activities under domestic competition laws. For example, a number of countries such as the United States, Japan, Germany and Australia offer explicit statutory exemptions from the antitrust rules to export associations (also called export cartels). In the US, the earliest 'export exemption' to its antitrust laws dates back to 1918 with the adoption of the Webb-Pomerene Export Trade Act ('WPA'), 15 U.S.C. §§ 61-66 (2001). The WPA, which is still in effect today, allows US firms to join export associations and receive antitrust exemptions, as long as their effects are strictly outside the United States. In 1982, the US Congress expanded upon the antitrust exemptions provided in the WPA when it unanimously passed the Export Trading Company Act (the 'ETC Act'), 15 U.S.C. § 4001(a) (2003). At the time, there were 39 registered Webb Pomerene associations in existence; in 2002 they had reached the number of 155. See, M. C. Levenstein V. Y. Suslow, *The Changing International Status of Export Cartel Exemptions*, Ross School of Business Working Paper Series Working Paper No. 897, November 2004; and Staff Report of the Federal Trade Commission, WEBB Webb-Pomerene Associations: a 50-year Review, 1-7 (1967).

29 See P. Areeda and H. Hovenkamp, Antitrust Law, para 1417b.

30 *Id.* at 105 (footnotes omitted).

31 The First Amendment to the Constitution of the United States provides: "*Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances*" (emphasis added).

and the protection of internal deliberations by members concerning lobbying strategies and tactics[32]. The associational privacy doctrine was articulated by the Supreme Court in 1958[33] in *N.A.A.C.P. v. Alabama ex rel. Patterson*[34]. The Supreme Court, in recognising the freedom to associate, stated that: "*effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association [...] It is beyond debate that the freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech*"[35]. Based on the right of associational privacy, courts have invoked a 'qualified constitutional privilege'. This privilege "*protects the speech and privacy rights of individuals who wish to promulgate their information and ideas in a public forum while keeping their identities secret.*"[36] In the context of discovery, for instance, the privilege operates as a limit to disclosure of information that intrudes on the associational privacy rights of individuals or groups[37].

4.2 The Noerr-Pennington doctrine in the United States

28. One of the primary functions of trade associations is to build consensus among the members on public policy issues affecting the industry and to promote these policy interests with the government and with other public institutions. Such activity, however, may level the playing field among the members of the association and to a certain extent limit competition in the industry. The question of whether trade associations and their members should be subject to antitrust liability for seeking to influence the passage of an anticompetitive public measure was addressed for the first time by the Supreme Court in the United States in two cases in the early sixties: *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*[38] and *United Mine Workers of America v. Pennington*[39]. The holdings in those two cases form the so-called *Noerr-Pennington* doctrine[40].

29. In *Noerr* and in *Pennington*, the Supreme Court recognised that liability under the Sherman Act may not be premised on concerted efforts to secure government-imposed restraints on competition[41]. In

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32 See C. H. Samel and J. A. Carmassi, *Trade Associations: Boundaries in Antitrust Litigation (Part One)*, The Antitrust Litigator, Vol. 5, Nr. 2, Spring 2006.

33 The right of associational privacy evolved in the context of Supreme Court cases involving civil rights during the 1950s and 1960s, and protects the speech and privacy rights of individuals and groups who wish to advocate their ideas in a public forum.

34 357 U.S. 449 (1958).

35 *Id*. at 460.

36 See *Rancho Publ'ns*, 68 Cal.App. 4th at 1547.

37 See C. H. Samel and J. A. Carmassi, *Trade Association: Boundaries in Antitrust Litigation (Part One)*, The Antitrust Litigator, Vol. 5, Nr. 2, Spring 2006.

38 365 U.S. 127 (1961).

39 381 U.S. 657 (1965).

40 For a summary of the doctrine, see *Enforcement Perspectives on the Noerr-Pennington Doctrine*, An FTC Staff Report (2006), available at: http://www.ftc.gov/opa/2006/11/noerr.htm.

41 The doctrine is rooted in the First Amendment, which guarantees to the people the right to petition the government and to freely express its views in public. In addition, the doctrine is underpinned by the principle that competition rules regulate business activity and not political activity. The doctrine, therefore, ensures that antitrust law does not impinge on the government decision making process, whether it be decisions by federal or state governments, which largely depends on the ability of the people to make their wishes known to their representatives. Outside the US, references to the right to petition the government as a limit on antitrust action are fewer. See, for example, the decision of the TAR - Tribunale Amministrativo

Noerr, the Court held that: (1) the Sherman Act does not prohibit efforts to influence the passage and enforcement of laws; and (2) insofar as disparagement of customers and the public was alleged to be part of a strategy to influence legislation and law enforcement, such disparagement was 'incidental' to petitioning and therefore protected as well[42]. The Court also emphasised that the fact that the motive behind the petitioning is to harm competitors was irrelevant, as 'the right of the people to inform their representatives in government' cannot be conditioned on the intent of that action. In *Pennington*, the Court extended the protection in Noerr beyond the legislative arena to prohibit an antitrust challenge to the petitioning of any public official.

30. In the last forty years, the Supreme Court has clarified - and in some cases limited - the scope of the doctrine. In *California Motor Transport Co. v. Trucking Unlimited*[43], the Court held that the doctrine applies also to concerted efforts to influence administrative and judicial proceedings as well as to efforts to influence legislative and executive actions. The Court, however, declined to apply the doctrine to lobbying efforts to affect the standard setting process of a *private* association[44]. The Court also limited the applicability of the doctrine "*[…] where the alleged conspiracy is a mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor and the application of the Sherman Act would be justified*"[45] (so-called 'sham' exception).

4.3 The state action doctrine

31. Many activities of trade and professional associations are established by law or find their justification in public policies. Many associations are expressly given powers by a public entity to set prices or other terms and conditions for exercising a commercial activity (e.g. meeting certain standards or certification requirements). The public entity in some cases is also asked to approve or veto a resolution by the industry association. The question is whether such activities, which can entail serious price or output restrictions on the members of the associations, should be subject to antitrust scrutiny although they are compelled or authorised by law. In various ways, courts have concluded that no antitrust liability can be found if the challenged private conduct (including conduct by trade associations) is determined by lawful public measures. This is the so-called *state action defence*[46].

Regionale del Lazio (Italy) of 25 September 2002 nr. 8235 which excluded from the constitutional protection of the rights of association and free speech private conduct whose primary objective was to distort competition. In the EC, see Commission Decision of 23 December 1992 Cewal, Cowac and Ukwal, in Official Journal L/34 of 10 February 1993, p. 20, referred to in footnote 25 of I. Berti, *Associazione di Imprese e Diritto Antitrust: un Difficile Connubio*, paper presented at the conference on "Antitrust tra diritto nazionale e diritto comunitario", 13 may 2004, Treviso (Italy).

42 365 US at 135-144.

43 404 U.S. 508 (1972).

44 See *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492 (1988).

45 See *California Motor Transport Co. v. Trucking Unlimited* 404 U.S. 508 (1972), at 511. Recently, in *Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc.* (508 U.S. 49 (1993)), the Court clarified the role of intent in the Noerr doctrine, stating that its protection extends to attempts to influence government officials regardless of intent, and that the Court's various applications of the doctrine have demonstrated that neither it nor the sham exception "t*urns on subjective intent alone.*" (at 59).

46 See T. J. Muris, *State Intervention/State Action - A U.S. Perspective,* October 2003, George Mason Law & Economics Research Paper No. 04-18; J. T, Delacourt, and T. J. Zywicki, *The FTC and State Action: Evolving Views on the Proper Role of Government*, Antitrust Law Journal, Vol. 72, No. 3, pp. 1075-1090, 2005.

32. The question of the antitrust liability for conduct directed by the government was addressed by the Supreme Court of the United States for the first time in 1947 in *Parker v. Brown*. In *Parker*, a group of raisin producers agreed on output restrictions and the agreement was subsequently ratified by a state department of agriculture. The Supreme Court held that anticompetitive conduct is immunised from antitrust enforcement if two cumulative conditions are met:

- The conduct "must flow from a clearly articulated and affirmatively expressed state policy"; and
- Be subject to "active state supervision".

33. Under *Parker*, therefore, a conduct that follows the direction of clearly articulated and affirmatively expressed state policy and is subject to active state supervision, is protected from antitrust liability. The state action defence has been applied in a number of cases after *Parker*, including trade association cases, in which US courts have refined and clarified the interpretation of the two *Parker* conditions. In particular, courts have applied close scrutiny to the meaning of 'clear articulation of a state policy', refusing to extend the defence to every governmental activity; courts have also closely scrutinised the application of the 'active supervision' criteria, objecting to the defence where such supervision is *de facto* rarely or never exercised[47]. For example, in *Retail Liquor Dealers Association v. Midcal Aluminium Co.*[48], the defence was denied to a trade association's 'price posting' system because, although the system was established by law, it was not properly supervised as prices continued to be left to the discretion of the participating dealers.

34. In Europe, the European Court of Justice (ECJ) was confronted with the issue of state measures with anticompetitive effects and their relationship with the competition provisions in the EC Treaty since the seventies[49]. Most cases, however, discuss the state action doctrine, which outlaws state measures which hamper the effectiveness of the EC competition rules applicable to undertakings, rather than the state action defence, which immunises private behaviour fully determined by lawful public measures from the competition rules. Already in 1977, the ECJ concluded that: "*while it is true that Article [82] is directed at undertakings, nonetheless it is also true that the Treaty imposes a duty on Member States not to adopt or maintain in force any measure which could deprive that provision of its effectiveness*"[50]; that is, a wide obligation to abstain from depriving Article 82 of its effectiveness. Likewise, continued the Court, "*Member States may not enact measures enabling private undertakings to escape from the constraints imposed by Articles [81] to [89] of the Treaty*"[51].

35. The scope of the duty of Member States not to enact or maintain state measures which may affect the application of the competition rules of the Treaty was clarified over the years by the European courts in a number of cases. In *Eycke*[52], the ECJ re-stated the principle established in GB-Inno-BM that the EC Treaty requires the Member States not to introduce or maintain in force measures, even of a legislative nature, which may render ineffective the competition rules and clarified that "s*uch would be the case, [...], if a Member State were to require or favour the adoption of agreements, decisions or concerted practices contrary to Article [81] or to reinforce their effects, or to deprive its own legislation of its official*

47 See *FTC v. Ticor Tiles Inc.*, 504 US 621 (1992), *cert. denied*, 114 S.Ct. 1292 (1994).

48 445 US 97 (1980).

49 See J. B. Cruz, *The State Action Doctrine*, in Amato & Ehlermann, *EC Competition Law – A Critical Assessment*, 2007, Hart Publishing, pp. 551-590.

50 See Case 13/77, *GB-Inno-BM*, [1977] ECR 2115, para 31.

51 *Id.* at para 33.

52 Case 267/86, *Van Eycke*, [1988] ECR 4769.

character by delegating to private traders responsibility for taking decisions affecting the economic sphere"[53].

36. As for the state action defence, which is the natural complement to the state action doctrine, the Court held that the Member states' obligations under the Treaty are *distinct* from the antitrust liability of the private entities under the EC competition rules[54]. According to the Court, the state action defence is very narrow and it does not exempt private entities from antitrust liability as such. Under EC law, companies are not responsible if their anticompetitive behaviour is required by a public measure and companies had no space for 'autonomous conduct'. The ECJ held that such defence is based on "*the general Community-law principle of legal certainty*"[55]. However, the undertakings are responsible under the EC competition rules and may incur fines if the public measure "*merely encourages, or makes it easier for undertakings to engage in autonomous anti-competitive conduct*". In such cases, antitrust liability can be established but the national legal framework may be taken into account as a 'mitigating factor' to reduce the fine imposed[56].

4.4 Competition rules, self-regulation and professional associations

37. The specificities of liberal professions, which often pursue general public interests such as consumer safety, health care or justice, have often been brought forward in antitrust cases as a basis for a different and more lenient approach when it comes to the application of competition rules to professional associations[57]. The justifications for a different competition law treatment are generally based on three arguments: (1) the asymmetry of information between professionals and their clients; (2) considerations related to the quality of care, health and public service in connection with the delivery of professional services, which may have an impact not only on the direct purchaser of the service but also on third parties[58]; and (3) the public service aspect of professions which, in some cases, are considered to offer public goods that are valuable for the society as a whole. Based on these arguments, professionals have long argued that the legality of restraints imposed by professional associations on their members should be governed by a different antitrust standard than that applicable to non-professionals.

38. In 1975, the US Supreme Court recognised that "[t]he public service aspect, and other features of the professions, may require that a particular practice, which could be viewed as a violation of the Sherman Act in another context, be treated differently [in a professional context]"[59]. According to the Court, the public service aspect of liberal professions may justify treating restraints amongst members of a profession differently from similar restraints amongst non-professionals. Despite this general statement, the 'public service' exception has rarely been used to treat restraints by professional associations differently from

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53 See para 16. The meaning of terms such as 'requiring' or 'favouring' an illegal conduct and 'reinforcing' the effects of such conduct or 'delegating' to private entities public regulatory functions was clarified in a number of cases: Case C-2/91, *Meng*, [1993] ECR I-5751; Case C-245/91, *Ohra,* [1993] ECR I-5851; Case C-185/91, *Reiff*, [1993] ECR I-5801.

54 Case C-198/01, *Consorzio Industrie Fiammiferi*, [2003] ECR I-8055, para 51.

55 *Id.* at para 54.

56 *Id.* at para 56-57.

57 See OECD, Roundtable on Competition in Professional Services, Background Note by the Secretariat, DAFFE/CLP(2000)2.

58 For example, an inaccurate audit may mislead creditors or investors or a poorly constructed building may jeopardise public safety.

59 See *Goldfarb v. Virginia State Bar Association*, 421 US 773, 778, n. 17(1975).

similar conduct by non-professionals. In California Dental[60], for example, the Court accepted as lawful an absolute ban on advertising related to quality imposed on its members by a professional association on the grounds that the restrictions were, at least at face value, designed to avoid false or deceptive advertising, in a market characterised by striking disparities between the information available to the professional and the patient. The inherent asymmetry of knowledge about the service offered made the quality claims asserted by health care professionals hard to verify in theory and in fact by patients. In this case, the Court concluded that the measure had pro-competitive effects as it solved the asymmetry of information problems that existed.

39. In Europe, the ECJ found that professional associations are subject to the competition rules of the EC Treaty but nevertheless concluded that in some circumstances restrictions adopted by professional associations may escape EC competition law scrutiny to the extent that those measures are necessary to insure the proper functioning of the profession, as organised in each Member State. According to the *Wouters* judgment[61], one has to look at the objectives of the measure under scrutiny in order to ensure that the ultimate consumers of the professional services are provided with the necessary guarantees in relation to integrity and experience. The consequential restrictive effects must be inherent to the pursuit of those objectives and must not go beyond what is necessary in order to ensure the proper practice of the profession (the so-called *proportionality test*).

40. Both the US and the European approaches are founded on the acknowledgment that self-regulation by professional associations can be pro-competitive as long as there is a plausible efficiency-enhancing explanation for the restraint. However, antitrust enforcers and courts will not accept the proposition that self-regulation by professional associations is always pro-competitive because of the public service role of professions. The restraint can be found unlawful if it is likely to raise price and restrict output in a manner that would be harmful to consumer welfare. The assessment must be done on a case-by-case basis and the analysis must focus on the subject matter, context and purpose of the measures under examination and the policy objective pursued by the restrictive measure. It is certain that antitrust enforcers and courts will not tolerate outright collusion, for instance on prices or output, simply because the conspirators are professionals.

5. The Application of Antitrust Rules on Hard Core Restrictions to Trade Associations

41. Despite the many pro-competitive aspects of trade associations, they remain by their very nature exposed to antitrust risks. Participation in trade and professional associations' activities provide ample opportunities for companies in the same line of business to meet regularly and to discuss business matters of common interest. Such meetings and discussions, even if meant to pursue legitimate association objectives, bring together direct competitors and provide them with regular opportunities for exchanges of views on the market, which could easily spill over into illegal coordination. Casual discussions of prices, quantities, future business strategies can lead to agreements or informal understandings in clear violation of antitrust rules. It is for this reason that trade associations and their activities are still subject to close scrutiny by competition authorities around the world.

42. By its very nature, any act or any action that involves a trade or professional association can, in theory, result in a restriction of competition. First of all, the act of incorporation and the by-laws of an association are considered an 'agreement' or a 'contract' or a 'combination' between the founding

60 See *California Dental Association v. FTC*, 119 S.Ct. 1604 (1999).

61 See Case C-309/99, *Wouters*, [2002] ECR I-1577. On the approach of the European Commission to competition issues in professional services see the Communication of the Commission of 9 February 2004 (COM/2004/0083 final) available on the web site of the Directorate General for Competition.

members of the association[62]. As agreements, they are fully subject to competition rules on horizontal restraints and restrictions therein may expose the association's members to antitrust liability[63]. Secondly, any decision[64], recommendation or other activity of the association[65] may be capable of restricting competition between the members of the association. Decisions do not need to be formal or binding, nor do they have to be fully complied with[66] to fall within the scope of antitrust rules, provided that they have an appreciable effect on competition. Decisions or recommendations do not have to be expressly approved by the members of the association to give rise to antitrust liability[67]; even an oral exhortation may trigger antitrust liability if it is intended that members should abide by it.

43. Although there is a wide consensus on the fact that trade associations should be subject to competition rules, if only to avoid members escaping antitrust enforcement by acting through the intermediary of the association, the role of a trade association in the infringement may vary significantly, like its liability for the anti-competitive conduct. The members of the association are solely responsible for restrictions in the act of incorporation or in by-laws of the association (e.g. anti-competitive membership criteria). The association, however, may be responsible alongside its members if it had a separate role in suggesting, orchestrating or executing an illegal conduct. Conversely, no liability is imposed on the association if the illegal conduct is put in place by the members without the association being aware of it. This would be, for example, the case if the members of the association were to use the opportunity of the meetings of the association to meet separately (before or after the legitimate association's activities) to fix prices or allocate customers or territories without the association's involvement[68].

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62 The very objectives of the association as agreed by the members in the act of incorporation could have an anticompetitive object. In the Dutch construction and building cartel case, the trade association had among its objectives the prevention of improper conduct in price tendering. Decision of the European Commission, *Building and Construction Industry in the Netherlands*, OJ [1992] L92/1; upheld by the Court of First Instance on appeal, see Case T-29/92, *SPO v. Commission*, [1995] ECR II-289 and by the European Court of Justice, see Case C-137/95, *SPO v. Commission*, [1996] ECR I-1611.

63 See Decision of the European Commission in *National Sulphuric Acid Association*, OJ 1980 L260/24; Decision of the European Commission in *Visa International-Multilateral Interchange Fee*, OJ 2002 L318/17.

64 Article 81 of the EC Treaty expressly covers 'decisions by associations of undertakings' in addition to 'agreements between undertakings'.

65 In the day-to-day conduct of the business of an association, resolutions of the management committee or of the full membership in general meetings, binding decisions of the management or executive committee of the association, or rulings of its chief executive may all be 'decisions' of the association. The key consideration from an antitrust perspective is whether the object or effect of the decision, whatever form it takes, is to influence the conduct or coordinate the activity of the members. See Office of Fair Trading, *Trade Associations, Professions and Self-Regulating Bodies*, Competition Law Guidelines, December 2004.

66 See Case C-96/82, *IAZ international Belgium NV v. Commission*, [1983] ECR 3369.

67 Members of the associations have agreed to empower the association to undertake obligations on their behalf and that may be sufficient, absent an express opposition to a specific association's act or decision, to expose the members to antitrust liability. See Decision of the European Commission in *Fedetab*, OJ 1978 L224/29; on appeal European Court of Justice, *Van Landewyck SARL and Others v. Commission*, [1980] ECR 3125.

68 In two recent international cartel cases - the Lysine Cartel and Citric Acid Cartel - the investigations showed that the conspirators used the 'cover' of the legitimate trade associations' activities to organise parallel, so-called 'unofficial' meetings, where conspirators agreed to fix prices and set market share quotas worldwide. The 'unofficial' conspiratorial meetings would take place on days immediately preceding or following the official trade association meetings. For these reasons, to avoid becoming the

44. While the activities of trade associations are usually under scrutiny for potential infringements of competition rules on horizontal anticompetitive agreements, the activities of trade associations are subject to all antitrust rules, including provisions on vertical restraints[69] and on abuse of dominance/monopolisation[70]. The traditional areas of concern for competition authorities when it comes to trade associations are price fixing, customers/territories allocation and bid-rigging. The next paragraphs include a non-exhaustive overview of these restrictions in the context of trade associations.

5.1 The direct or indirect fixing of prices or other trading conditions

45. If a trade or a professional association directly or indirectly fixes the prices of the product or services that are marketed in competition by its members, such conduct is likely to significantly restrict competition in the market. Most competition authorities consider that such price-fixing arrangements, by their very nature, restrict competition appreciably and should be prohibited *per se* under the competition rules.

46. There are many ways in which an association can fix prices. Price fixing may involve fixing the actual price charged by the association's members as well as one of its components, such as the level of discounts or allowances[71], of the transport fees, of the delivery charges or the level of payments for additional services, credit terms or the terms of guarantees. The association may not fix the actual price but it may achieve the same or a similar result by setting a target price or a minimum price. Equally restrictive is the practice of coordinating the price increases that the association's members can adopt *vis-à-vis* their customers, e.g. by limiting the members' freedom to determine independently the amount or the percentage by which prices are to be increased or by imposing a price range outside which prices cannot vary. Similarly, the obligation on the association's members not to quote a price without consulting in advance the association or the other members is likely to restrict competition.

47. In addition to prices, companies also compete on other terms and conditions of sale. Trade and professional associations may also be involved in the formulation of the standard terms and conditions to be applied by the members in their trading relationships. While not all terms and conditions are likely to have an appreciable effect on competition, if an association imposes on its members an obligation to use common terms and conditions of sale or purchase, this will inevitably restrict competition to some

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vehicle for prohibited horizontal collusion, trade associations usually have in place sophisticated compliance programmes and association staff and/or external counsel carefully monitor and control the activities of the members that take place at association-sponsored activities or that are done in the name of the association. In order to avoid antitrust exposure, it is also important that association activities and meetings have clear and comprehensive agendas and minutes. Unexplained, secret or furtive meetings may raise many suspicions as to the real purpose of the meeting and generate the impression that these are 'cover-ups' for conspiracies to suppress competition. See P. E. Areeda, *Conspiratorial Opportunity, Unexplained meetings, Furtive Behaviour, and Cover-Ups*, in Antitrust Law – An Analysis of Antitrust Principles and Their Applications, Volume 7, paragraph 1417.

69 Many associations represent companies which are active in more than one segment of the same industry sector, such as manufacturers, wholesalers, distributors and retailers. In such cases, the activities of the trade associations can potentially result in unlawful vertical restraints.

70 Trade associations which represent a large share of the industry participants could – in theory - be found to hold market power and therefore be subject to antitrust provisions on unilateral conduct. This could be, for example, the case if the trade association were to refuse, without justification, to extend the benefits of membership to a competitor within the industry.

71 This may also include an understanding promoted by the association that all the members should adhere to the published price lists and offer no discounts to customers on the listed price.

degree[72]. Competition enforcers are less concerned with such standards if the members of the association remain free to adopt other conditions or if only a minor proportion of the association's members adopts the standard conditions, leaving customers with alternative options[73].

5.2 The sharing of customers and/or markets

48. An agreement to share markets has, in economic terms, a similar effect to price fixing, particularly when products are standardised. Customers will ultimately pay higher prices because of the absence of competitive constraints on the exclusive supplier. Market allocation may take different forms: companies can allocate to each other individual customers or entire customer groups; or they can assign to each other exclusive trading territories. Specialisation agreements whereby each competitor specialises in the manufacture of certain products in a product range or in the manufacture of certain components of a product may have similar effects. Antitrust enforcers apply to market sharing and customer allocation a similar standard of review to the one applied for price fixing.

49. Trade and professional associations are sometimes directly involved in exclusive territory and marketing arrangements on behalf of their members. In the European cement cartel[74], for example, the European producers of cement and their trade association agreed on a common rule whereby each competitor would only sell in its home market and export the excess production at previously agreed terms. The market allocation scheme was complemented by a scheme to export outside the Community the excess production. Similarly, In *United States v. Topco*[75], a cooperative association of supermarkets allocated geographic markets for Topco-branded generic products, so that only one of its members would have the use of its brand name in any given area[76].

5.3 Collusive tendering and bid-rigging practices

50. Tenders are designed to achieve a competitive outcome in a situation where competition might otherwise be absent[77]. An essential feature of a tendering system is that prospective suppliers prepare and

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72 While horizontal price restraints are in most jurisdictions reviewed under a *per se* standard of illegality (see for example, *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940), in the United States), non-price related restrictions are reviewed under a rule of reason standard (see for example, *Chicago Board of Trade v. United States*, 246 U.S. 231, 237 (1918), in the United States). In circumstances where the restraint is not a horizontal restraint of price or quantity, courts tend to take into account the nature of the restraint, the scope of the restraint and the possible effects of the restraint on the market, and to consider any competitive or efficiency justifications for the restraint.

73 See Office of Fair Trading, *Trade Associations, Professions and Self-Regulating Bodies*, Competition Law Guidelines, December 2004.

74 See Decision of the European Commission, *Cement*, OJ 1994 L343/1.

75 405 U.S. 596 (1972).

76 Topco was a cooperative association of small and medium-sized independent regional supermarket chains. As its members' purchasing agent, Topco procured more than 1.000 different products, most of which had brand names owned by Topco. Topco's by-laws established an 'exclusive' category of territorial licenses, under which no member could sell Topco-brand products outside the territory in which it was licensed. Thus, expansion into another member's territory was in practice permitted only with the other member's consent. Since each member in effect had a veto power over the admission of a new member, members could control actual or potential competition in their territory.

77 See OECD, Roundtable on Competition in Bidding Markets, Background note of the Secretariat, DAF/COMP(2006)27; and OECD, Roundtable on Public Procurement, The Role of Competition Authorities in Promoting Competition, DAF/COMP/WP3(2007)1.

submit their bids independently. If bidders agree amongst themselves on who should win the tender and/or at what price, this will almost invariably infringe competition rules. Collusive tendering can take many forms. It requires active coordination amongst the prospective bidders and often entails a sophisticated monitoring system. In this respect, trade associations may function as a secretariat for the bid-rigging cartel and collect the information on intended quotes and allocate tenders amongst their members according to an agreed methodology.

51. A good example of the role that associations can play in orchestrating a bid-rigging conspiracy amongst their members is the cartel in the Dutch building and construction industry[78]. Since the early 1950s a number of Dutch associations of firms active in the construction business had drawn up self-imposed rules and codes of conducts with a view to organising competition in the industry. In 1963, those associations established a common organisation (SPO) with the purpose of designing a system of uniform price-regulating rules binding on all the members. In 1986, SPO adopted rules on the procedural framework for tendering for building works. The system had the effect of distorting competition as the members exchanged detailed information prior to the tenders and systematically colluded as to the level of the bids in order to ensure that the 'entitled' bidder would win a particular contract. A sophisticated rotation system ensured that contracts up for tender would be allocated to each participant in equal proportions.

6. Other Trade Associations Activities Which Can Raise Antitrust Concerns

52. Trade and professional associations are currently exposed to antitrust enforcement in a more sophisticated economic environment than that which gave rise to concerns about price-fixing conspiracies referred to by Adam Smith. Naked price fixing or customer allocation conspiracies orchestrated by a trade association are becoming more exceptional and competition enforcement is increasingly focussed on trade associations' practices which facilitate collusion amongst the members of the associations. Active participation in the activities of trade associations is increasingly viewed by competition authorities around the world as a facilitating factor for industry-wide conspiracies to restrain trade. Unduly restrictive membership rules, the exchange of detailed commercial information, the setting of exclusive/closed industry standards, the imposition of marketing restrictions, the adoption of ethical codes on pricing practices or on other trading practices which limit the members' ability to compete freely, are amongst the antitrust-sensitive issues which most affect the activities of trade associations today.

53. Some of these practices, however, may be pro-competitive and under certain circumstances enhance consumer welfare. For this reason, they are often reviewed under a *rule of reason* standard of review. In order to assess whether these practices amount to an unreasonable restraint of competition prohibited under the competition rules, enforcement agencies take into account many factors to weigh the likely pro-competitive effects and the likely restrictive effects of the conduct under examination. Factors like the structure of the market and its degree of concentration, the market shares of the members of the association and the share of the industry that is affected by the association's conduct will be very important factors in the analysis.

6.1 Membership rules and restrictions on access

54. Membership rules or rules on suspension or expulsion from a trade association may have a restrictive effect on competition if they allow the association (and its members) to arbitrarily exclude

[78] Decision of the European Commission, *Building and Construction Industry in the Netherlands*, OJ [1992] L/92/1; upheld by the Court of First Instance on appeal, see Case T-29/92, *SPO v. Commission*, [1995] ECR II-289 and by the European Court of Justice, see Case C-137/95, *SPO v. Commission*, [1996] ECR I-1611.

potential new members from the benefits of the membership. One should not assume, however, that membership is in every case essential for a company engaged in a given industry sector to compete on equal grounds with the association's members. Access restrictions applied to new applicants are particularly harmful only if the association plays an important role in the economy of a given industry sector and has such an influence that non-members would be at a distinct competitive disadvantage *vis-à-vis* members[79]. Conversely, no antitrust harm can be established if the services foreclosed by the refusal to grant membership are in fact not competitively significant or can be easily sourced by non-members from elsewhere. For this reason, a *rule of reason* approach is generally favoured when reviewing membership rules in trade associations[80]. The analysis of the services offered by the association, their availability to competing non-members and the importance of the association on the market are key elements to be taken into account when assessing if access restrictions make it extremely difficult for third parties to enter the market[81].

55. As to the criteria for electing membership, competition laws generally require that membership be voluntary[82] and based on clear, objective[83] and qualitative criteria[84], which are easily ascertainable. It is possible to argue that eligible criteria are reasonable if they are related to the objectives and activities of the association. There should also be in place appropriate procedures to appeal in case of a refusal[85]. The association rules governing the expulsion of members from the association or the suspension of their membership may have similar anticompetitive effects to a refusal to grant membership. Generally, where the underlying membership restrictions do not violate the antitrust laws, the enforcement of those rules by the association is also not illegal[86]. However, expulsion or suspension of members should be reasoned and

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79 See P. Watson and K. Williams, *The Application of the EEC Competition Rules to Trade Associations,* Yearbook of European Law 1998, p. 121; P. M. Vaughan and B. A. Nigro Jr., *Membership (Chapter IV)*, in American Bar Association, Section of Antitrust Law, *Antitrust and Trade Associations: How Trade Regulation Laws Apply to Trade and Professional Associations*, 1996, p. 55-66.

80 The Supreme Court of the United States, in 1985, reversed the *per se* approach that it established in *Associated Press v. United States*, 326 U.S. 1 (1945), in favour of a rule of reason analysis in *Northwest Wholesale Stationers v. Pacific Stationery & Printing Co.*, 472 U.S. 284, 298 (1985).

81 For example, in the Decision of the Commission in *Cauliflowers* (OJ 1978 L21/23) the Commission found that membership in the association gave access to the auction selling 90% of Brittany cauliflowers, artichokes and early potatoes. In the United States, courts require that the association have market power or control access to an element necessary to effective competition: see *United States v. Realty Multy-List Inc.*, 629 F.2d 1351, 1373; *Marrese v, American Academy of Orthopaedic Surgeons*, 1991-1 Trade Cas. ¶ 69,398 (N.D. Ill. 1991); *Massachusetts Board of Registration of Optometry*, 110 F.T.C. at 604.

82 In the European Community, see Decision of the European Commission in *PHC*, reported in 8th Report on Competition Policy, points 81 and 82; Decision of the European Commission in *EATE Levy*, OJ 1985 L219/35, on appeal see the European Court of Justice, *Antib v. Commission,* [1987] ECR 2201.

83 See Court of first Instance, Case T-206/99, *Metropole Télévision v. Commission*, [2001] ECR II-1057.

84 See Decision of the Commission in *Cauliflowers*, OJ 1978 L21/23. According to the OFT, the "*rules of admission as a member of an association of undertakings should be transparent, proportionate, non-discriminatory and based on objective standards.*" (see Office of Fair Trading, *Trade Associations, Professions and Self-Regulating Bodies*, Competition Law Guidelines, December 2004).

85 See Decision of the European Commission in *Sarabex*, reported in the 8th Report on Competition Policy, points 35-37; Decision of the European Commission in *Centraal Bureau voor de Rijwiehandel*, OJ 1978 L20/18.

86 See P. M. Vaughan and B. A. Nigro Jr., *Membership (Chapter IV)*, in American Bar Association, Section of Antitrust Law, *Antitrust and Trade Associations: How Trade Regulation Laws Apply to Trade and Professional Associations*, 1996, p. 55-66.

properly motivated and a right of appeal should be granted[87]. Arbitrary expulsions and expulsions which are not related to the goals of the association may be found to be a restriction of competition[88].

56. Membership in a professional association is often a *conditio sine qua non* for the exercise of a profession. In many countries, membership in a professional association is strictly regulated by the association itself. Market entry regulations by professional associations therefore may act as barriers to entry into the market[89]. Excessively restrictive regulations may result in a reduction of the supply of services with negative consequences for competition and the quality of the service. Empirical studies show that excessive entry restrictions may lead to higher prices for consumers without ensuring higher quality of the services offered[90]. While a certain degree of control on access to the profession may be acceptable to preserve the quality and the standard of the services offered by members of the profession, competition authorities are concerned that unreasonable and unjustified access criteria may result in costs for consumers[91]. For this reason, membership criteria should be qualitative in nature, rather than quantitative, and they should be proportionate to the policy objectives they are meant to serve.

6.2 Collection and dissemination of market information

57. One of the most important tasks of industry associations is to provide their members with information on the development of their industry and particularly with statistical information on economic and business factors relevant for the members' trading activities[92]. The availability of information on the market and its development is generally viewed as critical to develop a competitive environment[93]. For this

87 See Office of Fair Trading, *Trade Associations, Professions and Self-Regulating Bodies*, Competition Law Guidelines, December 2004.

88 See P. Watson and K. Williams, *The Application of the EEC Competition Rules to Trade Associations,* Yearbook of European Law 1998, p. 121; Office of Fair Trading, *Trade Associations, Professions and Self-Regulating Bodies*, Competition Law Guidelines, December 2004.

89 Access is generally conditioned to a number of qualitative factors, such as on training periods, professional examinations, and years of experience, etc.

90 See C. Cox and S. Foster, *The Costs and Benefits of Occupational Regulation*, Bureau of Economics Staff Report to the Federal Trade Commission, 1990, p. 26-27, cited in the Communication of the Commission of 9 February 2004 (COM/2004/0083 final) available on the web site of the Directorate General for Competition.

91 See OECD, Roundtable on Competition in Professional Services, Background Note by the Secretariat, DAFFE/CLP(2000)2.

92 The informational activities of trade associations are extremely useful not only to the market players but to governments and antitrust agencies alike. For example, the European Commission Notice on the Definition of Relevant Market (OJ 1997 C 372/5) expressly foresees that when defining markets the Commission will gather the necessary factual information from the parties, their customers and their competitors and adds that "*the Commission might also contact the relevant professional associations*" (para 33). The Notice continues that, also for the calculation of size of the market and the share of the market held by each supplier, the Commission can rely on information "*often available from market sources, i.e. companies' estimates, studies commissioned from industry consultants and/or trade associations.*" (para 53).

93 On exchanges of information and their pro and antic-competitive effects on competition see K. Kühn and Vives, *Information Exchanges Among Firms and their Impact on Competition*, in Office of the Official Publications of the European Community, 1995, Luxembourg; K. Kühn, *Fighting Collusion - Regulation of Communication Between Firms*, in Economic Policy, April 2001; A. Nilson, *Transparency and Competition*, mimeo, Stockholm School of Economics, 1999; C. Schultz, *Transparency and Tacit Collusion in a Differentiated Market*, mimeo, Stockholm School of Economics, 2002; H. P. Mollgaard e P. B. Overgaard, *Trasparenza di Mercato e Politiche per la Concorrenza*, in Rivista di Politica Economica, 2001; A. J. Padilla and M. Pagano, *Sharing Default Information as a Borrower Discipline Device*,

reason, the availability of information is perceived as a factor to be encouraged; after all, the ideal model of perfect competition is premised on demand-side and supply-side perfect information about the market. The knowledge of the market and its key features (e.g., characteristics of demand, available production capacity, investment plans, etc.) facilitates the development of efficient and effective commercial strategies by the market players[94]. New entrants or fringe players may benefit from this information to enter the market more effectively and to compete more fiercely against incumbents. Increased knowledge of market conditions also benefits consumers, who can choose between competing products with a better understanding of product characteristics; customers can also compare terms and conditions of the various offerings and freely choose the most suitable one for their needs. In these circumstances, increased transparency is a factor that promotes competition.

58. On the other hand, increased transparency is one of the facilitating factors required for tacit collusion to be sustainable on the market[95]. In order to reach terms of coordination, to monitor compliance with such terms and to effectively punish deviations, companies need to acquire detailed knowledge of competitors' pricing and/or output strategies. The artificial removal of the uncertainty about competitors' actions, which is the essence of competition, can in itself eliminate competitive rivalry. This is particularly the case in highly concentrated markets where increased transparency enables the companies to better predict or anticipate the conduct of their competitors and thus to align to it. For this reason, it is important to establish a clear demarcation line between cases where the dissemination underlies an illicit conspiracy and cases where the dissemination of information facilitates healthy and vigorous competition. Drawing such a line may not be easy in practice and depends on many factors including the type and nature of the information exchanged and the structure of the markets involved. In this respect, the role of trade associations is extremely sensitive, as often associations have in place statistical information exchange programs which may provide the ideal context for competing companies to exchange information which is competitively sensitive. The fact that there is no direct contact between competitors but that communications are managed by a trade association does not change the assessment of the practice under competition rules.

59. In many jurisdictions, the criteria that information exchange programs, whether through a trade association or through direct exchanges, have to meet in order to comply with competition rules have been developed in the case law[96]. These cases show that a number of factors are important when antitrust

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European Economic Review, 1999; E. Bissocoli, *Trade Associations and Information Exchanges under US Antitrust and EC Competition Law*, in World Competition, Vol. 23(1), 2000, p. 79; L. Peeperkorn, *Competition Policy Implications from Game Theory: an Evaluation of the Commission's Policy on Information Exchange*, Paper presented at the CEPR/European University Institute Workshop on Recent Developments in Design and Implementation of Competition Policy, Florence, 20 November 1996.

94 There are industry sectors where a certain degree of communication is even necessary to resolve the asymmetry of information about customers and thus to operate the market more efficiently. This is the case, for instance, in the insurance sector, where the exchange of certain information makes it possible to improve the knowledge of risks and facilitates the rating of risks for individual companies. This can in turn facilitate market entry and thus ultimately benefit consumers.

95 See OECD, Roundtable on Price Transparency, Background Note by the Secretariat, DAFFE/CLP(2001)22.

96 In the United States, for example, the first Supreme Court cases to address this issue were as early as the 1920s: *American Column and Lumber Co v. United States*, 257 US 377 394-95 (1921); *United States v. American Linseed Oil Co*, 262 US 371 (1923) and *Maple Flooring Manufacturers Association v. United States*, 268 US 563 (1925). More recent cases include *United States v. Container Corporation of America et al.*, 393 US 333 (1969); and *United States v. United States Gypsum Co. et al.*, 438 US 422 (1978). In the European Union, the leading case on the exchange of information between competitors remains the UK Agricultural Tractor Registration Exchange case, decided by the Commission in 1992, OJ 1992 L68/19; upheld by the Court of First Instance (Case T-34/92, *Fiatagri and New Holland Ford vs. Commission*,

enforcement assess whether an associational information exchange program is likely to restrict competition:

- The type and nature of the information exchanged: competitively sensitive information (*i.e.*, information on the very nature of the business), such as prices, volumes and commercial strategies cannot be shared with competitors[97];

- The level of detail of the information exchanged: the higher the level of detail the higher the possibility for competitors to predict each others' future conduct and to adjust accordingly. In general, antitrust enforcers do not object to the dissemination of aggregated/statistical data, which does not allow for identification of the information related to individual companies;

- The reference period of the information exchanged: the exchange of data regarding future strategies is more troublesome than the exchange of historical data. Information on future conduct is particularly sensitive and should remain within the corporate knowledge of each company. Historical information (even if regarding individual firms) has generally lost its competitive value and cannot affect the future conduct of the companies involved[98].

- The frequency of the exchange: frequent data exchanges allow companies to better (and more timely) adapt their commercial policy to their competitors' strategy and therefore are more likely to lead to anticompetitive effects.

- The concentrated nature of the market in which the parties to the exchange are active: the more concentrated a market is, the easier it is for competitors to reach and enforce sustainable terms of coordination. For this reason, agencies are particularly careful in reviewing exchanges of information which increase transparency in oligopolistic markets, particularly if protected by high entry barriers.

- The nature of the products in question: it is easier for companies to coordinate on a single, homogeneous product than on many differentiated products. In differentiated product markets, access to detailed sensitive information about competitors may not be useful to predict future behaviour of competitors and therefore may not lead to an increase of coordination.

- The beneficiaries of the information exchange programs: agencies also take into account whether the exchange of information is of a private nature - this form of cooperation between firms normally improves only the seller's knowledge of the market - or has a wider public impact on

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[1994] ECR II-905) and by the European Court of Justice (Case C-8/95, *New Holland Ford vs. Commission*, [1998] ECR I-3175). Earlier European cases include in particular *Cobelpa/VNP*, in OJ 1977 L242/10 and *Vegetable Parchment*, in OJ 1978 L70/54 and other cases cited in para. 6 of the 7th Report on Competition Policy (1977).

97 The relevance for collusion of information relating to other subject matters such as deliveries to customers, capacity utilisation, output and sales figures and market shares is not clear-cut. The analysis therefore cannot be done in abstract, but must refer closely to the economic context and to the alleged collusive risk (i.e., data on deliveries to customers may be very relevant if the risk of collusion relates to customer allocation, but may be irrelevant if the collusive arrangement is on the level of discounts).

98 As noted in the Background Note by the Secretariat for the Roundtable on Price Transparency, DAFFE/CLP(2001)22: "*Exchanges of information through trade associations could be less dangerous than direct transfers of sensitive information because intermediation might slow the process and old information is usually less dangerous for competition than up-to-date data - the significance of this point is diminishing as trade associations and their members make increasing use of the Internet.*"

customers as well, who will therefore be in a position to compare the various offers and increase the level of competition. Given the anti-competitive potential of asymmetric price transparency, it would be preferable if trade associations shared as widely as possible any sensitive price data that they have collected, i.e. through media or publications likely to be accessible to both members, non-members and consumers alike.

60. It can be inferred from the paragraphs above that associational information exchange programs can be structured upfront so as to prevent competition concerns. For instance, participation in the statistical programs should be voluntary and open to non-members, and - if possible - the collected information should be made available also to non-members; trade associations should not become the forum for further discussions between members about the data disseminated and its bearing on commercial strategies; and the staff of the trade association involved in collecting and aggregating the information should be independent from the members of the association. In general, there should be no objections to the exchange of information which is (i) historical, i.e. with no direct or indirect bearing on the future commercial strategies of the participants; (ii) anonymous and aggregated, i.e. which does not allow the recipient to identify information concerning individual participants in the exchange[99]; (iii) publicly released, i.e. the data are also available to members who have not participated to the exchange, to non-members and to customers.

6.3 Standard setting and certification programmes

61. Trade associations are often involved in establishing and promoting technical safety and quality standards in the industry. They also run certification programs to ensure that products or services marketed by the members of the association comply with the standards promoted by the industry. Standards can cover a variety of issues, such as grades or sizes of a particular product or technical specifications, but also nomenclatures and the like. Standard setting and certification programmes are generally considered as activities to be promoted. Promulgation by trade associations of a standard can result in significant pro-competitive effects as it lowers information costs, favours interoperability, and creates better products, which are the very benefits that the antitrust laws seek to promote[100].

62. However, as with many other joint activities by direct competitors, standard setting through a trade association may give rise to antitrust liability if the result of the joint effort is to deprive consumers of a desired product, to eliminate quality competition, to exclude producers of rival products or services, to prevent the commercialisation of innovative and lower-cost products, or simply to facilitate oligopolistic pricing by easing rivals' ability to monitor each other's pricing policy[101]. For this reason, standard setting and certification programs are subject to close scrutiny by antitrust agencies, generally under the rule of

99 In some circumstances, the use of third-party, independent firms to collect sensitive information from members and non-members alike and to aggregate it in statistical format may help to ensure compliance with competition rules. This also ensures the anonymity of the individual members who have provided the information.

100 See for example the Supreme Court in the United States, *Allied Tube & Conduit Corp. v. India Head Inc.,* 486 U.S. 492, 500 n. 5 (1988).

101 See R. S. Taffet, *Antitrust and Product Standardization and Certification Activities*, in American Bar Association, Section of Antitrust Law, *Antitrust and Trade Associations: How Trade Regulation Laws Apply to Trade and Professional Associations*, 1996, p. 89.

reason standard of review. To determine whether a standard setting program may result in a restriction of competition a number of factors are generally taken into account[102]:

- Participation in the standardisation process: In order for a standard setting process to be successful and to yield the pro-competitive effects mentioned above, it should be the outcome of a wide discussion in the industry and it should be supported by a wide consensus. For this reason, participation in the standard setting process should be unrestricted (i.e. non-members should also be allowed to participate) and transparent. This is normally the case for standards adopted by the recognised standards bodies which are based on non-discriminatory, open and transparent procedures.

- The market coverage of the standardisation process: standard setting efforts which have a negligible coverage of the industry are unlikely to raise competition concerns. High market coverage, however, does not necessarily amount to a concern as the effectiveness of a standardisation process is often proportional to the share of the industry involved in setting and/or applying the standard. On the other hand, standards that are not accessible to third parties may discriminate or foreclose third parties thereby restricting competition. Therefore, if the standard is set by companies which are jointly dominant, creating a *de facto* industry standard, it is important that the standard be as open as possible and applied in a clear and non-discriminatory manner.

- The scope of the standardisation process: similarly, it is unlikely that agencies would oppose standardisation processes which affect minor aspects of the commercial activities of the members of the standardisation body, such as minor product characteristics, forms and reports, or any other factor which has a non-appreciable effect on competition in the market.

- Binding standards v. voluntary standards: the adoption of a standard does not justify restricting innovation beyond the standard. Thus, there should be no obligation to comply with the standard, as the potentially restrictive effects of a standardisation agreement largely depend on the parties' inability to develop alternative technologies or products with features which do not comply with the agreed standard.

- Consumers benefit from the standardisation process: while one should assume that in most circumstances consumers can make informed decisions as to what technical or quality requirements they prefer, there are markets where consumer information is sufficiently imperfect or incomplete that standard setting is actually helpful and pro-competitive. This is the case in complex markets such as health care, or markets where technical complexity, safety and compatibility issues are important.

6.4 Other possible restrictions: advertising/marketing activities and trade exhibitions

63. There are other ways in which associations can interfere with the members' freedom to determine their commercial strategy independently from the association and from the other members of the associations. Two potentially restrictive practices deserve mentioning: restrictive marketing/advertising rules imposed by the association on its members and associational restrictions on trade fairs and exhibitions.

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[102] For the treatment of standardisation agreements in the European Union, see the European Commission Notice, Guidelines on the applicability of Article 81 of the EC Treaty to Horizontal Cooperation Agreements, OJ 2001 C 3/2, Chapter 6.

64. According to economic theory, advertising may facilitate competition by informing and educating consumers about different product features and characteristics[103]. Advertising provides a means by which consumers can compare products and services and seek out what suits their needs and financial means best, ultimately ensuring better informed purchasing decisions. The existence of severe advertising restrictions can thus make it more difficult for consumers to determine the likely price of a given product/service, and hence contribute to consumer ignorance. It is not uncommon, however, for trade associations to issue rules regulating their members' marketing activities, including promotional and advertising activities. In some cases advertising as such is prohibited. In others, specific media or advertising methods such as radio advertising, television advertising, 'cold calling' or specific types of advertising content are imposed. These restrictions may raise antitrust concerns despite the fact that in some instances they may be justified by the asymmetry of information between suppliers and consumers. This is particularly the case for some professional services where consumers may find it especially complex to assess information about professional services (such as quality claims about specific services offered) and therefore need particular protection from misleading or manipulative assertions[104].

65. Trade associations also organise trade fairs and exhibitions which bring together all industry players (manufacturers, wholesalers, distributors, retailers and customers) of a given sector and help promote a wide range of products. Both manufacturers and customers benefit from these events, which overall enhance competition in the sector. However, certain rules imposed by the trade associations organising such events may restrict competition. These restrictions often concern admission rules and the so-called 'restraints periods' (i.e. periods before or after the trade fair in which the participants are prohibited from exhibiting elsewhere); other restrictions may also apply such as limitation on the participants' freedom to promote or market products which are not present at the fair. A general concern with these types of restrictions is that trade shows may be used for exclusionary purposes. For this reason, admission should be open to everyone on a non-discriminatory basis[105]. However, restrictions on participation in trade fairs may be justified (and therefore accepted by antitrust agencies) if based on genuine problems in relation to limited exhibit space. Restraints periods may also have an exclusionary effect as they prevent participants from promoting their products in competing events.

7. Consequences of Antitrust Infringements by Trade Associations

66. In most jurisdictions, the infringement of competition laws exposes the participants to sanctions and penalties. Consequences of an antitrust infringement can vary significantly, depending on the national antitrust system involved, but they usually range from the imposition of a criminal sanction (such as the imprisonment of those responsible for the illegal conduct) to the imposition of an administrative fine. Fines can be imposed either on the corporation or on the individuals who have actually participated in the conspiracy or on both. Companies involved in an antitrust infringement may also be called to account for the damages caused by their illegal conduct in various measures.

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103 See P. W.Farris and D. J. Reibstein, *Consumer Prices and Advertising*, in Encyclopaedic Dictionary of Business Ethics, P. H. Werhane and R. E. Freeman, Blackwell Publishers Inc., 1997, p. 139-141; A. Mitra and J. Lynch, *Toward a Reconciliation of Market Power and Information Theories of Advertising Effects on Price Elasticity,* Journal of Consumer Research, 1995, 21(4), p. 644-660.

104 See Communication of the Commission of 9 February 2004 (COM/2004/0083 final) available on the web site of the Directorate General for Competition. See also *Bates v. State Bar of Arizona*, 4333 U.S. 350 (1965) and *American Medical Association v. FTC*, 455 U.S. 676 (1982); *California Dental Association v. FTC*, 119 S.Ct. 1604 (1999).

105 See Decision of the European Commission, *Sippa*, OJ 1991 L60/19; Decision of the European Commission, *Internationale Dentalschau*, OJ 1987 L 293/58; *British Dental Trade Association (BTDA)*, reported in the 27th Report on Competition, point 54. Similarly, in the United States, see *United States v. Western Winter Sports Representatives Association*, 1962 Trade Cas. (CCH) § 70,418 (N.D. Cal 1962).

67. Associations are not immune from the consequences of an antitrust infringement. However, the application of competition rules to associations may raise specific issues when it comes to determining the monetary sanctions for the illegal conduct of the association. In most cases, particularly where the association did not have an active role in the conspiracy, competition authorities prefer to go after the members of the association who are indeed the main beneficiaries of the illegal conduct, as the association is rarely involved in marketing activities itself. However, when the association is responsible for organising and executing the infringement, the association can be subject to fines separately from the members. This has raised practical difficulties, as fines to trade associations based on the trade association turnover may not achieve the necessary deterrent effect, not only towards the association concerned (specific deterrence) but also towards other associations engaged in practices that are contrary to competition laws (general deterrence).

68. A first issue relates to the relevant turnover that agencies should take into consideration when calculating the amount of the fine. If agencies were to take into account only the turnover of the association, the amount of the fine and the related deterrent effect would be minor. Associations generally are not active on the market and their turnover can be limited to the membership fees charged to the members. An administrative fine calculated on that basis would have no relation whatsoever to the actual impact on the market of the illegal conduct. For this reason, agencies have tried to lift the associational veil and to take as reference for the fine the turnover of the members of the association[106]. Regulation 1/2003[107], for example, allows the European Commission to impose a fine of up to 10% of "*the sum of the total turnover of each member active on the market affected by the infringement of the association*" provided that "*the infringement of an association relates to the activities of its members*"[108] The same principles are stated in the European Commission's Guidelines on the Method of Setting Fines[109].

69. A second important issue with which antitrust agencies are often confronted is how to enforce monetary sanctions against an association. As noted above, associations normally do not have a turnover and their assets are generally quite limited. Consequently, if the fine imposed on the association is calculated on the basis of the turnover of the association's members, it is quite likely that the association will not have the financial means to meet its obligations. For this reason, Regulation 1/2003 has introduced a new provision under which if the fine imposed on the association takes into account the turnover of its members and the association is not solvent, the association is obliged to call for contributions from its members to cover the amount of the fine[110]. If such contributions are not made to the association within a time-limit fixed by the European Commission, the Commission can demand the payment of the fine directly from any of the members of the decision-making bodies of the association and subsequently,

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106 On the other hand, this may create serious problems for the agency in cases where membership is dispersed, as it is generally the case for professional associations which enlist thousands of professionals with relatively little turnover.

107 See Regulation 1/2003 (OJ 2003 L1/1), Article 23.

108 Such an approach was supported by the European courts which in the past held that "*the correctness of this view is borne out by the fact that the influence which an association of undertakings has been able to exert on the market does not depend on its own 'turnover, which discloses neither its size nor its economic power, but rather on the turnover of its members, which constitutes an indication of its size and economic power.*" (Case C-298/98 P, *Metsä-Serla Sales Oy v. Commission*, [2000] ECR I-10157, para 12 and para 62-74). See also Joined Cases T-39/92 and T-40/92, *CB and Europay v. Commission*, [1994] ECR II-49, and Case T-29/92, *SPO and Others v. Commission*, [1995] ECR II-289; Joined Cases T-213/95 and T-18/96, *SCK and FCK v. Commission*, [1997] ECR II-1739; Case T-338/94, *Metsä-Serla Sales Oy v. Commission*, [1998] ECR II-1617.

109 OJ 2006 C/210/2, para 14 and 33.

110 See Article 23, para 4.

where necessary, to ensure full payment of the fine, the Commission can request payment of the balance from any of the members of the association. Regulation 1/2203, however, allows one or more members of the association to refuse payment of the fine imposed on the association if they can show that: (i) they have not implemented the decision of the association infringing EC competition rules and either (ii) were not aware of its existence or (iii) have actively distanced themselves from it before the Commission started its investigation.

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