Organisation de Coopération et de Développement Économiques
Organisation for Economic Co-operation and Development

09-Aug-2011

English - Or. English

DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE

DAF/COMP/LACF(2011)8
Unclassified

LATIN AMERICAN COMPETITION FORUM

Session I: Competition Issues in Trade Associations

Background Note

13-14 Septembre 2011, Bogotá (Colombia)

This Background Note was prepared by the OECD Secretariat. It is circulated FOR DISCUSSION under Session I of the Latin American Competition Forum at its forthcoming meeting to be held on 13-14 September 2011 (Colombia).

Contact: Ms. Hélène Chadzynska, Administrator, LACF Programme Manager
Tel.: +33 (01) 45 24 91 05; Fax: +33 (0)1 45 24 96 95; Email: helene.chadzynska@oecd.org

JT03305832

English - Or. English

LATIN AMERICAN COMPETITION FORUM

-- 13-14 September 2011, Bogota (Colombia) --

Session I: Competition Issues in Trade Associations

Background Note by the OECD Secretariat

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. Before focussing on some of the most important immunities and exemptions from antitrust laws that may apply to trade associations and their activities, the Note first discusses the notion of 'association' for antitrust purposes. The last part of this Note then provides an overview of 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 the 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. Finally, a summary box is included with suggestions that trade associations should consider to limit the risk of anti-competitive activities.

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 co-operate and collaborate.

4. Co-operatives 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 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 co-operation, however, often favoured explicitly co-operative 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 co-operation, in an effort to control 'combinations' and 'trusts' of businesses (hence the word 'antitrust'), which pursued joint profit maximisation through co-ordinated 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 101 TFEU (formerly Article 81 EC) on anticompetitive agreements to include *"[…] all agreements between undertakings, decisions by associations of undertakings and concerted practices […]"*.[3] Likewise, Article 3 of the Mexican Federal Law of Economic Competition (*Ley Federal de Competencia Económica* - LFCE) explicitly recognises that *"All economic agents are subject to the provisions of this law, whether*

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.

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

3 Article 101(1) TFEU, emphasis added.

natural or legal persons, profit or non-profit, departments and entities of the federal, state or municipal public administration, associations, commercial chambers, professional associations, trusts or any other form of participation in economic activities".[4]

2. Defining 'associations' for antitrust purposes

6. 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[5] 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[6].

7. The term 'association', however, is very wide and includes many forms of co-operation 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 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.

8. 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

4 Ley Federal de Competencia Económica (Mexico), last version published in DOF of 10 May 2011.

5 See Article 101 of the Treaty on the Functioning of the European Union (hereafter TFEU).

6 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.

applicability of competition rules[7]. 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[8]. 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.

9. 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[9]. Unlike trade associations, the main activity of a typical joint 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[10].

10. Generally, there are three main categories of associations which have an antitrust relevance: trade associations; professional associations and other self-regulating organisations[11].

11. 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 organisation, join together in order to take joint actions that further their commercial or professional goals*"[12]. In modern economies, there are trade associations in

7 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.

8 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 EU 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.

9 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.

10 *Id.*, at 1478.

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

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

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.

12. 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[13]. 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 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.

13. 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[14]. 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

---

13 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.

14 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.

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[15].

14. 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[16].

15. 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.

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

16. 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[17]. Costa Rica's Law for the Promotion of Competition and Effective Consumer Protection (*Ley de Promoción de la Competencia y Defensa Efectiva del Consumidor*), for instance, recognises the "*right of the chambers and private associations to self-regulate their economic activities, to ensure efficient provision of services to society, with strict observance of ethical principles and respect for the freedom of competition of the economic agents and to prevent behaviours, which are prohibited and sanctioned by this law*". It also states, however that "*[p]articipation in such associations can neither limit free access to the neighbouring market nor impede the competitiveness of the new economic measures*".[18]

17. In order to prevent conflicts between these fundamental rights and competition policy objectives, courts around the world have carved out a number of trade association activities from the application of

15 See further below.

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

17 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 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)).

18 Ley No. 7472 de Promoción de la Competencia y Defensa Efectiva del Consumidor (Costa Rica)

competition rules[19]. 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.

3.1 The associational privacy doctrine in the United States

18. 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.[20] 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*"[21].

19. 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[22] to the Constitution and includes the protection of the identities of the association's members and the protection of internal deliberations by members concerning lobbying strategies and tactics[23]. The

---

19 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).

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

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

22 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).

23 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.

associational privacy doctrine was articulated by the Supreme Court in 1958[24] in *N.A.A.C.P. v. Alabama ex rel. Patterson*[25]. 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*"[26]. 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.*"[27] 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[28].

3.2 The Noerr-Pennington doctrine in the United States

20. 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.*[29] and *United Mine Workers of America v. Pennington*[30]. The holdings in those two cases form the so-called *Noerr-Pennington* doctrine[31].

21. 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[32]. In

---

24 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.

25 357 U.S. 449 (1958).

26 *Id*. at 460.

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

28 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.

29 365 U.S. 127 (1961).

30 381 U.S. 657 (1965).

31 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.

32 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 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,

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[33]. 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.

22. 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*[34], 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[35]. 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*"[36] (so-called 'sham' exception).

3.3 The state action doctrine

23. 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*[37].

24. 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

---

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).

33 365 US at 135-144.

34 404 U.S. 508 (1972).

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

36 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).

37 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.

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".

25. 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[38]. For example, in *Retail Liquor Dealers Association v. Midcal Aluminium Co.*[39], 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.

26. In Europe, the Court of Justice of the European Union (ECJ) was confronted with the issue of state measures with anticompetitive effects and their relationship with the competition provisions in the EU Treaty since the seventies[40]. Most cases, however, discuss the state action doctrine, which outlaws state measures which hamper the effectiveness of the EU 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 (*now Article 102 TFEU*) 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*"[41]; that is, a wide obligation to abstain from depriving Article 102 TFEU 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* (now Article 101 TFEU) *to 89* (now Article 109 TFEU) *of the Treaty*"[42].

27. 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*,[43] the ECJ re-stated the principle established in GB-Inno-BM that the EU 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* (now Article 101 TFEU) *or to reinforce their effects, or to deprive its own*

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

39 445 US 97 (1980).

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

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

42 *Id.* at para 33.

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

legislation of its official character by delegating to private traders responsibility for taking decisions affecting the economic sphere" [44].

28. As for the state action defence, which is the natural complement to the state action doctrine, the Court held that the antitrust liability of the private entities under the EU competition rules is *distinct* from the Member states' obligations under the Treaty.[45] According to the Court, the state action defence is very narrow and it does not exempt private entities from antitrust liability as such. Under EU law, companies are not responsible if their anticompetitive behaviour is required by a public measure and companies had no space for 'autonomous conduct'.[46] The ECJ held that such defence is based on "*the general Community-law principle of legal certainty*"[47]. However, the undertakings are responsible under the EU 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[48].

3.4 Competition rules, self-regulation and professional associations

29. 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[49]. 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[50]; 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.

30. 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]"[51]. 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

---

44 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.

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

46 Case C-280/08P, *Deutsche Telekom v. European Commission*, [2010] ECR-0000, paras. 81-82.

47 *Id.* at para 54.

48 *Id.* at para 56-57.

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

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

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

similar conduct by non-professionals. In California Dental[52], 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.

31. In Europe, the ECJ found that professional associations are subject to the competition rules of the EU Treaty but nevertheless concluded that in some circumstances restrictions adopted by professional associations may escape EU 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[53], 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*).

32. 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.

4. The application of antitrust rules on hard core restrictions to trade associations

33. 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 co-ordination. 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.

34. 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

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

53 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[54]. As agreements, they are fully subject to competition rules on horizontal restraints and restrictions therein may expose the association's members to antitrust liability[55]. Secondly, any decision[56], recommendation or other activity of the association[57] 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[58] 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[59]; even an oral exhortation may trigger antitrust liability if it is intended that members should abide by it.

35. 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[60].

---

54 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.

55 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.

56 Article 101 TFEU expressly covers 'decisions by associations of undertakings' in addition to 'agreements between undertakings'.

57 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 co-ordinate the activity of the members. See Office of Fair Trading, *Trade Associations, Professions and Self-Regulating Bodies*, Competition Law Guidelines, December 2004.

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

59 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.

60 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 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

36. 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[61] and on abuse of dominance/monopolisation[62]. The traditional areas of concern for competition authorities when it comes to trade associations are price fixing, customers/territories allocation and bid-rigging.

37. A number of competition authorities have, in recent years, issued guidance on the potentially anti-competitive aspects of trade associations' activities. Despite this recent trend, such guidance has been in place in some countries for more than twenty years (*e.g.* in Korea since 1986 and in Japan since 1995). While the length and the level of detail of these guidance documents may vary, national competition authorities focus on similar key concerns. These include: recommendations on pricing, market sharing and other trading conditions, standard contracts, collective boycotts, participation in meetings, exchanges of information, advertising, and standard setting. The table below lists some of the guidelines published by competition authorities in OECD member countries.

"Competition authority guidance on trade associations"

Country	Autority, Document and Link
Australia	Australian Competition and Consumer Commission (ACCC) (2011) *"Professions and the Competition and Consumer Act"* http://www.accc.gov.au/content/item.phtml?itemId=926503&nodeId=422a6403260b1ca6197ca0a967e92953&fn=Professions%20and%20the%20CCA.pdf
Canada	Competition Bureau of Canada (CB) (2008) *"Draft Information Bulletin on Trade Associations"* http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/02730.html
Chile	Fiscalía Nacional Económica (FNE) (2011) *"Asociaciones Germiales y Libre Competencia: Guía para la Acción"* http://www.fne.gob.cl/wp-content/uploads/2011/05/guia_asociaciones_version_final_26012011.pdf
Ireland	The Irish Competition Authority (TCA) (2009) *"Notice on Activities of Trade Associations and Compliance with Competition Law"* http://www.tca.ie/EN/Promoting-Competition/Guidance-Notes/Trade-Associations.aspx

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.

61 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.

62 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. See, for instance, *Associated Press v. United States*, 326 U.S. 1 (1945), where the United States Supreme Court found that by limiting membership in the organisation, and thereby refusing access to its copyrighted news services, the Associated Press bylaws violated Section 1 and 2 of the Sherman Act. See also section 5.1 on membership rules and restriction on access.

Country	Autority, Document and Link
Japan	Japan Fair Trade Commission (JFTC) (1995) *"Guidelines Concerning the Activities of Trade Associations under the Antimonopoly Act"* http://www.jftc.go.jp/en/legislation_guidelines/ama/pdf/tradeassociation.pdf (2001) *"Guidelines Concerning the Activities of Associations Conducting of Qualified Professional under the Antimonopoly Act"* http://www.jftc.go.jp/en/legislation_guidelines/ama/pdf/qualify.pdf (1994) *"Guidelines Concerning the Activities of Firms and Trade Associations with Regard to Public Bids"* http://www.jftc.go.jp/en/legislation_guidelines/ama/pdf/publicbids.pdf (1981) *"Guidelines Concerning the Activities of Medical Association under the Antimonopoly Act"* http://www.jftc.go.jp/en/legislation_guidelines/ama/pdf/medicalassociations.pdf
Korea	Korea Fair Trade Commission (KFTC) (1986) *"The Guidelines on Business Associations' Activities"* (latest amendment in August 2009) http://www.ftc.go.kr/laws/laws/popRegulation.jsp?lawDivCd=01&firstFtcRelLawNo=446
Mexico	Comisión Federal de Competencia (CFC) (2010) *"Guía de Cumplimento de la Ley de Competencia para Asociaciones, Cámaras Empresariales y Agrupaciones de Profesionistas"* http://www.cfc.gob.mx/images/stories/Documentos/guias/asoccamarasyagrup.pdf
New Zealand	Commerce Commission (CC) (2010) *"Guidelines for Trade Associations"* http://www.comcom.govt.nz/guidelines-for-trade-associations/
Spain	Comisión Nacional de Competencia (CNC) (2009) *"Guía para las Asociaciones Empresariales"* http://www.cncompetencia.es/Inicio/Infomes/GuíasyRecomendaciones/tabid/177/Default.aspx
United Kingdom	Office of Fair Trading (OFT) (2004) *"Trade associations, professions and self-regulating bodies: Understanding Competition Law"* http://www.oft.gov.uk/shared_oft/business_leaflets/ca98_guidelines/oft408.pdf

38. The next paragraphs include a non-exhaustive overview of these restrictions in the context of trade associations.

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

39. 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.

40. 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[63], of the transport fees, of the delivery charges or the level of payments for

63 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.

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 co-ordinating 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.

41. 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 degree[64]. 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[65].

Involvement of associations in the fixing of prices or other conditions: recent cases

In **Spain** in 2009, the CNC fined the Spanish Federation of Food and Beverage Industries (FIAB) together with eight other associations active in the food sector, for collectively recommending prices.[66] The associations had issued a series of press releases in which they signaled to members that due to certain cost increases, consumer prices would have to be increased.

In July 2009, the **Irish** Competition Authority lodged cases in the High Court against the Licensed Vintners Associations (LVA) and the Vintners' Federation of Ireland (VFI) – the main trade associations representing publicans in Ireland. The associations were found to be in contempt of court for having implemented a one-year price freeze among their members, which was announced in a joint press release published in December 2008.[67] While a price-freeze may have been beneficial to consumers if implemented during a period of high inflation, the Competition Authority found that in view of the expected price deflation, the price-freeze was as "harmful to consumers as an agreement to raise prices in a normal inflationary environment".[68] The Court shared the Commission's view that such conduct infringed both Irish and EU competition law. Furthermore the measure was held to have breached undertakings given by the associations in the original cases instigated in 1998.

In a case concerning a voluntary fees structure in the Austrian association of builders, the **Austrian** Supreme Court ruled that a non-binding recommendation can fall under Article 101(1) TFEU if the aim of the association is to co-ordinate the conduct of its members.[69] The Supreme Court dismissed the Association's arguments that the fee

64 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.

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

66 CNC resolution, Case S/0053/08 *FIAB and Members*, 14 October 2009.

67 The Irish Competition Authority, The Annual Report 2009, p. 21

68 Ibid.

69 Austrian Supreme Court (Oberste Gerichtshof), 20 December 2005, Case no. 16 Ok 45/05, Honorarordnung der Baumeister.

structure was not commonly applied by its members. The Court followed the ECJ judgment in *Verbrand der Sachversicherer*[70] and concluded that whether the fee structure was actually applied in practice was irrelevant since it is unnecessary to take actual effects into account if the practice has as its object the prevention, restriction or distortion of competition.

In **Nicaragua**, in May 2011, the National Institute for the Promotion of Competition (*Instituto Nacional de Promoción de la Competencia* – Procompetencia), sanctioned the Association of Private Banks of Nicaragua for colluding to fix the interest rates for credit cards.[71] The Association argued *inter alia*, that as it is not an economic agent it is not subject to the application of Law 601 (Law for the Promotion of Competition). According to the Institute, agreements elaborated by competitors within trade associations are, on the one hand, capable of producing efficiencies beneficial to consumers. On the other hand, such agreements can also produce inefficiencies that are detrimental to consumers, and as such would be contrary to Article 1 of the Competition Law. Consequently, associations, such as ASOBANP, are obliged to comply with the Competition Law given that their activities can impact directly the market in a manner that can be either harmful or beneficial to consumers.

In **Panama**, a decision is currently pending before the First Civil Court in *Transporte de Carga Colón.*[72] In that case, the Authority for the Protection of the Consumer and Defence of Competition (*Autoridad del Protección al Consumidor y Defensa de la Competencia* – ACODECO) accused several associations and co-operatives of haulage companies that transport containers between the ports and the Colón Free Zone, and between the latter and Panamá City of naked collusion. It is alleged that the companies sent a note to their clients, which included a list of new higher tariffs for the transportation of containers.

In **Chile** there have been several cases involving trade associations. In the price fixing case, *FNE vs. AM Patagonia S.A. et al*, for instance, the Chilean Competition Tribunal (*Tribunal de Defensa de la Libre Competencia* – TDLC), imposed in 2007 a sanction against 74 of the 84 doctors in the city of Punta Arenas for colluding to fix prices in the supply of various medical services via a joint company.[73]

4.2 The sharing of customers and/or markets

42. 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.

43. 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.

70 Case 45/85, *Verbrand der Sachversicherer v. Commission*, [1987] ECR 405.

71 Procompetencia, Red Nacional de Defensa de los Consumidores (RNDC) v. Asociación de Bancos Privados de Nicaragua (ASOBANP) y sus miembros, Resolution No. 0003-2010 of 17 May 2011, available at : http://www.procompetencianic.org/salaprensa/2011/mayo/Resolucion-ASOBAMP.pdf

72 The complaint was filed before the court on 29 October 2009.

73 TDLC, Ruling No. 74/2008 of 2 November 2008, and confirmed by the Supreme Court in 29 December 2008, Rol 5937-08.

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

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 co-operative 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].

Sharing of customers and/or markets: recent cases

In January 2009, the **Chilean** Competition Tribunal (Tribunal de Defensa de la Libre Competencia – TDLC) fined a trade association of bus owners in *FNE v. Asociación Gremial de Buses Interbus*[77], for a collusive agreement aimed at the exclusion of a new entrant - the bus company Costa Cordillera. The association was providing urban and inter-city transport services in Chile's seventh region The defendant submitted that it had not engaged in any unlawful anti-competitive behaviour but was simply seeking to lawfully protect their participation in the transport market. Moreover, the trade association argued that it was not an economic agent. The TDLC, however, condemned the association and its directors for having adopted a series of exclusionary practices that had as their object and effect the exclusion of a competitor from the market. In its reasoning, the Tribunal rejected the defendant's argument that a trade association cannot be part of a collusive agreement. It found that the participating operators had suspended their independent competitive actions, and entrusted the association with the division of the market and allocating contracts with the specific objective to exclude a new competitor. Overall, the practices adopted by the parties (such as rotation, monitoring of the decisions adopted by the associated service providers and the imposition of fines) amounted to collusion.

In **Brazil**, the Administrative Council for Economic Defence (*Conselho Administrativo de Defesa Econômica* – CADE) concluded in 2007 that sixteen corporations, three trade associations and eighteen individuals had participated in a long-running bid rigging scheme in the market for the provision of security guard services in the state of Rio Grande do Sul.[78] The evidence showed that the parties held regular meetings at a trade association's headquarters and elsewhere, and that they had engaged in concerted practices, dividing contracts among themselves and adopting predatory pricing schemes to punish firms that deviated from the cartel lists' agreement.

4.3 Collusive tendering and bid-rigging practices

44. Tenders are designed to achieve a competitive outcome in a situation where competition might otherwise be absent[79]. An essential feature of a tendering system is that prospective suppliers prepare and 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

75 405 U.S. 596 (1972).

76 Topco was a co-operative 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 TDLC, Ruling No. 82/2009 of 22 January 2009, confirmed by the Supreme Court on 25 June 2009, Rol. 1856-2009. Similar facts arose also in *FNE v. Asociación Gremial de Dueños de Mini Buses Agmital*, TDLC, Ruling No. 102/2010 of 11 August 2010.

78 Rota-Sul Empresa de Vigilancia Ltda., (2007).

79 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.

forms. It requires active co-ordination 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.

45. 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[80]. 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.

5. Other trade associations activities which can raise antitrust concerns

46. 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.

47. 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.

5.1 Membership rules and restrictions on access

48. 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 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-*

[80] 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.

vis members[81]. 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[82]. 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[83].

49. As to the criteria for electing membership, competition laws generally require that membership be voluntary[84] and based on clear, objective[85] and qualitative criteria[86], 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[87]. 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[88]. However, expulsion or suspension of members should be reasoned and properly motivated and a right of appeal should be granted[89]. Arbitrary expulsions and expulsions which are not related to the goals of the association may be found to be a restriction of competition[90].

---

81 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.

82 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).

83 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.

84 In the European Union, 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.

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

86 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).

87 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.

88 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.

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

90 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.

50. 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[91]. 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[92]. 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[93]. 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.

5.2 Collection and dissemination of market information[94]

51. 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[95]. The availability of information on the market and its development is generally viewed as critical to develop a competitive environment[96]. For this reason, the availability of information is perceived as a factor to be encouraged; after all, the ideal model of

---

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

92 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.

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

94 See also OECD, Roundtable on Information Exchanges between Competitors under Competition Law, DAF/COMP(2010)37.

95 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).

96 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*, 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.

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[97]. 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.

52. On the other hand, increased transparency is one of the facilitating factors required for tacit collusion to be sustainable on the market[98]. In order to reach terms of co-ordination, 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. In other words, the exchange of information within a trade association by its members can either facilitate collusion, or increase market transparency to the point where competition can no longer exercise the necessary pressure on the market players. 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.

Information Exchanges between Competitors: recent cases

The scope for anticompetitive practices within trade associations has recently become a key concern for the **Spanish Competition Commission** (CNC). In 2011, the CNC sanctioned three trade associations for infringements of competition law committed either by the associations themselves or by their members. Two of these three cases concerned exchanges of information. In the case of STANPA, the CNC imposed fines of around €900,000 on the National Perfumery and Cosmetics Association. The association itself was fined for exchanging commercially sensitive information within some of its sub-committees in February 2011. Subsequently, in March 2011, the association together with its members was fined for exchanging information regarding the market for professional hair-care.[99]

97 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.

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

99 CNC resolution, Case S/0086/08, *Peluquería Profesional*, 2 March 2011.

In the **United States,** Section 1 Sherman Act claims against trade associations are usually brought by private plaintiffs. In a recent FTC enforcement action that involved potentially anti-competitive activities of a trade association, *In re National Association of Music Merchants Inc*,[100] the FTC questioned the role of the association in the process of exchanging competitively sensitive information aimed at restricting retail price competition. To settle the charges, the association entered into a consent decree with the FTC, which required the association to refrain from taking part in price-related information sharing and to implement an antitrust compliance programme.

In the **European Union**, an opportunity to examine exchanges of information between competitors within a trade association presented itself to the European Court of Justice in the preliminary ruling *Asnef/Equifax* case.[101] The Court considered an online register of Asnef, the Spanish association of financial institutions, which provided the lenders with risk-related information. While the register contained some sensitive information, the Court found that it was established to limit the risk of credit institutions, and as such it did not have as its object the restriction of competition. In 2009, the ECJ adopted a strict approach to information exchange in the *T-Mobile Netherlands* case.[102] While the exchange took place between mobile telecommunications operators, which were not associated, the findings of the Court are nevertheless relevant to this topic. The Court ruled that *"[…] an exchange of information which is capable of removing uncertainties between participants as regards the timing, extent and details of the modifications to be adopted by the undertaking concerned must be regarded as pursuing an anti-competitive object"*.

In 2006, the **Chilean** FNE brought a case before the TDLC against AGMital, a local transport trade association, alleging that a price-fixing agreement among the participants to charge a predatory tariff in the same route, was aimed at excluding a non-associated entrant. In its 2010 judgement, the TDLC imposed a fine on trade association (equivalent to fifty units of annual taxes).[103] AGMital's information exchange mechanism was used as a means to design and implement the price-fixing agreement.

In January 2011, the FNE published draft guidelines for public consultation - *Trade Associations and Competition: A Guide for Action*, which includes guidance on the exchange of information.[104] Given that the exchange of information within a trade association does not necessarily have anti-competitive effects, the FNE notes that it will take into account all the circumstances in which the specific exchange of information took place. In particular, the FNE will examine the characteristics of the market, the nature of the information exchanged, the firms involved, the frequency of exchanges, the mechanism used, the effects produced by the exchange as well as any other element that it deems relevant.

In **Mexico** Article 9 of the LFCE provides that any exchange of information among competitors with the purpose (object) or effect of fixing or manipulating the purchase or sale price of goods and services constitutes a *per se* infringement of law. In order to assess whether a general exchange of information would be contrary to the provisions of the LFCE, the CFC considers factors such as the structure of the market (the level of concentration), the nature and scope of the information exchanged, whether it is of a private nature or has a wider public impact, and the kind of evidence available. Moreover, some examples of information that should not be exchanged within associations have been listed by the CFC in the short *Compliance Guide with the LFCE for Associations, Professional Chambers and Professional Associations* published in 2010.[105]

100 *In re National Association of Music Merchants, Inc*., FTC Dkt No. C-4255 (2009)

101 ECJ, Case C-238/05, *Asnef-Equifax/Ausbanc*, [2006] ECR I-11125.

102 ECJ, Case C-8/08, *T-Mobile Netherlands and others*, [2009] ECR I-4529.

103 TDLC, Ruling No. 102/2010. Spanish text available at: http://www.tdlc.cl/DocumentosMultiples/Sentencia_102_2010.pdf

104 See table "Competition authority guidance on trade associations", Section 4.

105 See table "Competition authority guidance on trade associations", Section 4.

53. 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[106], and then consolidated in guidelines and other policy documents.[107] For example, in Europe, in January 2011, the European Commission published a new set of Horizontal Guidelines, which reflect both EU case law and the European Commission's practice in the area of information exchange between competitors.[108] The Guidelines apply to information exchanged in various contexts, including trade associations.

54. The cases, as well as the European Commission's Horizontal Guidelines, demonstrate that a number of factors are important when antitrust 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.[109] The Irish Competition Authority explains in its Notice on Activities of Trade Associations that where information exchange takes place in parallel with practices that have as the object the restriction of competition *(i.e.* price fixing, output restriction), both practices will be examined in combination.[110]
- **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

106 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*, [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).

107 See table "Competition authority guidance on trade associations", Section 4.

108 Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union ('TFEU') to horizontal co-operation agreements of 14 January 2011, [2011] OJ C 1/11.

109 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).

110 TCA, *Notice on Activities of Trade Associations and Compliance with Competition Law*, Decision N/09/002, (2009).

company. Historical information (even if regarding individual firms) has generally lost its competitive value and cannot affect the future conduct of the companies involved[111].

- **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 Chilean FNE, for instance, recommends that in order to decrease the risk of anti-competitive effects of information exchange, the frequency of such exchanges should be reduced.[112]
- **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 co-ordination. 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 co-ordinate 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 co-ordination.
- **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 co-operation between firms normally improves only the seller's knowledge of the market - or has a wider public impact on 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.

55. 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[113]; (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.

---

111 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.*"

112 FNE, *Asociaciones Gremiales y Libre Competencia: Guía para la Acción,* (2011)

113 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.

5.3 Standard setting and certification programmes[114]

56. 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[115].

57. 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[116]. For this reason, standard setting and certification programs are subject to close scrutiny by antitrust agencies, generally under the rule of 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[117]:

- **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.

---

114 See OECD, Roundtable on Standard Setting, DAF/COMP(2010)33

115 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).

116 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.

117 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.

- **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.

Standard setting: recent cases

In 2010, the **South African** Competition Tribunal examined a standard-setting case, which involved the Vehicle Security Association (VESA), an industry association for firms engaged in the vehicle security industry.[118] The association allowed its Stolen Vehicle Recovery (SVR) sub-committee to set the standard for membership to the VESA SVR committee. The Tribunal determined that the resulting performance-based criteria operated to exclude rival firms from effectively entering in the market to compete with incumbents who had been approved in terms of the standard.

In 2007, following the discussions with the **Australian** Competition and Consumer Commission (ACCC), the Royal Australian College of Physicians (RACP) and the Royal Australian and New Zealand College of Radiologists (RANZCR) amended their Standards for Accreditation of Nuclear Medicine Practices.[119] The ACCC was concerned that accreditation standards restricted competition insofar as they created artificial boundaries providing protection to service providers in particular geographic areas. Both RACP as well as RANZCR agreed to review their standards and subsequently amended them accordingly.

In **Brazil**, in November 2004, the Brazilian Association of the Manufacturers, Distributors, Merchants and Importers of Sunglasses (ABRACSOL) accused the Brazilian Optical Industry Association (ABIÓPTICA) of facilitating supplier discrimination through the creation of the ABIÓPTICA Stamp of Origin and Safety. According to ABRACSOL, only companies that used the stamp could participate in the ABIÓPTICA trade fair, a key regional and international optical market trade fair. ABRACSOL claimed that the stamp would restrict their members' operations. It also alleged that the ABIÓPTICA standard would limit competition and would increase supplier transaction costs, without delivering any efficiency enhancing benefits. As a result, the Ministry of Justice, the Secretariat for Economic Monitoring (SEAE) established an administrative procedure to investigate possible anticompetitive conduct by ABIÓPTICA. SEAE concluded that ABIÓPTICA's rules, related to the use of the stamp, were anti-competitive and referred the case to SDE for further investigation.

118 Competition Commission and Tracetec (Pty) Ltd and Netstar (Pty) Ltd, Matrix Vehicle Tracking (Pty) Ltd, Tracker Network (Pty) Ltd and Vehicle Security Association of South Africa, Case No: 17/CR/Mar05, Judgment of 19 April 2010.

119 ACCC, Press release MR 322/07, available at: http://www.accc.gov.au/content/index.phtml/itemId/804928/fromItemId/622975.

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

58. 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.

59. According to economic theory, advertising may facilitate competition by informing and educating consumers about different product features and characteristics[120]. 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[121].

60. 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[122]. 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.

---

120 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.

121 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).

122 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).

6. Consequences of Antitrust Infringements by Trade Associations

61. 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.

62. 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).

63. A first issue relates to the relevant turnover that agencies should take into consideration when calculating the amount of the fine. In the Portuguese *Veterinarian Medical Association* (VMA) 2007 case, the Lisbon Court of Appeal upheld the decision of the Competition Authority (PCA), fining the association for price fixing.[123] On the other hand, though, it followed the Lisbon Court of Commerce ruling insofar as the amount of the fine was concerned. Having considered the turnover of the association instead of its associates the Court reduced the amount of the fine. In reaching this decision, the Court pointed out that the price fixing resulted from the decisions taken by the association, and that if its associates were to be fined, the Court "would have to disregard VMA as a legal person and presume that all veterinarians participated in the decision making".[124]

64. 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[125]. Regulation 1/2003[126], for example, allows the European Commission to impose a fine of up to 10% of "*the sum of the total turnover of each member*

123 Lisbon Court of Appeals (Tribunal da Relação de Lisboa), 5 July 2007, Case 8638/06-9, 9. Secção do Tribunal da Relação de Lisboa, *VMA/PCA Veterinarian Medical Association.*

124 José Luís Da Cruz Vilaça, "A Portuguese Court upholds Competition Authority decision that imposed a fine to an association for price fixing, but reduces the amount of the fine by considering the association turnover as relevant in place of the associates' turnover (Veterinarian Medical Association)", e-Competitions, No. 21920.

125 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.

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

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*"[127] The same principles are stated in the European Commission's Guidelines on the Method of Setting Fines[128].

65. 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[129]. 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, 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 EU 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.

7. Compliance with competition law: practical suggestions for trade associations

66. The above review of cases and national guidelines demonstrates the antitrust risks that trade associations by their very nature are exposed to. Nevertheless trade associations can and do engage in pro-competitive industry enhancing functions. The following sets out some suggestions that trade associations should consider in order to manage and limit the risk of anti-competitive activities.

Promoting compliance with competition law: what can trade associations do?

- **Membership rules**: Trade associations can set membership rules. These should be objective, transparent, non-discriminatory and based on legitimate objectives. Association members should, as a matter of principle, be expelled only if they have breached a clearly defined non-arbitrary rule.
- **Meetings**: Trade associations can circulate agendas in advance of meetings and can establish a policy of recording and circulating the minutes of meetings. They can, and should, remind members at the beginning of each meeting that certain types of information, prices and any price-related matters in particular, must not be discussed. An association staff or counsel should always be present at the meetings.

127 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.

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

129 See Article 23, para 4.

- **Collection and dissemination of information**: The information exchanged can be (i) historical data, with no bearing on future commercial strategies; (ii) anonymous and aggregated data; (iii) publically released data which is available to other members, non-members and customers. Trade association staff or third-party independent firms can collect and aggregate the information to avoid competitors exchanging information directly. Participation to the information exchange programme should be voluntary and open to non-members. Trade associations can make the collected information available to non-members.

- **Standard setting**: Associations can set product or performance standards with the objective of ensuring the quality of products or services overseen by the association and promoting ethical standards within the industry. Standard setting can contribute to the better functioning of markets so long as it does not lead to output restraints or co-ordinated high prices, and the standards are not unjustifiably exclusionary.

- **Advertising/marketing activities and trade exhibitions**: Trade associations can facilitate advertising campaigns of the association or of its members to promote the industry and which do not have an impact on firms' ability to compete. Trade associations can also organise trade fairs which are open to everyone on a non-discriminatory basis.

- **Compliance programmes/training**: Trade associations can introduce "best practices"/risk avoidance for their members through compliance programmes and training on what is confidential, why it is of concern and simple do's and don'ts.

REFERENCES

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

Areeda and Hovenkamp, Antitrust Law – An Analysis of Antitrust Principles and Their Applications, Volume 7, paragraphs 1417, 1417b, 1477, 1478.

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).

Bissocoli, Trade Associations and Information Exchange under US and EC Competition Law, World Competition 23(1), 79-106, 2000.

Cox and Foster, The Costs and Benefits of Occupational Regulation, Bureau of Economics Staff Report to the Federal Trade Commission, 1990.

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

Da Cruz Vilaça, "A Portuguese Court upholds Competition Authority decision that imposed a fine to an association for price fixing, but reduces the amount of the fine by considering the association turnover as relevant in place of the associates' turnover (Veterinarian Medical Association)", e-Competitions, No. 21920.

Delacourt and 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.

European Commission, Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union ('TFEU') to horizontal cooperation agreements of 14 January 2011, [2011] OJ C 1/11.

European Commission Notice, Guidelines on the applicability of Article 81 of the EC Treaty to Horizontal Cooperation Agreements, OJ 2001 C 3/2.

European Commission, Communication of the Commission of 9 February 2004, Report on Competition in Professional Services (COM/2004/0083 final).

European Commission, Guidelines on the Method of Setting Fines.

European Commission, Notice on the Definition of Relevant Market.

Farris and 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.

Federal Trade Commission, Staff Report on Enforcement Perspectives on the Noerr-Pennington Doctrine, (2006).

Federal Trade Commission, Staff Report on the WEBB Webb-Pomerene Associations: a 50-year Review, (1967).

Feldman and 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.

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

Kühn and Vives, Information Exchanges Among Firms and their Impact on Competition, in Office of the Official Publications of the European Community, 1995, Luxembourg.

Kühn, Fighting Collusion - Regulation of Communication Between Firms, in Economic Policy, April 2001.

Levenstein and Suslow, The Changing International Status of Export Cartel Exemptions, Ross School of Business Working Paper Series Working Paper No. 897, November 2004.

Mitra and 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.

Mollgaard e Overgaard, Trasparenza di Mercato e Politiche per la Concorrenza, in Rivista di Politica Economica, 2001.

Muris, State Intervention/State Action - A U.S. Perspective, October 2003, George Mason Law & Economics Research Paper No. 04-18.

Nilson, Transparency and Competition, mimeo, Stockholm School of Economics, 1999.

OECD, Roundtable on Information Exchanges between Competitors under Competition Law, DAF/COMP(2010)37.

OECD, Roundtable on Standard Setting, DAF/COMP(2010)33OECD, Roundtable on Competitive Restrictions in Legal Professions, Background Note of the Secretariat, DAF/COMP/WP2(2007)3.

OECD, Roundtable on Public Procurement, The Role of Competition Authorities in Promoting Competition, Background Note of the Secretariat, DAF/COMP/WP3(2007)1.

OECD, Roundtable on Competition in Bidding Markets, Background Note of the Secretariat, DAF/COMP(2006)27.

OECD, Roundtable on Enhancing Beneficial Competition in Health Professions, Background Note of the Secretariat, DAF/COMP(2005)45.

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

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

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

Padilla and Pagano, Sharing Default Information as a Borrower Discipline Device, European Economic Review, 1999.

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.

Samel and Carmassi, Trade Associations: Boundaries in Antitrust Litigation (Part One), The Antitrust Litigator, Vol. 5, Nr. 2, Spring 2006.

Schaede, Self-Regulation, Trade Associations and the Antimonopoly Law in Japan, 2000, Oxford University Press.

Schultz, Transparency and Tacit Collusion in a Differentiated Market, mimeo, Stockholm School of Economics, 2002.

Shaffer, Trade Associations and Self Regulation, 20 Sw U.L. Rev. 289 (1991).

Taeush, Policy and Ethics in Business (1931).

Watson and Williams, The Application of the EEC Competition Rules to Trade Associations, Yearbook of European Law 1998, p. 121.