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# POTENTIAL PRO-COMPETITIVE AND ANTI-COMPETITIVE ASPECTS OF TRADE/BUSINESS ASSOCIATIONS

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## FOREWORD

This document comprises proceedings in the original languages of a Roundtable on Potential Pro-Competitive and Anti-Competitive Aspects of Trade/Business Associations held by the Competition Committee (Working Party No. 3 on Co-operation and Enforcement) in October 2007.

It is published under the responsibility of the Secretary General of the OECD to bring information on this topic to the attention of a wider audience.

This compilation is one of a series of publications entitled "Competition Policy Roundtables".

## PRÉFACE

Ce document rassemble la documentation dans la langue d'origine dans laquelle elle a été soumise, relative à une table ronde sur les Eventuels Aspects Proconcurrentiels et Anticoncurrentiels des Associations Commerciales/Professionnelles qui s'est tenue en octobre 2007 dans le cadre du Comité de la concurrence (Groupe de Travail No. 3 sur la coopération et l'application de la loi).

Il est publié sous la responsabilité du Secrétaire général de l'OCDE, afin de porter à la connaissance d'un large public les éléments d'information qui ont été réunis à cette occasion.

Cette compilation fait partie de la série intitulée "Les tables rondes sur la politique de la concurrence".

**OTHER TITLES**
**SERIES ROUNDTABLES ON COMPETITION POLICY**

| | | |
|---|---|---|
| 1. | Competition Policy and Environment | OCDE/GD(96)22 |
| 2. | Failing Firm Defence | OCDE/GD(96)23 |
| 3. | Competition Policy and Film Distribution | OCDE/GD(96)60 |
| 4. | Competition Policy and Efficiency Claims in Horizontal Agreements | OCDE/GD(96)65 |
| 5. | The Essential Facilities Concept | OCDE/GD(96)113 |
| 6. | Competition in Telecommunications | OCDE/GD(96)114 |
| 7. | The Reform of International Satellite Organisations | OCDE/GD(96)123 |
| 8. | Abuse of Dominance and Monopolisation | OCDE/GD(96)131 |
| 9. | Application of Competition Policy to High Tech Markets | OCDE/GD(97)44 |
| 10. | General Cartel Bans: Criteria for Exemption for Small and Medium-sized Enterprises | OCDE/GD(97)53 |
| 11. | Competition Issues related to Sports | OCDE/GD(97)128 |
| 12. | Application of Competition Policy to the Electricity Sector | OCDE/GD(97)132 |
| 13. | Judicial Enforcement of Competition Law | OCDE/GD(97)200 |
| 14. | Resale Price Maintenance | OCDE/GD(97)229 |
| 15. | Railways: Structure, Regulation and Competition Policy | DAFFE/CLP(98)1 |
| 16. | Competition Policy and International Airport Services | DAFFE/CLP(98)3 |
| 17. | Enhancing the Role of Competition in the Regulation of Banks | DAFFE/CLP(98)16 |
| 18. | Competition Policy and Intellectual Property Rights | DAFFE/CLP(98)18 |
| 19. | Competition and Related Regulation Issues in the Insurance Industry | DAFFE/CLP(98)20 |
| 20. | Competition Policy and Procurement Markets | DAFFE/CLP(99)3 |
| 21. | Regulation and Competition Issues in Broadcasting in the light of Convergence | DAFFE/CLP(99)1 |
| 22. | Relationship between Regulators and Competition Authorities | DAFFE/CLP(99)8 |
| 23. | Buying Power of Multiproduct Retailers | DAFFE/CLP(99)21 |
| 24. | Promoting Competition in Postal Services | DAFFE/CLP(99)22 |
| 25. | Oligopoly | DAFFE/CLP(99)25 |
| 26. | Airline Mergers and Alliances | DAFFE/CLP(2000)1 |
| 27. | Competition in Professional Services | DAFFE/CLP(2000)2 |
| 28. | Competition in Local Services | DAFFE/CLP(2000)13 |
| 29. | Mergers in Financial Services | DAFFE/CLP(2000)17 |
| 30. | Promoting Competition in the Natural Gas Industry | DAFFE/CLP(2000)18 |
| 31. | Competition Issues in Electronic Commerce | DAFFE/CLP(2000)32 |
| 32. | Competition and Regulation Issues in the Pharmaceutical Industry | DAFFE/CLP(2000)29 |
| 33. | Competition Issues in Joint Ventures | DAFFE/CLP(2000)33 |
| 34. | Competition Issues in Road Transport | DAFFE/CLP(2001)10 |

| | | |
|---|---|---|
| 35. | Price Transparency | DAFFE/CLP(2001)22 |
| 36. | Competition Policy in Subsidies and State Aid | DAFFE/CLP(2001)24 |
| 37. | Portfolio Effects in Conglomerate Mergers | DAFFE/COMP(2002)5 |
| 38. | Competition and Regulation Issues in Telecommunications | DAFFE/COMP(2002)6 |
| 39. | Merger Review in Emerging High Innovation Markets | DAFFE/COMP(2002)20 |
| 40. | Loyalty and Fidelity Discounts and Rebates | DAFFE/COMP(2002)21 |
| 41. | Communication by Competition Authorities | DAFFE/COMP(2003)4 |
| 42. | Substantive Criteria used for the Assessment of Mergers | DAFFE/COMP(2003)5 |
| 43. | Competition Issues in the Electricity Sector | DAFFE/COMP(2003)14 |
| 44. | Media Mergers | DAFFE/COMP(2003)16 |
| 45. | Non Commercial Services Obligations and Liberalisation | DAFFE/COMP(2004)19 |
| 46. | Competition and Regulation in the Water Sector | DAFFE/COMP(2004)20 |
| 47. | Regulating Market Activities by Public Sector | DAF/COMP(2004)36 |
| 48. | Merger Remedies | DAF/COMP(2004)21 |
| 49. | Cartels: Sanctions against Individuals | DAF/COMP(2004)39 |
| 50. | Intellectual Property Rights | DAF/COMP(2004)24 |
| 51. | Predatory Foreclosure | DAF/COMP(2005)14 |
| 52. | Competition and Regulation in Agriculture: Monopsony Buying and Joint Selling | DAF/COMP(2005)44 |
| 53. | Enhancing Beneficial Competition in the Health Professions | DAF/COMP(2005)45 |
| 54. | Evaluation of the Actions and Resources of Competition Authorities | DAF/COMP(2005)30 |
| 55. | Structural Reform in the Rail Industry | DAF/COMP(2005)46 |
| 56. | Competition on the Merits | DAF/COMP(2005)27 |
| 57. | Resale Below Cost Laws and Regulations | DAF/COMP(2005)43 |
| 58. | Barriers to Entry | DAF/COMP(2005)42 |
| 59. | Prosecuting Cartels without Direct Evidence of Agreement | DAF/COMP/GF(2006)7 |
| 60. | The Impact of Substitute Services on Regulation | DAF/COMP(2006)18 |
| 61. | Competition in the Provision of Hospital Services | DAF/COMP(2006)20 |
| 62. | Access to key Transport Facilities | DAF/COMP(2006)29 |
| 63. | Environmental Regulation and Competition | DAF/COMP(2006)30 |
| 64. | Concessions | DAF/COMP/GF(2006)6 |
| 65. | Remedies and Sanctions | DAF/COMP(2006)19 |
| 66. | Competition in Bidding Markets | DAF/COMP(2006)31 |
| 67. | Competition and Efficient Usage of Payment cards | DAF/COMP(2006)32 |
| 68. | Vertical mergers | DAF/COMP(2007)21 |
| 69. | Competition and Regulation in Retail Banking | DAF/COMP(2006)33 |
| 70. | Improving Competition in Real Estate Transactions | DAF/COMP(2007)36 |
| 71. | Public Procurement – The Role of Competition Authorities in Promoting Competition | DAF/COMP(2007)34 |
| 72. | Competition, Patents and Innovation | DAF/COMP(2007)40 |
| 73. | Private Remedies | DAF/COMP(2006)34 |

| | | |
|---|---|---|
| 74. | Energy Security and Competition Policy | DAF/COMP(2007)35 |
| 75. | Plea Bargaining Settlement of Cartel Cases | DAF/COMP(2007)38 |
| 76. | Competitive Restrictions in Legal Professions | DAF/COMP(2007)39 |
| 77. | Dynamic Efficiencies in Merger Analysis | DAF/COMP(2007)41 |
| 78. | Guidance to Business on Monopolisation and Abuse of Dominance | DAF/COMP(2007)43 |
| 79. | The Interface between Competition and Consumer Policies | DAF/COMP/GF(2008)10 |
| 80. | Facilitating Practices in Oligopolies | DAF/COMP(2008)24 |
| 81. | Taxi Services Regulation and Competition | DAF/COMP(2007)42 |
| 82. | Techniques and Evidentiary Issues in Proving Dominance/ Monopoly Power | DAF/COMP(2006)35 |
| 83. | Managing Complex Merger Cases | DAF/COMP(2007)44 |

## TABLE OF CONTENTS

## EXECUTIVE SUMMARY

***By the Secretariat***

Considering the discussion at the roundtable, the member country submissions, and the background paper of the Secretariat, a number of key points emerge:

*(1) Trade associations play valuable, fundamental roles as forums for the discussion and exchange of views on important issues of common interest for the industry sector which they represent. Many trade associations activities should be supported and encouraged, because they promote the efficient functioning of the market.*

Trade associations consist of individuals and firms with common commercial interests, joining together to further their commercial or professional goals. The important role played by trade associations in modern economies is widely recognised. Their activities benefit their members – especially the smaller members – but they may also be beneficial in increasing the efficiency of the market.

Although their principal function is to provide services to their members, trade associations also have important 'industrial policy' and 'political' functions. Most trade associations take an active role in shaping the way their industry works. They promote product standards and best practices, and 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. Trade associations also promote, representing and protecting the interests of members on legislation, regulations, taxation and policy matters likely to affect them.

*(2) Many trade association activities benefit from statutory and non-statutory exemptions or immunities from the application of competition rules, to permit them to perform these beneficial roles.*

In many countries, the existence and some of the activities of trade associations are protected by fundamental rights of freedom of association and expression and the right to freely petition the government. In order to prevent conflicts between these fundamental rights and competition policy objectives, many jurisdictions have exempted a number of trade association activities from the application of competition rules. However, these exemptions are generally interpreted narrowly, because accommodating these values may sometimes also impose costs on consumers.

A fundamental right of individuals and corporations is the right to associate freely or to join an existing association. An important consequence of this right is that membership and participation in the activities of a trade association should not be viewed as a violation of antitrust rules as such 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.

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. In order to preserve the associations' right to petition governments, some jurisdictions have exempted from antitrust liability concerted efforts to secure government-imposed restraints on competition. For competitors to lobby the government to change the law in a way that would reduce competition cannot be a violation of the antitrust laws, unless the concerted action is a mere "sham" to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor.

Many activities of trade and professional associations are established by law or find their justification in public policies. Some 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 many countries, 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. Under the so-called "state action" or "regulated conduct" doctrines, companies are not liable under the antitrust statutes if their anticompetitive behaviour is required by a public measure and companies have no space for autonomous conduct.

*(3) Trade associations may offer opportunities for direct competitors to meet repeatedly. This could easily spill over into illegal and anticompetitive activities and favour collusion and coordinated exclusionary conduct.*

Trade associations remain by their very nature exposed to antitrust risks, despite their many pro-competitive aspects. Participation in trade and professional associations' activities provide ample opportunities for companies in the same line of business to meet regularly and to discuss business matters of common interest. Such meetings and discussions, even if meant to pursue legitimate association objectives, bring together direct competitors and provide them with regular opportunities for exchanges of views on the market, which could easily spill over into illegal coordination. Casual discussions of prices, quantities and 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 subject to close scrutiny by competition authorities around the world.

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. Members of an association that create it would be responsible for restrictions in the act of incorporation or in by-laws of the association (e.g. anti-competitive membership criteria). The association itself, however, may be responsible alongside its members if it had a separate role in suggesting, orchestrating or executing an illegal conduct. No liability should be imposed on the association if the illegal conduct is put in place by the members without the association being aware of it.

The traditional areas of concern about trade associations are price fixing, allocation of customers or territories and bid-rigging. Naked price fixing or customer allocation conspiracies orchestrated

by a trade association are becoming rarer, though. Competition enforcement is increasingly focussed on trade associations' practices that facilitate collusion among the members. Unduly restrictive membership rules, exchange of detailed and sensitive commercial information, exclusive or closed industry standards, marketing restrictions, and "ethical" codes regulating pricing or other trading practices that limit the members' ability to compete freely are among the antitrust-sensitive issues which most affect the activities of trade associations today.

*(4) Associations may be liable for antitrust infringements, but the application of competition rules to associations may raise specific issues when it comes to determining and assessing monetary sanctions.*

In most jurisdictions, the infringement of competition laws exposes the participants to sanctions and penalties. Trade associations are not immune from the consequences of an antitrust infringement, and when they are responsible for organising and executing the infringement, they can be subject to fines separately from the members. This has raised practical difficulties in practice, 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).

A first issue relates to the relevant turnover that agencies should take into consideration when calculating the amount of the fine. If only the turnover of the association is taken into account, then the fine is likely to be small and the deterrent effect limited. Associations generally are not active on the market. Their turnover consist mostly of membership fees. An administrative fine calculated on that basis would have no relation to the 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.

A second important issue is how to enforce monetary sanctions against a trade association. Not only is their turnover typically small, but their assets are also often limited. 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, some countries have introduced provisions 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.

## SYNTHESE

***Par le Secrétariat***

De l'examen des débats de la table ronde, des contributions soumises par les pays membres et du document de référence du Secrétariat, il se dégage un certain nombre de points essentiels :

*(1)* *Les associations commerciales jouent un rôle précieux, fondamental, en tant que cadres de discussion et d'échange de vues sur des questions importantes d'intérêt commun pour la branche d'activité qu'elles représentent. Bon nombre de leurs activités doivent être soutenues et encouragées car elles favorisent le fonctionnement efficient du marché.*

Les associations commerciales regroupent des personnes et des entreprises ayant des intérêts commerciaux communs et qui s'unissent afin de promouvoir leurs objectifs commerciaux ou professionnels. Le rôle important joué par ces associations commerciales dans les économies modernes est généralement reconnu. Leurs activités profitent à leurs membres – surtout aux petites entreprises – mais elles peuvent aussi contribuer à renforcer l'efficacité des mécanismes du marché.

Bien qu'elles aient pour fonction principale d'offrir des services à leurs membres, les associations commerciales remplissent aussi des fonctions « de politique sectorielle » et « des fonctions politiques ». La plupart d'entre elles contribuent activement à façonner le mode de fonctionnement de leur secteur. Elles encouragent l'adoption de normes de produit et de bonnes pratiques et elles définissent les modalités et conditions de vente standard et en assurent la promotion. Elles publient et font appliquer des codes d'éthique et, dans certains cas, elles fixent et font respecter les règles de fonctionnement de leur branche. Elles formulent des recommandations à l'intention de leurs membres sur diverses questions d'ordre commercial et autres. Par ailleurs, les associations commerciales promeuvent, représentent et défendent les intérêts de leurs membres en matière juridique, réglementaire, fiscale ou dans tout autre domaine de l'action publique qui peut les concerner.

*(2)* *Bon nombre des activités des associations commerciales bénéficient d'exemptions ou d'immunités légales et autres les dispensant de l'application des règles de la concurrence afin de leur permettre de remplir ces rôles au profit de leurs membres.*

Dans beaucoup de pays, l'existence et certaines des activités des associations commerciales sont protégées par les droits fondamentaux de liberté d'association et d'expression et par le droit d'adresser librement des pétitions au gouvernement. Afin d'éviter tout conflit entre ces droits fondamentaux et les objectifs de la politique de la concurrence, de nombreux tribunaux ont soustrait un certain nombre d'activités exercées par les associations commerciales du champ d'application des règles de la concurrence. Cependant, ces exemptions sont généralement interprétées en termes restrictifs dès lors que la prise en compte de ces valeurs pourrait imposer des coûts aux consommateurs.

Un droit fondamental des personnes et des entreprises est le droit de s'associer librement ou d'adhérer à une association existante. Il s'ensuit notamment que l'adhésion et la participation aux activités d'une association commerciale ne peut être tenue pour une infraction au droit de la

concurrence non plus que pour une preuve suffisante de complot du point de vue du droit de la concurrence. Les associations commerciales et leurs membres ne peuvent être tenus pour responsables, aux fins du droit de la concurrence, pour le simple fait d'exercer un droit fondamental, protégé par la constitution. Cela vaut même si la participation active à une association commerciale peut procurer une « occasion » de conclure des accords illicites.

Les associations commerciales ont pour fonction essentielle de faire en sorte que leurs membres parviennent à s'entendre sur les questions de politique publique qui concernent leur secteur et de promouvoir ces intérêts auprès du gouvernement et des pouvoirs publics. Cette activité peut cependant induire un nivellement des conditions de concurrence entre les membres et, dans une certaine mesure, au sein du secteur. Afin de préserver le droit des associations d'adresser des pétitions au gouvernement, certains tribunaux ont exempté de la responsabilité en vertu du droit de la concurrence les efforts concertés en vue d'assurer que les pouvoirs publics imposeront des restrictions à la concurrence. Le fait que des concurrents exercent des pressions sur le gouvernement afin d'obtenir une modification de la loi de façon à réduire la concurrence ne peut pas être une violation des lois antitrust à moins que l'action concertée ne soit qu'un simple « simulacre » destiné à couvrir ce qui n'est, en réalité, rien de plus qu'une tentative de s'ingérer dans les relations commerciales d'un concurrent.

De nombreuses activités des associations commerciales et professionnelles sont définies par la loi ou trouvent une justification dans les politiques publiques. Certaines associations se voient expressément conférer certains pouvoirs par tel ou tel organisme public, comme celui de fixer les prix ou de définir d'autres conditions générales relatives à l'exercice d'une activité commerciale (par exemple l'obligation de respecter certaines normes ou certaines règles de certification). Les organismes publics peuvent aussi se voir demander d'approuver ou de récuser une résolution prise par une association sectorielle. Il y a lieu de se demander si de telles activités, qui peuvent entraîner d'importantes restrictions en matière de prix ou de production pour les membres des associations, doivent faire l'objet d'une surveillance particulière au regard du droit de la concurrence, même si elles ont été imposées ou autorisées par la loi. Dans de nombreux pays, les tribunaux ont conclu que la responsabilité ne peut être engagée, en vertu du droit de la concurrence, si le comportement privé contesté (y compris le comportement d'associations commerciales) a été déterminé par des mesures légales prises par les pouvoirs publics. En vertu des doctrines appelées de la « souveraineté de l'État » ou de la « conduite réglementée », la responsabilité des entreprises n'est pas engagée en vertu des lois antitrust si leur comportement anticoncurrentiel est imposé par une mesure publique et si ces entreprises ne jouissent pas d'une conduite autonome.

*(3) Les associations peuvent offrir aux concurrents directs l'occasion de se rencontrer à plusieurs reprises. Cela pourrait aisément donner lieu à des activités illicites et anticoncurrentielles et favoriser la collusion et des pratiques d'exclusion coordonnées.*

Les associations commerciales restent très exposées, de par leur nature même, aux risques relevant du droit de la concurrence. La participation aux activités des associations commerciales et professionnelles procure aux entreprises d'un même secteur de nombreuses occasions de se rencontrer régulièrement et de discuter de sujets d'intérêt commun relatifs à leur activité. Ces rencontres et discussions, même si elles s'inscrivent dans l'objectif légitime de l'association, mettent en contact des concurrents directs tout en leur offrant des occasions régulières d'échanger des idées sur le marché. Ces occasions peuvent facilement donner lieu à des pratiques de coordination illicite. Les discussions informelles sur les prix, les quantités, les futures stratégies commerciales peuvent aboutir à des accords ou à des ententes informelles clairement contraires aux règles de la concurrence. C'est pourquoi les associations commerciales et leurs activités

continuent de faire l'objet d'une surveillance attentive de la part des autorités de la concurrence dans le monde.

Même s'il est généralement admis que les associations commerciales doivent être soumises aux règles de la concurrence, ne serait-ce que pour empêcher que leurs membres puissent échapper à l'application du droit de la concurrence en agissant par leur intermédiaire, le rôle de l'association dans l'infraction commise peut être très variable, de même que sa responsabilité dans le comportement anticoncurrentiel. Les membres de l'association sont seulement responsables des restrictions (que seraient, par exemple, des critères d'adhésion anticoncurrentiels) contenues dans l'acte constitutif ou les statuts. L'association peut toutefois être tenue pour responsable, parallèlement à ses membres, si elle a joué elle même un rôle à part entière en suggérant, orchestrant ou commettant un acte illicite. À l'inverse, sa responsabilité ne saurait être engagée si le comportement illicite est le fait de ses membres, sans qu'elle en ait eu connaissance.

Les domaines traditionnels de préoccupation au sujet des associations commerciales sont les ententes sur les prix, l'attribution de clients ou de territoires et les soumissions concertées. Les conspirations pures et simples de détermination des prix ou d'attribution de clients orchestrées par une association commerciale deviennent toutefois plus rares. L'application des dispositions relatives à la concurrence se concentre de plus en plus sur les pratiques des associations commerciales qui facilitent la collusion entre leurs membres. Des règles d'adhésion indûment restrictives, l'échange d'informations commerciales précises, la définition de normes exclusives/fermées pour le secteur, l'application de restrictions relatives à la commercialisation, l'adoption de codes « d'éthique » sur les pratiques de détermination des prix ou d'autres pratiques commerciales qui limitent la capacité des membres à livrer librement concurrence, font partie des questions de concurrence sensibles qui affectent le plus les activités des associations commerciales de nos jours.

*(4) Les associations peuvent être responsables de manquements au droit de la concurrence, mais leur assujettissement aux règles de la concurrence peut poser des problèmes particuliers lorsqu'il s'agit de déterminer et d'évaluer les sanctions financières.*

Dans la plupart des pays, les manquements au droit de la concurrence exposent les participants à des sanctions et des amendes. Les associations commerciales ne sont pas à l'abri des conséquences d'un manquement au droit de la concurrence et, quand l'association est responsable de l'organisation et de l'exécution du manquement, elle peut être soumise à des amendes séparément de ses membres. Cela a soulevé des difficultés pratiques, car les amendes imposées aux associations en fonction du chiffre d'affaires de l'association peuvent ne pas avoir l'effet dissuasif nécessaire, non seulement en ce qui concerne l'association en question (dissuasion spécifique), mais aussi en ce qui concerne d'autres associations engagées dans des pratiques contraires au droit de la concurrence (dissuasion générale).

Un premier problème est lié au chiffre d'affaires pertinent que les autorités de la concurrence doivent prendre en considération lors du calcul du montant de l'amende. Si ces autorités devaient prendre en compte uniquement le chiffre d'affaires de l'association, le montant de l'amende et l'effet dissuasif correspondant seraient minimes. Généralement, les associations n'exercent pas d'activités sur le marché et leur chiffre d'affaires peut se limiter aux cotisations d'inscription facturées aux adhérents. Une amende administrative calculée sur cette base n'aurait aucun rapport avec le véritable impact sur le marché de la conduite illicite. Les autorités de la concurrence ont donc essayé de lever le voile de l'association et de prendre comme référence pour l'amende le chiffre d'affaires des membres de l'association.

Un deuxième problème important est la façon d'appliquer des sanctions pécuniaires à l'encontre d'une association. Si l'amende imposée à l'association est calculée sur la base du chiffre d'affaires de ses membres, il est assez probable que l'association n'ait pas les moyens financiers de respecter ses obligations. Pour cette raison, certains pays ont adopté de nouvelles dispositions selon lesquelles, si l'amende imposée à l'association prend en compte le chiffre d'affaires des membres et que l'association n'est pas solvable, cette dernière est tenue de faire appel à des contributions de ses membres pour couvrir le montant de l'amende.

# BACKGROUND NOTE

***By the Secretariat***

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.

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

## 1. Trade Associations and Antitrust Laws – Introductory Remarks

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

Cooperatives and trade groups can be traced back to the merchant guilds of the middle ages[1]. Since then, trade and business associations have played a key role in the development of professions and trading activities around the world and have contributed to the wealth and success of many economies. It is particularly in the nineteenth century, however, that trade associations played a key role in shaping the industrialisation process. In both liberal-oriented and in state-governed markets, many associations were created to react to the roughness of free market capitalism or to the invading presence of the state in the economy. Businesses started organising themselves to promote self-regulation and mutually agreed rules of conduct to compensate for shortcomings of the market or to pre-empt public intervention in the economy. Over time, associations became real service providers to their industry. Such tight cooperation, however, often favoured explicitly cooperative agreements between competitors which limited the ability of individual market players to determine their business strategy autonomously. These restrictions, which were often established and enforced by trade associations, eliminated the normal risk associated with business activity as it concerned prices, quantities and other competitive factors and raised considerable concerns in governments as they were seen as an incentive to collusion to the ultimate detriment of consumer welfare.

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

## 2. An Historical Overview of the Development of Trade Associations

Modern trade associations are direct descendents of the 19th century trusts and business associations, but have lost the negative association with conspiracies and illegal activities which had tainted them for

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 81(1) EC Treaty, emphasis added.

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

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

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

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

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

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

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

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

economic and social conditions in the country, while the previous system of competition implemented through the Sherman Act had caused dissipation of vast financial resources[7].

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

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

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

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

9 National Industrial Recovery Act, ch. 90, 48 Stat. 195 (1933). The National Industrial Recovery Act was part of President Franklin Delano Roosevelt's New Deal. It authorised the President to regulate businesses in the interest of promoting fair competition, supporting prices and competition, creating jobs for unemployed workers, and stimulating the United States' economy to recover from the Great Depression. The law created a National Recovery Administration, an executive agency exercising powers which Congress had delegated to it, to promote compliance on the part of corporations. The National Industrial Recovery Act fostered the activities of trade groups but many practices were clearly anticompetitive and caused the intervention of the Supreme Court, which ultimately declared the Act unconstitutional (*Schechter Poultry Corp. v. United States* (295 U.S. 495, 1935)). See E. Bissocoli, *Trade Associations and Information Exchange under US and EC Competition Law*, World Competition 23(1), 79-106, 2000.

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

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

### *2.2 German trade associations in the period 1900-1930*

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

A number of characteristics in Germany's heavy industries, such as the concentrated nature of these markets, the geographic proximity of the companies, a certain homogeneity of the products and high fixed costs, favoured cartelisation. The trade associations were at the heart of this phenomenon: they promoted vertical expansion, high prices and common terms and conditions. With the advent of World War I, trade associations had a significant impulse as they were mandated by the government to perform important functions in difficult economic times: the organisation of raw materials allocation, war contracting and other wartime economic functions. This sub-contracting of public functions to trade associations represented a resourceful way for the government to leverage talents and efficient organisations in the private sector to achieve public goals. Export control, through compulsory syndicates, is a good example of how the government used trade associations to improve the German balance of payments and to strengthen the mark on international markets. As a consequence, the number of trade associations multiplied significantly. For instance, between January 1914 and January 1918, the number of members in the VDMA (the Association of German Machine Builders) rose from 246 to 814[13].

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

## 3. Defining 'associations' for antitrust purposes

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

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

13 *Id.* at p. 422.

14 *Id.* at p. 444.

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

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

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

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

15 See Article 81 of the Treaty of Rome.

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

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

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

Associations should also be distinguished from other combinations of businesses, such as mergers and joint ventures. Although this may not always be true, a trade association is normally not an active player on a market but provides services only to its members. Unlike trade associations, mergers and joint ventures have an effect on the structure of the market in which the merging parties are active. In addition, the founders and the members of a trade association retain an independent market significance which is not the case in a merger setting[19]. Unlike trade associations, the main activity of a typical joint venture is research, production and distribution on its own right. The joint venture's market role may be separate from that of its parents and is more like that of an ordinary firm[20].

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

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

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

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

20 *Id.*, at 1478.

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

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

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

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

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

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

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

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

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

competition rules, there may be instances where the activities of a professional association benefit from an exemption from the competition regime[25].

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

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

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

The important role played by trade associations in modern economies is widely recognised. Many of the activities of trade associations are protected as an expression of fundamental rights of individuals and corporations, such as the right to form an association in the first place or to join an existing one, the right to express one's views and opinions and the right to freely petition the government. The exercise of these rights and freedoms however may collide with the main objective of competition laws, which is to promote competition for the benefit of consumers[27]. In order to prevent conflicts between these fundamental rights and competition policy objectives, courts around the world have carved out a number of trade association activities from the application of competition rules[28]. Non-competition values are important and, when constitutionally mandated, require deference by competition enforcers. However, competition agencies and courts have always interpreted these exemptions and/or indemnities narrowly, because accommodating these values may sometimes also impose costs on consumers.

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25 See further below.

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

27 As the United States Supreme Court observed, "*ultimately competition will produce not only lower prices, but also better goods and services. 'The heart of our national economic policy long has been faith in the value of competition'*" (*National Society of Professional Engineers v. United States*, 435 U.S. 679, 695 (1978) (quoting *Standard Oil Co. v. FTC*, 340 U.S. 231, 248 (1951)).

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

### *4.1 The associational privacy doctrine in the United States*

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

As a consequence, courts have recognised that trade associations enjoy a constitutional privilege which protects individuals and groups from having to disclose private information concerning their association. If such privileges were not to be recognised, the right of association would be endangered particularly in those instances where the interests advanced by associations pertain to political, religious and economic matters. In the United States, for example, this constitutional privilege is rooted in the First Amendment[31] to the Constitution and includes the protection of the identities of the association's members and the protection of internal deliberations by members concerning lobbying strategies and tactics[32]. The associational privacy doctrine was articulated by the Supreme Court in 1958[33] in *N.A.A.C.P. v. Alabama ex rel. Patterson*[34]. The Supreme Court, in recognising the freedom to associate, stated that: "*effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association [...] It is beyond debate that the freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech*"[35]. Based on the right of associational privacy, courts have invoked a 'qualified constitutional privilege'. This privilege "*protects the speech and privacy rights of individuals who wish to promulgate their information and ideas in a public forum while keeping their identities secret.*"[36] In the context of discovery, for instance, the privilege

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

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

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

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

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

34 357 U.S. 449 (1958).

35 *Id*. at 460.

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

operates as a limit to disclosure of information that intrudes on the associational privacy rights of individuals or groups[37].

### *4.2 The Noerr-Pennington doctrine in the United States*

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

In *Noerr* and in *Pennington*, the Supreme Court recognised that liability under the Sherman Act may not be premised on concerted efforts to secure government-imposed restraints on competition[41]. In *Noerr*, the Court held that: (1) the Sherman Act does not prohibit efforts to influence the passage and enforcement of laws; and (2) insofar as disparagement of customers and the public was alleged to be part of a strategy to influence legislation and law enforcement, such disparagement was 'incidental' to petitioning and therefore protected as well[42]. The Court also emphasised that the fact that the motive behind the petitioning is to harm competitors was irrelevant, as 'the right of the people to inform their representatives in government' cannot be conditioned on the intent of that action. In *Pennington*, the Court extended the protection in Noerr beyond the legislative arena to prohibit an antitrust challenge to the petitioning of any public official.

In the last forty years, the Supreme Court has clarified - and in some cases limited - the scope of the doctrine. In *California Motor Transport Co. v. Trucking Unlimited*[43], the Court held that the doctrine applies also to concerted efforts to influence administrative and judicial proceedings as well as to efforts to

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

38 365 U.S. 127 (1961).

39 381 U.S. 657 (1965).

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

41 The doctrine is rooted in the First Amendment, which guarantees to the people the right to petition the government and to freely express its views in public. In addition, the doctrine is underpinned by the principle that competition rules regulate business activity and not political activity. The doctrine, therefore, ensures that antitrust law does not impinge on the government decision making process, whether it be decisions by federal or state governments, which largely depends on the ability of the people to make their wishes known to their representatives. Outside the US, references to the right to petition the government as a limit on antitrust action are fewer. See, for example, the decision of the TAR - Tribunale Amministrativo Regionale del Lazio (Italy) of 25 September 2002 nr. 8235 which excluded from the constitutional protection of the rights of association and free speech private conduct whose primary objective was to distort competition. In the EC, see Commission Decision of 23 December 1992 Cewal, Cowac and Ukwal, in Official Journal L/34 of 10 February 1993, p. 20, referred to in footnote 25 of I. Berti, *Associazione di Imprese e Diritto Antitrust: un Difficile Connubio*, paper presented at the conference on "Antitrust tra diritto nazionale e diritto comunitario", 13 may 2004, Treviso (Italy).

42 365 US at 135-144.

43 404 U.S. 508 (1972).

influence legislative and executive actions. The Court, however, declined to apply the doctrine to lobbying efforts to affect the standard setting process of a *private* association[44]. The Court also limited the applicability of the doctrine "*[…] where the alleged conspiracy is a mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor and the application of the Sherman Act would be justified*"[45] (so-called 'sham' exception).

### *4.3 The state action doctrine*

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

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

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

Under *Parker*, therefore, a conduct that follows the direction of clearly articulated and affirmatively expressed state policy and is subject to active state supervision, is protected from antitrust liability. The state action defence has been applied in a number of cases after *Parker*, including trade association cases, in which US courts have refined and clarified the interpretation of the two *Parker* conditions. In particular, courts have applied close scrutiny to the meaning of 'clear articulation of a state policy', refusing to extend the defence to every governmental activity; courts have also closely scrutinised the application of the 'active supervision' criteria, objecting to the defence where such supervision is *de facto* rarely or never exercised[47]. For example, in *Retail Liquor Dealers Association v. Midcal Aluminium Co.*[48], the defence was

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

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

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

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

48 445 US 97 (1980).

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.

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

The scope of the duty of Member States not to enact or maintain state measures which may affect the application of the competition rules of the Treaty was clarified over the years by the European courts in a number of cases. In *Eycke*[52], the ECJ re-stated the principle established in GB-Inno-BM that the EC Treaty requires the Member States not to introduce or maintain in force measures, even of a legislative nature, which may render ineffective the competition rules and clarified that "s*uch would be the case, [...], if a Member State were to require or favour the adoption of agreements, decisions or concerted practices contrary to Article [81] or to reinforce their effects, or to deprive its own legislation of its official character by delegating to private traders responsibility for taking decisions affecting the economic sphere*" [53].

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

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

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

51 *Id.* at para 33.

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

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

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

55 *Id.* at para 54.

the national legal framework may be taken into account as a 'mitigating factor' to reduce the fine imposed[56].

### *4.4 Competition rules, self-regulation and professional associations*

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

In 1975, the US Supreme Court recognised that "[t]he public service aspect, and other features of the professions, may require that a particular practice, which could be viewed as a violation of the Sherman Act in another context, be treated differently [in a professional context]"[59]. According to the Court, the public service aspect of liberal professions may justify treating restraints amongst members of a profession differently from similar restraints amongst non-professionals. Despite this general statement, the 'public service' exception has rarely been used to treat restraints by professional associations differently from similar conduct by non-professionals. In California Dental[60], for example, the Court accepted as lawful an absolute ban on advertising related to quality imposed on its members by a professional association on the grounds that the restrictions were, at least at face value, designed to avoid false or deceptive advertising, in a market characterised by striking disparities between the information available to the professional and the patient. The inherent asymmetry of knowledge about the service offered made the quality claims asserted by health care professionals hard to verify in theory and in fact by patients. In this case, the Court concluded that the measure had pro-competitive effects as it solved the asymmetry of information problems that existed.

In Europe, the ECJ found that professional associations are subject to the competition rules of the EC Treaty but nevertheless concluded that in some circumstances restrictions adopted by professional associations may escape EC competition law scrutiny to the extent that those measures are necessary to insure the proper functioning of the profession, as organised in each Member State. According to the *Wouters* judgment[61], one has to look at the objectives of the measure under scrutiny in order to ensure that the ultimate consumers of the professional services are provided with the necessary guarantees in relation

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56 *Id.* at para 56-57.

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

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

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

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

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

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*).

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

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

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

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 members of the association[62]. As agreements, they are fully subject to competition rules on horizontal restraints and restrictions therein may expose the association's members to antitrust liability[63]. Secondly, any decision[64], recommendation or other activity of the association[65] may be capable of restricting

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

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

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

competition between the members of the association. Decisions do not need to be formal or binding, nor do they have to be fully complied with[66] to fall within the scope of antitrust rules, provided that they have an appreciable effect on competition. Decisions or recommendations do not have to be expressly approved by the members of the association to give rise to antitrust liability[67]; even an oral exhortation may trigger antitrust liability if it is intended that members should abide by it.

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

While the activities of trade associations are usually under scrutiny for potential infringements of competition rules on horizontal anticompetitive agreements, the activities of trade associations are subject to all antitrust rules, including provisions on vertical restraints[69] and on abuse of

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

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

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

68 In two recent international cartel cases - the Lysine Cartel and Citric Acid Cartel - the investigations showed that the conspirators used the 'cover' of the legitimate trade associations' activities to organise parallel, so-called 'unofficial' meetings, where conspirators agreed to fix prices and set market share quotas worldwide. The 'unofficial' conspiratorial meetings would take place on days immediately preceding or following the official trade association meetings. For these reasons, to avoid becoming the vehicle for prohibited horizontal collusion, trade associations usually have in place sophisticated compliance programmes and association staff and/or external counsel carefully monitor and control the activities of the members that take place at association-sponsored activities or that are done in the name of the association. In order to avoid antitrust exposure, it is also important that association activities and meetings have clear and comprehensive agendas and minutes. Unexplained, secret or furtive meetings may raise many suspicions as to the real purpose of the meeting and generate the impression that these are 'cover-ups' for conspiracies to suppress competition. See P. E. Areeda, *Conspiratorial Opportunity, Unexplained meetings, Furtive Behaviour, and Cover-Ups*, in Antitrust Law – An Analysis of Antitrust Principles and Their Applications, Volume 7, paragraph 1417.

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

dominance/monopolisation[70]. The traditional areas of concern for competition authorities when it comes to trade associations are price fixing, customers/territories allocation and bid-rigging. The next paragraphs include a non-exhaustive overview of these restrictions in the context of trade associations.

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

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.

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

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

### *5.2 The sharing of customers and/or markets*

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

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

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

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

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

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.

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

### *5.3 Collusive tendering and bid-rigging practices*

Tenders are designed to achieve a competitive outcome in a situation where competition might otherwise be absent[77]. An essential feature of a tendering system is that prospective suppliers prepare and submit their bids independently. If bidders agree amongst themselves on who should win the tender and/or at what price, this will almost invariably infringe competition rules. Collusive tendering can take many forms. It requires active coordination amongst the prospective bidders and often entails a sophisticated monitoring system. In this respect, trade associations may function as a secretariat for the bid-rigging cartel and collect the information on intended quotes and allocate tenders amongst their members according to an agreed methodology.

A good example of the role that associations can play in orchestrating a bid-rigging conspiracy amongst their members is the cartel in the Dutch building and construction industry[78]. Since the early 1950s a number of Dutch associations of firms active in the construction business had drawn up self-imposed rules and codes of conducts with a view to organising competition in the industry. In 1963, those associations established a common organisation (SPO) with the purpose of designing a system of uniform price-regulating rules binding on all the members. In 1986, SPO adopted rules on the procedural

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

75 405 U.S. 596 (1972).

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

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

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

framework for tendering for building works. The system had the effect of distorting competition as the members exchanged detailed information prior to the tenders and systematically colluded as to the level of the bids in order to ensure that the 'entitled' bidder would win a particular contract. A sophisticated rotation system ensured that contracts up for tender would be allocated to each participant in equal proportions.

## 6. Other Trade Associations Activities Which Can Raise Antitrust Concerns

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.

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

### *6.1 Membership rules and restrictions on access*

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-vis* members[79]. Conversely, no antitrust harm can be established if the services foreclosed by the refusal to grant membership are in fact not competitively significant or can be easily sourced by non-members from elsewhere. For this reason, a *rule of reason* approach is generally favoured when reviewing membership rules in trade associations[80]. The analysis of the services offered by the association, their availability to competing non-members and

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

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

the importance of the association on the market are key elements to be taken into account when assessing if access restrictions make it extremely difficult for third parties to enter the market[81].

As to the criteria for electing membership, competition laws generally require that membership be voluntary[82] and based on clear, objective[83] and qualitative criteria[84], which are easily ascertainable. It is possible to argue that eligible criteria are reasonable if they are related to the objectives and activities of the association. There should also be in place appropriate procedures to appeal in case of a refusal[85]. The association rules governing the expulsion of members from the association or the suspension of their membership may have similar anticompetitive effects to a refusal to grant membership. Generally, where the underlying membership restrictions do not violate the antitrust laws, the enforcement of those rules by the association is also not illegal[86]. However, expulsion or suspension of members should be reasoned and properly motivated and a right of appeal should be granted[87]. Arbitrary expulsions and expulsions which are not related to the goals of the association may be found to be a restriction of competition[88].

Membership in a professional association is often a *conditio sine qua non* for the exercise of a profession. In many countries, membership in a professional association is strictly regulated by the association itself. Market entry regulations by professional associations therefore may act as barriers to entry into the market[89]. Excessively restrictive regulations may result in a reduction of the supply of services with negative consequences for competition and the quality of the service. Empirical studies show that excessive entry restrictions may lead to higher prices for consumers without ensuring higher quality of

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

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

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

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

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

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

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

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

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

the services offered[90]. While a certain degree of control on access to the profession may be acceptable to preserve the quality and the standard of the services offered by members of the profession, competition authorities are concerned that unreasonable and unjustified access criteria may result in costs for consumers[91]. For this reason, membership criteria should be qualitative in nature, rather than quantitative, and they should be proportionate to the policy objectives they are meant to serve.

### *6.2 Collection and dissemination of market information*

One of the most important tasks of industry associations is to provide their members with information on the development of their industry and particularly with statistical information on economic and business factors relevant for the members' trading activities[92]. The availability of information on the market and its development is generally viewed as critical to develop a competitive environment[93]. For this reason, the availability of information is perceived as a factor to be encouraged; after all, the ideal model of perfect competition is premised on demand-side and supply-side perfect information about the market. The knowledge of the market and its key features (e.g., characteristics of demand, available production capacity, investment plans, etc.) facilitates the development of efficient and effective commercial strategies by the market players[94]. New entrants or fringe players may benefit from this information to enter the market more effectively and to compete more fiercely against incumbents. Increased knowledge of market conditions also benefits consumers, who can choose between competing products with a better

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

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

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

93 On exchanges of information and their pro and antic-competitive effects on competition see K. Kühn and Vives, *Information Exchanges Among Firms and their Impact on Competition*, in Office of the Official Publications of the European Community, 1995, Luxembourg; K. Kühn, *Fighting Collusion - Regulation of Communication Between Firms*, in Economic Policy, April 2001; A. Nilson, *Transparency and Competition*, mimeo, Stockholm School of Economics, 1999; C. Schultz, *Transparency and Tacit Collusion in a Differentiated Market*, mimeo, Stockholm School of Economics, 2002; H. P. Mollgaard e P. B. Overgaard, *Trasparenza di Mercato e Politiche per la Concorrenza*, in Rivista di Politica Economica, 2001; A. J. Padilla and M. Pagano, *Sharing Default Information as a Borrower Discipline Device*, European Economic Review, 1999; E. Bissocoli, *Trade Associations and Information Exchanges under US Antitrust and EC Competition Law*, in World Competition, Vol. 23(1), 2000, p. 79; L. Peeperkorn, *Competition Policy Implications from Game Theory: an Evaluation of the Commission's Policy on Information Exchange*, Paper presented at the CEPR/European University Institute Workshop on Recent Developments in Design and Implementation of Competition Policy, Florence, 20 November 1996.

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

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.

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

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

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

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

96 In the United States, for example, the first Supreme Court cases to address this issue were as early as the 1920s: *American Column and Lumber Co v. United States*, 257 US 377 394-95 (1921); *United States v. American Linseed Oil Co*, 262 US 371 (1923) and *Maple Flooring Manufacturers Association v. United States*, 268 US 563 (1925). More recent cases include *United States v. Container Corporation of America et al.*, 393 US 333 (1969); and *United States v. United States Gypsum Co. et al.*, 438 US 422 (1978). In the European Union, the leading case on the exchange of information between competitors remains the UK Agricultural Tractor Registration Exchange case, decided by the Commission in 1992, OJ 1992 L68/19; upheld by the Court of First Instance (Case T-34/92, *Fiatagri and New Holland Ford vs. Commission*, [1994] ECR II-905) and by the European Court of Justice (Case C-8/95, *New Holland Ford vs. Commission*, [1998] ECR I-3175). Earlier European cases include in particular *Cobelpa/VNP*, in OJ 1977 L242/10 and *Vegetable Parchment*, in OJ 1978 L70/54 and other cases cited in para. 6 of the 7th Report on Competition Policy (1977).

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

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

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

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

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

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

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

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

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

identify information concerning individual participants in the exchange[99]; (iii) publicly released, i.e. the data are also available to members who have not participated to the exchange, to non-members and to customers.

### *6.3 Standard setting and certification programmes*

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

However, as with many other joint activities by direct competitors, standard setting through a trade association may give rise to antitrust liability if the result of the joint effort is to deprive consumers of a desired product, to eliminate quality competition, to exclude producers of rival products or services, to prevent the commercialisation of innovative and lower-cost products, or simply to facilitate oligopolistic pricing by easing rivals' ability to monitor each other's pricing policy[101]. For this reason, standard setting and certification programs are subject to close scrutiny by antitrust agencies, generally under the rule of reason standard of review. To determine whether a standard setting program may result in a restriction of competition a number of factors are generally taken into account[102]:

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

- **The market coverage of the standardisation process**: standard setting efforts which have a negligible coverage of the industry are unlikely to raise competition concerns. High market coverage, however, does not necessarily amount to a concern as the effectiveness of a standardisation process is often proportional to the share of the industry involved in setting and/or applying the standard. On the other hand, standards that are not accessible to third parties may

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

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

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

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

discriminate or foreclose third parties thereby restricting competition. Therefore, if the standard is set by companies which are jointly dominant, creating a *de facto* industry standard, it is important that the standard be as open as possible and applied in a clear and non-discriminatory manner.

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

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

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

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

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.

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

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

professional services (such as quality claims about specific services offered) and therefore need particular protection from misleading or manipulative assertions[104].

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

## 7. Consequences of Antitrust Infringements by Trade Associations

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.

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).

A first issue relates to the relevant turnover that agencies should take into consideration when calculating the amount of the fine. If agencies were to take into account only the turnover of the association, the amount of the fine and the related deterrent effect would be minor. Associations generally

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

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

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

A second important issue with which antitrust agencies are often confronted is how to enforce monetary sanctions against an association. As noted above, associations normally do not have a turnover and their assets are generally quite limited. Consequently, if the fine imposed on the association is calculated on the basis of the turnover of the association's members, it is quite likely that the association will not have the financial means to meet its obligations. For this reason, Regulation 1/2003 has introduced a new provision under which if the fine imposed on the association takes into account the turnover of its members and the association is not solvent, the association is obliged to call for contributions from its members to cover the amount of the fine[110]. If such contributions are not made to the association within a time-limit fixed by the European Commission, the Commission can demand the payment of the fine directly from any of the members of the decision-making bodies of the association and subsequently, where necessary, to ensure full payment of the fine, the Commission can request payment of the balance from any of the members of the association. Regulation 1/2203, however, allows one or more members of the association to refuse payment of the fine imposed on the association if they can show that: (i) they have not implemented the decision of the association infringing EC competition rules and either (ii) were not aware of its existence or (iii) have actively distanced themselves from it before the Commission started its investigation.

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

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

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

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

110 See Article 23, para 4.

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# NOTE DE RÉFÉRENCE

*Par le Secrétariat*

Les associations commerciales/professionnelles jouent un rôle important dans les économies modernes. Dans la plupart des cas, elles servent des objectifs légitimes : elles préparent des études sur leur secteur d'activité respectif, défendent les intérêts sectoriels en attirant sur eux l'attention des pouvoirs publics, élaborent des instructions en matière de normalisation des produits, diffusent des informations agrégées sur le marché en vue d'aider les entreprises à prendre des décisions d'investissement, et ainsi de suite. Elles peuvent également former leurs membres à appliquer convenablement les règles de la concurrence. En revanche, en suscitant des occasions de contacts répétés entre concurrents directs, elles peuvent aussi servir de cadre à des activités ayant pour effet de restreindre la concurrence. Un bon nombre d'affaires concernant des ententes qui ont été portées devant les autorités de la concurrence dans le monde implique directement ou indirectement une association commerciale. Les associations peuvent elles-mêmes organiser, orchestrer et commettre des violations flagrantes du droit de la concurrence ou tout simplement les faciliter.

Cette note de référence examine le rôle complexe des associations commerciales dans les économies modernes et les risques que leurs activités peuvent susciter au regard du droit de la concurrence. Après un tour d'horizon du rôle joué par les associations commerciales et professionnelles en tant qu'autorités de tutelle sectorielles privées aux États-Unis et en Allemagne au début du 20e siècle, elle s'intéressera à la notion d'« association » aux fins du droit de la concurrence, avant de se pencher sur les immunités et les exemptions importantes vis-à-vis du droit de la concurrence qui peuvent s'appliquer à ce type d'associations et à leurs activités. La dernière partie traitera de l'application des règles essentielles de la concurrence aux associations commerciales, notamment en ce qui concerne les restrictions horizontales injustifiables, comme la fixation des prix, la répartition des clients et les soumissions concertées, ainsi qu'aux conséquences, pour les associations commerciales et leurs membres, des infractions au droit de la concurrence. Elle mettra aussi l'accent sur les pratiques potentiellement restrictives qui surviennent classiquement dans le cadre des associations commerciales et qui paraissent pouvoir favoriser les collusions. Les règles d'adhésion, les dispositifs d'échange informels et la définition de normes font partie des pratiques associatives qui sont suivies de très près par les autorités de la concurrence.

## 1. Associations commerciales et droit de la concurrence – Remarques liminaires

Le rôle des associations commerciales est inextricablement lié à la mise en œuvre des règles de la concurrence depuis les origines du droit de la concurrence. Si la concurrence repose assurément sur le fait que chaque acteur du marché suit son propre objectif de maximisation des bénéfices, certaines activités et fonctions ne peuvent être menées à bien efficacement par chaque entreprise isolément, mais relèvent davantage d'un effort collectif. Ces activités, qui font souvent progresser le bien-être des consommateurs, peuvent être exercées collectivement par les acteurs du marché dans le cadre de leurs associations commerciales et professionnelles. La normalisation des produits, l'harmonisation et la promotion de pratiques commerciales, la défense des intérêts commerciaux devant les administrations et les organismes publics, la définition de règles éthiques professionnelles, etc. sont autant d'exemples de fonctions qui ne peuvent être effectivement menées à bien que dans le cadre d'une coopération et d'une collaboration entre les entreprises.

On peut faire remonter l'origine des coopératives et des corporations commerciales aux guildes de marchands du Moyen Âge[1]. Depuis lors, les associations commerciales et professionnelles ont joué un rôle essentiel dans le développement des corps de métier et des activités commerciales dans le monde entier, contribuant à la prospérité et au succès de nombreuses économies. C'est au 19e siècle toutefois qu'elles ont joué un rôle particulièrement crucial dans la formation du processus d'industrialisation. Dans les économies de marché comme dans les économies dirigistes, nombre d'associations ont été créées soit en réaction à la brutalité du capitalisme de marché soit pour battre en brèche la mainmise envahissante de l'État dans l'économie. Les entreprises ont commencé à s'organiser pour promouvoir l'autorégulation et des règles de conduite mutuellement admises en vue de pallier les défaillances du marché ou de faire barrage à l'intervention publique dans l'économie. Au fil du temps, elles sont devenues de vrais prestataires de services pour leur secteur d'activité. Cet étroit partenariat entre les acteurs du marché a cependant souvent favorisé les accords de coopération explicites entre concurrents, ce qui a limité l'aptitude de chacun d'eux à définir sa propre stratégie commerciale de manière autonome. Ces restrictions concernant les prix, les quantités et d'autres paramètres de la concurrence, qui sont souvent édictées et mises en œuvre par les associations commerciales, ont éliminé le risque normal inhérent à l'activité commerciale, donnant corps à d'importantes préoccupations des pouvoirs publics qui les considèrent comme une incitation à la collusion au détriment, en dernier ressort, du bien-être des consommateurs.

Pour une grande part, les premières moutures du droit de la concurrence ont été promulguées en réaction à ce mouvement de coopération au sein d'un secteur d'activité, dans une tentative pour contrôler les « arrangements » et la « concentration » d'entreprises (d'où le terme de règles anti-concentration ou règles de la concurrence), en vue d'arriver conjointement à maximiser des bénéfices en adoptant une conduite concertée au sein d'un secteur. L'adoption en 1890 de la loi Sherman (« Sherman Act ») aux États-Unis est l'illustration même d'une réponse des pouvoirs publics à ce mouvement, réponse destinée à préserver les mécanismes concurrentiels pour les mettre au service de conduites socialement productives. À la fin du 19e siècle, les arrangements commerciaux ou concentrations d'entreprises passaient aux yeux du Congrès américain pour des agencements artificiels servant à contrôler les marchés, à limiter la concurrence et, au bout du compte, à exploiter les consommateurs[2]. De même, bien des années plus tard, les concepteurs des clauses du Traité de Rome relatives à la concurrence avaient une vue très claire des risques que pouvaient poser, au regard du droit de la concurrence, les activités des associations commerciales et ils ont donc étendu le champ d'application de l'Article 81 du Traité CEE relatif aux accords anticoncurrentiels pour y inclure *« […] tous accords entre entreprises, toutes décisions d'associations d'entreprises et toutes pratiques concertée[…]* »[3].

## 2. Historique du développement des associations commerciales

Les associations commerciales modernes descendent en droite ligne des concentrations d'entreprises et associations professionnelles du 19e siècle, mais elles se sont départies de leur assimilation négative à

1 On trouve des références aux corporations commerciales dans la Bible et dans des manuscrits de l'Empire romain. Les associations commerciales étaient aussi courantes dans les anciennes civilisations asiatiques comme l'Inde, la Chine et le Japon. C'est avec les guildes de marchands, leurs règles commerciales et leurs codes de conduite que le corporatisme et la poursuite d'intérêts individuels par l'intermédiaire d'une corporation sont devenus un mode d'organisation des entreprises en Occident. Voir Butler. D. Shaffer, *Trade Associations and Self Regulation*, 20 Sw U.L. Rev. 289 (1991) et E. Bissocoli, *Trade Associations and Information Exchange under US and EC Competition Law*, World Competition 23(1), 79-106, 2000.

2 US Congressional Record, p. 3151-53 (1890).

3 Article 81(1) du Traité CEE (souligné ajouté par nous).

des complots ou à des activités illégales qui entachait leur réputation depuis près de 200 ans[4]. Aujourd'hui, le monde des entreprises et les pouvoirs publics reconnaissent largement l'importance des associations commerciales et professionnelles, qui assument un grand nombre de fonctions extrêmement précieuses pour la société en général et pas uniquement pour leurs membres. Les associations commerciales et leurs activités sont considérées comme l'expression même des libertés économiques, sociales et politiques qui sont généralement protégées par la constitution. Dans de nombreux pays, le droit d'association est explicitement protégé comme l'un des droits fondamentaux des individus comme des entreprises. D'autres libertés et droits constitutionnels, comme la liberté de parole, la liberté d'association et le droit d'adresser des pétitions aux pouvoirs publics, s'appliquent à de nombreuses activités assumées par les associations commerciales et peuvent limiter, dans une certaine mesure, l'application des règles de la concurrence.

Les paragraphes suivants présentent un rapide tour d'horizon des premiers temps qui ont vu naître les associations commerciales modernes dans deux grands pays, les États-Unis et l'Allemagne. Ce rappel historique témoigne de l'importance qu'elles ont eue dans le développement socio-économique et politique des économies modernes et, explique, dans une certaine mesure, les raisons du scepticisme des différents régimes de concurrence à l'égard de leurs activités.

### *2.1 Les associations commerciales aux États-Unis durant la première moitié du 20e siècle*

Bien que les origines du corporatisme remontent sans doute à des temps très anciens, les associations commerciales ne sont apparues, sous leur forme moderne, qu'aux alentours de 1850 aux États-Unis, ne s'y généralisant pas avant la deuxième moitié du 19e siècle. Au départ, ces associations, qui étaient très semblables aux anciennes guildes du Moyen Âge, étaient des organisations indépendantes représentant la volonté des acteurs dominants du commerce et elles avaient le pouvoir de réglementer un secteur et d'imposer des restrictions aux pratiques commerciales de l'ensemble de leurs membres[5]. La plupart des activités de ces premières associations commerciales tomberaient sous le coup des règles modernes de la concurrence et seraient probablement jugées anticoncurrentielles aujourd'hui.

C'est aux abords des deux guerres mondiales que leur nombre a considérablement augmenté aux États-Unis. Durant ces deux périodes de conflit, l'État, soucieux d'assurer un contrôle des prix et de la production en des temps économiques difficiles, a encouragé le corporatisme. Durant la Première guerre mondiale, le Conseil des industries de guerre (*War Industries board* ou WIB) a joué un rôle central dans la réglementation des activités économiques et dans la fixation des prix et les pouvoirs publics ont favorisé

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4 On trouve déjà une allusion à la défiance générale vis-à-vis des associations commerciales qui étaient surtout réputées donner à des conspirateurs l'occasion de se rencontrer dans la célèbre citation de la Richesse des Nations (1776) d'Adam Smith : « *Il est rare que des gens du même métier se trouvent réunis, fût-ce pour quelque partie de plaisir ou pour se distraire, sans que la conversation finisse par quelque conspiration contre le public, ou par quelque machination pour faire hausser les prix. Il est impossible, à la vérité, d'empêcher ces réunions par une loi qui puisse s'exécuter, ou qui soit compatible avec la liberté et la justice ; mais si la loi ne peut pas empêcher des gens du même métier de s'assembler quelquefois, au moins ne devrait-elle rien faire pour faciliter ses assemblées, et bien moins encore pour les rendre nécessaires » [*Édition traduite en 1881 par Germain Garnier, à partir de l'édition revue par Adolphe Blanqui en 1843]. On trouve encore aujourd'hui des références au rôle d'autorité de tutelle que jouent les associations commerciales en exerçant un certain contrôle sur les facteurs de la concurrence. Ainsi selon l'Encyclopaedia Britannica Online, une association commerciale est « *une association volontaire d'entreprises commerciales organisée par secteur géographique ou par secteur d'activité en vue de promouvoir et de développer des opportunités commerciales et industrielles dans leur sphère d'activité, d'exprimer publiquement les opinions de ses membres sur les affaires d'intérêt commun, ou dans certains cas, d'exercer certaines mesures de contrôle sur les prix, la production ou les circuits de distribution* » (souligné ajouté).

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

d'autres pratiques limitant le commerce afin d'assurer la production des matières premières indispensables et d'empêcher l'éclatement de troubles sociaux, en contrôlant les prix et les salaires et en stabilisant les conditions du marché[6]. Après la guerre et la dissolution du Conseil, les associations commerciales se sont battues pour préserver les modalités de fonctionnement favorables qu'elles avaient obtenues sous les auspices du Conseil, faisant valoir que la coopération et l'autorégulation avaient amélioré les conditions économiques et sociales du pays alors que le régime antérieur de concurrence, mis en œuvre en vertu du Sherman Act, avait eu pour effet de dissiper des ressources financières considérables[7].

Dans la décennie qui a suivi, les industriels américains se sont efforcés d'atténuer les pratiques concurrentielles agressives en réduisant le risque de perte économique importante auxquelles étaient exposées les entreprises incapables de faire face à la concurrence[8]. Cette approche a été désignée sous le terme de « coopération d'entreprises » et l'esprit de coopération sectoriel émergent a été appelé « autorégulation sectorielle ». L'association commerciale a été l'un des principaux vecteurs utilisés pour mener à bien cette autorégulation des entreprises. Le champ d'intervention de ces associations allait des efforts entrepris en vue de susciter un esprit « coopératif » entre les concurrents à la formulation de « codes éthiques », en passant par des propositions de réglementations formelles d'un secteur donné (ou arrangements assimilables à des ententes), comme celles qui ont été encouragées par la loi nationale de redressement industriel (National Industrial Recovery Act[9]), en 1933, par le gouvernement de Roosevelt afin de soutenir le redémarrage de l'économie américaine à la suite de la Grande Crise.

Jusque là, la pénurie avait toujours été la principale préoccupation économique. Les réformateurs ont donc analysé les enseignements tirés de la Première guerre mondiale afin de déterminer comment le gouvernement pourrait augmenter la production par voie de planification. Le futur Président Hoover s'est fait le héraut du mouvement des associations commerciales dans les années 20, faisant largement usage de ses pouvoirs de ministre du Commerce pour promouvoir la rationalisation économique et limiter la

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

7 Voir Eddy, *The New Competition* (1916) ; Baker, *Automotive Industry* (1926) et Taeush, *Policy and Ethics in Business* (1931). Les premières affaires relevant de l'application du Sherman Act à l'encontre d'associations commerciales sont l'affaire *United States c. Trans-Missouri Freight Association*, 166 U.S. 290 (1897), et l'affaire *United States c. Joint Traffic Association*, 171 U.S. 505 (1898). Ces jugements contiennent certaines formulations donnant à penser qu'une simple restriction de l'autonomie des acteurs du marché suffit à établir qu'un accord a pour effet de restreindre le commerce aux termes du Sherman Act.

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

9 National Industrial Recovery Act, ch. 90, 48 Stat. 195 (1933). Le National Industrial Recovery Act s'inscrit dans le cadre du New Deal lancé par le Président Franklin Roosevelt. Il permet à la Présidence de réglementer l'activité des entreprises en vue de promouvoir une concurrence loyale, de soutenir les prix et la concurrence, de créer des emplois pour les chômeurs et de stimuler l'économie américaine pour qu'elle puisse se redresser après la Grande Crise des années 30. La loi instituait une administration du redressement industriel, organisme exécutif exerçant les pouvoirs qui lui avaient été délégués par le Congrès, en vue d'encourager les entreprises à adhérer à ce programme. Cette loi favorisait les activités des groupes commerciaux, y compris nombre de leurs pratiques anticoncurrentielles, ce qui a incité la Cour suprême à intervenir et à la juger anticonstitutionnelle (*Schechter Poultry Corp. c. United States* (295 U.S. 495, 1935)). Voir E. Bissocoli, *Trade Associations and Information Exchange under US and EC Competition Law*, World Competition 23(1), 79-106, 2000.

concurrence « destructrice »[10]. Les associations commerciales ont servi de vecteur à la mise en place d'un dispositif fondé sur la coopération et l'autorégulation. Les membres des associations commerciales étaient encouragés à échanger des informations, mais aussi à respecter des codes de conduite et des principes de loyauté de la concurrence. Ces codes étaient destinés à limiter les stratégies commerciales agressives, à encourager la coopération et à favoriser la protection des acteurs du marché en place. Ces codes éthiques s'intéressaient de près aux pratiques de fixation des prix, et en particulier à toutes celles qui visaient à baisser les prix, contribuant à donner une impression par trop générale de « guerre des prix », « de baisses de prix sauvages » et de concurrence « à couteaux tirés », autant de symptômes de comportements commerciaux « contraires à l'éthique »[11].

### *2.2 Les associations commerciales allemandes de 1900 à 1930*

L'émergence des premières grandes associations commerciales en Allemagne fait suite à l'essor économique du pays dans la deuxième moitié du 19e siècle. Ce sont surtout les industries lourdes (notamment le charbon, le fer et l'acier) qui ont créé les associations commerciales les plus en pointe, qui allaient dominer la politique économique allemande jusqu'au milieu des années 20[12]. Les premières associations ont été fondées durant la deuxième moitié du 19e siècle (comme la VdESI, l'association allemande des industriels du fer et de l'acier fondée en 1873) dans un contexte politique germano-prussien qui alliait faiblesse des institutions parlementaires et autoritarisme de l'exécutif et accordait à de puissants groupes industriels la liberté de s'autoréguler et certaines concessions socio-économiques, en contrepartie de leur soutien politique. Ce contexte était extrêmement favorable au développement des groupes d'intérêts et des associations commerciales.

Un certain nombre de caractéristiques de l'industrie lourde allemande, telles que la concentration des marchés, la proximité géographique des entreprises, une certaine homogénéité des produits et le niveau élevé des coûts fixes, favorisaient la formation d'ententes. Les associations commerciales se trouvaient au cœur de cette évolution, encourageant l'expansion verticale, favorisant les prix élevés et l'adoption de conditions générales communes. La Première guerre mondiale leur a donné un coup de pouce important. En ces temps de difficultés économiques, le gouvernement leur a délégué d'importantes fonctions : organiser l'affectation des matières premières, l'octroi de contrats de guerre et autre activités économiques des périodes de guerre. Cette délégation de fonctions publiques aux associations commerciales était pour le gouvernement un moyen judicieux de mettre à profit les compétences et l'efficacité des organisations du secteur privé dans un objectif public. Le contrôle des exportations, qui s'effectuaient obligatoirement par l'entremise de syndicats, illustre bien comment les pouvoirs publics ont utilisé les associations commerciales pour améliorer la balance des paiements allemande et pour renforcer le mark sur les marchés internationaux. Dès lors, le nombre d'associations commerciales s'est considérablement multiplié. Ainsi,

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10 Le Président Hoover remettait en question, dans les termes suivants, les motivations au nom desquelles les milieux d'affaires réglementaient les pratiques concurrentielles : « *Depuis l'émergence du système de production industrielle, on s'est efforcé d'atteindre plus de stabilité en usant de l'action collective. Cet effort visait à assurer une production plus régulière, un emploi plus stable, de meilleurs salaires, l'élimination des gaspillages, la préservation de la qualité ou du service, la réduction de la concurrence destructrice et les pratiques déloyales, mais aussi souvent à maintenir le niveau des prix ou des bénéfices »* (The Nation's Business, 5 juin 1924, p. 8).

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

12 Ces paragraphes présentent un tour d'horizon de l'évolution des plus grandes associations commerciales en Allemagne au début du 20e siècle, relatée dans G. D. Feldman et U. Nocken, *Trade Associations and Economic Power; Interest Group Development in the German Iron and Steel Machine Building Industries, 1900-1933*, The business History Review, Vol. 49, n°4, Hiver 1975, p. 413-445.

de janvier 1914 à janvier 1918, le nombre de membres de la VDMA (association allemande des industries d'armement) est passé de 246 à 814[13].

Les associations commerciales sont sorties de la première guerre mondiale considérablement renforcées par l'effort de guerre, prêtes et déterminées à affirmer leur indépendance et leur supériorité vis-à-vis de l'administration et des partis politiques et à revendiquer une primauté particulière les autorisant à prendre les commandes du développement socio-économique, voire politique du pays. La faiblesse politique de la République de Weimar (1919-33) n'a fait qu'amplifier l'inclination des organisations industrielles à l'auto-affirmation. Les associations commerciales ont assumé de plus en plus de fonctions publiques, en vertu d'accords privés passés entre elles. Il s'est ensuivi en retour une expansion et une complexification de leur organisation. Malgré certaines tentatives pour venir à bout de cette sur-organisation, qui n'a pas su faire face à la nouvelle donne issue de la crise de l'après-guerre, et pour mettre à bas l'ensemble du système des cartels et des autres organisations restreignant la concurrence, le régime nazi a décidé d'en conserver les éléments de base, mais de rationaliser ce dispositif en éliminant les organisations faisant double emploi et mutuellement concurrentes, établissant ainsi les fondations du système dont a hérité la République fédérale d'Allemagne[14].

### 3. Définir les « associations » aux fins du droit de la concurrence

Le droit de la concurrence s'applique généralement à toute personne morale ou physique engagée dans une activité économique ou commerciale, à but lucratif ou non, que la personne ou la structure concernée appartienne au secteur privé ou au secteur public. Les règles de la concurrence s'appliquent donc à la conduite des entreprises à responsabilité limitée, des sociétés de personnes, des travailleurs indépendants, des entreprises publiques et des organismes à but non lucratif, mais aussi aux activités des associations de personnes ou d'entreprises que sont par exemple les associations commerciales, les associations professionnelles et toute autre association de tutelle d'un secteur d'activité. Généralement, les activités des associations commerciales ou professionnelles, de par leur nature même, constituent un « contrat », un « arrangement » ou un « accord », de sorte qu'elles remplissent sans difficulté le critère minimal d'application des règles de la concurrence relatives aux restrictions horizontales. Dans certains cas, les règles de la concurrence s'appliquent expressément aux décisions prises par les associations, comme cela est le cas dans l'Union européenne[15] et dans tous les pays où les dispositions relatives aux ententes sont similaires à celles de l'UE ou qui sont dotés de dispositions spécifiques réglementant les activités des associations commerciales, comme le Japon[16].

Cela étant, le terme d'« association », est une notion très large, englobant de nombreuses formes de coopération et d'interaction entre personnes physiques ou morales. Il renvoie généralement à toutes sortes d'organisations agissant dans l'intérêt commun, économique ou autre, de leurs membres. Il inclut donc

13 *Idem,* p. 422.

14 *Idem*, p. 444.

15 Voir Article 81 du Traité CEE.

16 Voir Chapitre III de la loi japonaise de 1947, modifiée en 2005, relative à l'interdiction des monopoles privés et à la préservation de la concurrence équitable. En outre, la commission japonaise de la concurrence a publié un ensemble de principes directeurs applicables aux activités des associations commerciales. La loi japonaise anti monopole proscrit certaines pratiques des associations commerciales même quand celles-ci ne constituent pas une « restriction substantielle de la concurrence ». Différentes raisons historiques expliquent le traitement particulier accordé aux associations commerciales, car elles jouent traditionnellement au Japon un rôle essentiel dans l'organisation des pratiques anticoncurrentielles parmi leurs membres. La loi anti-monopole définit en outre sous quelles conditions une association doit être traitée en tant qu'« association commerciale » aux fins du droit de la concurrence.

toutes sortes d'unions, alliances, sociétés, fraternités et groupes couvrant tous les centres d'intérêt humain (artistiques, littéraires, philanthropiques, caritatifs, etc.). Cependant, tous ces arrangements entre personnes physiques et/ou morales, ne peuvent être appelés « associations » aux fins du droit de la concurrence. Faute de définition juridique de ce terme, la notion d' « association », comme celles d'« entreprise » ou de « structure commerciale » est définie et interprétée en termes généraux dans les affaires sanctionnées dans la pratique par les autorités de la concurrence ou les tribunaux.

Pour que le droit de la concurrence s'applique à une association, deux éléments doivent être réunis :

- **Sa structure/son organisation :** l'association doit avoir une structure institutionnelle durable. La présence de cette structure est pertinente à deux titres. Premièrement, elle distingue l'association proprement dite (et sa responsabilité au regard du droit de la concurrence) de ses membres. Deuxièmement, elle permet de distinguer une association de la simple activité conjointe (tel qu'un accord par exemple) de deux sociétés concurrentes, quelle que soit sa forme juridique ou le fait qu'elle soit ou non dotée de la personnalité juridique et qu'elle soit ou non à but lucratif. De même, le caractère public des fonctions qu'elles assument n'a aucune incidence sur l'applicabilité des règles de la concurrence[17], qui valent également pour les associations d'associations (ou associations de second degré).

- **Sa fonction :** L'association doit pouvoir exercer une influence sur l'activité économique. Elle ne doit pas nécessairement être elle-même active sur le marché, mais ses activités doivent avoir, d'une façon ou d'une autre, un effet sur la concurrence[18]. Nombre d'associations (comme les associations caritatives ou culturelles) assument des fonctions qui n'ont aucun effet direct ou indirect sur le marché. Dès lors, l'association et ses activités ne relèvent pas du champ d'application des règles de la concurrence.

On doit aussi les distinguer d'autres formes d'arrangements d'entreprises, comme les fusions et les coentreprises. Même si cela n'est pas toujours vrai, une association commerciale n'est pas, normalement,

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17 Cela étant, les décisions prises par les associations qui sont indispensables pour leur permettre d'exercer leurs fonctions statutaires peuvent être exclues du champ d'application des règles de concurrence tant qu'elles se limitent aux dispositions contenues dans les statuts et qu'elles ne s'étendent pas à la réalisation des intérêts commerciaux de leurs membres.

18 C'est pourquoi les syndicats ne sont en général pas considérés comme des associations soumises au droit de la concurrence. Le travail dépendant ne peut être considéré comme une activité économique ou commerciale dès lors les salariés n'assument pas le risque lié à l'activité commerciale, mais agissent sous le contrôle et sur les instructions de l'employeur. Si les salariés ne peuvent être considérés comme des entités économiques, les syndicats et autres instances de représentation de salariés ne sont pas des « associations » aux fins du droit de la concurrence. Il existe certainement certaines circonstances où leurs activités peuvent relever des règles de concurrence. Cela peut se produire si le syndicat n'agit pas en simple mandataire de ses adhérents mais de son propre chef et que les activités faisant l'objet d'une surveillance sont de nature économique. En ce qui concerne le traitement des salariés et des syndicats en vertu du droit européen de la concurrence, voir les Conclusions jointes de l'avocat général Jacobs présentées le 28 janvier 1999 - Albany International BV contre Stichting Bedrijfspensioenfonds Textielindustrie, Demande de décision préjudicielle: Kantongerecht Arnhem - Pays-Bas. - Affaire C-67/96. Recueil de jurisprudence 1999 page I-05751. Aux États-Unis, les négociations collectives bénéficient de plusieurs exemptions en vertu du droit de la concurrence. Mais surtout, les syndicats œuvrant dans l'objectif légitime visé par les négociations collectives bénéficient de l'exemption possible du travail au droit de la concurrence (voir Detroit Auto Dealers v. FTC, 955 F.2d 457 (1992)). Les associations et leurs membres négocient souvent avec les syndicats. Tant qu'il s'agit de négociations collectives avec les syndicats, les tribunaux admettent l'exemption du travail, mais certaines négociations non justifiées sur les conditions de travail peuvent contrevenir au droit de la concurrence.

un intervenant actif sur un marché, et ne fournit de services qu'à ses membres. Contrairement aux associations commerciales, les fusions et coentreprises ont un effet sur l'organisation du marché sur lequel les parties prenant part à la fusion exercent leur activité. En outre, les fondateurs et les membres d'une association commerciale conservent un rôle indépendant sur le marché, ce qui n'est pas le cas dans le cadre d'une fusion[19]. Contrairement aux associations commerciales, les principales activités d'une coentreprise classique, en tant que telle, sont la recherche, la production et la diffusion de biens ou de services. Le rôle joué sur le marché par cette société peut être distinct de celui de ses sociétés mères et s'apparente plutôt à celui d'une entreprise ordinaire[20].

En règle générale, il existe trois principales catégories d'associations pertinentes pour le droit de la concurrence : les associations commerciales, les associations professionnelles et les autres associations de tutelle d'un secteur d'activité[21].

**Les associations commerciales** sont la forme la plus courante d'associations. Selon le barreau américain, une « association commerciale » est composée de « *personnes physiques ou morales partageant des intérêts commerciaux et qui, sous les auspices de l'organisation, se réunissent en vue de mener des actions conjointes destinées à promouvoir des objectifs commerciaux ou professionnels* »[22]. Dans les économies modernes, on trouve des associations commerciales dans presque tous les secteurs d'activité. De plus, de nombreuses entreprises et associations commerciales sont elles-mêmes affiliées à des associations commerciales internationales. Le plus souvent, les associations commerciales ne commercialisent pas de produits ou de services sur le marché sur lequel leurs membres exercent et elles ne traitent pas directement avec les consommateurs, mais agissent plutôt comme des prestataires de services pour leurs membres. De par leurs activités, elles leurs procurent des avantages – notamment aux petites entreprises – mais elles peuvent aussi contribuer à renforcer l'efficacité des mécanismes du marché dans son ensemble.

Les fonctions assumées par les associations commerciales pour promouvoir les intérêts commerciaux de leurs membres et de la collectivité dans son ensemble sont diverses et peuvent se scinder en trois catégories :

- **Activités à destination des membres.** La principale fonction d'une association commerciale est de fournir des services à ses membres et notamment d'organiser de conférences et des activités de formation dans des domaines tels que le droit, la commercialisation et la mise au point des produits, d'organiser et de parrainer de foires et salons professionnels, de publier des bulletins d'information et des journaux spécialisés, et ainsi de suite[23]. Les associations commerciales

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

20 *Idem*, p. 1478.

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

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

23 On peut aussi inclure dans cette catégorie l'une des fonctions traditionnellement assumée par les associations commerciales japonaises : le *shinboku* ou « promotion de l'amitié ». Le *shinboku* est un terme plutôt général renvoyant à toutes les manifestations sociales permettant aux salariés et aux dirigeants des entreprises membres de débattre de questions d'intérêt commun. Cette notion peut malheureusement aussi recouvrir les activités auxquelles Adam Smith pensait en observant qu'il est rare que des hommes d'affaires se réunissent uniquement pour une partie de plaisir. Voir U. Schaede, *Self-Regulation, Trade Associations and the Antimonopoly Law in Japan*, 2000, Oxford University Press.

recueillent, rassemblent et diffusent des données statistiques et sectorielles et préparent régulièrement des études sur l'évolution du marché dans leur secteur.

- **Fonctions économiques et réglementaires.** Les associations commerciales assument une importante fonction de politique sectorielle, en contribuant activement à définir les modalités de fonctionnement de leur secteur d'activité. Elles assurent notamment la promotion des normes de produits et des pratiques exemplaires de leur secteur ; elles fixent les conditions générales de vente du secteur et en assurent la promotion ; elles publient et font appliquer des codes éthiques ; dans certains cas, elles formulent et font respecter les règles de fonctionnement du secteur ; elles formulent des recommandations à l'intention de leurs membres sur des questions très diverses, d'ordre commercial ou non.

- **Fonctions politiques et de représentation d'intérêts particuliers.** Les associations commerciales exercent aussi une fonction « politique » qui consiste à promouvoir, à représenter et à protéger les intérêts de leurs membres en matière juridique, réglementaire, fiscale ou dans tout autre domaine relevant de l'action publique qui peut les concerner. Compte tenu du vaste champ d'application de la réglementation économique publique, il est devenu de plus en plus important que les entreprises participent à leur planification et à leur mise en œuvre. Les associations commerciales peuvent représenter les intérêts de leurs membres auprès des pouvoirs publics de nombreuses manières. On peut distinguer au moins deux catégories d'associations : celles qui sont un lieu d'échange d'idées au sein d'un secteur d'activité et celles auxquelles les pouvoirs publics assignent un rôle spécifique d'action publique (par exemple, la définition des conditions d'accès à une profession) aux fins d'une autoréglementation des activités de ce secteur. Si la première catégorie coopère occasionnellement avec les pouvoirs publics en vue de promouvoir ou de contester un aspect législatif ou réglementaire précis, le rôle exercé par la seconde catégorie est presque assimilable à une fonction d'intérêt public.

Les membres des professions libérales (avocats, médecins, architectes, vérificateurs des comptes, experts-comptables, etc.) s'organisent souvent en associations professionnelles, officiellement reconnues, qui œuvrent en relation étroite avec les pouvoirs publics[24]. Ces associations prennent souvent part à l'élaboration et à la mise en œuvre de règles applicables à leur profession, ainsi qu'à la mise au point de nouvelles réglementations qui doivent être approuvées par les autorités de tutelle publiques. En règle générale, ce sont elles qui déterminent les qualifications universitaires et l'expérience requises pour exercer la profession, elles tiennent un registre des membres de la profession, elles édictent les normes de conduite que leurs membres doivent respecter et les font appliquer par voie de recours ou disciplinaire. À l'instar d'une association commerciale, une association professionnelle représente les intérêts de ses membres auprès du gouvernement, des pouvoirs publics et des médias. Dans de nombreux cas, elles font office d'autorités de tutelle de leur profession, trouvant légitimité dans leurs statuts qui délèguent la réglementation de la profession à la profession elle-même. Même si, en général, le caractère public des missions assignées à une association professionnelle ne remet pas en cause l'applicabilité des règles de la concurrence, il peut arriver que certaines activités exercées par une association professionnelle soient exemptées du régime de concurrence en vigueur[25].

Enfin, il existe certaines autres autorités professionnelles qui ne relèvent ni du champ des associations commerciales ni de celui des associations professionnelles. Ce sont, par exemple, les conseils du secteur publicitaire régissant les pratiques de la profession, qui élaborent leurs propres codes en matière de

24 Pour une analyse générale de l'application des règles de concurrence aux professions libérales, voir OCDE, Roundtable on Competition in Professional Services, Background Note by the Secretariat, DAFFE/CLP(2000)2.

25 Voir plus loin.

publicité et les font respecter par les membres de la profession ou encore les conseils régissant l'autorégulation d'Internet en matière de ventes en ligne, de messagerie électronique, de codes d'auto gouvernance, de publicité en ligne, etc. En soi, tout dispositif d'autorégulation suppose que le comportement de membres qui y adhèrent est soumis à la surveillance et au contrôle de son instance de représentation ou d'une organisation mise en place par cette instance ou par ses membres afin de protéger les utilisateurs ou les consommateurs de comportements contraires à l'éthique ou inacceptables[26].

Cette note s'intéresse surtout aux activités des associations commerciales, mais nombre des remarques qui y sont formulées valent aussi pour les associations professionnelles et les autres autorités professionnelles.

## 4. Limites des activités des associations commerciales soumises aux règles de la concurrence

Le rôle important joué par les associations commerciales dans les économies modernes est largement reconnu. Nombre de leurs activités sont protégées, car elles sont l'expression de droits fondamentaux des individus et des entreprises, en tout premier lieu le droit de s'associer ou d'adhérer à une association, le droit d'exprimer ses idées et ses opinions, et le droit d'adresser librement des pétitions au gouvernement. L'exercice de ces droits et libertés peut toutefois entrer en conflit avec le principal objet du droit de la concurrence, qui est de favoriser la concurrence au bénéfice des consommateurs[27]. Pour empêcher les conflits entre ces droits fondamentaux et les objectifs de la politique de la concurrence, les tribunaux ont soustrait un certain nombre d'activités exercées par les associations commerciales du champ d'application des règles de la concurrence[28]. Certaines valeurs non concurrentielles sont essentielles et, si elles sont imposées par la constitution, doivent être prises en compte par les instances chargées de faire appliquer le droit de la concurrence. Cela étant, les autorités de la concurrence et les tribunaux ont toujours interprété ces exemptions ou immunités en termes restrictifs, dès lors que la prise en compte de ces valeurs pourrait imposer des coûts aux consommateurs.

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

27 Comme l'a observé la Cour suprême des États-Unis, « *en dernier ressort, la concurrence n'aura pas uniquement pour effet de faire baisser les prix, mais produira aussi de meilleurs biens et services. La foi dans la valeur de la concurrence se trouve depuis longtemps au cœur de notre politique économique nationale* » (*National Society of Professional Engineers c. United States*, 435 U.S. 679, 695 (1978) (citation de l'arrêt rendu dans l'affaire *Standard Oil Co. c. FTC*, 340 U.S. 231, 248 (1951)).

28 Cette section ne traitera pas des nombreuses exemptions légales dont bénéficient les associations commerciales et professionnelles ou leurs activités en vertu du droit de la concurrence des différents pays. Ainsi, dans un certain nombre de pays comme les États-Unis, le Japon, l'Allemagne et l'Australie, la loi exempte expressément les associations d'exportation (également appelées ententes à l'exportation) des règles de concurrence. Aux États-Unis, la toute première « exemption des exportations » au régime du droit national de la concurrence remonte à 1918 avec l'adoption de la loi Webb-Pomerene sur le commerce à l'exportation (Webb-Pomerene Export Trade Act ou WPA), 15 U.S.C. §§ 61-66 (2001). Cette loi, qui est encore en vigueur aujourd'hui, permet aux entreprises américaines, d'adhérer à des associations d'exportation et de bénéficier d'exemptions au droit de la concurrence, tant que leurs effets n'ont d'incidence qu'en dehors des États-Unis. En 1982, le Congrès américain a étendu les exemptions prévues dans la WPA en adoptant à l'unanimité la loi sur le commerce à l'exportation (Export Trading Company Act ou « ETC Act »), 15 U.S.C. § 4001(a) (2003). À l'époque, on dénombrait 39 associations relevant de la loi Webb Pomerene ; ce chiffre était passé à 155 en 2002. Voir 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, novembre 2004 et Staff Report of the Federal Trade Commission, WEBB Webb-Pomerene Associations: a 50-year Review, 1-7 (1967).

### *4.1 La doctrine du droit au secret des associations aux États-Unis*

Un droit fondamental des personnes et des entreprises est le droit de s'associer librement ou d'adhérer à une association existante. Il s'ensuit notamment de la doctrine du secret des associations que l'adhésion et la participation aux activités d'une association commerciale ne peut être tenue pour une infraction au droit de la concurrence non plus que pour une preuve suffisante de complot du point de vue du droit de la concurrence. Les associations commerciales et leurs membres ne peuvent être tenus pour responsables, aux fins du droit de la concurrence, pour le simple fait d'exercer un droit fondamental, protégé par la constitution. Cela vaut même si la participation active à une association commerciale peut procurer une « occasion » de conclure des accords illicites[29]. De ce fait, l'application du droit de la concurrence ne saurait avoir pour effet de priver les individus de leurs droits (autrement dit d'empêcher les personnes et les entreprises de créer une association ou à d'adhérer à une association existante). Dès lors, les instances répressives doivent uniquement surveiller les activités de l'association susceptibles d'avoir un effet sur la concurrence et d'être préjudiciables aux consommateurs. Comme l'ont relevé Areeda et Hovenkamp : « *mettre en péril des collaborations raisonnables, favorisant la concurrence, ne serait conforme ni au droit de la concurrence ni à l'approbation clairement énoncée par la Cour Suprême autorisant de nombreuses formes de collaboration entre concurrents* »[30].

En conséquence, les tribunaux admettent que les associations commerciales jouissent d'un privilège constitutionnel dispensant les personnes et les groupes de personnes d'avoir à révéler des informations confidentielles concernant leur association. Si ces privilèges n'étaient pas reconnus, le droit d'association serait compromis, notamment dans les cas où les intérêts défendus par les associations ont un caractère politique, religieux ou économique. Ainsi, aux États-Unis, ce privilège est inscrit dans le Premier Amendement[31] de la Constitution. Il assure notamment la protection de l'identité des membres d'une association et la protection des délibérations internes des membres portant sur les stratégies et pratiques définies aux fins de la représentation des intérêts[32]. Cette doctrine a été formulée par la Cour suprême en 1958[33] dans l'affaire *N.A.A.C.P. c. Alabama ex rel. Patterson*[34]. La Cour suprême, reconnaissant la liberté d'association, a indiqué que : « *la possibilité de défendre effectivement des opinions, en public ou en privé, notamment des opinions controversées, est indéniablement renforcée par la forme collective de l'association […] Il ne peut y avoir de discussion sur le fait que la liberté de s'impliquer dans une association pour faire progresser ses croyances et ses idées est inextricablement lié au concept de « liberté », telle qu'il est affirmé dans la clause de procédure régulière et équitable figurant au Quatorzième Amendement, qui couvre la liberté d'expression* »[35]. S'appuyant sur le droit au secret des associations, les tribunaux ont invoqué un « privilège constitutionnel qualifié ». Ce privilège « *protège les droits à la libre expression et à la vie privée des individus qui souhaitent diffuser leurs connaissances et*

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29 Voir P. Areeda et H. Hovenkamp, Antitrust Law, paragraphe 1417b.

30 *Idem* p. 105 (notes omises).

31 Selon le Premier Amendement de la Constitution des Etats-Unis : « *Le Congrès ne pourra faire aucune loi concernant l'établissement d'une religion ou interdisant son libre exercice, restreignant la liberté de parole ou de la presse, ou touchant au droit des citoyens de s'assembler paisiblement et d'adresser des pétitions au gouvernement pour le redressement de leurs griefs* » (souligné par nous).

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

33 Le droit au secret des associations a évolué au gré des affaires ayant trait aux droits civiques qui ont été jugées par la Cour suprême dans les années 50 et 60 et il protège le droit d'expression et le droit au respect de la vie privée des personnes et groupes de personnes exprimant leurs idées dans un espace public.

34 357 U.S. 449 (1958).

35 *Idem,* p. 460.

*leurs idées dans un espace public, tout en conservant le secret de leur identité »*[36]. Dans le contexte de la découverte de la preuve par exemple, ce privilège limite la divulgation d'informations de nature à empiéter sur le droit au secret des associations dont jouissent les personnes ou groupes de personnes qui en sont membres[37].

### *4.2 La doctrine Noerr-Pennington aux États-Unis*

Les associations commerciales ont pour fonction essentielle de faire en sorte que leurs membres parviennent à s'entendre sur les questions de politique publique qui concernent leur secteur et de promouvoir ces intérêts d'action publique auprès du gouvernement et des pouvoirs publics. Cette activité peut cependant induire un nivellement des conditions de concurrence entre les membres et, dans une certaine mesure, au sein du secteur. La question de savoir si les associations commerciales et leurs membres peuvent être tenus pour responsables, du point de vue du droit de la concurrence, lorsqu'ils cherchent à influer sur l'adoption d'une mesure anticoncurrentielle prise par les pouvoirs publics a été tranchée pour la première fois par la Cour suprême des États-Unis dans deux affaires survenues au début des années 60 : l'affaire *Eastern R.R. Presidents Conference c. Noerr Motor Freight, Inc.*[38] et l'affaire *United Mine Workers of America c. Pennington*[39]. Les arrêts rendus dans ces deux affaires forment ce que l'on appelle la doctrine *Noerr-Pennington*[40].

Dans l'affaire *Noerr* et dans l'affaire *Pennington*, la Cour Suprême a admis qu'on ne peut postuler que la responsabilité des personnes mises en cause est engagée, en vertu du Sherman Act, pour avoir déployé des efforts concertés en vue d'assurer que les pouvoirs publics imposeront des restrictions à la concurrence[41]. Dans l'affaire *Noerr*, la Cour suprême a statué que : (1) le Sherman Act n'interdit pas les actions menées en vue d'influencer l'adoption et la mise en application des lois et que (2) dans la mesure où le dénigrement des consommateurs et du grand public est présumé faire partie d'une stratégie visant à influencer la législation et la mise en application des lois, ce dénigrement est « inhérent » au dépôt de la

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36 Voir *Rancho Publ'ns*, 68 Cal.App. 4th p. 1547.

37 Voir C. H. Samel et J. A. Carmassi, *Trade Association: Boundaries in Antitrust Litigation (Part One)*, The Antitrust Litigator, Vol. 5, n°2, Printemps 2006.

38 365 U.S. 127 (1961).

39 381 U.S. 657 (1965).

40 Pour une synthèse de cette doctrine, voir *Enforcement Perspectives on the Noerr-Pennington Doctrine*, An FTC Staff Report (2006), à l'adresse Internet suivante : http://www.ftc.gov/opa/2006/11/noerr.htm.

41 Cette doctrine trouve son origine dans le Premier Amendement qui garantit le droit du peuple d'adresser des pétitions au gouvernement et d'exprimer librement ses opinions en public. Elle se fonde en outre sur le principe selon lequel les règles de concurrence gouvernent l'activité commerciale mais non l'activité politique. Elle assure donc que le droit de la concurrence ne saurait primer sur les décisions prises par les pouvoirs publics, tant à l'échelon fédéral qu'à celui des États, qui dépendent largement de la capacité du peuple à se faire entendre de ses représentants. En dehors des États-Unis, il n'existe guère de références au fait que le droit d'adresser des pétitions au gouvernement constitue une limite aux mesures relevant du droit de la concurrence. Voir par exemple l'arrêt n° 8235 rendu par le tribunal administratif de la région du Latium (Tribunale Amministrativo Regionale del Lazio ou TAR) en Italie, le 25 septembre 2002 excluant de la protection constitutionnelle des droits d'association et de libre expression les comportements privés ayant pour principal objet de fausser la concurrence. Pour la CEE, voir la Décision du 23 décembre 1992 de la Commission européenne dans l'affaire Cewal, Cowac et Ukwal, publiée au journal officiel L/34 du 10 février 1993, p. 20, citée en note 25 du rapport d'I. Berti, *Associazione di Imprese e Diritto Antitrust: un Difficile Connubio*, présenté lors de la conférence intitulée « Antitrust tra diritto nazionale e diritto comunitario », qui s'est tenue le 13 mai 2004, à Trévise (Italie).

pétition et de ce fait protégé au même titre[42]. La Cour a aussi souligné que le fait que la motivation ayant présidé au dépôt de la pétition était de porter préjudice aux concurrents était irrecevable puisque le « droit du peuple à informer ses représentants au gouvernement » ne peut être subordonné à l'intention ayant motivé l'action. Dans l'affaire *Pennington*, elle a étendu au-delà de la sphère législative l'exemption prévue dans l'affaire Noerr afin d'interdire toute contestation, au nom du droit de la concurrence, du droit d'adresser une pétition à un quelconque agent public.

Au cours des quarante dernières années, la Cour suprême a précisé – et parfois limité – la portée de cette doctrine. Dans l'affaire *California Motor Transport Co. contre Trucking Unlimited*[43], par exemple, elle a statué que cette doctrine s'applique également aux initiatives concertées menées en vue d'influencer des procédures administratives et judiciaires ainsi qu'aux initiatives destinées à influencer des actions du pouvoir législatif et exécutif. En revanche, elle a refusé de l'appliquer aux actions de lobbying destinées à influencer le processus de définition des normes d'une association *privée*[44]. Elle a également limité l'applicabilité de la doctrine « *[…] lorsque le complot présumé n'est qu'un simple simulacre destiné à couvrir ce qui n'est, en réalité, rien de plus qu'une tentative de s'ingérer dans les relations commerciales d'un concurrent. Le cas échéant, l'application du Sherman Act est alors justifiée* »[45] (« exception du simulacre »).

### *4.3 La doctrine de la souveraineté de l'État*

De nombreuses activités des associations commerciales et professionnelles sont définies par la loi ou trouvent une justification dans les politiques publiques. Un grand nombre d'associations se voient expressément conférer certains pouvoirs par tel ou tel organisme public, comme celui de fixer les prix ou de définir d'autres conditions générales relatives à l'exercice d'une activité commerciale (par exemple l'obligation de respecter certaines normes ou certaines règles de certification). Les organismes publics peuvent aussi se voir demander d'approuver ou de récuser une résolution prise par une association sectorielle. Il y a lieu de se demander si de telles activités, qui peuvent entraîner d'importantes restrictions en matière de prix ou de production pour les membres des associations, doivent faire l'objet d'une surveillance particulière au regard du droit de la concurrence, même si elles ont été imposées ou autorisées par la loi. Dans des termes divers, les tribunaux ont conclu que la responsabilité ne peut être engagée, en vertu du droit de la concurrence, si le comportement privé contesté (y compris le comportement d'associations commerciales) a été déterminé par des mesures légales prises par les pouvoirs publics. Cette doctrine est appelée *excuse de la souveraineté de l'État*[46] (« state action doctrine »).

La question de la responsabilité, en vertu du droit de la concurrence, découlant d'un comportement induit par l'État a été tranchée pour la première fois par la Cour suprême des Etats-Unis en 1947 dans l'affaire *Parker contre Brown*. Dans cette affaire, un groupe de producteurs de raisins secs a convenu

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42 365 US, p. 135-144.

43 404 U.S. 508 (1972).

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

45 Voir *California Motor Transport Co. c. Trucking Unlimited* 404 U.S. 508 (1972), p. 511. Plus récemment, dans l'affaire *Professional Real Estate Investors, Inc. c. Columbia Pictures Industries, Inc.* (508 U.S. 49 (1993)), la Cour a précisé le rôle de l'intention dans la doctrine Noerr-Penningon, énonçant que sa protection s'étend aux tentatives d'influencer des agents publics, intentionnellement ou non, et que les différentes applications de la doctrine par la Cour montraient que ni cette doctrine ni l'exception de simulacre « *ne jouent automatiquement du seul fait subjectif de l'intention* » (p. 59).

46 Voir T. J. Muris, *State Intervention/State Action - A U.S. Perspective,* octobre 2003, George Mason Law & Economics Research Paper n°04-18 ; J. T, Delacourt et T. J. Zywicki, *The FTC and State Action: Evolving Views on the Proper Role of Government*, Antitrust Law Journal, Vol. 72, n°3, pp. 1075 à 1090, 2005.

d'appliquer des restrictions de production et cet accord a été ensuite ratifié par le ministère de l'agriculture d'un État. La Cour suprême a décidé que ce comportement anticoncurrentiel bénéficiait d'une immunité vis-à-vis de l'application du droit de la concurrence si deux conditions étaient réunies en même temps :

- Le comportement « doit découler d'une politique publique clairement formulée et affirmée par l'État » et

- Faire l'objet de la « surveillance active de l'État ».

En vertu de l'affaire *Parker*, un comportement allant dans le sens d'une politique publique clairement formulée et affirmée et faisant l'objet d'une surveillance active de l'État, est exonéré de la responsabilité découlant du droit de la concurrence. L'excuse de la souveraineté de l'État a été appliquée à un certain nombre d'affaires à la suite de l'affaire *Parker*, y compris à des affaires impliquant des associations commerciales, dans le cadre desquelles les tribunaux américains ont affiné et précisé plus avant l'interprétation des deux conditions énoncées dans l'affaire *Parker*. Ils se sont notamment intéressés de près à la signification de l'expression « politique publique clairement formulée par l'État », refusant d'étendre cette excuse à toute action de l'État ; ils ont en outre suivi de près l'application du critère de « surveillance active », récusant cette excuse lorsque cette surveillance n'est guère ou jamais exercée dans la pratique[47]. Ainsi dans l'affaire *Retail Liquor Dealers Association contre Midcal Aluminium Co.*[48], l'excuse a été récusée pour un dispositif d'affichage des prix d'une association commerciale car, bien que prévu par la loi, le dispositif en question ne faisait l'objet d'aucune surveillance convenable, puisque les prix étaient toujours laissés à la discrétion des commerçants qui y participaient.

En Europe, la Cour de justice des communautés européennes (CJCE) est confrontée depuis les années 70 au problème des mesures ayant des effets anticoncurrentiels prises par l'État et de leur interaction avec les clauses de concurrence du Traité de Rome[49]. La plupart des arrêts rendus dans ces affaires, cependant, remettent en cause la doctrine de la souveraineté de l'État lorsqu'elle exempte les mesures prises par l'État éliminant l'effet utile des règles communautaires applicables aux entreprises en matière de concurrence, mais non lorsqu'elle exempte des règles de la concurrence les comportements privés résultant entièrement de mesures licites prises par les pouvoirs publics. Dès 1977, la CJCE statuait : « *que, dès lors, s'il est vrai que l'article [86] s'adresse aux entreprises, il n'en est pas moins vrai que le Traité impose aux États membres de ne pas prendre ou maintenir en vigueur des mesures susceptibles d'éliminer l'effet utile de cette disposition* »[50], imposant de ce fait une obligation générale de ne pas éliminer l'effet utile de l'Article 86. Elle poursuivait en énonçant « *que, pareillement, les États membres ne sauraient édicter des mesures permettant aux entreprises privées de se soustraire aux contraintes imposées par les articles [81] à [89] du Traité* »[51].

Le champ d'application de l'obligation imposant aux États membres de ne pas prendre ou maintenir en vigueur des mesures susceptibles d'affecter les règles de la concurrence énoncées dans le Traité a été précisé plus avant, au fil du temps, par les tribunaux européens dans un certain nombre d'affaires. Dans

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

48 445 US 97 (1980).

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

50 Voir Arrêt de la Cour du 16 novembre 1977. - *SA G.B.-INNO-B.M. contre Association des détaillants en tabac (ATAB)*, Demande de décision préjudicielle: Hof van Cassatie - Belgique. - Tabacs manufacturés. - Affaire 13-77 Recueil de jurisprudence 1977 page 02115, paragraphe 31.

51 *Idem,* paragraphe 33.

l'affaire *Eycke*[52], la Cour de justice des communautés européennes a réaffirmé le principe énoncé dans l'affaire GB-Inno-BM, selon lequel le Traité de Rome impose aux États membres de ne pas prendre ou maintenir en vigueur des mesures, fussent-elles législatives, susceptibles de rendre inefficaces les règles de la concurrence, précisant que « *tel est le cas, [...], lorsqu' un État membre soit impose ou favorise la conclusion d'ententes contraires à l'article [81] ou renforce les effets de telles ententes, soit retire à sa propre réglementation son caractère étatique en déléguant à des opérateurs privés la responsabilité de prendre des décisions d' intervention en matière économique* »[53].

En ce qui concerne l'excuse de la souveraineté de l'État, complément logique de la doctrine de la souveraineté de l'État, la Cour de justice des communautés européennes a arrêté que les obligations pesant sur les États membres en vertu du Traité sont *distinctes* de celles découlant pour les entreprises de la responsabilité incombant aux entités privées en vertu des règles communautaires[54]. Selon la Cour, l'excuse de la souveraineté de l'État a un sens très restrictif et n'exempte par les entités privées de la responsabilité en tant que telle qui leur incombe en vertu du droit de la concurrence. En vertu du droit communautaire, la responsabilité des entreprises n'est pas engagée si leur comportement anticoncurrentiel est imposé par une mesure publique et si toute possibilité de comportements autonomes des entreprises est exclue. La Cour a précisé que cette excuse se fonde sur le *« principe général de droit communautaire de la sécurité juridique »*[55]. Cela étant, les entreprises sont responsables en vertu des règles communautaires en matière de concurrence et peuvent encourir des sanctions si la mesure publique « *se limite à inciter ou à faciliter l'adoption, par les entreprises, de comportements anticoncurrentiels autonomes »*. Dans de telles affaires, leur responsabilité découlant du droit de la concurrence peut être établie, mais le cadre juridique national peut alors être retenu comme une « circonstance atténuante » pour alléger la sanction imposée[56].

### *4.4 Règles de la concurrence, autorégulation et associations professionnelles*

Les spécificités des professions libérales, qui servent souvent des intérêts publics généraux, comme la sécurité des consommateurs, la santé ou la justice, ont souvent été mises en avant dans des affaires liées à des pratiques relevant du droit de la concurrence pour justifier les modalités différentes et plus souples d'application des règles de la concurrence aux associations professionnelles[57]. Trois arguments sont généralement avancés pour justifier une différence de traitement au regard du droit de la concurrence : (1) l'asymétrie de l'information entre les professionnels et leurs clients ; (2) les considérations liées à la qualité des soins, à la santé et au service public en lien avec la prestation de services professionnels, qui peuvent avoir un impact non seulement sur la personne acquérant directement ces services mais également sur des tiers[58] et (3) les aspects de service public de professions réputées, dans certains cas, distribuer des biens

52 Affaire 267-86, *Van Eycke*, Recueil de jurisprudence 1988 page 4769.

53 Voir paragraphe 16. La signification des termes « impose » ou « favorise » un comportement illicite ou « renforce » les effets d'un tel comportement ou « délègue » à des structures privées des fonctions réglementaires publiques a été précisée dans un certain nombre d'affaires : Affaire C-2/91, *Meng*, [1993] Rec. p. I-5751; Affaire C-245/91, *Ohra,* [1993] Rec. p. I-5851 ; Affaire C-185/91, *Reiff*, [1993] Rec. p. I-5801.

54 Arrêt de la Cour du 9 septembre 2003. - *Consorzio Industrie Fiammiferi (CIF) contre Autorità Garante della Concorrenza e del Mercato*. - Demande de décision préjudicielle: Tribunale amministrativo regionale per il Lazio - Italie - Affaire C-198/01. Recueil de jurisprudence 2003 page I-08055, paragraphe 51.

55 *Idem,* paragraphe 54.

56 *Idem,* paragraphes 56 et 57.

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

58 L'inexactitude d'un audit peut ainsi induire en erreur les créanciers et les investisseurs ou les malfaçons d'un bâtiment peuvent mettre en péril la sécurité publique.

d'intérêt public précieux pour la collectivité dans son ensemble. En invoquant ces arguments, les professionnels font valoir de longue date que les contraintes imposées par les associations professionnelles à leurs membres doivent relever de règles de la concurrence différentes de celles imposées aux personnes n'exerçant pas une profession libérale.

En 1975, la Cour suprême des États-Unis a admis que « la composante de service public et d'autres spécificités des professions libérales peuvent imposer qu'une pratique particulière, qui pourrait être réputée constituer une violation du Sherman Act dans un autre contexte, soit traitée différemment [s'il s'agit d'une profession libérale] »[59]. Selon la Cour, la composante de service public des professions libérales peut justifier un traitement différent des contraintes imposées aux membres d'une telle profession par rapport aux contraintes similaires imposées à des personnes n'exerçant pas une profession libérale. Malgré cet avis général, l'exception du « service public » a rarement été utilisée pour traiter différemment les contraintes imposées par les associations professionnelles de celles imposées à un comportement analogue de personnes n'exerçant pas une profession libérale. Dans l'affaire California Dental [association des dentistes californiens][60], par exemple, la Cour a accepté comme juridiquement recevable l'interdiction absolue de faire de la publicité sur la qualité des prestations imposée aux membres de cette association au motif que cette restriction visait, du moins à première vue, à empêcher toute publicité fausse ou trompeuse sur un marché caractérisé par des disparités flagrantes entre les informations dont disposent des praticiens et celles auxquelles les patients peuvent avoir accès. En raison de l'asymétrie de connaissances inhérente au service offert, les patients pouvaient difficilement vérifier, en théorie et en pratique, la véracité des affirmations avancées par les professionnels de la santé concernant la qualité de leurs services. Dans cette affaire, la Cour a conclu que cette restriction avait des effets favorables à la concurrence car elle réglait les problèmes d'asymétrie de l'information qui pouvaient exister.

En Europe, la CJCE a conclu que les associations professionnelles sont soumises aux règles de la concurrence du Traité de Rome, tout en précisant que dans certains cas, les restrictions imposées par les associations professionnelles peuvent être exclues du champ de la surveillance découlant du droit de la concurrence communautaire sachant qu'elles sont nécessaires au bon fonctionnement de la profession, telle qu'elle est organisée dans chaque État membre. Dans l'arrêt qu'elle a rendu dans l'affaire *Wouters*[61], elle a statué qu'il faut tout d'abord tenir compte des objectifs de la mesure sous surveillance en vue d'assurer qu'ils procurent la nécessaire garantie d'intégrité et d'expérience aux consommateurs finaux des services professionnels. Les effets restrictifs de la concurrence qui en découlent doivent être inhérents à la poursuite de ces objectifs et ils ne peuvent aller au-delà de ce qui est nécessaire pour garantir la bonne pratique de la profession (*test de proportionnalité*).

Les approches américaine et européenne se fondent toutes deux sur la reconnaissance du fait que l'autorégulation exercée par les associations professionnelles peut favoriser la concurrence tant qu'il existe une raison plausible aux restrictions imposées, qui en renforce l'efficacité. Cela étant, les autorités de la concurrence et les tribunaux réfuteront l'argument selon lequel l'autorégulation exercée par les associations professionnelles favoriserait toujours la concurrence en raison de la fonction de service public assumée par les professions libérales. Ils peuvent juger ces restrictions illicites si les mesures prises sont susceptibles d'entraîner des hausses de prix ou une limitation de la production de nature à porter atteinte au bien-être des consommateurs. Il convient donc d'apprécier les affaires au cas par cas. L'examen doit s'en

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

60 Voir *California Dental Association c. FTC*, 119 S.Ct. 1604 (1999).

61 Voir Affaire C-309/99, *Wouters*, [2002] Rec. I-1577. En ce qui concerne l'approche de la Commission européenne sur les questions de concurrence dans les professions libérales, voir la Communication de la Commission-Rapport sur la concurrence dans le secteur des professions libérales du 9 février 2004 (COM/2004/0083 final), disponible sur le site Internet de la Direction générale de la concurrence.

tenir au point contesté et s'intéresser au contexte et à la finalité des mesures faisant l'objet d'une surveillance ainsi qu'à l'objectif de politique publique visé par la mesure restrictive. Les autorités de la concurrence et les tribunaux ne tolèreront aucune collusion flagrante, sur les prix ou la production par exemple, du simple fait que ses instigateurs exercent une profession libérale.

## 5. L'application des règles de la concurrence en matière de restrictions injustifiables applicables aux associations commerciales

Malgré les nombreux aspects proconcurrentiels des associations commerciales, celles-ci restent très exposées, de par leur nature même, aux risques relevant du droit de la concurrence. La participation aux activités des associations commerciales et professionnelles procure aux entreprises d'un même secteur de nombreuses occasions de se rencontrer régulièrement et de discuter de sujets d'intérêt commun relatifs à leur activité. Ces rencontres et discussions, même si elles s'inscrivent dans l'objectif légitime de l'association, mettent en contact des concurrents directs tout en leur offrant des occasions régulières d'échanger des idées sur le marché. Ces occasions peuvent facilement donner lieu à des pratiques de coordination illicite. Les discussions informelles sur les prix, les quantités, les futures stratégies commerciales peuvent aboutir à des accords ou à des ententes informelles clairement contraires aux règles de la concurrence. C'est pourquoi les associations commerciales et leurs activités continuent de faire l'objet d'une surveillance attentive de la part des autorités de la concurrence dans le monde.

De par sa nature même, tout acte ou toute action impliquant une association commerciale ou professionnelle peut, théoriquement, avoir pour effet de restreindre la concurrence. Premièrement, l'acte constitutif et les statuts d'une association sont considérés comme un « accord », un « contrat » ou un « arrangement » conclu entre les membres fondateurs de l'association[62]. À ce titre, ils sont soumis à l'ensemble des règles de la concurrence concernant les restrictions horizontales et de ce fait, les éléments restrictifs qui y sont contenus peuvent engager la responsabilité des membres de l'association en vertu du droit de la concurrence[63]. Deuxièmement, toute décision prise[64], recommandation formulée ou autre

62 Les objectifs mêmes de l'association, qui sont convenus par les membres dans son acte constitutif, peuvent avoir un objet anticoncurrentiel. Dans l'affaire concernant une entente conclue dans le secteur néerlandais de la construction, l'association avait notamment pour objet d'éviter et de combattre des comportements inconvenants lors de l'offre de prix. Décision 92/204/CEE de la Commission, du 5 février 1992, relative à une procédure d'application de l'article 85 du traité CEE (IV/31.572 et 32.571 - *Industrie de la construction aux Pays-Bas*), JO L 92 p. 1 ; confirmée en appel par l'arrêt du Tribunal de première instance des Communautés européennes, voir Affaire T-29/92, *SPO contre Commission des communautés européennes*, Recueil de jurisprudence 1995 page II-289 et par la Cour de justice des communautés européennes, Affaire C-137/95, *SPO contre Commission des communautés européennes*, Recueil de jurisprudence 1996 p. I-1611.

63 Voir Décision de la commission européenne relative à une procédure d'application de l'article 85 du traité CEE (IV/27.958 *National Sulphuric Acid Association*, JO 1980 L260/24 du 30.10.80; Décision de la commission européenne relative à une procédure d'application de l'article 81 du traité CE et de l'article 53 de l'accord EEE (Affaire COMP/29.373 — *Visa International — Commission multilatérale d'interchange*), JO 2002 L318/17.

64 L'Article 81 du Traité CEE couvre, outre les décisions d'entreprises, « toutes décisions des associations d'entreprises ».

activité menée par l'association[65] peut avoir pour effet de restreindre la concurrence entre ses membres. Il n'est pas nécessaire à cet égard que les décisions soient formelles ou contraignantes ou qu'elles soient entièrement observées[66] pour relever du champ d'application des règles de la concurrence, dès lors qu'elles ont un effet appréciable sur la concurrence. Il n'est pas nécessaire que les décisions ou recommandations soient expressément approuvées par les membres de l'association pour engager leur responsabilité du point de vue du droit de la concurrence[67]; une simple exhortation orale peut également déclencher cette responsabilité s'il est entendu que les membres doivent s'y conformer.

Même s'il est généralement admis que les associations commerciales doivent être soumises aux règles de la concurrence, ne serait-ce que pour empêcher que leurs membres puissent échapper à l'application du droit de la concurrence en agissant par leur intermédiaire, le rôle de l'association dans l'infraction commise peut être très variable, de même que sa responsabilité dans le comportement anticoncurrentiel. Les membres de l'association sont seulement responsables des restrictions (que seraient, par exemple, des critères d'adhésion anticoncurrentiels) contenues dans l'acte constitutif ou les statuts. L'association peut toutefois être tenue pour responsable, parallèlement à ses membres, si elle a joué elle-même un rôle à part entière en suggérant, orchestrant ou commettant un acte illicite. À l'inverse, sa responsabilité ne saurait être engagée si le comportement illicite est le fait de ses membres, sans qu'elle en ait eu connaissance. C'est le cas par exemple quand les membres d'une association utilisent l'occasion de se réunir qu'elle leur offre pour se rencontrer séparément (avant ou après les activités organisées par l'association) afin de fixer les prix, de se répartir les clients ou se partager les territoires, en dehors de toute implication de l'association[68].

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65 Dans la conduite quotidienne des activités d'une association, les résolutions adoptées par le comité de gestion ou par l'ensemble des membres lors des assemblées générales, les décisions contraignantes du comité de gestion ou de direction de l'association, ou les instructions de son directeur général peuvent toutes être des « décisions » de l'association. Du point de vue du droit de la concurrence, il convient essentiellement de se demander si la décision, quelle que soit sa forme, a eu pour objet ou pour effet d'influencer le comportement ou de coordonner l'activité des membres. Voir Office of Fair Trading, *Trade Associations, Professions and Self-Regulating Bodies*, Competition Law Guidelines, décembre 2004.

66 Voir Affaire C-96/82, *IAZ international Belgium NV contre Commission des communautés européennes*, Recueil de jurisprudence 1983 page 03369.

67 Les membres des associations ont convenu d'autoriser l'association à assumer certaines obligations en leur nom et cela peut donc suffire, en l'absence de contestation explicite d'un acte ou d'une décision spécifique de l'association, à engager leur responsabilité en vertu du droit de la concurrence. Voir Décision de la commission européenne, *Fedetab*, JO 1978 L224/29 et l'arrêt rendu en appel par la Cour de justice des communautés européennes, *Van Landewyck SARL et autres contre Commission des communautés européennes*, Recueil de jurisprudence 1980 page 03125.

68 Dans deux affaires récentes concernant des cartels internationaux – le cartel de la lysine et le cartel de l'acide citrique – les investigations ont montré que les instigateurs avaient agi sous le « couvert » des activités légitimes de leurs associations commerciales pour organiser des rencontres parallèles, dites « informelles », au cours desquelles ils s'entendaient pour fixer les prix et déterminer leurs parts de marché mutuelles dans le monde. Ces rencontres « informelles » entre les conspirateurs avaient lieu dans les jours précédant ou suivant immédiatement les réunions officielles de l'association commerciale. Pour ces raisons et pour ne pas servir de cadre à des ententes horizontales interdites, les associations commerciales mettent généralement en place des programmes complexes de certification et le personnel de l'association et/ou ses conseillers extérieurs suivent et contrôlent les activités des membres ayant lieu dans le cadre des activités que l'association organise ou qui sont réalisées en son nom. Pour ne pas exposer leur responsabilité au regard du droit de la concurrence, il importe aussi que les activités et réunions des associations soient précisément répertoriées dans des ordres du jour ou des minutes. Toute réunion injustifiée, secrète ou furtive peut éveiller des soupçons quant à son objet réel et susciter l'impression qu'elle « dissimule » des complots visant à éliminer la concurrence. Voir 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, paragraphe 1417.

Si les activités des associations commerciales font généralement l'objet d'une surveillance en raison des infractions aux règles de la concurrence relatives aux accords horizontaux anticoncurrentiels qu'elles sont susceptibles de commettre, elles n'en sont pas moins soumises également à l'ensemble de ces règles, et notamment aussi aux dispositions relatives aux restrictions verticales[69] et aux abus de position dominante/monopoles[70]. Pour les autorités de la concurrence, les motifs classiques de préoccupation liés aux associations commerciales concernent les accords de fixation des prix, de répartition des clients/territoires et les soumissions concertées. Les paragraphes suivants passent en revue ces restrictions, de manière non exhaustive, dans le contexte des associations commerciales.

### *5.1 La fixation directe ou indirecte des prix ou d'autres conditions commerciales*

Si une association commerciale ou professionnelle fixe directement ou or indirectement les prix de produits et services commercialisés, en concurrence, par ses membres, ce comportement est susceptible de restreindre nettement la concurrence sur le marché. La plupart des autorités de la concurrence estiment que de tels arrangements en matière de fixation des prix restreignent en eux-mêmes la concurrence de manière appréciable et doivent être proscrits sans exception en vertu des règles de la concurrence.

Une association peut imposer des prix par de nombreux moyens. Cette pratique peut recouvrir la fixation des prix effectivement facturés par ses membres ainsi que l'un quelconque des éléments composant le prix, comme les remises ou les rabais[71], les frais de transport, de livraison ou le montant des paiements pour les services additionnels, les conditions de crédit ou de garantie. Sans fixer le prix effectif, l'association peut atteindre un résultat identique ou similaire en déterminant un objectif de prix ou encore un prix plancher. La pratique consistant à coordonner les augmentations de prix que les membres de l'association peuvent appliquer à leurs clients est tout aussi restrictive car elle peut notamment limiter leur liberté de décider par eux-mêmes le montant ou le pourcentage de l'augmentation ou les obliger à respecter une fourchette de variation des prix. De même, l'obligation imposée aux membres de l'association de ne pas annoncer de prix sans consulter préalablement l'association ou les autres membres est de nature à restreindre la concurrence.

Outre les prix, les entreprises se font aussi concurrence sur les conditions générales de vente. Les associations commerciales et professionnelles peuvent aussi intervenir dans la formulation des conditions que leurs membres imposent à leurs relations commerciales. Toutes ces conditions générales n'auront sans doute pas un effet appréciable sur la concurrence, mais il n'empêche que, si une association impose à ses membres d'utiliser des conditions générales de vente ou d'achat communes, cette pratique aura

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69 De nombreuses associations représentent des entreprises exerçant des activités dans plusieurs créneaux d'un même secteur comme les producteurs, les grossistes, les distributeurs et les détaillants par exemple. Le cas échéant, les activités des associations commerciales peuvent donner lieu à des restrictions verticales illicites.

70 Il peut s'avérer que des associations commerciales qui représentent une fraction importante des acteurs d'un même secteur sont susceptibles – en théorie – de détenir un pouvoir de marché et peuvent donc être soumises aux dispositions du droit de la concurrence relatives au comportement unilatéral. Tel peut être le cas par exemple si une association commerciale décidait, sans justification, de priver un concurrent appartenant au secteur des avantages découlant de l'adhésion à l'association.

71 Cela peut aussi inclure tout accord favorisé par l'association en vue de contraindre l'ensemble de ses membres à appliquer les tarifs publiés et à n'accorder aucune remise sur les prix affichés à leurs clients.

inévitablement pour effet de restreindre la concurrence dans une certaine mesure[72]. Les autorités de la concurrence seront moins préoccupées par ces conditions type si les membres de l'association restent libres d'appliquer d'autres conditions ou si une minorité d'entre eux seulement les adoptent, laissant ainsi aux consommateurs une liberté de choix[73].

### *5.2 Le partage des clients et/ou des marchés*

Un accord de partage des marchés a, économiquement, le même effet qu'un accord de fixation des prix, notamment lorsque les produits sont normalisés. Les consommateurs paieront au bout du compte plus cher puisque le fournisseur exclusif ne sera pas exposé à des pressions concurrentielles. Le partage du marché peut prendre différentes formes : les entreprises peuvent se partager mutuellement certains clients donnés ou des groupes de clients entiers ou encore se répartir entre elles des territoires commerciaux exclusifs. Les accords de spécialisation en vertu desquels chaque concurrent se spécialise dans la production de certains produits d'une même gamme ou dans la fabrication de certains composants d'un produit peuvent avoir des effets analogues. Les autorités de la concurrence appliquent aux accords de partage de marché et de répartition des clients les mêmes normes de surveillance qu'aux accords de fixation des prix.

Les associations commerciales et professionnelles sont parfois directement impliquées, pour le compte de leurs membres, dans des accords d'exclusivité concernant des territoires ou la commercialisation de produits. Ainsi dans l'affaire du cartel européen du ciment[74], des producteurs européens de ciment et leur association commerciale s'était mis d'accord sur une règle commune selon laquelle chaque concurrent ne commercialiserait sa production que sur son marché national et exporterait ses excédents de production en respectant des conditions préalablement convenues. Ce dispositif de partage du marché était complété par un arrangement stipulant que les excédents de production seraient uniquement exportés à l'extérieur de la CEE. De même aux États-Unis, dans l'affaire *United States c. Topco*[75], une association coopérative de supermarchés avait réparti géographiquement les marchés pour les produits vendus sous la marque de distributeur Topco, de sorte que cette marque ne pouvait être utilisée que par un seul de ses membres à la fois dans un secteur donné[76].

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72 Si les restrictions tarifaires horizontales sont examinées, dans la plupart des pays, selon le principe d'illégalité *per se* (voir par exemple l'affaire *United States c. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940), aux États-Unis), les restrictions non tarifaires sont examinées au cas par cas selon la règle de raison (voir par exemple l'affaire *Chicago Board of Trade c. United States*, 246 U.S. 231, 237 (1918), aux États-Unis). Dans les cas où la restriction n'est pas une restriction horizontale sur les prix ou les quantités, les tribunaux prennent généralement en compte la nature de la restriction, sa portée et ses effets éventuels sur le marché, ainsi que les raisons qui la justifient du point de vue de la concurrence ou de l'efficience.

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

74 Décision de la Commission des communautés européennes, du 30 novembre 1994, relative à une procédure d'application de l'article 85 du traité CE (Affaire IV/33.126 et 33.322 - *Ciment*), JO L343 du 30.12.1994.

75 405 U.S. 596 (1972).

76 Topco était une association coopérative regroupant de petites et moyennes chaînes de supermarchés régionales indépendantes. Faisant office de centrale d'achat pour ses membres, Topco achetaient plus d'un millier de produits différents, la plupart commercialisés sous la marque Topco. Les statuts de Topco instauraient une forme « exclusive » de licences territoriales en vertu desquelles aucun des ses membres ne pouvait commercialiser les produits en question en dehors du secteur qui lui avait été assigné. Aucun d'entre eux n'était donc pas autorisé à s'implanter sur le secteur d'un autre membre sans l'accord de celui-ci. Disposant d'un droit de veto sur l'adhésion de tout nouveau membre, chaque membre pouvait ainsi contrôler la concurrence effective ou éventuelle sur son secteur.

### *5.3 Collusion en matière de soumissions et soumissions concertées*

Les appels d'offres sont conçus pour faire jouer la concurrence dans les cas où, autrement, la concurrence pourrait faire défaut[77]. L'une des principales caractéristiques du système des appels d'offre est que les futurs adjudicataires préparent et soumettent leur offre séparément. Si les soumissionnaires s'entendent entre eux pour déterminer qui remportera l'offre et/ou à quel prix, il s'ensuit presque immanquablement une infraction aux règles de la concurrence. La collusion en matière de soumissions peut prendre de nombreuses formes. Elle nécessite la coordination active entre les futurs soumissionnaires et exige souvent de mettre en place un dispositif de suivi complexe. À cet égard, les associations commerciales peuvent assurer une forme de secrétariat pour le compte du cartel procédant à une soumission concertée, recueillir des informations sur les intentions d'offres de prix et répartir les offres entre leurs membres suivant des modalités préalablement convenues.

L'affaire du cartel du secteur néerlandais de la construction[78] illustre bien le rôle que les associations peuvent jouer en orchestrant une soumission concertée entre leurs membres. Depuis le début des années 50, un certain nombre d'associations néerlandaises regroupant des entreprises du secteur de la construction avaient élaboré leurs propres règles et codes de conduite en vue d'organiser la concurrence au sein du secteur. En 1963, ces associations ont mis sur pied une organisation commune (SPO) dans le but de mettre en place des règles uniformes pour réglementer les prix, et de les rendre contraignantes pour leurs membres. En 1986, SPO a adopté des règles gouvernant le cadre des procédures de réponse aux appels d'offres sur les marchés de la construction. Ce dispositif a eu pour effet de fausser la concurrence puisque les membres s'échangeaient des informations détaillées avant le lancement des appels d'offres et s'entendaient systématiquement entre eux sur le niveau des offres afin d'assurer que le soumissionnaire « autorisé » emporterait un contrat donné. Un système de rotation assurait une répartition équitable, entre chaque participant, des contrats sur le point d'être adjugés.

## 6. Autres activités d'associations commerciales susceptibles de susciter des craintes antitrust

Les associations commerciales et professionnelles sont actuellement exposées à l'application de dispositions du droit de la concurrence dans un contexte économique plus complexe que celui qui suscitait des inquiétudes quant à des conspirations en matière de fixation des prix qu'Adam Smith avait évoquées. Les conspirations pures et simples de détermination des prix ou d'attribution de clients orchestrées par une association commerciale deviennent exceptionnelles et l'application des dispositions relatives à la concurrence se concentre de plus en plus sur les pratiques des associations commerciales qui facilitent la collusion entre les membres des associations. Partout dans le monde, une participation active aux activités des associations commerciales passe de plus en plus aux yeux des autorités de la concurrence pour un facteur facilitant les conspirations à l'échelle du secteur en vue de restreindre le commerce. Dès règles d'adhésion indûment restrictives, l'échange d'informations commerciales précises, la définition de normes exclusives/fermées pour le secteur, l'application de restrictions relatives à la commercialisation, l'adoption de codes d'éthique sur les pratiques de détermination des prix ou d'autres pratiques commerciales qui

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77 Voir OCDE, Table ronde sur la concurrence sur les marchés d'enchères, Note de référence du Secrétariat, DAF/COMP(2006)27 et OCDE, Roundtable on Public Procurement, The Role of Competition Authorities in Promoting Competition, Background Note by the Secretariat -DAF/COMP/WP3(2007)1.

78 Décision 92/204/CEE de la Commission, du 5 février 1992, relative à une procédure d'application de l'article 85 du traité CEE (IV/31.572 et 32.571 - *Industrie de la construction aux Pays-Bas*), JO L 92 p. 1 ; confirmée en appel par l'arrêt du Tribunal de première instance des Communautés européennes, voir Affaire T-29/92, *SPO contre Commission des communautés européennes*, Recueil de jurisprudence 1995 page II-289 et par la Cour de justice des communautés européennes, Affaire C-137/95, *SPO contre Commission des communautés européennes*, Recueil de jurisprudence 1996 p. I-1611.

limitent la capacité des membres à livrer librement concurrence, font partie des questions de concurrence sensibles qui affectent le plus les activités des associations commerciales de nos jours.

Certaines de ces pratiques, cependant, peuvent être favorables à la concurrence et, dans certaines circonstances, améliorer la protection des consommateurs. C'est pourquoi elles sont souvent examinées selon la norme appelée la *règle de raison*. Pour évaluer si ces pratiques reviennent à une restriction déraisonnable de la concurrence, ce qui est interdit selon les règles de la concurrence, les autorités de la concurrence prennent en compte de nombreux facteurs afin de mettre en balance les effets pro-concurrentiels et les effets restrictifs probables de la conduite examinée. Des facteurs comme la structure du marché et son degré de concentration, les parts de marché des membres de l'association et la part du secteur affectée par la conduite de l'association constituent des éléments extrêmement importants pour l'analyse.

### *6.1 Règles d'adhésion et restrictions d'accès*

Les règles d'adhésion ou règles de suspension ou d'expulsion de l'association commerciale peuvent avoir un impact restrictif sur la concurrence si elles permettent à l'association (et ses membres) d'exclure arbitrairement d'éventuels nouveaux membres des avantages de l'adhésion. Il ne faut cependant pas partir du principe que l'adhésion est dans tous les cas essentielle à une entreprise exerçant des activités dans un secteur donné pour prendre part à la concurrence dans des conditions équitables aux membres de l'association. Les restrictions d'accès appliquées aux nouveaux candidats à l'adhésion ne sont particulièrement nuisibles que si cette association joue un rôle important dans l'économie d'un secteur industriel donné et exerce une telle influence que les non-membres seraient nettement désavantagés du point de vue concurrentiel par rapport aux membres[79]. Inversement, aucun préjudice anticoncurrentiel ne peut être établi si les services auxquels n'aura pas droit le candidat qui se voit refuser son adhésion ne sont en fait pas significatifs du point de vue de la concurrence ou peuvent être facilement obtenus par les non-membres auprès d'autres sources. Pour cette raison, une approche fondée sur la *règle de raison* est généralement préférée dans le cadre de l'examen des règles d'adhésion des associations commerciales[80]. L'analyse des services proposés par l'association, leur accessibilité aux non-membres concurrents et l'importance de l'association sur le marché constituent des éléments essentiels à prendre en compte lorsqu'il s'agit d'évaluer si les restrictions à l'accès entravent l'accès de tiers au marché[81].

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

80 En 1985, la Cour suprême des États-Unis est revenue sur l'approche *per se* qu'elle avait établie dans l'affaire *Associated Press contre United States*, 326 U.S. 1 (1945), en faveur d'une analyse selon la règle de raison dans l'affaire *Northwest Wholesale Stationers contre Pacific Stationery & Printing Co.*, 472 U.S. 284, 298 (1985).

81 Par exemple, dans la Décision de la Commission relative aux choux-fleurs (JOCE 1978 L21/23), la Commission a conclu que l'adhésion à l'association donnait accès à la vente aux enchères de 90 % des choux-fleurs, des artichauts et des pommes de terre nouvelles de Bretagne. Aux États-Unis, les tribunaux ont exigé que l'association ait un pouvoir de marché ou un contrôle d'accès par rapport à un élément nécessaire à une concurrence efficace : voir *United States contre 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.

Pour ce qui est des critères d'éligibilité d'adhésion, les lois de la concurrence exigent généralement que l'adhésion soit facultative[82] et fondée sur des critères clairs, objectifs[83] et qualitatifs[84], qui sont facilement vérifiables. On peut avancer que les critères d'éligibilité sont raisonnables s'ils sont liés aux objectifs et aux activités de l'association. Des procédures appropriées qui permettent de faire appel en cas de refus[85] doivent aussi être en place. Les règles de l'association déterminant l'exclusion des membres de cette association ou la suspension de leur adhésion peuvent avoir des effets anticoncurrentiels comparables à un refus d'accorder l'adhésion. Généralement, quand les restrictions sous-jacentes concernant l'adhésion n'enfreignent pas le droit de la concurrence, l'application de ces règles par l'association n'est pas non plus illégale[86]. Cependant, l'expulsion ou la suspension des membres doit reposer sur des motifs et être convenablement justifiée et un droit de faire appel doit être accordé[87]. Les exclusions arbitraires et les exclusions qui ne sont pas liées aux objectifs de l'association peuvent être considérées comme une restriction de la concurrence[88].

L'adhésion à une association professionnelle est souvent une condition *sine qua non* pour l'exercice d'une profession. Dans de nombreux pays, l'adhésion à une association professionnelle est strictement réglementée par l'association elle-même. La réglementation de l'accès au marché par des associations professionnelles peut donc constituer un obstacle à l'accès au marché[89]. Une réglementation excessivement restrictive peut entraîner une réduction de l'offre de services, avec des conséquences défavorables pour la concurrence et la qualité des services. Des études empiriques montrent que des restrictions excessives à l'entrée peuvent provoquer une augmentation des prix pour les consommateurs sans assurer une meilleure qualité des services proposés[90]. Bien qu'un certain contrôle de l'accès à la profession puisse être acceptable

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82 Dans les Communautés européennes, voir la Décision de la Commission européenne dans *PHC*, signalée dans le 8e Rapport sur la politique de la concurrence, points 81 et 82 ; Décision de la Commission européenne relative au *Régime de frets fluviaux en France : cotisation EATE*, JOCE 1985 L219/35, en appel voir la Cour de Justice des Communautés européennes, *Antib contre Commission,* [1987] ECR 2201.

83 Voir Tribunal de première instance, Affaire T-206/99, *Metropole Télévision contre Commission*, [2001] ECR II-1057.

84 Voir la Décision de la Commission relative à *Choux-fleurs*, JOCE 1978 L21/23. Selon l'OFT, les « *règles d'admission d'un membre d'une association d'entreprises doivent être transparentes, proportionnées, non discriminatoires et fondées sur des normes objectives.* » (voir Office of Fair Trading, *Trade Associations, Professions and Self-Regulating Bodies*, Competition Law Guidelines, décembre 2004).

85 Voir la Décision de la Commission européenne concernant *Sarabex*, signalée dans le 8e Rapport sur la politique de concurrence, points 35-37 ; Décision de la Commission européenne concernant *Centraal Bureau voor de Rijwielhandel*, JOCE 1978 L20/18.

86 Voir P. M. Vaughan et 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.

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

88 Voir P. Watson et 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, décembre 2004.

89 L'accès est généralement conditionné à un certain nombre de facteurs qualitatifs, notamment concernant les périodes de formations, les examens professionnels et les années d'expérience.

90 Voir C. Cox et S. Foster, *The Costs and Benefits of Occupational Regulation*, Bureau of Economics Staff Report to the Federal Trade Commission, 1990, p. 26-27, citée dans la Communication de la Commission du 9 février 2004 (COM/2004/0083 final) disponible sur le site Internet de la Direction générale de la concurrence.

pour préserver la qualité et la norme des services proposés par les membres de la profession, les autorités de la concurrence craignent que des critères d'accès déraisonnables et injustifiés puissent générer des coûts pour les consommateurs[91]. Pour cette raison, les critères d'adhésion doivent être qualitatifs, plutôt que quantitatifs et ils doivent être proportionnés aux objectifs stratégiques qu'ils sont censés servir.

### *6.2 Collecte et diffusion des informations sur le marché*

Une des tâches principales des associations sectorielles consiste à fournir à leurs membres des informations sur l'évolution de leur secteur et, plus particulières, des statistiques sur les facteurs économiques et commerciaux touchant aux activités commerciales desdits membres[92]. La disponibilité d'informations sur le marché et son évolution est généralement considérée comme essentielle au développement d'un environnement concurrentiel[93]. Pour cette raison, la disponibilité des informations est perçue comme un facteur à encourager ; après tout, le modèle idéal de la concurrence parfaite se fonde sur une information parfaite du côté de l'offre et du côté de la demande concernant le marché. La connaissance du marché et de ses caractéristiques essentielles (par exemple, les caractéristiques de la demande, de la capacité de production disponible, des projets d'investissement, etc.) facilite la conception de stratégies efficientes et efficaces de la part des intervenants sur le marché[94]. Les nouveaux entrants ou les intervenants marginaux peuvent tirer parti de ces informations pour pénétrer le marché plus efficacement et livrer concurrence plus agressivement aux entreprises déjà établies. Une meilleure connaissance des conditions du marché présente aussi un avantage pour les consommateurs, qui peuvent choisir entre des

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91 Voir OCDE, Roundtable on Competition in Professional Services, Note de référence du Secrétariat, DAFFE/CLP(2000)2.

92 Les activités informationnelles des associations commerciales sont extrêmement utiles, non seulement pour les intervenants sur le marché, mais aussi pour les pouvoirs publics et les organes de protection de la concurrence. Par exemple, la Communication de la Commission européenne sur la définition du marché en cause (JOCE 1997 C 372/5) prévoit expressément que, lorsqu'elle définit les marchés, la Commission dot réunir les informations factuelles nécessaires auprès des parties, de leurs clients et de leurs concurrents et, et elle ajoute que « *la Commission peut être amenée à contacter les associations professionnelles compétentes* » (paragraphe 33). La Communication poursuit en précisant que, également pour le calcul de la taille du marché et de la part du marché détenue par chaque fournisseur, la Commission peut se fier aux « *sources d'information telles que les estimations des entreprises ou encore les études commandées à des sociétés de conseil aux entreprises ou à des associations professionnelles.* » (paragraphe 53).

93 Sur les échanges d'informations et leurs effets favorables ou défavorables à la concurrence, voir K. Kühn et Vives, *Information Exchanges Among Firms and their Impact on Competition*, in Office des publications officielles des Communautés européennes, 1995, Luxembourg ; K. Kühn, *Fighting Collusion - Regulation of Communication Between Firms*, in Economic Policy, avril 2001 ; A. Nilson, *Transparency and Competition*, document non publié, Stockholm School of Economics, 1999 ; C. Schultz, *Transparency and Tacit Collusion in a Differentiated Market*, mimeo, Stockholm School of Economics, 2002 ; H. P. Mollgaard et 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*, rapport présenté au CEPR/Atelier de l'institut universitaire européen sur les évolutions récentes observées dans la conception et la mise en œuvre de la politique de concurrence, Florence, 20 novembre 1996.

94 Il y a des secteurs où un certain degré de communication est même nécessaire pour résoudre l'asymétrie de l'information sur les clients et donc pour exercer plus efficacement ses activités sur le marché. C'est le cas, par exemple, dans le secteur de l'assurance, où l'échange d'informations permet d'améliorer les connaissances sur les risques et facilite la tarification des risques pour les différentes entreprises. Cela peut aussi faciliter l'entrée sur le marché et donc être en définitive bénéfique aux consommateurs.

produits concurrents en comprenant mieux les caractéristiques des produits ; les consommateurs peuvent aussi comparer les conditions des différentes offres et choisir librement la plus convenable en fonction de leurs besoins. Dans ces conditions, l'amélioration de la transparence est un facteur qui favorise la concurrence.

D'un autre côté, une plus grande transparence est un des facteurs de facilitation requis pour qu'une collusion tacite puisse perdurer sur le marché[95]. Pour déterminer des conditions de coordination, pour surveiller le respect de ces conditions et pour sanctionner efficacement les manquements, les entreprises doivent acquérir des connaissances précises sur les stratégies de détermination des prix ou de production des concurrents. La suppression artificielle des incertitudes quant aux actions des concurrents, qui constituent l'essence même de la concurrence, peut éliminer elle-même les rivalités concurrentielles. C'est notamment le cas dans les marchés fortement concentrés où une amélioration de la transparence permet aux entreprises de mieux prévoir ou anticiper la conduite de leurs concurrents et donc de s'aligner dessus. Pour cette raison, il importe de tracer une démarcation nette entre les cas où la diffusion des informations sous-tend une conspiration illicite et ceux où la diffusion facilite une concurrence saine et dynamique. La définition de cette frontière peut être difficile dans la pratique et dépend de nombreux facteurs, dont le type et la nature des informations échangées et la structure des marchés concernés. À cet égard, le rôle des associations commerciales est très sensible, car elles ont souvent des programmes d'échange d'informations statistiques qui peuvent créer les conditions idéales pour un échange, entre entreprises concurrentes, d'informations qui sont très sensibles du point de vue de la concurrence. Le fait qu'il n'y ait pas de contact direct entre concurrents, mais que les communications soient gérées par une association commerciale ne change pas l'évaluation de la pratique au regard des règles de la concurrence.

Dans de nombreux pays, les critères que doivent respecter les programmes d'échange d'informations, que ce soit dans le cadre d'une association commerciale ou d'échanges directs, pour se conformer aux règles de la concurrence découlent de la jurisprudence[96]. Ces cas montrent qu'un certain nombre de facteurs sont importants quand les autorités de la concurrence évaluent si un programme d'échange d'informations d'une association risque de restreindre la concurrence :

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95 Voir OCDE, Roundtable on Price Transparency, Note de référence du Secrétariat, DAFFE/CLP(2001)22.

96 Aux États-Unis, par exemple, les premiers cas jugés à la Cour suprême concernant cette question remontent aux années 20 : *American Column and Lumber Co contre United States*, 257 US 377 394-95 (1921) ; *United States contre American Linseed Oil Co*, 262 US 371 (1923) et *Maple Flooring Manufacturers Association contre United States*, 268 US 563 (1925). Parmi les cas plus récents figurent *United States contre Container Corporation of America* et al., 393 US 333 (1969) ; et *United States contre United States Gypsum Co.* et al., 438 US 422 (1978). Dans l'Union européenne, le cas principal sur l'échange d'informations entre concurrents reste l'affaire du UK Agricultural Tractor Registration Exchange, qui a fait l'objet d'une décision de la Commission en 1992, JOCE 1992 L68/19 ; confirmée par le Tribunal de première instance des Communautés européennes (Affaire T-34/92, *Fiatagri et New Holland Ford contre Commission*, [1994] ECR II-905) et par la Cour européenne de Justice (Affaire C-8/95, *New Holland Ford contre Commission*, [1998] ECR I-3175). Parmi les cas européens antérieurs, il y a en particulier *Cobelpa/VNP*, in JO 1977 L242/10 et *Parchemin végétal*, in JOCE 1978 L70/54 et d'autres cas cités au paragraphe 6 du 7e Rapport sur la politique de concurrence (1977).

- **Le type et la nature des informations échangées** : les informations sensibles sur le plan concurrentiel (à savoir les informations sur la nature même de l'activité), comme les prix, les volumes et les stratégies commerciales ne peuvent être partagées avec les concurrents[97] ;

- **Le niveau de détail des informations échangées** : plus les informations sont détaillées, plus il y a de chances que les concurrents prédisent leur future conduite mutuelle et s'y adaptent en conséquence. En général, les autorités de la concurrence ne sont pas opposées à la diffusion de données agrégées/statistiques, qui ne permettent pas de repérer les informations concernant les différentes entreprises ;

- **La période de référence des informations échangées** : l'échange de données concernant les stratégies futures est plus préoccupant que l'échange de données rétrospectives. Les informations sur la conduite future sont particulièrement sensibles et doivent continuer de faire partie des savoirs propres à chaque entreprise. Les informations rétrospectives (même si elles concernent les entreprises à titre individuel) ont généralement perdu leur valeur concurrentielle et ne peuvent avoir d'impact sur la conduite future des entreprises concernées[98].

- **La fréquence des échanges** : des échanges fréquents d'informations permettent aux entreprises de mieux adapter (et en temps plus opportun) leur politique commerciale à la stratégie de leurs concurrents et ils sont par conséquent plus susceptibles d'avoir des effets anticoncurrentiels.

- **Le caractère concentré du marché où les parties à l'échange d'informations exercent leurs activités** : plus un marché est concentré, plus il est facile pour les concurrents de s'entendre sur des conditions de coordination et de les appliquer. Pour cette raison, les autorités de la concurrence sont particulièrement prudentes lorsqu'elles examinent les échanges d'informations qui accroissent la transparence sur les marchés oligopolistiques, surtout s'ils sont protégés par d'importants obstacles à l'entrée.

- **La nature des produits en question** : il est plus facile pour les entreprises de se coordonner pour un seul produit homogène que pour de nombreux produits différenciés. Sur des marchés de produits différenciés, l'accès à des informations sensibles détaillées concernant les concurrents peut ne pas être utile pour prédire le comportement futur des concurrents et par conséquent peut ne pas donner lieu à un renforcement de la coordination.

- **Les bénéficiaires des programmes d'échange d'informations** : les autorités de la concurrence du fait que l'échange d'informations a un caractère privé – cette forme de coopération entre entreprises n'améliore normalement que les connaissances sur le marché qu'a le vendeur – ou

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97 La pertinence pour une collusion d'informations concernant d'autres sujets comme les livraisons aux clients, l'utilisation des capacités, les chiffres de production et de vente et les parts de marché n'est pas nettement établie. L'analyse ne peut donc se faire dans l'abstraction, mais doit se référer étroitement au contexte économique et au risque de collusion allégué (en d'autres termes, des données sur les livraisons aux clients peuvent être très pertinentes si le risque de collusion concerne la répartition de la clientèle, mais elles peuvent être sans intérêt si la collusion porte sur le niveau des remises).

98 Comme le souligne la Note de référence du Secrétariat pour la Table ronde sur la transparence des prix, DAFFE/CLP(2001)22 [en anglais uniquement] : « *Les échanges d'informations par l'intermédiaire d'associations professionnelles pourraient être moins dangereuses que des transferts directs d'informations sensibles car une intermédiation est susceptible de ralentir le processus et les informations anciennes sont généralement moins dangereuses vis-à-vis de la concurrence que des données d'actualité – l'importance de cette aspect diminue dans la mesure où les associations professionnelles utilisent de plus en plus l'Internet.* »

bien un impact sur un plus vaste public comme les clients également, qui seront donc en position de comparer les différentes offres et d'intensifier la concurrence. Étant donné le potentiel anticoncurrentiel d'une transparence asymétrique des prix, il serait préférable que les associations commerciales partagent aussi largement que possible les éventuelles données sensibles sur les prix qu'elles ont collectées, à savoir dans les médias ou dans des publications susceptibles d'être accessibles aux membres, aux non-membres et aux clients.

On peut déduire des paragraphes plus haut que les programmes d'échange d'informations d'associations peuvent être organisés en amont de manière à éviter de susciter des les préoccupations en matière de concurrence. Par exemple, la participation à des programmes statistiques doit être facultative et ouverte aux non-membres et – si possible – les informations collectées doivent être également mises à la disposition des non-membres ; les associations commerciales ne doivent pas devenir le forum d'autres discussions entre membres sur les données diffusées et leurs conséquences sur les stratégies commerciales ; et le personnel de l'association commerciale concernée par la collecte et l'agrégation des informations doit être indépendant des membres de l'association. De manière générale, il ne doit y avoir aucune objection à l'échange d'informations qui sont (i) rétrospectives, autrement dit qui n'ont pas de conséquence directe ou indirecte sur les futures stratégies commerciales des participants ; (ii) anonymes et agrégées, autrement dit qui ne permettent pas au bénéficiaire de repérer les informations concernant les participants à titre individuel à l'échange d'informations[99] ; (iii) diffusées publiquement, autrement dit les données sont aussi accessibles aux membres qui n'ont pas participé à l'échange, aux non-membres et aux clients.

### *6.3 Définition de normes et programmes de certification*

Les associations commerciales participent souvent à la définition et à la promotion de normes de sécurité technique et de qualité dans le secteur. Elles gèrent aussi des programmes de certification pour s'assurer que les produits ou les services commercialisés par les membres de l'association sont conformes aux normes promues par le secteur. Les normes peuvent couvrir des aspects divers, comme les classifications ou les tailles d'un produit particulier ou les spécifications techniques, mais aussi des nomenclatures et autres éléments comparables. La définition de normes et les programmes de certification sont généralement considérés comme des activités à promouvoir. La promulgation d'une norme par des associations commerciales peut avoir des effets favorables à la concurrence qui sont significatifs, car cela fat baisser les coûts d'information, facilite l'interopérabilité et aboutit à de meilleurs produits, ce qui correspond précisément aux avantages que cherche à promouvoir le droit de la concurrence[100].

Cependant, comme pour bien d'autres activités communes exercées par des concurrents directs, la définition de normes par une association commerciale peut donner lieu engager sa responsabilité au regard du droit de la concurrence, si le résultat de l'effort commun est de priver les consommateurs d'un produit souhaité, d'éliminer la concurrence de qualité, d'exclure les producteurs de produits ou services rivaux, d'empêcher la commercialisation de produits innovants et à plus faible coût ou simplement de faciliter la détermination oligopolistique des prix en favorisant la capacité des concurrents à contrôler mutuellement

99 Dans certaines circonstances, le recours à des sociétés indépendantes tiers pour réunir des informations sensibles auprès de membres et de non-membres et pour les agréger sous un format statistique peut contribuer à assurer le respect des règles de la concurrence. Cela garantit aussi l'anonymat des différents membres qui ont fourni les informations.

100 Voir par exemple la Cour suprême des États-Unis, *Allied Tube & Conduit Corp. contre India Head Inc.,* 486 U.S. 492, 500 n. 5 (1988).

leur politique de fixation des prix[101]. Pour cette raison, la détermination de normes et les programmes de certification font l'objet d'un examen attentif de la part des autorités de la concurrence, généralement selon les critères de la règle de raison. Pour déterminer si un programme de définition de normes peut entraîner une restriction de la concurrence, il convient généralement de prendre en compte un certain nombre de facteurs[102] :

- **Participation au processus de normalisation** : pour que le processus de définition de normes soit réussi et produise les effets favorables à la concurrence évoqués précédemment, il doit être le résultat d'une vaste discussion dans le secteur et il doit être soutenu par un large consensus. Pour cette raison, la participation au processus de définition de normes ne doit pas faire l'objet de restrictions (autrement dit, les non-membres doivent être autorisés à participer) et il doit être transparent. C'est normalement le cas pour les normes adoptées par les organismes de normalisation reconnus qui se fondent sur des procédures non discriminatoires, ouvertes et transparentes.

- **Couverture du marché par le processus de normalisation** : les efforts de définition de normes qui présente une couverture négligeable du secteur ne risque pas de susciter des inquiétudes en matière de concurrence. Une couverture très étendue du marché, en revanche, ne doit pas forcément provoquer des craintes, car l'efficacité d'un processus de normalisation est souvent proportionnelle à la part du secteur concernée par la définition et/ou l'application de la norme. Cela étant, des normes qui ne sont pas accessibles à des tiers peuvent introduire une discrimination ou leur éviction, ce qui restreint la concurrence. Par conséquent, si la norme est définie par des entreprises qui ensemble dominent le marché, créant une norme sectorielle *de facto*, il faut que la norme soit aussi ouverte que possible et s'applique de façon claire et non discriminatoire.

- **Portée du processus de normalisation** : de même, il est peu probable que les autorités de la concurrence s'opposent aux processus de normalisation qui concernent des aspects mineurs des activités commerciales des membres de l'organisme de normalisation, comme des caractéristiques mineures des produits, des formulaires et des rapports, ou tout autre facteur qui a un effet non appréciable sur la concurrence sur le marché.

- **Normes contraignantes et normes facultatives** : l'adoption d'une norme ne justifie pas la restriction de l'innovation au-delà de la norme. Par conséquent, il ne doit pas y avoir d'obligation de se conformer à la norme, car les effets potentiellement restrictifs d'un accord de normalisation dépendent largement de l'incapacité des parties à concevoir des technologies ou des produits alternatifs présentant des caractéristiques qui ne se conforment pas à la norme convenue.

- **Avantage pour les consommateurs du processus de normalisation** : même si l'on doit partir du principe que, dans la plupart des circonstances, les consommateurs prennent des décisions en connaissance de cause concernant les exigences techniques ou de qualité qu'ils préfèrent, il existe certains marchés où les informations à l'intention des consommateurs sont suffisamment imparfaites ou incomplètes pour que la définition de normes soit en fait utile et favorable à la

101 Voir 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.

102 Pour le traitement des accords de normalisation au sein de l'Union européenne, voir la Communication de la Commission européenne, *Lignes directrices sur l'applicabilité de l'article 81 du Traité CE aux accords de coopération horizontale*, JOCE 2001 C 3/2, Chapitre 6.

concurrence. C'est le cas sur des marchés complexes comme la santé ou bien sur des marchés où la complexité technique, la sécurité et les questions de compatibilité sont importantes.

### *6.4 Autres restrictions possibles : les activités de publicité/marketing et les salons commerciaux*

Les associations ont d'autres moyens de restreindre la liberté de leurs membres de déterminer leur stratégie commerciale indépendamment d'elles et des autres membres de ces associations. Deux pratiques potentiellement restrictives méritent d'être mentionnées : les règles restrictives concernant la publicité/le marketing imposées par l'association à ses membres et les restrictions de l'association sur les salons commerciaux et les expositions.

D'après la théorie économique, la publicité peut faciliter la concurrence en informant et en éduquant les consommateurs concernant les différents aspects et caractéristiques des produits[103]. La publicité est un moyen qui permet aux consommateurs de comparer les produits et les services et de trouver ce qui correspond le mieux à leurs besoins et à leurs moyens financiers, donnant en définitive la possibilité de prendre des décisions d'achat en étant mieux informé. En cas de restrictions sévères de la publicité, il peut être plus difficile pour les consommateurs de déterminer le prix probable d'un produit/service donné, et par conséquent ces restrictions peuvent contribuer à l'ignorance des consommateurs. Il n'est pas rare, cependant, que des associations professionnelles publient des règles organisant les activités de commercialisation de leurs membres, y compris les activités de promotion et de publicité. Dans certains cas, la publicité est interdite en tant que telle. Dans d'autres, des méthodes médiatiques ou publicitaires spécifiques, comme la publicité à la radio, la publicité à la télévision, la « sollicitation à froid » ou des types particuliers de contenu publicitaire sont imposés. Ces restrictions peuvent susciter des inquiétudes sur le plan de la concurrence, même si, dans certains cas, elles sont justifiées en raison de l'asymétrie des informations entre les fournisseurs et les consommateurs. C'est surtout le cas de certains services professionnels à propos desquels les consommateurs peuvent trouver particulièrement ardu d'évaluer les informations (comme les prétentions de qualité concernant les services spécifiques proposés), les consommateurs ayant besoin dans ce cas de protection par rapport aux affirmations trompeuses ou manipulatrices[104].

Les associations professionnelles organisent aussi des salons et des expositions professionnels qui réunissent tous les intervenants (fabricants, grossistes, distributeurs, détaillants et clients) d'un secteur donné et aident à promouvoir une vaste gamme de produits. Les fabricants tout comme les clients bénéficient de ces événements, qui dans l'ensemble favorisent la concurrence dans le secteur. Cependant, certaines règles imposées par les associations professionnelles organisant de tels événements peuvent restreindre la concurrence. Ces restrictions concernant souvent les règles d'admission et ce que l'on appelle les « périodes de carence » (à savoir la durée précédant ou suivant le salon professionnel pendant laquelle les participants n'ont pas le droit d'exposer ailleurs) ; d'autres restrictions peuvent aussi s'appliquer comme des contraintes concernant la liberté des participants à promouvoir ou à commercialiser des produits qui ne sont pas présentés au salon. Ce type de restrictions fait généralement craindre que les salons professionnels ne servent à des fins d'exclusion. Pour cette raison, l'admission devrait être ouverte à

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

104 Voir la Communication de la Commission du 9 février 2004 (COM/2004/0083 final) disponible sur le site Internet de la Direction générale de la concurrence. Voir aussi *Bates contre State Bar of Arizona*, 4333 U.S. 350 (1965) and *American Medical Association contre FTC*, 455 U.S. 676 (1982) ; *California Dental Association contre FTC*, 119 S.Ct. 1604 (1999).

tout le monde de façon non discriminatoire[105]. Cela étant, les restrictions à la participation aux salons professionnels peuvent se justifier (et être par conséquent acceptées par les autorités de la concurrence) si elles se fondent sur des vrais problèmes dus à une surface d'exposition limitée. Les périodes de carence peuvent aussi avoir un effet d'exclusion car elles empêchent les participants de promouvoir leurs produits à l'occasion de manifestations concurrentes.

## 7. Conséquences des manquements au droit de la concurrence par les associations professionnelles

Dans la plupart des juridictions, les manquements au droit de la concurrence exposent les participants à des sanctions et des amendes. Les conséquences d'un manquement au droit de la concurrence peuvent varier considérablement, selon le système national de protection de la concurrence concerné, mais elles vont habituellement de l'imposition d'une sanction pénale (comme l'emprisonnement des responsables de la conduite illicite) à l'imposition d'une amende administrative. Les amendes peuvent être imposées soit à l'entreprise, soit aux personnes physiques qui ont effectivement participé à la conspiration ou aux deux. Les entreprises ayant participé à l'infraction au droit de la concurrence peuvent être amenées à répondre des dommages provoqués par leur conduite illicite à divers degrés.

Les associations ne sont pas à l'abri des conséquences d'un manquement au droit de la concurrence. Cependant, l'application des règles de la concurrence aux associations peut engendrer des problèmes spécifiques quand il s'agit de déterminer les sanctions pécuniaires pour la conduite illicite de l'association. Dans la plupart des cas, en particulier lorsque l'association n'a pas joué un rôle actif dans la conspiration, les autorités de la concurrence préfèrent s'en prendre aux membres de l'association qui sont effectivement les principaux bénéficiaires de la conduite illicite, car l'association participe rarement elle-même aux activités de commercialisation. Toutefois, quand l'association est responsable de l'organisation et de l'exécution du manquement, elle peut être soumise à des amendes séparément de ses membres. Cela a soulevé des difficultés pratiques, car les amendes imposées aux associations professionnelles en fonction du chiffre d'affaires de l'association peuvent ne pas avoir l'effet dissuasif nécessaire, non seulement en ce qui concerne l'association en question (dissuasion spécifique), mais aussi en ce qui concerne d'autres associations engagées dans des pratiques contraires au droit de la concurrence (dissuasion générale).

Un premier problème est lié au chiffre d'affaires pertinent que les autorités de la concurrence doivent prendre en considération lors du calcul du montant de l'amende. Si ces autorités devaient prendre en compte uniquement le chiffre d'affaires de l'association, le montant de l'amende et l'effet dissuasif correspondant seraient minimes. Généralement, les associations n'exercent pas d'activités sur le marché et leur chiffre d'affaires peut se limiter aux cotisations d'inscription facturées aux adhérents. Une amende administrative calculée sur cette base n'aurait aucun rapport avec le véritable impact sur le marché de la conduite illicite. Les autorités de la concurrence ont donc essayé de lever le voile de l'association et de prendre comme référence pour l'amende le chiffre d'affaires des membres de l'association[106]. Le Règlement 1/2003[107], par exemple, permet à la Commission européenne d'imposer une amende allant jusqu'à 10 % de « *la somme du chiffre d'affaires total réalisé par chaque membre actif sur le marché*

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105 Voir la Décision de la Commission européenne, *Sippa*, JOCE 1991 L60/19 ; Décision de la Commission européenne, *Internationale Dentalschau*, JOCE 1987 L 293/58 ; *British Dental Trade Association (BTDA)*, signalé dans le 27e Rapport sur la concurrence, point 54. De même, aux États-Unis, voir *United States contre Western Winter Sports Representatives Association*, 1962 Trade Cas. (CCH) § 70,418 (N.D. Cal 1962).

106 En revanche, cela peut créer de gros problèmes pour l'instance répressive si les adhérents sont dispersés, ce qui est généralement le cas pour les associations professionnelles qui dénombrent des milliers de professionnels avec un chiffre d'affaires relativement bas.

107 Voir Règlement 1/2003 (JOCE 2003 L1/1), article 23.

*affecté par l'infraction de l'association* » sous réserve que « *l'infraction d'une association porte sur les activités de ses membres* »[108]. Les mêmes principes sont énoncés dans les lignes directrices de la Commission européenne pour le calcul du montant des amendes[109].

Un deuxième problème important auquel les autorités de la concurrence sont souvent confrontées est la façon d'appliquer des sanctions pécuniaires à l'encontre d'une association. Comme on l'a souligné plus haut, les associations n'ont généralement pas de chiffre d'affaires et leurs actifs sont habituellement assez limités. Par conséquent, si l'amende imposée à l'association est calculée sur la base du chiffre d'affaires des membres de l'association, il est assez probable que l'association n'ait pas les moyens financiers de respecter ses obligations. Pour cette raison, le Règlement 1/2003 a introduit une nouvelle disposition selon laquelle, si l'amende imposée à l'association prend en compte le chiffre d'affaires des membres de l'association et que l'association n'est pas solvable, l'association est tenue de faire appel à des contributions de ses membres pour couvrir le montant de l'amende[110]. Si ces contributions ne sont pas remises à l'association dans les délais fixés par la Commission européenne, la Commission peut exiger le paiement de l'amende directement auprès de tous les membres des instances de décision de l'association et, par la suite, si nécessaire, pour s'assurer du paiement intégral de l'amende, la Commission peut exiger le paiement du solde auprès d'un quelconque membre de l'association. Le Règlement 1/2203 autorise, cependant, un ou plusieurs membres de l'association à refuser le paiement de l'amende imposé à l'association s'ils peuvent montrer : (i) qu'ils n'ont pas mis en œuvre la décision de l'association d'enfreindre les règles de la concurrence de la CE et soit (ii) qu'ils n'étaient pas conscients de son existence, soit (iii) qu'ils ont pris activement leurs distances par rapport à cette décision avant que la Commission ait commencé son investigation.

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108 Cette approche a été appuyée par les tribunaux européens qui, par le passé, ont affirmé que « *le bien-fondé de cette analyse est corroboré par le fait que l'influence qu'a pu exercer sur le marché une association d'entreprises ne dépend pas de son propre 'chiffre d'affaires', qui ne révèle ni sa taille ni sa puissance économique, mais bien du chiffre d'affaires de ses membres qui constitue une indication de sa taille et de sa puissance économique*. » (Affaire C-298/98 P, *Metsä-Serla Sales Oy contre Commission*, [2000] ECR I-10157, paragraphe 12 et paragraphes 62-74). Voir aussi les Affaires conjointes T-39/92 et T-40/92, *CB et Europay contre Commission*, [1994] ECR II-49, and Case T-29/92, *SPO and Others contre Commission*, [1995] ECR II-289; Joined Cases T-213/95 and T-18/96, *SCK and FCK contre Commission*, [1997] ECR II-1739; Case T-338/94, *Metsä-Serla Sales Oy contre Commission*, [1998] ECR II-1617.

109 JO 2006 C/210/2, paragraphes 14 et 33.

110 Voir article 23, paragraphe 4.

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# CANADA

## 1. Introduction and Background

Trade Associations ("TAs") are commonly created by members of a particular trade, industry or profession to represent to government, public bodies and other targeted audiences the interests of its members on a variety of topics such as legislation, regulations, and policy matters that are likely to affect them. TAs seek to create a unified stance and to promote actions which further their commercial and/or professional goals in order to improve their competitive position in the markets in which they operate. TAs vary considerably in size and membership and can represent members from multiple trades or professions or be particular to one. TAs exist in almost every sector of the Canadian economy and many Canadian companies are members of international TAs.

The Competition Bureau's ("Bureau") view is that many of the functions and activities performed by TAs do not raise competition law issues and can provide benefits to industry and consumers at large. Most functions of TAs are clearly beneficial to their members and may also serve to enhance the efficiency of the market system as a whole. However, the Bureau acknowledges that the very nature of TAs, especially those that bring together competitors, creates a risk that they could be used directly or indirectly as a vehicle for anti-competitive activity. In doing so, the Bureau recognizes that a TA can either act as the conduit or vehicle for anti-competitive activity or as a party to or perpetrator of the anti-competitive activity. Therefore, while TA members may need to come together to discuss legitimate issues of concern and perhaps exchange information relating to TA activities, care needs to be taken to ensure that they do not involve, or give the appearance of involving, communications or agreements that might raise issues under the *Competition Act* ("Act"). In order to minimize the risk of engaging in anti-competitive activity, the Bureau deems it important for TAs and their members to be aware of the application of competition law and potential risks relating to their activities.

## 2. Relevant provisions under the *Competition Act*

The Act is a law of general application and, with limited exceptions, applies to all business activities in Canada. Its purpose is to maintain and encourage competition in the marketplace so as to provide for, among other objectives, an efficient and adaptive economy, competitive prices and product choices for consumers, and accurate information in the marketplace.

TAs must comply with the Act as a whole. Although there are no specific provisions in the Act that deals exclusively with TAs,[1] there are key provisions that are most relevant to their activities. These provisions deal with agreements among competitors (namely the conspiracy and bid-rigging sections of the Act), price maintenance, restrictive trade practices, abuse of dominance and false or misleading representations. More information about the general applicability of the above-mentioned provisions of the Act can be found on the Bureau's website at www.competitionbureau.gc.ca.

[1] With the exception of collective bargaining activities, as defined in Section 4 of the *Competition Act* ("Act").

## 3. Association activities that may raise concerns under the *Competition Act*

As previously indicated, not all TA activities raise issues under the Act and many activities can benefit members, the industry and consumers. For example, TAs can provide a venue to keep members informed of industry developments, to set standards for products and services, and to improve product quality and safety. Many TAs also publish trade journals and sponsor product and market research. TAs work to enhance the knowledge of their members, providing them with a better understanding of trends and industry conditions, which promote more informed business decisions.

In addition to the benefits TAs provide to their members, their particular industry and consumers, they can also act as an important venue to promote competition law and pro-competitive activity. For example, TAs can improve industry laws through their education efforts to governments and other public bodies. Moreover, TAs can be good sources of intelligence as they have the capacity to identify market place issues and can often assist in resolving these issues by acting as the liaison between competition law enforcement agencies and the industry. TAs can also assist competition law agencies in their outreach initiatives by providing them with the opportunity to establish a cooperative relationship. For example, last year, the Retail Council of Canada worked closely with the Bureau to educate retailers on how the Ordinary Selling Price provisions of the Act apply to their business. The Bureau's presentations took place in Toronto, Montréal and Vancouver and were very successful. The Bureau was also recently invited to speak to the Canadian Network of National Associations of Regulators, where various groups of regulators were informed about effective ways to obtain the benefits of regulation and competition. These cooperative relationships provide competition authorities with a broad audience with whom to discuss the benefits of competition law.

Despite these benefits, by bringing together competitors, some TA activities have the potential to raise competition concerns. The following are a number of key activities that the Bureau believes pose greater anti-competitive concern.

### *3.1 Hard-core cartel behaviour*

It is generally recognized that hard-core cartels, namely, agreements to fix prices, make rigged bids (collusive tenders), establish output restrictions or quotas, or share or divide markets by allocating customers, suppliers, territories, or lines of commerce, are the most harmful types of anticompetitive conduct. Cartels harm consumers and have pernicious effects on economic efficiency, businesses and consumers. For example, cartels inflict significant damage to the economy including inflating prices, restricting output and misallocating resources. Moreover, they offer no legitimate economic or social benefits that would justify the losses that they generate. The detection, investigation, prosecution and deterrence of cartels remain the number one priority of the Bureau.

Social networks can offer a natural venue to conspire. It becomes even easier when networks are fairly well established and closed. TAs promote social contacts and, even though most TAs are formed and operated for legitimate purposes, they can be used to promote and coordinate the objectives of the cartel. Many of the cases the Bureau has investigated have involved the use of a TA to promote and coordinate the objectives of the cartel.

### *3.2. Information Sharing*

Information sharing is one of the most common activities undertaken by TAs. While in most cases information sharing can be beneficial and is not likely to raise competition concerns, in some instances it can lead to or be an integral part of an anti-competitive agreement among TA members who would otherwise be rivals. The Bureau recognizes that the market works more efficiently when information is

freely available and that information sharing by members of TAs can produce significant economic benefits that can improve market competitiveness. In some instances, information sharing may also help sellers predict and adapt to market trends such as higher quality products, more services and rising input prices. However, depending on a number of factors, the exchange of information can also be harmful to the market.

When examining the nature of information shared, it is important to recognize that certain types of competitively sensitive information have a greater potential to raise competition issues. The Bureau recommends that members of TAs exercise caution in sharing any information related to the competitive aspects of their businesses. For example, the Bureau is of the opinion that members of TAs should avoid the exchange of information relating to current or future pricing, costs, sales and volumes of production, credit or trading terms, promotional allowances, discounts or rebates to customers, customer information, and business or strategic and marketing plans. If there is reason to believe that such exchanges of information have occurred, the Bureau will investigate and may open an inquiry under the conspiracy provision of the Act. Even if there is no evidence of explicit conspiracy, the Bureau may refer the matter to the Attorney General and may seek the issuance of a prohibition order under section 34(2) of the Act.[2]

However, there are other types of information that the Bureau considers to be less sensitive and can usually be shared among competitors, some of which are specifically enumerated as defences in the Act. [3] These could include statistics, definition of product standards, definition or terminology used in a trade, industry or profession, size and shape of packaging, restrictions on advertising or promotion, adoption of the metric system of weights and measures, measures to protect the environment, service and standards of competence and integrity to protect the public in the practice of a trade or profession.

### *3.3 Data Collection*

Inherent to the sharing of information is the gathering of such information. The Bureau's view is that data collection by TAs must be exercised with caution so as to avoid any competition law exposure. As with the sharing of information, it is preferable to collect and generate only historical prices, market share data, costs, and capacity and output levels in an aggregated format. For example, the Bureau recommends data collected from industry participants be obtained by an independent firm (that is a non-member and a non-association) and the anonymity of individual members should be preserved. The Bureau's view is that direct exchanges of sensitive commercial information between or amongst competitors are riskier than those made through an independent third party that holds the information in confidence and distributes only aggregate figures.

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2 Section 34(2) Where it appears to a superior court of criminal jurisdiction in proceedings commenced by information of the Attorney General of Canada or the attorney general of the province for the purposes of this section that a person has done, is about to do or is likely to do any act or thing constituting or directed toward the commission of an offence under Part VI, the court may prohibit the commission of the offence or the doing or continuation of any act or thing by that person or any other person constituting or directed toward the commission of the offence.

3 Not all agreements between competitors violate the conspiracy provision of the Act. The Act contains a number of defences. Subsection 45(3) of the Act, for example, exempts agreements in respect of, among other things, the exchange of statistics, the definition of product standards, the size and shapes of product packaging, cooperation in research and development, restrictions on advertising or promotion, or measures to protect the environment. However, these defences are not without limits. Subsection 45(4) makes it clear that what would not be acceptable under the basic conspiracy provisions will not be permitted to occur through activities related to these defences. As a result, if a strategic alliance is likely to lead to an undue lessening or prevention of competition in respect of prices, quantity or quality of production, markets or customers, or channels or methods of distribution; or if the alliance restricts anyone from entering into or expanding a business, the defence does not apply.

### *3.4 Agendas and Meetings*

In order to avoid illegal activities, TA meetings should have a clear agenda and comprehensive minutes. The Bureau recommends that agendas be specific and avoid sensitive topics that may cause competition law issues such as pricing, costs, market allocation, production and market shares. Furthermore, the discussion of discounts, payment terms, business strategy, bidding tactics and allocation of markets can raise competition concerns and as such are topics that should not be discussed. The Bureau also recommends that TA counsel review agendas and minutes and attend all TA meetings where there is potential for discussion of legally sensitive subjects. The legal importance of minutes should not be underestimated. Minutes should be clear, complete and accurate with regard to the actions which were taken and the justification for those actions.

While most TA meetings will not raise issues under the Act, the informal conversations and discussions that take place outside the regularly scheduled meetings and activities may raise concerns. Unscheduled or informal meetings between competitors, held in conjunction with regular TA meetings, should be actively discouraged.

### *3.5 Association Membership*

The majority of firms that choose to become members of a TA do so because of the benefits provided by the TA. However, under certain circumstances, TA membership could raise issues under the Act. For example, potential issues could arise where membership requirements, exclusions and expulsions, could impair a firm or person's ability to compete. Requirements for entry into a TA may also raise concerns where they artificially restrict entry by setting requirements which exceed those necessary. Example of such includes professional associations that have educational and training requirements as well as examinations and fee payments. These types of restrictions on membership can result in higher prices than necessary for professional services.

In addition, it is sometimes the case with professional services that there are restrictions on the ability to perform those services to the fullest extent of the defined scope of practice. These restrictions can arise from outside a particular TA, as may be the case where two professions have overlapping scopes of practice, or have traditionally worked together in such a way that one profession has been subservient to the other. Restrictions may also arise from within a TA, where the profession itself restricts the ability of its members to fully engage in their scope of practice. In either event, the restrictions may affect competition.

As a recent example, dental hygienists in the Province of Ontario have historically been subject to a legislative requirement that effectively placed their right to exercise their scope of practice in the hands of members of a TA for a competing profession, namely dentists. A dental hygienist could not perform the vital act of her profession without an order from a dentist. The Bureau identified this as raising concerns for competition and advocated a review of this restriction, which was subsequently changed. The determination of whether a dental hygienist is able to practice to the full extent of that profession's scope of practice is now within the exclusive ambit of the regulatory body for that profession. In establishing the new criteria for that determination, the regulatory body paid heed to comments by the Bureau. Standards have been developed that clearly articulate the rationale for each requirement and that seek to avoid having the restrictions that are necessary for the sake of public health and safety from being overly burdensome barriers to entry in the market.

Similar concerns apply to industry TAs. These issues could be reviewed civilly or criminally (group boycott) under the Act. Other specific examples of problematic practices include members being excluded because of their non-adherence to certain pricing policies implemented by the TA.

### *3.6 Fee Guidelines*

The Bureau recognizes that professional TAs often disseminate fee guidelines, as a way of providing consumers or professionals with a descriptive and objective source of information concerning prevailing prices in professional services markets. The Bureau's view is that the issuance of a fee guideline, which is genuinely intended to be a source of information as to the prevailing fees in a particular market, would not likely, in and of itself, raise an issue under the Act. However, the Bureau would be concerned in the case where such a guideline was issued with the intention or expectation that the professional TA's members alter their prices to conform to the fees presented in the guideline.

The Bureau considers a genuine suggested fee schedule as one which is issued merely for professional information purposes, without raising any intention or expectation whatsoever that the members will adopt the schedule in their practices. Members must feel that they are free to deviate from the schedule without fear of recrimination or sanction. Accordingly, fee guidelines which have the following characteristics are less likely to raise concern under the Act:

- prepared in a systematic and scientific fashion;
- comprised of statistics gathered and compiled by an independent third party;
- based on questionnaires which ask respondents what fees they have charged, on average, over a given period, as opposed to what fees they consider desirable or acceptable;
- based on a predetermined response rate from the relevant association membership; and
- based on independent verification of a sub-sample of responses.

The Bureau believes that the very process by which a fee guideline is developed, involving the discussion of fee levels by competitors with the object of reaching a consensus as to what is a reasonable fee and what fee information should be made public, may be construed as steps directed toward the establishment of an agreement on prices. Moreover, regardless of whether fee information is presented to members as mandatory or as informational only, it is possible for a professional TA to promote adherence to the fee levels described without the direct agreement of members or the imposition of sanctions for non-compliance.

### *3.7 Advertising*

The Bureau recognizes the competitive benefits of advertising. For example, advertising reduces barriers to entry by enabling new firms to make their presence and unique features widely known. It also increases consumer awareness of prevailing prices, which may promote price competition. Association activities relating to advertising typically fall into two categories: the advertising conducted by the association itself and the guidelines or rules adopted by an association in relation to advertising.

The Bureau recommends that TAs exercise caution in imposing restrictions or prohibitions on advertising conducted by its members. Examples of such restrictions include professional associations prohibiting their members from doing any comparative advertising; canvassing or soliciting; and offering an inducement or discount. In addition, the size, style and medium of advertising are often restricted. The Bureau's view is that the rule should start with the premise that all publicity is permitted except for false or misleading advertising and that all other restrictions should be removed. Before imposing restrictions, the TA should assess whether or not it would restrict a member's ability to compete in a market.

### *3.8 Self-Regulation and Voluntary Codes*

#### *3.8.1 Self-Regulation*

Many TAs put in place rules and regulations by which their members must abide. These rules and regulations can take on many forms such as by-laws, policies and procedures, and the setting of standards. Usually, these regulations are intended to protect consumers and to ensure standards of service delivery. It is also generally recognized that some forms of regulation, such as social and ethical regulations, are inevitable and often desirable. However, it is also true that regulation can have a negative impact on competition by impeding market forces to the detriment of the public interest.

The Bureau recommends that TAs assess multiple options for achieving a given policy goal and that they opt for regulations that minimally interfere with the marketplace. In other words, TAs should rely to the greatest extent possible on market forces and when regulation is still necessary, the restrictions should be as circumscribed as possible. TAs regulations should be clear and effectively address legitimate concerns without unnecessarily restricting competition. A primary objective of the regulatory framework should be to promote open and effective competitive markets. Moreover, the regulatory environment should neither favour nor constrain the ability of particular market participants to compete in the market. In addition, the regulatory process must be impartial and not self-serving. Finally, regulations should be reviewed and assessed periodically to determine their effectiveness.

When developing and implementing regulations, the Bureau believes that TAs should ensure that regulations do not unduly restrict competition. In doing so, TAs should be concerned if the proposed regulations have the following effects:

- limit the number or range of suppliers, which is likely to be the case if the proposal, among other things: grants exclusive rights for a supplier to provide goods and services; establishes a license, permits or authorizes a process as a requirement of operation and significantly raises the cost of entry or exit by a supplier; creates a geographical barrier to the ability of companies to supply goods and services, or invests capital or supply labour;

- limit the ability of suppliers to compete, which is likely to be the case if the proposal, among other things: controls or substantially influences the prices for goods or services; limits the freedom of suppliers to advertise or market their goods or services and sets standards for product quality that provide an advantage to some suppliers over others or that are above the level that many well-informed customers would choose, significantly raises costs of production for some suppliers relative to others; or

- reduce the incentive of suppliers to compete vigorously, which may be the case if the proposal, among other things: requires or encourages information on company outputs, prices, sales or costs to be published or exempts the activity of a particular industry or group of companies from the operation of general competition law.

Examples of self-regulated association restrictions which could raise concerns under the Act include accreditation, mobility, scope of practice, advertising, pricing and business structure. The Bureau will be discussing each of these restrictions in more detail in its self-regulated profession study that is to be published this fall. The intent of the study is to identify potentially unnecessary restrictions in a select group of self-regulated professions that may hinder competition, and make a contribution to the discussion on how best to regulate the professions in a way that effectively achieves the benefits of both regulation and competition.

In Canada, in the event a TA develops and implements rules and/or regulations which appear to raise issues under the Act, the Bureau will assess whether the regulated conduct doctrine ("RCD") applies. The RCD helps to reconcile conflicts between competition law and conduct regulated by another law. The RCD applies in limited circumstances when there is a conflict between a specific provincial statutory regulatory regime enacted in the public interest and the general criminal provisions of the Act containing a competition effects test. In such a case, the provincial regime authorizes or requires conduct that is contrary to the general provision of the Act. In such unique circumstances, the RCD governs and the Act becomes inoperative. The Bureau recently revised its policy on how it views the application of the RCD. For more information on this doctrine, please refer to the Bureau's updated technical bulletin on RCD which outlines the general approach to the enforcement of the Act with respect to conduct that may be regulated by another federal, provincial or municipal law or legislative regime.[4]

*3.8.2 Voluntary Codes (Codes of Conduct)*

In addition to the above noted regulations, TAs may put in place voluntary codes. Voluntary codes (also known as codes of conduct, codes of practice, voluntary initiatives, guidelines and non-regulatory agreements) are codes of practice and other arrangements that influence, shape, control or set benchmarks for behaviour in the marketplace. TAs may be involved in the design and implementation of such codes so as to encourage their members, companies and organizations to conduct themselves in ways that benefit both themselves and the economy. Such codes can also serve as a sign to consumers that the organization's product, service or activity meets certain standards. Voluntary codes are also a recognized means of achieving public-interest goals. Many industries around the world have adopted codes as part of their commitment to fair dealings with consumers.

The benefit of voluntary codes is that they establish benchmarks for responsible behaviour, address industry-specific problems or needs, promote a high standard of professionalism, and convey a positive image to the public. They also improve relations with the public or government and lessen the need for government intervention, regulation and litigation.

Successful voluntary codes are characterized by the explicit commitment of the leadership, acceptance by members, a clear statement of objectives, expectations and responsibilities, transparency in development and implementation, regular flow of information, effective, and transparent dispute resolution, and meaningful inducements to participate. To help TAs address potential competition problems, the Bureau suggests that TAs ensure that codes be voluntary and achieve the objectives of the TA only through the willing cooperation of members.

However, the Bureau considers voluntary codes that address prices that members charge for services, mandate levels or types of services, or restrict member advertising as potentially raising competition issues. While TAs may feel compelled to put in place voluntary codes for their members, they should be aware of the potential risk of shaping or influencing the competitive aspects of member activities. The Bureau therefore recommends that voluntary codes not be used in a way that could substantially reduce competition, prevent non-participating firms from entering the market, significantly raise prices, or limit product choice. Likewise, voluntary codes that encourage or mandate a certain price or fee, prescribe levels of service, restrict advertising, or impose association membership criteria (such as the exclusion or expulsion of members) could be viewed as forms of anti-competitive agreements.

[4] For more information see http://www.competitionbureau.gc.ca/internet/index.cfm?itemID=2141&lg=e

## 4. Conclusion

The Bureau is currently preparing a draft Information Bulletin on Trade Associations (the "Bulletin"). The Bulletin will provide information and guidance to the general public, businesses and their legal and economic advisors on the applicability of the Act to the actions and activities conducted by or under the auspices of TAs. The Bulletin will provide an overview of those key provisions of the Act which apply to TA activities, and a general description of TA activities that could potentially raise concerns under the Act. The Bulletin will elaborate on a number of factors that may be assessed to determine whether TA activities may raise issues under the Act and will also recommend best practices that TAs can adopt to avoid coming into conflict with the law. Finally, it will provide a brief description of cartel cases where a TA engaged in anti-competitive acts, in order to provide examples of behaviour that the Bureau deems anti-competitive.

# CZECH REPUBLIC

## 1. Introduction

Trade associations are usually established for the purpose of ensuring better information on the situation and innovation in the sector, protecting the interest of the profession within the economy and also working as a guarantee of quality in the profession delivery. Their activities bring many important practical aspects that are beneficial for members of associations and chambers but not always favourable for the competition on the relevant markets. The role of an association as an initiator or organiser of a cartel or as the author of rigid anti-competition regulations then becomes the subject of review by competition authorities. In this paper the Czech Office for the Protection of Competition (hereinafter "the Office") wishes to concentrate on changes achieved through the analysis of the liberal professions sector in the Czech Republic and to reflect on its experience with pro-competitive as well as anti-competitive activities of other trade associations.

## 2. Liberalisation in the liberal professions sector

It is typical for the liberal professions to associate persons in professional chambers. Liberal professions represent a significant portion of the service sector that participates in the total turnover of the EU with ca. 8% and in total employment in the EU with ca. 6%. Liberal professions include mainly *legal services* (notaries, attorneys, bailiffs/executors), *accounting services* (auditors, accountants, tax consultants), *medical professions* (physicians, pharmacists, dentists), and *technical and consultation services* (architects, engineers and technicians working in construction), etc. The position of these professions in the Czech Republic is highly important. The liberal professions sector is typical of a high level of regulation where frequently state regulation, self-regulation, practice and habit that have been developing for a long time work together. In the entire European economic area a comprehensive analysis of these professions has started recently with a view to the proper functioning of competition. Strong and often outdated regulation can have a negative impact on the consumers, as it results in elimination or restriction of competition. Such regulation must be adopted that gives more support to competition among service providers in liberal professions (*smart regulation*). The Office marked the main areas that can clash with competition rules in liberal professions: i) *setting fixed prices of provided services,* ii) *pricing recommendations for individual members of professional associations,* iii) *complete ban or restriction on advertising services provided by members of professional associations,* iv) *restrictive criteria on joining professional associations* and v) *regulation of business forms* and *regulation of activities undertaken by members of professional associations in parallel.*

In order to judge to what extent the anti-competition regulations and rules on liberal professions serve the public interest and to what extent they can be objectively considered as justifiable, the Office proposed to use the *proportionality test:* any rule regulating the execution of services in liberal professions should have a clearly pronounced objective, including an explanation why the selected regulative measure was considered as a mechanism for an efficient achievement of the defined objective. Generally, the rule regulating the execution of services in liberal professions must be correctly defined in terms of proportion – it has to achieve a balance between interest in proper execution of the profession and interest in the sufficient functioning of competition. The proportionality analysis is essential for defining the pro- and anti-competitive behaviour of these associations of competitors.

The leading principles of the Office's effort to improve the competition environment in liberal professions are the following: *proportionality rule* (see above) and the principle that the *price must be tied with the quality of provided service.* It ought to be a general requirement on services that the price reflects quality of the delivery, i. e. that it be possible to trace the dependence between quality of provided services and the price paid by the consumer on any market. A typical problem in terms of competition law is the *tying, i. e. offering complete services packages (bundling)* where only one part of the service (*individual service)* is provided in relation to the execution of public power (for example, in case of notarial services it is the drawing of a public document). Yet it is valid that in principle the monopoly position of a particular profession on the market of the individual service can be *justified by public interest* in high-quality and independent execution of the particular activity. On the other hand, unjustified inclusion of this individual service in a package of other deliveries, that are not necessarily related and that could be subject to unregulated free competition with all benefits stemming from free competition, is detrimental in consequence and prevents the development of a competitive environment.

## 3. Cases addressed by the Czech Competition Office in the liberal professions sector

At the turn of 2006 the Office embarked upon an analysis of all rules regulating the liberal professions sector. In spring 2006 the Czech Government published a Resolution that obliged the Office to analyse the necessity of competition restrictions arising from applicable legislation in the liberal professions sector in the Czech Republic and to analyse the necessity of competition restrictions arising from internal professional standards in the liberal professions sector in the Czech Republic.

For this purpose the Office established a task force consisting of experts on competition law in the liberal professions sector. The analysis aimed at identifying rules that are not essential for the proper execution of the professions and are, in substance, anti-competitive. In 2006 the Office concentrated mainly on the following professions: attorneys and notaries, pharmacists, auditors, architects and authorised engineers and technicians. At the end of 2006 the standards regulating the work of bailiffs/executors were also analysed. Other professions with mandatory membership in chambers (physicians, dentists and others) are being analysed on an ongoing basis following similar principles. Professions with voluntary membership in chambers (accountants, some consulting professions, etc.) will be analysed later on, as the voluntary membership in chambers reduces the potential risks of competition distortion through uniform approach of members following internal regulations of an association.

The Office analysed all relevant legislation. This involves mainly rules regulating individual liberal professions, consumer protection standards, civil and commercial law and standards regulating advertising. The aim was to prove a preliminary conclusion that many protective measures forming a common part of internal standards of chambers are superfluous, such as for example the regulation on unfair competition, advertising, customer and consumer protection, etc., i. e. that such internal regulations of chambers duplicate or even tighten the existing general legislation.

Last November the Office drafted the Report on the Analysis of Necessity to Restrict Competition by Applicable Legislation in the Liberal Professions in the Czech Republic. In this report the Office branded the regulation in the authorised architects profession and regulation in the execution of authorised engineers and technicians in construction as a major problem in the local legislation. This stipulation approves that trade associations issue price lists, which is a significant restriction of competition that cannot be justified under any circumstances. The author of this regulation proposed that it be abandoned. Moreover, the Office pointed out the anti-competitive nature of construction of price for notarial services and some services of attorneys and bailiffs/executors, where the price is based on the value of the assets, therefore it does not reflect the quality of service provided to the customer.

This year's Report on the Analysis of Necessity to Restrict Competition by Applicable Legislation in the Liberal Professions in the Czech Republic referred mainly to a document in building design sector that contains tables and rules for defining the price of a service in relation to the total price of delivery, type of activity and building category (or other aspects, such as zone planning). The Chamber of Architects as well as the Chamber of Engineers and Technicians repeatedly referred to this internal regulation in internal standards. The Office identified a significant ability of such provisions to distort competition among design service providers – horizontal competitors on the market who are mandatorily members of one of the chambers. The identified anti-competitive provisions included the prohibition of dumping prices issued by the Chamber of Auditors of the Czech Republic. Thanks to the principle of competition advocacy the modification in internal regulations was gradually achieved.

In 2005 the Office issued a decision in an administrative proceeding with the Czech Pharmaceutical Chamber. The Office identified the following prohibited decisions by the trade association:

- adopting the Professional Code that prohibits its members to publish offers and prices of particular medicines in promoting pharmacies,

- stipulating the Professional Code that restricts pharmacists in marking and advertising pharmacies (especially in larger distances from the pharmacy, in order to protect competitors),

- adopting a view by the chamber board members on the use of customer discount cards in pharmacies preventing pharmacists from giving discounts on administered medicines or bonuses or other benefits on administered medicines,

- activities undertaken by the Czech Pharmaceutical Chamber in influencing its members so that they would not reduce sales prices while eroding their margins.

A fine of CZK 300,000 (ca. EUR 10,000) was imposed on the Chamber as well as corrective measures consisting in the ban of such wrongful behaviour in the future, modification of relevant regulations and informing the members. This decision by the Office was confirmed by a decision of Chairman of the Office issued on 14 April 2006 and a judgement by the administrative court dated 3 April 2007.

The Office completed another administrative proceeding with the Czech Pharmaceutical Chamber regarding the approval of the provision of the Licence Code by the meeting of delegates in November 2002 that contains the authorisation of the Chamber to express its approval with the location of a pharmacy, including a separated department for the administration of medicines and medical material and its approval with the material, technical and staff provision of the pharmacy with a view to the scope of care to be provided. In this way the Chamber, beyond the framework of its legal power, prevented pharmacies operated by chemist chains from entering the market.

At the moment the Office is active in the field of other medical professions. It is addressing the service provision by veterinary doctors to their clients among farmers. In this respect there is a multiple petition by cattle breeders supported with an economic analysis prepared by an external organisation. The Office, within its competition advocacy endeavour, aims at separating the veterinary services from the sale of medicines by these doctors, which would have a significant impact on boosting competition in this area. Another difficult issue is the impossibility to employ veterinary doctors (at large farms, for example), which is a common practice in many EU countries. Further, the Office disagrees with the drafting of regulations on medicines in such way that breeders are not at all allowed to use medicines on animals. The condition that breeders may administer medicines only in amounts and in relation to a diagnosis on a concrete animal, even though the condition of other animals has been consulted with a vet, reaches beyond

the framework of requirements on a proper and safe treatment of animals. On the contrary, the delay before the next doctor's visit, especially in cases where the breeders may diagnose a disease or condition of another animal using their obligatory knowledge and experience or with the use of equipment, can cause damage to the breeder as well as, indirectly, to the doctor, if the subsequent treatment is more costly and longer, since doctors are often paid a flat rate.

The aim of this activity undertaken by the Office and the Czech Republic in general, under the Lisbon Strategy, is to completely review of generally binding and internal regulations on liberal professions in the Czech Republic with a view to their influence on the proper functioning of competition and, if necessary, harmonise them with basic EU principles. The core of this activity is not to remove regulations but to introduce *smart regulation* advantageous for all stakeholders: professional organisations and their members, participating regulators including competition authorities and, first of all, for consumers.

## 4. Current cases in the field of other trade associations

The effort to protect its members, help the sector and introduce uniform rules often leads to the violation of competition rules. Various associations and chambers in the Czech Republic frequently influence mainly the pricing aspect of their members' undertakings.

In an administrative proceeding with the Czech Meet Processors Association the Office identified a violation of the competition law by the Association that recommended its members to transfer the amounts paid for checking their animals for BSE to the cattle breeders. Farmers were then able to sell cattle for slaughter to meat-packing plants only at prices reduced by a flat amount of the processor's cost. The Office identified a prohibited decision by the trade association that could distort the competition on the slaughter cattle market and imposed a fine of CZK 300,000 (ca. EUR 10,000) on the Association.

Publishing all types of codes, rules and lists appears to be very popular among trade associations who define services to be provided by their members or list produced goods and amend them with recommended or fixed prices and/or price ranges. Recently, the Office had to deal with a list of services not covered from the public health insurance published by the Czech Medical Chamber where the minimum prices of treatment were provided. A fine was imposed on the Chamber along with the obligation to remove the price list from publicly accessible web sites.

The Czech Association of Cleaning behaved in a similar way when they published an extensive document describing all tidying and cleaning activities where the price ranges were defined depending on the surface area to be cleaned and type of service, which were to be respected in the remuneration for the Association member. The Office had to prohibit such practice and impose a fine. Price recommendations were issued also by the Chamber of Veterinary Doctors of the Czech Republic that defined the amount for evaluating x-ray photographs of dog legs.

The decisions by two associations in the area of media and advertising production touched upon the pricing as well as other commercial conditions for association members. These associations (Association of Communication Agencies and Association of Czech Advertising Agencies) recommended their members to request a certain compensation for preparing a draft advertising solution for their clients when bidding for a contract, even if they do not win the contract. If the clients do not accept such a condition, members of the Association were not to bid for the contract at all. Since the associations tried to address considerable losses suffered mainly by small agencies if they did not succeed in competitions, in the end the Office withdrew from imposing a fine but, nevertheless, prohibited the practice.

The role of trade associations as organisers of cartels manifested itself, for example, in the investigation of a prohibited agreement among building savings banks. In its decision the Office declared

that in 1997 building savings banks, by agreeing on the system of monthly exchange of statistical information on the results of their undertakings in the building savings field, entered a prohibited and void agreement on the exchange of information that could lead to the distortion of competition on the building savings market – saving phase. They respected this agreement until 2001. The Association of Building Savings Banks worked as a platform for the exchange of information, its processing and distribution to other Association members. In this case fines were imposed on members of the horizontal agreement, not the Association (in the Czech Republic it is possible to sanction an association in the amount of up to 10 % of its own turnover, not the turnover of its members).

On the other hand, the Office identified the recent activity of competitors in the brewery field – the Czech Beer and Malt Association – as beneficial. This association tried to address the situation in collecting deposits on beer barrels, since in their absence barrels are often sold as scrap material, stolen or damaged. The association inquired from the Office whether it was allowed to issue a decision that each beer barrel will be delivered against a deposit of CZK 1,000 (its production cost is over CZK 2,500, ca. EUR 100, if sold as scrap the price is around CZK 1,000). As an alternative they proposed issuing a generally binding legal regulation that would – like in the case of beer bottles – define a uniform deposit. After the Office has completed its investigation, it preferred alternative 2. Wasting raw materials for the barrel production and brewery property thefts are undoubtedly good reasons for introducing the deposits. Also the fact that breweries often collect from pub-owners barrels previously delivered for a different or no deposit justifies the uniform deposit.

On the other hand, a decision by a trade association having a direct impact on an element of price of goods produced by all association members can show signs of a prohibited decision by a trade association. Assessment of the efficiency and potential regulation is best undertaken by an independent state authority (Ministry of Agriculture) rather than by a trade association on the market.

## 5. Conclusion

In its contribution the Office tried to make a reference to many, namely pricing, practices by trade associations in the Czech Republic. Both liberal professions and other sectors are frequently jeopardised by horizontal “regulation” the pro- and anti-competitive effects of which the competition authorities have to monitor. The Czech competition authority focuses its activities on procedures and practices of trade associations, both in the framework of competition advocacy and in sanctioning intentional violation of competition, that can be hiding behind the associations’ operations. In many practical examples shown above it is possible to see that in many cases the violation of competition rules is committed unconsciously, without the intention to make any negative impact on the competition or consumers. In such cases the Office acts in framework of its competition advocacy powers and the association rectifies the situation in line with the Office’s recommendation so that the anti-competitive behaviour does not continue. However, the Office revealed some procedures by associations that acted with the aim to co-ordinate the activities of its members while being aware of the negative impacts on competition and their potential disguise under the association. In these cases the Office sanctioned such behaviour correspondingly. In the future the Office wishes to co-operate with the trade associations, analyse their activities and address similar cases with the help of both instruments mentioned above.

# FINLAND

## 1. Introduction

The cooperation between competitors within trade associations has long traditions in Finland. In many cases the conduct has been somewhat problematic from the competition law point of view. When the FCA was founded in the 1980s, the office had negotiations with approximately 100 trade associations. On the basis of these negotiations it was able to dismantle a large number of competition restraints, related mainly to price recommendations.

Following the reform of the competition legislation in the beginning of the 1990s, the FCA solved several exemption applications by trade associations, which mainly concerned the issue of price recommendations. In several cases, the parties appealed against the FCA's decision not to grant an exemption to the Competition Council, which was the first instance of appeal at that time. In a vast majority of the cases the Competition Council decided in favour of the FCA's decision.

In recent years, the FCA has investigated several cases where the instigator or participant in a competition restraint has been a trade association. In many of these cases the office has also proposed a fine to the association.[1] In addition to the cases discussed below, the cases investigated by the FCA have involved price cooperation within a trade association, price recommendations issued and information exchange conducted by a trade association.

## 2. Trade associations' influence on political decision-making and legislation

In Finland, many trade associations have close relations to policy makers, which enable them to influence political debate and decision-making. Due to historic traditions, trade associations are well represented in legislative preparatory work and their influence on legislative bodies is often considerable.

Trade associations' potential to lobby is significant especially in regulated markets where political decision-makers and supervising authorities are often dependent upon information provided by the trade association. This may lead to legislation that may have anticompetitive or protectionist effect. On the other hand, close cooperation between officials and associations provides also useful information, as the association often has the best knowledge of the market. In addition to regulated markets, trade associations' political influence is also strong when the market in question otherwise represents special know how. In Finland, trade associations' political influence is considerable especially in insurance, pharmacy, traffic (taxis, buses, aviation) and health care markets.

The case *Insurance brokers*[2] illustrates trade associations' influence on political decision-makers in the legislative bodies. The Federation of Finnish Insurance Companies (SVK) applied for an exemption from the FCA for the recommendation to move into a net based pricing issued by the federation to its indemnity insurance members. In net pricing, the insurance brokers charge their fees from the client instead of the insurance company, which was the prevailing custom.

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1 The competition infringement fine is imposed by the Market Court upon the FCA's proposal.

2 FCA's decision of 22 April 2004 in case Insurance brokers, diary no 1128/61/02.

In practice, the recommendation implied that the insurance companies should no longer enter into contracts on commission with the insurance brokers. According to the FCA, the recommendation concerned a pricing principle and was prohibited by the Competition Act. According to the FCA, it was used to influence the use of means of competition by the insurance companies in relation to the insurance brokers. The FCA found that the exemption could not be granted because the efficiency benefits possibly created could be attained by means which were less restrictive of competition, such as the brokers' duty to notify their client of the size of the fee obtained by them from the insurer. SVK appealed against the FCA's decision to the Market Court, which dismissed the appeal[3].

After the FCA and the Market Court had dismissed the exemption application, preparatory work for the new Insurance Presentation Act was launched in the Ministry of Social Affairs and Health. SVK was able to influence the preparation of the Act and obtained a clause into the final government bill and law text which was accordant to its own recommendation in spite of the FCA's dissenting opinion.

## 3. Internal regulation and rules of trade/business associations

In the case *Finnish Association of Architects*[4] (SAFA), the FCA ordered that SAFA terminate the conduct where architectural competition rules prevented the members from participating in any other competitions than national ones consulted or approved by SAFA. The adherence to the rules had been strengthened by temporarily removing membership rights from members who had participated in other competitions and by sending out notices which prohibited participation in certain competitions.

The FCA found that the case involved a supply limitation, which had significantly distorted competition in the architectural service market. One of the major drawbacks to competition was that the SAFA architects who had acted as entrepreneurs were not able to offer their services in the extent or on the terms desired by them. The rules also limited competition among the SAFA members while SAFA controlled the terms on which the members were obligated to mutual competition in the design business. The FCA found that SAFA had not presented such efficiency benefits for the conduct prohibited by the Competition Act, based on which the conduct would have been acceptable. The FCA ordered SAFA to terminate the forbidden conduct but due to SAFA's appeal the Market Court prevented the implementation of the decision until the appeal has been investigated[5]. The case is still pending at the Market Court.

## 4. Exchange of information conducted within the trade association

Several cartels investigated by the FCA concerning exchange of information, or cartels where the exchange of information has been one form of unlawful co-operation, have involved a trade association.[6] In some cases, the exchange of information has been organised within the frame of the association, but in others, the meetings of the associations have simply enabled the contacts between competitors and hence made the unlawful cooperation easier.

In the case *Roofing felt*[7], the three biggest companies in the field – Icopal Oy, Katepal Oy and Lemminkäinen Oy – conducted unlawful exchange of information within the so-called Bitumen Group of

3 Market Court's decision of 22 June 2006 129/06, diary no 141/04/KR.

4 FCA's decision of 11 October 2004 in case SAFA, diary no 669/61/2002.

5 Market Court's decision of 20 December 2004, diary no 291/04/KR.

6 See e.g. FCA's proposition of 21 December 2006 in case Timber, diary no 416/61/2004 and the FCA's proposition of 31 March 2004 in case Asphalt cartel (share of the Asphalt Association), diary no 1198/61/2001.

7 FCA's decision of 16 February 2006 in case Roofing felt, diary no 1011/61/2002.

the Confederation of Finnish Construction Product Industries (RTT) during 1993 and 1996-2001. The exchange of information was conducted by gathering detailed and up-to-date sales information from the companies and compiling the data into monthly statistics. At the beginning of each month, the companies had delivered their monthly sales information to the federation, which had compiled it and delivered it to the companies during the first half of the month. The companies had also gone through the sales figures in the meetings of the Bitumen Group and the said information was available only to the members of the Group.

The FCA found that the exchange of information between the said companies and RTT had violated the Competition Act. The major negative impacts on competition included increase in the transparency of the market in the already highly concentrated bitumen market to the effect that it apparently totally removed or at any rate considerably decreased the competition remaining in the market.

However, the FCA did not propose fines for the infringement. The main reason for this was that at the time of the infringement, 1996-2001, the applicability of the Competition Act to the exchange of sales information was also unclear to the parties. The decision not to make a proposal was also affected by the fact that the companies adjusted their restrictive conduct at their own initiative prior to the launching of the FCA's investigation.

In the FCA's experience, the risk of unlawful exchange of information by companies within the trade association increases the more concentrated the market in which the association operates is. In the *asphalt cartel*[8], the *timber purchase cartel*[9] and the above-mentioned *roofing felt* case, the markets were highly concentrated and all the major operators met within the sphere of a trade association. When the market is more fragmented and the number of undertakings active in the trade association is high, the risk for unlawful cooperation is lesser, especially if the members of the trade association only represent a small or mediocre share of the total market.

In the asphalt and timber cartels in particular, the forbidden cooperation, including exchange of information, was rather conducted in the sphere of the association than by the association itself. In these cases, the association provided a forum for the competing companies to meet each other after the official agenda and in social events. These contacts made the exchange of information possible between the companies as well as facilitated the price cooperation.

## 5. Sanctions imposed on trade/business associations

The imposition of effective sanctions to the trade associations has proven problematic due to the sanction provisions in the Finnish Competition Act. According to Article 7 of the Competition Act, the penalty payment shall not exceed 10 per cent of the total turnover of the business undertaking or an association of business undertakings concerned in the preceding year. Hence, the fine cannot exceed 10 per cent of the turnover of the trade association. In contrast, under the EC competition provisions, the fine imposed by the European Commission shall not exceed 10 per cent of the sum of the total turnover of each member active on the market affected by the infringement of the association.

The size of the fine should, as a rule, exceed the benefits obtained through the competition restriction. However, due to the above-mentioned wording of Article 7 of the Competition Act, when an association has committed the violation, the level of fines is relatively low since the turnover of associations is normally small and mainly based on membership fees.

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8 FCA's proposition of 31.3.2004 in case Asphalt cartel (share of the Asphalt Association), diary no 1198/61/2001.

9 FCA's proposition of 21.12.2006 in case Timber, diary no 416/61/2004.

In concentrated markets in cases where all the key players on the market are represented in the association, it is normally possible to impose penalty directly to the members. In these cases, the low level of fines for the associations has not been a significant problem.

The problem is more severe in cases where the market is fragmented and the undertakings active in the decision making bodies of the trade association represent only a small share of the market's total turnover. In these cases, there is a danger that the implementation of a competition restraint within trade association lacks a genuine threat of a penalty payment. This also lessens the deterrent effect of the penalty payment.

In its recent decisions, the FCA has tackled this problem in two ways: it has raised the level of the penalty to its maximum i.e. 10 per cent of the turnover of the associations. Moreover, it has fined the member companies, which have participated in the implementation of the competition restraint in the board of the trade association. Still, even if the fine is 10 per cent of the turnover, it often remains fairly low in relation to the total size of the market and the turnovers of the incumbents.

The fining of board members in these cases is not without problems, either. Firstly, in several cases it raises the number of concerned parties to several dozens, which makes the proceedings even in simple matters strenuous and time-consuming. A second problem is related to evidence: The fining of board members requires that the FCA is able, with respect to each member of the board, to show that the member has participated in the decision-making, which has lead to the competition restraint. It is often rather difficult to obtain such evidence.

Two recent cases exemplify the problems related to the low level of fines. In the case involving price cooperation in the *Association of Finnish Household Appliance Maintenance,*[10] the FCA decided to propose fines not only to the association but to 19 member entrepreneurs who were active in the board during the time the violation occurred. The total sum of the fines proposed was EUR 280,000. The size of the fine proposed to the association was only EUR 6,300, even if it corresponded to 10 per cent of the association's turnover. The total value of the relevant household appliance maintenance market in Finland at the time was roughly EUR 80 million. The case is pending in Market Court.

In the case involving the price recommendations by the *Finnish Hairdressers' Association*[11], the FCA did not have sufficient evidence to individualise the board members who were responsible for the violations. The FCA therefore proposed that the fine only be imposed on the association. The size of the proposed fine is EUR 33,000 and it corresponds to 10 per cent of the turnover of the association. The total size of the relevant hairdressers' and barbers' market in Finland is roughly EUR 360 million; consequently the proposed fine is roughly 0.01 per cent of the total turnover in one year, although it is the largest possible fine under the Competition Act. This case is also still pending in Market Court.

10 FCA's proposition of 4 May 2006 in case SKHL, diary no 250/61/2002.

11 FCA's proposition of 27 August 2006 in case Finnish Hairdressers' Association, diary no 502/61/2006.

# FRANCE

Les organisations professionnelles rassemblent les acteurs d'un même secteur d'activité. Elles peuvent prendre la forme d'association, de syndicat, d'ordre professionnel, de fédération ou de comité. Elles ont pour fonction de promouvoir, de réglementer et de protéger les intérêts d'une ou plusieurs professions ou d'un secteur d'activité. Elles informent et conseillent leurs membres et peuvent agir en justice au nom de leurs adhérents.

Si ces groupements professionnels peuvent aider leurs adhérents dans l'exercice de leur activité, cette aide ne doit pas exercer d'influence directe ou indirecte sur le libre jeu de la concurrence à l'intérieur de la profession.

De nombreuses décisions illustrent ainsi le caractère anti-concurrentiel de certaines activités de ces organisations professionnelles (I). Ces dernières sont sanctionnées, comme le seraient des entreprises responsables de pratiques anticoncurrentielles. Les sanctions sont alors fixées en tenant compte des ressources de l'organisation professionnelle et de ses membres (II). Enfin, il sera relevé que l'action des organisations professionnelles revêt pourtant par ailleurs une dimension pro-concurrentielle : ces dernières disposent en effet de la faculté de saisir le Conseil de la concurrence. Elles usent de cette faculté pour attirer l'attention de l'autorité de concurrence sur les pratiques anti-concurrentielles qui affectent l'efficacité économique de leurs membres (III).

## 1. Aspects anti-concurrentiels

Les décisions du Conseil de la concurrence sanctionnant des organisations professionnelles sont nombreuses. La tentation est en effet grande de faire de ces lieux de réunion et de rencontre, le support d'activités anticoncurrentielles.

Les organisations professionnelles ne bénéficient d'aucune immunité particulière en raison de leur statut, de leur action, ou de leur proximité avec les pouvoirs publics. Le Conseil considère en effet qu'une association professionnelle ou un syndicat sort de sa mission de défense de ses adhérents lorsqu'il se livre à des pratiques anticoncurrentielles. La défense de la profession par tout syndicat créé à cette fin ne l'autorise nullement à s'engager, ni à engager ses adhérents dans des actions collectives visant à empêcher, restreindre ou fausser le jeu de la concurrence ou susceptibles d'avoir de tels effets.

Les pratiques observées présentent une grande diversité, l'action des organisations professionnelles pouvant être plus ou moins active et plus ou moins agressive.

### *1.1 Typologie des pratiques mises en œuvre par les associations professionnelles et reconnues comme anticoncurrentielles par le Conseil de la concurrence.*

#### *1.1.1 Les ententes sur les prix*

Le Conseil de la concurrence a sanctionné de nombreuses organisations professionnelles en raison de leur rôle dans la mise en place d'ententes sur les prix. Ce type de pratique est notamment observé dans les secteurs d'activités qui rassemblent des professionnels nombreux, le plus souvent indépendants

(professions libérales, artisans). Le syndicat professionnel tient alors le rôle de chef de file de l'entente et exerce des pressions sur les membres qui refuseraient de participer aux pratiques illicites.

Ainsi, par exemple, dans une décision[1] relative à des pratiques mises en oeuvre dans le secteur des taxis à Marseille, le Conseil a estimé, en réponse aux syndicats de taxis qui reconnaissaient s'être entendus sur le prix de cession des licences de taxis mais soutenaient l'avoir fait pour défendre l'intérêt général de la profession de taxi, que « *dans un régime de droit commun de liberté des prix, il n'appartient pas à une organisation professionnelle de fixer des prix sur un marché, cette possibilité n'étant prévue que dans le cadre d'une autorisation législative expresse. Un prix est soit déterminé par le libre jeu du marché, soit fixé par les pouvoirs publics dans des conditions prévues par la loi, mais ne peut en aucun cas prendre la forme d'un "tarif syndical" arrêté au sein d'une organisation professionnelle pour le seul bénéfice de ses membres* ».

En 2004, le Conseil de la Concurrence a sanctionné la Fédération départementale de la boulangerie et de la boulangerie pâtisserie de la Marne[2], qui avait diffusé à ses adhérents des consignes de prix relatives à la baguette de 250 grammes. Le Conseil a estimé qu'en diffusant largement ces tarifs auprès des boulangers, la Fédération était sortie de son rôle de défense de ses membres et s'était livrée à une pratique dont l'objet était de faire obstacle à la fixation des prix de la baguette par le jeu du marché.

### *1.1.2 La diffusion de consignes*

En diffusant à leurs adhérents des consignes les invitant à harmoniser leurs comportements, les organisations professionnelles participent activement à la création d'ententes illégales.

En 2004, le Conseil a ainsi sanctionné[3] l'ordre des architectes d'Aquitaine pour avoir élaboré des notes destinées aux architectes, très largement diffusées, leur déconseillant de se soumettre à des consultations sur leurs honoraires et pour être intervenu auprès des maîtres d'ouvrage afin qu'il ne soit pas tenu compte de la rémunération des candidats lors de la procédure de sélection des candidatures. Le Conseil a estimé qu'en ce faisant, il s'opposait à une concurrence par les prix.

De même, le Conseil de la concurrence saisi de la situation de la concurrence dans le secteur d'activité des géomètres-experts et des géomètres-topographes[4], a sanctionné en 2002 le Conseil supérieur de l'Ordre des géomètres-experts pour avoir diffusé une note interprétative tendant à réserver l'accès aux marchés de travaux topographiques à incidence foncière aux seuls géomètres-experts, excluant ainsi, les géomètres-topographes. Cette pratique avait été suivie d'interventions auprès des donneurs d'ordre, en amont, au moment de l'élaboration des cahiers des charges ou de l'examen des offres, afin que ces derniers étendent le monopole des géomètres-experts sur les travaux topographiques à incidence foncière à tous les travaux topographiques. Le Conseil a estimé que l'élaboration et la diffusion de cette note par cet ordre professionnel, avaient pour objet et pour effet de limiter la concurrence entre géomètres experts et géomètres-topographes sur le marché des travaux topographiques sur lequel la concurrence pouvait s'exprimer.

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1 Décision n° 06-D-30, du 18 octobre 2006, relative à des pratiques mises en oeuvre dans le secteur des taxis à Marseille.

2 Décision n° 04-D-07 du 11 mars 2004 relative à des pratiques relevées dans le secteur de la boulangerie dans le département de la Marne.

3 Décision n° 04-D-25 du 23 juin 2004 relative aux pratiques mise en œuvre dans le domaine des honoraires d'architecte dans les marchés de maîtrise d'œuvre en Aquitaine.

4 Décision n° 02-D-14 du 28 février 2002 relative à la situation de la concurrence dans le secteur d'activité des géomètres-experts et des géomètres-topographes.

### *1.1.3 Les appels au boycott*

Les organismes professionnels sont parfois sanctionnés pour coordonner le boycott de certains concurrents potentiels.

Dans une décision[5] de 2006 relative à des pratiques mises en oeuvre dans le secteur des appareils de chauffage, sanitaires, plomberie et climatisation, le Conseil a sanctionné la Fédération française des négociants en appareils sanitaires, chauffage, climatisation et canalisations (FNAS), pour avoir organisé, avec les entreprises membres, « *une stratégie globale d'éviction des grandes surfaces de bricolage et des coopératives d'installateurs sur les marchés de l'approvisionnement et de la distribution de produits de céramique sanitaire, robinetterie et chauffage* ». Ces pratiques avaient pour objet de limiter les sources d'approvisionnement des grandes surfaces de bricolage et coopératives d'installateurs sur les marchés amont de l'approvisionnement en produits de céramique sanitaire, de robinetterie et de chauffage et de restreindre leur accès aux marchés aval de la distribution de ces produits. De même, l'appel au boycott des fournisseurs d'une coopérative par un syndicat de détaillants, et le refus par ces détaillants de nouer des relations commerciales avec la coopérative ont été considérés comme étant de nature à limiter artificiellement le marché et qualifiés de pratiques concertées prohibées[6].

### *1.1.4 Réponses concertées à un appel d'offres*

Le Conseil de la concurrence a rappelé dans plusieurs affaires[7] que « si les organisations professionnelles ont notamment pour mission d'assurer la défense des intérêts collectifs de leurs membres et de les assister dans l'exercice de leur profession, elles sortent du cadre de cette mission lorsqu'elles organisent la concertation entre elles en vue de répondre à un appel à candidatures de façon groupée et à un prix identique ».

### *1.1.5 Les refus de demandes d'adhésion*

Les pratiques illicites peuvent également prendre la forme de refus de demandes d'adhésion. Ainsi, dans une décision relative à des pratiques mises en oeuvre à l'occasion des foires d'antiquité et de brocante dans le département des Vosges[8], le Conseil a sanctionné pour entente le Syndicat des antiquaires et brocanteurs des Vosges pour avoir, dans le cadre de son activité d'organisation de la foire de Xaronval – c'est-à-dire dans le cadre d'une activité de services – exclu de ses membres et interdit de foire pendant deux ans, quatre antiquaires qui avaient voulu étendre la foire de Xaronval, pratique de nature à limiter l'accès de ces quatre professionnels au marché.

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5 Décision n° 06-D-03 bis du 9 mars 2006 relative à des pratiques mises en œuvre dans le secteur des appareils de chauffage, sanitaires, plomberie, climatisation, affaire pendante devant la Cour d'appel de Paris.

6 Décision 03-D-68 du 23 décembre 2003 relative aux pratiques mises en œuvre par le Centre National des Professions de l'Automobile (CNPA) dans le secteur de la distribution automobile.

7 Notamment décision n° 03-D-46 du 30 septembre 2003 relative à des pratiques concernant un marché public de transport occasionnel d'élèves dans le département des Alpes-Maritimes.

8 Décision n° 05-D-14 du 6 avril 2005 relative à des pratiques mises en œuvre à l'occasion des foires d'antiquité et de brocante dans le département des Vosges.

**Tableau 1. Les principales décisions du Conseil de la concurrence sanctionnant des organisations professionnelles/typologie des pratiques anticoncurrentielles**

| Numéro de la décision | Date | Auteur de la pratique | Secteur d'activité | Pratiques sanctionnées |
|---|---|---|---|---|
| 02-D-14 | 28 février 2002 | Ordre National des Géomètres experts | Métreurs, géomètres | Entente sur l'attribution d'un marché public/éviction |
| 02-MC-06 | 30 avril 2002 | GIE Sport Libre | Activités de radio | Comportements susceptibles de gêner l'exploitation par la société RMC Info de ses droits exclusifs de diffusion radiophonique de la coupe du monde de football |
| 02-D-23 | 27 mars 2002 | Association d'ambulanciers "Urgences 88" | Ambulances | Concertation afin d'adopter une attitude commune face à l'appel d'offre de l'hôpital d'Epinal/Fixation en commun de tarifs pour le transport ambulancier |
| 02-D-59 | 25 septembre 2002 | Régie Départementale des Transports de l'Ain (RDTA). Union Professionnelle des Transporteurs routiers de l'Ain (UPTRA) | Transports routiers réguliers de voyageurs | Rencontre entre transporteurs au cours d'une procédure de délégation de service public de transports scolaires lancée par le conseil général de l'Ain/mise en échec du jeu de la concurrence |
| 03-D-03 | 16 janvier 2003 | Barreau de Marseille | Activités juridiques | Obligation de contracter un contrat d'assurance civile/dépassement de la mission de conseil, d'information et de protection au titre de L. 420-4 |
| 03-D-04 | 16 janvier 2003 | Barreau d'Alberville | Activités juridiques | Obligation de contracter un contrat d'assurance civile/dépassement de la mission de conseil, d'information et de protection au titre de L. 420-4 |
| 03-D-46 | 30 septembre 2003 | Fédération Nationale des Transports de Voyageurs des Alpes-Maritimes (FNTV 06) | Transports voyageurs | Concertation en vue de répondre à un appel à candidatures de façon groupée/concertation sur les prix |
| 04-D-07 | 11 mars 2004 | Fédération départementale de la boulangerie et boulangerie pâtisserie de la Marne | Industries alimentaires Boulangerie et boulangerie-pâtisserie | Entente sur les prix/Obstacle à la fixation des prix de la baguette |

| | | | | |
|---|---|---|---|---|
| 04-D-25 | 23 juin 2004 | Conseil de l'Ordre des architectes d'Aquitaine, Association Architecture et Commande Publique | Services fournis principalement aux entreprises ; Activités d'architecture | Elaboration et diffusion à l'initiative d'une organisation professionnelle de mots d'ordre et de consignes de prix |
| 04-D-49 | 28 octobre 2004 | UNCEIA | Insémination artificielle bovine | Refus de délivrance de licence aux vétérinaires/Elaboration et diffusion à l'initiative d'une organisation professionnelle de mots d'ordre et de consignes de prix/dépassement de la mission de conseil, d'information et de protection au titre de L. 420-4 |
| 05-D-10 | 15 mars 2005 | Organisations professionnelles producteurs de fruits de Bretagne | Commerce de gros de fruits et légumes | Clause d'exclusivité/entente visant à favoriser les exportations de choux-fleurs à destination de certains négociants prédéterminés exerçanat essentiellement hors de France/fixation de prix/conditions d'agréement au marché aux enchères faisant obstacle à l'entrée sur le marché |
| 05-D-14 | 6 avril 2005 | Syndicat des Antiquaires et Brocanteurs des Vosges (SABV) | Commerce de détail et réparation d'articles domestiques ; Commerce de détail de biens d'occasions | Entente pour exclure des concurrents/obstacle à l'accès au marché/priorité aux adhérents pour l'accès à la foire/accord pour empêcher l'organisation par les concurrents évincés d'une foire parallèle |
| 05-D-43 | 20 juillet 2005 | Conseil départemental de l'Ordre des chirurgiens-dentistes du Puy-de-Dôme | Pratique dentaire | Conseil départemental des chirurgiens-dentistes, soutenu par le Conseil national, a incité les directeurs de maisons de retraite à ne pas donner à une prothésiste l'autorisation de proposer ses services/pratique interdisant le libre accès à la clientèle/mise en place d'un monopole factice |
| 06-D-03 bis | 9 mars 2006 | FNAS, GFCC, CAPEB, UNCP, UCF, Association Chauffage Fioul, FISB | Plomberie et chauffage | Organisation d'une stratégie globale d'éviction des grandes surfaces de bricolage/appel au boycott/accords cadres avec clauses d'exclusivité et remises discriminatoires |
| 06-D-30 | 18 octobre 2006 | Syndicats marseillais de taxis | Taxis | Entente sur les prix de cession des licences/fixation de barème |

| | | | | |
|---|---|---|---|---|
| 07-D-05 | 21 février 2007 | Union française des orthoprothésistes (UFOP) | Fabrication d'instruments médicaux, de précision, d'optique et d'horlogerie ; Fabrication d'appareils médicochirurgicaux | Consignes tarifaires/entente et concertation sur les prix en vue d'appels d'offre |

### *1.2 Typologies des pratiques mises en œuvre par les associations professionnelles et n'ayant pas été reconnues comme anticoncurrentielles par le Conseil de la concurrence*

#### *1.2.1 Lobbying et action des organisations professionnelles auprès des pouvoirs publics*

Les associations, ordres et organismes professionnels ou interprofessionnels sont souvent associés aux pouvoirs publics pour assurer la réglementation des professions. Cette collaboration pose la question de la soumission des décisions des organisations professionnelles au droit de la concurrence.

En droit communautaire, un organisme professionnel n'est pas qualifié d'association d'entreprises lorsqu'il prend des décisions dans l'exercice de compétences déléguées par l'État et étroitement contrôlées par lui, des « *mesures de caractère étatique* ». Elles échappent dans ce cas au droit de la concurrence applicable aux entreprises.

Relèvent de ce cas de figure, et ne constituent pas des ententes anticoncurrentielles, les avis des organismes professionnels consultés en matière économique par les pouvoirs publics avant d'arrêter une réglementation économique ou chargés de déterminer, en fonction de critères d'intérêt général arrêtés par eux-mêmes, une telle réglementation, les pouvoirs publics conservant un pouvoir de contrôle et de réformation des décisions prises à cet effet.

Faisant application de cette jurisprudence (et notamment des arrêts du 17 novembre 1993, Bundesanstalt für den Güterfernverkher/Reiff, 185/91, du 9 juin 1994, Allemagne/Delta Schiffahrts und Speditiongesellschaft, C-153/93, du 5 octobre 1995, Centro Servizi Spediporto/Speditioni Marittima del Golfo, C-96/94), le Conseil a estimé, dans une décision relative à des pratiques mises en oeuvre dans le secteur des eaux-de-vie de Cognac par le Bureau national interprofessionnel du cognac (BNIC)[9], que l'accord pris lors de l'assemblée plénière du BNIC, concernant les « *quantités normalement vinifiées* » ou QNV (seuil à partir duquel les vins sont soumis à une distillation obligatoire de retrait), constituait une simple discussion préparatoire, une prise de position dans le cadre de la consultation du ministre chargé de réglementer le secteur par voie d'arrêté : « *La consultation des professions intéressées par les pouvoirs publics avant de prendre une décision d'intervention économique n'est nullement contraire aux obligations des États membres au regard des règles de concurrence du traité CE et, d'autre part, le seul fait, pour un organisme professionnel ou interprofessionnel de prendre des décisions internes en vue de déterminer sa position dans le cadre d'une telle consultation ne saurait être considéré comme constitutif d'un accord anticoncurrentiel susceptible de relever des interdictions de l'article 81 CE ou de l'article L. 420-1 du Code de commerce* ». La décision finale appartient aux pouvoirs publics qui, d'ailleurs, ne suivent pas toujours les propositions du BNIC.

[9] Décision n° 06-D-21 du 21 juillet 2006 relative à des pratiques mises en œuvre dans le secteur des eaux-de-vie de cognac par le Bureau national interprofessionnel du cognac.

De la même manière, dans une décision[10] relative à une saisine de la société Le Casino du Lac de la Magdeleine, le Conseil a estimé qu'une note du syndicat des Casinos modernes, adressée au ministre, qui, selon la saisissante aurait visé à influencer le ministre afin qu'il refuse l'implantation d'un casino, n'avait pas d'objet anticoncurrentiel en soi, car elle s'inscrivait dans le « *contexte d'un débat public dans lequel les groupes socioprofessionnels font connaître leur point de vue pour défendre les intérêts de leurs membres* » .

*1.2.2 Actions d'information et de formation engagées par les organisations professionnelles auprès de leurs membres*

Il reste également loisible à un syndicat professionnel de diffuser des informations destinées à aider ses membres dans l'exercice de leur activité. De telles actions ne sont pas qualifiées d'anticoncurrentielles. Ainsi, par exemple, dans une décision[11] de 2005, le Conseil a estimé que *« l'Ilec* [était] *resté dans son rôle d'information et de conseil de ses adhérents en analysant la jurisprudence relative aux centrales d'achat, en les informant de la saisine du Conseil de la concurrence,* [...] *à l'encontre des centrales d'achat Lucie et Opéra et en leur conseillant de garder des traces écrites des demandes de Lucie en prévision d'un éventuel contentieux* ». De même, le Conseil de la concurrence a considéré dans cette affaire que l'organisation professionnelle mise en cause n'avait pas outrepassé son rôle de défense collective des fournisseurs en leur rappelant l'illégalité des ristournes sans contreparties. Il ne s'est pas immiscé dans les négociations entre les fournisseurs et les centrales d'achat et ne s'est donc pas rendu coupable d'une entente anticoncurrentielle.

Il est également possible pour une association regroupant des professionnels d'un même secteur d'activité de donner à ses membres des informations destinées à les renseigner de manière générale sur le fonctionnement d'un marché ou à les aider dans la gestion de leur entreprise.

## 2. Les sanctions

### *2.1 Le montant des sanctions pécuniaires que le Conseil peut infliger à une organisation professionnelle est plafonné par la loi à 3M€ mais tient compte de ses ressources et de la possibilité pour l'organisation de lever des fonds auprès de ses membres.*

L'article L. 464-2 du code de commerce prévoit que si le contrevenant n'est pas une entreprise, le montant maximum de la sanction pécuniaire pouvant lui être infligée est de 3 millions d'euros. Il dispose également que « *les sanctions pécuniaires sont proportionnées à la gravité des faits reprochés, à l'importance du dommage causé à l'économie, à la situation de l'organisme ou de l'entreprise sanctionnée ou du groupe auquel l'entreprise appartient et à l'éventuelle réitération de pratiques prohibées par le présent titre (...) »*..

S'agissant d'organisations professionnelles le Conseil prend également en compte les ressources de ces organismes.

Néanmoins, il peut être souligné qu'un organisme professionnel peut être sanctionné dans le respect des plafonds légaux, mais à un niveau qui excède ses ressources immédiatement disponibles. A l'instar du

[10] Décision n° 05-D-20 du 13 mai 2005 relative à une saisine de la société le casino du Lac de la Magdeleine.

[11] Décision n° 05-D-33 du 27 juin 2005 relative à des pratiques mises en œuvre par l'Ilec.

droit communautaire[12], le Conseil a en effet observé dans sa pratique décisionnelle[13] que les organisations professionnelles ont toujours la possibilité de faire appel à leurs membres pour lever les fonds nécessaires au paiement de la sanction pécuniaire qui leur est infligée.

Il ressort de ces décisions que lorsque l'infraction au droit de la concurrence d'un organisme professionnel porte sur les activités de ses membres, il y a lieu de prendre en compte leurs propres capacités économiques. A défaut, des comportements anticoncurrentiels ayant un impact significatif sur le marché pourraient ne pas être sanctionnés à un niveau suffisamment dissuasif. Ainsi par exemple dans une affaire relative à des pratiques mises en œuvres par l'Union françaises des orthoprothésistes[14], le Conseil de la concurrence a pris en compte le montant des cotisations versées à l'organisation (250 000 €) et, ayant pu constater qu'elle disposait par ailleurs de réserves sous forme de trésorerie ou de placements de plus de 300 000 € et qu'elle pouvait lever des fonds auprès de ses membres, l'UFOP s'est vu infliger une sanction d'un montant de 125 000 €.

**Tableau 2. Les sanctions infligées aux organisations professionnelles reconnues responsables de pratiques anti-concurrentielles**

| Décision | Organisation sanctionnée | Ressources | Amendes | Amendes/Ressources |
|---|---|---|---|---|
| 02-D-14 | Ordre national des géomètres experts | 1.689.011 € | 150.000 € | 8,88 % |
| | Ordre de Lyon | 129.621 € | 100.000 € | 77,1 % |
| | Ordre de Montpellier | 74.497 € | 50.000 € | 67 % |
| | Ordre de Marseille | 96.964 € | 75.000 € | 77 % |
| | Ordre de Strasbourg | 42.796 € | 60.000 € | 140 % |
| 02-D-59 | Régie départementale des transports de l'Ain | 8.076.620 € | 72.000 € | 1 % |
| | Union professionnelle des transports routiers | 75.963,06 € | 3.800 € | 5 % |
| 03-D-46 | FNTV 06 | 12.349 € | 12.000 € | 97 % |
| 04-D-07 | Fédération boulangerie patisserie de la Marne | 89.565 € | 15.000 € | 16 % |

12 Décision de la Commission européenne du 2 avril 2003, relative à une procédure d'application de l'article 81 CE, affaire viandes bovines françaises (JOCE L. 209, p. 12) et l'arrêt relatif à cette décision du Tribunal de première instance des Communautés européennes du 13 décembre 2006, FNCBV, FNSEA et autres/Commission (T-217/03 et T-245/03, points 312 à 319).

13 Décision du Conseil de la concurrence n° 06-D-30 du 18 octobre 2006 relative à des pratiques mises en oeuvre dans le secteur des taxis à Marseille (points 117 et suivants).

14 Décision n°07-D-05 du 21 février 2007 relative à des pratiques mises en œuvre par l'Union française des orthoprothéistes sur le marché de la fourniture d'orthoprothèses, affaire pendante devant la Cour d'appel de Paris.

| | | | | |
|---|---|---|---|---|
| 04-D-25 | Conseil de l'Ordre des architectes d'Aquitaine | 244.080 € | 10.000 € | 4 % |
| | Association Architecture et commande publique | 9.421.33 € | 2.000 € | 21 % |
| 04-D-49 | UNCEIA | 2.961.189 € | 30.000 € | 1 % |
| 05-D-10 | CERAFEL | 24 M€ | 15.000 € | < 0,1 % |
| | SICA Saint-Pol-de-Léon | 229,69 M€ | 10.000 € | < 0,1 % |
| | UCPT | 107,7 M€ | 10.000 € | < 0,1 % |
| | SIPEFEL | 12,4 M€ | 10.000 € | < 0,1 % |
| 05-D-14 | SABV | 97.845 € | 1.000 € | 1 % |
| 05-D-43 | Conseil de l'Ordre des chirurgiens-dentistes | 182.265,20 € | 1.000 € | 0,50 % |
| 06-D-03 bis | FNAS | 408.657 € | 100.000 € | 24 % |
| | GFCC | 434.795 € | 20.000 € | 4 % |
| | CAPEB | 12.783.243 € | 80.000 € | 0,50 % |
| | UNCP | 478.259 € | 20.000 € | 4 % |
| | UCF | 599.400 € | 30.000 € | 5 % |
| | Association Chauffage Fioul | 2.500.513 € | 1.000 € | < 0,1 % |
| | FISB | 41.500 € | 5.000 € | 12,00 % |
| 06-D-30 | Section marseillaise du syndicat des taxis CFTC | 2.488 € | 15.000 € | 600 % |
| 07-D-05 | UFOP | 251.540 € | 125.000 € | 50 % |

### *2.2 Le risque de sanction pèse tant sur l'organisation professionnelle que sur ses membres*

La loi permet au Conseil de la concurrence de sanctionner, tant les associations professionnelles ayant enfreint les règles du droit de la concurrence, que les entreprises qui en sont membres. Le Conseil de la concurrence examine en effet le rôle spécifique de ces différentes entités dans la mise en œuvre des pratiques illicites.

Ainsi, dans certaines décisions, ayant relevé que l'organisation professionnelle n'avait joué qu'un rôle passif dans la mise en œuvre des pratiques anticoncurrentielles, seuls les membres de l'organisation ont été sanctionnés. Dans d'autres décisions, le Conseil n'a sanctionné que l'association professionnelle, sans que ses membres ne soient directement mis en cause. Enfin, dans certaines décisions, le Conseil a pu

sanctionner tant l'organisation professionnelle que ses membres. Dans un cas[15] récent, le Conseil a ainsi rappelé que « *les décisions d'associations d'entreprises sont, par définition, l'expression d'une volonté commune des entreprises membres, et* a fortiori*, de leurs dirigeants, lorsque ceux-ci siègent au sein des organes décisionnels de ladite association, en l'occurrence, la FNAS. Leur responsabilité au regard des règles de concurrence est dès lors engagée lorsque les entreprises unissent leur volonté à celle d'autres pour mener, y compris au sein d'associations professionnelles, des actions illicites* ».

## 3. Aspects pro-concurrentiels de l'activité des organisations professionnelles

### *3.1 La faculté donnée aux organisations professionnelles de saisir le Conseil pour avis*

Aux termes de l'article L. 462-1 du Code de commerce, le Conseil de la concurrence peut être saisi par les organisations professionnelles et syndicales. Ces dernières disposent en effet de la possibilité de consulter le Conseil sur les propositions de loi ainsi que sur toute question affectant la concurrence.

Ces saisines sont relativement peu nombreuses, et concernent des secteurs d'activité très variés (Telecom, Agriculture, Santé, Assurance, Transport…). Elles ont généralement pour objet d'attirer l'attention du Conseil de la concurrence sur des mesures de nature législative ou réglementaire affectant leur profession.

**Tableau 3. Exemples de saisines pour avis, exercées par des organisations professionnelles**

| Numéro de l'avis | Date de l'avis | Nom du saisissant | Secteur concerné | Objet de la saisine |
|---|---|---|---|---|
| 02-A-08 | 22/05/2002 | Association pour la promotion de la distribution de presse (APDP) | Distribution de la presse | Avis sur une éventuelle restriction à l'entrée du marché par l'élaboration d'un réseau de dépositaires de presse |
| 02-A-11 | 02/09/2002 | Syndicat de l'Union nationale des professionnels de la formation des automobilistes (UNPFA) | Auto-école | Avis sur l'existence d'un effet anticoncurrentiel par la mise en place de modalités d'attribution des places d'examen du permis de conduire |
| 03-A-09 | 06/06/2003 | Groupement des entreprises mutuelles d'assurance (GEMA) | Assurance automobile | Avis sur l'existence d'un effet anticoncurrentiel par l'élaboration et la diffusion d'un nouvel indice destiné à mesurer l'évolution des coûts de réparation automobile |
| 03-A-18 | 15/10/2003 | Union nationale des économistes de la construction et des coordonnateurs (UNTEC) | Métreurs, géomètres | Avis sur l'existence d'un effet concurrentiel par la création d'un nouvel outil de gestion |

[15] Décision du Conseil de la concurrence du 9 mars 2006 (06-D-03), relative à une entente dans le secteur des produits de chauffage, sanitaires, plomberie et climatisation, affaire pendante devant la Cour d'appel de Paris.

| | | | | |
|---|---|---|---|---|
| 03-A-19 | 17/11/2003 | Fédération française des courtiers d'assurances et de réassurances | Assurance des risques industriels | Avis sur une clause contractuelle précisant les conditions de garanties et de primes proposées en matière de coassurance des risques industriels |
| 04-A-01 | 08/01/2004 | Association française des réseaux et services de télécommunications (AFORS) | Télécoms | Avis sur les principes généraux des relations contractuelles entre les utilisateurs et les différents acteurs du dégroupage |
| 04-A-02 | 16/01/2004 | Fédération de l'hospitalisation privée (FHP) | Santé (fabrication d'instruments médicaux) | Avis sur le fonctionnement des marchés des dispositifs médicaux |
| 04-A-04 | 29/01/2004 | Fédération nationale des taxis indépendants | Transports de voyageurs par taxi | Effets préjudiciables des dispositions législatives et réglementaires régissant la profession de chauffeur de taxi |
| 04-A-06 | 16/04/2004 | Association française des sociétés d'autoroutes et d'ouvrage à péage (ASFA) | Services auxiliaires de transport | Avis sur les conditions d'attribution par la société d'autoroutes des autorisations d'installations commerciales sur les aires d'autoroutes |
| 04-A-13 | 12/07/2004 | Institut français des experts comptables (IFEC) | Activités comptables | Conséquences de la mise en place du service emploi-service |
| 04-A-14 | 23/07/2004 | Syndicat national de l'équipement de bureau et de l'informatique (SEBI) | Commerce de gros d'ordinateurs et d'équipements informatiques | Mise en œuvre par une société de pratiques discriminatoires |
| 04-A-21 | 28/10/2004 | Fédération interprofessionnelle de la communication d'entreprise (FICOME) | Télécoms | Avis sur les conditions d'exercice par France Télécom des activités d'opérateurs accès et d'installations-maintenance de système de télécommunications |
| 04-A-23 | 20/12/2004 | Syndicat intercommunal de la périphérie de Paris pour l'électricité et les réseaux de télécommunications | Télécoms | Avis sur les conditions fixées par France Télécom dans le cadre de son offre de référence pour l'accès à la boucle locale |
| 05-A-22 | 02/12/2005 | Association pour le maintien de la concurrence sur le réseau autoroutier (AMCRA) | Gestion d'infrastructures de transports terrestres | Avis sur la privatisation des sociétés d'économie mixte concessionnaires d'autoroutes |
| 06-A-09 | 14/02/2006 | Union des expéditeurs et exportateurs en fruits et légumes du Finistère (UEEFL) | Commerce de gros de fruits et légumes | Conditions d'application des articles L. 420-1 et 2 du Code de commerce dans le secteur de la première commercialisation des fruits et légumes |

### *3.2 La faculté donnée aux organisations professionnelles de saisir le Conseil de toute pratique anti-concurrentielle affectant les membres de la profession dont elles défendent les intérêts*

Aux termes de l'article L. 462-5 du code de commerce, le Conseil de la concurrence peut être saisi de toute pratique anti-concurrentielle par les organismes professionnels et les syndicats. Ces personnes morales doivent agir par l'intermédiaire de leurs représentants mandatés ou qualifiés.

Ces saisines contentieuses, dénonçant des pratiques anti-concurrentielles affectant l'activité économique du secteur d'activité dont les organisations ont la charge, sont peu nombreuses. Dans leurs saisines, les organisations professionnelles attirent souvent l'attention de l'autorité de concurrence sur les comportements abusifs d'opérateurs intervenant sur un marché amont (approvisionnement des membres) ou aval (distribution).

**Tableau 4. Les saisines contentieuses des organisations professionnelles**

| Numéro de la décision | Date | Nom du saisissant | Secteur concerné | Objet de la saisine |
|---|---|---|---|---|
| 03-D-26 | 04/06/2003 | Confédération nationale de la distribution pétrolière | Production et distribution de gaz et d'électricité | Les pratiques mises en œuvre par EDF tendant à limiter l'accès sur le marché |
| 03-D-30 | 02/07/2003 | Syndicat européen des mandataires et intermédiaires d'assurance (SEMIA) et des chambres syndicales d'agents généraux d'assurances | Assurance | Accord ayant débouché sur la réforme des statuts des agents généraux d'assurances (contraire à l'article L. 420-1 du Code de commerce) |
| 03-D-42 | 18/08/2003 | Centre national des professionnels de l'automobile (CNPA) | Fabrication, commerce et réparation de véhicules à deux roues | Pratiques d'imposition de contrats contraire aux règlements 1/2003 accentuant la dépendance économique du réseau |
| 03-D-67 | 23/12/2003 | Syndicat des professionnels européens de l'automobile (SPEA) | Commerce de véhicules automobiles | Pratiques tendant à limiter les importations hors réseau |
| 03-D-68 | 23/12/2003 | Syndicat des professionnels européens de l'automobile (SPEA) | Commerce de véhicules automobiles | Pratiques tendant à limiter les importations hors réseau |
| 04-D-48 | 14/10/2004 | Association professionnelle TENOR | Télécoms | Pratiques de conditions tarifaires, accords et offres limitant l'entrée sur le marché |
| 04-D-61 | 25/11/2004 | Union professionnelle de la carte postale (UCPC) | Télécoms, édition et imprimerie | Pratiques de prix tendant à éliminer les concurrents et abus de position dominante |
| 05-D-68 | 12/12/2005 | Chambre syndicale nationale de l'enseignement privé à distance (CHANED) | Education, formation des adultes et formation continue | Abus de position dominante et obtention d'avantages discriminatoires |

| | | | | |
|---|---|---|---|---|
| 06-D-21 | 21/07/2006 | Comité de défense de la viticulture charentaise | Vinification | Abus de position dominante et pratiques de restriction de la production |
| 06-D-34 | 09/11/2006 | Alliance pour la formation et la retraite des médecins (AFIRM), Union des chirurgiens de France (UCF) | Assurance | Pratiques professionnelles et modification du contexte législatif. |

### *3.3 Actions internes des organisations professionnelles : formations, informations, « compliance programs », et règles déontologiques*

Par leurs actions de formation et d'information, les organisations professionnelles contribuent à diffuser une *« culture de la concurrence »*. Des membres du Conseil de la concurrence sont parfois invités aux conférences organisées par ces organisations et participent ainsi à leurs actions de formations en droit de la concurrence.

Elles peuvent également prévenir ou mettre fin à des infractions par le biais des *« compliance programs »*.

Enfin certaines organisations rappellent les règles du droit de la concurrence dans leurs chartes et corpus de règles déontologiques. Néanmoins la visibilité de ces actions reste assez faible pour le Conseil de la concurrence.

# GERMANY

## 1. Introduction

In Germany, about 2000 associations are active nationwide[1]. The major German associations of undertakings include in particular the Federation of German Industries (*Bundesverband der Deutschen Industrie, BDI*) which represents 37 member associations and thus the interests of more than 100,000 companies[2], the Association of the German Chambers of Industry and Commerce (*Deutscher Industrie- und Handelskammertag, DIHK*) which operates as an umbrella organisation of the 81 German chambers of industry and commerce[3], and the German Confederation of Skilled Crafts (*Zentralverband des Deutschen Handwerks, ZDH*) which includes inter alia 54 chambers of crafts and 38 confederations of skilled crafts[4]. It is the central task of these associations to represent the joint interests of their members, in particular within the framework of legislative projects. Furthermore trade associations often fulfil self-regulation tasks, above all in the area of technical standardization and quality assurance (see II.1). An important self-regulation case in Germany was the implementation of the first package of EU-directives concerning the liberalisation of the electricity and gas markets which was carried out through the so-called negotiated network access model on the basis of the Associations' Agreements on electricity and gas (see II.2). On the one hand the trade associations' activities often contributed to improving the competitive conditions, on the other the Bundeskartellamt conducted several cartel proceedings in which trade associations were involved. They were either directly involved, i.e. the associations themselves had organised restraints of competition or facilitated agreements between their members (see III.1), or indirectly, i.e. members had used the associations' activities to enter into illegal agreements without the associations' knowledge (see III.2).

## 2. The associations' self-regulation process

### *2.1 Technical standardization and quality assurance*

Technical standardization and quality assurance are important areas where self-regulation tasks are fulfilled by trade associations. However, they rarely become active on their own responsibility. Above all they participate in the standardization work of the German Institute for Standardization (*Deutsches Institutut für Normung e.V., DIN*) and the German Institute for Quality Assurance and Certification (*Deutsches Institut für Gütesicherung und Kennzeichnung e.V., RAL*).

In Germany technical standardization is almost exclusively carried out by the non-profit institute DIN. Under Section 1 (2) of its statutes the DIN pursues the objectives to establish and publish German standards and other results of standardization work which serve to advance rationalisation, quality assurance, environmental protection, safety and communication in industry, technology, science,

1 Cf. the "Public list on the registration of associations and their representatives" available at http://webarchiv.bundestag.de/archive/2007/0206/wissen/archiv/sachgeb/lobbyliste/lobbylisteaktuell.pdf

2 cf. www.bdi-online.de/de/bdi/72.htm

3 cf. www.dihk.de

4 cf. www.zdh.de/der -zdh.html

administration and the public sector through the common efforts of the interested parties in the public interest.[5] Currently the DIN has 1693 members[6] which, apart from companies and authorities, include many trade associations. As can be seen from the number of the so-called DIN standards established by the institute (2006: 30,046)[7] these standards meanwhile cover all areas of economic life. However, the DIN's activities are carried out on a voluntary basis. Its standards are therefore not necessarily binding and have merely recommendatory character. The standardization work is carried out within more than 70 standardization committees, which are organised according to specialist areas, and to which about 3,300 work committees are assigned. Interested parties can send their experts to participate in these committees in which agreement on the content of standards is reached in a consensus-building process.

As regards quality assurance, the system of quality associations (*Gütegemeinschaften)* is of particular importance in Germany. The objective of these associations is to contribute to safeguarding production and quality standards among their members by awarding legally protected quality marks. The RAL is the umbrella organisation of all German sector-specific quality associations. Among the members of the executive committee of the non-profit organisation RAL, the board of trustees (*Kuratorium*), are 14 leading trade associations.[8] The RAL is responsible for creating quality marks and assigning them to the specialised quality associations. The precision work of quality assurance, however, is carried out by the RAL member organisations, i.e. by the individual quality associations. The principle of self-commitment also applies in this context: Companies may not be forced to comply with the quality standards associated with the individual quality marks. However, membership in a quality association is subject to compliance with these standards.

However, the requirements for the award of quality marks have already given rise to the suspicion of unfair hindrance of suppliers of similar products. For example, the quality and test regulations of the *Gütezeichengemeinschaft Acrylwanne e.V.* (Quality Mark Association Acrylic Bathtub) for sheets made from cross-linked cast sanitary acrylic were examined by the Bundeskartellamt. Under these regulations solely manufacturers of cast acrylic could bear the quality mark at all. Manufacturers of semi-finished products made from other types of acrylic and suppliers of bathtubs made from this were excluded from bearing the quality mark. With regard to the product concerned, the establishment of such high technical requirements was not objectively justified and appeared to serve the purpose of making market entry for suppliers of other plastics more difficult. Ultimately however, the Bundeskartellamt did not prohibit the further use of these quality provisions as no significant effects on market success could be established in sales of plastic bathtubs which did not bear the quality mark. As to the development of quality assurance criteria for finished products in the future, the Bundeskartellamt has called on RAL to solely take into account objectively measurable characteristics which are relevant according to the generally received opinion.

### *2.2 Liberalisation of the electricity and gas markets*

The associations' self-regulation process became particularly important in Germany within the context of the liberalisation of the electricity and gas markets. Under the European Union's so-called first

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5 The statutes are available at www.din.de/cmd?level=tpl-unterrubrik&menuid=47391&cmsareaid=47391&cmsrubid=47514&menurubricid=47514&cmssubrubid=47522&menusubrubid=47522&languageid=de

6 Cf.www.din.de/cmd;jsessionid=6D3C53E624380B474726BA218AFAD11D.3?level=tpl-rubrik&menuid=47391&cmsareaid=47391&menurubricid=47514&cmsrubid=47514&langeuageid=de

7 Cf. www.din.de/sixcms_upload/media/2896/zahlenundfakten.jpg

8 Cf. www.ral.de/de/ral_guete/organisation/kuratorium.php

package of directives[9] Member States could choose between opening the networks for third parties via negotiated network access, which means that providers and "eligible customers" themselves negotiate the contracts on network access in observance of the principle of good faith, or opting for regulated network access, which grants third parties the right of network access on the basis of published tariffs and other conditions and obligations for network use. Germany was the only EU Member State to choose negotiated network access, i.e. it was left to the market participants to formulate conditions and tariffs for network access. For this purpose, both for the electricity and gas sectors, different trade associations which represented producers, suppliers and major industrial customers and purchasers entered into agreements on the establishment of fees for network use and network use principles, the so-called Associations' Agreements.

In May 1998, the German Electricity Association (*Verband der Elektrizitätswirtschaft, VDEW*), which represents the suppliers' side, the Association of Industrial Energy and Power Management (*Verband der Industriellen Energie- und Kraftwirtschaft, VIK*), which represents industrial customers, and the Federation of German Industries (*Bundesverband der Deutschen Industrie, BDI*) decided upon an Associations' Agreeement for the electricity sector (*VV Strom I*) which included criteria to establish transmission fees, but no detailed prices. The Bundeskartellamt agreed to tolerate this Agreement until September 1999 so as not to block the network operators' first pro-competitive measures. However, some of the Agreement's criteria for calculating transmission fees met with criticism. They were therefore replaced in December 1999 by a revised and, from a competition point of view, clearly improved version (*VV Strom II*) in the formulation of which the Association of Municipal Utilities (*Verband kommunaler Unternehmen, VKU*) also participated. The updated version of the Agreement (*VV Strom II+*), which was completed in December 2001 due to pressure resulting from proceedings conducted by the Bundeskartellamt, and in which a consumer association participated for the first time, represented a further improvement. However, significant obstacles to competition continued to exist in the electricity sector. The main problem was the generally excessive level of fees for network use.

In July 2000, the BDI, the VIK, the VKU and the Association of German Gas and Water Industry (*Bundesverband der deutschen Gas- und Wasserwirtschaft, BGW*) agreed upon an Associations' Agreement on network access for the natural gas sector (*VV Erdgas I*). However, even after taking into account the supplements added in March and September 2001, the Bundeskartellamt did not consider this Agreement to be suitable for formulating practicable conditions for non-discriminatory network access in the gas markets. Above all the Agreement did not include sufficiently detailed regulations for network access. Furthermore, the model of distance-related fees for network use conflicted with effective transmission. These points of criticism could not be eliminated by the second Associations' Agreement (*VV Erdgas II*)which was adopted by the associations in May 2002. However, the associations' negotiations on the further development of the Agreement failed.

The implementation of network access on the basis of the Associations' Agreements was supported by the competition authority's effective abuse control under the Act against Restraints of Competition (ARC). Against this background the Associations' Agreements system was supported in principle by the Bundeskartellamt although it included elements that were problematic from the point of view of competition law. Constant efforts were made to improve the system and to achieve a more pro-competitive design[10], by, inter alia, the "*Report of the Working Group on Network Use in the Electricity Sector of the*

9 Consisting of Directive 96/92/EC concerning common rules for the internal market in electricity (OJ L 27 of 30 January 1997, p. 20) and Directive 98/30/EC concerning common rules for the internal market in natural gas (OJ L 204 of 21 July 1998, p. 1).

10 Dr Ulf Böge, Wettbewerb in der leitungsgebundenen Energiewirtschaft – Ist der ordnungspolitische Rahmen zufriedenstellend?, in: Aktuelle Entwicklungen im deutschen und europäischen Energiewirtschaftsrecht, ed.: Jürgen F. Baur, Baden-Baden, 2003, p. 21.

*Competition Authorities of the Federation and the Länder*" of 19 April 2001[11]. The legal presumption of "good professional practice" in the case of compliance with the Associations' Agreements on gas and electricity, which to a certain extent "juridified" these private law agreements at association level, and which was introduced with the amendment of the Energy Industry Act (*Energiewirtschaftsgesetz, EnWG*) in May 2003 for a limited period up to 31 December 2003, was therefore viewed with criticism. According to the Bundeskartellamt's assessment, in view of the anti-competitive provisions still included in the Associations' Agreements, above all concerning the gas sector, "good professional practice" could not be generally established.

According to the Bundeskartellamt's findings, the model of negotiated network access supported by abuse control under competition law generally proved successful, at least in the electricity sector, although improvements were still required.[12] However, after the adoption of the so-called Acceleration Directives[13] in June 2003, which made the model of regulated network access and the establishment of a regulation authority mandatory, the system could no longer be continued.

## 3. Cartel proceedings with the participation of trade associations

Since the sixth amendment of the ARC in 1998 the prohibition of cartels stipulated in Section 1 covers, as well as "agreements between undertakings" and "concerted practices" also "decisions by associations of undertakings", in conformity with Art. 81 (1) sentence 1 EC. In the course of investigations conducted by the Bundeskartellamt on the grounds of violations of competition law, associations of undertakings have consequently often been the target of searches. Since 2004 the Bundeskartellamt has carried out a total of 49 searches and in six of these examined a total of 13 trade associations. One of the searches involved three associations and another, five associations. Furthermore, the Bundeskartellamt conducted a number of cartel proceedings in recent years, in which trade associations were involved (inter alia). Their involvement was either direct (i.e. the associations organized the violation themselves) or indirect (i.e. the association members used the association's activities to conclude anticompetitive agreements).

### *3.1 Cartel proceedings with the direct participation of trade associations*

The Bundeskartellamt is currently investigating several pharmacy associations on suspicion of their call for boycott under Section 21 ARC and in this connection searched the premises of regional associations in the federal states of Mecklenburg-West Pomerania, North Rhine Westphalia, Berlin, Baden-Württemberg and Thuringia in July 2007. According to information from the market, there are indications that these associations have called on their members to cease their supply relationship with the pharmaceutical wholesaler Gehe Pharma Handel GmbH (Gehe). A possible reason for this call for boycott could be the acquisition of the internet pharmacy DocMorris by Celesio AG (Celesio), the parent company of Gehe. With this acquisition Celesio paved the way for the creation of a national pharmacy outlet

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11 The report is available (in German) at www.bundeskartellamt.de/wDeutsch/download/pdf/Merkblaetter/Merkblaetter_deutsch/01_Netznutzung.pdf.

12 Cf. Report by the Federal Ministry of Economics and Labour to the German Bundestag on the effects of the Associations' Agreements under energy and competition law (*Bericht des Bundesministeriums für Wirtschaft und Arbeit an den deutschen Bundestag über die energiewirtschaftlichen und wettbewerblichen Wirkungen der Verbändevereinbarungen*), p. 31 ff.

13 Directive 2003/54/EC concerning common rules for the internal market in electricity (OJ L 176 of 15.7.2003, p.37) and Directive 2003/55/EC concerning common rules for the internal market in natural gas (OJ L 176 of 15.7.2003, p. 57).

network and has now become the direct rival of the pharmacies. Although in Germany it is forbidden to set up pharmacy chains with more than four outlets, this regulation could possibly be lifted by an ECJ judgement expected in the coming year. Celesio already operates a large number of pharmacies abroad, namely in Great Britain, Norway, Italy, the Netherlands, Ireland, Belgium and the Czech Republic. Statements which could be understood as a call to cease supply relationships have been found inter alia in internal circulars of the associations.

### *3.2 Cartel proceedings with the indirect participation of trade associations*

In addition the Bundeskartellamt has, for example, conducted two cartel proceedings in which the participants used association committee meetings to conclude anticompetitive agreements.

#### *3.2.1 Pharmaceutical wholesale sector*

In August 2006, in cartel proceedings against pharmaceutical wholesalers (B3 – 129/03)[14], the Bundeskartellamt imposed fines totalling 2.635 million euros against the four major companies active in Germany and against seven persons on the grounds of agreements on market share reduction.[15] The companies involved were Andreae-Noris Zahn AG (Anzag), Sanacorp Pharmahandel AG (Sanacorp), Phoenix Pharmahandel AG & Co. KG (Phoenix) and Gehe Pharma Handel GmbH (Gehe). The Bundeskartellamt qualified the agreements as a quota cartel bordering on a price-fixing cartel as their purpose was to limit rebate and discount competition between the wholesalers.

An underlying feature of the pharmaceutical wholesale sector is that there are only a few major suppliers which are active throughout the whole country and that their shares of the national market have remained stable over the years. Another feature of the market is its high degree of transparency. This transparency is created, inter alia, by the Federal Association of Pharmaceutical Wholesalers (*Bundesverband des Pharmazeutischen Großhandels e.V., Phagro*), which provides a forum for the lively exchange of information, e.g. in the form of regular circulars, statistics, cooperation within the data transmission network *Datenfernübertragungsgeräte Gesellschaft mbH (DATEG)* and meetings at director, regional director and sales representative level. The most significant competition parameters after the regularity and reliability of supply are the rebates (and discounts) granted to the pharmacies.

Against this background and according to the findings of the Bundeskartellamt, Anzag launched a so-called push forward strategy at the beginning of 2003, with the aim of increasing its market share. Under this strategy Anzag increased its rebates to pharmacies. However, its competitors in turn also began to increase their rebates and this resulted in an all-out "discount battle" which ultimately brought about a worsening in the earnings position of the wholesalers. In the middle of 2003, in reaction to this and after a change of board, Anzag decided to end the price war and agreed with Gehe, Phoenix and Sanacorp to restore the "calm" which had prevailed for years in the pharmacy wholesale sector and in particular to return the market shares it had gained through its "push forward strategy" (hereafter: basic agreement). To this effect "balance lists" were exchanged which indicated how many pharmacies in a particular region, and with what average monthly turnover, had switched from Anzag to one of the other competitors and vice versa. It was planned to adjust any disparities by Anzag granting pharmacies with an according purchase volume less favourable purchasing conditions to induce them to switch back to the partner to the agreement which had been their previous supplier. Further measures agreed by the pharmaceutical wholesalers to restore calm to the market, which, however, were not the subject of the fine proceedings,

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14 The German version of the decision is available at www.bundeskartellamt.de/wDeutsch/download/pdf/Kartell/Kartell06/B3-129-03.pdf .

15 Fines up to a total of 2,185 million euros are now final. In two cases the Bundeskartellamt discontinued its proceedings against the individuals personally involved.

were the reduction of rebates at the end of 2003 and the collective agreement not to grant rebates on prescription medicines from January 2004 onwards but at most a discount of 2 per cent.

In the course of the search operation carried out by the Bundeskartellamt the wholesaler association Phagro was also searched and evidence seized. According to this evidence the rebate reduction had been planned at association level by means of statements in a circular to the pharmacies: These stated that they could not be granted rebates from 1 January 2004 because of amendments to the law, which would reduce the wholesale margin. According to the findings of the Bundeskartellamt, it is also very likely that the "basic agreement" was made at a Phagro trade association meeting in September 2003 which was attended by director-level representatives of all the wholesale companies concerned. This is evident from the fact that only two days after the association meeting Anzag launched a new company strategy which, above all, focussed on an acquisition stop and a rebate increase.

*3.2.2 Industrial insurers*

The importance of association committee meetings and the possibility they offer of communication between competitors is all the more clear from cartel proceedings against industrial insurers (B 4 – 82/02)[16] on grounds of agreements on measures to increase premiums and align conditions and to offer one another portfolio protection. In these proceedings the Bundeskartellamt first imposed fines totalling 130 million euros against ten insurance companies and board members personally affected in September 2005 and in September 2005 more fines against seven public-law insurance companies and the board members of these companies totalling approx. 20 million euros.[17] The violation of cartel law involved above all industrial property insurance, which had nationwide and cross-sector repercussions.

According to the Bundeskartellamt's findings, in the middle of 1999 the relevant insurers agreed to put an end to the intense competition at that time in premiums and conditions in order to cause a "turnaround in the market" and to induce company-specific measures to improve revenue. To this effect they agreed on standard principles (so-called FIS Principles) for their future contracting policy and in particular for the renewal of contracts. Within the framework of these "FIS principles" the parties concerned agreed inter alia not to reduce insurance contributions during terms of contract, not to make any backdated premium adjustments, to conclude new contracts only with opt-out and adjustment clauses and to consult each other more in "competition problem cases". These principles were supplemented over time by further agreements on premium and retention level increases as well as on the adjustment of contract conditions. It was also agreed not to disrupt the "restructuring measures" of their rivals and not to undercut the adjusted premium demanded. By making enquiries with the previous insurer about the planned contract renewal measures and premium increases and by refraining from submitting competitive offers the insurers were generally to offer each other "portfolio protection".

All these agreements were concluded by the directors of the industrial companies participating in the cartel at meetings of the Special Committee for Industrial Property Insurance of the German Insurance Association (*Gesamtverband der deutschen Versicherungswirtschaft, GDV*). The cartel agreement was implemented, however, at director and head of department level. The regionally active working and discussion groups and regular meetings of the representatives of the various rival companies were the major platforms for this cooperation. The objective of these meetings was to exchange in-depth information on company-specific restructuring criteria and revenue improvement measures and to constantly manifest mutual reliability as regards market behaviour and non-competition.

16 The decision has not been published.

17 The companies appealed against all but one order imposing the fines. One appeal has meanwhile been withdrawn. The oral proceedings before the Düsseldorf Higher Regional Court are expected to take place in October 2007.

Although the findings provided indications that the GDV had knowledge of the conduct of its members, it was not fined itself because the agreements could not unequivocally be qualified as the "decision by an association of undertakings" within the meaning of Section 1 ARC or Art. 81 (1) EC.

# HUNGARY

## 1. Introduction

Trade and business associations have important legitimate and illegitimate role in competition. They are active in the representation of their members, submitting legislative proposals, lobbying for favourable regulation or the maintenance of preferential rights, defending particular interests in proceedings initiated by or against the association etc. On the other hand these entities have a significant role in the organisation of hard core cartels, in the maintenance of anti-competitive ethical and other internal rules or in the sanctioning and repressing attempts of their members to effectively compete with competitors. According to the experiences of the GVH in the latter case members of the associations generally have a more active role, while in the former instances it is rather the single face of the association itself that appears behind the initiatives. However as there was only one cartel case in which the association itself was not aware of the infringement, it cannot be said that associations were only abused by their members for illegal purposes.

Article 11 of the Competition Act, similarly to EC 81(1), involves/covers the decisions of associations of undertakings under the title of restrictive agreements. Even if the association itself does not engage into economic or financial activity, it is covered by the scope of the Competition Act if its members are undertakings, and the decision brought by the association qualifies as a restriction of competition. A decision restricts competition if its aim or actual or potential effect is the undue restriction, or elimination of competition between competitors, or the free choice of consumers, or if the aim or effect of the association is to become a factor determining the formation of competition in respect e.g. prices.

Acts of associations, chambers or similar entities do not have to meet specific formal requirements to be qualified as decisions. The Competition Act covers not only formal recommendations and decisions but any manifestations (e.g. informal expression of objectives) reflecting the intention to restrict competition through the coordination of the activities of its members, without regard to actual effect such acts might have.

Activities of associations are therefore generally covered by the Competition Act, unless specific legislative authorisation expressly provides otherwise.

## 2. The role of trade associations in legitimately petitioning the government: examples of lobbying activities and legislative activities by trade associations

A number of associations of business entities, from civil law societies to legislatively established chambers aim the promotion of the interest of their members and the respective segment of the economy. Though unconnected to Competition Law in its strict sense, they perform widespread activities influencing the development of competition either to a positive or a negative way. Many of their legitimate initiatives target the creation of competition friendly market circumstances, better regulation, greater transparency and consciousness of market actors. On the other hand legitimate initiatives can also relate to the restraining of the competitiveness of the market, mainly through lobbying for “worse” regulation.

An example for efficient cooperation is the Forum of Industrial Energy Consumers, a society established in 2000. The society is aiming the promotion of the establishment of competitive energy markets thereby serving the interest of consumers, and acting as a civil organisation, to facilitate

consultation among governmental bodies, regulators, market actors and consumers. Before the partial liberalisation of the energy markets the society actively participated in the framing of the model of the future market. It submitted recommendations and opinions concerning the draft legislation. It organised conferences on which it discussed certain elements of liberalisation with the regulators, expressing the needs of consumers. It also invited foreign experts who presented their experiences with liberalisation and raised attention to possible failures and problems. After the initial periods of the opening up of the market, it presented first experiences and the developments of competition. It informs consumers on legislative changes, and other developments of the market. In some instances it consulted members of the government and officials of regulatory authorities representing the interests of certain members. The GVH also consulted the society in cases affecting the energy sector.

A similar society in the banking sector is the Hungarian Bank Association. Established in 1988 when the two-tier banking system was introduced, and aims the representation of the interests of its members. It establishes working groups consisting experts of the member banks in order to formulate the professional view of the members, and the Association subsequently represents those views before the Government, regulators and other third parties. Besides opining draft legislation, it actively contributed into the establishment of a number of institutions necessary for the proper functioning of the market, like: the deposit insurance and credit guarantee institutions, the debtor registry, the credit rating institution and the Giro system. It also conducts projects aiming the information of the general public about the functioning of the bank sector. In recent recommendations prepared by a governmental working group in which as independent expert an official of the GVH has also participated, it was suggested that certain issues of the sector should be regulated by market actors themselves, instead of legislative initiatives. The Association took on the initiative and prepared proposals for self regulation that is now submitted for approval.

The Federation of the Hungarian Leasing and Financing Association (HLFA) a professional representative body for financial institutions dealing with funding, has contacted several authorities with market supervisory and regulatory functions concerning the leasing market for personal vehicles. The HLFA expressed its concerns about certain trends in the market, in particular about extensive duration of the contracts, and the limited necessity of own funds. The HLFA emphasised prudential risks arising from high-risk loans granted for personal vehicles, and wished to establish some regulation in the issue. However, from a competition point of view such regulation would have put some restraints on firms, the necessity of which was not proven. As a result of this, the Hungarian Competition Authority did not support the initiation, which has found some support at the Hungarian Financial Supervisory Authority.

The Hungarian Publishers' and Booksellers' Association is one of the oldest civil organisation. Its members represent 92% of the books published in Hungary. It makes efforts to promote the interest of the members, e.g. lobbies for public subsidy, fights for the reduction of VAT duty imposed on books, or to retain the status of intellectual creative work as an activity exempt from social security payment. In relation to competition it should be mentioned that the Association is lobbying for years for the adoption of an act, allowing the right to resale price maintenance by publishers. While these efforts remained fruitless, the GVH initiated proceedings and established that the Code of Ethics of the Association prescribing RPM was illegal.

Associations were active in competition law procedures as well, aiming the protection of the rights of their members or to ensure legal certainty for them. In one case the national association of sugar beet producers successfully challenged a decision of the GVH refusing to assess the allegedly abusive behaviour of sugar producers. The court established that the reasoning of the refusal was not sufficient and that the GVH should enter into a more in depth assessment of the case.

Regional associations initiated a number of procedures aiming the benefit of individual exemption for agreements concluded in the electricity sector. The agreements in question were concluded between the

regional electricity supplier and associations of electricians and related to the establishment of a qualification system for electricians. According to the agreements only those professionals were allowed to perform certain activities, who have participated on courses and were listed by the electricity supplier. The system aimed to ensure the appropriate quality of the affected services, and no undue restrictions were imposed as a condition for participation. The agreements were cleared mainly without conditions. A regional body of the chamber of advocates has also tried to acquire individual exemption to its tariff system but the GVH rejected its notification.

## 3. Experiences with industry self-regulation, codes of conduct, standard setting and the promotion of industry-wide business practices

Codes of conduct of different chambers and associations were closely analysed by the GVH. The chambers of vets, accountants and advocates applied general restrictions on advertising. In its procedures the GVH established that the restriction was not justifiable in any of these cases, and quality, nature, product security and other defences raised by the parties were not eligible to avoid the application of the prohibition of the Competition Act. In a case in 1999, however a code of the chamber of physicians, containing restriction of advertising was given individual exemption by the GVH. The provisions in question did not contain a general prohibition of all advertising, only restricted it to a minimum level, allowing only the indication of the name, field of speciality or address of premise. The GVH considered that the code not suppressed, only regulated competition and exempted it from the prohibition of the Competition Act. In a later procedure however it established that due to the changes in the regulatory and factual background, the exemption can not be maintained. New regulation introduced the notion of entrepreneur physicians and individual medical activity, the number of private medical firms has increased and competition generally became a more significant characteristic of medical activities. The role of private capital has significantly increased.

Price related rules were also established by industry wide codes of conduct. The national association of paprika producers prohibited for its members to make purchases with the aim to make prices rise. It also prohibited the application of “unjustified discounts” causing damages to other market participants. The national association of book publishers applied a general RPM rule, establishing that the publisher has the sole right to determine the final price of its product. Discounts were allowed only under strict conditions. Severe sanctions were envisaged for the infringement of the rules on “fair competition”. The chamber of pharmacists prohibited the use of targeted discounts.

Determination of recommended, fixed and minimum prices, or tariff zones was also common. The code of the association of real estate agents prescribed that fees under the established minimum level might only be applied in exceptional cases. Minimum tariffs were also established by the chambers of physicians, vets, accountants or the association of ambulances. Recommended prices were set by the association of producers of ornamental plants, graphic artists, hunting societies.

Non-price related naked restrictions were also applied in certain cases. The association of ambulances prescribed to its members that in the case of an area covered by a competitor refrain from providing services unless it is done in cooperation with the local supplier.

## 4. Examples of trade associations organising naked restrictions of competition and examples of trade associations facilitating collusion

Chambers and business associations were in many cases the instigators, or constituted formal frameworks for the setting up of hard core cartels of their members.

In a case concerning the pharmaceutical sector, prices of the different producers were negotiated with the Government annually. In the given year, as the Government slowed down the process the negotiations did not lead to an acceptable result for the producers in time. The producers signalled to their respective associations that the situation threatened their business interests. The three affected associations discussed the matter and agreed in a coordinated action, suggesting a uniform 8,5% price rise to their members. The associations undertook to arrange the introduction of the new prices into the pharmacies' IT database and to cover the respective costs though normally that should have been covered by the Chamber of Pharmacists. The three associations were fined for the fixed price rise, but it was also taken into account as an attenuating factor that the behaviour of the Government introduced uncertainties into the situation on the market.

The association of cement producers besides fulfilling other, legal activities served as a channel to exchange sensible business data, and to coordinate pricing among the members. Similarly the association of bee-keepers was used as an institutional background for the agreement of the members. Though with only 60% of the members present, the general assembly was not quorate, those who were present agreed that a single position of the association would suffice to remedy the problems deriving from the need of price rise. A new price adjusted to the rate of inflation was accepted, and established as a recommended price. The agricultural sector experienced a number of other coordinated price determinations as well, the instigator of which were usually the representative associations of the producers. Such was the situation with the target price for apple, the notice to rise the price of bread, the fixed price of pig, the reduction of output and the determination of a desirable price level of grains, or the case when the representative society of car dealers entered into a vertical agreement with car insurers which inter alia contained uniform fees for repair services.

## 5. Examples of members using trade association activities to cover unlawful collusion, without the knowledge of the trade association

In Hungary it seems to be rare where members of an association use the coverage or the institutional background provided by their association for the organisation of anticompetitive practices without the knowledge of the association itself. The only example similar to such a situation was where the national association of bakers was not aware of the cartel of its members, but even in that case the head of the regional body did participate on some meetings.

## 6. Examples of trade association antitrust compliance procedures

As it was mentioned above an important form of compliance conducted by associations was when agreements of its members were submitted to the GVH for approval. This way the associations could provide legal certainty and avert possible negative consequences of illegal agreements entered into due to the lack of knowledge of legal prohibitions.

Being sentenced by the GVH for price fixing, the association of bakers was obliged to submit to an antitrust compliance program, which consisted of courses provided by an expert on competition law matters. A result of this program was that the next time when bakers were forced by market changes to increase prices, instead of entering into a price fixing agreement, they have notified to the GVH an agreement laying down the method of calculation of the price of the four most popular types of bread. The notification also contained a request to be allowed to hold meetings two times a year to discuss the cost structure of bakery products. Though the notification was dismissed, it nevertheless indicated an important change in the thinking of a sector of the economy that previously provided work for the Cartel Unit of the GVH.

## 7. Membership rules and restrictions on access

In many cases the infringement of Ethical Codes and Codes of Conduct was to be sanctioned with exclusion from membership. Such a punishment could mean the loss of the right to continue a given profession (normally in the case of Chambers, where membership is a precondition to the exercise of the profession), or may result that the sanctioned undertaking is excluded from certain advantages, like access to governmental contributions lobbied by the association.

In a case the local association of taxi drivers had the right to determine the conditions of access to taxi-ranks and it established that those drives who were not members of the association had to pay the double of the normal fee. This evidently constituted a pressure on professionals to enter the association.

In the case of the planned opening of a new pharmacy the Chamber of Pharmacists had to be asked by the licensing authority for its consent. Should such a consent not be given, the authority had to refuse the establishment of the new pharmacy.

## 8. Sanctions that have been applied to trade associations

According to Article 78 of the Competition Act the maximum fine imposed on social organisations of undertakings, public corporations, associations or other similar organisations shall not exceed ten per cent of the total of the net turnover in the preceding business year of undertakings which are members of them. Concerning however the imposed sanctions a distinction should be made between two different scenarios.

In many cases where the infringement was constituted by codes of conduct, or ethical codes the GVH did not impose financial penalties, or imposed only insignificant fines (generally 1 million HUF equalling app. 4000 EUR). One of the reasons was that until the 2005 amendment of the Competition Act, though the maximum amount of the fine could have been determined up to 10% of the turnover of the companies which were members of the association, the fine was imposed and could have been recovered solely from the association itself. At the imposition of the fine the GVH therefore had to take into consideration the financial situation of the association if it wanted the fine to be collectable. Another less practical reason was that the associations were generally not aware of the anticompetitive nature of their codes as the incriminated rules were considered traditional and often as indispensable having regard to the “special character” of the service in question. Besides they usually proved to be cooperative during the investigations.

In other cases where the infringement consisted in the organisation of a naked price fixing cartel or the association qualified as a recidivist, the GVH imposed more substantial fines, representing a different degree of magnitude. The highest fine imposed was 150 million HUF (app. 700.000 EUR). In these situations the GVH considered that there was no room to rely on the lack of competition culture or on traditional solutions of an industry.

# IRELAND

## 1. Introduction

Business and trade associations occupy an important place in Irish commerce. They are actively involved in public debate on issues that directly affect their members and over larger questions that frame the direction of Ireland's internal policies, its participation in the European Union and its role around the globe. The perspectives offered by business and trade associations in Ireland are widely distributed in the media and directly to government officials. Their influence begins in the neighbourhood, extends to the nation and is affected by events taking place around the world.

At their best trade associations provide pro-competitive benefits both to their members and their communities through self-policing, industry standards, and legislative reforms that enhance competition and protect consumers. Quality standards for products and services that are developed by trade associations using transparent processes and open consultation can provide real consumer benefits. Standard-setting activities that foster interoperability and further product innovations can provide significant cost savings and efficiencies that may be readily passed on to consumers. However, standards activities also may be abused to foster industry "capture" by a select few competitors and to foreclose innovations of next-generation products.

Lobbying efforts for legislative reforms can easily become wholly self-serving activities cloaked in the mere fig-leaf of public interest. "Self-policing" may become a polite term for trade association cartels with strong enforcement mechanisms. Regrettably, recent Competition Authority experience with business and trade associations in Ireland has, in some cases, been heavily weighted toward their anticompetitive activities.

## 2. Overview of Trade and Business Associations in Ireland

In Ireland a "Social Partnership" exists between the government, employers and employees. The key objectives of the Social Partnership are:

- "To provide advice to the Taoiseach, Government Chief Whip and Minister of State for European Affairs on social partnership and related policy issues;

- To support the process of social partnership, including through the implementation of Towards 2016, the Ten-Year Framework Social Partnership Agreement 2006-2015, the seventh in a series of agreements between the government and the social partners dating back to 1987, and to maintain and develop social dialogue;

- To support dialogue at national level aimed at ensuring industrial relations peace and stability;

- To support partnership in the public and private sectors aimed at modernising the workplace and improving performance and service delivery;

- To promote social dialogue at EU level in line with the Lisbon Agenda."[1]

Select business, professional and trade associations such as the Irish Business and Employers Confederation (IBEC), the Construction Industry Federation (CIF), the Chambers of Commerce Ireland (CCI) and the Irish Congress of Trade Unions (ICTU) are registered as Social Partners and take an active part in negotiations of the Social Partnership Agreement.

Those activities and other legitimate wage and salary negotiations with management by trade unions representing employees are outside the scope of coverage of Competition Act, 2002. However, some recent initiatives by trade associations on behalf of their self-employed members have demonstrated that legitimate activities by trade associations can easily cross the line of legality if they are not carefully policed by the Competition Authority.[2]

## 3. Activities by Trade Business Associations: Pro and Anticompetitive

The Competition Authority has observed some gratifying examples of trade associations that have instituted competition compliance training and codes of conduct for professional staff.

In the course of preparing professional studies and industry reviews, the Competition Authority has consulted at length with trade association representatives and the contributions of their time, expertise and opinions have substantially informed the Authority's efforts and strengthened the end products.

A key feature in each of the Competition Authority's studies has been recommendations to strengthen competition. While responses to Authority recommendations by trade and professional associations have not been unanimously positive, there are some noteworthy, positive examples.

### *3.1 Pro-competitive Response to Authority Recommendations*

In September 2005, the Authority published a study of the Retail Banking Industry, which included recommendations to strengthen competition, some of which were aimed at the banking associations.[3] Two banking associations, the Irish Payment Services Organisation (IPSO) and the Irish Banking Federation (IBF) responded well to recommendations contained in the Study designed to enhance competition. IPSO changed its membership rules to provide greater transparency about the criteria for membership to the payment clearing system and since instituting those changes new members have been admitted. IPSO also initiated lobbying for a Single European Payment Area (SEPA) which will facilitate the creation of a single European market in financial services. The IBF introduced switching codes for consumers and businesses to make it easier for customers to switch their business between banks. The IBF also lobbied for removal of the stamp duty on credit cards in conjunction with the Consumers Association of Ireland.

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1 For more information on the Social Partnership and the present Social Partnership Agreement, see the web-site of the Department of the Taoiseach. http://www.taoiseach.gov.ie/index.asp?locID=179&docID=-1 .

2 In September 2004, the Competition Authority published a decision in relation to agreements between Irish Actors' Equity SIPTU and the Institute of Advertising Practitioners in Ireland concerning the terms and conditions under which advertising agencies will hire actors. The decision is available on the Authority's website: www.tca.ie

3 *Competition in the (non-investment) Banking Sector in Ireland,* September 2005. The full report is available on the Competition Authority's website: www.tca.ie .

The Competition Authority has published five studies of the professions in Ireland that have assessed competition among Engineers, Architects, Optometrists, Dentists and Solicitors & Barristers.[4] Following publication of the Competition Authority's studies a number of professional associations have adopted several, or in some cases all, the Competition Authority's recommendations designed to increase competition. For example, the Bar Council removed restrictions for lawyers on switching status between barrister and solicitor. It also allowed practising barristers to have part-time occupations, permitted barristers to act for former employers, and notified barristers that the practice of a junior counsel charging two-thirds the fee charged by a senior counsel is anticompetitive. The Institute of Engineers Ireland liberalized its accreditation system for engineering degrees and removed membership of the Institute as a pre-requisite for inclusion in the accreditation process.

### *3.2 The Groceries Order: Anticompetitive Self-Interests Sometimes Trump Consumer Welfare*

For 50 years, from 1956 to 2006, the Groceries Order was a legal requirement in Ireland. It prohibited retailers from so-called "below cost" selling and from passing on discounts negotiated with suppliers to consumers on 150 grocery and personal items. Among grocery items only fresh meat, fish and fruit and vegetables were not covered by the Groceries Order.

In the Competition Authority's view, the Order was anticompetitive and anti-consumer. Following a long period of consultation the Minister for Enterprise, Trade & Employment Micheál Martin TD, on 20 March 2006 signed the Order to commence the Competition (Amendment) Act 2006, which abolished the Groceries Order, 1987.[5]

In May 2005 the Minister for Enterprise, Trade & Employment engaged in a public consultation process before making any decision in regard to the future of the Order and trade associations had a significant impact on the debate surrounding the Groceries Order. Activities by some of them opposing elimination of the Groceries Order are, from the Competition Authority's perspective, a stark example of member self-interest and lobbying prowess trumping competition and consumer interests. During the debate, trade association lobbying characterized self-interests as matters of consumer welfare, in some instances confusing the issues and fueling public anxiety.

Among the arguments supporting retention of the Groceries Order were claims that:

- High food prices in Ireland are as a direct result of a high cost base;
- The retail sector in Ireland is highly competitive as witnessed by the arrival of discounters;
- The UK has no Groceries Order, yet experiences similar high market concentration to Ireland;
- The Groceries Order was introduced for the purpose of fostering choice and continued to ensure Irish consumers a wide range of product choices;
- Removal of the Groceries Order would be particularly detrimental to small communities, the elderly and the poor, who might have to walk miles to purchase food if the Order was lifted.

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4 The full reports for each of the profession studies are available on the Competition Authority's website: www.tca.ie

5 The Competition (Amendment) Act 2006 is available at: http://www.entemp.ie/publications/commerce/2006/competitionamendmentact.pdf

> Claims were made that "*the UK has experienced the slow death of small town centres and villages – rural shops are closing at the rate of 300 a year*."[6]

Chambers of Commerce Ireland appears to be the only trade association that advocated the repeal of the Groceries Order. The Chamber's submission stated that, while it agreed that below cost selling should be discouraged, it also agreed with the Consumer Strategy Group report conclusions that:

> *"[It] is a ban on selling below the invoice price and instead of reducing prices it keeps prices to the consumer higher than they could be….the Group is convinced that the actual operation of the Groceries Order, as outlined above is inherently against the interests of consumers"*[7]

The Competition Authority fully supports the right of trade and business associations to lobby and would expect trade associations to have a strong interest in the self-preservation of their members. Nonetheless, the list of trade associations who actively opposed abolition of the Groceries Order is noteworthy. It includes representatives of retail newsagents, business representative bodies and representatives of small grocers.

In response to strong lobbying and debate, that continued after the repeal became effective in March 2006, the Minister for Enterprise Trade and Employment asked the Competition Authority to study the results in the year following repeal of the Groceries Order. The Competition Authority hopes to have its first report published before the end of 2007.

## 4. Competition Authority Enforcement Involving Trade Associations

In Ireland's relatively short history of anti-cartel enforcement by the Competition Authority, trade associations have been at the centre of two conspiracies that netted criminal convictions against eighteen companies and individuals. The *Connaught Oil Promotion Federation* and *Irish Ford Dealers Association* Trade were used as facially legitimate "covers" for cartel behaviour. Business at meetings of those trade associations went well beyond legal activities permitted by trade associations and included reaching price fixing agreements among the membership, agreeing methods for policing their conspiracies and punishing those members who cheated on the cartel agreements. Other criminal prosecutions are presently before the Irish courts involving other trade and business associations.

### *4.1 Trade Associations Operating as Hard-Core Cartels*

#### *4.1.1 The Connaught Oil Promotion Federation cartel*

The investigation and prosecution of a heating oil cartel in the Galway region established and run by the Connaught Oil Promotion Federation (COPF)[8] revealed price fixing and other anticompetitive activities by heating oil suppliers in the west of Ireland. At the centre of the conspiracy was the COPF, an

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6 *Groceries Order Review 2005 Submission No.F213* Ciaran Fitzgerald, IBEC p.12 http://62.17.220.242/grocery/docs/F213.pdf

7 *Groceries Order Review 2005 Submission No.F073* Chamber of Commerce Ireland. http://62.17.220.242/grocery/docs/F073.pdf

Consumer Strategy Group (2005), *Make Consumers Count: A New Direction for Irish Consumers,* p81

8 Further information on the Heating Oil cases is available in the Competition Authority's 2006 Annual Report which is available on the Competition Authority's website: www.tca.ie See also, Paul Gorecki and David McFadden (2006), *Criminal Cartels in Ireland: the Heating Oil Case*, Vol.27 E.C.L. pp.631-640.

unregistered trade association that ostensibly had been set up as a forum for discussing industry concerns of its members.

The evidence painted a different picture of the actual purpose of the COPF. Price fixing took place at arranged meetings of the COPF, a "facilitator" was appointed to manage and monitor the operation of the cartel and attempts were made to persuade other suppliers to join. Under the guise of legitimate trade association business, the COPF cartel fixed prices and ensured that their decisions were implemented by the members. The COPF achieved the aim of its cartel agreement and consumers in the west of Ireland paid excessive prices for an essential commodity for homes and businesses.

The heating oil cartel prosecutions were the first cartel cases prosecuted on indictment in Ireland. They netted the first jury conviction and the first custodial sentence (suspended) for cartel violations in Ireland. To date, prosecutions and convictions have been obtained against 17 undertakings: 10 companies and 7 individuals.[9] The final case is scheduled for trial later in the year.

During the sentencing hearing for one of the heating oil conspirators, the Judge, the Honourable Raymond Groarke, provided a clear signal that trade and business associations are not safe havens for individuals to conspire and fix prices to the detriment of consumers, stating:

> *"[T]hese businessmen went into this with their eyes wide open and knew what they were doing was criminally illegal. It was about greed…*[10].

*4.1.2 The Irish Ford Dealers Association Cartel*

Following a Competition Authority investigation into the activities of The Irish Ford Dealers Association (IFDA), the Director of Public Prosecutions charged the Secretary of IFDA with aiding and abetting price fixing by the association. In January 2007, he became the first individual convicted in the Central Criminal Court under the Competition Act, 2002.[11]

Investigation into the IFDA cartel and its illegal activities revealed a striking number of similarities to the illegal activities of COPF in the heating oil cartel. The paid Secretary of the IFDA was employed by the IFDA members, who are Ford car dealers throughout Ireland, to facilitate the cartel illegal agreements and police adherence to them. As with the COPF case, the legitimate activities of the IFDA were subverted to cartel behaviour.

The IFDA cartel operated under the guise of legitimate association meetings dealing with issues such as vehicle warranties, negotiations with the distributor, (Ford Ireland) concerning annual sales incentive programmes, and competitiveness between Ford vehicles and other marques,. A euphemistically titled '*Profitability Programme'* was devised and so-called "recommended prices" were sent by the IFDA Secretary to all Ford dealers. Thereafter, "mystery shopper" surveys were undertaken to establish if

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9 The facilitator of the cartel received a suspended six month jail sentence and €15,000 fine. 6 other individuals and 10 companies received various fines from €1000 to €15000. For full details of outcome of proceedings as of December 2006, see the Competition Authority's 2006 Annual Report p11 available at www.tca.ie.

10 See The Competition Authority's 2006 Annual Report p10 at www.tca.ie

11 On 30 January 2007, the Secretary of the IFDA pleaded guilty to one count of aiding and abetting price fixing by the Irish Ford Dealers Association under the Competition Act 2002. On 9th February 2007, he was sentenced to 12 months incarceration, suspended for 5 years, and fined €30,000. Publication of the Central Criminal Court judgment and sentence, by Mr. Justice Liam McKechnie, is expected later in the year.

members were abiding by the agreed prices. [12] Dealers were fined for selling vehicles below a recommended price range. The "Profitability Programme" was coordinated, monitored and enforced through the Secretary's efforts.

*4.1.3 Charges Against the Citroen Dealers Association*

Additional criminal prosecutions have commenced relating to the activities of another trade association under investigation by the Competition Authority. On 5th June 2007 an individual appeared before Dublin District Court charged with aiding and abetting the activities of the Citroen Dealers Association (CDA) in violation of the Competition Act, 2002.[13] This matter is listed for trial before The Central Criminal Court on March 3rd 2008.

That trade associations have been at the heart of the first two criminal price fixing conspiracies prosecuted in Ireland is noteworthy. It is not by happenstance that supposedly legitimate trade association meetings evolved into full-blown criminal enterprises. The heating oil and Ford Dealers cartel cases starkly highlight the heightened opportunities and strong potential for hard-core anticompetitive behaviour that exists among competitors who meet in trade and business associations.

As one author on trade associations notes:

> *"Trade associations in the very nature of their business are collective organisations of competing businesses. Competition policy is therefore very relevant to them. They need to be careful not to restrain competition by price fixing or quota arrangement and also to ensure that this does not happen because of lack of adequate controls."*[14]

Some trade associations in Ireland have made risky choices to operate outside the competition laws and engage in criminal conduct. The onus rests with the associations to ensure that their lawful existence is not compromised by engaging in illegal activities.

***4.2 Trade Associations' Anticompetitive Activities Outside of Cartels***

The Irish experience has also highlighted the potential for trade and business associations to engage in other less blatant types of collusive, anticompetitive behaviour than outright price fixing and bid rigging. In a number of Competition Authority investigations that focused on concerted anticompetitive practices involving trade associations the Competition Authority has initiated civil actions in the High Court and reached settlements that end the anticompetitive conduct.

*4.2.1 Irish Medical Organisation*

In February 2005 the Competition Authority began an investigation into allegations of price fixing by the Irish Medical Organisation (IMO) in relation to the provision of Private Medical Attendant Reports (PMARs) to life insurance companies.[14] On 3rd July 2006, the Competition Authority initiated proceedings in the High Court alleging that the conduct of IMO violated Section 4 of The Competition

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12 "What the court heard about big dealers running Ford cartel", Competition Press pp 47-49, Vol. 15, Edition 3.

13 "Car trial for Criminal Court" pp 18, The Irish Times, June 6 2007.

14 Managing Trade Associations, Mark Boleat, Trade Association Forum, pp 17.

Act, 2002.[15] The Competition Authority reached a settlement with the IMO, which has agreed to refrain from: [16]

- Issuing any communications to its members that directly or indirectly instruct, recommend or express an opinion on fees to be charged for services provided to life insurance companies by doctors including, but not limited to, PMARs and medical examinations, or otherwise facilitating coordinated behaviour with regard to fees for these services.

- Issuing any communications to its members that directly or indirectly instruct or recommend to GPs that they withhold services from life insurance companies in breach of competition law.

- Directly or indirectly discouraging its members from individually negotiating with life insurance companies.

- Indicating to life insurance companies that its members will refuse to supply services to such companies if they do not agree to fees sought.

#### *4.2.2 Irish Dental Association*

In April 2005, the Irish Dental Association (IDA)[17] agreed settlement terms with the Competition Authority in advance of a full hearing in the High Court. Legal proceedings had been initiated following allegations of a collective boycott of a private dental insurance scheme being introduced in Ireland by Vhi DeCare. The Competition Authority alleged that the IDA had brokered an agreement, decision or concerted practice that had as its object and or effect to prevent the development of a new market for dental health insurance.

#### *4.2.3 Irish Hospital Consultants Association*

In May 2005 The Competition Authority initiated legal action against the Irish Hospital Consultants Association (IHCA).[18] The investigation concerned alleged price fixing by the IHCA and its members in the context of negotiations with private health insurers. The investigation was closed on foot of undertakings from the IHCA to refrain from facilitating discussions and agreement amongst its members on fees and not to advise its members to withdraw services in the absence of agreement on fees by private health insurers.[19]

### *4.3 Other Activities By Trade Associations*

The Competition Authority has encountered behaviour by trade and business associations which might be considered a minor or technical breach of competition law. There is sometimes a very fine line

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15 For further details of this case see the Competition Authority press release of May 28th 2007, available at www.tca.ie .

16 The settlement terms are without any admission of wrongdoing by IMO and it does not agree that it is in breach of Section 4 of The Competition Act.

17 The main representative body for general dental practitioners, specialists and health board dental surgeons. www.irishdentist.ie

18 There are over 1800 members of the Association and it is the leading representative group of medical consultants in Ireland. www.ihca.ie

19 For further details of the IDA and IHCA investigations see the Competition Authority's 2005 Annual Report 2005 available at www.tca.ie

between what might be considered representing the interests of members and advocating anticompetitive conduct.

Recent comments in the media by trade associations and their paid representatives advocating the need for increased prices to consumers in order to shield their members from changing economic circumstances are examples of activities that may easily cross the line from legitimate expressions of opinion to concerted activities that violate the Competition Act. Seemingly benign activities that call for higher prices may signal the start of anticompetitive conduct. Pronouncements that "prices will have to rise," and statements calling for percentage price increases may be interpreted as invitations for concerted conduct. If all members of a trade association were to act in unison following such comments, clear issues would arise concerning violations of the Competition Act. On several occasions the Competition Authority has contacted trade associations to warn them of the dangers of indicating to their members that percentage price increases would be required to address increased costs of business in Ireland. Clearly it is up to individual members of a trade or business group to set their own prices in response to their own costs and desired margins.

## 5. Conclusion

On balance the record of competition compliance by trade associations in Ireland does not get universally high marks. Substantial education and outreach initiatives to and by trade associations about competition laws, compliance and enforcement are clearly required. Continued vigorous investigation and prosecution of cartels involving trade associations is clearly warranted.

# JAPAN

Japan has a large number of trade associations that engage in a wide range of activities, including liaising with government bodies, promoting friendship among the members, conducting studies and research into trends in domestic markets and demand, PR activities, and publicizing and promoting official standards.

A trade association is any combination or federation of combinations of two or more firms having as its principal purpose the furtherance of their common interest as firms (Article 8-(2) of the Antimonopoly Act ("AMA")). Whereas the activities of trade associations can promote fair and free competition in some ways, they also can have a negative aspect in that they can induce anticompetitive conduct.

Article 8 of the AMA prohibits trade associations from (i) substantially restraining competition in any particular field of trade (Article 8-(1)-(i)), (ii) limiting the number of companies in any particular field of business (Article 8-(1)-(iii)), (iii) unjustly restricting the abilities or activities of the members (Article 8-(1)-(iv)), and (iv) inducing companies to employ unfair trade practices (Article 8-(1)-(v)) and others. Article 8 also requires trade associations, when they are formed or dissolved or the original details reported are changed, to notify the JFTC (Article 8-(2) to (4)).

As of the end of FY 2006, the number of trade associations whose formation had been reported to the JFTC without subsequent notification of their dissolution stood at 15,610 (see Appendix).

In view of issues raised in the request for written contributions, the following sections discuss (i) self-regulations by trade associations, (ii) information activities by trade associations, (iii) possible legal measures against trade associations and (iv) recent cases of anticompetitive conduct by trade associations.

## 1. Self-regulations by trade associations

### *1.1 Self-regulations relating to variety, quality and standards*

Trade associations establish self-regulation standards regarding the variety, quality and standards of goods and services for such purposes as rationalizing production and distribution systems and enhancing consumer convenience. Trade associations also establish quality-related self-regulation and self-imposed certification and authorization that are necessary for such socially beneficial purposes as preserving the environment or ensuring safety. Although there are instances in which such activities do not pose any particular problems in light of the AMA, depending on their content or the manner of activities, such activities can impede competition in terms of the development or supply of diverse goods or services, and can thereby violate Article 8-(1)-(iii), (iv),or (v). Even when the activity in question takes the form of self-regulation or self-imposed certification or authorization, it violates Article 8-(1)-(i) if it substantially restrains competition in a market.

The JFTC's Trade Association Guidelines[1] state that the judgments as to whether or not self-regulation or related conduct constitutes an impediment to competition under the provisions of Article 8-

[1] Guidelines Concerning the Activities of Trade Associations Under the Antimonopoly Act (October 30, 1995, JFTC).

(1)-(iii), (iv) or (v) are made on the basis of the considerations outlined in 1.1.1 below. Similarly, judgments concerning self-imposed certification and authorization are made on the basis of the considerations outlined in 1.1.2 below, in conjunction with the considerations outlined in 1.1.1.

### 1.1.1 Criteria concerning self-regulation

The following factors should be considered in judging whether or not a given self-regulatory activity constitutes an impediment to competition. The following factors (i) and (ii) are the main criteria for a judgment, and factor (iii) is a sub-element that should be taken into account in making a judgment:

(i) Whether the activity unjustly harms the interests of users by restricting means of competition;

(ii) Whether the activity unjustly discriminates among firms; and

(iii) Whether the activity is within the reasonably necessary scope to achieve social or other rightful purposes.

To ensure that self-regulation does not constitute an impediment to competition on the basis of the above considerations, a trade association should, when initiating self-regulatory activity, carefully listen to the opinions of the members concerned and, if necessary, exchange views and hold hearings with knowledgeable third parties, users of the goods or services in question, and others.

In addition, the use and observance of self-regulation should be left to the discretion of the members; a trade association that forces its members to use or to obey self-regulation is likely to pose a problem in light of the AMA.

### 1.1.2 Criteria concerning self-imposed certification and authorization

With respect to self-imposed certification and authorization, the following will be considered in addition to the factors described in 1.1.1 above:

(i) The use of self-imposed certification and authorization should be left to the discretion of the members; a trade association that forces a member to use self-imposed certification and authorization is likely to pose a problem in light of the AMA.

(ii) Under conditions in which it is difficult for a firm to conduct business without receiving self-imposed certification and authorization from the association, the association is likely to be in violation of the AMA if it imposes restrictions on a specified firm with respect to the use of said certification and authorization without due cause. Under these conditions, the use of self-imposed certification and authorization should be open to firms, including non-members. (Charging a reasonable amount of money to non-members as payment for expenses related to the use of self-imposed certification and authorization does not pose a problem.)

The Trade Association Guidelines show examples of conduct that is suspected to constitute a violation as well as conduct that does not, in principle, constitute a violation, as follows:

- Conduct suspected of constituting a violation

(i) Deciding that the members should not develop or supply specific types of goods or services.

(ii) Establishing or implementing self-regulation that discriminates against a specified firm or firms.

(iii) Forcing the members to use or to comply with self-regulation, or forcing them to use self-imposed certification and authorization.

(iv) Restricting, without proper justification, a specific firm's use of an association's self-imposed certification and authorization, under conditions in which it is difficult for the firm to conduct business without receiving said certification and authorization.

- Conduct that does not, in principle, constitute a violation

(v) Establishing self-imposed criteria for standardization that serves the interests of users.

(vi) Establishing self-imposed criteria concerning such aspects as the variety, quality or function of goods or services, as reasonably deemed necessary to achieve socially beneficial purposes such as environment conservation or safety assurance.

(vii) Promoting the propagation and dissemination of self-imposed standards or codes which do not pose a problem in light of the AMA, such as those described in (v) and (vi) above, or applying self-imposed certification and authorization concerning conformance with said standards or codes.

- Conduct relating to the type, content and method of business operation

Trade associations establish standards in self-regulation regarding information on such matters as the type, content, or method of business operations that is disseminated through public announcements and advertisements for such purposes as making it easier for consumers to select products. Trade associations also establish self-regulation to achieve socially beneficial purposes such as environmental conservation or the protection of minors, or to address labor problems. In some cases these activities do not pose any particular problem in light of the AMA. Depending on their content or manner, however, such activities can impede competition in terms of the diversity, content, or method of business operations, and thereby can violate Article 8-(1)-(iii), (iv) or (v). Even when the activities in question take the form of self-regulation, they nonetheless violate Article 8-(1)-(i) if they substantially restrain competition in a market.

The Trade Association Guidelines state that the judgments as to whether or not such self-regulation constitutes an impediment to competition in terms of Article 8-(1)-(iii), (iv) or (v) are made in accordance with the principles described above.

The Trade Association Guidelines show examples of conduct suspected of constituting a violation and conduct that does not, in principle, constitute a violation, as follows:

- Conduct suspected of constituting violations

(i) Deciding that the members should not employ specified sales methods.

(ii) Adopting self-regulation that restricts the supply of information that helps consumers make correct product choices, such as regulations that restrict the content, media, frequency, or other aspects of public announcements or advertisements of the members.

(iii) Establishing self-regulation that discriminates against specified firms.

(iv) Forcing the members to use or to comply with self-regulation.

- Conduct that does not, in principle, constitute a violation

(v) Establishing self-imposed criteria, concerning such matters as the type, content, or method of business operation, as reasonably deemed necessary to achieve socially beneficial purposes such as preserving the environment or protecting minors, or to resolve labor problems.

(vi) Establishing self-imposed criteria that make it easier for consumers to make correct product choices, such as criteria that prohibit false or exaggerated statements or advertisements, or that set minimum requirements concerning information that should be included in public announcements or advertisements.

(vii) Compiling model contracts, encouraging firms to contract in writing, and pursuing other activities that clarify trade terms, without influencing the actual contents of trade terms.

**2. Information activities**

Trade associations engage in information activities in their respective fields for a variety of reasons. For example, they collect objective information concerning products, technological trends, management expertise, the market environment, statistics concerning industrial activities, legislative or administrative trends, and socioeconomic conditions. Trade associations also provide this information to the members, related fields of business, and consumers, in order to develop an accurate understanding of society's demands on their respective fields of business and to accommodate those demands, to improve consumer convenience, or to understand and introduce the actual conditions in the fields of business concerned. There is a wide range of information activities such as these that do not pose any particular problem in light of the AMA.

However, there are also cases in which a trade association's information activities make it possible for competing firms to predict the specific contents of such important competition-related factors such as pricing concerning present or future business activities among them. In light of this, information activities of the kind described in (i) below are suspected to constitute violations of the AMA.

If an information activity of this kind results in the formation of a tacit understanding or common intent among the members to restrain competition, or if it is used as a means or a method of restraining competition, the case shall in principle be found to constitute a violation of the Act. That is, if a trade association's information activities lead to restrictive conduct by the association, such as fixing prices, restricting resale prices, restricting quantities, restricting customers, allocating markets, allocating contracts, predetermining the bidder expected to win a contract, restricting the construction or expansion of facilities and restricting entry, or if they accompany such restrictive conduct, such cases shall be found to constitute a violation of Article 8-(1).

In addition, if firms, through information activities by a trade association, formulate an agreement concerning the restriction of competition with respect to such matters as price, quantity, customers, sales channels, or facilities, and those firms substantially restrain competition in a market, their conduct shall constitute a violation of Article 3 (Unreasonable restraint of trade).

- Conduct suspected of constituting a violation

(i) Collecting or offering information from or to the members, or promoting the exchange of information among the members, where such information specifically relates to important factors on competition, concerning the present or future business activities of the members, such as the following: specific plans or prospects regarding the prices or quantities of goods or services supplied or received by the members; specific details of members' transactions with or inquiries from customers; and the limits of anticipated plant investment.

In contrast, the types of conduct such as those described below usually do not have the effect of restraining competition, and therefore in principle do not constitute violations of the AMA.

- Conduct that does not, in principle, constitute a violation

(ii) Offering, for purposes of improving consumers' convenience, information on such matters as the proper use of products or services in the field to consumers.

(iii) Collecting and offering general information on such matters as technological trends, management expertise, market environment, legislative or administrative trends, and socioeconomic conditions in the field, information that is in fact provided by government agencies, private research organizations and so forth.

(iv) In order to obtain and disseminate information on general business performance in the field, collecting, at the discretion of the members, general information on the historical results of members' business activities, such as the quantities or monetary value of previous production, sales and plant investment; statistically and objectively processing such information; and publicly disseminating that information in rough form without disclosing the actual quantities or monetary amounts relating to the individual members. In addition, in cases in which the member in question has already publicly announced its specific quantities or monetary amounts, the association may disclose this relevant information.

(v) For the purpose of providing the members and users with information on historical prices, collecting, at the discretion of the members, general information on the members' historical prices; statistically and objectively processing such information; deriving an accurate indication of price distributions and trends; and offering such general information to the members and users without disclosing the prices of the individual members.

(vi) Offering the members information materials or technology indicators that enable fair and objective comparisons of price-related matters such as expense items, degree of difficulty of operation, and quality of goods or services whose prices are difficult to compare in the market.

(vii) Collecting and offering general information on overall demand trends in the field; or formulating and disseminating rough forecasts of demand, based on objective facts.

(viii) Collecting and offering to the members objective information concerning the credit standings of customers for the purpose of ensuring safe transactions by the members.

## 3. Possible legal measures against trade associations

Trade Associations that have committed violations of the AMA will be subject to cease and desist orders and can be subject to criminal punishment. If trade associations conduct a certain kind of AMA violation, their members will be subject to surcharge payment orders.

### *3.1 Cease and desist orders*

When the JFTC finds any activity in violation of the provisions of Article 8, it may order the trade association concerned to file a report, to cease and desist from such activity, to dissolve the association, or to take any other measures necessary to cease the violation (Article 8.2-(1)). Even when the violation of Article 8-(I)-(i), (iv) or (v) has already ceased, the JFTC may, when it finds it particularly necessary, order the trade association concerned to publicize the cessation of the violation and to take other measures necessary to ensure that the violation does not recur (Article 8.2-(2)). When ordering a trade association to take the measures described above, the JFTC may, when it finds it particularly necessary, order the executive officers, managers, and the members of the trade association in question to take the necessary measures (Article 8.2-(3)).

### *3.2 Surcharge payment orders*

When a trade association violates the provisions of Article 8-(1)-(i) or (ii) (entering into international agreements or international contracts that contain provisions that constitute unreasonable restraints of trade), and when either violation pertains to the prices of goods or services or affects the prices of goods or services by restraining the supply thereof, the JFTC shall order the members of the trade association in question to pay surcharges.

### *3.3 Criminal punishment*

Penal provisions are provided for conduct that violates Article 8-(1)-(i) to (iv). They are also provided for violations against notification obligations stipulated in Article 8-(2) to (4).

## 4. Recent cases of anticompetitive conduct by trade associations

Recent cases in which the JFTC took action against the anticompetitive conduct of trade associations that impedes or substantially restrains competition are described below.

### *4.1 Case against the Shiga-prefecture pharmacist association (cease and desist order on June 18, 2007)*

The pharmacist association forced the retailers of specific pharmaceutical products not to represent their prices of non-prescription drugs in newspaper insert advertisements (unjustly restricting the abilities or activities of the members).

### *4.2 Case against the Yokkaichi-city medical association (recommendation decision on July 27, 2004)*

The medical association (i) set minimum fees charged by the members for influenza vaccinations for patients aged under 65 at 3,800 yen per vaccination (substantially restraining competition in any particular field of trade). It also (ii) unjustly restricted the abilities or activities of the members by placing limitations on their opening medical institutions, expanding specialist departments and increasing the numbers of beds (unjustly restricting the abilities or activities of the members).

### *4.3 Case against the Mie-prefecture certified social insurance & labor consultant association (recommendation decision on July 12, 2004)*

The association placed restrictions on members' advertising activities through direct mail, fax and other means and their efforts to win customers from other members (unjustly restricting the abilities or activities of the members).

### *4.4 Case against the national cooperative of hospital food wholesalers (recommendation decision on April 9, 2002)*

The cooperative placed restrictions on members' ability to choose sales areas for therapeutic food products sold by the cooperative or its supporting members (unjustly restricting the abilities or activities of the members).

### *4.5 Case against the Mitoyo-town, Kanonji-city medical association (Tokyo High Court ruling on February 16, 2001)*

The medical association (i) limited the number of firms by placing restrictions on their opening medical institutions (limiting the number of firms in any particular field of business). It also (ii) unjustly restricted the abilities and activities of the members by placing limitations on their expanding specialist departments, increasing and improving beds, and opening healthcare facilities for the elderly (unjustly restricting the abilities or activities of the members).

## APPENDIX

**Table 1. Number of Trade Associations by Industry (As of the end of March 2007)**

| | | Number of Trade Associations | Nationwide |
|---|---|---|---|
| | Agriculture, forestry and fishery | 104 | 40 |
| | Mining | 17 | 8 |
| | Construction | 1,718 | 521 |
| Manufacturing | Food | 690 | 218 |
| | Textile products | 534 | 117 |
| | Timber and wooden products | 587 | 51 |
| | Paper and pulp | 126 | 53 |
| | Publishing, printing | 139 | 35 |
| | Chemical products | 579 | 474 |
| | Petroleum and coal products | 92 | 24 |
| | Plastic products | 130 | 87 |
| | Rubber and leather products | 84 | 52 |
| | Ceramic, stone and clay products | 371 | 153 |
| | Iron and steel | 125 | 56 |
| | Non-ferrous metals | 34 | 28 |
| | Metal products | 190 | 99 |
| | General Machinery | 178 | 118 |
| | Electrical Machinery | 121 | 90 |
| | Transportation equipment | 78 | 40 |
| | Precision instruments | 93 | 69 |
| | Others | 284 | 97 |
| | Subtotal | 4,435 | 1,861 |
| | Wholesale | 1,762 | 318 |
| | Retail | 4,150 | 163 |
| | Financial and insurance | 290 | 49 |
| | Real estate | 106 | 16 |
| | Transport, communication and storage facilities | 803 | 122 |
| | Electricity and gas | 48 | 28 |
| | Services | 1,603 | 260 |
| | Others | 574 | 85 |
| | Total | 15,610 | 3,471 |

Note: The number of trade associations refers to the number of those that have submitted a notice of establishment based on Article 8-(2) AND have not submitted a notice of dissolution based on Article 8-(4) to the JFTC.)

# KOREA

## 1. Introduction

Between the 1960s and the 1980s, business associations[1] in Korea were established in great number on the back of the government-led industrial development policy, and played an important role as a bridge connecting the government and the business. As a result, it is now almost impossible to find a business sector without a business association in Korea.

Therefore, sanction on business associations' anti-competitive practices holds a significant meaning for establishment of a competition culture in the market. In this regard, Korea's Monopoly Regulation and Fair Trade Act (MRFTA) regulates business associations' practices comprehensively including cartels. This is because business associations have the potential to restrict member enterprisers' business activities not only in a horizontal relationship but also in a vertical relationship.

It should be also noted that business associations can contribute to promotion of competition in markets where their member enterprisers are doing business by spreading desirable business practices. In this sense, more importance is being put on prevention of competition law violations going beyond ex post punishment of violations. Reflecting this change, the KFTC is educating business associations to encourage them to spread pro-competition practices among their member enterprisers.

## 2. Anti-competitive aspect of business associations

### *2.1 Overview*

The KFTC bans business associations from creating cartels, limiting the number of enterprisers and restricting member enterprisers' business activities. As of the end of 2006, cases where the KFTC imposed remedies stronger than warnings for business association's prohibited practice mostly consisted of cartels (46.55%) and restriction of member enterpriser's business activities (46.55%). Cases concerning limitation of the number of enterprisers only accounted for 1.7%, and in particular, there is no statute restricting membership in business associations regarding only foreign enterprisers.

### *2.2 Examples of anti-competitive practice by business associations*

#### *2.2.1 Cartels*

Article 16 (1) 1 of the MRFTA prohibits business associations' act of unfairly restricting competition including acts determining prices, terms and conditions of transactions, production volume, transaction area or partner.

One example of a cartel led by a business association is the "Seoul Medical Association's engagement in a prohibited act (Mar. 2006)" The Seoul Medical Association reached a resolution to double the medical

[1] Article 2 (4) of the MRFTA defines business association as "a juristic person or federation that is organized by two or more enterprisers for the purpose of promoting their common interests, regardless of the association's form."

certificate issuance fee charged by 18,234 member medical institutions and constantly encouraged member enterprisers to follow this decision.

As in this case, cartels can be effectively created through resolution of business associations, even when there are so many small and medium-sized enterprisers that it is difficult to form a cartel. In this respect, business associations' practices can have a significant negative effect on competition.

Meanwhile, there were cases where enterprisers actively demanded a cartel. A case in point is the one that involved the Korea Chicken Council (Sep. 2006). Following the outbreak of avian influenza in December 2003 that caused a dramatic fall in the demand for chicken and bankruptcy of many chicken farmers, enterprisers agreed to jointly raise chicken price, which would be decided through the Korea Chicken Council. Upon such request from chicken producers, the Korea Chicken Council decided to increase chicken price and posted the price change on its website.

The KFTC judged that as long as enterprisers, for whatever reason, initiated a separate meeting and reached an agreement while a business association executed the agreement, the practice, in principle, constitutes a cartel among individual enterprisers and the involved business association is also subject to sanction for its contribution to cartel formation. Based on this decision, the KFTC imposed corrective orders on the Korea Chicken Council and its member enterprisers with surcharges.

*2.2.2 Examples of restriction of enterprisers' business activities by business association*

Since business associations are established with the purpose of promoting the common interest of their member enterprisers, it is somewhat predictable that they would restrict member enterprisers' business activities to a certain extent. For example, a business association's act of setting a standard for exclusion of false advertising and other practices, intended to promote fair trade order, cannot be perceived as unduly limiting its members' business activities.

However, Article 26 (1) 3 of the MRFTA prohibits business associations' act of unreasonably restricting business matters or activities of member enterprisers to undermine free competition among member enterprisers.

For instance, in the case concerning the Korean Judicial Agent Association (Aug. 1994), the KFTC imposed corrective orders on the Korea Judicial Agent Association for restricting member judicial agents' free business activities by not allowing individual agents' engagement in group registration work exceeding a certain size to allocate the registration work to its member agents in the order of membership acquirement.

In another case involving the Korea Oil and Fat Industry Cooperative Federation" (Jan. 2001), the Federation claimed that its member A was buying raw materials at a high price to raise the overall level of raw material prices, and requested other member enterprisers to stop dealing with A. The KFTC saw this as an act of unduly restricting A's business activities with the purpose of limiting raw material price competition, and thus imposed remedies.

*2.2.3 Examples of limitation of the number of enterprisers by business associations*

Article 26 (1) 2 of the MRFTA prohibits business associations from engaging in any acts restricting the present or future number of enterprisers in any business area. Such acts become a problem when a business association limits a new enterpriser's membership at the association to disturb the enterpriser's business activities in the market.

For example, in 2003, an association consisting of 200 real estate agents in Hwamyung-dong, Busan decided to limit membership because excessive increase in members would reduce earnings of its member real estate agents. To this end, it increased its membership fee from 300,000 won to three million won and banned its members' dealings with non-members[2].

In this case, enterprisers who could not enter the association are unable to participate in joint real estate dealings freely and consequently, their business activities are unduly restricted. Therefore, the KFTC imposed corrective orders for the association's act of limiting the number of enterprisers.

## 3. Examples of pro-competition practices by business associations

### *3.1 Overview*

Business associations play a positive role in promoting the common interest of their member enterprisers while keeping in harmony with the competition law by providing useful information to members, serving as a bridge between the government and the business and inducing enterprisers' compliance with the competition law through education and campaigns.

Nevertheless, because such pro-competitive activities of business associations have the potential to grow into anti-competitive activities, distinguishing between the pro-competitive and anti-competitive aspects of business association becomes both important and difficult task for the competition authority.

### *3.2 Information provision and sharing*

Business associations' act of providing useful but hard-to-obtain information to member enterprisers through research projects and expert studies contributes to boosting member enterprisers' business competitiveness. Such act should be conducted within the framework of the competition law as a duty of business associations, which have the purpose of promoting the common interest of the member enterprisers.

Information provision activities include publication of statistical data, education and training of member enterprisers, publication of handbooks on laws and institutions, business consultations, studies on foreign management techniques and commissioning of expert research on business matters of common interest.

However, one should take heed of the fact that business associations can engage in information provision activities of anti-competitive nature, such as distribution of comparative data on member enterprisers' prices or terms of transaction. Such practices lead to price convergence among member enterprisers limiting competition.

### *3.3 Bridge between the government and the business*

Business associations act as a bridge enabling information exchanges between the government and the business and by doing so, they participate in the government's policy-making process. For instance, they

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[2] There are two methods of real estate brokerage; independent brokerage, where an agent independently broker a real estate dealing between clients and joint brokerage, where the agent with a property to sell jointly broker a deal with another agent who have a potential buyer.

These days, the properties for sale are limited and prompt brokerage is demanded. So many real estate agents located in large apartment complexes or populous areas tend to rely on joint brokerage dealings. Therefore, if certain restrictions are imposed on joint brokerage, such agents' business will suffer greatly.

may submit their opinions on statutory revision or enactment or make proposals to the government. This way, business associations can deliver the voice of the industry directly to the government, thereby contributing to realistic legislation and institution-building by the government

At the same time, however, business associations might distort policies by providing only the information that would benefit their member enterprisers rather than offering objective opinions. This would weaken the competitiveness of other business associations in confrontation with the concerned association or undermine consumer benefits.

In addition, business associations serve as a window for the government to efficiently deliver its opinions to industries. Therefore, Korea has issued administrative guidance on concerned industries through business associations in order to effectively implement government-led industry fostering policies between the 60's and the 80's.

The reason why the government's administrative guidance is anti-competitive is that there are many incentives for enterprisers to take advantage of the guidance to create a cartel. For example, after fixed book price system was introduced in 2003, the Ministry of Culture and Tourism asked for the Korean Study Materials Association's cooperation in improving publishing companies' practice of setting high prices on the premise that discounts would be offered before the introduction of the fixed price system and also in ensuring proper implementation of the fixed book price system.

However, the Korean Study Materials Association took advantage of the Ministry's administrative guidance and raised the per-page price of study materials in a meeting, for which the KFTC imposed corrective orders and surcharges.

### *3.4 Promotion of business practices and competition law enforcement*

Business associations play a central role in addressing problems in the market where their member enterprisers do business. For example, the Korea Telecommunications Operators Association is running a "mobile phone piracy report center" to prevent crimes and damages mobile phone users suffer in relation to illegal piracy of mobile phones and illegal wiretapping.

The Credit Finance Association has developed a "fraud detection system" so that consumers can use credit cards more safely, and is encouraging consumers to sign up for the credit card issuance suspension service should they be concerned about identity theft related to credit card issuance. In addition, it has public campaigns to help credit card users avoid various types of financial frauds.

As business associations have the capacity to resolve problems common to enterprisers, which cannot be solved by an individual enterpriser, they will contribute to effective promotion of market competition if the competition authority induces them to play the role of encouraging member enterprisers' compliance with the competition law.

Currently, Article 23 (4) of the MRFTA stipulates that "in order to prevent the unreasonable inducement of customers, the enterprisers or business association may voluntarily write a "fair competition code," and the KFTC can review whether the fair competition code is in violation of the competition law.

## 4. KFTC's experience in inducing compliance of business associations

When regulating business associations, it is necessary to minimize their anti-competitive aspects while maximizing their pro-competitive aspects for maximization of law enforcement effect. In this regard, the KFTC is strictly sanctioning business associations' violation of the competition law based on Article 26 of the MRFTA.

However, at the same time, the KFTC is helping business associations build capacity for voluntary compliance with the competition law through education and campaigns on the competition law provided for business associations in parallel with ex post sanctions.

For example, the KFTC has been sending e-mails informing business associations of the KFTC's deliberations, policy, statutes and the court's rulings as part of its efforts to promote the business's awareness of the competition law.

In a survey conducted in August 2005 to find out the level of satisfaction with the e-mailing service, 80% of respondents said the service had help them learn about the competition law and seven respondents answered that they had corrected or planned to correct practices suspected of violating the competition law after receiving the e-mailing service.

The KFTC also imposed remedies on the Korea Taekwondo Association and its affiliated Taekwondo Associations nation-wide for their practice of collectively deciding private Taekwondo institutes' tuition fee and Taekwondo skill test application fees and of limiting the number of enterprisers by setting a distance limit between local institutions.

Additionally, recognizing that these illegal practices were conducted because of the Taekwondo Associations' lack of understanding and awareness of the competition law, the KFTC published a handbook on the competition law and distributed it to the Korea Taekwondo Association to prevent repetition of the same violation. The handbook included explanation of the MRFTA provisions related to operation of private Taekwondo institutes with actual examples of the types of violation that the institutes could easily commit. The Korea Taekwondo Association distributed the handbook to all of its member enterprisers across the country and also conducted an education program on the competition law by itself.

# MEXICO

## 1. Introduction

This document analyses the role that business chambers and trade associations have played in the establishment of anticompetitive agreements in Mexico. The central thesis of the article is that trade liberalisation and the introduction of competition legislation are two of the factors that have given collusive agreements among competitors a new sense and shape. The first section outlines the nature of the problem and the regulatory framework; the second section briefly reviews the history of legislation affecting business associations; the third section analyses the economic context before and after the Mexican economy was liberalised in the mid-1990s; the fourth section analyses a variety of cases of agreements among competitors in which the Federal Competition Commission (hereinafter CFC) has intervened; and finally, the fifth section offers some final considerations.

## 2. Problem statement & regulatory framework

In Mexico there is a long tradition of industries organised in chambers of commerce and trade associations. Historically these groups have played a variety of roles, such as defending their members' interests, self-regulating their business practices and implementing industrial development policies. The chambers and associations have unquestionably served as a space to facilitate decision-making within each industry and to exchange information. However, even though these groups by their very nature constitute a "legitimate" space for enabling their members/competitors to interact, they have also served as a vehicle for carrying out practices that restrict or hinder the process of competition and free market access. Over the 14 years since the enactment of competition legislation, the CFC has intervened in numerous cases in which different types of anticompetitive practices by business groups have been found. Initially, it was clear that such behaviour was due to ignorance of the law rather than the intention to collude. Nevertheless, over time such behaviour has taken on more sophisticated forms that range from lobbying and political pressure to establishing cartels with highly effective supervision mechanisms.

The most basic foundation regulating business and trade associations is found in Article 9 of the Mexican Constitution,[1] which establishes freedom of association as one of our individual rights.

> *"Article 9 "The right to assemble or associate peacefully for any lawful purpose cannot be restricted; ... No meeting or assembly shall be deemed unlawful which has for its object the petitioning of any authority or the presentation of a protest against any act; nor may it be dissolved, unless insults be proffered against said authority or violence is resorted to, or threats are used to intimidate or compel such authority to render a favourable decision." [Not an official translation]*

Consequently, business and trade associations are regulated at a federal level in the Business Chambers and their Confederations Law,[2] which states:

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1 Political Constitution of the United Mexican States, published in the Diario de la Federación on February 5, 1917.

2 Published in *the Diario de la Federación* on January 20, 2005.

*"Article 1° This Law looks after public interest and is mandatory within the Mexican territory. Its purpose is to regulate the incorporation and functioning of Chambers of Commerce, Services and Tourism as well as the Industrial Chambers and the Confederations that group them. (...)".*

## 3. History

The first chambers of commerce established in Mexico date back to the 18th century, although there is evidence of commercial groups dating back to pre-Hispanic times. The first law on business associations issued by the Legislative Branch was enacted in 1908.[3] This "Law on National Chambers of Commerce" established the National Confederation of Chambers of Commerce (CONCANACO)[4] and the Confederation of Industrial Chambers (CONCAMIN),[5] respectively, in 1917 and 1918. The law forced all existing business chambers in Mexico to join one of these unifying Confederations.

Subsequently in 1936, the obligation of the chambers to join one of the above-mentioned confederations was extended to companies and business people. Article 5 of the new "Law on Chambers of Commerce and Industry"[6] made membership in one of the chambers a compulsory requirement for an industry or business to operate, along with registration in the National Registry of Commerce and Industry, and the payment of an annual fee.

To ensure compliance, the Law itself prohibited the authorisation of business and industrial activities by public offices if the interested party did not present proof of having become a member and paid the fee to the corresponding business association.[7] It also made it mandatory for the chambers to provide the government with a list of the companies that had not met membership obligations. This would make them subject to a fine of up to twice the maximum membership fee, which could be doubled in cases of reoccurrence. The payment of this fine did not release the violator from the obligation to enroll as a member.

These requirements allowed the government to exercise control over all spheres of production. On the one hand, it supervised business and trade activity through the chambers of commerce and industry; while on the other hand controlling labour through the workers' and peasant farmers' confederations. For example, one of the powers of the Ministry of National Economy[8] was to "suggest" actions and request business organisations to collaborate with the government's policy and plans.

Over the time, the Law on Chambers was the target of numerous attacks in the courts until 1995, when the Supreme Court of Justice of the Nation (SCJN) ruled that the obligation to become a member of the chambers, contained in the law, was unconstitutional.[9]

*"The freedom of association established in Article 9 of the Constitution is a right enjoyed by all individuals, both natural persons and juridical-collective persons, to create a new legal entity with its own legal capacity distinct from that of its associates. This right is violated by Article 5 of the Law on Chambers of Commerce and Industry by imposing... the obligation to become a*

3 June 12, 1908

4 Founded on November 3, 1917.

5 Founded on

6 August 27, 1936.

7 Article 16.

8 Currently, the Ministry of the Economy.

9 *Tesis Jurisprudenical número28/1995 (9ª), approved on October 5, 1995.*

*member of the related Chamber… warning us that, failure to do so will result in a fine, which will be doubled if the failure is repeated, and will not release the violator from the obligation to fulfill this requirement. … the sphere of protection arising from the constitutional guarantee in question may operate in three possible directions: 1. The right to associate by forming an organisation or incorporating an organisation that already exists; 2. the right to remain in an association or withdraw from it; and 3. The right to not associate. Similarly, the authority may not prohibit an individual from associating: it may not restrict the right to remain in an association or withdraw from it, nor may it oblige the individual to join an association. Consequently, Article 5 of the Law on Chambers of Commerce and Industry… violates the freedom of association established by Article 9 of the Constitution." [Not an official translation]*

On December 4, 1996, the Chamber of Deputies approved the new "Law on Business Chambers and their Confederations,"[10] which in Article 17 states that: "...Affiliation with the Chambers shall be voluntary on the part of the companies...." But in Article 10 it also establishes that: "...The purpose of the Chambers shall be: I) to represent and defend the general interests of trade and industry … and to operate, under the supervision of the Ministry of Commerce and Industrial Promotion (SECOFI), through the *Sistema de Información Empresarial Mexicano*, SIEM (Mexican Business Information System).

## 4. Economic context

The unconstitutionality ruling of the SCJN coincided with the entry into force of NAFTA,[11] which marked the most notable beginning of economic opening and liberalisation, although in a strict sense the opening had already begun a decade earlier, when Mexico joined GATT in 1985.[12]

Prior to NAFTA, the government had effectively controlled business activity for decades through a powerful political apparatus and by maintaining favourable economic and trade conditions for the domestic private sector represented through the chambers. In addition, the Mexican economy was protected from foreign competition by barring foreign investment and imports while there was a high degree of State participation. In addition, a system of price controls was maintained through a complex regulatory framework.

Protectionist policies plus the government's control of the economy exercised through the chambers, effectively divided the market among the few participants that existed in each market, resulting in a sort of *"state-promoted collusion"*. As a consequence, companies had little incentive for collusion since historically the government had sponsored anticompetitive practices.

During the early 1990s, Mexico was gradually becoming an open economy and, as a result, the competitive conditions in which the business sector operated started to change. One of the most important reforms was the State's privatisation of various activities, such as telephone services, the banking system, air transportation, highway concessions and others, in addition to greater openness to private investment in sectors previously reserved for the State.

NAFTA triggered changes in the rules to protect the process of competition. Chapter XV of NAFTA, which refers to policies on competition, monopolies and State companies, indicates that "the signing

10 *Published in the Diario Oficial de la Federación on December 20, 1996.*

11 North American Free Trade Agreement, Entered into force on January 1, 1994

12 General Agreement on Tariffs and Trade. The Government of Mexico became a member of GATT through the ratification of the Protocol of Adhesion of Mexico to the Agreement, adopted in Geneva on July 17, 1986. Entry into force for Mexico: August 24, 1986

parties assume the commitment to adopt or maintain measures to prohibit anticompetitive practices."[13] Furthermore, when the Federal Law on Economic Competition (LFCE) came into effect in 1993,[14] it partially repealed Executive Branch powers included in the Law on Federal Executive Powers in Economic Matters,[15] such as price fixing and entry barriers dispositions.

During the CFC early years, a large number of cases were filed claiming the absolute monopolistic practices (Hard core cartel conduct) due to ignorance of the law. The CFC has found that one of the factors hindering the elimination of price fixing practices among competitors is how economic agents view the process of agreeing to coordinate prices, imposing production quotas or segmenting markets as natural — with or without government participation.

As result, in 1998, when the Rulings of the Federal Law on Economic Competition (RLFCE)[16] where published, the Commission sought to clarify to the business community in Article 5, that instructions or recommendations issued by business or trade associations to their members with the object of effect of cartelising a market (conduct described in Article 9 of the Law[17]) would be considered an indication of an absolute monopolistic practice. This included instances where two or more competitors established maximum or minimum prices for a good or service, or adhered to the sales or purchase prices issued by the business or trade association for a good or service.

Under the new competitive conditions that were created under NAFTA, the trade associations began to concentrate on defending their members, by lobbying actively for protection from the effects of international trade and asking the government for the establishment of industrial policy programmes aimed at developing their specific sectors.

In the context of increasing openness to competition, anticompetitive agreements reached within business and trade associations began to make more sense for their members. In contrast to historical experience, now the associations actively defended their interests, even by confronting "rival" new chambers. In some cases, the fight for the market has led businesses to adopt aggressive pricing strategies that cut their profit margins in order to displace competitors. In other cases, competitors have found that over the long term there are enough economic incentives to peacefully coexist if the parties abide by the rules of the cartel agreement. In these cases, the CFC has realised that business and trade associations have played a central role as a space for information exchange and reaching agreements.

In theory, to operate cartels require: (i) reaching an agreement among competitors; (ii) establishing mechanisms that allow them effectively to police compliance with the agreement and set punishments to violators; (iii) undertaking actions aimed at ensuring that external agents do not cause damage to the agreement. Therefore, business and industry chambers are particularly well suited to ensure that cartels are stable over time, since, they count with the necessary tools to survey competitors' compliance.

As a result, the Mexican competition authority pushed to reform the law, in order to clarify that, for the purpose of competition law enforcement, business and industry chambers are in fact economic agents regardless of their lack of lucrative purpose.

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13 Fifth part: Investment, Services and Related Matters. Chapter: Policy in the Field of Competition, Monopolies and State Companies. Article 1501: Legislation in the field of competition

14 Published in the Diario Oficial de la Federaciónon December 24, 1992.

15 Published in the Diario Oficial de la Federaciónon December 30, 1950.

16 Published in the Diario Oficial de la Federación on March 4, 1998.

17 Fractions I,II and III.

## 5. Cases investigated by the CFC

Over the CFC's 14 years in operation, it has intervened in many cases in which trade associations exercise some kind of intervention in or hinder the process of competition and free market access for goods and services. Although, this conduct has taken a wide variety of forms, this contribution concentrates on four types.

### *5.1 Practices based on ignorance of the law.*

One example is producer or service provider associations acting as the vehicle for transparently agreeing upon retail prices. Some of these cases are mentioned below.

- Between 1994 and 1995, the CFC learned of and began to investigate several collusive agreements to fix prices by the Mexico City Dry Cleaning Associations,[18] purified water suppliers in the states of Puebla[19] and Campeche,[20] newspaper and magazine vendors in Veracruz,[21] and transportation providers in the Federal District affiliated to the National Chamber of Freight Transportation (CANACAR).

- Similarly, a case of collusion among two producer groups, the National Tequila Producers Association and the Jalisco Regional Tequila Producers Association, which entered into a written agreement that established reference prices for ripe *agave* at the factory from August 2000 through December 2002.

- In the year 1997, the CFC learned that the National Alliance of Tourism Transportation Providers voluntarily presented a price list to the Ministry of Communications and Transportation in order to obtain authorisation for its members to charge the agreed upon prices.

The common denominator in all of the above cases is that the organisations were unaware of the law, and so were unconcerned about entering into written agreements and making them public. This facilitated the CFC's work and in most cases, the CFC declared the agreement void (as stated in article 9 of the LFCE) and imposed sanctions that were merely symbolic.

### *5.2 Cases in which collusion is fostered or endorsed by government authorities.*

These also result from ignorance about the law, but in these cases, mostly state and local authorities were unaware of the law. The CFC has learned of cases in which authorities sought to resolve disputes among competitors by getting them together to negotiate a division of geographical markets or to agree upon prices.

- A good example of this was a conflict between tortilla producers and distributors in Felipe Carrillo Puerto Municipality, Quintana Roo. Municipal officials brought together the Industrial Tortilla Producers Association and other unaffiliated producers to sign an agreement establishing

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18 File IO-05-93. *Asociación Nacional* de Industriales de limpieza profesional, A.C.

19 File IO-02-94. *Asociación de Productores y Distribuidores de Agua Purificada en el Estado de Puebla* (Puebla Purified Water Producers and Distributors Association).

20 IO-13-94. *Asociación de Embotelladores* (Bottlers Association).

21 IO-11-94. *Unión de Voceadores, Expendedores y Repartidores de Periódicos, Revistas y Similares del Puerto de Veracruz* (Veracruz News Vendors Union).

minimum distances between tortilla retailers, so that each could sell to a defined geographic area.[22]

- Local government officials have also made commitments to refuse operating permits to new tortilla retailers in exchange for large-scale organised retailers cooperating by lowering their prices in a coordinated way. This undoubtedly builds political capital for the person advocating it, since variations in the prices of tortillas have a strong impact on household income.

In dealing with this type of cases, the CFC has issued opinions to the authorities involved, indicating to them that their behaviour violates the competition law. However, the CFC is not empowered to sanction government officials and can only request them to stop the practice.

### *5.3 Legal provisions and technical regulations that foster collusion among association members.*

The Commission has observed cases in which government authorities are legally obligated to obtain the approval of business and trade associations for the entry of new suppliers into a market. The fact that these kinds of barriers to entry appear in regulations only accentuates the freedom with which associations coordinate their positions and lobby against any potential new competitor. A similar case is that of legislation that favours members of an existing association in the issuance of new concessions. Controlling entry ensures that an agreement among competitors (member firms in a business or industry chamber) can be more easily policed as the number of players in a market remains relatively constant as does supply, and the potential entrance of maverick firms that can destabilise the agreement is prevented.

- As regards cement imports into Mexico, the applicable law provides that every importer must be registered in a Cement Importers' Registry operated by the Mexican Customs Agency. Under this instrument, the opinion of the National Cement Association must be requested in order for a new importer to be added to the registry. This association is made up of all six of Mexico's cement producers. The organisation deliberates and recommends to the authorities whether to allow new cement importers to enter Mexican market. There is growing concern that this practice facilitates blocking cement imports.

- In the states of Queretaro and Sinaloa, legal provisions for granting concessions or permits to suppliers of public transportation services grant preferential treatment for existing members of transportation associations. This creates incentives for these organisations to agree not to allow any new members and thereby prevent the authorities from granting any new permits.

The CFC has sought to eliminate these kinds of practices through studies and opinions that focus attention on potential problems of new existing regulations. The CFC has repeatedly appeared formally before state Legislatures to point out the anticompetitive consequences of forcing new competitors to be approved by business and trade associations.

### *5.4 Business and trade associations play the role of promoting collusive agreements among their members with a view to fixing prices, restricting output, segmenting markets and coordinating bids.*

In this case, the conduct is a conscious exercise of avoiding competition in the market.

- The CFC received a complaint against three companies dedicated to the production and marketing of radiographic materials. The companies were members of the National Association

[22] IO-41-96.

of Producers of Radiographic Materials (ANFAMAR) holding the positions of President, Secretary and Treasurer. During a three year period these companies participated in numerous bids, organised by the public health sector, from which analysis the CFC was able to detect patterns of unlawful collusive activity. In addition ANFAMAR's lawyer was representing the three companies in various administrative procedures.

In order to address these types of cases, the CFC has begun in-depth investigations of both competitive conditions in the corresponding markets and evidence of collusion among competitors. Even if competition legislation could not hold business and trade associations directly responsible for illegal behaviour (for conducts undertaken prior to the enactment of the new law), the CFC found that associations could sponsor and oversee compliance of collusive agreements. The CFC has investigated and directly sanctioned the members and has also sought to involve trade and business associations in implementing commitments to stop illegal practices.

Finally, a subject worthy of discussion is how to analyse horizontal practices that do not fall under the hard core cartel heading foreseen in article 9 of the LFCE. The law is mute regarding agreements among competitors that could be reviewed under a rule of reason approach. For example, certain inter-bank practices aimed at coordinating their services and which are undertaken through the Mexican Bankers' Association (ABM) may in fact create efficiencies for the economy and for users of the system.

## 6. Concluding remarks

As is evident, the ruling that mandatory membership in a chamber of commerce and business association is unconstitutional has been very relevant to the subject addressed here. The triumph of freedom of association which goes hand in hand with greater economic freedom has challenged business and trade associations to more effectively represent their members' interests.

In just 14 years, the CFC has managed to position itself as a recognised regulatory agency in the field of competition, which has earned the respect and participation of many chambers of commerce and trade associations.

The CFC is taking several steps to extend the culture of competition into as many arenas as possible. In the case of business and trade associations the Commission has sought to clarify that anticompetitive agreements created within business chambers are in no way a form of legitimate competition among market participants. The CFC expects to focus its current and future efforts on conducting studies and issuing opinions (both binding and non binding) about the performance of different sectors of the economy and the role that business associations play in them; conducting in depth investigations that lay the foundation for imposing meaningful sanctions to economic agents that undertake anticompetitive behaviour; and spreading understanding of competition culture at all levels.

# NETHERLANDS

## 1. Introduction

The Netherlands would like to submit a written contribution to the roundtable discussion of 16 October 2007 on potential pro-competitive and anticompetitive aspects of trade/business associations. The Netherlands thus hopes to be able to contribute to a fruitful discussion.

The structure of the submission is as follows. Firstly, a short overview will be given of the legal framework with a focus on legislation and on the Guidelines on cooperation of undertakings. Secondly, the recent practice in case law of the Netherlands Competition authority (hereinafter: NMa) will be illustrated by analysing the pro- and anticompetitive aspects of business associations. Thirdly, the enforcement methods of competition employed by the NMa will be outlined. Finally, an outlook is presented.

## 2. Legal framework

### *2.1 Hard law: legislation*

The cartel prohibition is laid down in Article 6, paragraph one of the Dutch Competition Act and paragraph three contains the legal exception. Article 6 of the Dutch Competition Act is the same as Article 81 of the EC Treaty (hereinafter: EC), except for the additional requirement of interstate effect which is laid down in Article 81 EC only. This cartel prohibition bans agreements between undertakings, decisions by associations of undertakings, and concerted practices of undertakings which have as their object or effect the prevention, restriction or distortion of competition on the Dutch market, or any part thereof.

The cartel prohibition does not apply to agreements between a limited number of undertakings with a low turnover. Article 7 of the Competition Act (the so-called bagatelle provision) lays down that the cartel prohibition does not apply to agreements which do not involve more than eight undertakings provided the collective turnover of these undertakings does not exceed:

- EUR 4,540,000 if the core activities of these undertakings relate to the supply of goods;[1] and
- EUR 908,000 in all other cases, for example the supply of services.[2]

On the grounds of Article 12 of the Competition Act, the European block exemptions have been incorporated in Netherlands competition legislation. If a particular agreement is exempted from the application of the European cartel prohibition, because it falls under a European block exemption, then this agreement will also be exempted from the application of the Netherlands cartel prohibition. Likewise, this applies to agreements which do not influence interstate trade and to which the European cartel prohibition

1 From 1 October 2007, this provision is changed by law into an amount of € 5,500,000.

2 From 1 October 2007, this provision is changed by law into an amount of € 1,100,000. Moreover, the cartel prohibition does not apply to agreements when the market share does not exceed 5% and the turnover does not exceed € 40,000,000.

does not, therefore, apply and, moreover, to agreements which although influencing interstate trade, are still covered by a European block exemption (Article 13 of the Competition Act).

For a number of types of agreements, particularly those concerning the Small and Medium Sized Enterprises (hereinafter: SMEs), generic exemptions on the basis of Article 15 of the Competition Act are available. These relate to the Decision in Relation to the Exemption of Agreements executed as a Combination, the Decision in Relation to the Exemption of Agreements to Protect Sectors of Industry and the Decision in Relation to the Exemption of Cooperation Agreements in the Retail Trade.

### *2.2 Soft law: Guidelines on Cooperation of Undertakings*

The NMa looks favourably on any cooperation between undertakings which enhances efficiency, innovation and promotes competition. Cooperation arrangements such as business associations can result in various forms of cooperation, particularly amongst SMEs, which play a useful role and enable activities to be undertaken which could not be undertaken by individual undertakings. In addition to promoting interests, providing information and acting as a point of contact for a particular business sector, this also relates to, for example, the collective undertaking of research into factors and circumstances which can, in a general sense, influence undertakings in that sector and improve the quality of the supply of goods and services.

The business community will profit from an effective and clear application of the Competition Act. In particular this applies to the SMEs, which do not, in general, have much power in the market. In the vast majority of cases, cooperation between these undertakings does not contravene the rules of competition. Moreover, it is precisely the SMEs that benefit from the steps being taken against the prohibited cartels, the combating of abuse facilitated by economic dominance and the prevention of the creation or strengthening of positions of power.

On 8 June 2001, the NMa published guidelines for the assessment of forms of cooperation between companies both within and outside business associations. Taking account of, inter alia, developments in case law, as well as signals and requests from, and the requirements of, business associations, their members and their umbrella associations, the NMa drew up new guidelines. In 2005, the NMa published an updated version of the Guidelines on Cooperation between Undertakings, at the request for more concrete examples of amongst others the Dutch Association of SMEs. As certain agreements between competing undertakings are in principle considered to be unlawful, particularly those involving parameters of considerable importance to competition such as price and volume, it is highly relevant to undertakings to know for sure which kinds of agreements on cooperation are indeed permitted. Especially for SMEs, cooperation between undertakings is often preconditional to operating on particular markets. In the updated version of the Guidelines, the NMa indicates in what way collaborative structures will generally be assessed within the framework of the Competition Act. This concerns SMEs in particular, because of the important position of business associations. The Guidelines were developed after careful consultation with the employers' association VNO-NCW and MKB Nederland (the Dutch Association of SMEs). The information presented in these guidelines will stimulate compliance with the Competition Act.[3]

These Guidelines on Cooperation between Undertakings relate to a number of specific, horizontal forms of cooperation which are not governed by European block exemptions, publications or guidelines. The reason being that in such cases the European Commission is not competent to judge on these forms of cooperation as trade between member states is not influenced. It is also possible that the European

[3] Guidelines for the healthcare sector are also in the making. They will mainly deal with subjects such as collective negotiating by business organisations. The Guidelines for the healthcare sector will be published this year.

Commission does not deal with these forms of cooperation very often and, for that reason, feels less need to issue guidelines itself. In a number of other forms of cooperation there is no question of competition being restricted (i.e. general terms and conditions, cooperation in the area of administration, joint purchasing and joint advertising) and, therefore, in principle, the issue of a national or European block exemption does not arise.

The forms of cooperation contained in the Guidelines are strictly formulated. These strict criteria are specified by case law where all the specific circumstances of the case will be taken into account. The Guidelines contain a strict formulation for reasons of clarity, since it is not possible to take the context of the case into account and in order to prevent business associations being active in an area where competition is likely to be restricted.

Issues dealt with in the Guidelines on Cooperation between Undertakings are: the legal framework, recommendations from trade organisations, general areas of application and the assessment framework for forms of cooperation and specific forms of cooperation. The specific forms of cooperation dealt with are: recommendations from trade organisations, exchange of information, recognition schemes, membership criteria of trade organisations, general terms and conditions, cooperation in the area of administration, code of conduct, joint purchasing and joint advertising.

If you would like to obtain a copy of the Guidelines in English, the OECD organisation has printed some for you to take with you or they can be downloaded from our website at www.nmanet.nl.

## 3. Case law

Whether or not agreements restrict competition and are, therefore, in contravention of the cartel prohibition depends, inter alia, on the nature and size of the undertakings concluding the agreements and on the content of the agreements associated with the cooperation.

In practice, the majority of the complaints and requests which are dealt with by the NMa, concern price recommendations of business associations, calculation models, information exchange and to some extent also recognition schemes.

In this paragraph, the contents of the agreement are illustrated by some recent cases the NMa has dealt with. Firstly, recent case law concerning recommendations from business associations related to tariffs is set out. Secondly, recognition schemes and thirdly, costs estimates are discussed.

### *3.1 Recommendations from business associations*

#### *3.1.1 Recommendations related to tariffs: the need to investigate the context and appreciability*

Following European case law, there is a clearly discernible trend in national case law towards a greater emphasis by the courts on the economic effects of prohibited practices. In the absence of any concrete (proven) facts, the court does not readily accept that certain practices or agreements are anti-competitive by object. This sets requirements to evidence presented by NMa. The Trade and Industry Appeals Tribunal [CBb] stated in the Secon[4] and Modint[5] cases at the end of 2005, that an examination was necessary of the factual and economic context in which these practices occur ('context examination').

4 The Trade and Industry Appeals Tribunal of 7 December 2005, Secon en G-Star / NMa, LJN: AU8309.

5 The Trade and Industry Appeals Tribunal of 28 October 2005, *Vereniging Modint en Modint Credit & Finance BV vs de Raad derdebelanghebbende Vereniging Retail Partners Nederland*, AWB 04/794 en 04/829 9500.

This is necessary to prove the case for practices or agreements of anti-competitive object. Furthermore, NMa must render plausible that parties involved do not have a negligibly small position on the market ('appreciability examination'). Both of these investigations are separate from the investigation into the concrete effects of the practices under consideration ('examination of the effects'). The latter investigation must take place in case of practices that are anti-competitive by effect, not by object.[6] Within this assessment framework, the Court of Rotterdam issued a number of rulings in 2006.

Bicycles[7]

*Facts*

The department Two Wheels companies of the BOVAG (the Union of Garage Owners) and NCBRM (the Dutch Christian Union of Bicycle and Motor Dealers) recommended the following to their members:

- not accepting any offers from the Centre of Coordination of Transport in the province Brabant and National Cycling projects to participate in company bicycle promotions, because of the low profit margins and payment risks;

- tariffs for service and control maintenance by means of service and control maintenance booklets issued by BOVAG;

- the percentages for costs of interest and profit margins incorporated into the tariffs of the maintenance shops by means of a Guidance Booklet issued by NCBRM.

*Analysis*

The Court ruled that a distinction must be made between evident and non-evident intention to restrict competition. Obstructing entry to the market by (potential) competitors or attempting to force (potential) competitors out of the market, according to the Court, is an example of an evident intention to restrict competition, for which a limited examination of the context is sufficient.

However, the booklets are not evidently recommendations which restrict competition. Further examination of the context is necessary, such as the economic context in which the recommendations are applied, notably the objectives of BOVAG and NCBRM and the real circumstances of the relevant market, such as the way in which the bicycle dealers concerned apply the booklets. According to the Court, the NMa has conducted insufficient examination related to the question whether the recommendations of providing the booklets leads to a restriction of competition, since any insight into the actual functioning of the decision within the relevant market is lacking.[8]

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6 The examination of the effects consists of an economic investigation into the concrete consequences of the alleged infringement on the relevant market, whereas the context examination consists of an investigation into the functions and objectives envisaged by the alleged infringement.

7 The Court of Rotterdam of 28 February 2006 *BOVAG/NCBRM t. NMa*, MEDED 04/3141 WILD, and new decision of the NMa taking into account the objections of the parties of 19 October 2006.

8 The NMa has decided not to appeal the decision.

Psychologists[9]

*Facts*

Three associations of undertakings recommended to their members the tariffs to be applied for their psychotherapist care.

*Analysis*

The Court ruled that the NMa had not adequately made likely that the recommended tariffs were generally known to the members of two of the associations of psychotherapists. The Court only considers a recommendation a *real* recommendation when it is also generally known to the members of the association.[10]

In this case, according to the Court, the NMa had not adequately examined the role of the referring general practitioner (on which aspects does he choose a specialist?) and the health insurer in referrals to psychologists and psychotherapists. In the changing context of healthcare, that is the introduction of market elements, without a further examination of the context, the NMa could not conclude that the prices recommended by the professional associations of psychotherapists in themselves had the effect of restricting competition. The NMa had to examine to what extent the price is taken into account when choosing a psychotherapist and in what manner competition would have evolved in the market of psychotherapist care if the associations concerned had not recommended the tariffs.[11]

### *3.1.2 Calculation models and cost estimates*

In paragraph 57 of the Guidelines on Cooperation of Undertakings, the NMa has included the case law up until mid 2005 and summarized the aspects thereof which are taken into account when assessing whether calculation models and cost estimates are in conformity with competition rules. This paragraph states that regarding the nature of the information, the general rule is that competition is less likely to be restricted the more objective the information is, the more aggregated it is, the more generally available it is and the more it relates to facts from the past, such as details from Statistics Netherlands (CBS), or the Bureau for Economic Policy Analysis (CPB), or information on the basis of collective labour agreements. The more the information takes on a subjective character – such as is, by definition, the case with profit mark-ups or standard incomes – or contains specific interpretations and 'translations' of general information for a particular sector or is highly detailed and can be traced back to individual situations or individual undertakings, or contains extrapolations to the future in respect of unpredictable developments, then the more likely it is that there is a question of prohibited restricted competition. In these cases, the advice from the business associations once again acquires a prescriptive character, which may incite the members to adjust their prices (uniformly), irrespective of their own cost developments.

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9 The Court of Rotterdam of 17 July 2006, *NIP, LVE en NVVP t. NMa*, MEDED 05/2213-WILD, MEDED 05/2214-WILD, MEDED 05/2215-WILD and appeal at the Trade and Industry Appeals Tribunal is still pendant.

10 The NMa has not appealed this issue.

11 The NMa has appealed this part of the decision and emphasises the economic and legal context of the recommendations and that the recommended tariffs have the object of restriction competition in accordance with recent European case law (GlaxoSmithKline Services Unlimited and Belgian Architects). The difference between examination into the context and into the effects is disappearing. According to the NMa, the examination should not concern how the recommended tariffs would have evolved, but how competition should have (better) evolved without the recommended tariffs. In other words, what the negative influence of the recommendations would have been.

Case TLN, AZ en VZV[12]

*Facts*

Three business associations, Transport and Logistics Netherlands (TLN), Alliance Transporters of Containers over Sea (AZ) and Association of Transporters of Containers over Sea (VZV), were suspected of recommending prices to their members. The alleged price recommendations related to the passing on of the annual general development in costs (by issuing annual letters containing the results published by a research bureau on the expected cost developments), fluctuations in fuel prices and the cost of the proposed German road toll.

*Analysis*

The business associations infringed competition law by recommending that their members pass on fluctuations in the fuel price and the German road toll to their customers. The NMa has not imposed a fine for this infringement because the Dutch government repeatedly and clearly expressed the desirability of passing on the increase in fuel prices and the road toll in full. The government left the realisation of this to the undertakings themselves. The associations involved then recommended in all openness that their members do so and made model clauses and tables available to their members for this. After it appeared that the NMa had objections to this, the associations immediately ceased issuing these recommendations. Due to the specific circumstances of this case, the NMa has decided not to impose fines for these infringements.

The NMa concluded that competition rules were not infringed with regard to the issuing of annual information on the development of costs. Giving such information to members is a legitimate task of a business association. However, business associations must draw their members' attention to the fact that they must determine their commercial behaviour, including their prices, independently of each other and, by doing so, must take their individual cost structure as the point of departure. The information provided related to objective and generally available data which did not contain interpretations made by the business associations themselves. For this reason, the NMa did not regard this information as a prohibited price recommendation which restricts competition.

### *3.2 Recognition schemes*

Recognition schemes can contribute to the quality of the production, service and distribution, and to the information provision and choice of options open to customers. In principle, therefore, the NMa assesses such schemes positively. Recognition schemes can, however, also limit competition in the sense of the cartel prohibition. The following points describe when such situations could arise.

Although it may not have been the aim of a recognition scheme to restrict competition, it is possible that this could be the effect. To assess whether a recognition scheme has the effect of restricting competition, a test of the scheme should take account of the specific situation in which it has an effect. In particular, account should be taken of the economic and legal context in which the undertakings concerned operate, the nature of the services to which the agreement relates, the structure of the relevant market and statutory circumstances under which it functions, unless it is a question of a recognition scheme incorporating factors which clearly restrict competition (such as price and market sharing agreements). The

12 Case 3371/*TLN, AZ en VZV*, decision of the NMa of 25 March 2005.

previous sentence implies that the actual effects of the scheme on the level of competition must be assessed.[13]

Recognition schemes will not restrict competition if the undertakings participating in the recognition schemes only represent a small part of the market. A low (joint) market share of the undertakings participating in the recognition scheme indicates that an undertaking *not* participating in the scheme can, even without participating in the scheme, operate in, or enter, the market. Those undertakings not participating in the recognition scheme will, in such situations, be able to exercise sufficient competitive pressure to compensate for any reduction in competition between the recognised undertakings. Given the reference framework of the European Commission's guidelines on horizontal agreements,[14] the point of departure could, in principle, be that a recognition scheme will not have a restrictive effect on competition when the participating undertakings have a joint market share of less than 20%, provided the scheme does not contain any provisions which specifically aim to restrict competition.

Recognition schemes which do not have the aim of restricting competition may, however, still have the effect of restricting competition if the joint market share of the undertakings affiliated to the recognition scheme is greater than 20%. There is a question of a restrictive competitive effect if, inter alia, the recognition scheme has an exclusionary effect (or a potentially exclusionary effect). If, in respect of activities in the market, the recognition scheme offers its participants important economic advantages which they would not otherwise enjoy, then a situation could arise which makes it difficult for the undertakings not participating in the recognition scheme to operate in, or enter, the market, without first participating in the scheme. This will be the case if the participating undertakings represent a large share of the market and consumers or businesses consider the particular recognition scheme an important condition when deciding from whom to procure goods and services.

To prevent unfair exclusion and to guarantee that anyone who fulfils the requirements for participation in a recognition scheme can participate in that scheme, the recognition scheme must satisfy the following conditions:

- the recognition scheme should have an open character;
- the requirements laid down for participation in the recognition scheme must be objective, non-discriminatory and made clear in advance;
- the (admission) procedure for recognition must be transparent; and
- the (admission) procedure for recognition must provide for an independent decision about the admission on first assessment, or should recognition be rejected, on appeal.

If a recognition scheme fulfils these conditions, then the scheme will not normally pose any restriction to competition in the sense of the cartel prohibition.

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13 Court of Rotterdam, 25 March 2004, *UNETO-VNI*, MEDED 02/796-HRK.

14 Guidelines on the applicability of Article 81 of the EC Treaty on horizontal cooperation agreements, OJ 2001, C 3 of 6 January 2001, p. 2.

### *3.2.1 Installation sector*[15]

*Facts*

In order to admit an undertaking to membership of the trade association in the installation sector, the trade association has laid down requirements in respect of craftsmanship in its articles of association and regulations. Of those participating in the market, 90% are members of the trade organisation. It is well-known that customers (and potential customers) attach no, or almost no, importance to membership of the trade organisation. Members do, however, use a logo to differentiate themselves from those who are not members.

*Analysis*

If becoming a member of the trade association is dependent on fulfilling requirements of craftsmanship, membership can take on the role of a recognition scheme according to the Court of Rotterdam. The articles of association and regulations of the trade association should, therefore, be deemed a recognition scheme. The simple fact that 90% of the participants in the market are affiliated to the recognition scheme is, however, insufficient for the conclusion to be drawn that participation in this recognition scheme is a factor of importance in the market, as it is well-known that customers (and potential customers) attach no or little importance to membership of the trade organisation. Nor does the use of a logo as a mark of quality alter this. The recognition scheme does not restrict competition and is, consequently, allowed. According to the Court, the existence of a theoretical possibility that an exclusionary effect can occur, constitutes insufficient proof that concrete anti-competitive effects occur in the market. The NMa should have examined the concrete effects of the membership schemes on competition.[16]

## 4. Enforcement of competition

The classic enforcement method at hand for the NMa is the imposing of fines or periodic penalty payments under administrative law through a sanction decision. Nowadays, it has become more and more common to close an investigation or a complaint by means of an alternative instrument. In this paragraph, the NMa's policy towards alternative enforcement is set out, followed by illustrative examples of an intervention, an informal opinion, compliance programmes and self-regulation.

### *4.1 Alternative enforcement policy*

Specific situations may warrant the choice for an alternative mode of enforcement. In so doing, the NMa refrains from imposing fines and works towards a settlement with the undertakings or association of undertakings involved. With a view to fostering precision and transparency as to its enforcement policy, the NMa developed a range of policy criteria which have to be met in order to refrain from sanctions:

- the infringement is terminated immediately or has already been terminated;
- the offence is not likely to be repeated;
- the consumer will expectedly benefit more from alternative modes of enforcement as opposed to sanctions procedures;

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15 Court of Rotterdam, 25 March 2004, *UNETO-VNI*, MEDED 02/796-HRK.

16 The NMa has not appealed this decision.

- alternative modes of enforcement generate sufficient prevention effects;

- alternative modes of enforcement do not meet with principal objections from third parties concerned;

- the offence does not concern a so-called 'hardcore' infringement; these include price rigging practices and agreements on market splitting and production volume.

The NMa emphasises the importance of maintaining contacts with the sector. In this respect, the NMa wishes to exert an advisory role. The NMa realises this by delivering speeches and presentations, and by issuing advice to for instance business associations. Furthermore, the NMa issues guidelines and brochures which elucidate the way in which legislation is to be interpreted and helps clarify NMa's policy with regard to the use of information and the implementation of its statutory powers. The alternative enforcement method is of considerable importance to the NMa's effectiveness. Following an investigation, the NMa may decide on using an alternative instrument. A healthy balance between these preventive measures and repressive intervention will contribute to the success of our mission to make markets work.

Informal opinions are also employed as prevention instruments. They are helpful in providing insight into the specific market position of parties. In 2006, the NMa issued 22 informal opinions. In deciding to honour a request for an informal opinion, the NMa applies a 'yes, provided that'-policy to which the following requirements apply cumulatively:

- the matter must raise a new legal issue;

- a considerable social and/or economic interest must be at issue; and

- it must be possible to form an opinion on the basis of information provided by the applicant, in other words, without the need for the NMa to carry out further substantive research.

The NMa will not issue an opinion if a similar case is being dealt with by the NMa, the European Commission or any other competition authority, or if a relevant case is before the courts.

### *4.2 Alternative enforcement in practice*

In this paragraph, a number of examples illustrate the NMa's alternative enforcement in practice.

#### *4.2.1 Intervention concerning Orthobanda*

Orthobanda is the business association for orthopaedic instrument makers, who offer both tailor-made and standard orthopaedic products and protheses. A large number of orthopaedic instrument makers calculated their prices on the basis of a collective system for calculating prices developed by Orthobanda. After studying the practical effects of this system, the NMa concluded that it obstructed competition in the sector. Orthopaedic instrument makers ought to determine their prices independently of each other through negotiations with healthcare insurers. This message was also communicated to all healthcare insurers in the Netherlands.

After intervention by NMa, the business association Orthobanda appealed to its members at the end of 2004 to cease applying the collective system for calculating prices. If this had not been done, the NMa could have started an investigation.

### *4.2.2 Informal opinion on shrimp fishery industry*

At the request of the Producer Organisation (PO) Dutch Fishery Union, the NMa gave its opinion on regulations to be implemented in the shrimp sector by the newly founded Transnational Association of Producer Organisations (TVPO). All TVPO's – several TVPO's may be set up in the shrimp fishery industry – are subject to the stipulation that they may not take up a dominant position in the relevant market, unless such a dominant position is in exceptional cases held to be necessary in order to comply with the objectives of the Common Agricultural Policy as set out in article 33 of the EC Treaty. In this way, PO's and/or TVPO's will remain in competition with one another, but can also deploy sufficient countervailing powers to offset wholesalers in the shrimp sector. Ultimately, the consumer will benefit from effective and actual competition between the various links constituting the shrimp production chain. Whether or not the TVPO that is envisaged by the PO Dutch Fishery Union, actually disposes of a dominant position, is left undecided in the informal opinion. A TVPO may only implement measures with an effect on prices and the amount of shrimps brought to land, if these measures remain within the strict normative framework of legislation on Common Agricultural Policy. In this regard, the informal opinion refers back to a previous NMa assessment of practices among producer organisations (and others), relating to agreements on fishing quotas, for example.[17] The informal opinion of the NMa stressed that a situation of structural overcapacity in the shrimp fishery industry may lead to company failures, surpluses and a very high fishing intensity, bearing ecological consequences of various kinds. In order to remove the structural overcapacity of the market at present, a clearance operation might prove worthwhile.

In its informal opinion, the NMa pointed out that – in exceptional circumstances – it is possible to set up a crisis cartel in order to revitalise the sector and restore economic soundness.

The NMa underlined that it attaches great importance to compliance-programmes set up by undertakings and PO's in the shrimp sector. These may increase awareness and stimulate compliance with current competition legislation. Various important players in the shrimp sector had developed a compliance programme by the end of 2005 or were in the process of doing so.

### *4.2.3 Compliance programme for business association of pharmacology*

On the basis of market signals, the NMa started an investigation into possible anti-competitive behaviour of the Royal Dutch Society for the Advancement of Pharmacology (KNMP) and its members. In mid 2006, the investigation was dropped after KNMP had promised to instigate a compliance programme. The compliance programme, in short, comprised a set of measures and procedures necessary to safeguarding compliance

with the Competition Act. The KNMP appointed a compliance officer, who is responsible for investigating, terminating and preventing anti-competitive practices.

### *4.2.4 Self-regulation in the liberal professions sector*

The liberal professions are in a state of development, ever more so in the last few years. This calls for regular critical evaluations of regulation in the liberal professions, as provided by law and set out in rules drawn up by professional associations themselves. In 2004, the NMa embarked on an analysis of professional self-regulation and codes of practice among architects, auditors, the legal profession and the notary profession. In these analyses, the central question was whether professional self-regulation and codes of conduct are necessary and proportional to the sound exercise of these professions. Restrictions to

[17] This is expounded in the sanctions decision of 14 January 2003 and the decision on objection of 28 December 2004 relating to case 2269.

competition among the abovementioned professional groups may be necessary to guarantee specific public interests with regard to services provided. However, it is important that professional associations should always bear in mind the competitive impact of rules and regulation, since the liberal professions have an important economic role, that is essential to other sectors of the economy as well. Improving competition within these professional groups may have a positive effect on economic performance in other sectors.

Architects

Within the framework of its 2006 analysis, the NMa conducted meetings with the professional associations concerned: the Royal Institute of Dutch Architects (BNA) and the Dutch Professional Organisation of Urban Designers and Planners (BNSP). These meetings resulted in a number of changes to self-regulation. Codes of conduct should not hinder or stop clients from switching to another architect. The NMa expects these alterations to promote the level of competition among architects and provide a wider range of choice to clients when selecting an architect. This may improve the quality of architectural services provided. NMa analysis of self-regulation among architects has now come to an end.

Notary profession

The NMa conducted a series of meetings with the professional association concerned: the Royal Society for the Notary Profession (KNB). By subsequently issuing a consultation document on 30 March 2006, the NMa invited the opinion of a wide range of parties involved in the market for notary services, including private and business users. They were queried on the issue whether current forms of self-regulation were considered to be necessary and proportional to the sound exercise of the notary profession. These included the prohibition on awarding provision and specific limitations regarding the use of intermediaries and the outsourcing of services. The consultation document was not sent out until the government had officially reacted to the report issued by the Committee on the Evaluation of the Notary Act. The consultation round was officially closed by means of a round table meeting on 4 December 2006, in which various respondees and a number of interested parties participated. A final report of the NMa is expected in 2007.

Legal profession

Likewise, the NMa conducted a series of meetings with the professional association the Netherlands Bar Association (NOvA). Following this, the NMa invited the opinion of a wide range of interested parties, including private and business users of legal services, who were asked to give their opinion by responding to a consultation document. The question under consideration was whether current forms of self-regulation were considered to be necessary and proportional to the sound exercise of the legal profession and the protection of customers. More specifically, rules prohibiting particular collaborative associations and the direct approach of potential clients were the subject of consultation. The consultation document was not sent out until the government had officially reacted to the report issued by the Committee on the Legal Profession. After taking note of the reactions to the consultation document, the NMa will in the second half of 2007 convene a round table meeting inviting respondees and interested parties. Subsequently, the NMa will draw up its final report on self-regulation among legal professionals.

Auditors

In 2006 the NMa conducted a series of meetings with the professional associations the Royal Dutch Institute for Registered Auditors (NIVRA) and the Dutch Association for Auditors and Administrative Advisors (NOvAA). Almost simultaneously, various legislative processes were completed. Recently, the Directive 2006/43/EC, the Act on the Enforcement of Auditors Organisations (Wta) and the Decision on the Enforcement of Auditors Organisations (Bta). On the basis of this regulation, NIVRA and NOvAA

have drawn up many new directives and supplementary regulation, while removing regulation that had now become obsolete. The NMa commented on these directives and supplementary regulation from the perspective of competition. At the end of 2006, some new directives and supplementary regulation had not yet been implemented. The process will be completed in the second half of 2007.

## 5. Assessment

Prior to the entry into force of the Dutch Competition Act, the Netherlands used to be a so-called cartel paradise. Historically, guilds were commonly present in every sector. Cartels used to be allowed and common practice. In 1996, the European Court of Justice ruled that the Dutch trade association of the building sector infringed European competition law.[18] In 1998, the Dutch competition law entered into force and the NMa started investigating cartels.

At the beginning of its existence, the infringements regularly involved business associations. The NMa strengthened its advisory role through issuing advice to business associations. The NMa continued to receive quite a lot of complaints and requests concerning business associations. Especially, the request for more (concrete) examples from the Dutch Association of SMEs, made the NMa publish a better and improved version of the Guidelines on Cooperation between Undertakings, which clearly stated which practices were and were not allowed in competition law.

The guidelines proved to be useful for business associations as well as the NMa, since the amount of complaints, signals and requests concerning business associations seemed to have decreased since then.

This is a positive development, since, after all, self-assessment by undertakings is crucial. Alternative enforcement methods through compliance programmes and self-regulation have increased. Moreover, following case law, it has become harder and harder for the NMa to prove an infringement of competition law, since context examination is required.

## 6. Conclusions

The legal framework consists of hard law as well as soft law. Hard law concerns legislation and soft law the Guidelines on Cooperation of Undertakings. The cartel prohibition, the bagatelle provision, the European block exemptions and the generic exemptions are set out.

The Dutch Association of SMEs requested more concrete examples of what is allowed and what is prohibited under competition law. This request mainly concerned price recommendations of business associations, calculation models, information exchange and also recognition schemes. Therefore, the NMa published an updated version of the Guidelines on Cooperation between Undertakings in 2005 in which case law is laid down and illustrative examples are given.

The forms of cooperation contained in the Guidelines are strictly formulated. These strict criteria are specified by case law where all the specific circumstances of the case will be taken into account. The Guidelines contain a strict formulation for reasons of clarity, since it is not possible to take the context of the case into account and in order to prevent business associations being active in an area where competition is likely to be restricted.

Following European case law, there is a clearly discernible trend in national case law towards a greater emphasis by the courts on the economic effects of prohibited practices. In the absence of any

[18] Decision of the European Court of Justice of 25 March 1996, *SPO vs Commission*, C-137/95-P, Jur. 1996, I-1611.

concrete (proven) facts, the court does not readily accept that certain practices or agreements are anti-competitive by object.

The classic enforcement method at hand for the NMa is the imposing of fines or a periodic penalty payments under administrative law through a sanction decision. Nowadays, it has become more and more common to close an investigation or a complaint by means of an alternative instrument. In this paragraph, the NMa's policy towards alternative enforcement is set out, followed by illustrative examples of informal opinions, compliance programmes and self-regulation.

# NORWAY

## 1. Introduction

A trade organisation is generally an organisation founded and funded by corporations that operate in a specific industry. The purpose of the trade organisation can be defined through both its external and internal activities. External activities will often be to promote the industry through public relations activities, lobbying and the preparation and publishing of industry studies.

The main internal activities will involve different forms for collaboration between companies, for instance standardisation work. Associations may also offer other services, such as producing conferences, networking or offering classes or educational materials to its members. Typically, trade associations are non-profit organisations governed by bylaws and directed by officers who are also members.

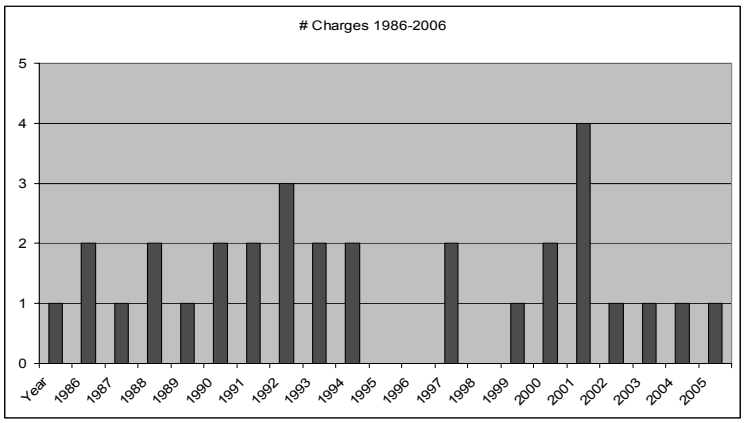
Undoubtedly, trade associations play an important role in modern economies. And in most instances, trade associations serve legitimate purposes. On the other hand, trade associations offer opportunities for repeated contacts between direct competitors, and consequently can serve as a forum that restricts competition.

This contribution from the Norwegian Competition Authority (NCA) will focus mainly on our experience with trade organisations organising or facilitating collusion, but we will also present some experience and considerations related to information and tacit collusion issues.

## 2. Cartels and trade associations in Norway

In the period from 1980 to 2006, 31 cartel cases were submitted from the Norwegian Competition Authority to *Økokrim* - The Norwegian National Authority for Investigation and Prosecution of Economic and Environmental Crime.

**Number of cartel cases submitted from the NCA for prosecution by year**



In 13 of the cases, the illegal cooperation occurred under the cover of, or involved some form of trade organisation. The table below gives some key information regarding the cartels where a trade organisation has been directly or indirectly involved.

**Table 1. Cartel cases involving trade organisations submitted for prosecution by the NCA.**

| Type of trade | Period active | Case sent from NCA[1] | Type of cooperation | Trade organisation directly involved | Members of cartel | Members of trade organisat-ion |
|---|---|---|---|---|---|---|
| Wallboard | 1984-88 | 1989 | Prices and rebates | Yes, organising | 4 | 4 |
| Steel wholesale | 1983-88 | 1986 | Prices and rebates, transport cost | Yes, organising | 14 | 14 |
| Regional glaziers | 1990 | 1991 | Bid rigging with agreed prices on window glass and prices per hour | Yes, organising | 8 | No information |
| Producers of roofing felt | 1983-86 | 1987 | Prices and rebates | Partly. TA organising cooperation with Finnish producers | 2 | 2 |
| Pipe wholesalers | 1985-87 | 1987 | Gross prices and rebates | Yes, facilitating | 15 | No information |
| Corrugated paper producers | 1983-90 | 1991 | Calculation model | Yes, organising | 4 | 4 |
| Battery producers | 1985-92 | 1992 | Prices, rebates, transport costs | Yes, facilitating | 2 | 4 |
| Regional goldsmiths | 1992-95 | 1995 | Recommended prices, calculation model | Yes, organising | 47 | 47 |
| Regional Crafts association | 1993-94 | 1994 | Recommended minimum prices per hour | Yes, organising | Only crafts association charged | No information |
| Impresario association | 1989-2000 | 2000 | Ethical rules disallowing members to go under recommended prices | Yes, organising | Only association charged | >50 |
| Local goldsmiths | 1992-95 | 1995 | Calculation model and agreement to use recommended prices | No, organising | 8 | 11 |

[1] Before the NCA was established, this was done by the Price Directorate.

| | | | | | | |
|---|---|---|---|---|---|---|
| Millers | 2001-02 | 2002 | Price-cooperation | Yes (partly), organising | 2 | 2 |
| Electronic equipment wholesalers | 1990-2000 | 2001 | Gross prices and rebates i.a. | Yes (partly), organising | 5 | 5 |

The table illustrates a couple of interesting points, in addition to the observation that trade associations are involved in almost half of the cases the NCA has sent for prosecution (13 of 31). In 6 of the cases, all of the members of the association were involved. We can also note that in most of the cases we have information on, the association had relatively few members. Furthermore, in all but one of the cases the trade association and its management have been directly involved in the illegal activities.

In the table we have also tried to distinguish, based on the limited information available, between the cases were the trade association only has facilitated collusion and the cases were the trade organisation has organised naked restrictions. Some examples where information is available will be presented in the following.

## 3. Examples of trade organisations organising naked restrictions

### *3.1 Steel wholesale*

Frequent meeting in the steel association "marketing committee", which had the determination of list prices on steel as its main activity.

### *3.2 Roof felt*

Frequent direct contact meetings between representatives from the two producers (90% market share) agreeing on prices and rebates. Roof felt association directly involved in price cooperation with Finnish producers.

### *3.3 Corrugated paper*

The Norwegian corrugated paper producers consisted of the four charged producers. The association and its member companies were all charged for agreeing on a common calculation model. The board of the association determined absolute or relative price changes. The "marketing committee" determined the maximum price increases the market conditions would allow. The "economic committee" determined how the price increases should be managed technically.

### *3.4 Crafts associations (goldsmiths, crafts, impresario, glaziers)*

These are all cases where the association has encouraged members to follow list prices or not price below recommended minimum prices.

### *3.5 Electronic equipment wholesalers (case not closed)*

Cooperation on prices and rebates, partly through meetings at the electronic equipment wholesalers'association.

## 4. Examples of trade organisations facilitating collusion

### *4.1 Pipe wholesale*

31 persons, 15 companies and the pipe wholesalers association charged for illegal price cooperation. "Club meetings" were held in connection with the official association meetings on issues that the involved companies did not want on the official agenda. The purpose of these "club meetings" was mainly to organise illegal price cooperation.

### *4.2 Battery producers*

The cooperation involved two of four producers in the association. The two producers had frequent meetings where they agreed on prices and rebates for different groups of customers. The cooperation took place in the period 1985 to 1992. Between 1985 and 1987, the meetings took place in the trade association, which at that time was dissolved. Representatives from the two companies also met at a meeting organised by the Scandinavian battery producers' trade association, where the competition authority assumed that illegal price cooperation were agreed between the two.

## 5. Examples of members using trade organisations as cover

It is difficult to find cases where it can be concluded that the only purpose of the trade organisation was to cover unlawful practices. Potential candidates are obviously cases where the trade association consists of very few members and these have all or most of the market for the product(s) in question.

### *5.1 Millers' association*

Only two producers were members of the association. Furthermore, they were the only two producers of flour for human consummation in Norway. The parties agreed on price increases that allegedly could be attributed to "changed framework conditions". The cooperation partly took place under the cover of the trade association.

## 6. Information

Trade organisations serve many purposes for the members, among them collection, compilation and submission/exchange of information. The compiled information can be used e.g. to inform the authorities and the general public on the trade's activities. Ideally, information can increase efficiency in the trade, but in many cases information can obviously also serve anti-competitive purposes.

Different categories of information can be:

- Prices
- Production
- Demand
- Costs

The information collected, compiled and made available will vary with the degree of detail and actuality. If historic information is collected, the trade association members can get access to the information immediately or only after some time has passed. Finally, the information can be made available only to members, to the authorities or even to the general public.

The probability that information provided by the trade organisation serves anti-competitive practices increases with the degree of detail and actuality.

### *6.1 Examples involving trade organisations*

None of the cases listed in the table above involve exchange of information per se, although the Norwegian Competition Authority has submitted charges in two cases involving hotels in two major Norwegian cities. In both cases, information on prices and capacity utilisation was collected and exchanged between hotels centrally located. Both cases were dismissed. However, the exchange of information stopped after the control by the NCA.

In 2005 the NCA published a report reviewing competition in free liberal professions and the role of their trade associations. A similar review was done in the early 90-ies, but with the new Norwegian competition law from 2004, it was deemed useful to do a new review, not the least to increase awareness among the professionals and their organisation in issues of competition and competition law. The work can also be considered in the light of a report by the Commission in 2004 on the competition in liberal professions.

The NCA-report considered 9 professions (architects, engineers, estate brokers, assessors, lawyers, doctors, dentists, veterinarians, pharmacists), all having a very strong standing within their professions (95% membership). Often the association has a strong direct or indirect role in the regulation of the supply of services, i.e. most associations have ethical rules that members are obliged to follow, and that includes rules of conduct relating to customers and competitors. The role of the association will be particularly strong where the means of sanctions also are strong, for instance where membership is considered a proof of quality and exclusion will harm business.

Rules of ethics and other forms of regulation concerning the exercise of the profession will normally be considered unproblematic from a competition perspective. However, trade associations' rules of self regulation can be considered unlawful in cases of coordinated behavior considered to hinder, restrict or distort competition. A trade association can for instance not give advice on e.g. minimum prices or ban a member for advertising his or her services in the geographic domain of other members.

The review discovered practices in breach of these principles, and some of these were followed up as separate cases. Some of the associations had questionable internal rules, for instance stating that:

- fees should be "reasonable"
- members shall not behave "disloyal" to other members

The report also concluded that the exchange of information, in particular recently updated information, on single members' prices and fees is highly questionable from a competition point of view. On the other hand, the report points out that providing customers with price information is positive from the same perspective.

### *6.2 Examples involving intermediary*

Although not a case of information compiled and provided by a trade organisation, the recent AC Nielsen case can nevertheless serve as a useful example.

The Competition Authority noticed in 2005 that the grocery chains possess detailed information on each other's prices and turnover, and that the information exchange orchestrated by ACNielsen is an

essential source for this. The conditions were revealed when the Authority produced a report on payments for shelf space in the grocery trade.

The Norwegian grocery market is distinguished by the fact that four nationwide chains account for more than 98 percent of turnover, and that it is difficult for new ones to enter the market. Through weekly reports from ACNielsen, Norwegian grocery chains have had access to fresh and detailed information on each others' prices. The reports show among other things which prices a given chain uses within a given geographic area. This type of data are normally not exchanged among competitors, and exchanging such information can be a breach of the Competition Act's prohibition of cooperation that limits competition.

The information exchange makes the market more transparent for the chains, so that they can react quickly to price changes by their competitors. This reduces the uncertainty in the market, and that contributes to suppressing competition among the grocery chains.

These conditions were important in the Competition Authority's assessment of how harmful the weekly price reports could be. Thus, the Norwegian Competition Authority considered intervening in the grocery chains' exchange of weekly price information through the marketing information company ACNielsen. The reason is that the information exchange can weaken competition among the chains.

The Competition Authority scrutinised the agreements between ACNielsen and the grocery chains, investigated what types of information were exchanged and how it was used by the grocery chains. The parties subsequently received a thorough explanation of the basis of which the weekly price reporting could be in violation of the Competition Act. After having been presented with the Authority's assessment, and a constructive dialog with ACNielsen, the parties in the spring 2007 chose to amend the practice voluntarily.

ACNielsen and the grocery chain groups agreed to significantly amend the reporting. It will no longer be possible to see the prices for individual chains, but only a common price for a group of competing chains. Thus, it will no longer be possible to follow weekly price changes by other competitors. Further, future reports will be made every four weeks, not every week as before. In addition, the number of products included will be greatly reduced, from 50-60 000 to around 2 000. Thus the information exchanged will be less detailed, less fresh, and as a consequence it will have a less harmful effect on competition.

## 7. Conclusions

As stated initially, trade associations play an important role in modern economies. However, as the evidence above also shows, in many cases, trade associations are also involved directly or indirectly in illegal collusion and price cooperation. This implies a trade off between the efficiency gains of trade associations and the risk of facilitating collusion. Moreover, the information collected and exchanged trough a trade organisation can also open up for tacit collusion. Exactly how big this risk is will depend on i.a. the market structure, the frequency and how updated the information exchanged is. Few and symmetric firms will enhance the risk for tacit collusion. The same applies with frequent, updated and disaggregated information.

The evidence presented here also illustrates that most of the cases of explicit collusion were characterised by trade associations having relatively few firms as members. However, even with relatively many members, the trade association could facilitate collusion through recommending prices and suggesting price calculation models.

The normative implications of this are that trade associations should:

- not present collected information to its members that is too disaggregated, too updated or too frequent;
- not operate with rules and regulations for member conduct that serves anticompetitive purposes
- never engage in issues that involve members' prices for services provided
- in cooperation with the competition authorities educate its members on competition law;
- encourage its members to introduce compliance measures and rules for how to interact with competitors at meetings organised by the trade organisation as well as at other occasions.

# POLAND

## 1. The role of trade associations in legitimately petitioning the government: examples of lobbying activities and legislative activities by trade associations

Trade unions can influence the legislative process in Poland mainly by:

- the lobbying activity,
- participation in social consultations.

Lobbying in Poland is governed by the act of 7 July 2005 on lobbying activities in the process of establishing law. It defines the principles of the openness of the lobbying activity in the process of establishing law, the principles of performing professional lobbying activities, the forms of the professional control of lobbying activities and the principles of maintaining a register of entities performing professional lobbying activities.

The act defines **the lobbying activity** as every activity performed with the use of legitimate methods aiming at exerting influence on the public authority bodies in the process of establishing law. However, **the professional lobbying activity** is a gainful activity performed for the benefit of third persons in order to consider the interests of those persons in the process of establishing law. It can be performed by an entrepreneur or a natural person who is not an entrepreneur (on the basis of a civil contract).

Each entity performing a professional lobbying activity is subject to an entry in the register maintained by a minister competent for administration matters. Without an entry in the register such activity may not be performed. Otherwise such entity is subject to a fine.

Information regarding the actions undertaken towards public authority bodies by entities performing the professional lobbying activity is published in the Public Information Bulletin, together with the result expected by those entities. Once a year managers of offices supporting the public authority bodies also provide information about the actions undertaken towards those bodies in the previous year by entities performing a professional lobbying activity.

The object of lobbying activities are first of all entities preparing legal acts and representatives of legislative bodies. Because a competition authority is responsible for preparing regulations of a rather horizontal character (regarding entrepreneurs in general and not individual industries), it is the subject of interest of persons dealing professionally with lobbying to a small degree. Therefore it is difficult to give an example of such activities.

The President of the Office of Competition and Consumer Protection is the central government administration body responsible for the competition and consumer protection matters and for this reason he takes part in the so called social consultations. The documents subject to such consultations are drafts of legal acts, policies, strategies and other directed documents adopted by the government. In case of each of those documents, if this is required for the protection of competition and consumers, the Presisent of the OCCP may issue his critical comments or proposals of changes. Such interventions have been undertaken many times.

Bodies that prepare drafts subject to consultations, if this is justified, are also obliged to conduct social consultations. Social consultations, understood as any forms of enquiring about opinions of interested parties in the process of establishing law, are one of the tools that increase the effectiveness, clarity and engagement of interested parties in the process of creating, implementing and abiding by the law regulations. They may be the source of information on possible effects of given regulations, as well as possibilities of making improvements in drafted regulations.

The aim is to conduct social consultations that are as wide as possible and performed at the earliest possible stage of legislative works, before preparing the draft of a prescriptive act. In practice most often this is taking place by publishing a document on the body's website and sending its copies to bodies representing the given type of entrepreneurial activity with a request for their opinion. In case of entrepreneurs these are trade associations, economic chambers or employer organizations, such as e.g. Business Centre Club.

It is also possible to indicate cases where trade associations, while lodging their reservations or comments to drafts of legal acts, also inform an competition authority about them with a request for support of their stand or drawing the attention to possible threats to competition or consumers.

## 2. Experiences with industry self-regulation, codes of conduct, standard setting and the promotion of industry-wide business practices.

Because in Poland the competition authority is responsible not only for the protection of competition, but also for the protection of consumers, the approach to codes of conduct and industry self-regulation differs, depending on the scope and subject matter of those regulations.

In the area of competition protection the President of the OCCP does not cooperate with entrepreneurs regarding their self-regulation. The competition authority has encountered requests directed by some trade associations to review codes of conduct, regulations concerning accepting new members and statutes implemented by them concerning their compliance with the antitrust act. However, these requests were dismissed, because the Polish law does not give the competition authority a possibility of issuing a binding interpretation or opinion.

Moreover, it should be mentioned that despite the fact that codes of conduct and self-regulations can have a positive effect on the standards of entrepreneurs' functioning in the market, very often they also hinder the development of competition.

In the past the President of the OCCP conducted antitrust proceedings and issued decisions prohibiting specific practices regarding self-regulation in some sectors of economy, in particular regarding liberal professions (professional services).

An excellent example is the decision (DDF-31/2002) issued on 20 May 2002 in a proceeding against the National Chamber of Notaries whose code of conduct listed "attracting clients with lower [than maximum] rates" as an instance of "glaringly unfair competition", subject to disciplinary sanctions. Compliance with the provisions was enforced by local associations, whose representatives inspected notarial offices around Poland, checking whether the rates offered do not amount to "unfair competition" as defined in the code of conduct. In effect it turned a system of maximum rates (set by the ministry of justice) into a system of prices fixed at the maximum level. Competition authority issued a decision declaring the contested provision to be a price fixing agreement. After conflicting court rulings, the provision was declared unfair and unlawful by the Supreme Court and removed by notaries from the code of conduct.

As far as the consumer protection is concerned, the approach to codes of conduct is a bit different. The President of the OCCP cooperates in this scope with entrepreneurs, giving opinions about drafts of codes of conduct sent to him. The suggestions given to entrepreneurs, however, are not binding and do not exclude a possibility of later intervention.

These differences in the approach result first of all from the fact that as far as the consumer protection is concerned, self-regulation is a more flexible and faster method than the provisions of law. Its function is particularly significant in case of new forms of communication, where a long-term legislative process is not able to meet the needs of ensuring the safety of legal transactions fast.

The actions in this area are also the contribution of the competition authority in promoting the Corporate Social Responsibility (CSR). The actions already undertaken by the Minister of Labour and Social Policy, the Minister of Economy, the Minister of Environment and the President of the OCCP in cooperation with the World Bank, non-governmental organizations and scientific institutions for the implementation of the CSR principles in Poland are aimed at developing the policy basis in this area, taking into account the Polish social and economic realities. An important element of this policy will be defining in the Polish realities the conditions of finding a company socially responsible. This can be proved, among others, by the level of effective use of energy sources, possessing and observing the code of conduct, programmes realized for the benefit of the local society, reliable information on labels, etc.

## 3. Examples of trade associations organising naked restrictions of competition and examples of trade associations facilitating collusion.

In the judicature of the President of the OCCP we can find examples of direct participation of trade associations in applying anti-competition practices, as well as examples of actions undertaken by those entities that facilitated actions forbidden by the act, or even made them possible.

While analysing the participation of trade associations in anti-competition practices from the perspective of the Polish judicature of the competition authority in the recent years, we can indicate the following three patterns:

1. practices being the initiative of an association, which played the role of an initiator and leader,

2. practices in which an association was only the executor of a strategy of associated entrepreneurs, and sometimes was established mainly for this reason,

3. practices which consisted in the participation of associations in broader agreements with other entrepreneurs and trade associations.

### *3.1 Pattern 1*

We deal with this pattern very often in markets of services rendered by the so called liberal professions. It also can be found in markets, where there is a larger number of entities with a limited market power. In those markets it is very difficult for entrepreneurs to make effective arrangements as part of an independent initiative of one or a few of entrepreneurs. In a situation where we deal with associations with an established position, resulting very often from historical or legal conditions, they undertake actions leading to the restriction of competition.

In the recent years the President of the OCCP has intervened in the actions of professional self-governments, among others of architects, notaries, veterinarians and pharmacists. In case of some actions the competition authority has conducted a number of proceedings. This resulted from the fact that in Poland professional self-governments often act independently on the local level, therefore a number of

proceedings were conducted at the same time regarding similar practices taking place in different parts of the country. Below examples of decisions regarding the mentioned markets have been described.

On 31 December 2004 the President of the OCCP issued a decision No. RKR – 47/2004 made after conducting an antitrust proceeding against the Małopolska Veterinary Chamber in Tarnów, which established minimum prices for veterinary services rendered in the territory of the Małopolskie voivodship. On 18 September 2002 this association passed a resolution in which it established the minimum prices for veterinarian services recommended to be used in their practice. During the proceeding it was found that this practice was no longer used. A fine was imposed on the Chamber.

Similar antitrust proceedings were conducted against: the Lubelska Veterinary Chamber in Lublin (decision No. RLU 10/04), the Świętokrzyska Veterinary Chamber in Kielce (decision No. RŁO 9/2004), the Śląska Veterinary Chamber in Katowice (decision No. RTK-67/2004), the Warsaw Veterinary Chamber in Warsaw (decision No. RWA-20/2005), the Lubuska Veterinary Chamber in Zielona Góra (decision No. RWR 52/2005), the Dolnośląska Veterinary Chamber in Wrocław (decision No. RWR 51/2005). In all those cases the activities of associations were found to be practices restricting competition and fines were imposed.

On 15 December 2005 the President issued a decision No. RPZ 36/2005 made after conducting an antitrust proceeding against the Wielkopolska District Pharmaceutical Chamber in Poznań, whose governing body - the Chamber's Council on 28 June 2005 passed a resolution „concerning unlawful advertisements of medical products", obliging members of the Chamber performing the functions of managers of public pharmacies „(…) to observe the regulations concerning advertisements of medical products and avoid unlawful practices", indicating in Article 1.b of the mentioned resolution that an unlawful practice is in particular: "offering medical products and diagnostic preparations from the list of basic medicines and from the list of medicines for some chronic diseases for a flat rate price, for a price lower than the established flat rate price", which is equal with indirect fixing of prices for those products. The result of the proceeding was finding the above resolution as an antitrust agreement and imposing a fine on the Wielkopolska District Pharmaceutical Chamber in Poznań.

On 18 September 2006 the President of the OCCP issued a decision No. DOK-106/06 made after conducting an antitrust proceeding against the Chamber of Architects in Warsaw, which directly established the conditions of selling the architectural designs of members of this Chamber in the national market of architectural services. The Chamber of Architects included in the Code of an Architect's Professional Conduct a clause prohibiting the member of this Chamber from taking part in tenders for the architectural designs in which the only criterion of the assessment of their offer is the price. The result of the conducted proceeding was the above mentioned decision of the President of the OCCP who decided that practice restricted competition and imposed a fine on the Chamber of Architects. The Chamber also crossed out the subject clause from the Code of an Architect's Professional Conduct.

### *3.2 Pattern 2*

The practises of this kind are most often encountered in markets where there is a relatively small number of entrepreneurs that can have an effective influence on the relevant market. The associations functioning in this kind of market structures are dominated by their most significant members that control its actions and impose the direction of the conducted policy. In this situation even if the anticompetitive actions are officially supported by the association, its role is rather instrumental.

In his judicative practice, the President of the OCCP also encountered associations whose one of the main aims (and sometimes probably the only one) was conducting or coordinating the anti-competitive activity.

It was mentioned above that this kind of situation is characteristic for relevant markets, where there is a small number of significant players. However, this does not mean that we always deal with big companies. Sometimes this type of pattern exists in the local market, restricted to a small area, and for that reason we deal there with small entities.

As an example here we can quote the decision No. RWA-8/2006 issued on 24 February 2006 after conducting an antitrust proceeding against the Association of Merchants „Gildia" in Warsaw, which concluded an illegal agreement restricting competition in the local market of organizing the trade and service activity covering the area of the Shopping Arcade at the Warszawa-Wileńska Shopping Centre and its direct surroundings, consisting in obliging the members of the Association to avoid conducting a competitive economic activity, by introducing a ban on selling goods or rendering services in the scope undertaken by any of the members of the Association at the Shopping Arcade in the above mentioned Shopping Centre. The „Gildia" Association made it impossible for its members to change the profile of the conducted economic activity. A resolution was adopted according to which members of the Association could change their activity only for one which is not conducted by any other member of the Association. In this way changing the profile of the conducted activity is possible only when the activity in this scope is not conducted by any of the members of the Association. This meant that in a situation when e.g. the activity conducted by the association member turned out to be nonprofitable, they could not change freely the profile of their activity. In the result of the conducted proceeding the Association finish the competition restricting practice.

### *3.3 Pattern 3*

The third of the mentioned patterns of associations' active participation in anti-competitive activities assumes cooperation of trade associations with other similar organizations or independent entrepreneurs. Here we can deal with specific market structures of technical character (e.g. associations of taxi cab drivers served by one taxi operator), which in normal conditions compete with each other. These agreements are concluded by trade associations, and not between entrepreneurs themselves on account of the number of associated entities, or like in the case of the mentioned taxi operators' services, for technical reasons.

The President of the OCCP conducted numerous antitrust proceedings in the taxi services market against associations of taxi drivers in various towns and cities, among others in Szczecin, Zielona Góra, Łódź, Poznań, Katowice, Tarnów, Rzeszów and Bydgoszcz, concerning: fixing the prices for taxi rides or establishing the same discounts. The proceedings ended with finding the practices to be restricting the competition, as well as imposing fines.

A special case of this behaviour pattern of trade associations is concluding agreements between local trade associations in order to popularize particular anticompetitive solutions in the territory of the country and ensure their greater durability thanks to that. (Entrepreneurs in a given local market are then less threatened by the entry to the market of potentially more competitive entities acting in other parts of the country).

An example of this type of agreement concluded between trade associations is the case settled by the decision of 7 June 2006 No. RKT-31/2006 after conducting antitrust proceedings against:

- The Association of Tax Advisers in Katowice,
- The Śląskie Association of Tax Advisers in Jastrzębie-Zdrój,
- The Association of Tax and Accounting Advisers in Wrocław,

- The Wielkopolskie Association of Tax Advisers in Poznań,
- The Association-Club of Tax Advisers in Warsaw,
- The Zachodniopomorskie Association of Tax Advisers in Szczecin,
- The Association of Financial Experts and Tax Advisers in Warsaw.

Above mentioned associations were accused of concluding an agreement restricting the competition in the national market of tax advisory services consisting in a direct or indirect fixing of prices by publishing price lists for tax advisory services in the „Tax Advisers Forum" magazine. It was proved that in the meetings of the Consultative Council of the „Tax Advisers Forum", whose members were representatives of the above mentioned associations, price lists used in tax advisers' offices were discussed, so there was an exchange of information regarding the prices used by individual tax advisers. The effect of those meetings was establishing the suggested price lists of tax advisory services and publishing them twice in this magazine. This practices was found to be restrictive of competition and ceasing it was ordered. Fines were also imposed on individual associations.

The practice of the Polish competition authority shows that trade associations may play an important role in anti-competitive agreements, therefore in many proceedings conducted by the President of the OCCP regarding the agreements the trade associations' role is also analysed. Often these organizations, despite the fact that they do not participate in a cartel, deal with its administration (they collect and process data) and provide logistic support – organize meetings, provide premises, etc.

Sometimes in this type of cases it is difficult to prove the participation of an association in an anti-competitive agreement along with its members, or even define its function explicitly. An example is the decision of 4 September 2007 No. RŁO 47/2007 made after conducting an antitrust proceeding against four passenger carriers in the route Pabianice – Łódź and Łódź – Pabianice, associated in the „Inter-Buss" Association. These entrepreneurs concluded an agreement restricting the competition in the local market of regular transport of passengers by bus on the route Łódź – Pabianice and Pabianice – Łódź, consisting in the direct fixing of prices of single adult tickets for the transport of passengers in the above mentioned route. As a result of the proceeding the President of the OCCP imposed fines on the above mentioned entrepreneurs.

In the case of the „Inter-Buss" Association no documents were found confirming direct participation of the Association. Moreover, it was found that the Association's statute does not include statements which would impose on its members a duty to establish or coordinate the price policy.

The case-law of the President of the OCCP includes also cases in which the role of associations was well defined and documented, but on account of their administrative and technical character and lack of decisive powers they were not treated as a participant of an agreement, and consequently, they were not punished.

An example is the decision of 29 May 2002 No. RBG 11/2002 made after conducting an antitrust proceeding against the owners of driving schools in Bydgoszcz and the surrounding towns, who concluded an agreement regarding fixing of uniform prices of driving lessons. Most of those entrepreneurs belonged to the Regional Association of Driving School Owners in Bydgoszcz, on whose meetings the uniform prices for training were established and declarations of abiding by them were signed. This was proved by the Association's documents. Both members of the Association, as well as owners of independent driving schools participated in the meetings. As a result of the proceeding fines were imposed on most participants of the unlawful agreement, however the Association was not punished.

## 4. Examples of members using trade association activities to cover unlawful collusion, without the knowledge of the trade association.

Using a trade association by its members for antitrust activities without their knowledge is rather difficult, in particular in organizations associating a small number of entities. In Poland a common practice is that the authorities of trade associations consist of people representing their individual members. In case when there is only a small number of companies in the market all of them are in some way represented in the association's authorities, so as to ensure their influence on its activity. In a situation where in a given industry there are many entrepreneurs in the market, the major entities or the representatives of individual groups with similar interests are represented in the authorities.

In larger associations a common practice is that an authority dealing with operational management in the association consists of professionals not connected directly with any of the associated entities – then they act as „the management board", „the office", etc. However, the association's control authorities (most often the supervisory board) consist of representatives of the members.

Therefore the situation described above creates conditions not very favourable for the members to use an association, without its knowledge, for activities infringing the competition law.

Such situation is most likely to occur in associations with a large number of members, and even then the association is used rather for auxiliary purposes, e.g. using official meetings for the exchange of confidential information or secret arrangements.

An example is the case of a yeast cartel, for which the President of the OCCP issued the decision on 14 March 2003 (No. DDF-13/03). The antitrust proceeding conducted by the President of the OCCP showed that six entrepreneurs infringed the antitrust act by concluding an agreement which resulted in restricting the competition in the market of baker's yeast by establishing directly the sale prices.

As part of the proceeding it was proved that all those entrepreneurs from 15 to 19 September 2001 increased the prices of their products, which was directly connected with the series of four meetings that they held in August and September 2001. One of the meetings mentioned in the decision took place during the meeting of the National Council of Yeast Industry associating the national yeast producers. The organization itself was never suspected of the participation in the cartel. Besides, it should be mentioned that the National Council of Yeast Industry, functioning since 1993, as an industry unit of a larger organization, the Scientific and Technical Association of Engineers and Technicians of the Food Industry, deals mainly with problems in the field of research and development.

Assuming that the yeast producers used the Council's meeting to exchange information essential to conclude the anticompetitive agreement, the organization itself probably did not participate in this practice.

## 5. Examples of pro-competitive vs. competition restrictive information exchanges among trade associations' members.

So far the President of the OCCP has not issued a decision finding that a practice consisting exclusively in the exchange of information between entrepreneurs via their association is an anti-competitive practice.

A detailed analysis of the data given by entrepreneurs to associations and their distribution among the members was an element of numerous explanatory proceedings and market research. The President of the OCCP analysed the detail of the data, their sensitivity to the competitive position of entrepreneurs, as well as the level of aggregation and processing that characterizes the results of analyses published or distributed among the members of an association.

The patterns of information exchange in some analysed industries, e.g. in the musical recordings production and distribution market or in the banking services market raised doubts, however, so far none of them has become a basis to start antitrust proceedings. The most common reason of such approach was a small possible influence of information exchanges on the state of competition on account of the heterogeneity of the products and services offered in the market.

The pro-competitive effect of information exchanges among entrepreneurs very rarely is the subject of interest of the competition authority. This kind of conclusions can only be reached during research and analyses of markets. One of the examples of this type of activities is the exchange of information within the Polish Association of Public Opinion and Marketing Research Firms (OFBOR), which collects data in order to prepare an annual national ranking of research companies in individual categories. Publishing official rankings, in a situation of the existence of relatively fragmented market stimulates competition. It is also worth adding that OFBOR prepares standards binding for the industry and awards certificates of quality, however, in order to avoid, among others accusations regarding illegal exchange of information this research is commissioned to entities from outside the business.

## 6. Examples of trade association antitrust compliance procedures

The most evident influence on the functioning of associations probably had decisions issued by the President of the OCCP regarding practices in which trade associations participated. Those, to which the decisions were addressed, of course had to stop specific actions. Those decisions, however, had very often an influence on the behaviour of other similar entities – also forcing them to renounce a specific kind of behaviours, as well as preventing copying them. This had a special meaning in a situation of associations acting in the regional level.

We should also mention cases of adjusting their actions to the requirements of the antitrust law, which were revealed during the market research or other actions conducted in relation to a given entrepreneur. During the lime market research conducted at present the President of the Office received e.g. information about the mechanism of information exchange that was modified after the trade association received negative legal opinions. The interpretations of the antitrust act and judicature made by legal companies rendering services for the producers of lime indicated that the information exchange mechanism may infringe the competition act. The system was modified, among others the scope of information given was changed.

## 7. Membership rules and restrictions on access

In the case-law of the President of the OCCP there are no decisions regarding restrictions on access to trade associations. Besides, in most cases the membership in a trade organization, or lack of it, does not determine the competitiveness of entrepreneurs and their position in the market, it also does not influence the existence of barriers to entry.

The activities of a trade association may have influence on the market entry of new competitors in a situation when it has a legal possibility of controlling new market entries or has access to some important resource from the perspective of conducting a business activity.

In the former case one usually deal with organizations in which the membership is obligatory and which were given by the legislator an authority to establish and control requirements that must be met by a new entrepreneur before entering the market. Excellent examples of such situation are all kinds of professional corporations: barristers, legal advisers, notaries, pharmacists, architects, etc.

As it has been described above, the competition authority has intervened in the activity of those associations, however, the interventions did not regard the barriers to market entry. Such barriers most

often result directly from legal regulations, therefore the President of the OCCP must limit his activity only to criticizing the existing solutions and supporting initiatives aiming at changing them. One of the signs of this was engaging the competition authority in reforming the access to legal professions that took place in Poland in 2005 (publishing of the report on competition in the legal services market, participation in the public debate, etc.)

The latter case describes enterprises that for historical reasons have or manage resources essential for effective competing in the market – this can be jointly developed know-how e.g. the certification system or access to information – jointly created database e.g. the register of bad debtors. In this kind of situations the discriminating access to an association can have a character of an anticompetitive practice. As it has been mentioned, despite the fact that the President of the OCCP analyses this type of behaviours, so far there has not been an antitrust intervention in such a case.

## 8. Sanctions that have been applied to trade associations

The act on the protection of competition and consumers of 16 February 2007 does not differentiate the amount or method of applying sanctions on the entrepreneurs and trade associations. They are treated equally.

According to the act the President of the Office of Competition and Consumer Protection can impose on a trade association a fine in the amount up to 10% of the turnover in the financial year preceding the year of imposing the fine, for practices that restrict competition. In a situation when an association did not have any turnover in the year preceding the imposing of the fine, then its amount can equal max. two hundred average monthly wages. It is also possible to impose an additional fine in the amount constituting the equivalent of up to 50,000,000 euro, if an association even unintentionally failed to provide information demanded by the President of the OCCP, provided false or misleading information, or it did not cooperate during the inspection conducted as part of the antitrust proceeding. The act also regulates a situation when the Office refrains from imposing a fine, if the association, which is a member of the unlawful agreement, meets all of the conditions mentioned below:

- is the first member of the agreement to:
  - provide information to the President of the OCCP about the existence of the unlawful agreement sufficient to initiate an antitrust proceeding, or
  - present to the President of the OCCP, at its own initiative, evidence enabling issuing a decision finding a given practice to restrict the competition;
- cooperates with the President of the OCCP during the proceeding in the full extent, providing immediately any evidence that they have, or that they may have, and providing immediately any information connected with the case, on their own initiative or at the request of the President of the OCCP;
- has stopped taking part in the agreement not later than on the day of informing the President of the OCCP about the existence of the agreement or presenting the evidence;
- was not the initiator of concluding the agreement and did not encourage other entrepreneurs or associations to participate in the agreement.

The President of the OCCP is obliged to lower the fine for a competition restrictive practice, if the association does not meet the above mentioned conditions, but at its own initiative presents to the President

of the OCCP evidence that will contribute in a significant way to issuing a decision finding a practice to be unlawful and has stopped participating in an agreement not later than at the moment of presenting such evidence. In such situation the maximum fine that can be imposed equals 5% of the income received in the financial year preceding the year of imposing the fine. If a member of an unlawful agreement is the second to do that, then the President cannot impose a fine larger than 7% of the income received in the financial year preceding the year of imposing the fine. In case when subsequent members meet the above mentioned conditions, the highest fine that can be imposed equals 8% of the income received in the financial year preceding the year of imposing the fine.

If associations finding themselves in situations described in the paragraph above did not any turnover, then the amount of the fine is calculated as a multitude of the average wage - respectively: up to fifty average wages, up to seventy average wages and up to eighty average wages.

The fines imposed by the President of the OCCP can function as a preventive measure, a repressive measure or both. While imposing a fine this body must take into consideration whether imposing it is necessary or appropriate in given circumstances, and if yes, in what amount the fine will fulfil the assumed functions. While establishing the amount of the fine, the body should take into consideration in particular the time, degree and circumstances of infringing the provisions of the act on competition and consumer protection, as well as previous infringements of the provisions of this act.

Examples of fines imposed on entrepreneurs in cases described earlier:

- The Chamber of Architects, fine 215,000 PLN (approx. 53,750 euro), which constitutes approx. 40% of the value of the maximum fine;

- The National Chamber of Notaries, fine 36,000 PLN (approx. 9 000 euro), which constitutes approx. 8.6% of the maximum fine;

- The Wielkopolska District Pharmaceutical Chamber, fine 25,000 PLN (approx. 6,250 euro), which constitutes approx. 30% of the maximum fine;

- The Association of Tax Advisers in Katowice, the Śląskie Association of Tax Advisers, the Association of Tax and Accounting Advisers, the Wielkopolskie Association of Tax Advisers, the Association - Club of Tax Advisers, the Zachodniopomorskie Association of Tax Advisers, the Association of Financial Experts and Tax Advisers, fines up to 3,380 PLN (approx. 845 euro) – always 25% of the maximum fine;

- The Małopolska Veterinary Chamber, the Lubelska Veterinary Chamber, fine 6,236 PLN, the Świętokrzyska Veterinary Chamber, the Śląska Veterinary Chamber, the Warsaw Veterinary Chamber, the Lubuska Veterinary Chamber, the Dolnośląska Veterinary Chamber, fines from 2,500 PLN (approx. 625 euro) to 14,000 PLN (approx. 3,500 euro), which constituted from 15% to 33% of the maximum fine.

# SWITZERLAND

## 1. Introduction

Switzerland has a large number of associations that traditionally play an important role at both the national and cantonal levels. The direct democracy system, which provides an incentive for interest groups to become active, as well as federalism, which implies that many activities are carried out at the local level, contribute to this situation. The fact that the legislative process enables associations to intervene at several stages also adds to their influence. Trade and industry associations, business organisations, and cantonal and international chambers of commerce thus actively take part in the economic policy-making process in Switzerland.

The importance of associations has positive implications for competition, in particular since economic associations usually lobby for the creation of a competitive business environment. However, it also entails certain risks, in particular if associations publish rules or recommendations that potentially hamper competition.

## 2. The Role of Trade and Business Associations in Switzerland

### *2.1 Trade/Business Associations and the legislative process*

In Switzerland, trade and business associations are very active in the legislative process, thanks to the public consultation system, which is anchored in the Federal Constitution (Article 147). According to the Federal Law on the Consultation Procedure that implements the principles stated in the Constitution, consultation must take place at the preparatory stage for the modifications of the Constitution, federal laws, important international agreements as well as other important projects. Consultations aim to facilitate consensus building in the legislative process, and they often involve a large number of organisations. These broad consultations imply that the different interests at stake can be taken into account at an early stage of the legislative process already. In addition to cantons and political parties, national economic umbrella associations (such as economiesuisse, the largest umbrella organisation representing the Swiss economy, or the Swiss Federation of Trade Unions) are systematically consulted. Other associations are consulted on a case-by-case basis, if they are concerned by the project. Consultations are also carried out at the cantonal level.

For example, in 2001, when the Federal Act on Cartels and Other Restrictions to Competition (Cartel Act) was revised, many associations were consulted: in total, 66 large economic associations and other relevant organisations provided responses. As a result, certain proposals were withdrawn from the project.

In addition to consultations, direct democracy instruments such as initiatives for the amendment of the constitution and referendums (on constitutional changes, federal laws, or international agreements) are available, which provide associations with opportunities to influence the public debate and the legislative decision-making process. Many trade and business associations have the organisational capacity to either launch a referendum or an initiative, or to engage in favour or against a proposition submitted by another interest group.

Many trade and business associations in Switzerland also engage in lobbying activities, at both national and cantonal levels, outside the formal legislative process. They publish communiqués, position papers, or studies and take part in meetings or expert groups. They are often represented in the special extra-parliamentary committees that prepare legislative projects.

Competition issues are often addressed in advocacy activities. Large economic associations are particularly active on competition issues, and they often hold positions of principle in favour of competition. Some of them even have created a committee dedicated to competition. Sectoral associations are also frequently involved in debates related to competition issues, however, their position tends to be more pragmatic, depending on the issue at stake and on its practical impact on the association's members.

### *2.2 Trade/Business Associations and Self-Regulation*

In Switzerland, self-regulation is important in the services sector (banking, insurance), in which it often sets standards of conduct, as well as in certain industries (watch industry, road and transport, electrical engineering, etc.), in which it mainly consists of technical standards. The Swiss Association of Engineers and Architects provides an example of extensive activity in the field of self-regulation. The Association elaborated standards and rules in the construction sector, notably technical standards, regulations on collaboration between the different players involved in a construction work, and on tenders for architects and engineers.

Even though they are in practice very useful, standards and rules published by associations also imply risks for competition and market access. If they affect or suppress competition, for instance by facilitating price collusion between the association members, these rules may be considered as unlawful agreements under the Cartel Act (see below).

## 3. Associations under the Cartel Act

Associations may be considered as "enterprises" under the Cartel Act, provided that they produce goods or supply services[1]. An agreement between two or more associations may thus be prohibited under Art. 5 of the Cartel Act (for instance if several associations agree on the price of their services), and an association abusing its dominant position may fall under Art. 7 of the Cartel Act. In addition, a decision taken or an activity undertaken by an association may constitute an unlawful agreement between the members of the association. In cases where their practices are restraining competition, associations are parties in the procedure[2].

### *3.1 Unlawful agreements*

Article 5 of the Cartel Act prohibits agreements that significantly affect competition on a certain market if they are not justified by economic efficiency reasons, as well as agreements that lead to the suppression of an efficient competition.

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1 See Message of the Federal Council, FF 1995 I 472 (534).

2 In addition, associations may be entitled to participate as third parties in an investigation: Under Article 43 of the Cartel Act, professional or economic associations that may, according to their articles of associations, defend the economic interests of their members can participate in an investigation, provided that the members of the association or of one of its branches are entitled to take part in the investigation. Thanks to that provision, the interests of small enterprises that are affected by a restraint of competition and that could not bear the costs of a procedure on their own can nevertheless be represented.

In this regard, the associations' practices most frequently addressed by the Competition commission (Comco) are price recommendations. Price recommendations issued by associations are considered as agreements between members of the association (i.e. horizontal agreements between competitors) and fall under Article 5 of the Cartel Act, which includes an *a priori* presumption that agreements directly or indirectly setting prices are unlawful. Comco regularly examines price recommendations and opens preliminary investigations when needed. Price recommendations by associations are common practices in the services sector (e.g. legal or health services, accident insurance, driving lessons, travel agencies, etc.) and in the goods sector (e.g. books).

In 1998, Comco published a notice on "calculation tables"[3], acknowledging that these tables may be useful for economic efficiency under certain conditions enumerated in the notice, and provided that they are not linked to agreements on prices. In order to enquire whether their recommendations or models are lawful, associations may notify them to Comco under Article 49a of the Cartel Act.

### *3.2 Dominance*

An association may be considered as an enterprise in a dominant position according to Article 2 of the Cartel Act. In that case, under Article 7 of the Act, certain practices are unlawful if the enterprise abuses its dominant position and thus prevents other enterprises from entering or competing in the market or penalizes trading partners. For instance, in a preliminary investigation, the Swiss Football Association was considered having a dominant position in the market of organisation of national football games[4]. Two or more associations may also be collectively in a dominant position.

If an association is in a dominant position, and if membership to the association is of utmost importance (i.e. if the association provides "essential facilities"), refusing to admit someone as a member of the association (Article 7 al. 2 lit. a) or imposing excessive membership fees (Article 7 al. 2 lit. c) without any objective justification may constitute an abuse of dominant position contrary to the Cartel Act. This may for instance be the case when a sports association refuses to admit an athlete without objective reasons, if membership is necessary in order to take part in major tournaments5, or when a professional association refuses to admit someone as a member without objective reasons, if membership is necessary to practice that profession.

## 4. Illustrating cases

The Comco has dealt with many cases involving Trade and Business associations. Until recently, the vast majority of the associations were not aware of the potential anticompetitive effects of their practices. The most common practices were price recommendations addressed by associations to their members. With the introduction of fines for violations of the Cartel Act, many associations notified their price recommendation to the competition Authority. The Comco has intervened frequently in order that these associations avoid emitting price recommendations. The following cases illustrate several different issues related to associations. As the possibility to impose fines was only recently introduced, the Comco has so far not imposed any sanction on an association.

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3 According to the Notice, "calculation tables" are general indications and standardised calculation bases that allow users to calculate or to evaluate the costs of their products or services, in order to set or evaluate their selling prices.

4 See RPW 1998/4, pp. 567-573.

5 See P. Philipp (2005), *Rechtliche Schranken der Vereinsautonomie und der Vertragsfreiheit im Einzelsport*, Zurich (Schulthess), p. 66.

### *4.1 Examples of trade associations organising naked restrictions of competition*

The Comco has dealt throughout many years with the case of the book market in the Swiss German part of Switzerland. The book market was to everybody's knowledge price regulated by the editors and booksellers association. This system called the "Sammelrevers" implicated all the levels of the book market, from editors to booksellers, passing through wholesalers, and concerned 90% of all the books written in German in Switzerland. In 1999, the Comco stated the illegality of the single price for books fixed by the editors and booksellers association[6]. On appeal, the Federal Supreme Court referred the matter back to the Comco for it to examine whether the restriction affecting competition caused by the standard book price could be justified on grounds of economic efficiency. The Comco examined at the time whether it led to an increase in choice, to a greater variety of products, or to an improvement of sales due to an increase in the number of points of sale and better advice. It confirmed that the positive effects claimed by the association could not be proven and could not justify the restraint of competition, which must be considered unlawful in this case. The question of knowing whether a system of this type is desirable on the grounds of cultural policy cannot be considered by Comco, by virtue of the Cartel Act.

### *4.2 Examples of pro-competitive vs. competition restrictive information exchanges among trade associations' members*

In the construction market sector, the Secretariat of the Competition commission (Secretariat), received in 2000 an indication from a cantonal construction department, that the regulations on tenders of the Swiss Builders Association, could infringe the Cartel Act, because the association regulation could facilitate bid-rigging agreements among the association's members through an information and reporting system[7].

Three provisions contained in the association's regulation were under scrutiny: the obligation for the association members to notify their tenders to the association (and the existence of sanctions in case of non compliance), the association's obligation to inform all tendering companies about the participating enterprises, and the possibility to organise preliminary meetings before the tender process. The Secretariat proposed to the Swiss Builders Association an adjustment of their competition regulation, either in removing the problematic provisions or in changing them.

The Swiss Builders Association removed the obligation to notify tenders as well as the sanctions in case of non-compliance. However, the association kept the notifying system concerning the participation in a tender. The possibility to organise preliminary meetings was not removed but at least, following Comco's suggestion, the association has to inform the building owner about the taking place of this kind of meetings and give him the possibility to attend these meetings. These preliminary meetings aim at clarifying, in particular, technical norms, guarantees, construction deadlines. Thus, the association could maintain information exchanges that could have pro-competitive aspects for the association's members, which are usually SME. The information and presence of the building owner at the meetings should discourage enterprises to misuse these meetings in entering in unlawful big-rigging agreements.

### *4.3 Examples of tariffs set by associations*

The Comco has dealt with numerous cases involving associations' tariffs in the services sector. Members who did not follow the association's tariffs could be excluded from the association. Hereafter three cases are presented.

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6 Sammelrevers 1993 für den Verkauf preisgebundener Verlagserzeugnisse in der Schweiz, DPC 2005/2, p. 269 et seq.

7 Wettbewerbsreglement des Schweizerischen Baumeisterverbandes, DPC 2003/4, p. 726 et seq.

In 1998, the Secretariat of the Competition commission opened a preliminary investigation in order to establish whether the advised prices in the driving school market (motorcycle, auto and truck lessons) in the French-speaking part of Switzerland and in the Canton of Bern, could constitute an illicit agreement. Indications of illicit competition restraints were blatant in the Canton of Fribourg. In 1999, by reason of these indications, the Secretariat opened an investigation concerning the tariff recommendations of the association of driving schools in the Canton of Fribourg (AFEC)[8]. AFEC's main task is to fight unfair competition and to enact regulations and standards mandatory for their members. AFEC's members commit themselves to respect the tariffs and conditions established by the association, for example by posting them in their buildings or by submitting them to each new candidate. AFEC openly disapproves of driving instructors that do not respect the tariffs and regularly files complaints in general assemblies. In 1996, AFEC even refused the admission of a new member, because he offered lessons at a lower price than recommended by AFEC. The tariff recommendations, which established a horizontal agreement between competitors, aim to restrict price competition. Moreover, they also involve a competition restraint insofar as they make it possible for all the instructors to foresee with a reasonable degree of certainty the pricing policy of their competitors. The Secretariat came to the conclusion that the tariffs recommended by AFEC for motorcycle lessons, remove effective competition and therefore are illicit. Furthermore, the Secretariat concluded that the tariffs for traffic theory, auto- and truck-driving lessons significantly affect competition on the referred markets without being justified on grounds of economic efficiency, and were therefore illicit. Subsequently, in 2000, AFEC agreed to stop enacting tariffs and recommending prices during general assemblies.

In the Canton of Zurich, the doctors which were members of the Physicians Association of the Canton of Zurich (AGZ) charged their services for medical treatment according to a "private price", which excluded any possibility of competition in prices, as 90% of the doctors, which practice medicine independently in Zurich, are members of the AGZ[9]. The application of the private price list was mandatory. The preliminary investigation, handled by the Secretariat in 2001, produced some evidence, which indicated that the price list could be an illicit price-fixing agreement. To verify that evidence, an investigation was opened. The members decided to eliminate the tariff prior to the completion of the investigation, because of the threat of high procedure costs.

The use of unified price lists is a common practice in Switzerland. Likewise, the Comco had opened an investigation against the members of the Doctors Society of the Canton of Geneva. Genevian doctors used a common price list, similar to the one used in the Canton of Zurich, to charge medical treatments of their patients. During this investigation, the association suppressed the private price list.

### *4.4 Examples of trade association antitrust compliance procedures*

Some associations, such as Promarca (Swiss Association of producers of branded products [food and near-food products]), take an active part in the prevention of infringements to cartel law. To provide support to its members, Promarca has published a brochure[10] relating the changes and prohibited behaviours in the revised Cartel Act that came into force in April 2004.

Major trade and business associations were also received at their request at the Competition commission's Secretariat to discuss in an informal manner about competition issues that are of interest to

8 Des tarifs conseillés de l'association des écoles fribourgeoises de circulation (AFEC), DPC 2000/2, p. 167 et seq.

9 Privatärztetarife im Kanton Zürich (AGZ), DPC 2001/4, p. 695 et seq.

10 www.promarca.ch/fileadmin/webfolder/Themen_Positionen/Neues_Wettbewerbsrecht/Kartellgesetz_Kurzfassung_fr.pdf

their members. More generally, the Competition Authority places a paramount importance in informing and supporting trade and business associations in the field of antitrust compliance. For instance, members of the Comco are regularly invited by trade and business associations to speak at their annual assemblies on Competition Law compliance.

# TURKEY

## 1. Introduction

The Act No 4054 on the Protection of Competition (the Competition Act) is applicable to anti-competitive agreements, concerted practices between undertakings, and decisions and practices of associations of undertakings. The Competition Act provides definitions for undertakings and association of undertakings under Article 3. Accordingly, undertakings are defined as "*natural and legal persons who produce, market and sell goods or services in the market, and units which can decide independently and do constitute an economic whole*" whereas association of undertakings is defined as "*any kind of associations with or without a legal personality, which are formed by undertakings to accomplish particular goals*". Some of these associations of undertakings have their roots in the Constitution under the name of public professional organizations. For instance, according to Article 135 of the Constitution, such public professional organizations are " … *public corporate bodies established by law, with the objectives of meeting the common needs of the members of a given profession, to facilitate their professional activities, to ensure the development of the profession in keeping with common interests, to safeguard professional discipline and ethics in order to ensure integrity and trust in relations among its members and with the public* ...". Apart from those, there are other associations of undertakings formed by undertakings operating in a certain field of the industry and their objectives are more or less similar to objectives cited in the Constitution. The Competition Act normally is neutral and equally applies to anti-competitive decisions and practices of the associations of undertakings, whether Constitutional or not.

Anti-competitive decisions and practices of associations of undertakings are prohibited by the Competition Act (Article 4). In case such anti-competitive decisions and practices also include some pro-competitive elements and these elements outweigh the anti-competitive ones, then such decisions and practices may be exempted (Article 5). Basically, there are four conditions to be satisfied cumulatively if exemption is to be granted and they can be cited as 1 - ensuring new developments and improvements, or economic or technical development in the production or distribution of goods and in the provision of services, 2 - benefiting the consumer, 3 - not eliminating competition in a significant part of the relevant market, and 4 - not limiting competition more than what is compulsory for achieving the goals of ensuring new developments and improvements, economic or technical development, and consumer benefit. Moreover, in case decisions or practices of associations of undertakings do not violate the relevant articles of the Competition Act, the associations of undertakings may be granted a certificate clearing the decisions or practices in question (Article 8). A substantive fine up to ten percent of the annual gross revenue of associations of undertakings and/or the members of such associations is to be imposed in case the Competition Act is violated (Article 16). Moreover, associations of undertakings may be asked to terminate the infringement together with specific instructions on how to terminate the infringement (Article 9). Interim measures may be taken if it is likely that serious and irreparable damages occur (Article 9). Finally, advocacy powers may be used by the Turkish Competition Authority (TCA) before relevant state entities with a view to amending the relevant legislation producing anti-competitive impact (Article 27 and 30).

After citing the basic legislative framework in the Competition Act regarding anti-competitive as well as pro-competitive decisions and practices of associations of undertakings, the approach of the Competition Board, the decision-making body of the TCA, will be summarised below.

## 2. Restrictions of Competition and Exemption

As the members of the associations of undertakings are rival undertakings, it becomes a very sensitive matter to distinguish pro and anti-competitive activities of the associations of undertakings.

Beginning from its earlier decisions, the Competition Board had to deal with anti-competitive decisions and practices of the associations of undertakings. Therefore, in the case law of the Competition Board, there are many instances involving associations of undertakings' fixing prices[1], sharing markets[2], complicating the activities of competing undertakings or excluding firms operating in the market by boycotts or other behaviour or preventing potential new entrants to the market.[3] In these cases, it is observed that the role of associations of undertakings changes in a wide range, from enabling the member undertakings to convene and act in concert through facilitating communication among them to taking an anti-competitive decision itself. The Competition Board, in most of these cases, prohibited the anti-competitive practices and decisions by the associations of undertakings together with imposition of fines. Moreover, it informed the relevant associations and its members on how to terminate the infringement and what to refrain in order to ease its concerns regarding the matter.

Generally, the Competition Board's attitude is strict in the sense that in most of the cases it has prohibited practices and decisions of association of undertakings fixing prices, sharing markets, and complicating rivals' activities and has denied exemption because the relevant conditions are missing. However, in rare occasions the Competition Board, taking into account the peculiarities of the case in question, has ruled that pro-competitive aspects of the decisions and practices by the association in question outweigh the anti-competitive ones and granted exemption.

For instance, in one case[4] where the goldsmiths' association sent its members a recommended price list, the Competition Board decided that this practice satisfied the exemption conditions. More specifically, the Competition Board mentioned that recommended price list removed the necessity for every goldsmith to establish a technical infrastructure to follow rapidly changing prices for gold, and the recommended list not only facilitated the goldsmiths to monitor the fluctuations in prices but also ensured consumer awareness. Moreover, the consumers might also buy products cheaper depending on the level of competition because the goldsmiths no more needed to invest in technical infrastructure to follow prices for gold and therefore they would enjoy decrease in their costs. As the market operators were numerous and mostly small and medium size undertakings, the recommended price list would not likely to eliminate competition among goldsmiths operating in the city of Antalya. Finally, as the relevant legislation

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1 See, among others, Bakery Associations of İstanbul (27.10.1999; 99-49/536-337(a)), Customs (26.4.2001; 01-21/191-49), Opticians (31.08.2001; 01-42/424-107), Bodrum drinking water (22.1.2002; 02-04/39-20), TMMOB (22.1.2002; 02-04/40-21), Turgutlu Goldsmiths' Association (26.3.2002; 02-16/176-70), Advertising Agencies' Association (25.07.2002; 02-45/530-219), Insurance (30.10.2003; 03-70/844-366), Turkish Doctors' Association (30.10.2003; 03-70/851-369), Turkish Bar Association (13.11.2003; 03-73/876(a)-374), Turkish Dentists' Association (13.11.2003; 03-73/876(b)-375), Gaziantep Association of Bakeries (7.1.2005; 05-02/18-9); Manisa Goldsmiths' Association (28.3.2007; 07-28/255-88), Şanlıurfa Goldsmiths' Association (28.3.2007; 07-28/256-89).

2 See, for instance, Bakery Associations of İstanbul (27.10.1999; 99-49/536-337(a)); Bodrum drinking water (22.1.2002; 02-04/39-20), Konya Mechanical Engineers (19.9.2003, 03-63/764-354), Konya and Isparta Milk Market (26.7.2006; 06-56/714-204).

3 See, BIAK (4.3.1999; 99-13/99-40), TÜRSAB (17.12.2003; 03-80/967-397), Association of Industrialists of Friction Equipments (4.10.2005; 05-64/925-248), Association of Dubbing Artists (15.6.2006; 06-44/566-152), Şanlıurfa Goldsmiths' Association (28.3.2007; 07-28/256-89).

4 Antalya Goldsmiths' Association (23.5.2007; 07-42/461-176).

empowered the goldsmiths' associations to determine maximum prices[5], the practice of recommending prices was less restrictive of competition than fixing the maximum level. As a result, the Competition Board exempted the practice of the association of goldsmiths in Antalya to recommend price for gold.

However, in an earlier case[6], the Competition Board decided that exemption conditions were absent regarding a notification of a recommended price list to be prepared and sent to member opticians by five opticians' associations and the federation including these associations after considering specific features of the market in question. Among other considerations, the Competition Board took into account that there were appreciable price differences in the market (approximately 20%) in the absence of the recommended price list and the basic aim of such a list was to remove the current price competition in the market. Therefore, the Competition Board decided that the price list had the potential to restrict the price competition significantly.

To clarify one point, in the case law of the Competition Board, it is not required that the decision by an association of undertakings is binding.[7] Therefore, recommended decisions can be regarded as violating the competition rules although they are not binding. It is taken into account whether members of associations have shown a tendency to follow the recommendations in the past and the recommended decision has caused a significant impact in the market. In making this assessment, it is also important that the members feel they are bound by the decision. As a result, the decision is considered binding if the members of the association comply with it because they feel they are actually bound by it. Moreover, it is not required that the relevant association of undertakings has provided sanctions against those members failing to comply with the decision in order to consider it anti-competitive.[8]

## 3. Information Exchange

Information exchange facilitated by associations of undertakings has been evaluated various times in the past under the Competition Act. For instance, the TCA has formulated its opinion as a response to an application by Turkish Cement Manufacturers' Association (TCMA) who gathered relevant information monthly and made short, medium and long term projections concerning production, domestic sale, export and stocks of cement and then sent them to all cement manufacturers.[9] In this application, TCMA asked the TCA to forward its opinion on its practice of gathering information, making projections and sending them to cement manufacturers.

The Opinion of the TCA can be given in the following:

> *"…Together with the features of the cement market, information exchange systems including the interchanging of quantity data on an undertaking basis have the potential to facilitate the creation of structures and practices which the Competition Law aims to prevent. It is clear that in such market, frequent and detailed information exchange may be a means to create artificial market conditions containing abnormally transparent and stable flow of goods in order to eliminate the flexibility of the practices of economic units and risks inherently existing in competition. Similar information exchange systems carrying detailed information on an*

5 See Article 62 of the Tradesmen and Craftsmen Occupational Organizations Law numbered 5362.

6 *Spectacle Glasses, (4.1.2006; 06-01/6-3).*

7 See especially *Insurance (30.10.2003; 03-70/844-366).*

8 See *Opticians (31.08.2001; 01-42/424-107), Bodrum drinking water (22.1.2002; 02-04/39-20), Advertising Agencies' Association (25.07.2002; 02-45/530-219); Konya and Isparta Milk Market (26.7.2006; 06-56/714-204).*

9 See *Cement (1.2.2002; 02-06/51-24)*.

*undertaking basis may lead to these consequences: determining undertakings' conducts according to factors other than individual choices made under free competitive conditions, coordinating market behavior, supervising the operation of anticompetitive structures."*

With these concerns, the TCA refused to clear the information exchange under Article 8 of the Competition Act and provided that following principles should be followed at data collection and distribution stages in order to eliminate its concerns and prevent infringements of competition law:

*"1. The tables showing the data related to quantities (production, sales, inventory, export, etc.) should be prepared in a manner that prevents their disclosure on the basis of an undertaking or groups of undertakings which form an economic unit. Therefore, these tables should contain only data related to total production, sales, import, export and inventory for each geographic region. If the number of groups of undertakings forming an economic unit is less than three in a region, the data related to that region should be shown in a table combined with the data from one of the neighboring regions so that it would not be possible to make calculations on an individual basis.*

*2. Tables showing comparisons between undertakings depending on any kind of data should not be prepared.*

*3. Statistical data included in the tables should not be discussed in meetings where representatives of undertakings are present.*

*4. Any comment, analysis or advice, as well as the distributed statistics that may affect competitive behavior of undertakings should not be given.*

*5. Tables showing the quantities of the production of each good in a certain period should be prepared in accordance with the principles related to the concealment of individual information. Therefore, product types should be divided into three groups at the most and published in regional sums.*

*6. Estimations related to the future conditions of prices, sales and use of capacity rates should not be made.*

*7. Associations of Undertakings should ensure that officials responsible for the collection and tabling of data conceal competition sensitive information (in particular individual quantity data collected from undertakings) from members of the Association and third parties.*

*8. In case there is a possibility that competition sensitive information related to a particular undertaking could be inferred, summaries and total sums should not be published.*

*9. Tables showing monthly data should not be distributed in two months following the respective month. ...*

*10. The relationships with public bodies that request statistical information (TSI [State Statistics Institute], SPO [State Planning Organisation], etc) may continue in the same way. ..."*

In another case[10] concerning a decision by Automobile Distributors' Association to prepare a website that would include, among others, statistical information on monthly and annual aggregate sales and import data for new automobiles and light commercial vehicles sold in Turkey, countrywide monthly and annual

[10] Automotive Distributors' Association, (15.4.2004; 04-26/287-65).

aggregate sales data and market shares on the basis of brands, brand based domestic-import distributions regarding the sales of automobiles and light commercial vehicles, the Competition Board emphasized market peculiarities. The Competition Board, especially, distinguished information exhanges in oligopolistic markets with homogenous products such as cement and fertilizer markets from less concentrated markets with heterogeneous products.

In this sense, the Competition Board took into account that concentration level of the market of motor vehicles has decreased to a great extent compared to the past ten years as a result of the increase in the number of producers and in imports. Demand in the motor vehicle markets was also characterized by high volatility from year to year depending on the economic situation of the country, the stagnation of which in recent years (at that time) had deep impact in the motor vehicle market. Moreover, the products are far from being homogenous and competition in the market is not totally dependent on price. Apart from price, quality, efficient marketing, rapid response to changing demand, ability to develop new models, product variety and widespread service network constitute very important elements of competition in this market. With these facts in mind, the Competition Board thinks that probability of information exchange to result in coordination of competitive behaviours among market players is limited in motor vehicle sector. As a matter of fact, the information in the website would include only quantities sold and market shares of the brands in the whole country with no detailed statistics prepared on the basis of regions or cities. Furthermore, statistics regarding brands would contain aggregate sales data of automobiles and light commercial vehicles with no detailed information on price, quantity, and market shares in different sub-segments. Moreover, there would be no data including projections on prices, production, sales and capacity utilization rates. Therefore, these features of the statistical information also do not have the potential to coordinate the competitive behaviours in the market. As a result, the Competition Board cleared the decision by the Automobile Distributors' Association to prepare a website on the condition that it would not cause exhange of information and data that could prevent formation of a competitive market at gathering, publishing and distributing stages in the future.

The sensitivity of the Competition Board regarding information exchanges is justified when a case is taken into account where grave violations of competition have been detected and which involved an association of undertakings gathering information sensitive for competition. In *Fertiliser*[11] case, Association of Fertiliser Producers played an important role in exchanging information via meetings and a monthly statistical bulletin. For instance, regular Board of Directors meetings of the association in question were held with the participation of general managers of fertiliser producers. Some of these meetings were also held in headquarters of these producers. In these meetings, discussions were held on the state of supply and demand, sales policies, prices, costs, and sales systems. With the documents found during inspections by the TCA, it was seen that such information exchange that could lead to price fixing and market sharing was being carried out for years in meetings within the association with the participation of high level people of the relevant fertiliser producers. Moreover, publication of statistical information including data on individual producers enabled the producers to learn production and sale amounts of the rivals which contributed to transparency in the market and the predictability of the behaviours of the rival undertakings.

To summarise the attitude of the Competition Board regarding information exchanges,[12] exchange of information sensitive for competition among competitors may limit competition. Information sensitive for competition relates to prices, costs, sales, production, capacity utilization, stocks and information having

11 8.2.2002; 02-07/57-26. Following this case, the Competition Board reiterated more or less the guidance it provided to Turkish Cement Manufacturers' Association in its Opinion upon a request by Association of Fertiliser Producers regarding the publication of information in its Monthly Statistical Information Bulletin. See *Association of Fertiliser Producers (8.8.2002; 02-47/586-M).*

12 See *Automotive Distributors' Association (15.4.2004; 04-26/287-65).*

the character of trade secrets which, when known by undertakings operating in a market, increase predictability of prospective behaviours of competitors. Exchange of such information among competitors increases transparency of the market and results in coordination of competitive behaviours. Therefore, exchange of such information should be limited and be far from creating coordination among competitors. While considering the impact of information exchanges, structure of the market and the characteristics of the information are important. In competitive markets, flow of information is beneficial for manufacturers as well as consumers and enables the market to reach equilibrium in a shorter time period by transmitting signals regarding changes in supply and demand. In oligopolistic markets, however, information exchange is a more sensitive matter. In these markets, it is easier for competitors to meet each other, reach agreement and implement it. Information exchange not only becomes effective in concluding anti-competitive agreements or entering into concerted practices, but also turns into an instrument in monitoring whether the relevant agreement or concerted practice is implemented. Limitation or prevention of competition is easier in markets especially where the product is homogeneous. As product differentiation increases, it would be hard to agree on a price and cartel agreements would easily be broken. While making assessments regarding agreements and practices enabling information exchange, nature of the market, level of concentration, entry barriers, and characteristics of information exchanged gain importance. This makes it necessary to take into account such agreements in their economic context and observe them carefully in oligopolistic markets.

## 4. Standard Setting

Approach of the Competition Board regarding standard setting can be seen in one case[13] where a decision by an association of undertakings to produce medium density fibreboard and chipboard with a thickness of 16 mm instead of 18 mm has been evaluated under the Competition Act. 16 mm is the standard thickness in European Union and the Middle Eastern countries whereas consumption in Turkey concentrates on 18 mm leading to differentiation of Turkish production from world standards. By changing the industry standard to 16mm, it is aimed to avoid restrictions faced by the industry in imports as well as exports.

While evaluating an agreement or a decision by an association of undertakings under Article 4 of the Competition Act, the Competition Board mentions that it should be taken into account that participation of the relevant undertakings in the standard setting process has not been restricted and transparency has been ensured. Although it is not a relevant criterion under the Competition Act whether the market share represented by the undertakings participating in the process is high, standardization decisions become effective as the combined market share of the undertakings participating in the setting and implementing the standard increases. Therefore, it is important that all undertakings in the industry participate in the decision making process. However, if the standard agreed via a decision by the association of undertakings is used with an aim to drive current or potential rivals out of the market or such effects occur, then the decision would be contrary to competition rules. To understand if such an aim exists or such an impact is likely, the main issues to be considered by the Competition Board are whether participation of the relevant undertakings in the process has been restricted, a transparent environment where relevant undertakings or persons can obtain information regarding the standard exists, the standard is applied to create discrimination, and undertakings are constrained to sell and market their products that do not comply with the standard.

First of all, the decision in question has been favoured by most of the undertakings operating in the market representing a very large part of the market. The members of the association as well as non-members were aware of the nature and subject of the decision and participated in the decision-making process by presenting their views. The number of undertakings favouring the decision, the high market

[13] Medium Density Fiberboard and Chipboard (14.8.2003; 03-56/650-298).

share they represented, the nature of the decision and transparency of the decision-making process were taken as indications that the aim was to create a new standard for the industry and there did not exist a practice by some undertakings with a purpose to restrict competition. Moreover, that the decision did not aim to drive any actual or potential competitors out of the market was also apparent from the fact that any undertaking could produce the 16mm product without any additional cost, investment or difficulty. Furthermore the decision did not include any restriction preventing the undertakings from producing the 18 mm product on demand.

## 5. Membership Rules

In *BIAK*[14] case, membership rules of an association of undertakings were regarded as anti-competitive by the Competition Board.

Joint Industry Committee on National Readership Survey (BIAK) was an association of undertakings whose members included advertising agencies, advertisers and media entities providing advertisement space. BIAK aimed to commission a joint press readership survey (the Survey) that would be made available for use both by the media and the advertisement sector. The Survey would enable advertisers to have economic and efficient expenditures for advertisements, and advertisement agencies to reach the right target audience by efficient media planning. Moreover, it would expand the advertisement market and increase advertisement revenues for media entities providing advertisement space.

The Survey would be the single currency as named in the sector because it would be the most comprehensive survey carried out in Turkey in terms of the size of the sampling and the number of publications included; it would be reliable as all units who would increase the reliability of the Survey such as advertisers, those preparing advertisements and media entities providing advertisement space would be involved, quality control of the Survey would be done by an independent supervisory unit, and a software programme enabling optimum media planning that would use the data of the Survey would be given to the relevant parties.

However, according to membership rules, membership to BIAK of those media institutions using distribution channels other than those of BIAK required approval by the founding members of BIAK. In line with this rule, BIAK refused membership to an undertaking named Universal Yayıncılık (Universal Publishing). This was regarded as complicating the activities of Universal Yayıncılık when market conditions, the value of the Survey as single currency and the characteristics of members of BIAK were all taken into account. Since the results of the Survey regarding publications of Universal Yayıncılık would not be available, it would be hard for these publications to attract advertisements. As a result, the Competition Board asked BIAK to re-determine membership rules and the criteria regarding use by third parties of the relevant data obtained via the Survey and send them to the Competition Board for consideration.

In *TURSAB* case, admission fee determined by the General Assembly of TURSAB (Association of Turkish Travel Agencies) was the subject of an investigation by the TCA. TURSAB was founded according to Act concerning Travel Agencies and Association of Travel Agencies and according to that Act it was obligatory to be a member of TURSAB in order to operate as a travel agency. Moreover, according to the Act in question, admission fee was to be determined by the General Assembly of TURSAB whose participants were representatives of the travel agencies. The admission fee determined by the General Assembly was regarded by the Competition Board high enough to prevent new entry after extensive analyses on its nature as entry barrier. Among the factors taken into account while deciding whether admission fee constituted an entry barrier were the facts that admission fee that had to be paid in

14 4.3.1999; 99-13/99-40.

cash was a separate element of cost in addition to start-up costs, it was paid in order to enter the market and the certificate obtained in return was not always transferable or was an element of cost that could not be recoverable in its total, and admission fee could not be turned into liquidity immediately or total amount of the cash paid could not be taken back in case of exit from the market. It was taken into account that representatives of the travel agencies in the General Assembly were encouraged to determine a high admission fee as this would ensure few entry to the market and increase the value of the current operation licences that were transferable. This was a good example that membership rules may be used by the members in an anti-competitive manner.

# UNITED KINGDOM

## 1. Introduction

Trade/business associations play an important role in modern economies. This is particularly the case in the United Kingdom, where trade associations are found in almost every sector of the UK economy (and indeed many UK companies and national bodies are members of international trade associations). In the OFT's experience the functions of trade associations in furthering the trade interests of their members are diverse and may include:

- representing to Government, the European Commission and other public bodies the interests of members on legislation, regulations, taxation and policy matters likely to affect them;
- promoting and protecting the interests of members in the media;
- collecting and disseminating aggregated and historic statistics and industry information,
- collecting and disseminating information about legislation and Government policy;
- promulgating voluntary standards, codes of practice or standard terms and conditions of sale;
- providing a range of services of an advisory or consultancy nature on, for example, legal, accounting, training or environmental matters; and
- providing advice of a more commercial nature.

The OFT's experience of trade associations and their activities thus goes beyond the confines of cartel enforcement under Article 81 of the EC Treaty or equivalent national competition legislation.[1] As well as conducting market studies and enforcing competition and merger legislation, the OFT as a combined competition and consumer authority operates a Consumer Codes Approval Scheme (CCAS) whereby groups of businesses (usually through a trade association) draw up voluntary codes of practice which set challenging standards of customer service above those required by law.

## 2. Summary

This paper:

- Explains the UK legislative framework under which OFT engages with trade associations (section 3);

[1] See e.g. the OFT guideline *Trade Associations, professions and self regulating bodies*: http://www.oft.gov.uk/shared_oft/business_leaflets/ca98_guidelines/oft408.pdf. We do not propose to discuss in this submission practices involving trade associations that might be examined under Article 82 (e.g. the use of membership rules to exclude competitors from joining the association and sharing in the benefits of membership).

- Identifies anti-competitive aspects of trade associations and OFT enforcement experience under the Competition Act 1998 relating to trade associations (sections 4 and 5);

- Discusses the OFT's experience of working with trade associations generally and in two specific areas:

  – the OFT's review of competition in the professions; and

  – the Consumer Codes Approval Scheme (section 6); and

- Draws conclusions on how national competition authorities can utilise the pro-competitive aspects of trade associations to promote competition law compliance (section 7).

## 3. UK legislative background

This section sets out the principal legislative provisions under which the OFT engages with trade associations.

### *3.1 Competition Act 1998*

The UK applies both domestic and EC competition law on anti-competitive agreements. The domestic prohibition in section 2 of the Competition Act 1998 (the Chapter I prohibition) mirrors that contained in Article 81 except as regards jurisdiction (UK rather than EU-wide).

The OFT may therefore investigate cartels where, for example, the anti-competitive conduct arises through decisions made by a trade or business association (where the association constitutes an undertaking) or through agreements between members of the association.

### *3.2 Enterprise Act 2002*

The OFT conducts market studies under section 5 of the Enterprise Act 2002 (EA02) in order to identify whether perceived problems in a market should be addressed through the OFT's other functions.[2] Following a study the OFT may decide to, e.g., give the market a clean bill of health, publish information to help consumers, encourage firms to take voluntary action, encourage a consumer code of practice, made recommendations to Government, investigate/carry out enforcement action against companies or individuals suspected of breaching consumer or competition law, or make a market investigation reference to the Competition Commission.

The OFT also operates a Consumer Code Approval Scheme under section 8 EA02 whereby:

> *"…the OFT may … make arrangements for approving consumer codes and may, in accordance with the arrangements, give its approval to or withdraw its approval from any consumer code."*

Further details of this scheme are contained in section 6.2 below.

[2] Section 5 states that the OFT has the general "function of obtaining, compiling and keeping under review information about matters relating to the carrying out its functions."

## 4. Anti-competitive aspects of trade associations

European case law illustrates that there is evidence that undertakings may use a trade association to facilitate or cover up unlawful collusion.[3] There may be an inherent risk that members use the trade association as an opportunity to collude since it provides a forum to bring competitors together: Adam Smith's famous quotation encapsulates this idea.[4] For example, a trade association might be used as a conduit for its members to pass price information to facilitate, e.g., bid-rigging. The association may be a particularly suitable forum where the cartel has many members as its functions may enable or facilitate effective monitoring of compliance with the cartel. Alternatively the association may itself be the instrument used to organise the cartel or other anti-competitive practices rather than acting as a forum or a facilitator for members or groups of members.

## 5. UK enforcement experience under the Competition Act 1998

### *5.1 Historical experience*

The OFT does not have the same level of experience under the Competition Act 1998 (CA98) of investigating cases of price fixing cartels within trade associations as, for example, the European Commission, although historically under the old Restrictive Trade Practices legislation there have been a number of cases of price fixing by trade associations in the UK.[5]

### *5.2 Recent experience*

More recently the OFT has issued decisions that have considered the potential for anti-competitive practices on the part of trade associations. In *GISC*[6] one of the rules of the General Insurance Standards Council prevented its members from dealing with insurance intermediaries unless they were themselves members of GISC. After the Competition Appeal Tribunal concluded that this rule had the object and effect of restricting competition to an appreciable extent, GISC dropped the offending rule and the OFT concluded that the remaining rules did not infringe the Chapter I prohibition.

In *Northern Ireland Livestock and Auctioneers' Association* the OFT concluded that the NILAA had infringed the Chapter I prohibition by recommending that its members introduce a standard buyer's commission to be payable by purchasers of livestock in Northern Ireland cattle markets. No penalty was imposed however due to the exceptional circumstances of the case.[7]

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3 E.g. *Amino Acids* [2001] OJ L152/24; *Citric Acid* [2002] L239/18; *Carbonless paper* [2004] OJ L115/1.

4 "People of the same trade seldom meet together, even for merriment and diversion, but the conversation ends in a conspiracy against the public, or in some contrivance to raise prices … Though the law cannot hinder people of the same trade from sometimes meeting together, it ought to do nothing to facilitate such assemblies, much less render them necessary." Smith, A. 1776. *An inquiry into the nature and causes of the wealth of nations*, London: Methuen and Co., Ltd

5 E.g. *Re Yarn Spinners' Association's Agreement* [1959] 1 WLR 154 (where the Association bound its members not to sell certain yarn at prices lower than those fixed by the Association); *Re Phenol Producers' Agreement* [1960] 1 WLR 464 (where there was an agreement between the members of the Phenol Producers' Association to fix the price of carbolic acid).

6 Case CA98/01071/00, 13 November 2002; http://www.oft.gov.uk/advice_and_resources/resource_base/ca98/decisions/general-insurance

7 Case CP/0504-01, 3 February 2003;

### *5.3 Professions*

The OFT has also used its CA98 enforcement powers to address restrictions created by professional bodies (which are also forms of trade associations). In 2000 the OFT reviewed the British Medical Association's general fee guidance to medical practitioners and after discussions amendments were made to that guidance. However, concerns remained that a single nationally-agreed fee for locum charges could have detrimental effects on fee competition. The BMA withdrew its guidance given the concerns outlined by the OFT. The BMA has since introduced new arrangements which assist locums to calculate and negotiate their fees independently.

Some UK local law societies conduct surveys of the current hourly litigation rates that their members charge: this information is sent to the courts who may use it when awarding costs. In 2005 the OFT received a complaint that the Surrey Law Society (SLS) had on one occasion circulated among its members an anonymised version of the results of such a survey. After the OFT made known its concerns about the sharing of such information, SLS decided to cease circulating it among its members.[8] The OFT has also used its CA98 powers to address other restrictions in fee setting,[9] advertising[10] and anti-competitive membership rules.[11]

### *5.4 UK market study experience*

OFT has also had a UK-wide programme of work on competition in professions since 2000. Further details of this work are set out below in section 6.1.

## 6. OFT experience of working with trade associations

OFT's recent experience suggests that trade associations can be effective in representing the views of their members to government on matters of interest to them.

For example under the merger provisions of the Enterprise Act 2002, the OFT often receives responses from trade associations in response to its Invitations to Comment as to the association's views on a particular merger. The OFT may also contact them as part of its third party enquiries in mergers, for example for their opinions on such matters as the degree of substitutability between products or whether they believe that the merged undertaking might behave anti-competitively. The OFT treats such third party

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http://www.oft.gov.uk/advice_and_resources/resource_base/ca98/decisions/livestock; in particular the OFT took into account the effects of the diseases BSE (bovine spongiform encephalopathy) and foot and mouth disease on the cattle industry in Northern Ireland generally and cattle auctioneers in particular, by way of increased veterinary health regulation, reduction in throughout of cattle and the temporary closure of the marts.

8 http://www.oft.gov.uk/shared_oft/ca98_public_register/feb2006.pdf

9 E.g., the Notaries Society repealed its recommended fee guidelines to its members: see http://www.oft.gov.uk/shared_oft/ca98_case_closures/april2004.pdf

10 E.g., the Law Society of Northern Ireland revoked its rules which prohibited fee advertising and comparative fee advertising. In addition the restrictions on soliciting have been relaxed subject to safeguards: http://www.oft.gov.uk/news/press/2005/218-05

11 For example in the Glasgow Solicitors' Property Centre (GSPC) case in 2003, the OFT intervened to prevent GSPC from operating membership criteria that were not objective and transparent in circumstances where there was a strong suspicion that vague criteria were being employed by GSPC to exclude a potential member who might compete "too vigorously", see http://www.oft.gov.uk/news/press/2003/pn154-03

responses as confidential, although the bodies themselves may choose to publicise their contact with the OFT.[12]

Trade associations may also respond to other consultations conducted by the OFT, providing their views on potential legislative changes or policy issues.[13] They have equally been helpful through their work on the framing of useful guidance[14] and have also helped to develop guidance in relation to competition in specific industry sectors or for business more generally.[15]

Two further examples of the OFT's experience of dealing and working with trade associations are discussed in more detail below:

4. the OFT's review of competition in the professions; and

5. the Consumer Codes Approval Scheme.

### *6.1 Competition in the professions*

The OFT's work on promoting competition in the professions has been set out previously and in more detail elsewhere.[16] The OFT's report *Competition in Professions*[17] published in 2001 identified restrictions on competition in three professions: law, accountancy and architecture in England and Wales. The report found that the majority of restrictions of competition were found to originate in professional rules: the professional associations responsible for the restrictions (referred to as self-regulatory organisations or SROs) were given 12 months to remove or justify the rules that appeared to infringe competition law. The OFT emphasised that if appropriate action was not taken it would use its competition enforcement powers.[18]

A year later in April 2002, OFT published a progress statement[19] reviewing the progress made by the professions and by government in addressing the restrictions identified in the 2001 report. The OFT found

12 E.g., http://www.thelocalshop.com/default.asp?Call=Article&ID=4317

13 E.g. responses to the OFT's April 2007 discussion paper *Private actions in competition law: effective redress for consumers and business* were received from, among others, the Federation of Small Businesses, the Forum of Private Business, Professional Contractors Group and RMI National Franchised Dealers Association.

14 E.g. through their participation in a stakeholder working group set up by OFT and BERR they have made a valuable contribution to the development of draft OFT/BERR illustrative guidance on the Consumer Protection from Unfair Trading Regulations (which will implement the Unfair Commercial Practices Directive implementing in the UK).

15 E.g. trade associations commented on the OFT's draft CA98 guidelines which were revised in 2004 following implementation of Council Regulation 1/2003.

16 See UK submission to Round table on competition restrictions in legal professions, DAF/COMP/WP2/WD(2007)35 (4 June 2007); speech by Philip Collins to 2006 Annual Fall Conference in Competition Law: *Promoting Competition in professions: Developments in the UK* (29 Sept 2006)

http://www.oft.gov.uk/shared_oft/speeches/sp0906.pdf

17 http://www.oft.gov.uk/shared_oft/reports/professional_bodies/oft328.pdf

18 The report also found that some restrictions had their origin in statute and were therefore for government to address; e.g. the report for the removal of the then exclusion of professional rules from the Chapter I prohibition.

19 http://www.oft.gov.uk/shared_oft/reports/professional_bodies/oft385.pdf

that many of the restrictions had been addressed by the relevant SRO or that the arguments put forward to justify the restrictions on competition were sufficiently persuasive. Some restrictions had not been addressed sufficiently and OFT has subsequently taken action under its CA98 enforcement powers.[20]

The OFT's work with professional bodies is still ongoing. The OFT has been increasingly involved in advocacy to government in Scotland and Northern Ireland to ensure that progress similar to that made in England and Wales is also made in those jurisdictions.[21] The lessons learned from the 2001 report have informed work across the whole range of professions. The report and subsequent work with the SROs has allowed the OFT to achieve significant liberalisation within the professions without incurring the costs involved in running a large number of enforcement cases. Some of the more significant restrictions have remained (especially in the legal profession) although the report was a key driver in the decision by the Government in 2004 to launch an independent review towards the reform of the regulation of legal services.[22] A well-developed competition programme to promote competition in the professions is critically important, particularly to economies such as the UK where the service sectors, including the professions, play a significant part.

### *6.2 The Consumer Codes Approval Scheme*

#### *6.2.1 Background and rationale*

The OFT has the power to encourage trade and professional associations to prepare and disseminate to their members, codes of practice for guidance in safeguarding and promoting the interests of consumers.

Since 2001, the OFT has run a Consumer Codes Approval Scheme (CCAS), the aim of which is to promote and protect consumers' interests by encouraging businesses to draw up and abide by voluntary codes of practice which set challenging standards of customer service.[23] The CCAS aims to safeguard consumers' interests by helping them identify businesses and brands with higher standards of customer care and in which consumers can have confidence: codes approved through this process carry an OFT Approved code logo. By signing up to an OFT approved code, a business has agreed to provide consumers with the benefits that are outlined in the code. These include clear pre-sale information, fair contracts and access to an independent redress mechanism.

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20 See for example paragraphs 13 and 14 above.

21 E.g. as part of the Scottish Executive's (SE) Working Group on the Legal Services Market in Scotland, the OFT highlighted to the SE in 2006 a range of restrictions on competition in professional rules and in regulation that existed. The Law Society of Scotland has agreed to the lifting of restrictions on advertising, including comparative advertising, and the OFT is now working to ensure that other necessary reforms identified in the report are taken forward. Other recommendations for reform have been achieved through a combination of advocacy and the threat of enforcement action: e.g. after the OFT voiced its concerns the Faculty of Advocates has amended its rules on advertising and direct access. Also, following receipt of a super-complaint from a consumer body in May 2007, the OFT has made recommendations to the SE and the legal professions in Scotland to lift restrictions on advocates' business structures, the ability of advocates and solicitors to provide services jointly, third party entry into the market, and direct consumer access to advocates.

22 See the published Report of the Review of the Regulatory Framework for Legal Services in England and Wales, December 2004, can be found on http://www.legal-services-review.org.uk/

23 A consumer code of practice can be defined as a set of rules that a group of businesses agree to follow in order to set standards of customer service that are higher than legally required. Under the CCAS signing up to a code is voluntary: there is no legal requirement for an industry sector to operate a code, nor for a business to join it (unlike the codes of conduct some professions must follow).

An OFT approved code offers higher levels of customer service than those required by the law, and specifically addresses areas of concern and consumer detriment in a particular sector. Although using a business that complies with an OFT approved code cannot guarantee that all transactions will be trouble free, it does guarantee a straightforward procedure for resolving consumer complaints.

*6.2.2 Code approval process*

To submit a code for approval under the CCAS, the sector or industry must have a 'code sponsor'.[24] In practice a sponsor is usually a trade association, representing a majority of firms within a sector. The OFT scheme only covers business-to-consumer codes, and therefore codes that cover business-to-business transactions fall outside it.

As part of the approval process, the codes of practice will have a rigorous assessment which ensures, amongst other things, that the codes do not breach competition law; for example they ensure that membership rules do not create barriers to entry, do not deal with prices or involve any element of market sharing or customer sharing.

Approval of a code enables the code sponsors and members to use an approved "OFT code logo" and the OFT, as well as code sponsors and members, will publicise the newly approved scheme nationally through business and consumer campaigns to raise and maintain the code's profile to create a brand that shoppers recognise and look out for when purchasing goods or services. To achieve this, the OFT cannot afford to allow the logo be prejudiced by the activities of businesses who fail to comply with their code.

Although withdrawal of Code approval (and the logo) by the OFT is the ultimate sanction, the OFT expects code sponsors to take action to deal with non-compliance by their members. Monitoring of codes is seen as a key: in approving a code, the OFT expects code sponsors to review compliance with the code and assess consumer satisfaction on a regular basis.

*6.2.3 CCAS to date*

To date six consumer codes of practice have achieved OFT approval. The trade body sponsors are from a variety of business sectors (covering predominantly small and medium-sized enterprises).[25]

*6.2.4 CCAS in practice*

The OFT's experience operating the CCAS is one of dialogue with association sponsors before, during and after a code has been approved. OFT can discuss code applications with prospective sponsors prior to the application being submitted, after application it will work with the sponsor to help them bring

[24] The OFT defines a sponsor as being 'a body that administers voluntary business-to-consumer codes and one that can influence and raise standards within that sector.'

[25] The six code sponsors are: the Society of Motor Manufacturers and Traders (which represents large car manufacturers); the Vehicle Builders and Repairers Association Limited (which represents over 1,500 car body repairers of which over 700 provide business to consumer services); the Direct Selling Association (whose members range from small companies to large multi-nationals); the Ombudsman for Estate Agents Company Ltd (which represents estate agents in the UK and its code of practice for residential sales); the Carpet Foundation (which represents over 1,000 registered carpet specialists); and Robert Bosch Ltd (who represents independent garages in the car repair and servicing sector). The code administered by the Association of British Travel Agents (ABTA) was OFT approved until 1 September 2006 when, on introduction of a new code, ABTA withdrew from the CCAS (the new code includes changes to ABTA's financial protection arrangements under which consumers' deposits and prepayments are no longer protected to the same extent as under the former OFT approved code).

their code within the requirements of the CCAS to achieve approval, and thereafter it will maintain contact with the sponsor (especially where issues arise that might have implications for the code's approved status).[26]

An OFT approved code can boost consumer confidence and can provide a more appropriate alternative to direct regulation by government. For example the OFT approved code of practice for estate agents run by the Ombudsman for Estate Agents Company Ltd enables clients to access free dispute resolution via the Ombudsman for Estate Agents scheme, provides for best practice when giving property valuations, and surveys consumers to test consumer satisfaction and code compliance levels.

*6.2.5 Evaluation of CCAS*

The CCAS was evaluated in 2006 to assess its impact on business, consumers and code sponsors. The independently commissioned report[27] showed that:

- code sponsors are positive that the code is having the desired effects, both in improving customer service and enhancing operating conditions for businesses;
- consumers can expect a better approach to customer service and satisfaction from businesses that are members of an OFT approved code than from those outside the scheme;
- the costs to CCAS members of implementing and maintaining an OFT approved code do not appear to be substantial: and
- the scheme has benefited code sponsors directly, enhancing their reputation and increasing demand for membership.

## 7. Conclusion

A competition authority's dealings with trade associations are traditionally in respect of anti-competitive conduct, i.e. investigating suspected breaches of competition law. Recent experience in the UK suggests that trade associations may have a significant role to play in promoting competition law compliance and high standards of consumer protection. Trade associations have a variety of roles that serve legitimate purposes, not least inputting into debates on the future direction of legal or policy developments. In some industries, the technical complexity of the products available may require a significant degree of judgment by the consumer to assess the quality of products and to exercise choice, and the association may have a significant role to play in consumer education.

Through its work, especially in operating the CCAS, the OFT established long-standing and effective relationships with trade associations, who can be proactive and keen to raise standards in their sector (higher standards lead to increased confidence which in turn leads to higher sales and increased profitability). Self regulation, through consumer codes of best practice, has the potential to provide an effective and far more flexible alternative to statutory regulation and enforcement. Codes can be tailored to

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26 E.g. OFT has maintained a continuous dialogue with the Carpet Foundation (CF) since it achieved Code approval in January 2007. On one occasion the OFT advised CF that it had been made aware that a consumer had lost £2,000 as a result of a CF member going into liquidation and was reassured to learn that the CF had already taken steps to ensure that another CF member would fulfil the order at the original price under their Deposit Protection Scheme.

27 *Review of impact on business of the Consumer Codes Approval Scheme*, October 2006 (OFT870): http://www.oft.gov.uk/shared_oft/Approvedcodesofpractice/oft870.pdf

address specific problems which cause detriment to consumers in the sector or locality concerned, and achieve significantly higher standards than the law alone requires. Where businesses themselves establish and maintain the codes, a high level of compliance is likely and continuous improvements become the norm.

A competition authority's relationships with trade associations can be mutually beneficial: the authority may better understand the markets it encounters while the associations may influence and inform policy and legal debates that are of interest to them. The OFT's experience is that trade associations are effective dialogue partners, for example when discussing about compliance with consumer credit legislation.

Trade associations are also ideally placed to facilitate increased compliance across their markets. The OFT seeks to achieve compliance with competition law in two ways: through deterrence (by making enforcement decisions) and by educating businesses and consumers. Trade associations can perform a crucial role in communicating both of these messages to their members.

# UNITED STATES

The large majority of trade association activity is pro-competitive or competitively neutral. A trade association may, for example, perform an important information-gathering function that would be difficult for its members to perform individually, or it may have as a principal function the establishment of standards that protect the public or allow the interoperability of components made by different manufacturers. The association may represent its members before legislative bodies and governmental agencies, a competitively-neutral activity that may serve the socially desirable function of improving the information upon which governmental decisions are made. If done carefully and with adequate antitrust advice, these legitimate goals can be accomplished without undue antitrust risk.

Trade associations and their members sometimes fail to take account of antitrust issues, however, which can result in their engaging in illegal conduct. The most obvious example is outright price-fixing, bid-rigging, or market division by members at trade association meetings or, more likely, separate sessions on the margins of a meeting.

In the first sections of the paper we discuss the antitrust implications of various trade association activities, such as collecting and exchanging economic information, antitrust compliance procedures, facilitating and/or organizing restraints on competition, and membership issues. In the last two sections, we discuss antitrust issues relating to standard setting.

## 1. Collection and Exchange of Economic Information by Trade Associations

U.S. courts have long recognized the utility of statistical information collection by trade associations. As the Supreme Court stated as far back as 1925 in *Maple Flooring Mfrs. Ass'n v. United States*,[1]

> *It is the consensus of opinion of economists and of many of the most important agencies of government that the public interest is served by the gathering and dissemination, in the widest possible manner, of information with respect to the production and distribution, cost and prices in actual sales, of market commodities, because the making available of such information tends to stabilize trade and industry, to produce fairer price levels, and to avoid the waste which inevitably attends the unintelligent conduct of economic enterprise.*

Exchanges of price information can pose significant anticompetitive risks, however, particularly in concentrated industries, and are analyzed under the rule of reason. "An exchange of price information that is not part of a price-fixing scheme still may be upheld if it is unlikely to have an anticompetitive effect on prices or if the exchange has a legitimate business purpose that offsets any likely anticompetitive effect in a rule of reason analysis."[2] As a general rule, information exchanges involving cost or other data rather than price, and historical data rather than current or future data, are less likely to raise antitrust concerns; aggregated data managed by an independent third party, in which particular suppliers or customers are not revealed, also raise fewer concerns. The U.S. antitrust agencies have set forth detailed views on dissemination of price and cost data among health care providers in the 1996 DOJ and FTC Statements of

1 268 U.S. 563, 582-83 (1925).

2 ABA Section of Antitrust Law, Antitrust Law Developments (6th ed. 2007), at 95.

Antitrust Enforcement Policy in Health Care (Health Care Statements). The DOJ has issued numerous business review letters relating to proposed information exchanges by various trade associations, available at http://www.usdoj.gov/atr/public/busreview/letters.htm.

## 2. Examples of Trade Association Antitrust Compliance Procedures

Trade associations can serve an important compliance function, by holding meetings and seminars and inviting speakers from the antitrust enforcement agencies or the antitrust bar. This kind of antitrust advice is often the first line of defense for preserving competition and can be more effective and efficient than trying to prosecute violators after the fact. The antitrust compliance activities of trade associations help to avoid anticompetitive conduct by both the associations themselves and of their members.

The antitrust agencies do not review or approve antitrust compliance programs. There are, however, certain obvious characteristics of a good trade association antitrust compliance program. Every compliance program should include a clear statement of the trade association's commitment to comply with the antitrust laws, accompanied by a set of practical dos and don'ts, so that every employee and member can understand them. A policy statement is, however, only the beginning. The trade association should have an active training program that includes in-person training by knowledgeable counsel. The in-person training sessions can be supplemented by video and Internet training tools, but these are no replacement for some personal instruction. The instruction should be as practical as possible, including case studies drawn from actual experiences. The instruction should also include education as to the consequences of antitrust violations for the trade association, the members, and individual employees.

Counsel responsible for a trade association's antitrust compliance program should attend trade association meetings and pay close attention to the association's activities. Most importantly, the program should include periodic antitrust compliance audits that look for certain "red flags." Among other things, it is important to determine (i) whether the positions of the attendees at trade association meetings match the purpose of the meeting, (ii) whether the association is gathering detailed industry data, especially specific transaction data or forward-looking pricing and output data, (iii) whether meetings are attended by counsel, (iv) whether there is an agenda for the meetings and a record of what was discussed, and (v) whether there is a pattern of meetings in foreign countries.

Counsel should not be satisfied, however, simply to review the association's official antitrust compliance policy, bylaws, agendas and minutes. Counsel must consider the possibility that these types of official documents may be nothing more than cover for conspiratorial conduct and that the official meetings may provide the opportunity and camouflage for collusion.

## 3. Examples of Trade Associations Facilitating Collusion and/or Organizing Naked Restrictions of Competition

In recent decades, the antitrust agencies have generally not encountered trade associations that have organized naked restrictions of competition, such as price-fixing, bid rigging and market allocation. This is partially due to the level of sophistication of U.S.-based trade associations about the antitrust laws. Even more likely, however, it is attributable to the fact that individuals and companies that engage in such conduct realize that, to avoid detection, collusion must be conducted covertly. The open involvement of a trade association could only increase the chances that the conspiracy would be disclosed to the Division through the amnesty program or otherwise.

On occasion, however, the Division has encountered trade associations that have facilitated collusion. One such example involved a trade association of wirebound box manufacturers, two of which the Division prosecuted for a 20 year conspiracy to allocate customers. In that case, the trade association kept

records of its members' customers. When one of the association's members (member A) made a sales call on a potential customer, member A contacted the association to determine if the potential customer was already being serviced by one of the association's members. If the customer was already being serviced by one of its members (member B), the trade association would provide a code letter. The code letter identified a certain section of the United States on a secret map kept by the association and its members. Through the use of the code letter and the secret map, member A knew that member B serviced the customer. Member A then called member B to see what member A should bid or quote to ensure that member B kept the customer.

### 4. Examples of Members Using Trade Association Activities to Cover Unlawful Collusion, without the Knowledge of the Trade Association

More frequently, the Division has encountered examples of trade associations that have provided cover for collusion. One of these examples involved a conspiracy among five major citric acid manufacturers to fix prices and allocate sales volumes for citric acid worldwide from March 1991 through June 1995. The industry's trade association, the European Citric Acid Manufacturers' Association (ECAMA), was a legitimate trade association but was used to provide cover for the cartel. One of the witnesses in the related lysine trial testified in court that ECAMA gave the citric acid conspirators "good cause" to be together at the particular location for the official ECAMA meetings. Since the conspirators were all attending the official meetings in any case, it was convenient to meet the day before the official meetings to fix the prices of citric acid and set market shares. Consistent with the purpose of being a cover for illegal activity, ECAMA took steps to prevent its formal activities from crossing the antitrust line.

Another example was the trade association subcommittee formed for the sole purpose of providing cover for the lysine conspiracy. The lysine conspiracy involved price-fixing and volume allocation agreements in the world market for lysine from June 1992 through June 1995, affecting over $1 billion in sales. Early in the lysine conspiracy, the conspirators formed an amino acid working group or subcommittee of the European Feed Additives Association for the purpose of providing cover in the same way that they observed that ECAMA was providing cover for the citric acid conspiracy. The subcommittee provided a false, but facially legitimate, explanation as to why the conspirators were meeting. One witness in the lysine trial described the lysine trade association as a "good reason to get together." Another witness described the trade association as "camouflage" for the "unofficial meeting" where the conspirators would meet to "agree on the price [of lysine]." To maximize the cover the subcommittee provided, the conspirators created sham documents under the association's imprimatur to conceal the conspirators' true activities. For instance, one witness prepared, in his words, a "phony" agenda for a subcommittee meeting in Paris in October 1992 in order to attach a legitimate purpose to a conspiratorial meeting. In fact, none of the issues on the agenda were discussed at the meeting.

### 5. Trade Association Organization of Anticompetitive Activity

A trade association may openly exceed its legitimate functions and organize anticompetitive activity. In *United States v. Association of Retail Travel Agents (ARTA),*[3] for example, the Division charged ARTA in connection with its efforts to orchestrate a boycott of travel providers that did not conform to ARTA's vision of an appropriate travel agent compensation system. ARTA's Board of Directors had adopted a written policy calling for a minimum ten percent commission on hotel and car rental sales by travel agents, the elimination of all distribution outlets for airline tickets other than travel agents, and the payment of commissions based on full fares rather than the actual discounted prices. A few days later, ARTA hosted a press conference where it announced the content of this policy, and shortly thereafter, one of ARTA's

[3] United States v. Ass'n of Retail Travel Agents, 1995-1 Trade Cas. (CCH) ¶70,957 (D.D.C. Mar. 16, 1995).

board members announced that his travel agency would cease doing business with certain travel providers whose commission and sales practices did not comport with the policy, and invited other travel agents to do likewise. Thereafter, at least one other board member made a similar announcement.

ARTA developed a position for its travel agent members on the prices and terms upon which they should be compensated, and then invited and encouraged members not to deal with travel providers that did not follow its prescription. The Division's complaint alleged that ARTA and its members agreed on commission levels and other terms of trade on which ARTA members and other travel agents should transact business with travel providers, and invited, encouraged and participated in a group boycott designed to induce travel providers to agree to those commission levels and terms of trade, all in violation of Section 1 of the Sherman Act. The case was settled by a consent decree in which ARTA was prohibited from "inviting or encouraging concerted action by travel agents or travel agencies to refuse to do business with specified suppliers of travel services or to do business with specified suppliers only on specified terms; and directly or indirectly adopting, disseminating, publishing, or seeking adherence to any rule, bylaw, resolution, policy, guideline, standard, objective, or statement made or ratified by an officer, director or other official of defendant that has the purpose or effect of advocating or encouraging any of the[se] practices."

### 6. Trade Association Rules that Inhibit Competition

Industry codes of conduct that restrain competition may be anticompetitive. The DOJ challenged a professional society's prohibition in its canon of ethics of competitive bidding by its members (*National Soc. of Professional Engineers v. U.S.*[4]). In that case the Supreme Court held that the trial court was justified in refusing to consider the defense that the canon was justified "because it was adopted by members of a learned profession for the purpose of minimizing the risk that competition would produce inferior engineering work endangering the public safety." The Court held that "no elaborate industry analysis is required to demonstrate the anticompetitive character of such an agreement," and that "the Rule of Reason does not support a defense based on the assumption that competition itself is unreasonable."

### 7. Issues Associated with Trade Association Membership

In *Northwest Wholesale Stationers v. Pacific Stationery & Printing Co.,* 472 U.S. 284 (1985), the Supreme Court addressed the exclusion of companies seeking membership in a wholesale buying cooperative of office supply retailers. The Court noted that the cooperative "permit[ted] the participating retailers to achieve economies of scale in both the purchase and warehousing of wholesale supplies, and also ensure[d] ready access to a stock of goods that might otherwise be unavailable on short notice." The asserted reason for expelling the plaintiff – failure to comply with a cooperative rule on disclosure of a change in stock ownership – was described as a "reasonable" rule which "may well provide the cooperative with a needed means for monitoring the creditworthiness of its members." The Court held that a rule of reason analysis was appropriate: "[w]hen the plaintiff challenges expulsion from a joint buying cooperative, some showing must be made that the cooperative possesses market power or unique access to a business element necessary for effective competition."

The DOJ and FTC have also applied a rule of reason analysis to membership in health care joint ventures, such as physician and multiprovider networks. The agencies' Health Care Statements "focus not on whether a particular provider has been harmed by the exclusion but on whether the exclusion reduces competition among providers in the market and thereby harms consumers. That analysis requires an assessment and balancing of potential procompetitive and anticompetitive effects, which in turn requires an

[4] National Society of Professional Engineers v. United States, 435 U.S. 679 (1978).

evaluation of the market structure, the basis for the exclusion, and the resulting competitive incentives, all of which are integral to a rule of reason analysis."[5]

## 8. Standard Setting: Exclusionary Conduct Through Product Certifications

The other major class of restraints are those designed to restrict competition, not within the group, but between favored firms and disfavored firms. The theme here is exclusion rather than collusion. An example is a seal of approval or other standard-setting activity. The first point to make about standard setting is that it will almost invariably be analyzed under the rule of reason, unless it is merely a device to enforce a price-fixing agreement by excluding new entrants or by punishing members who deviate from the cartel. Standards provide many pro-competitive benefits to consumers by providing them with information, by ensuring that products of different manufacturers are compatible with each other, and by keeping unsafe products out of the marketplace. Rule of reason treatment is therefore generally appropriate when analyzing standards issues.

The second point is that market power is an important factor in determining whether a standard can have an anticompetitive effect and therefore can be unlawful. If certification by a particular group is only one among many ways to be recognized by consumers as acceptable, deprivation of that certification is unlikely to have a significant competitive effect. If, on the other hand, failure to adhere to the particular standard would result in effective exclusion from the market, then there is much greater reason to be concerned about the appropriateness of such exclusions as do take place.

The third point is that exclusion by an entity in the standard setting body is not necessarily unlawful, depending on the legitimacy of the reasons for exclusion. One important proxy for the legitimacy of the exclusion is the fairness of the process by which it was reached. The two most significant Supreme Court cases in this area arose from processes that were fundamentally flawed. In *American Society of Mechanical Engineers v. Hydrolevel Corp.*[6], a manufacturer of safety devices for water boilers made competitive use of the position of one of its employees as a vice-chair of the relevant standards-setting subcommittee of ASME. To meet a competitive threat from another company, the employee worked with the chair of the subcommittee to request an opinion from ASME concerning the competitor's product. The chair then responded to the letter that he had helped draft, erroneously suggesting, on ASME stationery, that the competitor's product was unsafe and in violation of ASME's code. The employee was later commended in his personnel file for "efforts and skill in influencing the various code making bodies to 'legislate' in favor of [the manufacturer's] products." The Supreme Court upheld a finding of liability against ASME.

Similarly, in *Allied Tube & Conduit Corp. v. Indian Head, Inc.*,[7] a manufacturer of steel conduit for electrical wiring defeated an attempt by a competitor to get plastic conduit approved as safe for use in electrical wiring. It did so by "packing" a meeting of the National Fire Protection Association at which the relevant provisions of the National Electrical Code were to be discussed and voted upon. The Supreme Court held that the *Noerr-Pennington* doctrine[8] did not protect the manufacturer from liability for this abuse of the standards-setting process.

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5 ABA Section of Antitrust Law, Antitrust Law Developments (6th ed. 2007), at 480.

6 *American Society of Mechanical Engineers v. Hydrolevel Corp.*, 456 U.S. 556 (1982).

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

8 The *Noerr-Pennington* doctrine protects a defendant from liability for anticompetitive government actions and incidental anticompetitive effects resulting from the defendant's petitioning the government for such actions. *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.,* 365 U.S. 127 (1961); *United Mine Workers v. Pennington,* 381 U.S. 657 (1965).

## 9. Standard Setting: Interoperability Standards and Patent Hold Up

Industry standards are recognized as "one of the engines driving the modern economy."[9] Many industries have found it beneficial to develop standards to specify product dimensions, features, or interfaces that enable interoperability, including interchangeability, between products from competing suppliers. Interoperability standards enhance competition between rival products.

While interoperability standards may enhance competition, the selection of a technology for the standard may lead to the elimination of rival technologies, if the standard becomes generally accepted in the marketplace. But the efficiency of industry standard setting in selecting technologies through direct competition most often leads to a procompetitive outcome.

However, there is a risk that a party may manipulate the joint action involved in standard-setting process for anticompetitive exclusionary purposes through deception regarding patents and patent applications applicable to technologies that are selected for a standard. If a party holding a patent or patent application misleads the standard-setting process about its IP during the standard-setting process, rival technologies may be eliminated for reasons other than competition on the merits. After the standard has been published and the industry chooses to follow the standard, the patent holder may be able to command a higher licensing royalty for its patented technology then it could command if it had not misled the standard-setting organization or even to block use of the standard.

In this section, we describe first the potential procompetitive benefits flowing from interoperability standards. The paper then addresses how the standard-setting process may be manipulated for anticompetitive purposes by patent holders to secure monopoly power and deny the industry and consumers the potential procompetitive benefits expected from standard setting. Finally, the paper sets forth a framework of analysis, to determine whether a patent holder has manipulated the standard-setting process to acquire monopoly power, developed by the U.S. Federal Trade Commission in its recent decision in *Rambus, Inc*.[10]

### *9.1 Value of Industry Standard Setting*

Acting through private standard-setting organizations, many industries have developed interoperability standards that enable interconnection of compatible products from different suppliers. These private standard-setting organizations select technologies for the standard using cooperative, consensus decision-making. The standards are voluntary, with each industry member deciding independently whether it wishes to offer a standard-based product.

Industry interoperability standards generally enhance competition to the benefit of consumers. Standards that facilitate interoperability among products typically increase the chances of market acceptance of the product, make the product more valuable to consumers, stimulate output, and enhance price competition.[11] By lowering the cost to consumers of switching between competing products and services, interoperability standards enhance competition among suppliers. Especially in industries with network effects, a standard may enlarge markets by overcoming coordination failures among those

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9 U.S. Department of Justice and Federal Trade Commission, "Antitrust Enforcement and Intellectual Property Rights: Promoting Innovation and Competition" (April 2007) at 33, available at http://www.ftc.gov/reports/innovation/P040101PromotingInnovationand Competitionrpt0704.pdf.

10 *In the Matter of Rambus, Inc.*, FTC slip opinion (Aug. 2, 2006), 2006 FTC LEXIS 60 (2006), found at http://www.ftc.gov/os/adjpro/d9302/060802commissionopinion.pdf.

11 *Id.* at 3.

interested in developing and using the standard, so that the products are available to, and used, by more consumers.[12]

Interoperability standards enhance competition in upstream markets, as well. The standard-setting process can function as an efficient substitute for selecting interoperable technologies through direct competition.[13] A standard-setting organization can compare competing technologies, patent positions, and licensing terms before an industry becomes locked into a standard.[14] Thus, the setting of a standard is, itself, a competitive process. In regard to upstream markets, the standard also may enhance competition among suppliers in regard to the means for implementing the chosen standard. Firms may thereafter compete on other product features not necessary for interoperability.

### *9.2 Potential for Abuse*

Standard setting may pose risks to competition when it displaces the competitive process through which consumers commonly select technologies and products. Antitrust enforcement agencies remain watchful for possible abuses. Typically, however, the procompetitive benefits of standard setting outweigh these risks.[15] For this reason, antitrust enforcement has shown a high degree of acceptance of, and tolerance for, standard-setting activities.[16]

One risk of harm to competition in the standard-setting context arises when a patent holder participating in the standard-setting process subverts the process through deception. When a patent holder's intellectual property covers technologies under consideration for the standard, the standard-setting selection process may be distorted if the patent holder misleads the standard-setting organization to believe that it does not hold essential IP. This deception may obscure the relative merits of alternative technologies.[17]

Absent the patent deception, the standard-setting organization could either select a rival technology or secured protection against the patent holder from later asserting the patent to block use of the standard. Members also could seek to negotiate lower licensing royalties prior to the selection of its patented technology. "[K]nowledge of potential patent exposure, may [give a prospective user of the standard] powerful economic incentives to negotiate a license before the technology becomes standardized, based on a lower, *ex ante* value of the patented technology."[18]

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12 *Broadcom Corp. v. Qualcomm Inc.*, 2007 U.S. App. LEXIS 21092 (3rd Cir. 2007); April 30, 2007, U.S. Dep't of Justice Business Review Letter to the Institute of Electrical and Electronics Engineers ("IEEE), available at http://www.usdoj.gov/atr/public/busreview/222978.htm; *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 501, 506-07 (1988); Areeda & Hovenkamp, *supra*, 2233; Deborah Platt Majoras, Chairman, Fed. Trade Comm'n, Recognizing the Procompetitive Potential of Royalty Discussions in Standard Setting, Remarks (Sept. 23, 2005), available at http://www.ftc.gov/speeches/majoras/050923stanford.pdf.

13 *Rambus, supra*, at 36.

14 *Id.* at 36; *Broadcom*, *supra*.

15 *Broadcom, supra*; Areeda & Hovenkamp, *supra*, P 100a.

16 *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 500-01 (1988); *Rambus, supra,* at 33; *see also* Standards Development Organization Advancement Act of 2004, 15 U.S.C. §§ 4302, 4303 (providing that private standard-setting conduct shall not be deemed illegal per se, and insulating such conduct from treble damages).

17 *Rambus, supra,* at 28-29.

18 *Id.* at 35, 36.

While the standard-setting organization may be able to choose among various technological options during the standard-setting process, once the technological choice is made and the standard has been commercially adopted, it can be time consuming and expensive to adopt a different technology.[19] After the technology is chosen for the standard and others have incurred sunk costs, the relative cost of switching to an alternative technology or standard may increase significantly.[20]

The results of such deception may be that the patent holder is able "hold up" the industry and consumers for greater licensing royalties than it could have commanded if it had disclosed its IP prior to the selection of its patented technology. Patent hold up may undermine the potential efficiencies offered by standard setting by chilling participation in the standard-setting process.[21]

The Commission held in *Rambus*:

> *Through a course of deceptive conduct, Rambus exploited its participation in JEDEC to obtain patents that would cover technologies incorporated into now-ubiquitous JEDEC memory standards, without revealing its patent position to other JEDEC members. As a result, Rambus was able to distort the standard-setting process and engage in anticompetitive "hold up" of the computer memory industry. Conduct of this sort has grave implications for competition. The Federal Trade Commission (FTC or Commission) finds that Rambus's acts of deception constituted exclusionary conduct under Section 2 of the Sherman Act, and that Rambus unlawfully monopolized the markets for four technologies incorporated into the JEDEC standards in violation of Section 5 of the FTC Act.*[22]

Consumers may be harmed when a deceptive patent holder blocks or inhibits use of a standard. When this anticompetitive harm exceeds the efficiencies gained from standard setting, the standard-setting process is no longer beneficial.[23]

### *9.3 Framework for Analysis of Manipulation of Standard-Setting Process Through Patent Deception*

In view of this potential for anticompetitive abuse of the standard-setting process through patent deception, the U.S. Federal Trade Commission has developed a framework for analyzing whether possible patent deception leads to the unlawful acquisition of monopoly power in its recent decision in *Rambus*

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19 *Id.* at 35; April 30, 2007, DOJ Business Review Letter to the IEEE, *supra*, (before the standard was set when competitive alternatives may have been available without "the expense and delay of developing a new standard around a different technology."); *Broadcom, supra*.

20 U.S. Department of Justice and Federal Trade Commission, "Antitrust Enforcement and Intellectual Property Rights: Promoting Innovation and Competition" (April 2007) at 35, found at http://www.ftc.gov/reports/innovation/P040101PromotingInnovationand Competitionrpt0704.pdf.

21 *Rambus, supra,* at 25 ("That conduct [to engage in patent hold-up], if established, might itself chill participation in cooperative standard-setting activities."), n.120 (one participant wrote that "[i]f we have companies leading us into their patent collection plates, then we will no longer have companies willing to join the work of creating standards."); U.S. Department of Justice and Federal Trade Commission, "Antitrust Enforcement and Intellectual Property Rights: Promoting Innovation and Competition" (April 2007) at 35-36, 35 n. 11 ("The potential for one party to hold up another party that has sunk investments specific to the [standard-setting] relationship may discourage that other party from investing efficiently in the collaboration in the first place."), available at http://www.ftc.gov/reports/innovation/ P040101PromotingInnovationandCompetitionrpt0704.pdf.

22 *Rambus*, *supra*, at 3.

23 *Rambus, supra,* at 33.

*Inc*.[24] That proceeding focused on standard setting by the Joint Electron Device Engineering Council (JEDEC), an industry-wide, voluntary standard-setting organization that developed standards for interchangeable computer memory technologies, among other products. Respondent Rambus participated in the JEDEC standard-setting process and held IP covering computer memory technologies included in the JEDEC standard.

In *Rambus*, the Commission concluded that respondent Rambus had engaged in a course of deception regarding its patents and patent applications that constituted unlawful exclusionary conduct. Under U.S. antitrust law, exclusionary conduct is conduct other than competition on the merits that appears reasonably capable of making a significant contribution to creating or maintaining monopoly power.[25] If "'a firm has been attempting to exclude rivals on some basis other than efficiency,' it is engaging in exclusionary conduct."[26] In the standard-setting context, "distorting choices through deception obscures the relative merits of alternatives and prevents the efficient selection of preferred technologies."[27] Thus, deception may lead to the exclusion of rivals on some basis other than efficiency. The Commission pointed out in its *Rambus* opinion that it is "extraordinarily difficult to justify" misleading a standard-setting body about patents.[28]

In *Rambus*, the Commission found its own 1983 Policy Statement on Deception ("Deception Statement") useful in determining when conduct may be deceptive and exclusionary and not competition on the merits.[29] The Deception Statement sets forth a framework of analysis to determine when "representations, omissions, and practices" are deceptive and unlawful. The policy statement is based upon the belief that "vigorous competitive advertising can actually benefit consumers by lowering prices, encouraging product innovation and increasing the specificity and amount of information available to consumers."[30] Deception harms competition because consumers who prefer a competitive product are wrongly diverted.[31]

Under the Commission's Deception Statement, a commercial communication is deceptive if it contains a representation or omission of fact that is likely to mislead a member of the target audience acting reasonably under the circumstances. In addition, the representation or omission must be material to the target audience's conduct or purchasing decision.[32]

The Commission found that Rambus distorted the JEDEC selection process through a course of deceptive conduct. Rambus concealed from the standard-setting organization pending patent applications covering technologies being considered by JEDEC for the standard. Years later, once the standard was established and adopted by the industry, Rambus sued firms practicing the standard, for patent infringement. The Commission found that Rambus had made potentially deceptive omissions through its

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24 *Id.* at 28.

25 *Id.* at 28.

26 *Id.* at 28, *quoting Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 605 (1985), *quoting* R. Bork, *The Antitrust Paradox* 138 (1978).

27 *Id.* at 28-29.

28 *Rambus* at 36, *quoting Aspen Skiing*, *supra*, at 605 n.32 (1985).

29 Federal Trade Commission, 1983 Policy Statement on Deception, *reprinted in* 4 Trade Reg. Rep. (CCH) ¶ 13, 205 at 20, 911-912, found at http://www.ftc.gov/bcp/policystmt/ad-decept.htm,

30 Deception Statement, *supra*, at n.58

31 *Id.* at n.58.

32 Deception Statement, *supra*, at 175.

continuing concealment of patents and patent applications and made outright misrepresentations by giving evasive and misleading responses to questions about its patents.[33] Furthermore, the Commission found that Rambus facilitated its patent hold up by using information derived from the standard-setting process to develop a patent portfolio that would cover JEDEC's standard.[34]

In its analytical framework set forth in *Rambus*, the Commission identified several additional requirements for finding deceptive conduct in the context of standard setting unlawful exclusionary conduct while preserving the procompetitive outcome of standard setting.[35]

In its decision, the Commission found that JEDEC operated a cooperative decision making process. It concluded that JEDEC members had reason to believe that the environment would be free from deceptive conduct.[36] Because of this expectation, JEDEC members were "likely to be less wary of deception" and "anticompetitive effects therefore [were] more likely to result."[37]

Second, the Commission concluded that deception in the standard-setting context must be wilful before finding it harmful to competition.[38] Without a requirement for wilfulness, innocent but erroneous statements about patents may be found unlawful. The Commission was concerned that applying its Deception Statement without finding willfulness may create a disincentive for firms to participate in standard-setting organizations and undermine the potential efficiencies flowing from the standard setting.

In *Rambus*, the Commission found that Rambus had engaged in patent deception deliberately. It found that Rambus had intentionally pursued its course of conduct consistent with a strategy to manipulate the standard-setting process.[39]

The usual elements for unlawful monopolization under U.S. antitrust law also must be established for patent deception to constitute unlawful exclusionary conduct in the context of standard setting. For example, there must be a causal relationship between the deception and the acquisition of monopoly power.[40] The deception must "reasonably appear capable of making a significant contribution to creating or maintaining monopoly power."[41] Thus, if the patent holder's deception was not material to the selection process, then the deception would not constitute unlawful exclusionary conduct.

Additionally, the patent deception must lead to durable market power. If the industry can switch quickly and without substantial cost to alternative technologies or a new standard once the patent holder undertakes to assert its patents, the patent holder has not unlawfully acquired monopoly power. Where there are "quick fixes," there cannot be durable monopoly power.[42]

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33 Rambus, supra, at 49-50.

34 Id. at 36-51, 66-67.

35 Id. at 28, 30.

36 Id. at 51-52, 66.

37 Id. at 34.

38 Id. at 30 and n.142.

39 Id. at 51, 71.

40 Id. at 73-74.

41 Id. at 28, quoting III Phillip E. Areeda & Herbert Hovenkamp, Antitrust Law, Para. 651 f, at 83-84 (2nd ed. 2002).

42 Id. at 33.

After concluding that Rambus had engaged in unlawful exclusionary conduct, the Commission found that the appropriate remedy to save consumers from the exercise of unlawfully acquired monopoly power was to restrict the patent holder from collecting a royalty amount greater than the amount that Rambus likely would have commanded had it not misled the standard-setting body. The Commission concluded that the remedy should be forceful enough to restore ongoing competition and inspire confidence in the standard-setting process without being unduly restrictive and thereby undermine the attainment of procompetitive goals of standard setting.

Rambus has appealed the Commission decision. The case is currently pending before the United States Court of Appeals for the District of Columbia Circuit.

# EUROPEAN COMMISSION

## 1. Introduction

As pointed out in the OECD secretariat's paper trade/business organisations and associations play an important role in competition policy and enforcement. When developing new policy approaches, ranging from legislative projects to enforcement guidelines and Communications, the Commission relies heavily on industry input. Business groupings follow the Commission's activities and frequently intervene to share their experience with policy makers. Opinions of industry organisations represent mainly business interests (and not necessarily cover the overall spectrum of market participants, in particular consumer interests). But this is without prejudice to the fact that they provide useful input in the preparation of new legislation or modification and adaptation of existing rules.

A good example illustrating that is the involvement of industry groups in the development and revision of legislation, particularly block exemption regulations of sectoral scope. Examples of sectoral Block Exemption Regulations which have been reviewed in recent years, and where the sectoral associations made detailed and useful input, are the Regulations concerning insurance, motor vehicle distribution, and IATA block exemption in the air transport sector. Recent examples include the revision of the antitrust rules as applied to liner shipping conferences and the. In the field of maritime liner conferences (which was the subject of a paper to the OECE Competition Committee for its meeting of February 2007), an association of freight shippers was at the forefront of a campaign to have the EU Block Exemption for such price-fixing conferences repealed, which has now happened, as explained in the February 2007 submission. In both examples, the Commission worked closely with industry associations to identify the need for exemptions and it was finally decided to phase out the special regimes regarding the application of Article 81. As a next step, the Commission will closely cooperate with the relevant industry groups to develop guidance on the application of the antitrust regime in these sectors.

The input by trade organisations is highly relevant for the Commission and its services, as it gives us an overview of the current developments in a particular industry. As suggested by the OECD, business organisations may also help competition agencies enforcing competition law, not only through the organisation of compliance programs but also by reporting alleged infringements when acting as complainants or informing an inquiry (i.e. as an interested third party providing expert advice). In several large antitrust inquiries industry organisations acted as complainants, an example being the complaint brought by a ship-owners' association against the insurance pooling system for maritime protection and indemnity insurance (P&I insurance) in the 1990s, leading to significant changes in the system which were subsequently sanctioned in a Commission exemption decision[1].

As suggested by the OECD, trade associations can make important contributions to the development of soft legislation (co-regulation or self-regulation), given that they have profound knowledge in their respective sectors and are therefore in principle well suited to produce workable effective rules for industry behaviour. However, the actions of trade associations can also have anti-competitive effects, for example when they issue recommended prices or control access to a profession in a restrictive way. This can

[1] P&I Clubs decision [1999] Official Journal L125/12.

particularly be the case in the sector of professional services, which has been the subject of a recent review by DG Competition of the European Commission[2].

The role of trade associations can be positive or negative with regard to the enforcement of competition rules. Drawing on the experience of DG Competition of the European Commission, this paper will take one recent example of a positive role of a trade association, in working with the Commission to draw up guidelines for exchange of information in connection with a legislative initiative in the chemicals sector, and several examples of trade associations co-ordinating or organising anti-competitive agreements.

## 2. Working with industry associations on the Community's REACH programme

An interesting and recent example of trade associations acting as a useful relay for competition agencies seeking to give guidance to industry is the experience gained by the European Commission when working with industry associations on the "Guidance on data sharing" for the chemical sector in the context of the "REACH" legislation on chemicals[3] .

Such guidance was deemed necessary as REACH makes comprehensive data exchange between industry players mandatory. Such mandatory information exchange between, in most cases, competitors may - under certain conditions - raise the inherent risk of collusion and thus of violations of Article 81 of the EC Treaty. Therefore, it was crucial to have guidance spelling out clearly the relevant competition problems which may typically arise under information sharing, and helping companies to avoid them. From a competition law perspective, it was imperative that undertakings appreciate that the EC competition rules do in fact apply to such co-operation, even if it is stipulated by an EC Regulation.

A consortium consisting of three industry associations and a law firm working for and under the scrutiny of the Commission helped the Commission to develop the guidelines, and they were discussed in so-called "stakeholder expert group meetings" comprising, among others, various industry associations. Furthermore, after finalising the tender project, the Commission launched a public consultation on the guidance, thus granting industry associations and others a further opportunity to submit their comments. The resulting guidance identifies instances, such as cost sharing for data exchanged calculated on the basis of (individual) production/sales volumes, where the risk that competition rules may be breached is high, and provides a set of practical rules helping to avoid such a breach.

## 3. Examples of trade associations involved in anti-competitive agreements

On the other hand, it is well-known that trade associations can play a role, and in the past have played a role, in anti-competitive agreements, including exchange of competitively sensitive information and the organisation of hard-core cartels. A classic example was the cement cartel sanctioned by the European Commission in 1994, in which the European Cement Association Cembureau was at the core of the cartel, and organised the price agreements and market sharing aspects of the cartel.

Since the 1970s it has been the practice of the European Commission to hold trade associations responsible for such practices along with their members. In several cases in the 1970s the European

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2 See http://ec.europa.eu/comm/competition/sectors/professional_services/overview_en.html.

3 Regulation (EC) No 1907/2006 of the European Parliament and of the Council of 18 December 2006 concerning the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH), establishing a European Chemicals Agency, amending Directive 1999/45/EC and repealing Council Regulation (EEC) No 793/93 and Commission Regulation (EC) No 1488/94 as well as Council Directive 76/769/EEC and Commission Directives 91/155/EEC, 93/67/EEC, 93/105/EC and 2000/21/EC, OJ L 396, 30 December 2006, p. 1–849. See: http://reach.jrc.it/docs/guidance_document/data_sharing_en.pdf.

Commission addressed prohibition decisions for competition infringements to trade associations in addition to their members, without however imposing fines on the associations[4].

In the 1980s the European Commission started to impose fines on trade associations, starting with the BNIC case of 1982, concerning producers of brandy. In that case a fine was imposed only on the association not on the members. The first in which the Commission imposed a fine both on an association and on its members was the *roofing felt* case of 1986.

Since then, the list of cases in which trade associations have been at the heart of cartels includes amino acids (2001), citric acid (2002), carbonless paper (2004) and industrial tubes. In most of these cases, the trade associations had a legitimate purpose, but turned to anti-competitive activity once the official agenda of meetings was finished.

A recent example of a cartel case in which unions of self-employed farmers were central was the French beef sector cartel sanctioned in April 2003 with fines totalling €16.7 million on six federations of French farmers. In the face of difficulties on European beef markets the federations had jointly set a minimum price and agreed to prevent imports from outside France. Several factors contributed to the gravity of the cartel, for example, documents found on the premises of the federations during the inspections indicated a full knowledge of the illegality of the agreement, and the federations of farmers used threats of violence against slaughterers in order to oblige them to respect the agreement.

The press release accompanying the decision[5] notes that: "This is the first time that the Commission has imposed fines on farmers' unions. The Commission recognises the importance of trade union freedom, but it is not the job of trade unions to assist in the conclusion and implementation of agreements that disregard the rules governing law and order and, more specifically, the competition rules." The Court confirmed this and held that a union can legitimately defend the interests of its members, but cannot use the principle of freedom of association to justify an infringement of the competition rules.

Given the large number of self-employed members of the unions in question, the fines in that case were imposed on the unions only, but, in order to check that the ceiling of fines was not reached, the Commission referred to the total turnover of the members, not the limited budget of the unions themselves. This approach was confirmed by the Court of First Instance on appeal, although the fines imposed by the Commission were slightly reduced[6]. In the meantime a new Regulation laying down rules and procedures for anti-trust cases had been adopted[7], which includes a few paragraphs on fines to associations (on the ceiling: 10% of the total turnover of the members active on the market where the infringement took place; and on the recovery of the fine) (see article 23).

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4 For example, the Belgian Wallpaper, Fedetab, and Italian flat glass cases.

5 Press release IP/03/479 of 2 April 2003.

6 CFI judgement in joined cases T-217/03 and T-245/03, December 2006. The Commission had already reduced the notional fines applicable by 60%, to take into account the background of the crisis in the beef sector due to the bovine spongiform encephalophathy ("mad cow") crisis, but the Court reduced the notional fine by a further 10%.

7 Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty. Article 23 concerns penalties, and point 4 of that article reads: *When a fine is imposed on an association of undertakings taking account of 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*.

Nor can trade associations make price recommendations to their members in the European Union, as indicated by the judgement of the European Court of Justice in the German Fire Insurance case of 1985[8], in which the German Association of Property Insurers (Verband der Sachversicherer), recommended increases in commercial premiums for industrial fire and consequential loss insurance of 10, 20, or 30 per cent in specified circumstances. Although the recommendation was stated to be non-binding, the Court upheld the Commission's decision prohibiting the decision of association of undertakings considering that it constituted 'the faithful reflection of the [Association's] resolve to coordinate the conduct of its members'[9].

This position was recently reaffirmed by the Commission in the Belgian architects' case, in which the Commission found a scale of recommended minimum fees of the Belgian Architects Association to in breach of European Union competition rules. In its press release, the Commission stated that like fixed prices, recommended prices reduce competition because they can facilitate price coordination[10].

## 4. Conclusions

Trade associations have many legitimate and beneficial functions, and can play an important role in assisting competition agencies by relaying to them the views of a sector on particular policy initiatives and relaying to companies in the sector the rules and procedures in place regarding competition and the importance of respecting them.

On the other hand, numerous examples exist where trade associations have been found to play a central part in co-ordinating anti-competitive activities, including hard-core cartels. In such cases the practice of the Commission, where a fine is appropriate, is to impose the fine both on the trade association in question and its members involved in the anti-competitive activity for their respective role. However, in particular circumstances, the association only may be fined, as appropriate.

8 Fire Insurance [1985] OJ L35/20.

9 Judgement 45/86 Verband der Sachversicherer [1987] ECR 405, 454–5.

10 Press release IP/04/800 of 24 June 2004.

# CHINESE TAIPEI

## 1. Background

Trade associations in Chinese Taipei are non-profit legal entities organized and funded by individual professions or corporations that operate in a specific industry. In accordance with the Industrial Group Act and Commercial Group Act of Chinese Taipei, the Ministry of the Interior and relevant business sector regulators govern the establishment, staffing, meeting, and funding of trade associations. Business entities in Chinese Taipei are required to be affiliated with the relevant associations since the Ministry of the Interior requests that trade associations report the enterprises that refuse to join any relevant associations in due time. Pursuant to the regulation of the Commercial Group Act, the Ministry of the Interior will punish enterprises that fail to be members of the relevant commercial associations within 3 months after notice is given. Furthermore, based on the importance placed by individual sector regulators on its supervising professions, some professions such as architecture and the legal profession require varying lengths of apprenticeships before a person can be certified by the professional association.

In order to coordinate the relationship among industries and enhance joint benefits so as to promote trade and industrial improvement, as long as they accelerate economic development, trade associations may offer a broad range of services to members as follows:

- handling membership affairs: collecting members' data, the registration of members, granting membership certificates, assisting members with applications for business licenses;
- research on market statistics: developing market surveys on sources of raw materials, production and sales, imports and exports, the labor force, production skills, and other related market information;
- promotion of members' products: making advertising copy, holding exhibitions either locally or internationally, and issuing product certifications;
- coordination of members' activities: organizing seminars and symposiums, developing joint R&D for members, coordinating with other social activities;
- assisting members in handling legal affairs: the settlement of conflicts between members, the settlement of labor conflicts, and handling and advocating cases decided by the government agencies.

The influences likely to be exerted by existing trade associations in Chinese Taipei are derived not only from services that they offer to the members, but also from the strong affiliations among members, strong cultural identity, and petitions based on common interests to influence public policy in a direction favorable to the members.

## 2. The Role of Trade Associations in the Fair Trade Law

The regulation of trade associations is in the original antitrust statute. According to Article 2 of the Fair Trade Law (hereinafter the "Law) of Chinese Taipei, the term "enterprise" as used in the Law includes

(1) a company, (2) a sole proprietorship or partnership, (3) a trade association, and (4) any other person or organization engaging in transactions through the provision of goods or services. The conducts of or decisions by trade associations cannot be exempted from the regulation of the Law. The process of handling cases related to trade associations in the Law is similar to that in cases related to other types of enterprises.

Moreover, Article 14 of the Law prohibits enterprises from partaking in concerted actions, save for specific conduct that is listed among the exceptions stipulated in Article 14 of the Law, is beneficial to the economy as a whole and is in the best interests of the public at large. In order to prevent trade associations from engaging in concerted actions, Paragraph 4, Article 7 of the Law specifically stipulates that if trade associations use a resolution of a general meeting of members or a board meeting of directors or supervisors, or any other means, to restrict activities of enterprises, such conduct by trade associations will be deemed to be a horizontal concerted action. Thus, the prohibition of concerted actions, as stipulated in Article 14 of the Law, is applied not only to enterprises, but also to trade associations.

Like other business entities, trade associations shall apply to the Fair Trade Commission (hereinafter the "Commission") for the pre-approval of the concerted actions only for specific purposes, such as to enhance efficiency or to accelerate the industrial development, benefit the economy as a whole and be in the best interests of the public at large. The Commission may attach conditions or require undertakings in its approval, which shall be valid for no more than three years. After a concerted action is approved, the Commission may revoke the approval, alter the contents of the approval, or order the enterprises and trade associations involved to cease from continuing the conduct or to rectify the conduct, and take necessary corrective actions if the cause for approval no longer exists, the economic condition changes, or the enterprises involved engage in any conduct beyond the scope of the approval.

Furthermore, the Commission has issued the Policy Statement on Trade Associations under the Law to facilitate the understanding of and adherence to the Law and to serve as a reference for future cases related to the activities of trade associations and the applicability of the Law. In the policy statement, trade associations are strictly prohibited from engaging in the following acts:

- restricting entry into or exit from a specific market by enterprises;
- acting in either one of the following ways which restricts competition in a given market and hampers the functioning of that market:
  - imposing restrictions on the types, specifications or forms of goods or services; and
  - restricting the expansion of production capacities or the scale of service.
- restricting the production, delivery, marketing of goods and the provision of services. Such acts might be committed by means of quantitative controls, such as quotas, ceilings or floors on output, inventories, production time and the procurement of raw materials. In addition, they might also be committed by qualitative controls, such as imposing restrictions on the standards of goods manufactured and marketed and the provision of services;
- formulating, drafting, announcing or altering agreements either on the prices of goods sold by members or on the fees charged for the services provided;
- setting restrictions on trading territories or trading counterparts connected with the goods or services provided by members;

- jointly deciding on the terms of sale, service and payment;

- concluding international agreements or contracts on the basis of improper trading restrictions or unfair trading practices; and

- causing members to engage in discriminatory treatments of their trading counterparts or committing other unfair acts.

Trade associations are requested to acquire legal consultation in documents of the Commission or to obtain the pre-approval of the Commission, where their acts are related to the following situations:

- The formulation of non-compulsory standard specifications with a view toward promoting production efficiency and consumer welfare.

- The formulation of a self-disciplinary code, which reasonably seeks to avoid unfair competition practices, such as exaggerated advertising.

The activities of trade associations conforming to the relevant provisions of the Industrial Group Act and Commercial Group Act are unlikely to violate the provisions of the Law. Examples are as follows:

- Assembling information for members' reference, such as information concerning foreign and domestic markets and their trends;

- Developing and popularizing management skills, and providing training programs for such skills.

The sanctions applied to the cases related to trade associations in the Law are similar to the cases related to other business entities. Under Article 41 of the Law, the Commission may order the trade association that violates any of the provisions of this Law to cease and rectify its conduct, or the Commission may take necessary corrective action within the time period prescribed in the order; in addition, it may impose upon such an association an administrative penalty of not less than NT$50,000 and not more than NT$25,000,000. For a repeated offence against a prior order related to a concerted action, a punishment of imprisonment for not more than three years or detention, or a criminal fine of not more than NT$100,000,000, or both, may be imposed.

## 3. Examples

Cases related to trade associations handled by the Commission could be classified into two categories. The first category is related to the approved cases of trade associations as the applicants for concerted actions. Since most trade associations were established before the implementation of the Law in 1992, the services of trade associations provided to members related to the concerted actions such as the joint imports of raw materials have lasted for a long time. In order to continue these services, trade associations are requested to file with the Commission the application documents according to Article 14 through Article 22 of the Enforcement Rules to the Fair Trade Act.

Where the application for joint acts in regard to the importation of foreign goods is strengthening trade, is beneficial to the economy as a whole and is in the public interest, the Commission will issue letters to approve such joint acts. Most of the approved cases are related to trade associations in the downstream industries applying for the joint importation of upstream raw materials and include the following:

- approval of a concerted action by the flourmill industry association in the form of the joint importation of wheat;

- approval of a concerted action by the grain mill industry association in the form of the joint importation of corn;

- approval of a concerted action by the barley industry association in the form of the joint importation of barley;

- approval of a concerted action by the vegetable oil industry association in the form of the joint importation of soybeans;

- approval of a concerted action by the forage industry association in the form of the joint importation of corns;

- approval of a concerted action by the gravel quarry business association in the form of the joint importation of gravel and stones.

In addition to the approved pro-competitive cases, the Commission has investigated cases related to trade associations restricting the operations of members in the market. In the third amendment to the Law in 2002, the definition of concerted actions, as referred to in Article 7 of the Law, was re-defined with additional conditions and the prohibition of concerted actions has been applied to trade associations in addition to enterprises. This amendment has gradually led the Commission to treat the trade association involved in the case of a concerted action rather than its individual members as the main investigated party. It could therefore save on the resources needed to be devoted to a large number of interviews, extensive travel and the lengthy analysis of collected documents. Although trade associations have become the best cover of concerted actions that are undertaken by business entities, the cases of members using trade association to cover unlawful collusion are very rare.

Chinese Taipei is a region well known and highly respected for its strong moral values and ethics. Cooperation has long been the most highly respected value, not competition. Thus, members affiliated to the trade association will not only consider it to be an obligation to cooperate with the resolutions of the board or general meeting, but will also follow the suggestions, standards, regulations and instructions formulated by the association in order to avoid destructive competition. As a result, even though the agreement of the trade association is not binding; the influence of such an agreement is even stronger than any written or verbal contract.

In the case of the Medical Association of Taoyuan County being reported entering into a price-fixing agreement to double the registration fees for clinic services (from NT$50 to NT$100) in 2004, the Commission found that there were 676 member clinics providing various medical services in Taoyuan County. Although it is far more difficult to coordinate prices in an industry with so many competitors and the products and services provided heterogeneous in nature, the Medical Association of Taoyuan County has successfully encouraged its members to increase the registration fees for services.

By sending letters to inquire of the 676 members' opinions with regard to the increase of the registration fees, and printing posters with information concerning the effective date on which to start to charge the new recommended registration fees as a formal announcement from the association to the clinics to remind future patients, more than 500 clinics in Taoyuan County simultaneously increased their registration fees. The Commission decided that such conduct by the Medical Association of Taoyuan County would affect the competition of the clinics in Taoyuan County and would diminish the choices for

patients, and thus ordered the association to cease the unlawful acts immediately and imposed a fine of NT$3,000,000 on the association.

Another issue raised by the cases related to the local trade associations is that the scale of the local market may be relatively small in terms of affecting the market's function so as to hardly meet the requirement of the definition of the concerted action. However, in considering whether or not there is an actual concerted action implemented by the members later on, the risk of a concerted action would possibly affect the market's function, and thus the conduct of local trade associations is still deemed to be an unlawful concerted action. The cases are briefly described as follows, and the penalties for such cases are relatively low:

- The Eggs Business Association of Taoyuan County passed a resolution in a meeting of the Boards of Directors and Supervisors requesting the egg-shipping distributors to decrease their sales prices by a certain margin so as to reduce the costs to its members in violation of the Law. The Commission ordered the association to cease the unlawful acts immediately and a fine of NT$200,000 was imposed.

- The Chinese Physician's Association of Taichung City passed a resolution to increase the registration fees for the services provided by clinics. The Commission ordered the association to cease the unlawful acts immediately and a fine of NT$500,000 was imposed.

- The Ferry and Yacht Business Association of Nantou arranged a joint shift schedule and the allocation of revenue among members. A fine of NT$500,000 was imposed by the Commission.

There are also 2 cases related to the conduct and decisions of state-level trade associations that restricted competition, thereby illustrating the sophistication of the order of the Commission.

### *3.1 Case I*

This case is related to the Flour Mills Industry Association of Chinese Taipei (hereinafter the "TFMIA") that had since 1997 received the Commission's approval to jointly procure and import wheat for 32 domestic flourmills. However, the Commission found that the TFMIA had arranged for its members to allocate the quantity imported by each member by supervising the input and output of its members since 1992. Moreover, in order to estimate the accurate shipment quantities and shipping dates, the TFMIA examined its members' income from operations to prevent its members from cheating. To execute the quantity control program, the TFMIA compiled a "Table of Allocation" and a "Table of Inventory" which it provided to its members as reference for determining the quantities to be shared. Such conduct was deemed to have violated the provision of Paragraph 1, Article 14 of the Law and therefore the Commission revoked the prior approval issued to the TFMIA and imposed an administrative penalty of NT$20,000,000 on the TFMIA in 2000.

After the sanction of the Commission, the TFMIA filed an appeal and alleged that the allocation and supervision activities had been proposed by its members. Although the evidence indicated that the "Table of Allocation" and the "Table of Inventory" had been compiled by the TFMIA, the raw information contained in these tables had been provided by members voluntarily from 1997 to 1998. The TFMIA itself had no incentive to restrict market competition so as to violate the Law. The Taipei High Administrative Court rendered a judgment to revoke the penalty punishment imposed but to support the other parts of the decision by the Commission. Although both the TFMIA and the Commission filed appeals to the Supreme Administrative Court successively, the Supreme Administrative Court rendered a judgment to dismiss both of the appeals.

The Taipei High Administrative Court concluded that the Commission had abused its administrative discretion regarding the assessment of the amount of the penalty. The Commission had not analyzed the motivation, purpose, the degree of the act's harm to market order, the duration of the act's harm to market order, the benefits derived on account of the unlawful act, the scale, operating condition, and market position of the enterprise. The Commission had failed to prove any benefits expected by the TFMIA as a non-profit industrial association. Furthermore, there was a lack of evidence to support the disposition of the Commission that the scale, operating condition, and market position of the TFMIA were significant enough to charge such a high level of penalties.

Therefore the case was brought up again at the Commissioners' meeting. After interviewing the TFMIA, the Commission found that this case had taken place a long time ago and hence it was in fact difficult to collect other evidence to support the original decision regarding the ruling. In accordance with the content of the Supreme Administrative Court's judgment and the statement of fact in the original disposition, the overall circumstances of the violation were deliberated over and a fine of NT$12,000,000 was again imposed on the TFMIA. The TFMIA has again filed an appeal with the Court.

### *3.2 Case II*

There is another case that is particularly worth noting since it clearly illustrates the position of the Commission when it comes to joint actions on the part of trade associations. It is rooted in the fact that the Commission is very mindful of the charters of some professional guilds that set service remuneration standards for certain practices.

The Commission had long been aware that some laws regulating professionals required that the charters of individual trade associations set fee standards for certain practices--for example, fees professionals may charge and fee schedules applicable to different types of service. In some cases, the trade associations had to submit their fee standard proposals for the regulators' approval. Given that professionals cannot practice without taking up membership in their own trade association, the fee standards stipulated in certain trade associations' charters have decreased significantly, or even eliminated entirely, any possibility of price competition in their respective markets.

Since these charters are authorized by relevant laws and have existed for quite a long time, to avoid any potential problem in terms of conflict, or even heated debate, among different jurisdictions as well as uncertainty over laws, the Commission decided to consult with the relevant regulators before taking any formal action against those trade associations. To this end, the Commission met with the Ministry of the Interior, the Ministry of Finance, the Ministry of Justice and the Public Construction Commission in 1999 to discuss whether the price standards in the trade association charters for architects, accountants, lawyers and technicians were in violation of the Law. Soon thereafter, the Commission concluded that the trade associations had undoubtedly been engaging in concerted actions, and as a result, the Commission forwarded its formal opinions to the relevant regulators as well as to the trade associations to explain its position in its implementation of the Law. The Commission advised those government agencies to amend the relevant laws and required that the relevant trade associations delete all provisions for setting fee standards within a year.

Some two years later, in 2001, the Commission found that none of the responsible government agencies had proposed a draft to revise the relevant laws. Of the trade associations for whom the agencies were responsible, some had urged their members not to continue to follow the fee regulations in their charters, but most architects' trade associations refused to comply with the Commission's requirements. Further communications with the architects' trade associations took place but had little effect. Finally, in 2003, the Commission issued orders to the three largest architects' trade associations demanding not only

that they stop using fee standards, but also that they repeal the relevant provisions in their charters at their next general meeting.

# INDONESIA[1]

## 1. Type and Structure of Business Association

An Association is an organisation that is formed by groups of individuals and/or business entities who share common goals. Based on the goals, associations can be classified into three types :

- Business Association
- Professional Association
- Association of Particular Interests

An Association where business players/companies that compete in the same market, is normally known as a *trade association*. This organisation is often defined as a non-profit organisation. Benyamin S. Kirsh defines trade association as: an organisation where producers or distributors of one commodity or service that is based on common goals: *to develop their industry and to improve the quality of service, to set standard of development and cooperation in formulating solutions for their common issues or problems.*[2]

An Association that is consists of individuals with the same professions is known as a Professional Association. This association has different characteristics from Business Associations, as its main goal is to set the standard of quality their professionals' services. Indonesian Doctors Association (IDI) and Indonesian Accountant Association (IAI) are examples of the Professionals Associations.

Besides these two associations, there is also a type of association that is formed with specific interest shared by its members. This cannot be classified as Business Association or Professional Association. This association is formed with focus on its members' advocacy. Labour Association or Labour Union.

Establishment of Business Association in Indonesia is not actually considered as "taboo", but it is often argued that business players may use association as a forum to perform collusive action that restraint of trade.[3] When business players gather to formulate steps to be taken in order to have control over the market, they actually make a collusive action that may distort the market.[4]

Business Association may be seen in Vertical and Horizontal forms. Vertical form is seen from its work pattern that exists in central and regional level. Horizontal form is when organisations are all in the same geographical level and from the same industry. In general, however, business associations

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1 The view expressed herein are those of the speaker and do not necessarily represent the views of the Commission of the Supervision of Business Competition, Indonesia.

2 Dr. Ningrum Natasya Sirait, SH, MLI, *Asosiasi dan Persaingan Usaha tidak Sehat*, Pustaka Bangsa Press, Medan. 2003 Hal 113.

3 Black, Henry Campbell, *Black Law Dictionary*,. St..Paul, Minesotta, West Publishing. Co.1990. hal 181.

4 ibid. hal 16.

organisational structures are vertical, where organisation heads are in the capital city and its branches are in another cities.[5]

Business actors may face various problems in running their businesses. The problems are in form of competition amongst business actors, --either new or old ones-- or government regulations regarding their industries. These would be much easier to resolve by formulating standardised strategies which will be a collective decision from all members. Thus, the fundamental of forming a business association is the existence of common problems.

If common problems do not exist, business association would be merely a meeting point for competitors, that is too weak to handle any potential problems or agreements, --either implicitly or explicitly and may be considered as an action that against competition principles and law. Only common problem that is not against Competition Law could be considered as indicator of justified motivation that forms the pattern of business association.

Business actors tend to view association as a tool to distort the market by setting price establishment, regional division or production quota. This is actually one of major problems, which lead to the widely accepted perception, that association is means for collusive culture formation.

From market economic spectrum where competition is treated as the basis of economy, association has paradoxical roles. While it may represent negative attitude of business players, it also make contribution to the business climate improvement by performing its role as the partner of government and industrialist in harmonising the regulations.

Historically, the establishment of associations in Indonesia has been driven by the needs for government partner in implementing government decision or regulation in various industries. Later on, business association tends to be managed by its professional members whose knowledge and competency are relevant with the needs of association, rather than by the government employees. According to the laws, associations are obliged to register themselves to the Directorate General for Social and Politic, Ministry of Home Affairs, RI.

## 2. Business Associations' Activities that relate to Competition Law

In the view of competition law, any meetings held by, or facilitated by an association shall be considered as an object of competition law. This is based on the assumption that, whether explicitly or implicitly, the so-called meetings often produces collusive actions. The meetings develop and share common arguments which lead to the collective decisions followed by real actions. Another activities may also be an object of observations, as they may also have tendencies to produce actions that against the business competition law. The activities, among others, are:

### *2.1 Certification, Accreditation and Recommendation by Business Association*

There are requirements to be fulfilled by business actors in entering the market. Besides economic requirements, another one to be fulfilled is certification. Certification is a standardisation process implemented by one particular body appointed by the government in one particular industry, especially for business where special skills are needed. The certification bodies are generally independent. To enter the market, business players may face natural or artificial barriers. Artificial barriers are those regulations made by business players within the Business Associations.

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5 George P. Lamb and Carrington, *Trade Association law and Practice* (1971) sebagaimana dikutip dari Dr. Ningrum Natasya Sirait, SH, MLI, op. cit. hal. 115.

Certifications may also be considered as a guarantee for accreditations of classification and qualification of related companies. Basically, accreditation is a positive step that functions as a tool of control for company performance as well as a guarantee that works and activities of the business companies meet all requirements. However, in the real business practices, there are misuses of certified-association authorities in formulating accreditation requirement. This came in terms of the formulation of standards which later on became barriers of business actors to compete. These barriers cannot be categorised as against the competition law as they were actually meant to be regulation mechanism to improve the quality of works and business.

The obligations to be a member of business associations, to obtain recommendations to enter the market and to have certification may be positively accepted. But, the fact that in the process there are still loop holes for collusive practices, is the negative aspect of the business associations' roles. These collusive practices will lead to the higher administrative cost on business actors' side, which tend to obstruct business actors to join the competition.

### *2.2 Price Fixing Agreements*

Business actors have a tendency to misuse the business association as a means for cartel agreement or other monopoly practices, to be done collectively and systematically through the business association. In general, business players will enter the agreement to limit the competition and to set the rules of price fixing, division of regions, limitation of regions or tender conspiracy. Business associations' members may also coordinate consensus without entering any agreements by taking the benefits of intensive communications within the association. In its formal activities, business associations often show activities directed to *price signalling* that aims on market balancing. In order to implement cartel, there must be elements of consensus, loyalty, and supervision on market developments.[6]

Cartel agreements are always followed by actions to enter other agreements that relate to the price setting by the association. This will be taken only after all association's members are agreed on production cost calculation. In business practices, associations will then try to create regulation on maximum or minimum prices. Most of associations argued, that it is better to make collective coordination and to avoid competition, since global and other industrial competitions have the similar practices. Consolidation in fixing the price would be the best solution for current economic system and economic condition.[7]

There is also another problem, that is, the fact that fixed price for public utilities is decided by the government, yet, this authority is delegated or mandated to the association. This behaviour will distort the market, as the market price will obstruct business players to perform efficiently or even worse, they will enjoy market protection provided by government regulations. The essence of cartel agreement is the capacity to increase the price by limiting production output and the competition, so that the associations will determine the market. The market itself is tend to be monopolistic and at the end of the day, will be detrimental for the consumers.

The Law clearly stipulates that price fixing per se is an illegal action. Thus, government authority that is delegated to the association as discussed above, should be observed, as associations use this polemic as a way out from legal enforcement action. The Law also stated that prices shall be determined by the market that is beneficial the consumers. Business actors will be demanded to be more competitive in terms of service and production costs. The Law only make an exemption in the article 5 (2) regarding the price fixing in joint venture companies or others, that solely regulated in existing Laws.

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6 Ibid.

7 Ibid.hal. 194.

### *2.3 Division of Regions and Quota Setting*

Other forms of cartel made by business association are division of regions, consumers, products or quotas. The divisions of those elements have big effects for competition climate. Business actors in the associations often argued that if divisions of regions, products or consumers are not implemented, the products will be invulnerable. Products with established brands cannot be competed with another product. These divisions were often agreed by regional governments as they argue to ensure and guarantee no single business actors will be left out from the market.

### *2.4 Tender Conspiracy*

Business associations are also involved in tender process. Their main role is to give accreditation on work requirements in tender process. This accreditation is often taken as a reference for setting the requirements even though it is not compulsory.

Associations' obligation in tender process is to provide information limited to the administrative scale. However, it is often found that associations:

- Tend to impede the competition by not limiting information to tender participants, as an initial collusive action.
- Tend to manipulate information by appointing media with limited coverage or readers.
- Is used as collusive medium where the winner of tender process is decided by sharing or exchanging the information in fixing the offering price or by creating procedures that push business actors to withdraw from the tender process.

Association argued that facilitation provided was only to protect business actors' existences in the market and therefore, associations have interest to manage scope of works offered in tenders.

### *2.5 Boycott (refusal to deal)*

Another negative action made by the association is making collective opinion to refuse market condition (boycott). Association is able to push, to set, to refuse or to control any business practices of its members. This action can be taken as a trade barrier in form of cartel, applied as collective action or agreement, to distort the market so that the existing industrial climate will not be disturbed by non-members business practices or government regulations. This element will be a reference to conclude the rationality behind association's action.

There is also a horizontal boycott, that is, where there is collective action to limit distributors not to make any business relations with non-members business players or with association's members that do not agree with association decision. This is to impede new players in the scope of the business association.

From Indonesian Competition Laws perspective this violation have similar element with cartel. Yet, there must be proof on agreement, either written or not written, amongst business actors as well as fulfilment of similar element, that are basically to impede other competitors to perform the same business activities.

Another boycott practice is refusal to distribute or to sell products or services, which aims to leave them out from the market.

## 3. Cases related to the Competition Law in Indonesia, facilitated by the Business Associations

### *3.1 Appraiser Service Industry on the Appointment of MAPPI (Association of Indonesian Appraiser Profession) as the Monopolist of Appraiser Professional Certification*

Appraiser as a knowledge was developed due to the demand of the ability to value physical assets in terms of monetary unit. This would help the owner to offer and to make transaction of the asset to another party. This practice requires special skill in comparing the physical value and market value of the asset and it was commonly known as *appraisal*.

Appraiser Service is to serve consumers in valuing or estimating the value of one business or asset (either tangible or intangible) owned by individuals or companies. The service is very useful for providing accurate information for stakeholders in their business transactions. Value of the company may be appraised based on its assets and performance in asset management for creating profit.

Scope of appraiser service industry can be categorised as follow:

- *Appraiser* is the valuing activities on activa such as buildings, properties, vehicles, equipments, machineries and others.

- Business *v*aluation covers valuing activities on intangible asset such as intellectual properties and brand, business interests i.e. bonds and notes and shares.

Appraiser Service grew rapidly due to the increasing importance of Good Corporate Governance issue for public companies where transparency is considered as a very important dimension. Transparency may be found in terms of company's ability to provide accurate and proper information regarding the value of the company.

In order to ensure transparency and accountability in information disclosure related to the asset condition, asset appraiser shall be done by the third party. Thus, business players would appoint this third party to do the appraisal, or appraiser service provider. Based on its nature of business, appraiser service provider can be categorised as information provider industry.

#### *3.1.1 Its relation to Business Competition*

Regulator, as government representative in this sector, is Directorate General for Accountant and Appraiser Service Establishment. The government has stipulated regulations in terms of Ministerial Decree and other agencies within the Ministry of Finance environment, including Supervisory Agency for Capital Market (Bapepam). Some of the existing regulations are:

- Minister of Finance Decree No. 57/KMK.017/1996 regarding Appraiser Service

- Joint Decree of Ministry of Industry & Trade and Ministry of Finance No. 327/KMK.06/2004 and 423/MPP/Kep/7/2004 regarding the Transfer of Tasks and Authorities of the Minister of Industry and Trade on Establishment and Supervision of Appraiser Service Industry to the Minister of Finance

- Minister of Finance Decree No. 406/KMK.06/2004 regarding Appraiser Service Industry in form of Limited Company

- Decision of Chairman of Supervisory Agency for Capital Market No. Kep.09/PM/2005 regarding the regulation NO. VIII.C.1: The Registration of Appraiser Service that Involved in Capital Market

The core issue of appraiser service industry lies in the role of MAPPI as the monopolist of appraiser profession certification. MAPPI is based on the Ministry of Finance Decree No 57/KMK.017/1996 regarding Appraiser Service. While, especially for appraiser service involved in Capital Market, the regulation came into effective on August 23, 2005 as stipulated by the Decision of the Chairman of Supervisory Agency for Capital Market No. Kep.09/PM/2005

Some major issues related to the development of this profession are as follows:

- Prior to the Decision of the Chairman of Supervisory Agency for Capital Market No. Kep.09/PM/2005 dated 23 August 2005 regarding the Regulation NO. VIII.C.1: The Registration of Appraiser Service that Involved in Capital Market, appraiser professionals are not obliged to obtain certification for a single association. In general, the appraiser providers joined with several accounting firms or financial advisors, well-known national or multinational agencies. Selection process of business valuation provider was fully arranged by financial companies, where this business valuation provider works.

- The selection of business valuation provider by the consumers (emitent) was fully determined by market mechanism. In other words, the selections were done through B to B (business to business) negotiation between emitent and appraiser company. Appraiser company track record would be the basis for their appointment by the emitent. IPPUI (Association of Indonesian Business Appraiser Profession) viewed that within this period there have been no significant issues related to the appraiser professions.

- In line with business valuation profession development, the appraiser then established IPPUI as an association that aims on the development of its members' professionalism. Joining IPPUI is not necessarily easy, as it has a long list of requirements to be fulfilled. However, IPPUI existence was not accepted positively by the regulators, even though IPPUI submits periodical report on business appraiser professions development.

- With the similar reason, MAPPI also established the compartment of business appraisal, while in its initial period MAPPI only covered business valuation for *fixed asset*. The establishment of this compartment, according to IPPUI became an embryo for monopolisation of business appraiser by MAPPI.

- Under this particular condition, Bapepam (Supervisory Agency for Capital Market) as the regulatory agency for capital market introduced the policy that confirmed MAPPI as a single and only business appraiser professionals association that has a right to deal with appraiser certification. On the other hand, IPPUI efforts to become similar association with the same right, has always been refused by the regulator as the government seems did not have any intention, even though all requirements had been met.

- As MAPPI is the only association for this industry, there are appraiser that are not eligible to join any companies in the capital market as they do not obtain business appraiser certificates as it is required.

- Ministry of Finance Decree No. 57/KMK.017/1996 regarding Business Appraiser Service clearly stated the identity of association that has been given authorities as semi-regulator body, namely,

MAPPI. This is different from some policies in another sector that was not clearly or directly appoints one particular association.

- Regulation issued by the Minister of Finance or Bapepam has created *barriers to entry*, where association membership is a requirement for performing any business activities in this sector. These are non-natural barriers to entry, as it is not derived from efficiency or technology superiority, which is not good for competition.

- Another consequence from this regulation is the more limited alternatives for business appraisal. Also, MAPPI has monopolistic power gained from regulation, not from competition. Some of potential business players in this sector may be directly eliminated without ever entering the competition.

- KPPU also found that currently to become an "appraisal", one of the requirements is the membership status from MAPPI. MAPPI is given the authority to certify the appraisal, as stipulated by the Minister of Finance Decree No.57/KMK.017/1996 regarding Business Appraiser Service.

### *3.1.2 KPPU's action on this Case*

Suggestions and recommendations offered to the government related to business appraisal service are:

- Role of government, as a regulator, in business valuation service industry shall not be given to any associations to regulate and administer this profession. As a regulator, government has to be firm, straightforward and transparent, to avoid impressions that the government tend to dominate this sector. Thus, there should be a clear division between the role of associations and the government.

- The substance of regulating the associations. There are two models to be developed, that in line with the fair competition principles. In this case, there are several requirements to be met in order to minimise the possibility of unfair competition to take place. Thus, in the area of regulating the professional certification, KPPU has submitted the recommendation for:

  - Government should give an equal opportunity to all associations that meet requirements to deal with business appraiser professional certifications. Prior to this, Government shall formulate requirements or criteria for associations to be eligible to perform this role. Government role in this model is strong, it should be able to encourage the grow of business appraiser professionals associations – that oriented to the improvement of appraisers' competition-- to grow; or

  - Government may appoint one particular association to issue professionals certification on appraiser profession as current practices. To do so, the government has to create the criteria and announced it openly and transparently, prior to make any decisions to confirm a particular association to own this authority. Furthermore, Government should closely supervise the selected association in performing its role, so that, there would be any misuses of its authorities that will against the fair competition principles. In appointing one professional association, the Government shall not directly appoint one particular name in its regulations. Thus, MAPPI appointment as a single association is recommended to be omitted.

- The Government, in this case, the Minister of Finance should revise the Decree of Minister of Finance No. 57/KMK.017/1996 regarding Business Appraiser Service. Revision should include suggestions and recommendations as previously discussed.

### *3.2 Case of Indonesian National Air Carrier Association (INACA) regarding authorities on regulate and fix the tariff of air transportation.*

Minister of Finance through the Decree No. 25 year 1997 has given the authority owned by the government to set the price or tariff of air transportation, especially for scheduled-economy class domestic airline to Indonesia National Air Carrier Association (INACA). In this Decree, INACA is also given the authority to submit input to the government on applying sanctions for airlines that do not meet INACA regulations.

INACA have set fixed exchange rate with the maximum and the minimum rate, to be applied by airline companies in setting their ticket price. Deal made by INACA was not about the criteria of fixed price or tariff amongst airlines per se, but still this is an infringement of the Law of Business Competition. KPPU is of the opinion that there is an indication of cartel in this case, taking into account the set of the maximum and minimum rate. This was also confirmed by complaints of the airlines who are the members of INACA.

INACA argued, that based on the Law, INACA regulation was not against the law, as there is actually an exception that allows INACA to take this decision. INACA confirmed that its regulation was made based on Minister of Finance Decree and therefore, it is not solely INACA's initiative, but a consequence resulted from performing government instruction.

#### *3.2.1 KPPU's action on this Case*

KPPU handled this case by providing recommendation to the Ministry of Transportation to cancel authorities given to INACA and to annul the fixed price set by INACA. There are 3 (three) alternatives provided by KPPU for setting the airlines' fare, namely: **One**, that government itself would set the rate through the team – and the method is not significantly different from what INACA has performed; **Two**, by formulating the minimum rate in order to protect the consumers; **Three**, it should not offer to the airlines, the right to set the price based on their own efficiency rate, as it may disturb company's performance.[8] In this case, the government is needed to regulate the route to be served by single airline (*natural monopoly*).[9]

Argument offered is that for a vital industry or commodity, the government should take its role, or in other words, it cannot be fully left to the market. For airline industry, tariff settings are normally decided upon the agreement between the government, business players or operators through associations forums. For Indonesia, this kind of policy may be the best alternative, so that practices of fixed price, division of regions or market in order to ensure the route of airlines are profitable, is actually against the Competition Law and should be reviewed by the rule of reason approach, for bigger social consideration.

### *3.3 Tender Conspiracy on SKTM Work (Cable with Medium Voltage) by the Association of Indonesia Electricity Contractors regarding Tender Process*

In the case No. 16/KPPU-L/2006 regarding the regulation that was taken as a basis by PLN Disjaya (State-owned Electricity Company, Jakarta Province) to arrange this tender process, was the PLN Board of

8 www.gamma.co.id, *Mencegah Kartel di Angkasa Biru*, seperti dikutip dari Ningrum, ibid, hal 148.

9 Black Law Dictionary, op.cit, hal 696.

Directors Letter No. No. 100.K/010/DIR/2004 and No. 200.K/010/ DIR/ 2004 which implementation was fully managed by every General Manager in every area. PLN Disjaya as tender committee has made mistakes in implementing the Letter, especially when they made the requirement to participate in the tender process. One of the criteria is the obligation for contractors to have support from cable manufacturers or to make consortium where the contractor would act as the leader. The role of the leader is relatively trivial, especially if it is compared to its basic components procurements. Clauses on consortium or support were actually not stipulated in those two Letters.

Furthermore, the clauses were used by cable manufacturers, DPD Association of Contractors for Indonesian Electricity – Tangerang and contractors to make arrangements or in another words making conspiracy in form of:

- Arrangement to obtain supporting letters or consortiums that create conditions where there are 3 lowest bidders for the package No. 4, 20 and 21 that always in the form of consortium. The support practices would then come in to the fourth rank and so on; and

- Arrangement on offering price, that made no tender participants were able to offer price more than the HPS (self estimated price) for every package in the point of tender explanation meetings; and

- Arrangement on the number of cable stocks for tendered package, so that, each manufacturer will provide for similar quantities.

The conspiracies were not very successful, as PT. Prima Beton was appointed as the winner in Package 9 and therefore, some manufacturers were cancelled to supply the cable Package 9. Later on, for business sake, over the approval for PLN Disjaya, PT. Prima Beton imported the cable, in order to perform the tender.

Another arrangement was through the adjustment amongst nine cable manufacturers in order to standardise the cable price, as follow:

Medium voltage cable, size 3 x 240mm2 and 3 x 300mm2 that previously was varied, changed to be Rp. 270.000/m2 for the size 3 x 240mm2 and Rp. 311.450/m2 for the size of 3 x 300mm2.

This arrangement took place as the Tender Committee has delayed the dead line of tender documents submissions and the change of the manufacturers.

### *3.3.1 KPPU's action on this Case*

From the investigation on the case No. 16/KPPU-L/2006 discussed above, KPPU through its decision made frightening effect and improved the business climate as well as improved the tender process to be in line with the Law. KPPU decided to punish the parties related with the tender in PLN by applying the sanction to pay the fine. KPPU, on the other hand, also offered the recommendation to the government to review the authorities given to AKLI (Association of Indonesia Electricity Contractor) to issue certification for business as a requirement to join the tender, as this would create discrimination and used as the means for tender conspiracy.

## 4. Conclusions

Associations were founded to create harmonisation in applying competition regulations towards the business actors. Associations are expected to discipline and to provide guarantee for industrial

standardisation and to transform the information. Association as an umbrella organisation for business actors is expected to protect competition values in the market.

However, in the implementation, they still need more consideration. Associations tend to perform negatively when they have common problems, that is, to maintain the market structure by not allowing new entree to the competition in their industry. This tends to make association as a collusive medium, by producing cartel practices, as can be seen by agreement on price fixing, division of regions, certification to limit number of competitors and boycott to distort the market.

The cases discussed above showed associations' tendency to misuse their authorities, merely to protect the business of its members and to put barriers for new competitors to enter the market. Thus, competition is difficult to be created and at the end of the day, the consumers of products and services will have to pay higher as production costs were increased.

Taking these into considerations, there is a need for an analysis on association behaviour, which take some association as the focus, particularly those who were viewed as against the Law. The real program is to implement structural advocacy activities toward government regulations, that offered authorities to the associations while its implementations were tend to avoid the competition. Also, law enforcement on any infringements done by the associations should also be implemented comprehensively in order to create healthy competition climate, and not merely to put sanctions for associations.

# ISRAEL

## 1. Introduction

Although business associations play an important role in Israeli economic life, their activity may raise serious competitive concerns. The purpose of this contribution is to depict how the Israel Antitrust Authority (hereinafter: "IAA") and the judiciary have dealt with business associations' activities which had a restricting or distorting effect on competition. In addition, the IAA perspective on business associations' lobbying activities shall be discussed. The contribution is structured as follows:

First, the statutory framework, serving as an introduction for the relevant IAA and Court decisions, shall be presented. Second, an overview of key decisions adopted by the IAA's General Director dealing with business associations' anti-competitive activities and two relevant Court rulings shall be overviewed. Finally, the General Director's official statement regarding business associations' lobbying activities shall be discussed.

## 2. Statutory framework

Israeli Restrictive Trade Practices Law, 5748-1988 (hereinafter: "the Law") deals specifically with business associations, and stipulates in Article 5 thereto that a course of action established or recommended by a business association for all or some of its members, which may eliminate or reduce business competition among them, shall be deemed to be a restrictive arrangement as defined in Article 2 thereto.

It is further stated that a business association and any of its members acting in accordance with such course of action shall be deemed to be a party to a restrictive arrangement.

"Business/Industrial Association" is defined in Article 1 of the Law as a body of persons, whether or not incorporated, all or some of whose purposes involve the promotion of the business interests of its members.

"Restrictive Arrangement" is defined in Article 2 of the Law as an arrangement entered into by persons conducting business, according to which at least one of the parties restricts itself in a manner liable to eliminate or reduce the business competition between it and the other parties to the arrangement, or any of them, or between it and a person not party to the arrangement. In addition, Article 2 provides for a number of specific restraints, the existence of which constitute an irrefutable presumption of a distortion of competition. Accordingly, an arrangement involving a restraint relating to any of the following issues is deemed to be a restrictive arrangement: the price to be demanded, offered or paid; the profit to be obtained; division of the market or part of it; the quantity, quality or type of assets or services in the business.

Entry into a restrictive arrangement without the authorization of the Antitrust Tribunal is prohibited, unless the arrangement is exempted by the IAA's General Director or falls under the provisions of the block exemption regulations.

The procedure used by the General Director to issue block exemptions or exempt parties from the requirement of obtaining the approval of the Tribunal is set by Articles 14 (a), 14A, 15 and 15A of the Law.

## 3. Decisions issued by the IAA's General Director

Article 43 (a) (2) of the Law stipulates that the General Director may determine whether a course of action established or recommended by an industrial association or which an industrial association seeks to establish or to recommend is a restrictive arrangement.

### *3.1 Determination concerning the Advertisers Association of Israel*[1]

The Advertisers Association of Israel (hereinafter: "AAI") comprises of 60 advertisers which constitute the vast majority of advertising firms in the market. As a part of AAI's policy and due to fact that a lot of members acted, as argued by the AAI, "*not as it would be expected from colleagues*", the AAI adopted rules of conduct (hereinafter: "the rules") for its members titled as "rules of ethics".

The introduction to the rules included a preface by the chairman explaining that the AAI has adopted a policy which aims "*to bring the industry into an order*". Hence, it was recommended that the actual or potential costumers, as well as members of the association, should be provided with a copy of the rules. *Inter alia*, the rules commanded the following:

- A "halt advertising" procedure – according to this rule whenever a client disagrees with a fee charged by an advertiser, the client must bring the dispute before the Association's arbitration committee. If the client refuses to adhere to the AAI's arbitration committee, the AAI has the right to address its members and require them to refuse to deal with that "unruly" client till the financial dispute is resolved. This procedure has been used in practice.

- A related rule stipulates that an advertiser cannot approach a potential client or offer its services as long as another advertiser is conducting business for that client.

- "Binding bidding" rules – these rules stipulate that the members should participate in bids for an advertising budget according to the terms established by the AAI. One of those rules dictated that a member must not participate in a bid if there are more than three participants. Evidence shows that this rule has been enforced in practice.

- Competition according to customary terms and commissions – the rules stipulate that competition between colleagues shall be conducted according to the customary framework of industry's terms and fees. This rule, as those mentioned above, has also been enforced by the AAI.

The rules were of an obligatory nature and the following provision was one of the indicators for that:

> *"The rules of ethics are the codex of rules of behavior binding upon all the members of the association and applying to every advertiser and every enterprise in the industry".*

Furthermore, any advertiser who sought to present its candidacy for membership in the AAI had to sign a declaration in the application form, stating that he is obliged to act according to the rules. The AAI constantly used the communication channels with its members to remind them about the duty to follow the

[1] Determination concerning the Advertisers Association of Israel, dated 15.3.1993; Publication No 3003671.

rules. On top of that, the AAI established an enforcement mechanism in the form of an arbitration committee.

After a thorough examination of the terminology and the nature of the rules, the IAA's General Director determined that the rules established a course of action which distorted competition between the members of the AAI, and therefore constituted a restrictive arrangement in violation of the Law.

### *3.2 Determination concerning the Association of Agents*[2]

The Association of Agents comprised of four of the largest actors' agencies in Israel. At some point the members of the Association faced a new competitor which acted both as a casting agency and a representation agency for actors.

The Association claimed that the activity of the new competitor featured a problematic conflict of interests that damaged the profession. Therefore it decided to boycott producers and directors which had business relations with the new agency. The Association sent a warning letter to producers and directors, in which it stated that any person, who will hire agency services from an agent that deals both with representing and casting, shall be boycotted by the Association and its members. Despite the general wording of the letter, it was clear that the intention was to block the activities of the specific new competitor.

The IAA General Director determined that the Association's activity qualified as a course of conduct determined by a business association which may prevent or distort competition, in violation of the Law and amounted for a restrictive arrangement. The General Director concluded that neither the concern over the likelihood of a potential conflict of interest, nor the possibility that the members of the Association acted in good faith, could justify Association's decision and conduct.

### *3.3 Exemption Decision concerning the Association of Travel Agencies* [3]

The Association of Travel Agencies (hereinafter: "ATA") filed an exemption request to allow negotiation, on behalf of all its members (approximately 600 travel agents), with a software company regarding the terms of a purchase of a professional computer program. The ATA claimed that the software company enjoys a dominant position in the market. Subsequently, the ATA asserted that it would be more balanced to conduct the negotiation process by the association than independently by each and every agency as it would allow improve the terms of the purchase and facilitate competition.

The General Director pointed out that a previous decision from 1997 already stated that a joint negotiation mechanism established for the purpose of purchase of inputs constitutes a restrictive arrangement[4]. In a different determination, the General Director stated that a negotiation arrangement might distort competition on several levels:

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2 Determination concerning The Association of Agents, dated 24.5.1994; Publication No 3003746.

3 Exemption Decision -The Association of Travel Agencies, dated 6.8.2002; Publication No 3015228.

4 The following passage appears is the IAA exemption decision concerning Channel 2 franchisees exemption request concerning joint negotiations, dated 6.10.1997; Publication No 3001344:

*Joint negotiation is a restrictive arrangement for the simple reason that any future decision of any grantee regarding the rights of broadcast – even if by the end of the day the negotiation between the grantees and the football association will fail – will not be an independent decision, but a decision based on the knowledge and data exchanged by the grantees in the framework of the joint negotiation which will be conducted between them and the football association.*

> *In general, any arrangement for a joint purchase is likely to distort competition on two levels: first level is the relevant sector directly related to the subject matter of the arrangement. In this case it is the sector of TV productions. An arrangement might grant its members a monopsony power[…] The second level is the adjacent sector[…] an arrangement for a joint purchase is likely to ease and encourage a collusion between Channel 2 grantees in the field of TV broadcasting and the sale of TV commercial advertising time slots.*5

The same considerations were applied to this case. The possible link-up raised concerns about creation of a monopsony power vis-à-vis software providers. On the 'second level' there was a concern as to a possible collusion between the travel agents in their day to day activities.

On the other hand, an arrangement for a joint negotiation might have positive pro-competitive aspects. Under certain conditions it can reduce transaction costs and enhance efficiency for the benefit of consumers.

The IAA concluded that the essence of the arrangement discussed here-above features a distortion of competition. The ATA failed to present sufficient data to demonstrate potential pro-competitive efficiencies and/or cost savings. The fact that the software provider was a monopolist could not in itself justify the creation of monopsony power. The IAA's General Director concluded that the arrangement could also distort competition in the market of software programs for travel agencies, as it could significantly harm the competitors of the dominant provider. Consequently, the exemption request was denied.

### *3.4 Exemption Decision concerning the Israel Bar – Will Drafting Campaign*[6]

The Israel Bar (hereinafter: "the Bar") filed an exemption request for a campaign to offer the public will drafting services at fixed maximum recommended prices set by the Bar. Participation of the Bar members in the campaign was non mandatory, and those who didn't want to participate could charge any fee regardless of the campaign. The duration of the campaign was two months with an optional prolongation for three months.

The IAA pointed out that the Bar is a "business association" for the purposes of Article 5 of the Law, since at least some of its objectives are the promotion of the business interests of its members. In its decision, the IAA's General Director made reference to Article 5, stipulating that a prohibited course of action set or recommended by a business association can be directed to all the members of an association or some of them. Charging a coordinated fee from Bar members who participate in the campaign, despite the fact that it would be for a short and set period of time, constitutes a restrictive arrangement which was likely to prevent or distort competition between members who took part in the campaign.

However, since members were not obliged to charge the maximum recommended fee, the competitive concern was somewhat less acute particularly due to the fact that many members expressed their intention to charge lower fees. The limited duration of the campaign also reduced the potential anti-competitive concerns. IAA's inquiry revealed that the maximum recommended price was lower than the average fee charged in the market for the same service. The IAA also considered the fact that the campaign would not harm potential clients interested in the will drafting services.

Based on the reasons mentioned above, the General Director decided to grant the requested exemption and thereby allow the campaign.

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5 Determination concerning a restrictive arrangement between Channel 2 franchisees, dated 12.4.1995.

6 Exemption Decision - Israel Bar, dated 14.1.2004; Publication No 5000697.

## 4. Court Decisions

### *4.1 Vulcan Batteries Ltd. v. Israel Garages Association*[7]

The applicant, Vulcan Batteries Ltd (hereinafter: "Vulcan"), a car batteries producer which used to distribute its products through car electricians, began to distribute its products also in department stores which sold the batteries to customers at a price lower than the "price list level" that was published by Vulcan.

Car electricians were required to provide free of charge warranty services for Vulcan batteries, regardless the source of their purchase. The Israel Garages Association (hereinafter: "IGA") has published a warning indicating that the car electricians intend to stop providing any maintenance service for the applicant's batteries.

The applicant filed a petition, asking the District Court of Tel Aviv-Jaffa to issue an injunction prohibiting the IGA from instructing car electricians to avoid purchasing applicant's batteries or providing services for those batteries.

The Court granted the requested injunction. In its reasoning, the Court pointed out that a course of action which obliges or instructs members of the IGA not to purchase appellant's products or to avoid providing services for such products, distorted competition between the members of the IGA. Every car electrician, according to the Court, was free to decide independently whether to purchase Vulcan batteries, provided that the decision is autonomous and does not result from a course of action dictated or recommended by the IGA. The same principle has been applied to the services provided by the electricians.

### *4.2 Israel Road Transport Board v. The IAA*[8]

The Israel Road Transport Board (hereinafter: "the Board") comprises of seven different organizations that include twenty transportation companies specializing in different types of carriage. The Board has published during 10 years, once in three months, price increase data (index comprising of costs) regarding transportation and maintenance costs of vehicles owned by its member transportation companies.

Following the IAA's decision that the distribution of the data constituted a restrictive arrangement the Board filed an appeal to the Antitrust Tribunal.

In its ruling, the Tribunal stated that most of the items included in the index appear in the official gazette that is issued by the Central Bureau for Statistics and other sources which are available and accessible to the public. It further noted that the Board created the index for informative purposes only and did not include any obligatory features.

The main importance of the ruling lies in the Tribunal's statement that for the purposes of Article 5 of the Law, even a course of action in a form of an implied recommendation from a business association to its members (and not only a guidance or a binding instruction) shall be considered a restrictive arrangement, provided that it has been proven that the course of action is likely to prevent or distort competition between its members. The appeal was approved by the Tribunal that concluded that the actions of the Board did not constitute a course of action prohibited by the Law, due to fact that most of the data, distributed by the

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7 Appeal 1617/93 [District Court of Tel-Aviv-Jaffa] Israel Road Transport Board v. The IAA. It should be noted that the IAA has not been a party to this civil proceeding.

8 Appeal 2/89 [The Antitrust Tribunal] Israel Road Transport Board v. The IAA.

appellant, and which included data on inflation fluctuations and costs of inputs necessary for transporters, has been published by public organizations and was available to the public. The Tribunal pointed out that the IAA did not prove that the distribution of the data by the Board had the potential of preventing or distorting competition between members of the Board.

## 5. Business Associations' Lobbying Activities

A major aspect of business associations' activity is devoted to lobbying and representation of the relevant industry before the Government. In year 2000 the IAA's General Director issued an official statement (hereinafter: "statement") regarding cooperation between competitors when dealing with the Government and its agencies. The issuance of such statements by the General Director serves as a complementary instrument to increase legal certainty, enhance transparency and clarify the IAA's policy with respect to specific issues.

The statement concerning lobbying activities was not aimed exclusively at business associations, nonetheless, it had (and still has) a great impact on their activities.

The rationale behind the statement relates to what is known as the *NOERR-PENNINGTON* doctrine, named after two famous US Supreme court decisions.[9] This doctrine seeks to balance the anticompetitive risks of cooperation between competitors with other important democratic interests such as the competitors' freedom of speech, and the fluent passage of information between the market and the government. Generally speaking, such interests can be better served when competitors act jointly rather than independently. Therefore, the statement acknowledges competitors rights to take common actions in order to promote their interests before the government, even if such actions are aimed at achieving anticompetitive results, e.g. increasing barriers to entry to the relevant market or restricting the number of competitors.

According to the statement, such cooperative activities will not be considered as restrictive arrangements as long as they comply with specified provisions which appear hereafter:

- The activity must be aimed at persuading the Government to take action or to avoid from taking action – e.g. legislation, licensing or establishment of standards – in its capacity as Government;

- Throughout the common activity only complete and reliable information will be presented to the Government;

- The activity is general in its nature, i.e. it does not aimed at promoting any specific competitor, but rather the common interests of all the cooperating competitors;

- The activity may not include any exchange of information between the competitors which might lead to an anticompetitive outcome,(e.g. confidential information of one of the competitors);

- The cooperation cannot include any exchange of information regarding the possible actions taken by the competitors in case of failure in achieving cooperation's goal.

In a recent case, the IAA faced a cooperation which underlined the risks which result from the misuse of the above mentioned statement. The case involved ad-hoc cooperation between the three largest cellular companies in Israel. A few months ago the Israeli Ministry of Communications (hereinafter: "MOC")

[9] E.R.R. Presidents' Conference v, Noerr Motor Freight, Inc., 365 U.S. 127 (1961); United Mine Workers of America v. Pennington, 381 U.S. 657 (1965).

decided to examine the possibility of using its regulatory power by imposing on the cellular companies a duty to lease part of their infrastructure to so-called "mobile virtual network operators" (hereinafter: "MVNOs"). The MOC considered taking such action due to the low level of competition in the cellular market. Naturally, before such an action could be taken, a detailed examination of the level of competition in the market had to be carried out, and so the MOC hired the services of an international economic consulting firm to conduct the examination and draft a professional opinion in the matter. In response, the cellular companies hired the services of another economic consulting firm to conduct a similar inquiry on their behalf. In order to reduce the anticompetitive risks raised by the cooperation, the companies used contractual mechanisms, which prohibited the consulting firm from transferring confidential information concerning one company to the others.

At that point the IAA decided to interfere and halt that joint activity, since such cooperation raised substantial competitive concerns. For example, the economic examination was supposed to check the existence of an oligopolistic equilibrium between the cellular companies, including deviations from the equilibrium, based on confidential information transferred from all three companies. The IAA was concerned that such information – whether in its initial form (i.e. the information that was transferred from one or few cellular companies), or in its final form, (i.e. the analysis preformed by the research company and its conclusions based on the initial form) – would eventually be obtained by the companies. Sharing of such information would have a critical impact on the state of competition in the cellular market.

The companies presented to the IAA a set of contractual mechanisms which were designed and adopted by the companies with the intention to protect competition, however the IAA found these mechanisms to be unsatisfactory.

Subsequently, the IAA used its right according to the statement and excluded the above-mentioned cooperation from the scope of the statement. In addition, the IAA advised the cellular companies that should they wish to cooperate on this matter, they would be required to follow the statutory exemption procedure and file an exemption request for the restrictive arrangement. It is noteworthy that the cellular companies had no initial intention of asking the General Director's approval, since they thought the cooperation is in full compliance with statement

The exemption was requested and granted, but under strict conditions, the main of which are: certain kinds of examinations are not to be made (e.g. deviation from an oligopolistic equilibrium); with regards to other examinations, the companies are obliged to hire an advisor – an antitrust lawyer with no previous relations with any of the companies – who would represent them with respect to their contacts with the consulting firm and act as an "information buffer" between them and the consulting firm. The advisor's responsibility would be to edit the documents and omit any sensitive information that might have an impact on competition. The advisor would receive the information from the companies and send it to the consulting firm and later on, would receive the final document from the consulting firm and present it to the MOC. The document could be passed on to the companies, but only after all the information that may have anticompetitive effects is erased by the advisor.

# LITHUANIA

## 1. Association as structure uniting enterprises

As usual associations execute various functions depending on the aims of companies establishing the association as well as the relevant market where they carry out its activity. Often associations indicate that join entities, help them to act in the relevant market, supply information on the same foreign market etc. Also associations can organise various kind of economic or other kind of activity even issue certificates and licenses, also can organise seminars etc. Usual associations indicate that the main function is to represent interests of enterprises especially drafting or amending laws that can make influence on the relevant markets. Also very often associations do the lobby work in order to promote or protect interest of entities on the relevant markets. Some associations have their own code of honour or even disciplinary instruments if their members do not follow the regulation of association, do not pay membership fees or do not participate in the events of association.

## 2. Possible influence of associations on enterprises and markets

Scope of activity of associations very often depends on how many and especially how many big enterprises – participants of the relevant market – are the members of such association. Conditionally there are several kinds of associations depending on a size of enterprises big, medium or small associations of various size of enterprises.

When association is very big, comprises of almost all participants of the relevant markets or consists only of large enterprises - leaders of the relevant market - it might be cases when all decisions, declarations, information, views or official opinions expressed by such associations might influence the rest participants of the relevant markets.

When association consists only of large enterprises - leaders of the relevant market – very high membership fee can be an obstacle to become a member of such association. In that case very often few alternative associations comprising small and medium enterprises or regional enterprises can appear on the relevant market.

## 3. Possible negative activity of association

Association can become not only place for enterprises to meet each other and to discuss problems but also can become a place for coordination of their activity on the relevant markets and even to make prohibited agreements. Article 3 part 10 of the Law on Competition of the Republic of Lithuania says that "agreement means contracts concluded in any form (written or verbal) between two or more undertakings or concerted actions of undertakings, including decision made by any combination (association, amalgamation, consortium, etc.) of undertakings or by representatives of such a combination"[1].

Experience showed that it should be clearly distinguished cases of direct negotiations on forbidden agreements from process during which the association tries to analyse situation on the relevant markets and

[1] http://www.konkuren.lt/english/antitrust/legislation.htm

wants to express its opinion on market processes, what is going on the markets, what influence changes will cause in the longterm perspective. When fast and unpredictable changes are going on the relevant markets it is natural that enterprises members of association pay attention and try to discuss such changes. Sometimes there is very narrow borderline between discussion and possible wish to coordinate activity in favour of enterprises of association and thus to make prohibited agreement.

Very often publicly expressed opinion of associations - that in case if prices will grow up on stock exchanges - the enterprises of associations subsequently will be forced to raise prices on the relevant markets (e.g. on the relevant fuel markets) are unlikely to be evidences of cartel activity. From the other hand – such declaration is very good illustration that discussions on market prices are going on actively between members of association.

Also often such discussions on various market changes can lead to arrangement of various recommendations for enterprises and can raise a wish to coordinate their strategies. In such cases activity of association can overgrow simple discussion and exchange of opinions, and can lead to active drafting of recommendations and even prescriptions how to operate on the relevant markets, and at last can become very strong instrument in case if all decisions of the association are obligatory for its members.

Thus very active discussions can run inside the association until such activity transforms into actions that are prohibited by the competition rules when association starts to coordinate activity of its members or starts to recommend measures to built obstacles for other competitors to enter the markets, or initiates the exchange of confidential information that can create more favourable situation for members of association comparing to other market participants, or arranges recommendations to keep minimal prices or to split the relevant geographic market, or to undertake other activity which can make influence on economic decisions of members of association and other economic entities on entire market.

## 4. Position of association and its members during investigation

Investigations showed that where are few kinds of behaviour of associations and their members in case of investigation of cartels where associations were under suspicion to be involved in a cartel activity. If members of association played active role in cartel it is always possible to identify enterprises-initiators of prohibited agreement. Such initiators, having their own interests, actively agitate other members to follow certain recommendations or models of certain behaviour on the relevant markets.

Other case when association tries to take collective responsibility of a cartel activity. In that case enterprises members of association indicate that administration of association or even leader of association initiated active preparation of recommendations and relying upon the data transmitted by the members calculated minimal recommended prices, and after that spread information between members of association. As usual in such cases interrogations always show that recommendations of associations are not obligatory. But as usual there are always a part of members of association who always follow the recommendations because of reputation and standing of the association.

Thus experience showed that as usual members of association are tended to follow the recommendation of association even in case if it is not obligatory because the membership means the acceptance and sharing of opinion and standpoint of association[2]. In such cases it is necessary during investigation to determine how widely members of association have followed the recommendations and how it could have influenced the competition environment on the relevant markets.

[2] European Cartels. Student Reports 2000. Editors: Nils Sigfrid, Clara Wrangel, Martin Levinson, Ginger Olson. Printed in Reprocentralen in Lund, Sweden, ISBN 91-630-9832-6, p. 33-34.

## 5. Experience of the Competition Council of Lithuania investigating activities of associations

Experience showed that associations could become not only a place for enterprises to meet each other but also a place for making prohibited cartel agreements. It should be said that there were some cases when associations directly applied to the competition authority asking to explain whether one or another activity of association can infringe the competition rules (e.g. Association of truckers in case of fast increasing of prices of petrol and insurance of vehicles). But such cases do not guarantee that later will not be any intentions of enterprises or association to initiate prohibited agreement.

Experience showed that there is a very big possibility of coordination of activities between members of association when the association is composed of big enterprises market leaders. Such companies dominating on various segments of the relevant markets can pursue to control entire market (oligopolic effect) and consequently to coordinate their activities. Often as consequence of such coordination is simple non-intervention in some parts of the relevant geographic market or various segments of the relevant product markets.

## 6. Case of exchange of confidential information in association

Competition Council of Lithuania investigated activity of paper trading merchants on the relevant paper markets of Lithuania and the Baltic Sates according to Article 5 of Law on Competition of the Republic of Lithuania and Article 81 of the Treaty[3]. In this case the Association of paper trading merchants organised longterm exchange of confidential information (e.g. total sales and value, market shares, confidential information on competitors etc.) and facilitated that members of association - the biggest paper trading companies in the Baltic States – could obtain such information. Investigation showed that information could have great influence on economic decisions of members of association on various relevant paper markets and consequently made influence on other market players and entire market.

When during investigation is hard to find proper facts of direct fixation of prices another important sphere of investigative activity should be a possibility to identify the subdivision of the relevant product and geographic markets on territorial basis. Exchange of data of total sales and of market shares on the relevant product markets indicate position of each company in every segment of the said markets. This could become an indication for other companies-competitors not to intervene into such spheres of activity of each company. As a consequent final result of such prohibited agreement – was longterm stability of market shares of members of the association on various relevant markets. In such cases very important to investigate longterm changes of market shares of members of association on various relevant markets. This analysis is necessary and very informative and can show possible longterm tendency and extent of coordination of activity between competitors.

In this case the Competition Council of Lithuania relied upon few similar cases investigated by other competition authorities of the member states. For example on the case No 05-D-65[4] of competition authority of France where it was determined that few companies having big part of the relevant market exchanged information and maintained market shares stable for a long period and thus blocked possibilities of other competitors to enter the relevant market. Also it was relied on the case No 05-D-38[5] of

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3 Case No 2S-13, http://www.konkuren.lt/ataskaitos/ataskaitos.htm, 2006 Annual report of the Competition Council of Lithuania, ECN case no 296;

4 http://www.conseil-concurrence.fr/pdf/avis/05d65.pdf. Décision n° 05-D-65 du 30 Novembre 2005 relative á des pratiques constatées dans le secteur de la téléphonie mobile**.**

5 http://www.conseil-concurrence.fr/pdf/avis/05d38.pdf). Décision n° 05-D-38 du 5 Juillet 2005 relative á des pratiques mises en oeuvre sur le marché du transport public urbain de voyageurs**.**

competition authority of France. It was determined in the said case that associations of transport having 60 % of the relevant market tried to stabilise market shares.

Also while investigating paper merchants case the Competition Council of Lithuania relied upon the EU case of Agricultural Tractors Registration Exchange[6] where exchange of confidential information has been examined.

It is necessary to analyse further cases of exchange of information through associations and to determine what kind of information and in what extent could be allowed that such exchange process do not influence the economic decisions of members of association and should not be treated as concerted practice or prohibited agreement. Each case is different depending on what kind of information have been exchanged and what consequences this exchange could cause on the relevant market.

## 7. Cases of cartel agreements in association

When one or few big enterprises are being dominated in association often they can wish to lead the activity of association and to enforce their own opinion or even initiate some activity that is prohibited by the competition rules.

Competition Council of Lithuania investigated activity of the Association of enterprises giving taxi services in Vilnius city[7]. During investigation the initiators of cartel who actively agitated other members of association to raise tariffs and to make cartel agreement were identified. Analysis of minutes of meetings of association showed that members of the said association constantly discussed possibilities to raise and fix tariffs of taxi services at the same time on the relevant market. Moreover leaders of cartel agreement constantly encouraged other entities non-members of the association also to raise tariffs of taxi service.

In another case the Competition Council investigated activity of the Association of drivers teaching and qualification raising schools[8]. Investigation showed that members of association many times have had meetings and discussion on prices and at last the final decision was to raise minimal prices and to establish the range of tariffs – "from...to". The said association was headed by a director of big enterprise which was one of the initiators of cartel agreement. In such cases very important to determine the input of each enterprise participated in cartel agreement.

## 8. Cases of investigation of impact of recommendations taken by associations

Competition Council of Lithuania investigated activity of the Association of architects[9]. Investigation showed that the code of professional ethics of this association has provisions obligating members of association not to compete with other members of association and to follow the recommendations on

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6 EEC 14.02.1992, Decision 95/157/EEC (UK Agricultural Tractor Registration Exchange; Official Journal L68-13/03/1992 Page: 19; Celex No: 392D01 57 and Judgment of Court of First instance and European Court of Justice related to this case; 27.10.94 CELEX 61992A0034; 29.05.1998; CELEX 61995J0008.

7 Case No 2S-3, http://www.konkuren.lt/archyvas/archyvas.htm, 2005 Annual report of the Competition Council of Lithuania.

8 Case No 2S-12, http://www.konkuren.lt/archyvas/archyvas.htm; 2004 Annual report of the Competition Council of Lithuania.

9 Case No 13/b, http://www.konkuren.lt/archyvas/archyvas.htm; 2000 Annual report of the Competition Council of Lithuania.

setting up prices of projecting works. Competition Council obligated the said association to abolish such provisions and to harmonise the said code with competition rules.

In 2006 the Competition Council of Lithuania started investigation of activity of the Association of auditors (Chamber of auditors) in the relevant market of audit services[10]. Investigation showed that administration of association initiated discussions on prices and collected information on prices applied by the members of association. Relying upon collected information the administration prepared the recommendation on fixed audit prices on the relevant market and spread the recommendations between members of association. Moreover the administration of association initiated few cases in order to investigate why some members of association do not rely upon the said recommendation and finally punished two of members.

In this case the Competition Council of Lithuania relied upon a few similar cases of other competition authorities of the member states. For example, on the case No 98-D-07[11] of the competition authority of France. Investigation showed that the council of advocates prepared indicative pricelist of services on the relevant market and thus infringed competition rules. Also on the case No 00-D-52[12] of competition authority of France where it was determined that issuing the recommendations on fees for services of advocates the council of advocates set up minimal service prices and eliminated free competition of prices on the relevant market.

In 2007 the Competition Council of Lithuania has started investigation of activity of Association of processing of recyclable garbage (PEATA)[13]. Investigation showed that the said association calculated, analysed and forecasted a growth of recyclable garbage prices on the relevant markets. During this activity the association drafted the recommendations with fixed minimal prices for recyclable garbage collection and spread the said recommendations not only between members of association but also agitated other garbage collecting companies to follow the recommendations. The case is still under investigation.

It is necessary to analyse further such cases in which associations try to act on behalf of members of association and to dictate its members, to prepare recommendations and to spread between members of association, and thus become an initiation, organiser and the main player in cartel agreement. Such cases are different from direct cartel agreements when companies simply agreed to make cartel agreements in association.

## 9. Conclusions

When there are few alternative associations on the relevant market established according to a size of enterprises it shows that there is some level of confrontation and tension between enterprises that might lead to splitting of market and fixing of spheres of influence on such relevant market. Associations made up exclusively of big enterprises, the leaders of the relevant market, give occasion to look thoroughly on competition environment on the relevant markets and possibly to analyse the activity of such association.

Experience shows that there are few possible models of cartel activity in case of participation of associations in cartels. It is necessary to separate cartel cases from attempts of associations to analyse and

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10 Case No 1S-142, http://www.konkuren.lt/archyvas/archyvas.htm; 2006 Annual report of the Competition Council of Lithuania, case still under investigation.

11 Décision n° 98-D-07 du 14 Janvier 1998, http://www.conseil-concurrence.fr/pdf/avis/98d07.pdf.

12 Décision n° 00-D-52 du 15 Janvier 2001, http://www.conseil-concurrence.fr/pdf/avis/00d52.pdf.

13 Case No 1S-38, http://www.konkuren.lt/archyvas/archyvas.htm; 2007 Annual report of the Competition Council of Lithuania.

explain changes going on the relevant markets, express its thinking and opinion on market processes and to express position of association. In that case there is a need to do preventive work in order to eliminate possibilities that activity of association could overgrow into prohibited agreements on the relevant markets.

In case of investigation of recommendations prepared by the association it is necessary to determine who was initiator of drafting and has led the process of implementation of recommendations, how widely and how many enterprises have followed the recommendations and what final impact the recommendations had on the economic decisions of the members of association and other competitors as well as final influence on the relevant market.

In case of investigation of cases of exchange of confidential information between enterprises through association it is necessary to determine whether such information gave advantage to members of association comparing to nonmembers, what possible influence such information could have on the economic decisions of the members of association and other competitors as well as final influence on the relevant market. Special attention should be payed to the longterm changes of market shares of members of association on the relevant markets; longterm stability of market shares can show possible coordination of activity between enterprises.

# ROMANIA

The Romanian Competition Council often found that trade associations play a positive role in helping the competition authority fulfill its tasks. Trade associations often brought to our attention competitive problems in an industry, frequently in the context of legislative activity or other aspects of our competition advocacy mission, but also in connection with investigations of potential violations of the antitrust laws.

Several cases of the Competition Council were started as a result of a complaint received from a trade or business association or based on information from such a complaint; the majority of such cases referred to abuse of dominance cases.

For example a complaint lodged at the Competition Council by the Association of Romanian Private Freight Railway Transport Companies – ARPFRT - was the starting point of an investigation that found the National Company for Freight Railway Transport ("CFR Marfa"-SA[1]) abusing its dominant position on the market of ancillary services to freight railway transport. In fact, ARPFRT claimed that CFR Marfa, taking advantage of its dominant position, adopted several decisions whereby it imposed to the private-owned freight railway operators, organized in ARPFRT, differentiated tariffs as compared to those charged to the State-owned operators and, in the end, CFR Marfa refused to deal any further with private operators, on the grounds that they were its competitors. CFR Marfa was sanctioned for abuse of dominance; the Council made also recommendations to the Ministry of Transports to improve the existing the legislative framework in order to guarantee equal conditions for all undertakings, irrespective of their nature.

Whether in cases regarding anticompetitive practices or in merger cases, trade associations were always considered by our experts as a useful source of information about the functioning of an industry, particularly during the early stages of an investigation.

Trade associations often play an important role in promoting antitrust rules, by holding meetings and seminars and inviting speakers from the antitrust enforcement authorities.

In recognizing this aspect of the trade associations' role, the Competition Council has always shown openness towards contributing with speakers to such events. For example, one of the business associations that repeatedly manifested its interest towards promoting an antitrust compliance programme among its members has been the Turkish Businessmen Association in Romania (TIAD). As a result, the Competition Council has participated with speakers in various events organized by TIAD.

Moreover, representatives of business and trade associations were always invited to public seminars and conferences organized by the Council or by its partners. In order to facilitate such attendance, the Council has concluded even since 2001 a MoU with the Chamber of Commerce and Industry of Romania. One of the topics of this MoU was to promote the introduction of antitrust compliance programmes in the business community.

[1] CFR Marfa is a spin-off owned by the State, set up after the reorganization of former National Company of Romanian Railroads, operating freight railway transport.

An additional example of good relations between the antitrust authority and a business association was our cooperation with the Automotive Manufacturers and Importers Association.

In 2005, the Competition Council had several meetings with the representatives of the Automotive Manufacturers and Importers Association**.** These meetings were intended to familiarize the undertakings in the sector with the provisions of the new *Regulation regarding the application of art.5 (2) to categories of vertical agreements and concerted practices in the motor vehicle sector*[2]*,* as both parties considered this goal of common interest.

Another important positive role of a trade/business association could be that the association may, for example, perform an important information-gathering function that would be difficult for the members to carry out on their own. Or the association may represent its members before legislative bodies and governmental agencies, thus improving the information upon which governmental decisions are made.

However, all these positive aspects in the activity of trade and business associations may easily turn into negative aspects if these organizations fail to take into account competition rules.

From a practical standpoint, we feel that antitrust authorities should focus their concern on several antitrust problem areas in the activity of trade/business associations, such as activities that foster or encourage cartels, membership restrictions, standardization and certification, self-regulation of the industry etc.

The Romanian competition authority has encountered several instances where associations infringed the provisions of art.5 (1) of the Competition Law (art 81 EC) by engaging in cartel-type activities. These activities consisted in fixing prices/tariffs among members, in collectively negotiating prices/tariffs with third parties, in dividing markets/customers or in exchanging sensitive business information.

Our experience showed that members of an association are most likely to violate the price/tariff-fixing prohibitions of the competition rules. A price-fixing violation may be inferred from similar price behavior by an association's members, even in the absence of a written or oral agreement. If price-fixing by an association or its members is established, the fact that the prices set are reasonable or that the ends sought through the price-fixing behavior are worthy are not an adequate defense.

One of these cases involved the insurance premium level charged for Green Card[3] insurance. Competition Council investigated the agreement concluded between the members of RMIB[4], having as object the concerted fixing of minimum insurance premiums.

In this investigation, the Competition Council established that, on May 20, 1999, the representatives of the nine companies, members of RMIB, organized a meeting at RMIB headquarters. In this meeting, the

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2 The regulation transposes *EC Regulation No 1400/2002 of 31 July 2002 on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices in the motor vehicle sector*

3 Third person liability insurance for vehicles, for accidents occurred abroad.

4 Romanian Motors Insurers Bureau is a nongovernmental professional organization, set up by the Romanian Motors Insurers, with the purpose of developing cooperation in the field of vehicle insurances and representing insurance undertakings in their relations with other Romanian or foreign organisations. According to RMIB Statute, in force at the date of the agreement, RMIB had no attributions as Issuer Office or Managing Office. Therefore, it had no power to repay to foreign Management Offices the amount of due compensations for damages caused by the insurance holders. At the same time, RMIB had no attribution to pay compensations to Romanian third injured persons.

undertakings decided unanimously that RMIB must recommend to the insurers authorized[5] to conclude facultative insurances, a minimum level for the „Green Card" insurance premiums.

This level had to be further used by the insurers as a benchmark in establishing the premiums, replacing the previous lower benchmark applied for this purpose. The insurers' refusal to observe the recommendation earned them also a sanction from RMIB: suspension of the right to issue „Green Card" insurance, or exclusion from RMIB and withdrawal of the right to issue „Green Card" insurance. This punitive measure emphasized the compulsory nature of the minimum premium, invalidating its recommendatory character, since one cannot sanction the failure to abide by a recommendation, but only an assumed obligation.

The agreement's effect materialized in an increase in the Green Card premium level by approximately 10 USD. At the same time, setting the minimum premiums caused market foreclosure and damaged consumer interest. Once implemented, consumers had no possibility to choose, as all authorized undertakings adopted the same increased levels of insurance premiums.

In their defense, RMIB representatives and the insurance companies stated that setting the minimum insurance premiums and their implementation did not restrict competition, since such actions were meant to avoid "an extremely low level of premiums not correlated to the risks assumed, not adequate to create the technical reserves necessary to the settlement of damages". The Competition Council concluded that such reasoning could not justify an agreement on concertedly fixing the minimum premiums and, anyway, a measure intended to prevent the insolvability of insurance companies does not justify the infringement of Competition Law.

The Competition Council's Plenum sanctioned the insurance companies, members of RMIB, for the infringement of art. 5(1) lit. a) of the Competition Law by concluding and implementing an agreement aimed at setting the minimum premiums' level for the Green Card insurance.

Another relevant case involving collective negotiations with third parties took place on the maritime and fluvial transport market. The Competition Council investigated the negotiation carried out by the Association of Romanian Shipping Companies and Port-River Undertakings (ARSCPRU), on behalf of its members, with administrations of ports and navigable canals. The negotiation regarded contractual clauses and tariffs charged for services provided to ARSCPRU members.

On an activity basis, ARSCPRU's members – shipping companies and port and inland water operators – compete with each other, either on the market for the port or inland water operators, or on the shipping companies market. As to the relation between the national companies and the ARSCPRU's members, this is led by commercial relations written down in economic contracts wherefrom derive the rights and the liabilities of each undersigning party. Therefore, the negotiation on the contractual conditions and services' tariffs should be settled only between the contracting partners.

The investigation conducted by the Competition Council revealed that the practice of negotiation, with port and navigable canals administrations covered a period of ten years. Negotiations took place with the attendance of the association's representatives, on the basis of the mandates received from a part of its members and in the presence of the managers or the legal representatives of other companies, as well as ARSCPRU's members. The negotiations were concluded by signing services contracts or minutes with attached annexes including services tariffs of port administrations.

5 The recommendation was made for the companies that had an authorization to conclude such types of insurance (green card).

In supporting their defence, ARSCPRU members stated that, in the absence of a "regulatory authority" in this field, the association might represent a "countervailing part for the eventual unilateral measures, of any nature, taken by any administration", therefore they empowered the association to "represent the viewpoints of all operators and fluvial shipping companies".

In taking its final decision, the Competition Council upheld, consistently with the case-law of the Romanian High Court of Cassation and Justice[6] that setting the tariffs within a collective negotiation constitutes an anticompetitive practice, and is per se unlawful. The Court also concluded in the aforementioned decisions that in such a case it suffices to prove the existence of the practice and it is not necessary to prove its negative effects on a competitive environment.

Consequently, the Competition Council found that the negotiation between ARSCPRU members and port and navigable canals administrations regarding the contractual clauses and the tariffs charged for the services provided to the association's members, had as an object the restriction, prevention and distortion of competition on the relevant market.

One of the biggest cartel cases investigated by the Competition Council, the cement cartel case, involved three cement producers on an oligopolistic market that used their membership within a trade association, CIROM, to exchange sensitive information that helped them divide markets and maintain symmetry of prices and market share throughout the duration of their cartel agreement.

CIROM published a quarterly bulletin comprising sensible and detailed information, including individual statistic data regarding each cement plant. turnover, share capital, gross profit, average of employees, gross average wage, labor productivity, volume of investments, fuel and energy consumption per plant, positions of the three companies at international level, volume of production and sales, development of the Romanian cement market (import and export figures).

These data were provided monthly to CIROM by the three companies. The bulletin provided also comparative data regarding the previous periods, in percentages and sums.

The three involved undertakings used this information exchange to restraint and distort the competition to their benefit. They agreed on certain artificial levels of the cement price, and this exchange of information allowed them to maintain a specific price level. The data regarding their turnover allowed them to compare it with the overall turnover and easily deduce the market share for each undertaking, and therefore to obtain and maintain equal market shares by adjusting the prices accordingly.

The parties claimed they are not to blame for this phenomenon, because the CIROM association had already been set up, and its policies had been implemented before their entry on the Romanian cement market. This was obviously not a convincing argument.

There was also further data that showed that the undertakings in question used their membership with CIROM as an effective cover for their meetings. The parties were members of the Cement Committee within CIROM. The Committee was formed from the three undertakings in question and CEPROCIM, the National Institute for Research in the cement sector.

The working meetings of the Cement Committee took place in turns at the headquarters of each of the three producers. The Committee also organized the "The Open Gates Day", event when each of the three producers invited the other two to pay a visit to one of his plants.

6 HCCJ Decision no. 1448/1999 and 955/1997.

In May 2005 the Competition Council decided to impose fines of over 27 million Euros to the three cement producers, considering that all three undertakings were members of a price fixing cartel on the Romanian market. The Competition Council also decided the annulment of the CEMENT Committee in order to eliminate the possibility of concluding further collusive agreements.

More often than not, members of an association exchange information regarding pricing policies, division of output markets or input sources, based on provisions in an association statute. The Competition Council found such a provision in the statute of the National Road Transport Union. The statute included among the objectives of the Union, the need to harmonize transport tariffs used by transporters, in accordance with beneficiaries' requirements in terms of volume, quantity, time restrictions etc. At the proposal of the Council, this provision was removed from the statute.

There are instances when even the legal framework for a certain sector creates the premises for cartels within associations. In the taxi sector, when issuing a regulation, the legislative framework required the legislator to consult with the taxi associations on setting the tariffs. The Competition Council repeatedly insisted on modifying the respective legislative provisions, however, some of them are still in place[7].

In several occasions, the Competition Council stated its position against initiatives of trade associations to publicly announce price hikes when common inputs in the sector recorded uniform increases in prices (for example the Romanian Meat Association). We considered that such announcements and especially anticipations of a specific level of future prices encouraged a concerted behavior among members of the association that could have been considered an agreement in the sense on art 5 (1) of the Law (art.81 EC). The associations did not always agree with the authority and in some cases a small media storm was created, nevertheless we felt that our message was clearly understood and insofar no signals from the market were received that would trigger an investigation in this type of behavior.

As shown above, we consider that, apart from cartels, certain aspects in the activity of trade/business associations may, upon failure to take account of antitrust concerns, lead to anticompetitive outcomes, such as barriers to entry resulting from membership restrictions, standardization and certification, self-regulation of the industry etc. However, until now the Competition Council did not encounter such cases in its enforcement practice.

[7] See Romania's contribution on Competition Committee's WP 2 October 2007 *Roundtable on taxi services.*

# SLOVENIA

## 1. Introduction

Trade/business associations on one hand perform a lot of important functions for their members such as market surveys, publication of specialized magazines, development of new products/services, but on the other hand they can serve as a forum for exchanging sensible business information, which can lead to a possible breach of competition rules.

In Slovenia we have had several cases of the breach of antitrust rules, where trade/business associations were involved. However, there are also several pro-competitive activities, which are performed through such associations.

## 2. Legislative activities by trade associations

In the contest of legislative activities the two major chambers are fully involved. The Chamber of Commerce and Industry of Slovenia cooperates with the government and ministries when creating economic policy and system, also through participation in legislative procedures.

The Chamber of Craft of Slovenia has recently prepared a draft of law regarding the funeral and burial activities, because the actual legislation does not allow any competition in this segment (the concessionaire has a legal monopoly). The draft of law contains provisions, which enable the opening of that market.

Furthermore, in the legislative procedure there is a proposal for a new competition act and the Slovenian Chamber of Commerce has submitted several comments and propositions to amend the proposal. In the near future there is also a meeting planned between the Competition Protection Office (hereinafter: the Office) and the Chamber of Commerce to discuss certain issues.

## 3. Standard setting and the promotion of industry-wide business practices

It can be noticed, that entry in the EU has brought additional responsibilities that also business associations have to deal with. Especially in the banking sector, where the SEPA (Single Euro Payment Area) project is currently underway, the Bank Association of Slovenia plays an important role. In fact, it is responsible for the accomplishment of the project. Recently it has also issued a special edition of its magazine “Bančni vestnik” with detailed information of the SEPA project in Slovenia.

## 4. Anticompetitive practices of trade associations

However, regardless of the pro-competitive role of the Bank Association of Slovenia in certain areas of the banking sector, a problem had arisen in the sphere of the buying of goods and services by instalments because of the crediting policies of the banks, members of the association. Accordingly, the Competition Protection Office of the Republic of Slovenia started an investigation and found that the Bank Association of Slovenia violated article 5 of our competition act (equivalent to Article 81 of the Treaty).

### *4.1 CASE 1: The Bank Association of Slovenia*

Until recently the Slovenian consumer could have chosen to buy goods and services by instalments using the payment instrument, called standing order, by concluding a contract at the store. In this case a contract was concluded between the seller (retailer, merchant) and the buyer (consumer), in which they agreed the number of instalments as well as the amount and the date of maturity of each singular instalment. The buyer also had to sign a statement, in which he had authorised his bank to open a standing order in favour of the bank account of the bank of the seller. (The seller had an individual contract with the bank, which was the legal basis for the sale of goods and services through standing orders.) As regards the interest rate, it was the sellers' choice, whether or not to charge interests. However, in most cases the seller offered interest-free instalment purchase.

As the banks estimated that entering that market (offering credits on the spot – at the store) would be very profitable, they agreed not to allow the payment of instalments by standing orders. They started cancelling or they did not renew the above mentioned individual contract with the sellers and they started offering a new product: "BANKREDIT", which is a credit for the purchase of goods and services of low value and can be authorised for the benefit of the buyer at the sales point, without the necessity of visiting the bank. For this purpose the seller would have to conclude an agreement with the banks, which would enable him to act as a credit intermediary for selling goods and services on instalments.

During the investigations the Competition Protection Office found out that the supervisory board of the Bank Association of Slovenia adopted a decision calling on banks to cancel contracts for standing orders at the time of launching a common bank product – BanKredit. The members of the Bank Association of Slovenia sent a statement, where they have agreed to follow the decision. After conducting the procedure, the Office established that the object of provisions of the aforementioned decision was to cancel an efficient service for paying goods or services by instalments and consequently to exclude competitors (points of sale) from offering the possibility of paying by instalments or of crediting at points of sale. A standing order is a modern payment instrument that served as an efficient mechanism to provide the possibility of paying by instalments or crediting. The Bank Association of Slovenia wanted to start an efficient marketing campaign of its product "BanKredit" by excluding from the market of instalment payments/crediting at selling points the offer of instalment payments by standing orders and thus excluded the possibility that sellers would offer to their customers the instalment payments by standing orders as a more favourable alternative. When buying goods or services by instalments using a standing order, the customer was able to pay the price of goods or services in several instalments without any additional costs, whereas in the case of the BanKredit service, they have to pay a high price for the application approval, insurance and interest rates. At the cost of consumers, the members of the Bank Association of Slovenia replaced a less expensive manner of crediting with a more expensive one.

On 15 November 2006 the Office issued a decision ordering the Bank Association of Slovenia to re-establish circumstances comparable to those that existed before cancellation of the possibility to pay by instalments or crediting by standing order at a selling point. In the decision the Office established that the disputed decision of the Bank Association of Slovenia represents a decision by an association of undertakings on the conditions of operating in a market, whose object is prevention, restriction and distortion of competition in the Republic of Slovenia, which makes it prohibited and null. By the decision the Office imposed on the Bank Association of Slovenia the following duties: to inform in writing all its members that the decision in question was null, to call on all its members in writing to facilitate the establishment of such contractual relations with business partners (traders and others) that would allow them to independently offer sale by instalments or crediting at a point of sale with the use of a standing order or any other adequate payment instrument.

The decision is not yet final, since the Bank Association of Slovenia filed an action against the Office decision at the Administrative court in Ljubljana, and the court has not made its ruling yet.

In addition to the administrative procedure minor offences procedure was launched simultaneously *ex officio* against the Bank Association of Slovenia and the responsible person at the Bank Association of Slovenia because of the suspicion that a minor offence was committed.

### *4.2 CASE 2: The Association of Travel Agencies of Slovenia*

The Slovenian travel agencies were charging **the same** extra fee for their service: booking of vacations, journeys and other travel arrangements. The amount of fee, which was charged per each booking, was 3.000,00 SIT (cca. 13 EUR). Our Office started an investigation and found out that the level of the fee and also the date of beginning of charging the new fee was established by a decision of the Board of the Association of Travel Agencies of Slovenia (the association of undertakings, members of which are also all the larger travel agencies in Slovenia). As the internal act (Statute) of the Association of Travel Agencies of Slovenia also stipulates some penalty clauses for the disobedience to the decisions, accepted by the Board, the Office concluded that decision of the Board represented a decision of the associations of undertaking. As a result our competition authority concluded that there was an infringement of Article 5 of Slovenian competition act. The Association of Travel Agencies of Slovenia has infringed the competition rules, because it set up the fee in a fix amount by decision, which was obligatory for the members (price fixing).

A minor offence procedure was launched against the Association of Travel Agencies of Slovenia and the responsible person in which the fine of 11 million tolars (circa 45.800 euros) was imposed. The parties have appealed against the decision.

### *4.3 CASE 3: The Professional Association of Publishers and Booksellers of Slovenia, the Chamber of Commerce of Slovenia and the Association for print and media*

The company Piano filed a complaint on 10 February 2005 to launch a procedure against the Professional Association of Publishers and Booksellers of Slovenia and the Society of Slovenian Publishers because of their General conditions for functioning of the Slovene book market (hereinafter: General conditions).

On 14 April 2005 a procedure was launched *ex officio* against different parties with regard to some provisions of the General conditions. In the procedure it was established that some provisions of the General conditions which entered into force on 3 August 2004 and were adopted by the Chamber of Commerce and Industry of Slovenia, Association for print and media, and the Professional Association of Publishers and Booksellers of Slovenia, represent a decision by an association of undertakings, which limits competition.

In the decision issued on 1 February 2006 the following disputed provisions of General conditions were proclaimed null and prohibited: provisions regarding a unified book price set by a publisher prior to publishing a book for the entire territory of the Republic of Slovenia, for all selling routes, valid for 12 months from date of publishing; a unified discount, which was limited to a maximum of 5% and then changed on 3 December 2005 into an unlimited discount, which was still unified for all customers; and a unified sales price. The object of each disputed provision alone and of all the provisions combined is to exclude competition among publishers and through them among booksellers and selling routes, which limits companies in freely setting of trading conditions. The unified price and unified discounts is required, regardless of the business policy of each company and regardless of costs that they bear when using

different selling routes, which is contrary to the constitutional right of a publisher to free economic initiative, to freely set a price to a book and other business conditions.

Against the decision all three parties filed legal action in an administrative dispute, in which the court has not ruled yet.

A minor offence procedure was launched against the Chamber of Commerce and Industry of Slovenia and the responsible person in which the fine of 11 million tolars (circa 45.800 euros) was imposed. The parties have appealed against the decision.

## 5. Conclusion

As the level of consciousness as regard the compliance with the competition rules is still not very high in our country, there is a need to monitor very closely the activities of trade/business associations. That is why the Office conducted numerous procedures against the trade/business associations. However, it is also very important to "promote competition" through a strong competition advocacy and the Office had several meetings with the major associations, where competition issues were discussed

# SOUTH AFRICA

This paper sets out some South African case studies of the conduct of non-statutory trade/business associations, under the following themes:

6. Trade associations organising naked restrictions of competition;

7. A trade association facilitating collusion;

8. Members using a trade association's activities to cover unlawful collusion;

9. Pro-competitive vs competition restrictive information exchanges amongst a trade association's members;

10. A trade association's antitrust compliance procedures; and

11. Advocacy.

## 1. Trade associations organising naked restrictions of competition: The SAMA, HASA and BHF cases

In terms of the Competition Act, an agreement between or concerted practice by, firms, or a decision by an association of firms, is prohibited if it is between competitors and if it involves directly or indirectly fixing a purchase or selling price or any other related trading condition.

During 2002, it came to the Competition Commission's attention that the South African Medical Association ("SAMA"), the Hospital Association of South Africa ("HASA") and the Board of Healthcare Funders ("BHF") were each determining and recommending tariffs to their respective members. Accordingly, the Commissioner initiated investigations against each of the abovementioned associations.

At the time of the Competition Commission's investigation, approximately 70% of doctors in both the public and private sectors were members of SAMA while HASA represented 95% of all private hospitals in South Africa. The BHF was a voluntary association of medical schemes and represented 80% of all medical aid schemes registered with the Council for Medical Schemes ("CMS"). The CMS is a statutory body established by the Medical Schemes Act to provide regulatory supervision of private health financing through medical schemes.

SAMA, HASA and BHF each determined, recommended and published benchmark tariffs for medical services on an annual basis. The recommended tariffs of SAMA and the BHF were embodied in an annual publication titled *Benchmark Guide to Fees for Medical Services*. Similarly, HASA's tariffs were contained in a publication titled the *Benchmark Guide to Fees*.

The Competition Commission's investigation concluded that the conduct of the three associations contravened the provisions of the Competition Act which prohibits competitors from fixing prices, and resolved to refer the matter to the Competition Tribunal for determination.

After the matters were referred, each of the associations began negotiating consent agreements with the Competition Commission. In terms of the Competition Act, the Competition Commission may negotiate and conclude consent agreements which the Competition Tribunal must confirm as an order. Both SAMA and HASA agreed to cease the publication of the recommended tariffs. BHF, however, was concerned about the impact that ceasing publication would have on its members and the healthcare industry as a whole. Consequently, representatives of the Competition Commission met with the CMS to determine the most appropriate remedy to address the industry's concerns. The CMS thereafter proposed that a third party continues with the publication of the tariff.

The above had the following outcomes:

- In April 2004, the Competition Tribunal confirmed orders that SAMA and HASA pay administrative penalties in the amount of R900 000 and R4.5 million (approximately €90 000 and €450 000) respectively. An order was also confirmed in March 2005, for BHF to pay an administrative penalty of R500 000 (approximately €50 000);

- The CMS published a National Health Reference Price List (NHRPL), intended as a costing model utilising benchmark values and standardised assumptions[1];

- The medical aid schemes, for the most part adopted the NHRPL, as they had previously done with the BHF tariff. Medical practitioners vary in the rates that they charge;

- During or about 2005, the Department of Health, as the custodian of health policy put together a technical team to compile the NHRPL from 2007 onwards. The Department of Health has this year taken over the responsibility of publishing the NHRPL from the CMS. The technical team is tasked with evaluating the costs of all health professions practices to enable it to compile a cost based price list which the Department of Health will publish as a reference for pricing. The team has requested and received various costing submissions which it is evaluating. In addition, the team has been conducting random audits on health care practices to ensure that the cost data submitted is accurate. The NHRPL process is an ongoing one and the list will be updated. The process has encouraged cost transparency and non-confidential versions of the cost data submitted are available on the CMS website.

- The Competition Commission is available to advise the NHRPL task team on any competition issues that may emerge in the course of its work.

## 2. A trade association facilitating collusion through membership rules and restrictions on access: The UDIPA case

In terms of the Competition Act, an agreement between or concerted practice by, firms, or a decision by an association of firms, is prohibited if it is between competitors and if it has the effect of substantially preventing, or lessening, competition in a market unless a party to the agreement, concerted practice, or decision can prove that any technological, efficiency or other pro-competitive gain resulting from it outweighs that conduct. The Competition Commission received a complaint from Dr SM Pillay on 29

[1] The NHRPL is intended to "form the basis of more meaningful negotiations between funders and providers – instead of negotiations being on the basis of an overall percentage increase on historically determined values, the costing model should allow pricing negotiations to take place at the levels of items within a detailed breakdown of costs underpinning item values"- paragraph 4.3, Circular 9 of 2006,Council for Medical Schemes, dated 20 February 2006.

November 2000, in which he alleged that the Uitenhage and Despatch Independent Practitioners Association (UDIPA), was engaged in such restrictive and prohibited practices.[2]

UDIPA was formed by Dr Pillay and various other medical practitioners as an independent practitioners association, allegedly to offer a low-cost capitated health plan to members of contracted medical schemes. UDIPA, at the time of the complaint consisted of 57 affiliated physicians, dentists and optometrists and had service provider contracts with three medical schemes. The members of UDIPA constituted in excess of 70% of the local physicians, dentists and optometrists. The practitioners who belong to UDIPA collectively control the association, set the fees to be paid by medical schemes and the trading conditions under which UDIPA practitioners must practice.

UDIPA's constitution prohibited any members from directly negotiating capitation and its related risk contracts outside the UDIPA framework and precluded members from contracting with competing organisations without UDIPA's approval. UDIPA members were therefore prohibited from entering into capitation agreements and its related risk contracts with medical aid schemes in competition with UDIPA. Dr Pillay's membership of UDIPA was terminated due to his failure to accept UDIPA as the sole channel and authority for negotiating capitation.

The constitution of UDIPA also contained provisions restricting new members from operating in particular areas. New members could not practice within 1 kilometer of an existing member without permission from the existing member while founding members were allowed to practice in any area in South Africa's Uitenhage and/or Despatch Magisterial Districts.

Members of UDIPA also agreed to charge a fixed fee for the services they were rendering to members of the contracted medical schemes ("a capitation fee").

The Competition Commission found that the exclusivity provision and the territorial restrictions amounted to a restrictive horizontal practice in contravention of the provisions of the Competition Act in that they had the effect of substantially preventing or lessening competition in the market for capitated healthcare plans in the Uitenhage and Despatch Magisterial Districts. The exclusivity provision was not a necessary requirement to carry out the goals of the association and there were no technological, efficiency or pro-competitive gains from the provisions.

However, in respect of the capitation fee arrangement, the Competition Commission found that it constitutes an integrated joint venture in which the members share substantial financial risk in providing services. Due to the extent of economic integration inherent in such an arrangement, the Competition Commission concluded that this rule of the association would not be characterised as constituting prohibited price fixing, as contemplated in the Competition Act.

UDIPA agreed to enter into a consent agreement with the Competition Commission, in terms of which it admitted to contravening the relevant provisions of the Competition Act and agreed to change all of its conduct and the restrictions which were identified as being anti-competitive. The consent agreement was confirmed by the Competition Tribunal.

[2] The delay in the finalizing of this case is due to several factors including negotiations with parties and a re-investigation of the case. This case was initially referred to the Competition Tribunal in 2002 on the basis of a per se (section 4(1)(b)) contravention. However, following the Supreme Court of Appeal's decision in the Ansac/Botash case relating to the characterization of an agreement between competitors, the Commission re-opened its investigation in 2005.

## 3. Members using a trade association's activities to cover unlawful collusion: The Vehicle Security Association of South Africa case

In 2005, the Competition Commission referred the conduct of 5 vehicle tracking and recovery companies to the Competition Tribunal ("the Tribunal") for adjudication on *inter alia* possible collusion.

These companies were members of the Vehicle Security Association of South Africa ("VESA"), at the time allegedly the only standards and regulation body dedicated to promoting and protecting the vehicle security industry and consumers in South Africa.

The complainant, Tracetec, operates a vehicle and movable asset identification, tracking and recovery system. Tracetec alleged that the five vehicle tracking and recovery companies, Netstar (Pty) Ltd ("Netstar"), Matrix Vehicle Tracking (Pty) Ltd ("Matrix"), Tracker (Pty) Ltd ("Tracker"), Global Telematics SA (Pty) Ltd ("Orchid") and Bandit Ltd ("Bandit") are using the VESA committees as a platform for collusion and collective abuse of dominance within the vehicle tracking system industry. Furthermore, it is alleged that these companies within the VESA Stolen Vehicle Recovery Committee determined the membership criteria for VESA accreditation, thereby raising barriers to entry into VESA. It is also alleged that it is almost impossible for other competitors to enter the market for vehicle tracking and recovery without VESA accreditation, as VESA accreditation is required to qualify for insurance related work.

The Competition Commission found that the companies engaged in prohibited practices, in that the agreement between or concerted practice by the five companies who were competitors impeded or prevented Tracetec and other competitors from entering or expanding within the market for the supply of products and services for the tracking and recovery of motor vehicles in South Africa. This exclusionary conduct in the industry further entrenched the dominance of Netstar and Tracker to the detriment of other competitors or potential competitors[3]. The Commission subsequently withdrew the complaint against Orchid and Bandit and intends calling representatives of these firms as witnesses at the hearing.[4]

The Competition Commission has therefore asked the Tribunal to declare the conduct of Netstar, Tracker and Matrix as prohibited practices and order that the companies refrain from engaging in such conduct in the future.

## 4. Pro-competitive vs competition restrictive information exchanges amongst a trade association's members: The Citrus Producers' Forum case

On 14 June 2006, the Competition Commission granted the Citrus Producers Forum ("CPF") a category exemption. CPF is a voluntary association of citrus fruit producers and consists of a group of citrus fruit producers from the Western Cape and the VaalhartsIMartswater areas (which are parts of South Africa's Northern Cape region).

The members of CPF produce, pack and export citrus fruit to the United States of America ("USA"). CPF's activities include the limitation of the quantity of citrus fruit to be exported to the USA by allocating maximum quotas per producer. CPF members also collect and exchange market related information. Such information includes weekly average prices of citrus fruit in the USA. Further, CPF also fixes the minimum export prices of citrus fruit that is exported to the USA. The above conduct is collusion and is prohibited by the provisions of the Competition Act.

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3 Market shares at the time of the referral was Netstar with 46,2% and Tracker with 39,8% of the relevant market.

4 Orchid and Bandit had respective market shares of 2,5% and 2,1 % at the time of the referral.

The exemption was granted under section 10(3)(b)(i) of the Act. Section 10(3)(b)(i) provides that the Competition Commission may exempt an agreement or category of agreements or practice/practices that contributes to the maintenance or promotion of exports.

The Competition Commission was satisfied that the agreement is necessary for the promotion of the export market for citrus fruit to the USA. The exemption was granted for a period of five years, beginning 1 July 2006 and until 30 June 2011 and is subject to certain conditions aimed at, *inter alia,* ensuring that the agreement promotes the export market and does not prevent or lessen competition in the domestic market, and that the method of allocating fruit quotas does not prejudice small domestic producers.

## 5. A trade association's antitrust compliance procedures: The Franchising Association of South Africa case

The Franchising Association of South Africa relies on self-regulation and has been lobbying the Department of Trade and Industry ("the dti") for a number of years to publish a franchising policy to regulate this sector. FASA has submitted draft regulations to the dti but these have not been finalised. The need to regulate the industry came about as a result of alleged unethical and unfair business practices by certain industry players (in particular franchisors).

FASA members were of the opinion that the franchising industry is 'a special industry' that needed to be given room to operate outside the provisions of the Competition Act. FASA therefore lobbied the dti for an exemption from the provisions of the Competition Act. The dti referred FASA to the Competition Commission.

The Competition Commission has since been working closely with FASA to ensure and promote voluntary compliance with the Competition Act. The Competition Commission has with the cooperation of FASA, developed a franchising guideline to assist the industry to better understand the provisions of the Competition Act and its application to the franchising sector, particularly with respect to practices of minimum resale price maintenance (which is enforced and applied widely in this industry) and territorial restrictions.

## 6. Advocacy: The South African Sugar Association case

While trade associations may promote and maintain ethical and other such standards, these associations are often used as *fora* to facilitate collusion. Often, the anti-competitive conduct of these associations is historically entrenched or legislatively condoned. In these cases, the Competition Commission would adopt an advocacy route rather than prosecute.

One such case is that of the South African Sugar Association. On 19 October 2005, the Competition Commission received a complaint that members of the South African Sugar Association ("SASA") in the Western Cape are indirectly fixing prices or trading conditions in that SASA members agreed to collectively grant rebates to their customers in respect of both brown and white sugar so as to counter import competition.

The Competition Commission evaluated the complaint and decided not to refer the complaint to the Competition Tribunal for determination. The reasons for this decision is that the Sugar Act[5] empowers SASA to determine the local price of sugar and these powers are reflected in the Sugar Industry Agreement ("SIA") entered into by SASA members. Further, the terms of SIA were endorsed and published by the Minister of Trade and Industry.

[5] Act 9 of 1978.

In the light of the above, the Competition Commission has resolved to advocate for pro-competition policies in this sector and is currently liaising with the dti to address competition concerns emanating from the Sugar Act and the SIA.

# BIAC[1]

## 1. Introduction

The Business and Advisory Committee (BIAC) to the OECD appreciates the opportunity to submit these comments to the OECD Competition Committee's Working Party No. 3 (WP3) for its roundtable on "Potential Pro-Competitive and Anti-Competitive Aspects of Trade/Business Associations." on 16 October, 2007.

In responding to the questions raised our focus has been on trade associations defined as organisations which are established to promote the common good of a given industry or economic sector and comprising undertakings which may not necessarily be operating at the same level of the relevant market. This paper does not take account of the activities of various other bodies which describe themselves as trade associations such as ad hoc representative groups sometimes established for a specific lobbying purpose.

BIAC is aware that the reported cases over the years are littered with examples of cartels utilising such trade associations whether directly or indirectly as shelter for their alleged activities. Equally regulators often seem to have an innate suspicion of the activities of trade associations perhaps influenced by the frequently quoted dictum of Adam Smith from 1776 in "The Wealth of Nations":

> *"People of the same trade seldom meet together, even for merriment and diversion, but the conversation ends in a conspiracy against the public, or in some contrivance to raise prices. It is impossible indeed to prevent such meetings, by any law which either could be executed, or would be consistent with liberty and justice. But though the law cannot hinder people of the same trade from sometimes assembling together, it ought to do nothing to facilitate such assemblies; much less to render them necessary."*

However, the world has moved on since 1776, particularly with the widespread growth globally of comprehensive competition laws, and whilst BIAC vigorously supports efficient and effective prosecution of hard core cartels[2] we believe that a balanced view should be taken of trade associations - taking into account the numerous useful and necessary functions which they perform, their awareness of the importance of compliance with competition laws and their often extensive activities in fostering such compliance. The direct engagement of a small minority of trade associations in unlawful activities over the years should not outweigh the benefits brought to the economy (in many cases both industry and consumers) by the vast majority of trade associations which taken together have become an integral feature of most market economies.

This paper will briefly review some of the key functions of Trade Associations and will then consider their role in relation to competition law in various jurisdictions, their value as a compliance tool in

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1 Paper prepared by Rufus Ogilvie Smals, General Counsel, GKN plc, with substantial contribution from BIAC Competition Committee members.

2 See, most recently, "Prosecuting Cartels Without Direct Evidence of Agreement" presented by BIAC to the OECD at the OECD Global Forum on Competition (8 February, 2006).

advocating the importance of competition law and will then deal with some of the more specific issues raised in the request for contributions.

## 2. Functions of Trade Associations

### *2.1 Information dissemination and exchange*[3]

One of the most useful activities of a trade association is the distribution to its members of information relating to its segment of the industry. This includes, among other things, information regarding legislation and regulations that may impact industry members. In addition, it can include technological trends, economic forecasts, projections regarding complementary or downstream industries, and other important information that can enable firms to make rational investment decisions that optimize the distribution of capital.

A particular type of information that sometimes attracts regulatory scrutiny is the collection and dissemination of statistical data from trade association members. Properly conducted, the collection of statistical information can stimulate competition by enabling firms, for example, to recognize demand trends and expand their investment in the industry. Thus, there should be a presumption that properly conducted statistical programmes are pro-competitive and can produce significant economic benefits.

In a typical statistical programme, individual company data is gathered and then compiled into industry-wide totals and disseminated to members and often to others in the industry. The value of access to reliable data concerning a particular industry is widely recognized. Information about total industry sales can be one of a number of factors taken into account by businesses as a means of ensuring maximum allocation of resources. In addition, decisions about the purchase of raw materials, advertising, plant or store location, and capacity can be made on a more efficient basis by relying on accurate statistical data.

One of the benefits of having a trade association collect and exchange information is that the trade association functions as an independent third party. Direct exchanges between competitors are riskier because they provide more opportunities for express or tacit price fixing agreements.[4] Exchanges through an independent third party, however, are less likely to be open to challenge.[5]

The U.S. competition agencies have provided a particularly useful model for the exchange of industry information in a presumptively procompetitive manner. The *Health Care Statements*, jointly issued by the Antitrust Division of the Department of Justice and the Federal Trade Commission in 1996, set forth an

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3 Portions of Section II are from draft versions of the AMERICAN BAR ASSOCIATION, SECTION OF ANTITRUST, ANTITRUST AND TRADE ASSOCIATIONS, 3D ED. (forthcoming Spring 2008).

4 Mary L. Azcuenaga, Commissioner, FEDERAL TRADE COMM'N, *Price Surveys, Benchmarking and Information Exchanges*, Washington, DC (Nov. 8, 1994) at 13 ("The principal concern in conducting a price survey should be insulating the members from direct price exchanges and an inference of an agreement on price").

5 *See, e.g.*, *id.* at 13-14; U.S. DEP'T OF JUSTICE & FEDERAL TRADE COMM'N, STATEMENTS OF ANTITRUST ENFORCEMENT POLICY IN HEALTH CARE (1996) [hereinafter HEALTH CARE STATEMENTS], *reprinted in* 4 Trade Reg. Rep. (CCH) ¶ 13,153, *available at* http://www.ftc.gov/reports/hlth3s.pdf, Statement 6, (one of the three requirements for an information exchange to fall within the antitrust "safety zone" is if "the collection is managed by a third party (e.g., a … trade association")); ABA SECTION OF ANTITRUST LAW, A PRIMER ON THE LAW OF INFORMATION EXCHANGE, 18-19 (2d ed. 2002).

antitrust safety zone that describes exchanges of price and cost information among providers that will not be challenged by the Agencies under the antitrust laws (absent extraordinary circumstances). The safe harbour exists if the following conditions are satisfied: (1) the survey is managed by a third party (e.g., a purchaser, government agency, health care consultant, academic institution, or trade association); (2) the information provided by survey participants is based on data more than three months old; and (3) there are at least five providers reporting data upon which each disseminated statistic is based, no individual provider's data represents more than 25 percent on a weighted basis of that statistic, and any information disseminated is sufficiently aggregated such that it would not allow recipients to identify the prices charged or compensation paid by any particular provider. [6] Notably, the U.S. agencies have endorsed the *Health Care Statements* model for general application across industries.

Participants in an information exchange will be less exposed to antitrust risk where they can show a legitimate business reason for the exchange. For example, in *Cement Manufacturers*, the U.S. Supreme Court upheld an exchange by a trade association of information regarding specific job contracts, relying heavily on the fact that the purpose for the exchange was to prevent the perpetration of fraud on the association's members.[7]

At the same time, improperly conducted statistical programmes may not enhance competition and, in some circumstances, may diminish competition. Often, such statistical programmes are not sufficiently robust in terms of the number of participants or the age of the data collected, but these shortcomings frequently can be cured through counseling and the imposition of precautionary measures. BIAC believes that improper statistical programs conducted in good faith by a trade association should be subject to prohibition orders or other remedial measures but should not be subject to prosecution as criminal enterprises or cartels subject to fines. Such prosecution should be reserved for naked restraints of trade. Of course, a naked price fixing agreement conducted under the guise of a trade association (i.e., not in good faith) is properly subject to cartel enforcement.

### *2.2 Industry promotion, for example, through joint marketing*

Trade associations engage in a variety of activities to promote, sell, or distribute goods or services that are produced either jointly or individually by their members.[8] Such activities include trade shows,[9] advertising programs,[10] the establishment of auctions and other marketplaces,[11] sports leagues,[12] joint

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6 HEALTH CARE STATEMENTS, Statement 6.

7 Cement Mfrs. Protective Ass'n v. United States, 268 U.S. 588 (1925), at 604.

8 *See* U.S. DEP'T OF JUSTICE & FEDERAL TRADE COMM'N, ANTITRUST GUIDELINES FOR COLLABORATIONS AMONG COMPETITORS (2000) [hereinafter COMPETITOR COLLABORATIONS GUIDELINES], *reprinted in* 4 Trade Reg. Rep. (CCH) ¶ 13,161, § 3.31(a), *available at* http://www.ftc.gov/os/2000/04/ftcdojguidelines.pdf.

9 *See, e.g.*, Gregory v. Fort Bridger Rendezvous Ass'n, 448 F.3d 1195 (10th Cir. 2006).

10 *See, e.g.*, Phil Tolkan Datsun v. Greater Milwaukee Datsun Dealers' Advertising Ass'n, 672 F.2d 1280 (7th Cir. 1982).

11 *See, e.g.*, Hudson's Bay Co. Fur Sales v. American Legend Coop., 651 F.Supp. 819 (D.N.J. 1986).

12 *See, e.g.*, Assoc. of Indep. Television Stations v. College Football Ass'n, 637 F.Supp. 1289 (W.D. Okla. 1986).

marketing of health services,[13] and joint selling of other services or products.[14] The U.S. *Competitor Collaborations Guidelines*, issued jointly by the DOJ and FTC, state that "[s]uch agreements may be procompetitive, for example, where a combination of complementary assets enables products more quickly and efficiently to reach the marketplace."[15]

### *2.3 Joint purchasing*

Some trade associations offer group purchasing programs to their members and other industry participants. In some joint buying programs the association acts as a purchasing agent, while in others the association has a more limited role and may simply sponsor the program on an opt-in basis. Group purchasing is not limited to product inputs but also may involve services; for example, trade associations may act as joint purchasing agents for health care services or insurance.[16] The potential procompetitive benefits of joint buying are apparent; "[p]urchasing collaborations, for example, may enable participants to centralize ordering, to combine warehousing or distribution functions more efficiently, or to achieve other efficiencies."[17]

The U.S. *Health Care Statements* again provide useful safe harbours, stating that, absent extraordinary circumstances, the agencies will not challenge joint purchasing arrangements if: (1) the buying group's purchases account for less than 35 percent of the total sales of the product or service by all suppliers in the relevant geographic market; and (2) the cost of the product or service being jointly purchased accounts for less than 20 percent of the total revenues from all products or services sold in the downstream market by each competing participant in the joint purchasing arrangement.[18]

The *Health Care Statements* also propose safeguards to mitigate concerns that might arise in joint purchasing agreements. The *Statements* counsel that "antitrust concern is lessened if members are not required to use the arrangement for all their purchases of a particular product or service."[19] In addition, "where negotiations are conducted on behalf of the joint purchasing arrangement by an independent employee or agent who is not also an employee of a participant, antitrust risk is lowered."[20] Finally, "the

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13 *See, e.g.*, U.S. DEP'T OF JUSTICE, Business Review Letter to Santa Fe, New Mexico Managed Care Organization 1997 DOJBRL LEXIS 3 (Feb. 12, 1997) (no intention to challenge plan to challenge plan to "offer hospital and physician services to health insurance plans and other third-party payers using capitation and global fee contracts as well as other types of contract arrangements").

14 *See, e.g.*, U.S. DEP'T OF JUSTICE, Business Review Letter to Association of Independent Corrugated Converters, 1998 DOJBRL LEXIS 16 (Dec. 23, 1998) (no intention to challenge proposal by independent corrugated converters with small or limited number of plants "to form joint selling entities . . . that could efficiently sell to national and regional accounts").

15 COMPETITOR COLLABORATIONS GUIDELINES, *supra* note 6, § 3.31(a).

16 HEALTH CARE STATEMENTS, *supra* note 3, Statement 7; U.S. DEP'T OF JUSTICE, Business Review Letter to Houston Healthcare Coalition, 1994 DOJBRL LEXIS 4 (March 23, 1994) (no intention to challenge formation of group purchasing association to procure health care services for its members).

17 COMPETITOR COLLABORATIONS GUIDELINES, *supra* note 6, § 3.31(a). *See also* Northwest Wholesale Stationers v. Pacific Stationery, 472 U.S. 284, 295 (1985) ("The [joint buying] arrangement permits the participating retailers to achieve economies of scale in both the purchase and warehousing of wholesale supplies, and also ensures ready access to a stock of goods that might otherwise be unavailable on short notice").

18 HEALTH CARE STATEMENTS, supra note 3, Statement 7.

19 *Id.*

20 *Id.*

likelihood of anticompetitive communications is lessened where communications between the purchasing group and each individual participant are kept confidential, and not discussed with, or disseminated to, other participants."[21]

### *2.4 Standards development*

Trade associations often promulgate industry standards which may be adopted by the government such that the standards become law. The Department of Justice and Federal Trade Commission recently commented on the procompetitive nature of standards development:

"Industry standards are widely acknowledged to be one of the engines driving the modern economy. Standards can make products less costly for firms to produce and more valuable to consumers. They can increase innovation, efficiency, and consumer choice; foster public health and safety; and serve as a "fundamental building block for international trade." Standards make networks, such as the Internet and wireless telecommunications, more valuable by allowing products to interoperate. The most successful standards are often those that provide timely, widely adopted, and effective solutions to technical problems."[22]

A prominent example of such activity is in Germany with widespread participation of trade associations in the development of DIN standards which cover all areas of economic life.

Standards development activities by their very nature require the exchange of substantial amounts of information sometimes very recently developed. These activities very often may achieve significant procompetitive results however. These may include lower information costs, expanded use of technologies to the advantage of consumers, increased compatibility and interoperability of complementary technologies, and enhanced entry by new participants in relevant markets.[23] It is therefore very important that these activities are not deterred by an overly strict approach to enforcement of competition rules, whilst recognising that information flows need to be carefully controlled within the governance and compliance policies of the standards development bodies.

### *2.5 Lobbying*

Another key activity of many trade associations is representing to Governments, Regulators and other public bodies the interests of members on legislation, regulations, taxation and policy matters likely to affect them. This is often of considerable value to governmental bodies as they can deal largely with "one voice" when seeking consultation with an industry on any proposed changes or developments. For many

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21 *Id.*

22 U.S. DEP'T OF JUSTICE & FEDERAL TRADE COMM'N, ANTITRUST ENFORCEMENT AND INTELLECTUAL PROPERTY RIGHTS: PROMOTING INNOVATION AND COMPETITION (Apr. 2007), at 33.

23 *See, e.g.,* Allied Tube, 486 U.S. at 500; Clamp-All Corp. v. Cast Iron Soil Pipe Inst., 851 F.2d 478, 487 (1st Cir. 1988), *cert. denied*, 488 U.S. 1007 (1989) (trade association's promulgation of a standard lowers information costs and creates a better product); XIII Philip E. Areeda & Herbert Hovenkamp, Antitrust Law ¶ 2230b (1999) (discussing consumer benefits flowing from standard-setting); Gerald F. Masoudi, Deputy Ass't Att'y Gen., ANTITRUST DIV., U.S. DEP'T OF JUSTICE, *Efficiency in Analysis of Antitrust, Standard Setting, and Intellectual Property*, Address at the High-Level Workshop on Standardization, IP Licensing and Antitrust, Tilburg University, Brussels, Belgium (Jan. 18, 2007) at 3-4, *available at* http://www.usdoj.gov/atr/public/speeches/220972.htm; Hill B. Wellford, Counsel to the Ass't Att'y Gen., ANTITRUST DIV., U.S. DEP'T OF JUSTICE, *Antitrust Issues in Standard Setting*, Remarks at the 2nd Annual Seminar on IT Standardization and Intellectual Property, China Electronics Standardization Institute, Beijing, China (Mar. 29, 2007) at 3, *available at* http://www.usdoj.gov/atr/public/speeches/222236.htm.

members (particularly smaller firms) this is a principal benefit from membership in that their interests and concerns can be represented more effectively and with greater weight than they would command individually.

There are many cases also where this type of activity has proven to be a two-way street for regulators; there are many examples where detailed new regulations or voluntary codes benefiting consumers could not easily have been developed without the close and detailed cooperation of trade associations, e.g. the REACH legislation on chemicals and the development of codes of practice under the Consumer Codes Approval Scheme (CCAS) in the UK.

## 3. Trade Associations and Competition Law

The rules of competition law apply equally, of course, to trade associations; EU Article 81(1) refers specifically not just to agreements between undertakings but also to decisions by associations of undertakings. This approach has filtered through into the domestic laws of most EU Member States in addition. Acting through a trade association as an intermediary does not work as a method of escaping Article 81(1).

Furthermore, the term "decision" has been widely interpreted. The case law position is that any action by an association which is designed to coordinate the conduct of its member undertakings constitutes a "decision" within the meaning of Article 81(1).[24] It is not necessary for a "decision" to be binding on the members. Being a member of an association is deemed sufficient to empower the association to undertake obligations on its behalf.

Consequently, even where a member has not expressly approved an anti-competitive agreement concluded by the association but has not expressly opposed it, the member may be held to have acquiesced in the agreement. This approach has been taken further in a recent decision of the Court of Justice[25] requiring positive disassociation to prove that you were not part of a cartel:-

> *"142 It is settled case-law that it is sufficient for the Commission to show that the undertaking concerned participated in meetings at which anti-competitive agreements were concluded, without manifestly opposing them, to prove to the requisite standard that the undertaking participated in the cartel. Where participation in such meetings has been established, it is for that undertaking to put forward evidence to establish that its participation in those meetings was without any anti-competitive intention by demonstrating that it had indicated to its competitors that it was participating in those meetings in a spirit that was different from theirs (see, in particular, Joined Cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P Aalborg Portland and Others v Commission [2004] ECR I-123, paragraph 81 and the case-law cited).*
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> *143 In that regard, a party which tacitly approves of an unlawful initiative, without publicly distancing itself from its content or reporting it to the administrative authorities, effectively encourages the continuation of the infringement and compromises its discovery.* ***That complicity constitutes a passive mode of participation in the infringement which is therefore capable of***

[24] Verband der Sachversicherer e.V. v. Commission, [1987] ECR 405 (para. 32); NV IAZ International Belgium and Others v. Commission, [1983] ECR 3369 (paras 19 to 21). See also Fedetab, OJ 1978 L224/29; Nederlandse Vereniging voor de Fruit - en groentenimporthandel, Nederlandse Bond van grossiers in zuidvruchten en ander geimporteerd fruit 'Frubo' v. Commission, [1975] ECR 563.

[25] Dansk Rorindustri v Commission 28/06/2005.

***rendering the undertaking liable in the context of a single agreement*** *(see Aalborg Portland and Others v Commission, cited above, paragraph 84)."*

Whilst in many other jurisdictions passive participation may not be regarded as sufficient to ground liability it is at least apparent that both within the EU and other jurisdictions there is no question of trade associations enjoying any special exempt status when it comes to compliance with competition laws. To the contrary, they are particularly vulnerable to investigation and prosecution with sufficient deterrence in place to make both the trade association and its members particularly anxious to avoid any conduct under the auspices of the association which could be considered questionable under applicable competition laws.

BIAC believes that the greater concern is that the many benefits of trade associations as described earlier in this paper could be unnecessarily limited or lost altogether should regulators adopt an unduly restrictive approach to their activities or if they view trade associations as a particular target for deterrence by, for example, imposing fines which threaten the continuation of the trade association (and possibly an element of double jeopardy on its members) even where its involvement in unlawful activity has been at best indirect.

## 4. Compliance Activities of Trade Associations

Fully appreciating the need to avoid becoming a refuge for cartels and in the interests of their members generally many trade associations have embarked upon comprehensive compliance and training programmes. A selection of such (publicly available) programmes as run by trade associations in various jurisdictions are listed in the attachment to this paper. Many also publish rigorous guidance relating to the conduct of meetings of the trade association. More generally, trade associations are often very active in providing training in competition laws to its members sometimes in close cooperation with national regulators.

### *4.1 Rules*

The right to become a member of a trade association can be critical to operating in a particular market which is why membership rules should be based on reasonable objective standards with appropriate appeal procedures in case of refusal of admission. In Metropole Television the CFI classified the standard of legality of membership rules to the effect that they should be "objective and sufficiently determinative so as to enable them to be applied uniformly and in a non-discriminatory manner vis-a-vis all potential members[26].

BIAC supports the need for rules of admission to a trade association to be transparent, proportionate, non-discriminatory and based on objective standards particularly where exclusion from membership is likely to put the undertaking concerned at a competitive disadvantage. For similar reasons procedures for expelling members should also be based on reasonable and objective standards.

## 5. Conclusions

Given the complexities of the economic and regulatory environment in which businesses have to operate the membership of a trade association can offer a range of benefits to members - particularly smaller companies - which help to maximise the efficiency of the market system as a whole.[27] The conduct

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26 Metropole Television v Commission [1996] ECR II-649.

27 "Trade associations, professions and self-regulating bodies: Understanding competition law," OFT 2004, at 17, para 5.2.

of such bodies, as well as that of the members, are subject to compliance with competition laws and most such bodies are acutely aware of this.

BIAC is not advocating any special leniency programme for trade associations but equally it does not believe that there would be any justification for trade associations to be any more targeted or more rigorously treated than their members.

Just as well organised companies with first class competition compliance programmes can sometimes run foul of competition laws, often as a result of the unauthorised conduct of misguided managers, so is it that trade associations can also unwittingly or otherwise infringe. It is an issue which is well appreciated by corporate compliance officers with best practice now developing towards extending special training to corporate representatives who attend trade association meetings.

Many trade associations themselves issue guidelines for conduct at such meetings and it may be that best practice guidelines for the conduct of trade associations generally should be developed by the regulatory community where such action is not already in progress.

However, any such approach should be risk based and proportionate so as not to unduly constrict the entirely legitimate objectives of trade associations in a manner which could limit their effectiveness. BIAC stands ready and willing to work with OECD and/or other regulators to develop such guidelines.

**ATTACHMENT**

Web Services – Interoperability Organization *Antitrust Compliance Policy:* http://www.ws-i.org/docs/Membership/20020828.WS-IAntitrust.pdf

Retail Packaging Association *Antitrust Compliance Policy and Guidelines:* http://www.retailpackaging.org/misc/legal/antitrust/

The International Titanium Association *Antitrust Guidelines:* http://www.titanium.org/Category.cfm?CategoryID=161

Southwestern Fertilizer Conference, Inc. *Guide to Antitrust Compliance:* http://www.swfertilizer.org/AntiTrust.htm

Institute of Electrical and Electronics Engineers, Inc. *Antitrust and Competition Policy:* http://www.ieee.org/web/services/general/sitemap.html?WT.mc_id=ft_smap

## SUMMARY OF DISCUSSION

The Chair opened the 100th meeting of the Working Party No. 3 and thanked the delegations for the wide interest expressed in this topic. The Secretariat received 26 submissions that formed the basis for the roundtable discussion together with a Background Note of the Secretariat.

At the outset, the Chair outlined the possible structure of the meeting and suggested a number of topics that could be addressed by the delegates in the discussion, namely (i) the pro-competitive aspects of trade associations; (ii) the issue of exemption and immunities for trade association activities, (iii) the distinction between 'naked' restraints of competition by trade associations and agreements reached by trade association members on the side of legitimate trade association activities without the involvement of the trade association, and (iv) other activities of trade associations which could facilitate collusion, if not properly handled, such as information exchanges, membership rules and industry self-regulation (standard setting, code of conduct, etc.).

Before opening the floor to the discussion, the Chair introduced the two distinguished guest speakers that were invited to introduce the topic from the perspective of the trade associations: Ms Nicole Maréchal, Senior Legal Counsellor and the Governance Officer for the European Chemical Industry Council (CEFIC); and Mr. Michael Altschul, Senior Vice President and General Counsel of CTIA, the U.S. based association for the Wireless Telecommunication Industry.

### I. Introductory remarks by the guest speakers

To launch the roundtable discussion, the Chair invited both speakers to introduce the topic from their experience of in-house counsel of a European and an American trade association.

Ms. Maréchal took the floor first and introduced herself. She started her introductory remarks presenting the activities, the role, the vision and the goals of CEFIC, the trade association of the chemical industry at European level. CEFIC represents more than 29.000 European companies, employing more than 2 million people and accounting for more than 30% of the world's chemical production. CEFIC's mission is to maintain and develop a prosperous chemical industry in Europe by promoting the best possible economic, social and environmental conditions for society. To achieve this mission, CEFIC is committed to the constant improvement of safety, health and environmental performance of its members. Its main goal is to enhance member value, to achieve effective public policy and earn the public trust.

Coming to the topic of the roundtable discussion, i.e. the role of trade associations in a modern economy, Ms. Maréchal asserted that trade associations can certainly play a very positive role. Trade associations help responding to important public policy needs such as health, safety, environment and competitiveness of individual companies and of entire industry sectors. They certainly do not act as forum for anti-competitive activities and are not directly or indirect involved in illegal activities. That being said, however, illegal activities between competitors can take place in trade association as in any other context in which competing companies meet. For this reason, a strong culture of legal compliance, including compliance with competition rules, is a key objective of CEFIC's governance and ethical policy. CEFIC's internal competition compliance system, for example, is applicable to all CEFIC staff, to all its members and their representatives and to all federations which are involved with CEFIC activities. Compliance is a core value in the association and this approach is entirely backed-up by the Board of the association and by

its Director General. Any infringement of the association's compliance procedures is considered as a professional misconduct and ignorance is not accepted as a justification.

In CEFIC, the work of a competition in-house counsel is to help colleagues understanding competition law and to advise the members and their representatives when acting in Cefic groups on how to define and conduct Cefic 's activities and policies so that they are in compliance with the applicable antirust legislation. In a large trade association, such as CEFIC, it is very important to have an internal service that helps achieving and monitoring compliance. In order to ensure compliance, CEFIC has many initiative in place: it distributes leaflets to its members with general information or with more specific "Do's and Don'ts"; it organises a significant amount of training and educational activities for its members and its staff; it systematically monitors internal discussions among the members of the association; and it cooperates with antitrust authorities in case of enquiries. A core objective of CEFIC is to raise the awareness of its members on competition compliance. To make a practical example, before the accession of the new member states to the EU, CEFIC organised various competition compliance seminars in all the new member states in which CEFIC has a member federation. This program was financed by the European Commission.

A very good example of pro-competitive cooperation between a trade association and a competition authority is the role played by CEFIC in the new European legislation on chemicals and their safe use, i.e. the REACH legislation, which introduced a registration system for chemical products and substances. Under the REACH regulation, competing companies are encouraged to co-operate and to exchange information. CEFIC identified this as a potential concern for competition and, through advocacy, managed to address the issue during the legislative process. A reference to the application of competition law was added to the legislation and this prevented companies from claiming that they could legitimately exchange any type of information simply because it was required by an EC regulation. Following the adoption of the REACH regulation, CEFIC engaged in a dialogue with DG Competition to see what else could be done to ensure full compliance with EC competition law. CEFIC's proposal, which was followed by the Commission, was to include a discussion on EC competition law in the guidance documents attached to the REACH legislation with the objective to provide specific guidance on data sharing and exchanges of information. This was a very interesting experience and today the guidance documents help companies in this business to understand to what extent information can be exchanged.

The Chair thanked Ms. Maréchal for her introductory remarks and turned to Mr. Altschul who is currently the Senior Vice President of CTIA, the American association of the wireless industry.

Mr. Altschul briefly introduced the wireless industry (also known as the mobile communication industry) and CTIA, his trade association. CTIA is based in Washington DC and includes among its members companies that are active in a variety of wireless services, from the traditional infrastructure companies to suppliers of handsets and devices for wireless data, broadband applications, Internet access etc. CTIA represents companies which serve more than 95% of the wireless customers in the US. To introduce the roundtable topic, Mr. Altschul described the competition compliance procedures of CTIA, which are very similar to those of CEFIC. All CTIA staff and all members of its Board of Directors receive training on antitrust law and on its application in the context of a trade association. The association has an annual mandatory review of these issues for its staff and the CTIA General Counsel reviews all meeting agenda, all data surveys produced by the association, and monitors all other activities of the association for compliance with competition policy. If necessary, an in-house competition counsel attends meetings where competition issues are likely to arise. As many industry associations around the world, CTIA also organises two conventions a year. These conventions have the format of an exhibition which brings together purchasers of wireless services and their suppliers, and include a three day educational programme that covers the fields of emerging technologies, customers' service, regulatory policy, etc.

With regards CTIA's public policy activities, the association interfaces with the US Congress on communications, tax and other issues important to the mobile industry. While the mobile industry is lightly regulated compared to traditional fixed telephony industry, wireless companies continue to be licensed by the Federal Communications Commission (FCC) The FCC is the industry regulator and therefore the relationship with it is the main focus of CTIA advocacy efforts. The Federal Trade Commission (FTC) is also expanding its interest into areas of wireless communication that are not regulated by the FCC, such as Internet and broadband activities. In addition to federal agencies, CTIA also deals with state and local governments when they are involved in regulating wireless activities. In the US, there are a number of regulations that are constantly being proposed, reviewed and revised both at the federal and state level. About 2/3 of CTIA budget goes into public policy advocacy activities with these public entities. Often the association challenges federal or state laws and policies in court.

CTIA is also involved in addressing and resolving network externalities to improve the efficiency and the value of the services offered by its members to the public. Over the last few years, CTIA has been increasingly active in developing guidelines and voluntary best practices to guide its members. As an example of such self regulation activity, Mr. Altschul referred to a set of consumer best practices on the content that users - particularly users who are under 18 - can obtain from carriers over their devices. CTIA is also responsible for monitoring compliance with the Mobile Marketing Association's guidelines which address the policies that mobile advertisers use for opting in and out opting out of campaigns that use short codes.

One of CTIA's more unusual activities is "cross-carrier business development," which has addressed network externalities in the mobile industry. For example, CTIA recently facilitated the introduction of inter-operability of SMS text messages and MMS messages sent from one carrier's network to another. In the US, there are four national wireless carriers, and because they use different digital interfaces and wireless devices, a wireless application from one mobile operator probably would not run on a competitor's network or wireless device. These differences in technology made it impossible to send an SMS message from one carrier to another. The association went through the process of finding the performance specifications that all of the carriers could support, i.e. the least common denominator set of requirements, and promoted it as industry standard. With the development of SMS inter-operability it is now possible to send messages across the platforms and deliver them to any carrier.

## II. The pro-competitive aspects of trade associations

The Chair thanked the two speakers for their introductory remarks and explained that the speakers' presentations have correctly emphasised the positive aspects of trade associations. As the Secretariat Background paper points out, trade groups are certainly one of the earliest forms of organisation to evolve in our economies. The traditional view on trade associations was articulated by Adam Smith in his Wealth of Nations in 1776: "*People of the same trade seldom meet together even for merriment and diversion but that the conversation ends in conspiracy against the public or in some contrivance to raise price*". However, as the country submissions and certainly the speakers have underscored, we have come a long way from the views of Adam Smith. Today, it is generally acknowledged that there are a lot of legitimate reasons for businesses getting together and engage in various forms of cooperation, many of which benefit the public at large.

To address the positive aspects of trade associations, the Chair noted that the submissions of the UK and the EC focussed specifically on some positive interactions that they had with trade associations and asked these two delegations to share these positive experiences with the Working Party.

The representative of the United Kingdom explained that the UK has an integrated competition and consumer agency, the Office of Fair Trading (OFT). One of the task of the OFT is to review and approve

consumer codes. The experience of the OFT with the consumer codes approval scheme (CCAS) has been extremely positive and it is believed to have generated many pro-competitive benefits. In practice, the OFT vets prospective codes proposed by trade associations or by other business organisations from a competition perspective. The approval process requires that the proposed codes do not breech competition law, for example that their membership rules do not create barriers to entry, do not deal with prices or market or consumer sharing. Once the code is approved, the sponsoring body and its members can used an approved OFT logo showing that they operate in accordance with the code. The approval can be withdrawn by the OFT, if the conditions for the approval are not met any longer; this has happened only once. So far, the OFT has approved six codes in the areas of real estate agencies, vehicle sales, maintenance and repair, carpets and direct selling. Six prospective codes are under review and there are sixteen others in the early stages of preparation.

The main purpose of the CCAS is to recognise and promote self-regulation through approved consumer codes of practice which set challenging standards of customer service. The CCAS aims to safeguard consumers' interests by helping them identify businesses and brands with higher standards of customer care and in which consumers can have confidence. The CCAS recognises that self-regulatory schemes often provide more flexible and responsive methods to address problems that consumers face and allow the industry to sort out consumer problems directly without the need for intervention by the enforcement authorities. As a result of these codes, the OFT believes that there is now a higher level of protection including pre-payment protection, improved customer service, access to redress schemes and ultimately independent redress such as ombudsman or adjudication that previously existed. An OFT approved code offers higher levels of customer service than those required by the law, and specifically addresses areas of concern and consumer detriment in a particular sector. Although using a business that complies with an OFT approved code cannot guarantee that all transactions will be trouble free, it does guarantee a straightforward procedure for resolving consumer complaints.

The representative of the European Commission intervened to offer a few comments on its positive relationship with trade associations. Following on the introductory remarks of Ms. Maréchal, the representative of the European Commission confirmed that the experience of the European Commission with trade and business associations is extremely positive. For example, the cooperation on the REACH legislation to which Ms. Maréchal referred previously is a very good example of a recent cooperation between the European Commission and an industry trade association. These types of co-operation have taken place in many industry sectors, including the maritime sector, the air transport sector and the insurance sector. As for the specific experience in the chemical sector, the REACH regulation encourages competing companies to exchange certain information including sensitive information. The reason why this is done is because companies are submitted to a regime of authorisation, evaluation and registration of their products and the exchange of certain information can help reducing the costs that the registration system has for each company and therefore is likely to increase the overall efficiency of the system.

The European Commission, however, was aware that such an exchange of information could facilitate collusion and other anticompetitive activities. In order to prevent anti-competitive practices, the European Commission asked three industry organisations to help it drawing a guidance document that would explain the Commission's practice on information exchange. The objective of such exercise was to increase the level of industry compliance with the EC competition rules. The guidelines contain a list of activities which are not permitted under EC competition rules (so-called "black list"). This list includes hardcore restrictions, such as price fixing, information sharing, output limitation and customer sharing. When it comes to information sharing, the document takes a more nuanced approach and lists the information which should not be exchanged: information on suppliers, customers, costs of production, plans on innovation and technology, etc. of each company. If companies are in a position that they have to exchange such information, they are requested to use ranges or thresholds. If companies cannot avoid exchanging absolute figures or individual information, the guidance document offers a set of alternative suggestions

such as the use of trustees or of independent organisms which would collect the information and redistribute them to the companies on an anonymous basis.

The Chair thanked the UK and the EC for their intervention and opened the floor for comments or question from the delegates.

The representative of Austria asked Ms. Maréchal if she could explain the historical background of CEFIC's competition compliance programme, in particular if the decision to adopt such a programme was a spontaneous decision of the association or if it was triggered by the fact that one or more members were heavily fined for an illegal conduct. The reason for the question is that in Austria trade associations were not really aware of cartel matters until the Federal Competition Authority was created in 2002. At the beginning, the newly-established authority had a fair number of proceedings against so-called 'non binding recommendations' by trade associations. The result of this enforcement activity was that many of such recommendations were withdrawn and the members of the associations which were fined were now among the most active supporters of competition compliance programs.

Ms. Maréchal replied that she was not aware of the specific history of CEFIC's compliance program but her understanding is that CEFIC was always very sensitive to competition issues. The fact that a statistical service was organised by Cefic encouraged the association to adopt compliance rules from the very beginning (in the 70s) in order to ensure competition compliance.

## III. Exemptions and immunities for trade association activities

The Chair then moved to the second area for discussion, i.e. exemptions and immunities for trade association activities. This topic follows from some of the interventions that stressed the interaction of trade associations with government regulators and the question that arises is whether such interaction confers any "vaccination" to the trade association activities. The Chair observed that the submissions from Canada, Mexico and Israel had some interesting comments on whether some activities of trade associations and/or self-regulatory activity deserve exemptions from antitrust rules and asked these delegations to comment.

The representative of Canada explained that in Canada there is a legal mechanism called the 'regulated conduct defence', which has been developed in order to resolve complex issues that might arise between locally regulated activities and common laws. This is often the case for self-regulated professions rather than trade association activities. In Canada, most self-regulated professions are controlled at the provincial level and since the competition law is a piece of federal legislation these conflicts between local and federal laws have occurred on a number of occasions. In particular, conflicts have arisen in the context of law societies that are authorised by the provincial legislation to carry out certain types of activities which might run afoul of the federal Competition Act. What courts have said is that where the provincial scheme authorises a self-regulatory body to regulate its members, then the behaviour will not be seen as a contravention of the federal legislation. The case law, however, makes clear that the regulated conduct defence does not extent to voluntary associations of professionals. Courts have looked at both those associations that are mandated under provincial law and those that are simply the results of voluntary actions by their members and decided that the regulated conduct defence could not apply to the latter.

The Chair thanked the Canadian delegation and gave the floor to the representative of Mexico to describe how the Mexican competition authority has addressed situations when an anticompetitive conduct appeared to be fostered, approved or condemned by public officials who may or may not have had the actual authority to confer any sort of exemption or immunity from the antitrust laws.

The representative of Mexico confirmed that the situation described by the Chair is an emerging practice in Mexico. In addressing these situations, the Mexican competition authority considered very important to distinguish between conduct fostered by legislative or regulatory provisions and conduct fostered by public officials. As for anti-competitive conduct which are fostered or approved by legislative/regulatory provisions, such as the imposition of minimum distances at the municipal or state level, the Mexican competition authority addressed them principally through advocacy efforts as in these cases it is not possible for the antitrust authority to directly enforce the competition rules. If the private conduct of the companies is mandated either by law or by secondary legislation the competition authority can advocate against the restrictive legislation by sending opinions to the municipal government or by attending the congress proceedings to discuss the anti-competitive effects of the proposed legislation. As for the second type of situations, i.e. the 'informal' actions by government officials, as long as the officials are acting within their authority, their act tends to be regarded by the courts as being exempt from the application of competition law. On the contrary, if the private conduct is not mandated by a legislation/regulation then competition law fully applies and there are cases in which the competition authority has enforced its antirust powers. This was the case, for example, when public officials have facilitated some kind of price agreement. To conclude, regardless of whether competition rules can be enforced against specific conduct or not, this is an area where the Mexican competition authority has found that advocacy efforts are crucial and in most cases more effective.

The Chair remarked that the issues raised by the Mexican delegation are very interesting. One can easily understand the dilemma of the business associations who may be involved in a situation where a public official who has great influence over many other aspects of the business group's economic wellbeing is putting pressure to resolve some issue that may have anti-competitive consequences. The public official may or may not be aware that they are encouraging a violation of the competition law and the business association may recognise the risk but may be reluctant to upset the public official by explaining that he/she has just recommended a violation of the competition rules.

The representative of Israel pointed out that the task to represent the industry interest vis-à-vis the government and other public entities is an important activity of trade associations. In order to facilitating this activity, in 2000 the Director General of the Israeli Antirust Authority issued a statement offering some guidance to the business community and to trade associations on what would be considered a restrictive arrangement in the context of a lobbying activity. According to the statement, cooperative activities will not be considered restrictive arrangements as long as they comply with a number of specific provisions. First, the activity must be aimed at persuading the government to take action or to avoid from taking an action. Then the activity, in its nature, must not aim at promoting any specific competitor but rather the common interest of all competitors. Finally, the activity may not include any exchange of information which might lead to anti-competitive practices. The rationale behind the statement is to balance the anti-competitive risks of the cooperation with other important public policy interests that can be better served when competitors act jointly rather than independently.

## IV. The distinction between 'naked' restraints of competition by trade associations and illegal agreements reached by members on the side of legitimate trade association activities

The Chair then moved to the next topic for discussion, i.e. the distinction between 'naked' restraints of competition by trade associations and agreements which are reached on the side of legitimate trade association activities, with the trade association not being directly involved but possibly acting as an unwitting facilitator. To open the discussion, the Chair asked the two speakers to address briefly how their respective trade associations deal with the issue of *per se* cartel violations which are reached on the side of trade association meetings, despite the trade association compliance programmes and monitoring activities.

Both Ms. Maréchal and Mr. Altschul explained that education and training is the answer to this question. The members of both CEFIC and CTIA are generally very sophisticated corporations that have their internal antitrust compliance programmes. Nevertheless, the members that attend the trade association meetings are always reminded to follow the agreed agenda, not to engage in discussions that are not included on an agenda and to leave any discussion that they are not comfortable being part of.

To explore how this issue is dealt with by the various competition agencies, the Chair asked the Irish delegation to share with the Working Party the lessons learned in the Connaught Oil Promotion Federation case, which is a good example of how legitimate trade association activities can provide coverage for a price fixing cartel.

The representative of Ireland explained that there have been two recent examples in Ireland where the activities of trade associations have been used as a place to engage in illegal price fixing activities. The meetings of the Connaught Oil Promotion Federation, for example, were conducted by the secretary of the organisation and at the meetings the members entered into illegal price fixing agreements. The members agreed on mechanisms for the policing of the agreements, they appointed a "facilitator" to ensure the efficient operation of the cartel and to convince other conspirators to join the cartel. This is an unfortunate example of how legitimate activities of trade associations can be subverted if the members decide to do so. The second case, which involved the Irish Ford Dealers Association, had a similar pattern. In this case, however, the association had also a number of legitimate activities that were taking place at the same time that the price fixing activities were going on. Following on what the two speakers have already emphasised, it is important to stress the importance of the educational activities of trade associations which can alert members to the risks and consequences of abusing the trade association to engage in illegal cartel activities. Finally, it is very important that trade associations have individuals in their staff who keep track at a very minute level of what is going on in the trade association.

The Chair then asked the South African delegation to discuss its experiences in the health care and medical industry where three business associations recommended tariffs and pricing schemes to their members.

The representative from South Africa explained that the Competition Commission investigated a case where three industry associations (one for the doctors, one for the private hospitals and one for the healthcare schemes) were publishing 'recommended tariffs', which in practice had the effect to fix prices. The case itself was not very controversial in the sense that once the Commission completed its investigation all parties settled and agreed to pay administrative penalties. The interesting part of this case was that after the antitrust intervention there remained a need for some kind of collective negotiations between the three trade associations. Medical schemes argued that they could not possibly engage into separate negotiations with each individual doctor and that they needed to balance the strong bargaining power of private hospitals, which are concentrated in three dominant groups. While doctors and hospitals were prepared to put an end to the investigated conduct, the medical schemes insisted on having some kind of reference price list. The Commission allowed reference prices provided that they were independently done, compiled on the bass of some cost benchmark and that the reference price would work as a maximum price leaving room for some competition below that cap. An interesting observation is that since the antitrust intervention tariffs collapsed and the larger medical schemes negotiated much more aggressively with private hospitals. As a result, members who belong to those larger medical schemes are able today to get lower rates. Of course the major difficulty is for the smaller medical schemes which do not have sufficient bargaining power to obtain the better price prices from the powerful private hospitals

## V. Other activities of trade associations which can facilitate collusion: information exchanges, membership rules and industry self-regulation (standard setting, code of conduct, etc.)

The Chair broadened the discussion beyond the naked restrictions of competition that may be enacted through or on the side of trade association activities to other activities of trade associations that can have a negative impact on competition if not handled properly. One example is the exchange of information between members of the association. To address this issue, the Chair asked the Norwegian delegation to describe the AC Nielsen case which is a good example of competition being restricted by an information exchange through an intermediary entity.

The representative of Norway clarified that AC Nielsen case is not a case involving trade associations but a third-party market analyst. Nevertheless, lessons on information sharing can be drawn from this case that may apply also to trade associations. The Norwegian grocery market is characterised by four nationwide chains accounting for more than 98% of the market. This market is also characterised by significant barriers to entry. In 2006, the Norwegian Competition Authority investigated a case of abuse of dominant position involving conditional payments for shelf space to one of the supermarket chains. To the great surprise of the competition authority, the case showed that all grocery chains had very detailed information on each other's prices and turnovers. The information was collected and disseminated by a third-party independent service provider, AC Nielsen. The chains received weekly reports from AC Nielsen showing the prices of approximately 50.000 different items, the information was organised by product, by chain and by geographic area.

The competition authority concluded that the exchange of such detailed information could amount to a breach of the Norwegian Competition Act. In particular, the competition authority looked at what information was exchanged and how it was used by the grocery chains. The competition authority concluded that the information exchanged made the market more transparent, reducing the uncertainty in the market and favouring collusion between grocery chains. After a constructive dialogue between AC Nielsen, the grocery chains and the competition authority, the parties voluntarily agreed to amend the information exchange system. Today, it is no longer possible to receive the prices charged by each individual chain; it is also no longer possible to receive weekly price updates and reports are distributed every four weeks. Finally, the number of products monitored by AC Nielsen has also been greatly reduced to approximately 2.000.

The Chair then turned to the possible restrictive effects of membership rules. He asked the Korean delegation to describe their experience with the 2003 case on real estate agents, where membership fees were used by the association as a means to control and limit the number of competitors in the market.

The representative of Korea explained that, under the Korean Fair Trade Law, it is prohibited for a trade association to restrict access to its membership. The 2003 real estate case is a good example of the KFTC enforcement practice in this area. A trade association consisting of 200 real estate agents in Busan (the 2nd largest city in Korea) decided to limit access to the association fearing that an excessive increase in the number of real estate brokers would reduce the income of the current members. To this end, the association increased its membership fee by ten times, from 300,000 Won (approximately €300) to three million Won (approximately € 3.000), and banned the members of the association from dealing with non-members. In addition, the fact that some real estate agents were not allowed to be part of the association also prevented them from participating in joint real estate dealings, which is a common practice in transactions of large apartment blocks. The KFTC found the association's membership rules to restrict competition in the market and imposed corrective measures on the association. The KFTC, however, did not impose monetary sanctions on the association or its members because the geographic market affected by the infringement was very narrow and both the association and its members had very small turnovers.

The Chair asked the German delegation to discuss the role that trade associations play in industry self-regulation with particular emphasis on standard setting and certification programmes, which are another way in which a beneficial activity of trade associations can, if not done properly, be harmful to competition.

The representative of Germany pointed out that technical standardisation and quality insurance are very important in Germany and have very long history. Germany has a non-profit institute dealing with standards, the German Institute for Standardisation (DIN), which includes among its members not only private companies and trade associations but also public authorities. The German Institute for Standardisation has approved more than 30.000 standards in practically all sectors of the economy. Its activities are carried out on a voluntary basis and the standards adopted are not binding but have a merely recommendatory character. The standardization work is carried out by more than 70 standardization committees, which are organised according to specialised areas. Interested parties can send their experts to participate in these committees and agreement on the standards is reached in a consensus-building process. The same applies to quality assurance which is pursued through a non-profit institute awarding a legally protected quality mark. The German systems for standard setting and quality assurance generally raise very little competition issues, as participation to the systems is open and transparent, it is not controlled by dominant firms and standards are voluntary and non-binding. Nevertheless the Federal Cartel Office (FCO) constantly monitors these standardisation activities as there may be instances where antitrust enforcement action is required. This was, for example, the case in the setting of a standard for the acrylic bath tubs where the FCO concluded that the technical requirements were so high and not objectively justified that the prevailing effect of the standard was to foreclose the market to new suppliers.

The Chair thanked the German delegation for these interesting remarks and asked the Hungarian delegation to discuss its experience with regard to self-imposed restrictions and in particular with the adoption by trade associations of codes of conduct regulating the advertising activities of their members.

The representative of Hungary explained that the Hungarian Competition Authority (GVH) had recently investigated a number of codes of ethics adopted by trade associations. Many of the provisions investigated related to bans on advertising. In most instances, these bans were quite serious as they restricted the possibility to advertise almost entirely. During the investigations, the parties' main defence for the maintaining such restrictions related to the alleged fact that competition law should not be applied because these restrictions served other legitimate public interests. The parties invoked the Wouters judgement of the European Court of Justice, but the GVH found that Wouters doctrine was not applicable to the facts of these cases. These cases were investigated by the GVH after the accession of Hungary to the EC and all cases were investigated under both European and national law in parallel. The competition authority concluded that the bans on advertising in the codes of conduct infringed competition law and could not be exempted. In some cases fines were imposed and in all cases, following the investigations, the associations agreed to amend the codes of ethics and to abolish the restrictions on advertising.

## VI. Concluding remarks

To conclude the roundtable discussion, the Chair invited all delegations to submit final remarks or to ask any final question to the two guest speakers.

The representative of BIAC intervened to sum up the various issues that had arisen in relation to trade associations. According to BIAC, trade associations are an essential component of modern economies and the companies need them for a whole variety of legitimate purposes. As emphasised by the two guest speakers, trade associations offer significant benefits to the members and to the economy in general. These benefits can be defined as efficiencies. Trade associations help enhancing companies' performance and cost reductions; they allow their members to offer better quality services and goods; they are basically in

the best position to deal with a whole range of public policy issues, including safety, environmental and other social issues. A clear example of this is the positive experience of the REACH regulation in the European Union, to which Ms. Maréchal and the European Commission have extensively referred. In a nutshell, trade associations contribute significantly to improving competitiveness in modern economies and that is an extremely important mission. There is of course the risk that illegal activities are carried out on the side of legitimate activities of trade associations. For this reason, trade associations and individual companies are very much involved in compliance efforts and in education programs to raise their staff's awareness of competition law and to alert them to the consequences of competition infringements. Finally, BIAC agreed with the comment of the Chair that a clear distinction has to be made between unlawful activities in which trade associations are directly involved and illegal activities by their members which use the trade associations as an unwitting cover. This is particularly relevant when it comes to the allocation of the antirust liability to the association or to its members or to the determination of the monetary sanctions for the illegal conduct.

The representative of Germany intervened to ask both external speakers if, when applying their very strict competition compliance programmes, their associations monitor also the activities of those member organisations which cannot afford to employ an in-house antitrust counsel. The German delegate also asked whether they were aware of how many of their national members associations run such a strict compliance programme.

Ms. Maréchal responded that CEFIC is truly committed to spreading a culture of compliance across all its members and all its member federations. This is particularly the case for those federations which have limited staff with antirust background. Ms. Maréchal added that it happens frequently that local federations contact CEFIC for advice on specific antitrust compliance issues. In practice, some national federations translate CEFIC information leaflets or use these in English and adapt them to the specific situation of each country and CEFIC may run educational programmes together with the local federation. Mr. Altschul pointed out that CTIA takes a similar approach to that described by Ms. Maréchal. Fortunately, trade associations of a certain size are sufficiently sophisticated and are very well-aware of competition laws. In addition, in the US, there is an organisation of trade associations to which many associations belong, the American Society of Associations' Executives (ASAE). A very important component of this ASAE's activities is training on antitrust and competition policy compliance and many small associations join ASAE to learn about other associations best practices, including best practices on antitrust and competition compliance.

To close the roundtable, the Chair congratulated all participants for the extremely interesting discussion on a topic which is obviously of great and widespread interest. The Chair thanked the two guest speakers for their very useful insights on the how trade associations deal with competition issues. The Chair also thanked the many delegations which have submitted a written contribution to this roundtable. He thought that the submissions and the Background Note of the Secretariat well reflected the wide range of issues that can arise in the context of trade associations, emphasising both the positive role of trade associations in helping develop a culture of competition law compliance but, at the same time, pointing out that there still are many examples of trade associations who have directly been involved in anticompetitive activities. This is the case of illegal information sharing, restrictive membership rules and standard setting and, in some instances, naked price fixing.

Absent any further comments, the Chair brought the roundtable to a close and thanked again the delegates and the speakers for their active participation.

## COMPTE RENDU DE LA DISCUSSION

Le Président ouvre la centième réunion du Groupe de travail n°3 et remercie les délégations pour le grand intérêt exprimé pour ce sujet. En plus d'une note de référence préparée par ses soins, le Secrétariat a en effet reçu 26 contributions qui doivent servir de base aux débats de cette table ronde.

En introduction, le Président donne les grandes lignes d'un découpage possible de la séance, en proposant quelques sujets susceptibles d'être abordés par les délégués au cours de la discussion, à savoir (i) les aspects proconcurrentiels des associations commerciales, (ii) la question de l'exemption et de l'immunité pour les activités des associations commerciales, (iii) la distinction entre les entraves flagrantes à la concurrence par les associations commerciales et les accords conclus par leurs adhérents parallèlement aux actions légitimes de ces associations, mais sans implication de ces dernières et (iv) d'autres activités des associations commerciales qui, si elles ne sont pas convenablement traitées, seraient susceptibles de faciliter les collusions, telles que les échanges d'informations, les règles d'affiliation et les mesures d'autorégulation du secteur (normalisation, codes de conduite, etc.).

Avant d'ouvrir les débats, le Président présente deux intervenants extérieurs de marque, qui ont été invités à présenter le sujet sous l'angle des associations commerciales, à savoir Nicole Maréchal, conseillère juridique senior et responsable de la gouvernance au Conseil européen de l'industrie chimique (CEFIC), et Michael Altschul, vice-président et conseiller général de la CTIA, l'association du secteur des télécommunications sans fil aux Etats-Unis.

### I. Déclarations introductives des intervenants extérieurs

Pour lancer les débats de la Table ronde, le Président invite les deux intervenants à présenter le sujet sous l'angle de leur expérience en tant que conseillers d'associations commerciales d'Europe et des États-Unis.

Mme Maréchal prend la parole la première et se présente, avant d'exposer les activités, le rôle, la vision et les objectifs du CEFIC, l'association professionnelle du secteur chimique à l'échelle européenne. Ce Conseil représente plus de 29 000 sociétés européennes employant plus de deux millions de personnes et réalisant plus de 30 % de la production chimique dans le monde. La mission du CEFIC consiste à soutenir et à développer l'industrie chimique en Europe *via* la promotion des meilleures conditions économiques, sociales et environnementales pour le corpos social. Pour remplir cette mission, le Conseil œuvre à l'amélioration permanente du niveau de sécurité, de santé et de respect de l'environnement de ses membres. Il vise principalement à valoriser ces derniers, à obtenir une action efficace des pouvoirs publics et à gagner la confiance de la population.

En ce qui concerne le sujet de la Table ronde, à savoir le rôle des associations commerciales dans une économie moderne, Mme Maréchal affirme que ce dernier peut être très positif. En effet, les associations commerciales contribuent à répondre aux importants besoins de l'action des pouvoirs publics notamment dans la santé, dans la sécurité, dans l'environnement et dans la compétitivité des entreprises et des secteurs entiers. Elles ne sont certes pas le lieu où se mènent des activités anticoncurrentielles et elles ne sont pas impliquées, de manière directe ou indirecte, dans des pratiques illégales. Cela étant, des activités illégales entre des concurrents peuvent se dérouler dans le cadre des associations commerciales, comme dans tout autre contexte de rencontre de sociétés présentes sur le même marché. C'est pourquoi une solide culture de

respect de la loi, y compris des règles de la concurrence, fait partie des objectifs essentiels de la politique de gouvernance et d'éthique du CEFIC. Par exemple, son système interne de respect de la concurrence s'applique à tous ses salariés, à tous ses membres et aux représentants de ceux-ci, ainsi qu'à toutes les fédérations intéressées à ses activités. Le respect du droit constitue une valeur essentielle de l'association et cette approche bénéficie du soutien total du conseil d'administration de l'association comme de son directeur général. Toute violation des procédures de déontologie de l'association est considérée comme une faute professionnelle, et leur ignorance ne peut constituer une justification acceptable.

Au CEFIC, le conseiller interne sur la concurrence a pour tâche d'aider ses collègues à mieux comprendre la législation dans ce domaine et de conseiller les membres et leurs représentants lorsqu'ils agissent dans des groupes appartenant au CEFIC pour définir et conduire les activités du CEFIC ainsi que leurs politiques de manière à respecter les textes en vigueur en matière de concurrence. Dans une grande association professionnelle comme le CEFIC, il est très important de disposer d'un service interne qui veille au respect de la loi. Pour s'en assurer, le Conseil agit de plusieurs manières : par la distribution à ses membres de brochures comportant des informations générales, ou plus précisément des conseils sur ce qu'il faut faire et ne pas faire, par l'organisation d'un certain nombre d'actions de formation pour ses membres et ses équipes internes, par un contrôle systématique des discussions internes entre les membres de l'association, et par la coopération avec les autorités de la concurrence en cas d'enquêtes. Le CEFIC a pour objectif fondamental de sensibiliser ses membres à la nécessité de respecter la loi. Pour prendre un exemple pratique, avant l'accession des nouveaux États membres de l'UE, le CEFIC a organisé chez ceux qui disposaient d'une fédération membre différents séminaires sur le respect du droit de la concurrence. Ce programme était financé par la Commission européenne.

Citons comme excellent exemple de coopération proconcurrentielle entre une association commerciale et une instance de surveillance de la concurrence le rôle du CEFIC dans la nouvelle réglementation européenne sur les produits chimiques et la sécurité de leur usage, à savoir REACH, qui instaure un système d'enregistrement des produits et substances chimiques. Dans le cadre de ce règlement, les entreprises concurrentes sont encouragées à coopérer et à échanger des informations. Pour le CEFIC, cette situation peut poser un problème de concurrence et il a réussi à le résoudre par une campagne de sensibilisation durant le processus d'adoption de REACH. Une référence à l'application du droit de la concurrence a ainsi été ajoutée au règlement, ce qui empêche les entreprises de prétendre qu'elles peuvent légitimement échanger toute sorte d'informations simplement parce que la réglementation communautaire l'exige. À la suite de l'adoption de REACH, le CEFIC s'est engagé dans un dialogue avec la Direction générale de la concurrence afin de voir quelles autres mesures pourraient être prises pour assurer un respect total du droit communautaire de la concurrence. La proposition du CEFIC, suivie par la Commission, consistait à inclure un passage mentionnant le droit communautaire de la concurrence dans les guides d'application joints à REACH, dans l'intention de formuler des recommandations spécifiques sur le partage de données et sur l'échange d'informations. Cette expérience a été très intéressante et, aujourd'hui, ces recommandations aident les entreprises du secteur à comprendre dans quelle mesure elles peuvent échanger des informations.

Le Président remercie Mme Maréchal pour ses remarques introductives et se tourne vers M. Altschul, actuel vice-président de l'association américaine du secteur des communications sans fil, la CTIA.

M. Altschul présente brièvement le secteur des communications sans fil (également appelées télécommunications mobiles) et son association, la CTIA. Cette dernière est située à Washington DC et compte parmi ses membres des sociétés présentes dans plusieurs segments de services de télécommunication sans fil, depuis les entreprises traditionnelles d'infrastructure aux fournisseurs de terminaux et d'appareils de transmission de données sans fil, d'applications à haut débit, d'accès à l'Internet, etc. La CTIA représente des sociétés couvrant plus de 95 % de la clientèle de services de télécommunication sans fil aux États-Unis. Pour présenter son intervention aux participants à la Table

ronde , M. Altschul décrit les procédures de respect de la concurrence appliquées par la CTIA, qui sont très proches de celles du CEFIC. Tous les collaborateurs de la CTIA et tous les membres de son Conseil d'Administration reçoivent une formation sur la législation antitrust et sur ses applications dans le contexte des associations commerciales. La CTIA procède à un examen annuel obligatoire de ces questions pour ses membres et le Conseil général du CTIA passe en revue tous les ordres du jour de réunions ainsi que toutes les enquêtes factuelles produites par l'association dont il supervise aussi toutes les autres activités afin de vérifier leur conformité avec la législation sur la concurrence. Si nécessaire, une commission interne chargée de la concurrence assiste aux réunions susceptibles d'aborder ce sujet. Comme de nombreuses associations professionnelles dans le monde, la CTIA organise également deux conventions par an, sous forme de rencontres entre les acheteurs de services de télécommunication sans fil et leurs fournisseurs, comprenant trois jours de conférences sur les nouvelles technologies, le service au client, la réglementation, etc.

En ce qui concerne les activités de la CTIA touchant à l'action des pouvoirs publics, l'association agit en interaction avec le Congrès des États-Unis dans le domaine des télécommunications, de la fiscalité et d'autres sujets importants pour le secteur des télécommunications sans fil. Bien que ce dernier soit peu réglementé par rapport à la téléphonie fixe traditionnelle, les opérateurs mobiles doivent toujours obtenir l'agrément de la Commission fédérale des télécommunications (Federal Communications Commission ou FCC). Cette dernière étant l'autorité de réglementation du secteur, c'est sur elle que la CTIA concentre l'essentiel de ses efforts de sensibilisation. Le champ d'action de la Commission fédérale du commerce (Federal Trade Commission ou FTC) s'étend également aux segments des télécommunications sans fil non réglementés par la FCC, comme l'Internet ou l'accès à haut débit. Outre les instances fédérales, la CTIA traite également avec les collectivités locales et les États lorsque ceux-ci sont impliqués dans la réglementation des activités de télécommunication sans fil. Aux États-Unis, on propose, examine et révise en permanence un grand nombre de règlements au niveau fédéral et des États. Environ les deux tiers du budget de la CTIA sont consacrés à des missions de représentation auprès de ces instances officielles. Bien souvent, l'association conteste devant les tribunaux des lois ou des mesures prises par l'État fédéral ou par les États fédérés.

La CTIA intervient également dans les problèmes posés par les externalités du réseau et contribue à les résoudre afin d'améliorer l'efficience et la valeur des services proposés au public par ses membres. Ces dernières années, la CTIA a mis au point de plus en plus lignes directrices et de bonnes pratiques volontaires à l'intention de ses adhérents. M. Altschul cite comme exemple de cette autorégulation un ensemble de bonnes pratiques de consommation sur le contenu que les usagers (en particulier ceux de moins de 18 ans) peuvent obtenir des opérateurs sur leurs appareils. La CTIA est également chargée de contrôler le respect des lignes directrices sur la commercialisation des services mobiles, qui portent sur les principes d'*opt-in* et *opt-out* dans le cadre des campagnes recourant à des numéros abrégés.

L'une des activités les plus inhabituelles de la CTIA concerne le développement de l'interopérabilité, et plus précisément les externalités de réseau du secteur mobile. Par exemple, la CTIA a récemment facilité l'introduction de l'interopérabilité des messages SMS et MMS envoyés du réseau d'un opérateur à un autre. Aux États-Unis, il existe quatre opérateurs sans fil nationaux, et parce qu'ils utilisaient une interface numérique et un terminal sans fil différents, une application mobile proposée par l'un d'entre eux ne pouvait fonctionner sur le terminal sans fil d'un concurrent. Ces divergences de technologies rendaient impossible l'envoi d'un SMS d'un opérateur à un autre. L'association a recherché quelles seraient les spécifications applicables à tous les opérateurs, soit le plus petit commun multiple exigible, pour en faire une norme du secteur. Grâce à la mise en place de l'interopérabilité des SMS, il est à présent possible d'envoyer des messages d'une plate-forme à l'autre et de les transporter vers n'importe quel opérateur.

## II. Aspects proconcurrentiels des associations commerciales

Le Président remercie les deux intervenants pour leurs présentations qui ont bien mis l'accent sur les aspects positifs des associations commerciales. Comme le souligne le document de référence du Secrétariat, les regroupements professionnels constituent certainement l'une des formes d'organisation les plus anciennes de nos économies. La vision traditionnelle des associations commerciales a été introduite par Adam Smith, dans sa *Richesse des nations*, publiée en 1776 : *« Il est rare que des gens du même métier se trouvent réunis, fût-ce pour quelque partie de plaisir ou pour se distraire, sans que la conversation finisse par quelque conspiration contre le public, ou par quelque machination pour faire hausser les prix »*. Cependant, comme le soulignent les contributions des pays et, naturellement, les interventions des deux invités, la situation a considérablement évolué depuis la vision d'Adam Smith. Aujourd'hui, il est généralement admis que des raisons tout à fait légitimes président aux regroupements d'entreprises et à leur engagement dans diverses formes de coopération, souvent bénéfiques pour l'ensemble de la population.

Pour aborder les aspects positifs des associations commerciales, le Président souligne que les contributions du Royaume-Uni et de la Commission européenne se sont attachées à certaines interactions favorables avec les associations commerciales, et demande aux deux délégations de faire partager ces expériences positives au Groupe de travail.

Le représentant du Royaume-Uni explique que son pays compte une instance intégrée chargée de la concurrence et de la consommation, l'Office of Fair Trading (OFT), dont l'une des tâches consiste à examiner et à approuver les codes de consommation. L'expérience de l'OFT concernant le plan d'agrément des codes de consommation (CCAS) s'est révélée extrêmement positive et passe pour avoir engendré de nombreux effets proconcurrentiels. Dans la pratique, l'OFT évalue sous l'angle de la concurrence les projets de codes proposés par les associations commerciales ou d'autres regroupements professionnels. Le processus d'agrément exige que les codes proposés ne soient pas contraires à la législation sur la concurrence, par exemple que les règles d'affiliation n'entraînent pas la formation de barrières à l'entrée, qu'elles ne statuent pas sur les prix ni ne prévoient de partage du marché ou de la clientèle. Une fois les dispositions approuvées, l'organe commanditaire et ses membres peuvent arborer le logo agréé de l'OFT qui atteste leur respect du code. L'OFT peut décider de retirer son agrément si les conditions requises ne sont plus remplies ; cela ne s'est produit qu'une fois. À ce jour, l'OFT a agréé six codes dans les domaines des agences immobilières, de la vente, de l'entretien et de la réparation de véhicules, des tapis et de la vente directe. Six projets de code sont en cours d'examen et seize autres en sont aux premiers stades de la conception.

Le principal objectif du CCAS consiste à reconnaître et à promouvoir l'autorégulation par le biais de codes de consommation pratiques établissant des normes ambitieuses de service au client. Le CCAS vise à préserver les intérêts des consommateurs en aidant ces derniers à identifier les entreprises et les marques respectant les normes de service au client les plus exigeantes et dans lesquelles ils peuvent avoir confiance. Le CCAS admet que les programmes d'autorégulation constituent bien souvent des solutions plus souples et plus réactives aux problèmes des consommateurs, tout en permettant au secteur de résoudre directement ses difficultés dans ce domaine, sans devoir faire intervenir les instances d'application du droit. Grâce à ces codes, l'OFT estime que la protection s'est améliorée, notamment dans les domaines de la protection en amont du paiement, du service au client, de l'accès aux réparations et aux recours indépendants ultimes tels que le médiateur ou le juge administratif, qui existaient précédemment. Un code agréé par l'OFT présente un niveau de service au client supérieur aux exigences légales et doit répondre aux préoccupations des consommateurs et remédier aux atteintes à leurs intérêts dans un secteur particulier. Même si le fait de s'adresser à une entreprise en conformité avec un code de l'OFT ne peut assurer que toutes les transactions seront entièrement dénuées de problèmes, cet agrément garantit cependant que les plaintes éventuelles des utilisateurs seront traitées selon une procédure simple et directe.

Le représentant de la Commission européenne intervient pour ajouter quelques commentaires à propos de sa relation positive avec les associations commerciales. Enchaînant sur la présentation de Mme Maréchal, il confirme que l'expérience de la Commission avec les associations commerciales et professionnelles s'avère extrêmement fructueuse. Par exemple, le travail conjoint sur la réglementation REACH, déjà mentionné par Mme Maréchal, constitue un très bon exemple de coopération récente entre la Commission européenne et une association professionnelle sectorielle. Ce type de collaboration a eu lieu dans de nombreux secteurs industriels, parmi lesquels le secteur maritime, les transports aériens et l'assurance. Quant à l'expérience spécifique de l'industrie chimique, le règlement REACH encourage les entreprises concurrentes à échanger certaines informations, parfois sensibles. Ce principe est justifié par le fait que ces entreprises sont soumises à un régime d'agrément, d'évaluation et d'enregistrement de leurs produits et que l'échange d'informations peut contribuer à réduire les coûts du système d'enregistrement pour chacune, et peut donc accroître l'efficience globale du système.

La Commission européenne est toutefois consciente qu'un tel échange d'informations risque de faciliter la collusion et d'autres pratiques anticoncurrentielles. Pour les empêcher, elle a demandé aux organisations industrielles de contribuer à la rédaction d'un guide exposant les pratiques qu'elle recommande en termes d'échange d'informations. Il s'agissait ainsi d'accroître le respect par les industriels de la réglementation communautaire sur la concurrence. Le guide contient une liste d'activités non autorisées en vertu de cette réglementation (la « liste noire »), qui comprend les entraves caractérisées à la concurrence, comme les ententes sur les prix, le partage d'informations, la restriction de la production et la répartition de la clientèle. En ce qui concerne le partage d'informations, le document adopte une approche plus nuancée et énumère les informations qui ne doivent pas être communiquées, à savoir sur les fournisseurs ou sur les clients, les coûts de production, les projets d'innovation et de technologie, etc. de chaque société. Si les entreprises se trouvent contraintes d'échanger de telles informations, elles doivent alors utiliser des fourchettes ou des seuils. Si elles ne peuvent faire autrement que d'échanger des chiffres en valeur absolue ou des renseignements individuels, le guide leur propose tout un ensemble de solutions de rechange, comme le recours à des mandataires ou à des organismes indépendants qui collecteront l'information et la diffuseront ensuite aux entreprises, de façon anonyme.

Le Président remercie le Royaume-Uni et la Commission européenne pour leurs interventions et donne la parole aux délégués qui auraient des commentaires ou des questions.

Le représentant de l'Autriche demande à Mme Maréchal si elle peut préciser l'historique du programme de respect de la concurrence du CEFIC, et en particulier si la décision d'adopter un tel programme émanait spontanément de l'association ou si elle a été déclenchée par l'administration de lourdes amendes à un ou plusieurs adhérents en situation illégale. Cette question s'explique par le fait que les associations commerciales autrichiennes n'étaient pas vraiment conscientes des problèmes d'ententes jusqu'à la création de l'autorité fédérale de la concurrence en 2002. Dans les premiers temps, le nouvel organe a engagé des procédures contre les « recommandations non contraignantes » des associations commerciales. En conséquence de ces mesures de respect de la loi, nombre de ces recommandations ont été supprimées et les membres des associations ayant dû payer des amendes figurent aujourd'hui parmi les soutiens les plus actifs des programmes de respect de la concurrence.

Mme Maréchal répond qu'elle ne connaît pas l'historique précis du programme de respect de la loi du CEFIC mais que, selon elle, le Centre a toujours été très sensible aux questions de concurrence. Le fait qu'un service de statistiques ait été mis en place par le CEFIC a encouragé l'association à adopter dès le début (dans les années 70) des règles de mise en conformité avec la législation afin d'assurer le respect de la concurrence.

## III. Exemptions et immunités pour les activités des associations commerciales

Le Président passe ensuite au second sujet de l'ordre du jour, à savoir les exemptions et immunités pour les activités des associations commerciales. Ce sujet découle de certaines interventions soulignant l'interaction des associations commerciales et des organes officiels de réglementation, et la question se pose ici de savoir si cette interaction constituerait une sorte de « vaccination » pour les activités des associations concernées. Le Président fait observer que les contributions du Canada, du Mexique et d'Israël comportaient quelques commentaires intéressants sur le fait que certaines activités des associations commerciales ou mesures d'autorégulation méritaient une exemption de la réglementation de la concurrence et demande aux délégations leur avis à ce propos.

Le représentant du Canada explique qu'il existe dans son pays un mécanisme juridique appelé « moyen de défense fondé sur une conduite réglementée » *(« regulated conduct defence »),* mis en place afin de résoudre les problèmes complexes susceptibles de survenir entre les activités réglementées à l'échelle locale et le droit commun. Ce cas se rencontre souvent pour les professions autoréglementées, plutôt que pour les activités des membres des associations commerciales. Au Canada, la majeure partie des professions autoréglementées sont contrôlées au niveau provincial et, puisque la législation sur la concurrence relève du droit fédéral, il y a eu à plusieurs reprises des conflits entre réglementation locale et réglementation fédérale. On retiendra notamment les conflits concernant des sociétés de services juridiques, autorisées par la législation provinciale à exercer certains types d'activités qui pourraient se révéler en contradiction avec la loi fédérale sur la concurrence. Les tribunaux sont arrivés à la conclusion que, lorsque le cadre de la province autorise une instance professionnelle à réglementer ses membres, alors le comportement n'est pas considéré comme contraire à la législation fédérale. Il ressort toutefois de la jurisprudence que le moyen de défense fondé sur une conduite réglementée ne s'étend pas aux associations professionnelles auxquelles l'adhésion est facultative. Les tribunaux se sont penchés à la fois sur les associations agréées par la loi de la province et sur celles qui ne procèdent que d'initiatives volontaires de leurs membres, pour décider que la défense fondée sur une conduite réglementée ne pouvait s'appliquer aux secondes.

Le Président remercie la délégation canadienne et donne la parole au représentant du Mexique, qui doit expliquer comment l'autorité mexicaine de la concurrence a réagi dans des cas d'encouragement apparent de conduites anticoncurrentielles, parfois approuvées ou condamnées par des fonctionnaires habilités ou non à accorder des immunités ou exemptions du droit de la concurrence.

Le représentant du Mexique confirme que la situation décrite par le Président correspond à une pratique émergente dans son pays. Face à de telles situations, l'autorité mexicaine de la concurrence estime qu'il est très important de faire la distinction entre une conduite encouragée par les dispositions législatives ou réglementaires, et des pratiques soutenues par des fonctionnaires. En ce qui concerne les conduites anticoncurrentielles encouragées ou approuvées par des dispositions législatives ou réglementaires, telles que l'imposition de distances minimales au niveau de la commune ou de l'État, l'autorité mexicaine réagit principalement par le biais de mesures de sensibilisation, car il ne lui est pas possible dans ce cas d'agir directement pour faire respecter le droit. Si la conduite privée des entreprises est prescrite par la loi ou par une législation secondaire, l'autorité de la concurrence peut plaider contre une législation restrictive en envoyant un avis à l'instance municipale ou en assistant aux débats du Congrès pour s'exprimer sur les effets anticoncurrentiels de la loi proposée. En ce qui concerne le deuxième cas de figure, à savoir les actions « informelles » des représentants de l'État, tant que ceux-ci agissent dans le cadre de leur domaine de compétence, les tribunaux considèrent qu'ils sont exemptés de l'application de la loi sur la concurrence. À l'inverse, si la conduite privée n'est pas préconisée par la loi ou par la réglementation, alors le droit de la concurrence s'applique pleinement et, dans certains cas, l'autorité de la concurrence a dû mettre en application les attributions qui lui ont été confiées. Tel a été le cas, par exemple, pour des fonctionnaires qui facilitaient une certaine forme d'entente sur les prix. En conclusion, indépendamment du fait que la

réglementation sur la concurrence puisse être appliquée face à des conduites spécifiques ou non, il s'agit d'un domaine dans lequel l'autorité mexicaine de la concurrence juge qu'il est essentiel et, dans la plupart des cas, plus efficace de procéder par des actions de sensibilisation.

Le Président souligne que les points soulevés par la délégation mexicaine sont très intéressants. En effet, on peut aisément comprendre le dilemme auquel se trouvent confrontées les associations professionnelles impliquées dans une situation dans laquelle un fonctionnaire très influent à l'égard de nombreux autres aspects du bien-être économique du secteur concerné exercerait une pression pour résoudre certains problèmes susceptibles d'avoir des conséquences anticoncurrentielles. Le fonctionnaire concerné peut avoir conscience ou non du fait qu'il encourage une violation du droit de la concurrence, et l'association professionnelle peut identifier ce risque, mais cette dernière pourra préférer ne pas contrarier le représentant de l'État en expliquant que celui-ci lui a précisément recommandé de passer outre les règles de la concurrence.

Le représentant d'Israël souligne que la tâche de représenter un secteur auprès du gouvernement ou d'autres organes publics figure parmi les activités importantes des associations commerciales. Afin de faciliter cette mission, le directeur général de l'autorité israélienne de la concurrence a publié en 2000 une déclaration à l'intention des entreprises et des associations commerciales précisant ce qui serait considéré comme des arrangements restrictifs dans le contexte d'activités de lobbying. D'après cette déclaration, les activités de coopération ne seraient pas considérées comme des arrangements restrictifs dans la mesure où elles respecteraient un certain nombre de dispositions spécifiques. Premièrement, l'activité doit viser à persuader le gouvernement de prendre des mesures ou d'éviter d'agir. Ensuite, l'activité ne doit pas, par sa nature, tendre à promouvoir un concurrent particulier, mais plutôt l'intérêt commun de tous. Enfin, l'activité ne peut inclure des échanges d'informations qui pourraient entraîner des pratiques anticoncurrentielles. La logique de cette déclaration consiste à trouver un équilibre entre les risques anticoncurrentiels entraînés par la coopération et d'autres intérêts importants de politique publique, qui seraient mieux servis si les concurrents agissaient de concert plutôt que séparément.

## IV. Distinction entre les entraves flagrantes à la concurrence par les associations commerciales et les accords illégaux conclus par leurs adhérents en marge de leurs actions légitimes

Le Président passe ensuite au prochain thème, à savoir la distinction entre les entraves flagrantes à la concurrence par les associations commerciales et les accords conclus en marge des activités légitimes de ces dernières, dans lesquelles elles ne sont pas directement impliquées tout en pouvant les faciliter involontairement. Pour introduire les débats, le Président demande aux deux intervenants d'indiquer brièvement comment leurs associations commerciales respectives se comportent à l'égard de ce qui constitue en soi des violations de la loi sur la concurrence en marge des réunions des associations commerciales, en dépit des programmes de mise en conformité et de contrôle de ces dernières.

Mme Maréchal comme M. Altschul répondent que ce sont la formation et l'information des membres qui importent ici. Les membres du CEFIC et de la CTIA sont en effet généralement des entreprises très complexes, dotées de leurs propres programmes de respect du droit de la concurrence. Cependant, il est toujours rappelé aux sociétés affiliées présentes aux réunions des associations commerciales qu'il convient de suivre l'ordre du jour convenu, de ne pas s'engager sur un terrain non prévu et d'abandonner toute discussion à laquelle elles ne souhaiteraient pas participer.

Pour examiner la manière dont ce point est abordé par les différentes autorités de la concurrence, le Président demande à la délégation irlandaise de faire partager au Groupe de travail les leçons de l'affaire de la Connaught Oil Promotion Federation, qui constitue un bon exemple de la manière dont les opérations légitimes d'une association commerciale peuvent en arriver à couvrir une entente sur les prix.

Le représentant de l'Irlande explique que son pays a connu deux affaires récentes dans lesquelles les activités des associations commerciales ont servi à la formation d'ententes illégales sur les prix. Les réunions de la Connaught Oil Promotion Federation étaient par exemple animées par le secrétaire de l'organisation et les membres se sont mis d'accord à cette occasion sur une entente illégale sur les prix. Ils ont fixé les modalités de contrôle des accords, nommé un « facilitateur » destiné à garantir le fonctionnement efficient de l'entente cartel et à inciter d'autres comploteurs à y adhérer. Il s'agit là d'un exemple regrettable du risque de subversion des activités légitimes des associations commerciales par le fait de leurs membres. Le deuxième exemple, qui concerne l'association irlandaise des concessionnaires Ford, suit le même principe. Ici toutefois, l'association exerçait aussi un certain nombre d'activités légales parallèlement à l'entente sur les prix. Dans la continuité des déclarations des deux intervenants, il est important de souligner le rôle des mesures d'information des associations commerciales, qui peuvent mettre leurs membres en garde contre les risques et les conséquences d'une utilisation répréhensible de leur cadre à des fins d'entente illégale. Pour finir, il est très important que les associations commerciales comprennent parmi leurs équipes des personnes chargées de suivre au plus près ce qui s'y passe.

Le Président demande ensuite à la délégation de l'Afrique du Sud de faire partager son expérience dans les domaines de la santé et du secteur médical, où trois associations professionnelles ont recommandé à leurs membres de pratiquer certains tarifs et grilles tarifaires.

Le représentant de l'Afrique du Sud explique que la Commission de la concurrence s'est penchée sur un cas dans lequel trois associations professionnelles (celle des médecins, celle des hôpitaux privés et celle des régimes d'assurance maladie) publiaient des « tarifs conseillés », ce qui avait créé une entente de fait sur les prix. Cette situation n'était pas particulièrement controversée en elle-même, dans le sens où, lorsque la Commission a terminé son enquête, toutes les parties se sont mises d'accord et ont accepté de s'acquitter d'une sanction administrative. L'aspect le plus intéressant de ce cas réside dans le fait qu'après l'intervention des autorités de la concurrence, il fallait tout de même engager des négociations collectives entre les trois associations. Les régimes d'assurance maladie faisaient en effet valoir qu'ils ne pouvaient pas s'engager dans des négociations individuelles avec tous les médecins et qu'ils devaient faire contrepoids au puissant pouvoir de négociation des hôpitaux privés, concentrés en trois groupes dominants. Tandis que médecins et hôpitaux étaient prêts à mettre fin aux pratiques concernées par l'enquête, les régimes d'assurance maladie insistaient pour disposer d'une sorte de liste de tarifs de référence. En conséquence, la Commission a autorisé l'établissement d'une telle liste, pourvu qu'elle soit rédigée de manière indépendante, que les tarifs soient établis sur la base d'un indice de coût de référence et qu'ils constituent un plafond en-deçà duquel une certaine concurrence serait permise. Il est intéressant de constater que, depuis l'enquête des autorités, les tarifs se sont effondrés et que les régimes d'assurance maladie ont pu négocier bien plus âprement avec les hôpitaux privés. En conséquence, les membres de ces grands régimes peuvent aujourd'hui obtenir des prix plus bas. Bien sûr, la principale difficulté concerne les régimes de moindre importance, qui ne disposent pas du pouvoir de négociation suffisant pour obtenir des conditions tarifaires plus intéressantes de la part des puissants hôpitaux privés.

## V. Autres activités des associations commerciales susceptibles de faciliter les collusions –les échanges d'informations, règles d'affiliation et mesures d'autorégulation du secteur (normalisation, codes de conduite, etc.)

Le Président élargit la discussion au-delà des entraves flagrantes à la concurrence découlant ou en marge d'activités des associations commerciales, aux autres pratiques de ces dernières qui seraient susceptibles, faute de traitement convenable, d'avoir un effet négatif sur la concurrence – comme l'échange d'informations. Pour aborder ce point, le Président prie la délégation norvégienne de bien vouloir exposer le cas d'AC Nielsen, qui représente un bon exemple d'entrave à la concurrence issue de l'échange d'informations par le biais d'un intermédiaire.

Le représentant de la Norvège précise qu'AC Nielsen n'implique pas des associations commerciales, mais un analyste de marché tiers. Cependant, on peut tirer de cet exemple des enseignements sur le partage d'informations applicables aux associations commerciales. Le secteur de l'épicerie en Norvège se caractérise par quatre chaînes nationales qui concentrent plus de 98 % du marché, mais aussi par d'importantes barrières à l'entrée. En 2006, l'autorité norvégienne de la concurrence s'est penchée sur un cas d'abus de position dominante impliquant des paiements conditionnels en contrepartie d'emplacements sur les linéaires d'une des chaînes de supermarchés. À la grande surprise de l'autorité, il s'est avéré que toutes les chaînes d'épicerie détenaient des informations extrêmement détaillées sur les prix et sur les chiffres d'affaires de leurs concurrentes. Ces informations avaient été collectées et diffusées par un prestataire de services indépendant, AC Nielsen. Chaque semaine, les chaînes recevaient des études de la part de ce dernier, portant sur quelque 50 000 articles différents, classés par produit, par chaîne et par zone géographique.

L'autorité de la concurrence en a conclu que l'échange d'informations aussi détaillées pouvait s'apparenter à une violation de la loi norvégienne sur la concurrence. En particulier, elle a examiné quelles étaient les informations échangées et comment les chaînes les utilisaient, pour en déduire que le marché s'en trouvait plus transparent, que l'incertitude en était réduite et que la collusion entre les enseignes était favorisée. Après un dialogue constructif entre AC Nielsen, les chaînes d'épicerie et l'autorité de la concurrence, les parties ont accepté de procéder à une modification volontaire du système d'échange des informations. Aujourd'hui, il n'est plus possible de recevoir une liste des prix pratiqués par chaque chaîne, ni des mises à jour hebdomadaires sur les prix, et les études sont distribuées toutes les quatre semaines. Enfin, le nombre de produits suivis par AC Nielsen a également considérablement diminué, pour être ramené à environ 2 000.

Le Président aborde ensuite les effets potentiellement restrictifs liés aux règles d'affiliation aux associations, demandant à la délégation coréenne de bien vouloir décrire son expérience de 2003 avec une association d'agents immobiliers, qui utilisait la cotisation acquittée par ses membres comme un moyen de contrôler et de limiter le nombre de concurrents sur le marché.

Le représentant de la Corée explique que, selon la loi nationale sur les pratiques commerciales, il est interdit à une association professionnelle de restreindre l'accès à son affiliation. Ce qui s'est passé en 2003 dans le secteur immobilier constitue un bon exemple de mise en application de la loi par la KFTC dans ce domaine. Une association professionnelle rassemblant 200 agents immobiliers de Busan (la deuxième ville de Corée) a décidé de limiter l'accès aux nouveaux membres, de crainte qu'une augmentation excessive du nombre d'agents n'entame les revenus de ses membres existants. À cette fin, l'association a multiplié par dix les frais d'adhésion, qui sont ainsi passés de 300 000 KRW (environ 300 EUR) à trois millions KRW (environ 3 000 EUR), tout en interdisant à ses membres de faire affaire avec des agents qui ne seraient pas affiliés. En outre, le fait que certains agents immobiliers n'étaient pas autorisés à rejoindre l'association les empêchait également de participer à des opérations immobilières conjointes, pratique fréquente pour les transactions portant sur les ensembles de logements d'une certaine importance. La KFTC a estimé que les règles d'affiliation de l'association constituaient une entrave à la concurrence sur le marché et elle a exigé de l'association qu'elle prenne des mesures correctives. Cependant, la KFTC n'a pas infligé de sanctions pécuniaires à cette dernière ni à ses membres en raison du caractère très limité de la zone géographique concernée par l'entrave à la concurrence et du fait que l'association comme ses membres réalisaient des chiffres d'affaires très réduits.

Le Président prie la délégation allemande d'évoquer le rôle joué par les associations commerciales dans l'autorégulation sectorielle, en mettant plus particulièrement l'accent sur l'établissement de normes et sur les programmes de certification, qui représentent, s'ils sont mal appliqués, un autre moyen pour ces associations d'entraver la concurrence par le biais d'une activité qui leur est profitable.

Le représentant de l'Allemagne souligne que son pays a une très longue histoire de normalisation technique et d'assurance qualité, et que ces deux domaines y occupent une très grande importance. L'Allemagne est dotée d'un institut de normalisation à but non lucratif, l'Institut allemand de normalisation (DIN), qui comprend parmi ses membres non seulement des sociétés privées et des associations commerciales, mais également des organes publics. L'Institut allemand de normalisation a approuvé plus de 30 000 normes dans quasiment tous les secteurs économiques. Ses activités s'effectuent sur une base volontaire et les normes adoptées n'ont pas de caractère contraignant, mais constituent seulement des recommandations. Le travail de normalisation est assuré par plus de 70 commissions, organisées par spécialité. Les parties intéressées peuvent associer leurs experts aux travaux de ces commissions, et les normes sont adoptées au terme d'un consensus. L'assurance qualité fonctionne selon le même principe, par le biais d'un institut à but non lucratif délivrant un label de qualité juridiquement protégé. Le système allemand de normalisation et d'assurance qualité suscite généralement très peu de problèmes de concurrence, puisque la participation y est ouverte et transparente, qu'il n'est pas contrôlé par des grandes entreprises et que l'application des normes est facultative et non contraignante. Cependant, l'Office fédéral des cartels (Bundeskartellamt – BKA) supervise en permanence ces activités de normalisation, car il peut arriver que des mesures d'exécution s'avèrent nécessaires. Tel a été le cas, par exemple, au moment de fixer une norme pour les baignoires en acrylique, le BKA ayant conclu que les exigences techniques étaient tellement élevées et non justifiées par des critères objectifs que l'effet principal de la normalisation aurait été de fermer le marché aux nouveaux fabricants.

Le Président remercie la délégation allemande pour ces remarques intéressantes et demande au représentant de la Hongrie de faire partager son expérience en termes de restrictions imposées par la profession elle-même, et en particulier en ce qui concerne l'adoption par les associations commerciales de codes de conduite visant à réglementer les activités publicitaires de leurs membres.

Le représentant de la Hongrie précise que l'autorité hongroise de la concurrence (la GVH) s'est récemment penchée sur plusieurs codes d'éthique adoptés par des associations commerciales. Parmi les dispositions étudiées, un grand nombre concernaient des interdictions de publicité. Dans la plupart des cas, ces interdictions étaient lourdes de conséquences, car elles restreignaient presque totalement la possibilité de faire de la publicité. Au cours de l'enquête, le principal argument des parties en faveur du maintien de telles restrictions résidait dans le fait que la loi sur la concurrence ne devait pas être appliquée en l'occurrence, puisque ces restrictions servaient d'autres intérêts publics légitimes. Les parties ont invoqué l'affaire Wouters, sur laquelle avait statué la Cour de justice des Communautés européennes, mais la GVH a estimé que cet arrêt n'était pas applicable aux faits concernés. Cette enquête de la GVH a eu lieu après l'accession de la Hongrie à l'Union européenne et tous les cas ont été évalués en parallèle, à la lumière du droit communautaire et du droit national. L'autorité de la concurrence en a déduit que les interdictions de publicité contenues dans les codes de conduite entravaient la loi sur la concurrence et qu'elles ne pouvaient faire l'objet d'une exemption. Dans certains cas, des amendes ont été imposées aux contrevenants et, à la suite de l'enquête, toutes les associations ont accepté de modifier leurs codes d'éthique et d'abolir les restrictions de publicité.

## VI. Conclusions

Pour conclure les débats de la Table ronde, le Président invite toutes les délégations à formuler des remarques finales ou à poser une dernière question aux deux intervenants extérieurs.

Le représentant du BIAC intervient pour résumer les différentes questions qui se sont posées en rapport avec les associations commerciales. D'après le BIAC, ces dernières sont une composante essentielle des économies modernes et les entreprises en ont besoin pour un très large éventail d'applications légitimes. Comme l'ont souligné les deux intervenants extérieurs, les associations commerciales proposent à leurs membres, et à l'économie en général, des avantages significatifs que l'on

pourrait définir comme des efficiences. Les associations commerciales contribuent à améliorer les résultats des entreprises et à réduire leurs coûts, elles permettent à leurs membres d'offrir des biens et services de meilleure qualité et elles sont foncièrement plus à même d'aborder tout un ensemble de questions concernant l'action des pouvoirs publics, parmi lesquelles la sécurité, l'environnement et d'autres aspects sociaux. Le règlement REACH de l'Union européenne, auquel Mme Maréchal et la Commission européenne ont largement fait référence, en constitue un très bon exemple. En résumé, les associations commerciales jouent un rôle majeur dans l'amélioration de la compétitivité des économies modernes, ce qui représente une mission de la plus haute importance. Bien sûr, il existe un risque que des activités illégales aient cours parallèlement aux activités légitimes de ces associations. C'est pourquoi ces dernières, et les entreprises, sont très impliquées dans des efforts de conformité avec la loi et dans des programme de formation destinés à sensibiliser leurs équipes au droit de la concurrence et à les mettre en garde contre les conséquences d'une violation de ces textes . Pour finir, le BIAC convient avec le Président de la nécessité d'opérer une réelle distinction entre les activités illégales impliquant directement les associations commerciales et celles qui seraient exercées par leurs membres, couverts par l'association à son insu. Ce point est particulièrement pertinent en matière de répartition des responsabilités de l'association ou de ses membres ou de la fixation des sanctions pécuniaires infligées au titre de pratiques illégales.

Le représentant de l'Allemagne intervient pour demander aux deux intervenants extérieurs si, dans le cadre de l'application de leurs programmes très stricts de respect de la législation, leurs associations supervisent également les activités des organisations membres qui n'ont pas les moyens de salarier un conseiller spécialisé interne. La délégation allemande demande également s'ils savent le nombre de leurs associations membres nationales que appliquent un programme aussi rigoureux de mise en conformité avec la loi.

Mme Maréchal répond que le CEFIC est très attaché à la diffusion d'une culture du respect de la loi parmi tous ses membres et toutes ses fédérations affiliées, et en particulier pour celles qui comportent un nombre limité de salariés compétents en matière de droit de la concurrence. Mme Maréchal ajoute qu'il arrive fréquemment que des fédérations locales contactent le CEFIC pour un conseil concernant des questions spécifiques de conformité en la matière. Dans la pratique, des fédérations nationales font traduire les brochures d'information du CEFIC ou les utilise en anglais et les adaptent aux situations spécifiques de chaque pays, et le CEFIC peut organiser des sessions de formation avec la fédération locale. M. Altschul ajoute que la CTIA a adopté une approche similaire à celle du CEFIC. Heureusement, les associations commerciales d'une certaine taille sont suffisamment développées et particulièrement conscientes de la législation sur la concurrence. En outre, il existe aux États-Unis un regroupement d'associations commerciales auquel appartiennent nombre d'associations, l'American Society of Associations' Executives (ASAE). Parmi les activités de cette dernière, la formation à la législation antitrust et au respect de la réglementation sur la concurrence jouent un rôle très important, et de nombreuses associations de petite taille rejoignent l'ASAE pour se renseigner sur les meilleures pratiques des autres membres, y compris à propos des questions d'entente et de respect de la concurrence.

Pour clore les ébats, le Président félicite tous les participants à cette discussion extrêmement intéressante sur un sujet qui suscite visiblement un large intérêt de la part de tous. Il remercie les deux intervenants extérieurs pour leurs contributions extrêmement utiles sur l'attitude des associations commerciales face aux questions de concurrence, ainsi que les nombreuses délégations qui ont fourni une contribution écrite à cette table ronde. Le Président estime pour sa part que ces contributions et la note de référence du Secrétariat reflétaient correctement le large éventail de sujets susceptibles d'être abordés dans le contexte des associations commerciales, en mettant à la fois l'accent sur le rôle positif de ces dernières dans le développement d'une culture du respect du droit de la concurrence, et sur le fait que persistent de nombreux exemples d'associations commerciales directement impliquées dans des pratiques anticoncurrentielles. Ces pratiques concernent notamment le partage illégal d'informations, les règles restrictives d'affiliation et la normalisation mais parfois aussi des ententes flagrantes sur les prix.

En l'absence de demande d'intervention, le Président clôt la Table ronde et remercie encore les délégués pour leur participation active.