# Part II:
# Study of US Antitrust Law

# Chapter 6: Restraint of Trade or Commerce under Section 1 of the Sherman Act

## *A. Introduction*

The trade associations researched are empowered to impose nonlegal sanctions on disloyal industry actors for not complying with an arbitral award, insofar as these measures are included in the bylaws and rules of these associations. If they do so, their members and non-members have a role in the execution of such extrajudicial measures.[435] These measures are carried out by blacklisting, expelling a member, denying membership for an ostracized member on the basis of an additional entry condition, refusing to deal with an expelled member, entering the premises of a wrongdoer without a warrant, and limiting adequate access to public courts prior to arbitral proceedings and after an award. Even if these measures are necessary to maintaining an effective alternative to judicial enforcement in public courts, they may run afoul of Section 1 of the Sherman Act.

According to this provision, "*Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal*". This requires that an agreement (contract, combination, or conspiracy) exists that unjustifiably has the effect of reducing competition in a relevant market place,

435 For the reasons stated in Part I, Chapter 5, B, I, the scope of application will not be mentioned in this Chapter (with the exception of Part II, Chapter 6, B). The focus will be on analysing whether the trade associations researched, their members and non-members can be held accountable for their participation in the practice of nonlegal sanctioning under Section 1 of the Sherman Act. Although the industry actors active in the diamond industry which the DDC represents have a closer connection to the US and, hence, will more readily fall within the scope of US Antitrust Law, this is more difficult to establish with regard to the industry actors active in the commodities industries represented by the five UK-based trade associations. Especially because EU Competition Law has a closer connection to this group of members. Despite this convergence, it will be presumed that all six trade associations researched, their members and non-members satisfy the scope of application of US Antitrust Law. The main reason being that a potential illegality of all three actors with regard to nonlegal sanctioning pursuant to Section 1 of the Sherman Act can be better scrutinized rather than by focusing on one industry.

which has been entered into by more than one individual or corporation.[436] To reach the conclusion that the nonlegal sanctions provided by the trade associations researched and executed by their members and non-members violate Section 1 of the Sherman Act, first, the actors involved in nonlegal sanctioning must qualify as a corporation or individual (Paragraph B). Second, a concurrence of wills must be present (Paragraph C). Third, the involvement of the three actors in the six types of nonlegal sanctioning must constitute a restraint of trade (Paragraph D). Fourth and last, in the event Section 1 of the Sherman Act is violated, possible justification grounds must not outweigh the restriction of competition (Paragraph E). At the end of this Chapter, the conclusions of the first three Paragraphs are summarized and critically discussed (Paragraph F).

### *B. The actors involved in nonlegal sanctioning*

An important jurisdictional element to open the scope of Section 1 of the Sherman Act requires that either individuals or legal entities are engaged in anticompetitive conduct.

#### I. Individual members, member undertakings and non-members

For individual members of a trade association who execute nonlegal sanctions on the basis of the rules of this association, this does not require much emphasis. The word person can be understood readily and is unmistakably fulfilled. The same can be said for the undertakings engaged in executing extrajudicial enforcement. They are corporations within the mean-

436 Albeit that Section 1 of the Sherman Act only refers to persons, according to Section 7 of the Sherman Act, *"The word ''person'', or ''persons'', wherever used in sections 1 to 7 of this title shall be deemed to include corporations and associations existing under or authorized by the laws of either the United States, the laws of any of the Territories, the laws of any State, or the laws of any foreign country"*; E. G. Perle, M. A. Fischer, and J. T. Williams, *"Perle and Williams on Publishing Law"*, Austin/Boston/Chicago/New York: Wolters Kluwer Law & Business 2009, p. 10-11. An undertaking acting alone or a single individual cannot infringe Section 1 of the Sherman Act. A plurality of actors is required; See also American Bar Association, *"Jury Instructions in Criminal Antitrust Cases, 1976-1980: A Compilation of Instructions Given by United States District Courts"*, Chicago: American Bar Association 1982, p. 311.

ing of Sections 1 and 7 of the Sherman Act. Non-members also satisfy the jurisdictional threshold, as they comprise corporations and individuals. They are also involved in nonlegal sanctioning in the sense that they tacitly agree with the extrajudicial punishment of recalcitrant market participants for not complying with an award rendered in specialized commercial arbitration. Sometimes they also expressly agree with this conduct when they are a party to a standardized agreement with a member of a trade association and this agreement made reference to this association's bylaws in which the nonlegal sanctions are included. Whether this is sufficient to justify antitrust scrutiny does not play a role here. This is examined in the following Paragraphs.

## II. Trade associations

For a trade association, as being the driving force of imposing nonlegal sanctions, this is less obvious. Especially because such an organization structure is not synonymous with the word corporation. After careful reading of Sections 1 and 7 of the Sherman Act, it is unclear whether a trade association, which comprises many member undertakings can be held liable for an infringement of the former provision. It was left to US courts to decide whether an association could be held accountable for antitrust purposes.[437]

In 1984, the Supreme Court initiated this discussion in *Copperweld Corp. v. Independence Tube Corp* by introducing the concept of a "single entity".[438] Albeit relating to the observation that Section 1 of the Sherman Act is applicable to a parent and its wholly-owned subsidiary, especially because both constituted a single entity in the sense that they pursued a common goal and had the same economic objective, these arguments can, in my opinion, also be used to confirm that the trade associations researched, which comprise a plurality of member undertakings, amount to a single entity. Both actors have the same goal, namely to punish disloyalty with arbitral awards. In addition, they have the same economic interest to reduce transaction and distribution costs.

---

437 P. van Cleynenbreugel, "Single Entity Tests in US Antitrust and EU Competition Law",
*Orbi* 2011, p. 6; Obviously, a trade association cannot be referred to as a private person.

438 Copperweld v. Independence Tube, 467 U.S. 752 (1984), para. III.

More than two decades later, in 2006, the 10th Circuit Court also used the second benchmark for determining whether a trade association classifies as a legal entity. This was done in *Gregory v. Port Bridger Rendezvous Association*.[439] On the merits of this legal dispute, both the board of the Fur Breeders Agricultural Cooperative and its member undertakings were engaged in unilateral conduct, because the latter group of actors had a direct economic interest in reducing the number of members and non-members that were entitled to sell goods on the basis of a policy that was introduced by the former actor.[440] Likewise, the members of the trade associations as well as their members are both engaged in unilateral conduct, namely to extrajudicially sanction recalcitrant industry actors to achieve a more thriving industry. As a result, they classify as a "legal entity" within the meaning of Section 1 of the Sherman Act. This entails that such actors can be held liable for violation of this provision when – of course – the other conditions are fulfilled.

### *C. Collusion: "a concurrence of wills"*

Before being able to discuss the anti-competitiveness of nonlegal sanctioning, at least one of the three forms of collusion needs to be present. These forms of collusion include a contract, a combination, or a conspiracy. Given that each of them has a different meaning, it must be discussed whether the participation of the trade associations researched, their members and non-members, when engaged in nonlegal sanctioning, amounts to an agreement within the meaning of Section 1 of the Sherman Act.[441]

#### I. Contract

The existence of a contract requires an explicit consensus between at least two actors in writing. This is laid down in the 9th Circuit Court's judgment in *County of Tuolumne v. Sonora Cmty. Hosp*.[442] According to the

439 Gregory v. Fort Bridger Rendezvous Ass'n, 448 F.3d 1195 (10th Cir. 2006).
440 Gregory v. Fort Bridger Rendezvous Ass'n, 448 F.3d 1195, 1201 (10th Cir. 2006).
441 K. N. Hylton, "*Antitrust Law and Economics*", Cheltenham: Edward Elgar Publishing 2010, p. 24. The collective term agreement comprises a contract, a combination and a conspiracy.
442 County of Tuolumne v. Sonora Cmty. Hosp., 236 F.3d 1148, 1155 (9th Cir. 2001), para. IV, A, I.

Supreme Court in *Monsanto Co. v. Spray-Rite Serv. Corp.*, this requires that conspirators "*had a conscious commitment to a common scheme designed to achieve an unlawful objective*".[443] Not only must there be a common design and understanding, a meeting of minds in an unlawful arrangement is also required.[444]

To answer the question whether nonlegal sanctioning amounts to a contract, the role of the members of the trade associations researched and – arguably –non-members in executing nonlegal sanctions needs to be discussed. With regard to the members, at the time of obtaining membership, these industry actors have agreed to uphold and respect the bylaws and rules of the relevant trade association. As a result, they have expressly agreed to execute extrajudicial enforcement on the basis of the rules included in these documents. Jointly, along with all other members, they have thus entered into a contract. The internal pressure from within associations to compel members to execute nonlegal sanctions under the threat of being sanctioned themselves does not change the outcome of this legal assessment. This is because they have agreed to execute such sanctions from the moment they accepted the bylaws and rules of the relevant trade association. In addition, when a member contracts with a member (or non-member) on the basis of a standardized contract offered by the relevant trade association, they consent to the execution of nonlegal sanctions. Especially because standardized contracts refer to a broader arbitration agreement, in which clauses exist that empower the relevant trade association to impose extrajudicial measures on disloyal industry actors. The argument that members are not expected to read all the rules drafted in the bylaws and rules when acquiring membership is not convincing. The operation of specialized commercial arbitration enforced by nonlegal sanctions should be clear for all applicants for membership.

This assessment is different for non-members. This group of actors only tacitly agrees to the execution of nonlegal sanction and does not enter into a written contract. An exception is possible when an individual market participant has entered into a standardized contract with a member of a trade association and this document refers to the bylaws of this association which contains a clause proscribing non-compliance with an arbitral award under the threat of nonlegal sanctioning. In this way, a written contract can be substantiated.

---

443 Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752, 764 (1984).

444 American Tobacco Co. v. U.S., 328 U.S. 781, 809f, 66 S.Ct. 1125, 90 L.Ed. 1575 (1946), para. III.

## II. Combination in the form of trust or otherwise

A combination in the form of a trust pertains to a monopoly type of organization structure which is created by shareholders of companies by transferring a controlling number of their shares (*i.e.* the majority) to a single board of trustees in return for trust certificates.[445] As a result, the companies retain their legal identity, but are controlled by a business policy of the trust combination.

When looking at the situation of the researched trade association, it does not need much explanation to draw the conclusion that they do not classify as a combination in the form of a trust. This is because their members have not transferred shares to the associations with the goal of forming a trust.[446] The trade associations researched were not established to control the business policy of their members. There main task is to represent the interests of their members on a not-for-profit basis by providing certain services (*e.g.* standardized contracts). Notwithstanding, this does not mean that no combination can be detected. According to the Antitrust Guide provided by the Association of Legal Administrators, trade associations typically qualify as a combination pursuant to Section 1 of the Sherman Act.[447] The word combination serves as a catch-all provision. Hence, collusion in the form of a combination can be established. For members and non-members it would require thought-provoking reasoning to explain that they collude in this manner. A combination is perfectly suited to establish whether the trade associations researched can be held accountable for their role in imposing nonlegal sanctions.

---

445 K. Chander, "*Encyclopaedic Dictionary of Commerce: Volume 3*", New Delhi: Sarup & Sons 1999, p. 780.

446 Even though the members of the LME transferred shares, this association was formed as a "private limited company by shares" and not as a trust.

447 Association of Legal Administrators, "Antitrust Guide: For Members of the Association of Legal Administrators", *Association of Legal Administrators* 2019, p. 1; The standard case used to establish the existence of a combination refers to the Supreme Court judgment in American Tobacco Co. v. United States, 3278 U.S. 781 (1946). In that case, the big three tobacco manufacturers purchased large quantities of cheap tobacco leaves so that other manufacturers had to buy more expensive tobacco. This evidenced a combination.

## III. Conspiracy

A conspiracy is a concerted action between at least two actors to achieve an unlawful purpose[448], or as the Oxford English Dictionary defines it, "*a combination of persons* [here: actors] *for an evil or unlawful purpose; an agreement between two or more to do something criminal, illegal or reprehensible; a plot*".[449] An agreement does not necessarily have to be written, Section 1 of the Sherman Act also includes tacit agreements.[450] According to the Supreme Court in *Interstate Circuit, Inc. v. United States*, this requires at a minimum that there must be evidence that competitors have agreed, without having a previous agreement in place, to an invitation to participate in a plan that results in a restraint of interstate commerce.[451]

By ascertaining whether trade associations, their members and non-members fall within this definition, one must make a distinction between two situations. First, for members that execute nonlegal sanctions that are drafted/initiated by the relevant trade association to which they belong, even though their co-action satisfies this rule, there is evidence of a written contract. As a result, nonlegal sanctioning by both actors can be placed better under the collusion category of a contract. Second, for non-members that have not contracted with a member of a trade association, there is no direct evidence of a written contract between this actor and the relevant trade association. Even more, there can be a tacit agreement when this actor, following the situation when a member (or non-member) is extrajudicially sanctioned, also executes this decision. Given that non-members will most likely not conduct further trade with an extrajudicially sanctioned industry actor, the role of non-members can also be relevant for antitrust purposes.

When applying the *Interstate* doctrine, it is unsure whether the rule established in *Interstate* is clear enough to determine whether non-members that are not contracting under a standardized agreement drafted by a trade association have conspired. Also, the Supreme Court's judgments in *Monsanto Co. v. Spray-Rite Service Corp*[452] and *Matsushita Electric Industrial Co. v. Zenith Radio Corp*. that require a "*conscious commitment to a common*

448 Aspen Publishers, "*Antitrust*", New York: Aspen Publishers 2004, p. 38.
449 Oxford Corpus, "*Shorter Oxford English Dictionary: Sixth Edition*", Oxford: Oxford University Press 2007.
450 See, *inter alia*, American Tobacco v. United States, 328 U.S. 781, 809 (1946).
451 Interstate Circuit, Inc. v. United States, 306 U.S. 208, 227 (1939).
452 Monsanto Co. v. Spray-Rite Svc. Corp., 465 U.S. 752, 768 (1984). This case concerns vertical constraints.

*scheme*" is rather vague.[453] Fortunately, later case law has defined what is to be understood as a conscious commitment. In *United States v. Cont'Group* the Third Circuit Court requires that any market participant must knowingly or intentionally have entered into an agreement to effectuate the objective of the conspiracy,[454] unless, according to the Model Jury Instructions in Criminal Antitrust Cases, there is a deliberate blindness to be part of that conspiracy.[455] On the basis of this annotation, in my opinion, one cannot with absolute guarantee make the argument that non-members have consciously participated in the enforcement of nonlegal sanctions. Their role in the execution seems to be more of an indirect nature. To prevent non-members from escaping antitrust scrutiny at this early stage, it would be unwise to conclude that they have not conspired. Despite not willingly, although this is open for debate and largely depends on the arguments being used, it is at least conceivable that such market participants have colluded on a deliberately unaware basis. This means that for non-members that did not conduct trade on the basis of a standardized contract with a member of a relevant trade association, to some extent evidence of a conspiracy can be found.

### *D. An unreasonable restraint on competition: The existence of an illegal horizontal agreement and collective boycott*

Regulatory sanctioning for not complying with arbitral awards, which are drafted/initiated by the trade associations and executed by their members and non-members can have serious consequences for targeted market participants. Not only is there an elevated risk that targeted industry actors are driven out of the second-tier commodities markets, but their social standing can also be jeopardized. Any antitrust lawyer could build a good and solid defence for these wrongdoers, especially because the involvement of the three actors in nonlegal sanctioning amounts to a horizontal agreement that, depending on the measure being imposed and executed, can infringe various antitrust doctrines. The most important are discussed in this

453 Matsushita v. Zenith Radio Corp., 475 U.S. 574 (1986); American Bar Association, "*Proof of Conspiracy under Federal Antitrust Laws*", Chicago: American Bar Association 2010, p. 24. The Supreme Court transposes the Monsanto rule to horizontal agreements.

454 United States v. Cont'Group 603 f.2d 444, 463 (5th Cir. 1979).

455 American Bar Association, "*Model Jury Instructions in Criminal Antitrust Cases*", Chicago: American Bar Association 2009, p. 71-75.

part and relate to the collection and dissemination of market information, membership rules and barriers for market access, collective refusal to deal, entering the premises of a recalcitrant industry actor without a warrant, and limiting adequate access to public courts prior to arbitral proceedings and after an award.

## I. Collection and dissemination of market information

All of the trade associations researched have one thing in common: they collect and disseminate the names of wrongdoers that deviate from their obligations in blacklists. Although this method is initiated by a trade association itself, its council, or its board of directors, depending on the relevant trade association, its execution is only effective if a sufficient number of members and – arguably – non-members commit to ruling out trading with recalcitrant market participants on the second-tier commodities market.[456] If the latter two actors were to refuse to do so and were to continue to conduct trade with a blacklisted member, this type of extrajudicial enforcement would be ineffective in deterring non-compliance with arbitral awards. In other words, the collection and dissemination of the names of wrongdoers requires a co-action between at least the relevant trade association and its members, but – arguably – also with non-members.

By foreclosing market access, all three actors (to the extent of their respective role) run the risk of being complicit in a horizontal collective boycott, which substantiates an unreasonable restraint on competition under Section 1 of the Sherman Act. The severity of this restraint should not be underestimated, as the Supreme Court in various judgments held that a collective boycott is prohibited.[457] This is because it has a pernicious effect on competition and lacks any redeeming virtue. According to the United States Court of Appeals for the District of Columbia Circuit in *Fed. Maritime Comm'n v. Aktiebolaget Svenska Amerika Linien*, any horizontal agree-

456 B. D. Richman, "The Antitrust of Reputation Mechanisms: Institutional Economics and Concerted Refusals to Deal", *Virginia Law Review, Vol. 95:325* 2009, p. 340.

457 See, *inter alia*, Eastern States Lumber Assn. v. United States, 234 U. S. 600 (1914); Fashion Originators' Guild v. Federal Trade Comm'n, 312 U. S. 457, 465 (1941); Kiefer-Stewart Co. v. Seagram & Sons, 340 U. S. 211, 214 (1951); Times-Picayune Publishing Co. v. United States, 345 U. S. 594, 625 (1953); Northern Pacific R. Go. v. United States, 356 U. S. 1, 5 (1958); Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207, 212 (1959).

ment to collectively boycott competitors should even be seen as illegal per se.[458] This entails that a court will not consider possible justifications. Whether the practice of blacklisting is indeed designed to multilaterally eliminate competitors and can be seen as inherently illegal is unclear. To date, no US case law or legislation has ever touched upon the illegality of blacklisting within a PLS. To address this uncertainty, the most closely related non-statutory law will be thoroughly discussed with regard to all three actors.

### 1. Blacklists by trade associations

As discussed throughout this research, trade associations are tasked with drafting rules concerning the collection and dissemination of market participants and imposing this type of nonlegal sanctioning when a market participant does not comply with an arbitral award. To draw the conclusion that there is an unreasonable restraint on trade, a mere facilitation of an anticompetitive agreement might be sufficient. The Supreme Court ruled that this is particularly true when a trade association exchanges information on sales, delivery charges and prices.[459] Such conduct amounts to an illegal facilitation contrary to Section 1 of the Sherman Act. For blacklisting, this is much more difficult to say. This is because US courts have never considered such a nonlegal sanction which is imposed by a trade association. However, the legal rule derived from the Supreme Court's judgment in *Eastern States Retail Lumber Dealers' Ass'n. v. United States* provides some guidance.[460] In this case, lumber associations consisting of retailers collected complaints from their members about wholesalers that sold lumber directly to consumers.[461] The names of such disloyal wholesalers were then drafted in a blacklist, which was sent by these associations to its members.[462] Following dissemination of the blacklist, in practice, the members

458 Fed. Maritime Comm'n v. Aktiebolaget Svenska Amerika Linien, 390 U.S. 238, 250 (1968).
459 American Column & Lumber Co. v. United States, 257 U.S. 377 (1921); United States v. American Linseed Oil Co., 262 U.S. 371 (1923).
460 Eastern States Retail Lumber Dealers' Ass'n. v. United States, 234 U.S. 600 (1914).
461 Eastern States Retail Lumber Dealers' Ass'n. v. United States, 234 U.S. 600, 605 (1914).
462 Eastern States Retail Lumber Dealers' Ass'n. v. United States, 234 U.S. 600, 608 (1914).

then refused to deal with wrongdoers included on that list. The Court found that this clearly hindered or impeded the trade of wholesalers and constituted a violation of Section 1 of the Sherman Act by the trade associations.[463] According to *Hylton*, the Supreme Court had not decided that a horizontal agreement was illegal because of its effects, but had drawn the more stringent conclusion that inducing the members to refuse to deal with a blacklisted wholesaler amounted to a *per se* outlawed group boycott.[464] No justifications were determined on the merits of the case that could redeem the associations.

Similarly, and perhaps even more akin to the collection and dissemination of wrongdoers initiated by the trade associations researched, in *Fashion Originators Guild of America (FOGA)* the Supreme Court found a *per se* violation within the meaning of Section 1 of the Sherman Act with regard to the blacklisting practice pertaining to a trade association of designers, manufacturers, distributers and retailers ("FOGA").[465] In this case, FOGA had blacklisted the names of all retailers who sold pirated garments, despite it having a pro-competitive purpose, namely to protect all members against "*the evils growing from the pirating of original designs*".[466] The main argument used by the Court was that even if copying garments was illegal in all states of the US, self-help in the form of blacklisting is a restraint on interstate commerce in violation of Section 1 of the Sherman Act.[467] For the trade association researched, this case has far-reaching implications. Their enforcement activity by initiating the practice of blacklisting directed at industry actors that did not comply with an arbitral award can easily be seen as a self-policing attempt to guarantee compliance. Despite the District Court in *NYNEX Corp. v. Discon, Inc.* to some extent mitigating this outcome, especially because it ruled that the *per se* rule is not applicable when an agreement generates a pro-competitive effect, in my opinion, there is a clear risk that participating in a collective boycott for the main ground of self-policing violates Section 1 of the Sherman Act.[468] The gravity of the illegality can even be worse when the relevant trade association

463 Eastern States Retail Lumber Dealers' Ass'n. v. United States, 234 U.S. 600, 614 (1914).

464 K. N. Hylton, "*Antitrust Law and Economics*", Cheltenham: Edward Elgar Publishing 2010, p. 33.

465 Fashion Originators' Guild of America v. FTC, 312 U.S. 457, 468 (1941).

466 Fashion Originators' Guild of America v. FTC, 312 U.S. 457, 458 (1941).

467 Fashion Originators' Guild of America v. FTC, 312 U.S. 457, 468 (1941).

468 NYNEX Corp. v. Discon, Inc., 525 U.S. 128, 134 (1998). Importantly, this case involves a vertical agreement and not a horizontal agreement and is not com-

has published the name of a wrongdoer in a publicly accessible blacklist. By doing so, not only would members be induced to participate in the collective refusal to deal, but also non-members that had not even conducted trade with a targeted member.

If the FTC and, in appeal, a US court were to indeed reach the conclusion that self-policing in the form of a blacklist constitutes a *per se* violation of Section 1 of the Sherman Act, this could endanger the existence of present-day PLSs. In my opinion, given the efficiencies created by operating in the shadow of the law, this is an unwanted outcome. The anti-competitiveness of blacklisting which has been facilitated by a trade association should at least be balanced against possible justification grounds in a rule-of-reason analysis. This raises the ensuing question: How can a trade association escape the *per se* illegality pursuant to Section 1 of the Sherman Act? Providing an answer is perhaps more straightforward than it might appear at first glance. If the trade associations researched classify as joint ventures, the *per se* rule is not always appropriate. For example, in *Broadcast Music, Inc. v. CBS, Inc.* the Supreme Court ruled that "*joint ventures and other cooperative arrangements are* […] *not usually unlawful*".[469] However, according to *Cross & Miller*, this does not mean that they are not subject to antitrust scrutiny pursuant to Section 1 of the Sherman Act.[470] When a joint venture fixes prices and/or divides territories or customers, a *per se* violation of this provision is likely. If not, notwithstanding an illegality, a rule-of-reason analysis is possible.

For the trade associations researched, it is clear that they do not participate in a horizontal agreement to fix prices or divide markets. They exclusively target wrongdoers for not complying with an arbitral award. Put differently, the collection and dissemination of market participants in blacklists does not constitute a *per se* violation if the trade associations qualified as joint ventures. Even though they facilitate an anticompetitive collective group boycott, they will then have the possibility of a rule-of-reason defence to escape a violation of Section 1 of the Sherman Act. There is only one problem: the trade associations researched would need to qualify as joint ventures. Under the rules of US Antitrust Law, the term joint venture

---

pletely suitable to discover the necessity of a rule-of-reason defence over a finding of *per se* illegality.

469 Broadcast Music, Inc. v. CBS, Inc., 441 U.S. 1 (1979), para. E.

470 F. B. Cross, R. L. Miller, "*The Legal Environment of Business: Text and Cases – Tenth Edition*", Boston: Cengage Learning 2018, p. 571.

does not have a single meaning.[471] It encompasses any collaborate activity,[472] or, as the District Court of Kentucky put it in *McElhinney v. Medical Protective*, "*the term 'joint venture' denotes a group of independent economic actors who have joined together, in part, to provide a common product or service*".[473] Despite some authors preferring a narrower conceptualization, in my opinion, the trade associations researched are joint ventures.[474] The reasons are two-fold. First, comparable with the broad definition, market participants have established trade associations with the purpose of a common overall aim, namely to represent and provide arbitration services to them. Second, given the procompetitive benefits that a system of specialized commercial arbitration under the threat of the collection and dissemination of the names of market participants in blacklists generates, it would be unwise to exclude the possibility to balance such an efficiency against a violation of Section 1 of the Sherman Act. If the trade associations researched do not qualify as a joint venture, any rule-of-reason analysis could not be considered.

In sum, by facilitating the collection and dissemination of market participants in blacklists, the trade associations researched violate Section 1 of the Sherman Act. This is because such practice amounts to a collective group boycott. Owing to the efficiencies this practice generates, establishing the existence of a *per se* violation is not preferred. The most sensible way to escape this conclusion is to consider the trade associations as joint ventures. In that way, a rule-of-reason analysis can be conducted.

---

471 J. M. Jacobson, "*Antitrust Law Developments (sixth)*", Chicago: American Bar Association, Vol. 1, 2007, p. 433.

472 P. J. Welch, G. F. Welch, "*Economics: Theory and Practice – Ninth Edition*", Hoboken: John Wiley & Sons 2010, p. 408.

473 McElhinney v. Medical Protective Co., 549 F. Supp. 121, 132 (E.D. Ky. 1982)

474 A narrower definition of what defines a joint venture was, for example, given in J. F. Brodley, "Antitrust Analysis of Joint Ventures: An Overview", *American Bar Association, Vol. 66, No. 3,* 1998, p. 1526. Following this journal, a joint venture must fulfil the following four conditions. First, the enterprise must be under the joint control of parent companies (which are not under related control). Second, every single parent has to give a substantial contribution to the enterprise. Third, the parents and the enterprise are separate business entities. Fourth, the enterprise must generate new technology, productive quality, create a new product, or commence in a new market. For the trade associations researched it is unlikely that they can be considered as joint venture on the basis of this four-step test. Especially because the trade associations do not achieve the goals under the fourth condition.

## 2. Execution of blacklists by members of trade associations

The role of the trade associations researched in blacklisting the names of market participants for not complying with an arbitral award is clear: they produce and impose this type of sanction. Despite blacklisting facilitating an illegal collective boycott, the effectiveness of this practice would remain fruitless if the members of the trade associations researched were to decide not to execute such measure. In other words, a wrongdoer can only be punished when both a trade association and its members work together to blacklist this individual or company.

Whereas the trade associations researched violate Section 1 of the Sherman Act, it is not implausible that a similar conclusion can be drawn concerning their members to the extent they execute the practice of blacklisting. This is because restricting the business opportunities of market participants is so severe that it has an exclusionary effect.[475] The best example of a case that illustrates the culpability of the members of the trade associations researched again refers to the Supreme Court's judgment in *Eastern States Retail Lumber Dealers' Ass'n. v. United States.* In that case, the dissemination of a blacklist was only effective because the members of the association acted upon that information and refused to deal with wrongdoers.[476] This constituted a *per se* violation for them. Although some companies did not agree to this outcome, two arguments can be made in favour of establishing a restraint of trade for the role that members play in blacklisting market participants.[477] First, without the members of a relevant trade association executing that measure, the purpose of the blacklist, namely to collectively boycott competitors from that market, cannot be achieved. Second, the members of the trade associations researched are capable of adjusting the policy of the latter actors to blacklist wrongdoers. A trade association is merely a combination of market participants that wish to be represented by an overarching institution in order to obtain certain benefits. Members could change the bylaws of the trade associations and delete the relevant

475 J. F. Ponsoldt, "The Application of the Sherman Act Antiboycott law to Industry Self-Regulation: An Analysis Integrating Nonboyocott Sherman Act Principles", *Bepress* 1981, p. 13.

476 It even follows from H. Hovenkamp, "*The Antitrust Enterprise: Principle and Execution*", Cambridge/London: Harvard University Press 2005, p. 2 that the members of the lumber associations destroyed the wholesale business of blacklisted market participants.

477 B. D. Shaffer, "*In Restraint of Trade*", Cranbury/London/Mississauga: Associated University Presses 1997, p. 64.

clauses which empower the trade association to blacklist recalcitrant market participants. If they refuse to do so, members are just as responsible for the imposition of this type of nonlegal sanction on other market participants as the trade associations to which they belong.

Despite one being able to make an argument that the complicity of the members of the trade associations researched in blacklisting wrongdoers can also amount to a *per se* violation of Section 1 of the Sherman Act, the qualification of the trade associations as joint ventures would also excuse the former actors from such finding that prohibits any form of justification. This is because members are the foundation on which a trade association is built and without them would merely be an empty vehicle. Notwithstanding, the concerted action of members to execute the collection and dissemination of market participants in blacklists is sufficient to constitute a violation of Section 1 of the Sherman Act. This is irrespective of the fact that the severity of any violation of this provision depends on the economic harm done to a wrongdoer. Determining the exact degree is not an easy task. Much depends on the combined total shares that the members have on the second-tier market and how essential it is to be a member of the relevant trade association.[478]

The precise harm inflicted upon a wrongdoer is difficult to ascertain. Empirical evidence relating to the market shares that members of the trade associations have is missing. Fortunately, logical reasoning provides some lucidity. All of the trade associations researched are the most important institutions that represent individuals and/or companies in a specific commodities market. Given the services and benefits that these associations offer, membership is crucial to survive in each relevant market. As a result, many market participants will choose to be closely connected with the relevant trade association. When a member or non-member is blacklisted, it not only negatively affects a market participant's business reputation, but also inflicts economic harm. This is especially true when a trade association not only disseminates this information to its members, but also circulates it to every other trade association representing members in the same commodities market. In addition, when such list becomes public, the harm inflicted upon wrongdoers intensifies.[479]

---

478 C. C. Bird, "Sherman Act Limitations on Noncommercial Concerted Refusals to Deal", *Duke Law Journal, Vol. 1970, No. 2* 1970, p. 253-254.

479 For a comparable observation, albeit referring to Section 6 of the Clayton Act, the United States v. King, 229 F. 275 (D. Mass. 1915) case deserves emphasis. In that judgment, Judge Morton held that when the association in this case circu-

In sum, despite there being only a single judgment that has ever ruled on the illegality of executing blacklists, members of the trade associations researched violate Section 1 of the Sherman Act. Their complicity in this type of nonlegal sanction amounts to a collective boycott. Yet, the gravity of restrictiveness is debatable, as much depends on determining the harm done to wrongdoers on a case-by-case basis. Owing to the procompetitive efficiencies created by the operation of specialized commercial arbitration, and its enforcement of awards usually being complied with due to the threat of blacklisting, it would be unwise to exclude the possibility of justification grounds at this stage. Members of the trade associations researched are the founders of these joint ventures and their conduct must be subject to a rule-of-reason analysis, even though their involvement amounts to a collective boycott.

### 3. Execution of blacklists by non-members

The complicity of non-members in an illegal collective boycott by executing a blacklist initiated by one of the trade associations researched merits being considered with regard to two situations. The first concerns the circumstance that a non-member has entered into a standardized agreement with a member of a trade association which agreement is linked to a broader arbitration agreement in which the practice of blacklisting is laid down and that trade association blacklists the latter individual or undertaking. Then, not only do all its members execute that extrajudicial measure, but also that specific non-member. Whether or not the complicity of such a non-member violates Section 1 of the Sherman Act is uncertain. To date, no statutory law or case law has ever touched on this subject. Irrespective of this unavailability, in my opinion, non-members that contract on the basis of a standardized contract cannot be held accountable for a violation of Section 1 of the Sherman Act owing to two reasons. First, these individuals and or undertakings do not have the competence to rescind a clause permitting this institution to blacklist a wrongdoer. Second, non-

---

lated a blacklist to non-members and instructed them to refuse to deal with members on the list, also the members were engaged in a proscribed restraint on trade; For an analysis of this case, see D. A. Frederick, *"Antitrust status of Farmer Cooperatives: The Story of the Capper-Volstead Act"*, Washington DC: United States Department of Agriculture 2002, p. 84.

members are often unaware that a standardized contract is linked to a broader arbitration agreement which includes a blacklisting clause.

The second situation to determine the complicity of non-members in a prohibited group boycott which is initiated by one of the trade associations researched refers to the scenario in which this group of actors has not entered into a standardized agreement with a member of this institution. When there is no connection between a trade association and market participants, it is unlikely that the latter group of non-members is sufficiently involved in the practice of blacklisting to reasonably prove participation in an illegal collective boycott. The fact that these non-members act upon the information provided in the blacklist by (completely or to some extent) refraining from dealing with a targeted market participant, contingent upon the public accessibility of this list, does not change this observation. Such a broadening of the scope of Section 1 of the Sherman Act has the risk of punishing every individual and company operating in the relevant commodities market. This would be an injudicious development resulting in over-punishment over rationale.

## II. Membership rules and barriers for market access

If the practice of blacklisting was already tantamount to a group boycott for the trade associations researched, their members and occasionally non-members, it is not unlikely that withdrawing membership, be it temporary or permanent, can also give rise to a violation of Section 1 of the Sherman Act by all three actors. Punishing a bad industry participant by terminating a market participant's membership not only sends a signal to other industry actors that this individual or company is unreliable, it also takes away association-specific benefits and services. As severe as this may appear, the following Paragraph (Paragraph 1) explains whether indeed case law substantiates the existence of a violation of Section 1 of the Sherman Act. Subsequently, it will be examined on the basis of relevant case law of the US courts whether denying membership for an expelled member on the basis of an additional entry condition violates this provision (Paragraph 2).

### 1. Withdrawal of membership of a trade association

Membership of the trade associations researched is vital to being competitive on each relevant commodities market for market participants. Owing to the competitive importance and strength of these trade associations, withdrawing access to its facilities and services places such recalcitrant member at a serious competitive disadvantage.[480] As is discussed below, trade associations, their members, but also non-members can violate Section 1 of the Sherman Act.

#### a. Withdrawal by a trade association

All of the trade associations researched have included the possibility to expel wrongdoers following non-compliance with an arbitral award in their bylaws. When such conduct occurs, depending on the relevant trade association, a Board of Directors, Council, Disciplinary Committee or arbitration board "may" with full discretionary freedom initiate this nonlegal sanction. Even though there is no obligation to do so, this Paragraph examines whether Section 1 of the Sherman Act is violated once a market participant has its membership temporarily or permanently terminated.

A good place to start a discussion of the anti-competitiveness of withdrawing membership by a trade association is the Supreme Court's judgment in *American Medical Assn. v. United States*.[481] In that case, the Court found that expelling physicians from the American Medical Association when accepting employment under Group Health, a nonprofit health maintenance organization, constituted a restraint of trade.[482] Although this case exclusively related to a permanent loss of membership, three decades later the US District Court for the Northern District of Georgia in *Blalock v. Ladies Professional Golf Association* held that also a one-year suspension of membership from the golf association violated Section 1 of the

480 T. V. Vakerics, "*Antitrust Basics*", New York: Law Journal Press 2006, p. 6-40.

481 American Medical Assn. v. United States, 317 U.S. 519 (1943).

482 American Medical Assn. v. United States, 317 U.S. 519, 535-536 (1943). The American Medical Association violated Section 3 of the Sherman Act. This Section extends the scope of the provision of Section 1 by including the District of Colombia; For the differences and similarities between Sections 1 and 3, see H. I. Saferstein and J. C. Everett, "*State Antitrust Practice and Statutes (Fourth)*", Chicago: American Bar Association 2009, p. 10-3, 10-4.

Sherman Act.[483] The Court held that such punishment for illegally moving a golf ball excluded this person's access to the entire market, because she could not compete in other tournaments. The suspension initiated by the golf association constituted a *per se* unlawful boycott.[484] Whether or not the Court would have reached this conclusion without the influence of members to convince the golf association to carry out a suspension is difficult to ascertain. The fact remains that the golf association imposed the boycott.[485]

For the trade associations researched, the precedent of US courts showcases that their promulgation of permanent withdrawals of membership corresponds to a *per se* violation of Section 1 of the Sherman Act. This is particularly true because this type of extrajudicial enforcement has the effect of ostracizing a targeted industry actor from the market. Without membership, a former member not only loses access to a trade association's facilities, but also suffers enormous reputational harm. With regard to a suspension, the establishment of a *per se* violation is not so obvious. Even though a suspended market participants loses access to the facilities of a trade association and suffers reputational damage, unlike the Court's reasoning in *Blalock v. Ladies Professional Golf Association* following which no tournament could be competed in, such an individual or company can still deal with any other member of the trade association, or with non-members.[486]

In later case law, such as in the Supreme Court's judgment delivered in *NW Wholesale Stationers v. Pac. Stationery*, the severity of such type of extrajudicial enforcement that amounted to a collective boycott was mitigated.[487] Following this case, an expulsion of a member from a cooperative is generally subject to rule-of-reason analysis under Section 1 of the Sherman

483 Blalock v. Ladies Professional Golf Association, 359 F. Supp. 1260 (N.D. Ga. 1973).

484 Blalock v. Ladies Professional Golf Association, 359 F. Supp. 1260, 1265-1266 (N.D. Ga. 1973).

485 See also Deesen v. Professional Golfers' Association of America, 358 F. 2d 165 (9th Cir. 1966) involving a similar expulsion for poor performance. In its judgment, the Federal Appellate Court did not find a restraint of trade pursuant to Section 1 of the Sherman Act, because the targeted individual could take some steps in order to play golf tournaments; K. N. Hylton, "*Antitrust Law and Economics*", Cheltenham: Edward Elgar, Vol. 4 2010, p. 50.

486 If a US court were to examine the illegality of a suspension initiated by one of the trade associations, it is possible that this institution would reach a different conclusion.

487 NW Wholesale Stationers v. Pac. Stationery, 472 U.S. 284 (1985).

Act when such collaboration was designed to make the market more competitive and increase efficiency without manifesting predominant anticompetitive effects.[488] To achieve this, the cooperative must establish and enforce reasonable rules.[489] Only if the cooperative has market power, or has exclusive access to an essential facility that is necessary for an expelled member to compete, a *per se* treatment might be more appropriate.[490] Whether or not the trade associations researched fall under this rule is debatable. A cooperative and a trade association are two different things, since in the first the members have an equity interest, because all of them own a portion of the cooperative, whereas in a trade association the members have a non-equity position.[491] In my opinion, transposing the legal rules derived from *NW Wholesale Stationers v. Pac. Stationery* to determine the anti-competitiveness of the trade associations researched seems appropriate.[492] Not only because of the efficiency gains that were being created by these legal entities, but also since an expulsion could be a reasonable method to dissuade the members of these associations from not complying with an arbitral award and thereby maintaining the functionality and operability of present-day PLSs. Despite the clear foreclosure effect for targeted market participants following a suspension or termination of membership, especially because the trade associations are essential for industry actors to compete in a relevant commodities market, a *per se* treatment would present the trade associations with the opportunity to at least justify their rationale for expulsion.[493] Another argument in support of this view is the qualification of the trade associations researched as joint ventures. Such collaboration typically does not give rise to *per se* violation.

The argument that only members of trade associations can be targeted with expulsion does not change the outcome that such type of extrajudicial

488 NW Wholesale Stationers v. Pac. Stationery, 472 U.S. 284, 295 (1985).
489 NW Wholesale Stationers v. Pac. Stationery, 472 U.S. 284, 296 (1985).
490 Ibid.
491 www2.ef.jcu.cz/~sulista/pages/kdfp/BUEN1-1.pdf.
492 T. J. Waters and R. H. Morse, "*Antitrust & Trade Associations: How Trade Regulation Laws Apply to Trade and Professional Associations*", Chicago: American Bar Association 1996, p. 58. The legal rules described in NW Wholesale Stationers v. Pac. Stationery apply to both a cooperative and a trade association. Put differently, both legal entities can be used interchangeably.
493 American Bar Association, "*Joint Ventures: Antitrust Analysis of Collaborations Among Competitors*", Chicago: American Bar Association 2006, p. 102. A court will usually consider the following two criteria to assess membership restrictions: first, the level of necessity that access has on effective competition, and second, the nature and scope of the infringement.

enforcement violates Section 1 of the Sherman Act. Ostracizing disloyal members amounts to a collective boycott. The severity of the boycott – arguably – increases when a trade association publishes its withdrawal of membership in a publicly accessible section of the website of this association just as two out of five of the trade associations researched have done.[494] This depends on whether (the responsible institution within) a trade association already circulated the name of a wrongdoer in a blacklist.[495] If not, the expulsion will bring additional reputational harm.

Offering ostracized recalcitrant members with the possibility to obtain an internal appeal against a withdrawal of membership decision to some degree negates the exclusionary effect of this measure.[496] However, according to the Supreme Court in *NW Wholesale Stationers v. Pac. Stationery*, the presence of procedural safeguards (*i.e.* possibility of internal appeal) does not change the conclusion that Section 1 of the Sherman Act is violated.[497] Procedural protection in itself does not justify a conclusive presumption of a predominantly anticompetitive effect of a membership being withdrawn.[498] The American Bar Association confirms this conclusion and establishes that the lack of procedural safeguards for suspending or expelling a member does not create an antitrust violation.[499] However, post-*NW Wholesale stationers v. Pac. Stationery*, the US District Court for the District of Vermont in *Charleton v. Vt. Dairy Herd Improvement Ass'n*[500] and the US District Court for the District of Kansas in *Pretz v. Holstein Friesian Ass'n*[501]

---

494 See Part I, Chapter 3, G, III.

495 If the FTC decides to make an antitrust case pursuant to Section 1 of the Sherman Act against one of the trade associations researched, the existence of a blacklist as well as the dissemination of an expulsion decision would need to be established on a case-by-case basis.

496 Only the ICA and the LME discuss the possibility of an internal appeal against a withdrawal of membership. The DDC and the FCC do not expound on this possibility. Members of FOSFA do not have a right to lodge an appeal against a withdrawal of membership.

497 NW Wholesale Stationers v. Pac. Stationery, 472 U.S. 284, 293 (1985).

498 American Bar Association, "*Joint Ventures: Antitrust Analysis of Collaborations Among Competitors*", Chicago: American Bar Association 2006, p. 102.

499 American Bar Association, "*Antitrust & Trade Associations: How Trade Regulation Laws Apply to Trade and Professional Associations*", Chicago: American Bar Association 1996, p. 62; Silver v. New York Stock Exch. 373 U.S. 341 (1963). A lack of notice on the reasons for suspension or expulsion by itself also does not infringe Section 1 of the Sherman Act.

500 Charleton v. Vt. Dairy Herd Improvement Ass'n, 782 F. Supp. 926, 932 (D. Vt. 1991).

501 Pretz v. Holstein Friesian Ass'n, 698 F. Supp. 1531, 1539 (D. Kans. 1988).

ruled that an absence of due process in withdrawing membership may be considered in a rule-of-reason analysis as evidence of the intent of the restriction pursuant to Section 1 of the Sherman Act.[502]

b. Execution of the withdrawal of membership by members of a trade association

There is a preponderance of evidence that the members of the trade associations researched, when these associations initiate a withdrawal of membership, also violate Section 1 of the Sherman Act. This is because these market participants have the competence to abide by and execute this non-legal sanction, or to use their power to overturn a withdrawal of membership, or can remove such a measure in the bylaws and rules of a relevant trade association. Put differently, members have a guiding role in boycotting a specific market participant. This raises the ensuing question: If the trade associations researched violate Section 1 of the Sherman Act, then why do their members not?

Answering this question on the basis of case law is difficult, as neither the FTC nor any US court has ever ruled that members specifically, or as a group, violate Section 1 of the Sherman Act for their complicity in expelling a member from a trade association. In line with the Supreme Court's decision in *NW Wholesale Stationers v. Pac. Stationery*, an answer can be given to some extent. In this case, although the cooperative initiated an exclusion of membership and committed an illegal horizontal agreement, without the concerted action of its members this would not have resulted in a termination of membership of the disloyal undertaking. This is particularly true because the members of the cooperative were the ones who voted to expel this market participant.[503]

In my opinion, because of the role that members play in orchestrating an expulsion, it may very well be possible that the FTC and/or US courts would find a similar degree of accountability for a violation of Section 1 of the Sherman Act. Much will depend on the analysis of either or both institutions in determining whether targeted members are placed at a severe competitive disadvantage following their membership being withdrawn.

---

502 These are lower court judgments and are in contrast with the Supreme Court's judgment in *NW Wholesale Stationers v. Pac. Stationery.*

503 NW Wholesale Stationers v. Pac. Stationery, 472 U.S. 284, 287 (1985).

c. Execution of the withdrawal of membership by non-members

Whether industry actors that are not members of a relevant trade association also partake in expelling a wrongdoer and violate Section 1 of the Sherman Act must be assessed on the basis of two scenarios. The first pertains to the situation that a non-member has entered into a standardized agreement with a member of a trade association that is linked to a broader arbitration agreement in which there is a clause that permits the relevant trade association to withdraw the membership of a wrongdoer and that wrongdoer is expelled. In this scenario, members as well as the relevant non-member have a role in the execution of that extrajudicial measure. Despite no statutory law or non-statutory law having ever explained whether the non-member violates Section 1 of the Sherman Act, in my opinion, liability should be refused on account of two reasons. First, non-members often have no knowledge that a standardized agreement is linked to a broader arbitration agreement which includes an expulsion clause. Second, these individuals and or undertakings do not have the competence to rescind an expulsion clause laid down in the bylaws and rules of a trade association.

The second scenario concerns non-members that are in no way connected to a trade association but, after becoming aware of a withdrawal of membership, discontinue trade with a targeted industry actor. By doing so, added reputational harm inflicted upon an expelled wrongdoer cannot be excluded. Whether or not a withdrawal decision is published or not is irrelevant. It is highly unlikely that the Commission will pursue non-members for placing additional reputational harm on ostracized members of a trade association. This is especially true because it is impossible to require non-members not to conduct business with a suspended or expelled member of a trade association. Any market participant has its reasons for selecting potential business partners. If a person's or a company's reputation is questionable, market participants cannot be forced to enter into a contract with a wrongdoer under the threat of antitrust illegality pursuant to Section 1 of the Sherman Act. Using competition law infringements proactively, as a "sword" would not only hamper the professional freedom of non-members, but it would also result in penalization beyond the aim of this provision.

2. Denial of membership for an expelled member on the basis of an additional entry requirement

In the event a member temporarily or indefinitely loses its membership status of one of the trade associations researched, on the ground that this status is crucial to operating on a relevant secondary commodities market, an expelled market participant has a compelling interest to become a member again. A limitation of regaining membership might seem to a certain extent justified, but once, in my opinion, an ostracized member again fulfils the entry requirement of the relevant trade association and after a certain period of time has elapsed, membership should be reinstated. To assess whether such a denial complies with Section 1 of the Sherman Act, the focus will be again on the three actors.

a. Access restrictions by a trade association

With regard to a refusal to regain membership of a trade association following a suspension or expulsion, discussing the anti-competitiveness of this refusal is not so straightforward. This is particularly true because only one out of the six trade associations researched makes restoration of membership subject to additional requirements besides the normal entry conditions, namely the lapse of a period of two years and acceptance by a Board of Directors of a reinstatement of membership.[504] This raises the ensuing question: In line with the observation that four out of six of the trade associations researched do not impose (similar) entry requirements, does this entail that discussing the anti-competitiveness of access restrictions pursuant to Section 1 of the Sherman Act is pointless? This question must be answered in the negative for three reasons. First, the trade associations researched are only a selection of many other institutions that punish disloyalty of members for not complying with arbitral awards by using nonlegal sanctions. It is very well possible that they also put access restrictions in place after withdrawing membership. Second, even though four out of the six trade associations researched do not impose written rules with regard to difficulties to regain membership after being ostracized, these institutions

504 Only the ICA imposes additional entry barriers for ostracized members to regain membership. The DDC, the FCC, the LME and FOSFA do not impose rules with regard to additional re-entry requirements for ostracized members.

can still refuse re-admission on the basis of non-written grounds.[505] Third, discussing the antitrust boundaries of access restrictions would provide guidance as completely as possible as to when and to what extent Section 1 of the Sherman Act is violated.

It follows from these reasons that considering the illegality of access restrictions pursuant to Section 1 of the Sherman Act is necessary. A good start relates to the Supreme Court's judgment in *NW Stationers v. Pac. Stationary & Printing Co.*, in which the Court ruled that trade associations "*must establish and enforce reasonable rules in order to function effectively*".[506] This requires that membership access requirements must be fair, non-discriminative and appropriate. Obviously, such a standard immediately raises the following question: Are the standard entry requirements and additional prerequisites for regaining membership after an expulsion demanded by the trade associations researched reasonable within the meaning of Section 1 of the Sherman Act?

When discussing the anti-competitiveness of the normal entry requirements for industry actors under Section 1 of the Sherman Act, the following table which does not go in-depth, but merely provides a short overview, is guiding.[507]

| **Standard entry requirements that all trade associations have in common** | **Violation of Section 1 of the Sherman Act?** |
|---|---|
| 1. Connection with the secondary commodities market which the trade association represents | No. Industry restrictions are legitimate under Section 1 of the Sherman according to the first Circuit Court's judgment in *Clamp-All Corp. v. Cast Iron Soil Pipe Institute*.[508] |
| 2. An application for membership. | No. Without an application, obtaining membership is impossible. |

505 Whether or not this occurs remains vague, since no information is available in the literature, etc.

506 NW Stationers v. Pac. Stationary & Printing Co., 472 U.S. 284, 297 (1985).

507 An in-depth analysis will be conducted with regard to the additional access barriers following a withdrawal of membership. This is because normal entry barriers apply not only to ostracized members, but to every new applicant. They are seemingly less discriminatory, even though they can still violate Section 1 of the Sherman Act.

508 Clamp-All Corp. v. Cast Iron Soil Pipe Institute, 851 F.2d 478, 490, 492 (11th Cir. 1988).

| | |
|---|---|
| 3. Entry fee | No. In *United States v. Realty Multi-List* Inc. the Fifth Circuit Court of Appeal ruled that an entry fee "*which bears no relation to cost factors […] may not only create a significant barrier to new entry into the association, but may create "a strong inference that the amount has been set up as a barrier against" new applications*".[509] The entry fees required by the trade associations researched most likely satisfy this rule because the fee are needed to operate these institutions and are not unreasonably restrictive of competition.[510] |
| **Standard entry requirements that not all trade associations have in common** | **Violation of Section 1 of the Sherman Act?** |
| 1. Support by at least two members of the relevant trade association | Maybe. This rule could prevent new market entrants from competing in the relevant commodities industry. This is because without access to one of the trade associations researched, it is not possible to be on equal footing with its members.[511] |
| 2. Minimum duration of experience in the relevant commodities market | Maybe. This rule could prevent new market entrants from competing in the relevant commodities industry. This is because without access to one of the trade associations researched, it is not possible to be on equal footing with its members.[512] |
| 3. Satisfy the Board of Directors and post a picture on the main trading wall for other members to comment on | Yes. This rule enables the Board of Directors to deny any potential candidate for membership for any reason. Because access to one of the trade associations researched is necessary to compete on a relevant commodities market, it raises high entry barriers for market participants.[513] |

Several lessons can be drawn from this comparative analysis of the antitrust limits of the normal entry requirements for market participants to

509 United States v. Realty Multi-List Inc., 629 F.2d 1351 (5th Cir. 1980), para. 107. In this case an entry fee of $1000 infringed Section 1 of the Sherman Act.

510 Although this is true, the FTC and/or any US court can always reach a different conclusion.

511 A broader discussion to assess the illegality of such a rule pursuant to Section 1 of the Sherman Act is required. Yet, such research will not be carried out because it applies to all potential candidates for membership and not exclusively to (temporarily) expelled members that re-apply for membership.

512 Ibid. However, in Deesen v. Professional Golfers Assn of America, 358 F.2d 165 (9th Cir. 1966) the Ninth Circuit Court of Appeals argued that the requirement that a sufficient number of years of experience for members is justified. It is not inconceivable that this ruling can be applied to argue that a minimum duration of experience in a commodities market is an acceptable membership requirement.

513 The anti-competitiveness of this rule will be discussed in more depth with regard to the additional access barriers following a withdrawal of membership.

obtain membership of one of the trade associations researched. First, once an applicant for membership is refused by one of the trade associations researched on the basis of standard entry requirements that all of these trade associations have in common, it is unlikely that this institution violates Section 1 of the Sherman Act. A connection with a specific adjacent commodities market that a trade association represents, an application for membership and a reasonable membership fee are within the bounds of this provision. Second, once a trade association refuses access of an applicant to obtain membership on the basis of entry requirements that not all the trade associations researched have in common, with the exception of the requirement to satisfy a Board of Directors, since it violates Section 1 of the Sherman Act beyond a reasonable doubt, it is possible that this provision is also infringed. Not only because it raises high market barriers for market entrants, but it also weakens the ability of established undertakings and/or individuals to compete. Despite this observation, neither the FTC nor a US court has ever ruled on the illegality of such rules. Whether this entails that more restrictive rules for membership are permissible within the meaning of Section 1 of the Sherman Act must be rejected. Silence is not synonymous with permissibility.

With regard to additional requirements to regain membership after membership is withdrawn, a broader discussion is required. This is because restrictive membership policies have a clear risk of infringing Section 1 of the Sherman Act and must be necessary to the existence and the effective functioning of a trade association.[514] Whether indeed the lapse of a period of two years following a withdrawal of membership and the discretionary freedom by a Board of Directors of a relevant trade association to decline re-admission constitute prohibited entry requirements and impose market barriers for ostracized industry actors, the guidelines provided by the American Bar Association in its Antitrust and Association Handbook and the case law of US courts on the restraints on non-member access to association services play a central role. With regard to the Handbook, all membership requirements must be objective and have a legitimate function in the sense that they cannot be applied discriminatorily by a relevant trade association and serve competitive reasons for limiting access.[515] In addition, they must be consistently and objectively applied to

514 American Bar Association, "*Antitrust and Associations Handbook*", Chicago: American Bar Association 2009, p. 64.

515 Ibid., p. 68.

both membership applicants and current members.[516] To this extent, subjective judgments are only permissible if they are necessary, proportionate and can be applied in a nondiscriminatory manner.[517] If not, subjective judgments would raise red flags for the FTC and US courts.

It follows from these guidelines that additional requirements to regain membership after membership is withdrawn issued by a trade association are not compatible with Section 1 of the Sherman Act. This is particularly true because they only apply to targeted disloyal industry actors and not to all members. Such rules can be seen as discriminatory. Empowering the Board of Directors of a trade association to deny an ostracized member's request for membership is even more restrictive. Such broad competence enables this body to completely put a halt to restoration of membership. In my opinion, this can be seen as an arbitrary method. It is well possible that directors abuse their position and deny membership to market participants they dislike and accept re-admission when they favour an industry actor. This causes problems, as the risk of a complete denial of membership effectively drives such industry actor out the market. Without this status, it is significantly more difficult to send a signal of trustworthiness to other market participants and obtain access to the many services provided by a relevant trade association. Section 1 of the Sherman Act is undoubtedly infringed.

Restraints on access to market essential services for non-members is also a topic that has been extensively discussed by US courts. A good starting point is the Supreme Court's judgment in *United States v. Terminal Railroad Association*. In this judgment, the Court ruled that equal treatment to facilities is required.[518] According to the Supreme Court in *Associated Press v. United States*, this entails that when membership is necessary to compete, a trade association cannot block new applicants from obtaining this status and limit access to its facilities.[519] Such a policy by a trade association typically results in an infringement of Section 1 of the Sherman Act, which is subject to a rule-of- reason analysis.[520] However, one important requirement exists. Access to the benefits of membership of a trade association

516 Ibid.
517 Ibid., p. 69.
518 United States v. Terminal R.R. Ass'n, 224 U.S. 383 (1912).
519 Associated Press v. United States, 326 U.S. 1, 23 (1945).
520 NW Wholesale Stationers v. Pac. Stationery, 472 U.S. 284, 295-297 (1985). The rule of reason has become the primary mode to assess restrictions to obtain association membership.

must be considered essential[521] without the existence of other viable alternatives.[522]

When following these precedents derived from the case law of US courts, to the extent a trade association imposes additional entry barriers to acquire membership for (temporarily) excluded former members, such practice is contrary to Section 1 of the Sherman Act. Given that an ostracized industry actor no longer has access to the services of one of the trade associations researched following a temporary or unlimited revocation of membership, a denial of the request of an ostracized member to re-obtain membership by a relevant trade association on the basis of an additional access barrier must be seen as an unduly restrictive practice. By taking into account that US courts are reluctant to apply a *per se* violation for limitations on access to services, a rule-of-reason analysis can justify such stifling of competition. This is done in Part II, Chapter 6, E of this research.

b. Access restrictions by members of a trade association

Obviously, when a trade association refuses to re-admit an expelled member as a member of the association on the basis of access restrictions, it is, in practice, the members of that association that acting in concert refuse to deal with a competitor. This is because members belonging to a trade association have the ultimate authority to amend and delete membership requirements laid down in the bylaws and rules of that association. Hence, in my opinion, one can say that the members are responsible when this association refuses a reapplication for membership on the basis of such barriers. A denial of membership restricts access to competitively valuable association services and violates Section 1 of the Sherman Act. Whether indeed the FTC and/or the US courts pursue members is unlikely. To date, case law has focused on trade associations as the recipients of antitrust scrutiny

521 T. J. Waters and R. H. Morse, "*Antitrust & Trade Associations: How Trade Regulation Laws Apply to Trade and Professional Associations*", Chicago: American Bar Association 1996, p. 65; One example refers to the US District Court for the Western District of Pennsylvania judgment in United States v. Western Winter Sports Representatives Ass'n, Inc., 1962, Trade Cas. (CCH) 74,263 (W.D. Penn. 1973). In this case, a refusal of access to a trade association's trade show for non-members is not permissible when this restricts the right and ability to compete in the relevant market.

522 Thompson v. Metro. Multi-List, Inc. 934 F.2d 1566, 1582 (11th Cir. 1991).

rather than its members. Whether this prevents future antitrust scrutiny remains to be seen.

### c. Access restrictions by non-members

Non-members have no competence to prevent a trade association from denying a reapplication for membership by an expelled member on the basis of entry restrictions. It is also unlikely that this group of actors places reputational harm on such an individual or undertaking. For these reasons, an absence of guidance by the FTC, legal doctrine and US courts, and the fact that non-members comprise a large group of industry actors that are often not even aware of any barriers to re-application for membership, they comply with Section 1 of the Sherman Act.

When a non-member conducts trade with a member of a trade association on the basis of this association's standardized agreement which is linked to a broader arbitration agreement in which additional re-entry requirements are laid down and an expelled member is barred from re-obtaining membership because of those grounds, both types of actors have a role in the execution of this barrier to membership. However, in an absence of statutory and case law, a violation of Section 1 of the Sherman Act cannot be attributed to such a non-member. This is because that non-member is often unaware that a standardized contract is linked to a broader arbitration agreement which empowers the relevant trade association to impose additional barriers to access.

## III. Refusal to deal with an expelled member

An instruction of a trade association to its members to refuse to deal with an ostracized member can be used as an economic weapon to curtail the commercial activities of such an industry actor.[523] According to *Haddock,* this has serious competitive effect and involves a *per se* violation.[524] To what degree this is true for the complicity of the trade associations researched, their members and non-members is reviewed below.

---

523 C. F. Barber, "Refusals to Deal under the Federal Antitrust Laws", *University of Pennsylvania Law Review, Vol. 103, No. 7* 1955, p. 847.

524 G. B. Haddock, "The Right of Trade Associations to Deny Membership and to Expel Members", *Antitrust Bulletin 13 Antitrust Bull.* 1968, p. 555-556.

1. Refusal to deal with an expelled member by a trade association

Section 1 of the Sherman Act was designed to foster, protect and encourage competition.[525] Initiating a refusal to deal by instructing members of a trade association not to conduct business with an ostracized industry actor contravenes this objective. Not only because it can be seen as an illegal boycott against targeted individuals and/or undertakings, but also by virtue of its ability to seriously curb a former member's commercial standing. In early US case law, the Supreme Court ruled that an association's refusal to deal with non-members is sufficient to violate Section 1 of the Sherman Act. The first noteworthy example refers to the Supreme Court's judgment in *Montague & Co. v. Lowry*.[526] In this case an association of manufacturers and dealers in tiles instructed its members, under threat of being expelled from the trade association, not to buy materials from non-members.[527] This conduct has the aim of excluding such an industry actor from the relevant market[528] and is proscribed by Section 1 of the Sherman Act.[529] In subsequent cases, the Supreme Court followed its stance on refusals to deal with non-members. In *Fashion Originators' Guild of America, Inc. v. FTC*, it ruled that a boycott program that forced member textile manufacturers to not sell goods to dress manufactures which sold pirated goods to stores and coerced member garment manufacturers not to sell to stores which sold pirated garments infringed Section 1 of the Sherman Act.[530] In *Associated Press v. United States*, the Supreme Court argued that a trade association's bylaw was contrary to Section 1 of the Sherman Act, because it prohibited members from supplying spontaneous news to non-members.[531]

Although the Supreme Court in these cases failed to clarify whether a *per se*, or a rule-of-reason standard was more appropriate and despite the

525 A. S. Zito Jr., "Refusals to Deal: The Sherman Antitrust Act and the Right to Customer Selection", *The John Marshall Law Review, Vol. 14, Is. 2* 1981, p. 357.
526 Montague & Co. v. Lowry, 193 U.S. 38 (1904).
527 Montague & Co. v. Lowry, 193 U.S. 38, 44 (1904).
528 J. W. Meisel, ""Now" or Never: Is There Antitrust Liability for Noncommercial Boycotts?", *Columbia Law Review, Vol. 80, No. 6* 1980, p. 1317.
529 Another case which affirmed the anti-competitiveness of a refusal to deal with non-members concerns the Supreme Court's judgment in United States v. United States v. Colgate & Co., 250 U.S. 300 (1919). However, this case concerns a vertical refusal to deal which is different than that of the trade associations researched.
530 Fashion Originators' Guild of America v. FTC, 312 U.S. 457, 465 (1941).
531 Associated Press v. United States, 326 U.S. 1, 2 (1945).

Supreme Court in *NW Stationers v. Pac. Stationary & Printing Co.* stating that "*there is more confusion about the scope and operation of the per se rule against group boycotts than in reference to any other aspect of the per se doctrine*,"[532] it is not inconceivable that the FTC and/or US courts favour the more rigid *per se* violation. Mainly two arguments rationalize the applicability of this test: first, a refusal to deal places additional reputational harm on ostracized industry actors and can completely remove them from the market. Second, a refusal to deal does not have a pro-competitive justification, but has nothing but anti-competitive aspects.[533] This is because in the event non-compliance with an arbitral award is punished by withdrawal of membership, an auxiliary attached instruction to members to refuse to deal with an ostracized industry actor results in overdeterrence.

Admitting that it is very well possible that a *per se* violation could be favoured in a potential antitrust case under Section 1 of the Sherman Act, an alternative view that supports a rule-of-reason analysis is also comprehensible. A rebuttal can find support in the structure of a trade association as a joint venture and the existence of procompetitive benefits that could outweigh anticompetitive harm. As a result, the necessity and proportionality of a refusal to deal is better considered in a separate rule-of-reason analysis.

In sum, there are two diverging possibilities to determine how the role of a trade association in instructing its members not to do business with an ostracized industry actor should be perceived. In my opinion, neither possibility is sufficiently convincing and arguments can be made for each. Whether a *per se* standard or a rule-of-reason standard is to be chosen will largely depend on the FTC and/or US courts. Notwithstanding this absence of clarity, Part II, Chapter 6, E considers the anticompetitive effects of a refusal to deal against its procompetitive benefits to operate an effective PLS in a rule-of-reason analysis.

---

532 NW Stationers v. Pac. Stationary & Printing Co., 472 U.S. 284, 294 (1985); See also CHA-Car, Inc. v. Calder Race Source, Inc., 752 F.2D 609, 613 (11th Cir. 1985). Therein, the 11th Circuit Court of Appeals ruled that even though a *per se* standard for a concerted refusal to deal is customary, case law in this area is unsettled and a confusing array of qualifications and exceptions continues to develop; The United States District Court for the Eastern District of New York and the Second Circuit Court of Appeals have confirmed such a source of confusion in Bennett v. Cardinal Health Marmac Distribs., 2003-2 Trade Cas. (CCH) 74, 137 (E.D.N.Y. 2003) and Bogan v. Hodgkins, 166 F.3D 509, 515 (2d Cir. 1999).

533 https://thebusinessprofessor.com/knowledge-base/the-sherman-act-antitrust-law/.

2. Execution of the refusal to deal with an expelled member by members of a trade association

If a trade association instructs its members to no longer do business with an expelled member under the threat of being punished, these members would most likely consent by acquiescence or by agreement to this type of nonlegal sanction. This is not only understandable from a commercial motive, as not abiding by an association's instruction to forfeit trade with an ostracized market participant can make such a member subject to nonlegal sanctions that lead to commercial reprisals and reputational harm, but is also evident from the coercive nature of the obligation, since members will in all likelihood abide by the rules of the relevant trade association when put under pressure. In spite of the fact that these arguments will most likely be used by some members to escape from a finding of illegality pursuant to Section 1 of the Sherman Act if the FTC decides to pursue these industry actors, it is unlikely that these arguments would hold any merit. Members have the competence to adapt or delete a clause in the bylaws and rules of a relevant trade association which empowers this association to prohibit its members from continuing to trade with an ostracized industry actor. Hence, in my opinion, they are engaged in an illegal group boycott under Section 1 of the Sherman Act.

Albeit not relating to the same circumstances compared with a refusal to deal initiated by one of the trade associations researched after a (temporary) termination of membership, the Supreme Court holds that it is not only a trade association that can infringe the first provision of the Sherman Act, but also its members. In *Eastern States Retail Lumber Dealers' Association v. United States*, the Court ruled that because a group of retailers that were united in a trade association agreed not to purchase lumber from a non-member supplier, they participated in an illegal boycott on the ground that their concerted refusal to deal excluded competing wholesalers from the retail market.[534] Hence, the Court held that this agreement was a *per se* violation.[535] While this case provides the best analogy to understand the extent members of a trade association can be subject to illegality under Section 1 of the Sherman Act for their concerted behavior in discontinuing trade with a non-member of a trade association following a with-

534 Eastern States Retail Lumber Dealers' Ass'n. v. United States, 234 U.S. 600, 601, 614 (1914).

535 K. L. Hall, "*Oxford Companion to the Supreme Court of the United States, Second Edition*", Oxford: Oxford University Press 2005, p. 145.

drawal of membership, albeit more tenuous, two other judgments are worth mentioning. The first concerns the Supreme Court's judgment in *Radiant Burners, Inc. v. Peoples Gas Light & Coke Co.*[536] In its judgment, the Court reviewed the illegality of a trade association which ensures the safe use of natural gas and its members comprising gas utilities companies, manufacturers and gas pipeline companies under Section 1 of the Sherman Act.[537] The Court argued that arbitrarily denying a seal of approval by both actors which targeted a non-member classified as an unlawful concerted refusal to deal which is treated as a *per se* violation.[538] The second case pertains to the Supreme Court's judgment in *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, in which a retailer of appliances disliked the price-cutting techniques of a competing retailer and demanded manufacturers supplying to both parties to stop selling to this undertaking, unless at excessively high prices.[539] The Court concluded that the retailer as well as the manufacturers were involved in a concerted refusal to deal resulting in a *per se* violation under Section 1 of the Sherman Act.[540]

Whereas all three cases date back from a time in which the executors of a refusal to deal initiated by another company or trade association were held accountable under the rigid *per se* doctrine and the second and third cases are not very comparable,[541] it is not sure whether the FTC and/or US courts would use this standard or allow a more lenient rule of reason when dealing with a potential case in which the members of one of the trade associations researched participate in a concerted refusal to deal with an ostracized industry actor. Regardless of both possibilities, Part II, Chapter 6, E will determine the complicity of the members of a trade association in a rule-of-reason analysis.

536 Radiant Burners, Inc. v. Peoples Gas Co., 364 U.S. 656 (1961).
537 Ibid.
538 Radiant Burners, Inc. v. Peoples Gas Co., 364 U.S. 656, 659 (1961).
539 Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207 (1959).
540 Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207, 212-213 (1959).
541 In Radiant Burners, Inc. v. Peoples Gas Light & Coke Co the relevant trade association did not instruct its members to put a halt to all contact with a non-member. In addition, in Klor's, Inc. v. Broadway-Hale Stores, Inc. there was no trade association involved, but the case concerned a retailer that instructed manufacturers to stop selling to its competitor.

### 3. Execution of the refusal to deal with an expelled member by non-members

In the event a trade association obligates its members to refuse to conduct business with an ostracized former member, non-members cannot be held accountable for a violation of Section 1 of the Sherman Act. The reasons are three-fold: first, non-members do not have the competence to change the bylaws and rules of a trade association in which the possibility to extralegally punish a recalcitrant member by refusing to deal is incorporated. Second, the group of non-members is undefined, so it is not possible to hold all of these industry actors accountable. Third, most non-members will most likely never hear about a trade association imposing a refusal to deal on its members, because none of the trade associations researched has published this decision. As a result, additional reputational harm inflicted on a targeted market participant due to a refusal to deal by non-members is debatable.

Also, when a non-member has entered into a standardized agreement with a member of a trade association which is linked to a broader arbitration agreement in which a refusal to deal with an expelled member is laid down and that association imposes this extrajudicial measure on an expelled member, that non-member does not violate Section 1 of the Sherman Act. Even though there is no statutory and/or case law on this issue, two reasons justify the role of non-members in the execution of a refusal to deal with an ostracized member. First, non-members are often unaware that a standardized contract is linked to a broader arbitration agreement which includes a clause on blacklisting. Second, these non-members cannot annul such a clause in the bylaws and rules of the relevant trade association.

## IV. Entering the premises of a recalcitrant industry actor without a warrant

When a defaulter does not pay the monetary fee ordered in an arbitral award, one of the trade associations researched enables its officials to conduct a full-fledged research by entering the premises belonging to the defaulter. Obviously, as was discussed before,[542] barging into the premises of

542 See Part I, Chapter 2, II, 1.

the defaulter without being invited can result in a non-neglectable breach of privacy and – arguably – reputational harm.

Although invasion of privacy is not covered by Section 1 of the Sherman Act, any horizontal agreement that can negatively impact the competitiveness of a market participant could fall within the ambit of this provision. Whether indeed entering the premises of a defaulter at the instruction of a trade association is in restraint of trade and, hence, violates this provision is unlikely. Despite much depending on the willingness of the FTC to consider the anti-competitiveness of such conduct under Section 1 of the Sherman Act, in my opinion, three reasons contradict a finding of illegality. First, neither the FTC nor any US court has considered the unlawfulness of an extensive right to enter premises under this provision. Second, not Section 1 of the Sherman Act, but criminal law is the more appropriate legal statute to challenge an uninvited entry of premises. Third, it is almost impossible to determine the degree of reputational harm inflicted upon a targeted industry actor. This is particularly true since no decision of any investigation will be published. A restraint of trade is doubtful. Consequently, a thorough analysis pertaining to the role that a trade association, its members and non-members play in invasive investigations in market participants' properties is unnecessary.

## V. Limiting adequate access to public courts prior to arbitral proceedings and after an award

As was described in Part I, Chapter 3, F, II, there is a risk that US-based trade associations representing market participants in specific commodities markets do not comply with Article 75 of the CPLR and the FAA. This is because the bylaws of the association researched, the DDC, allow industry actors less redress to a public court than both laws. This raises the following question: Does this mean that a trade association as well as its members that draft these rules can be held liable for a violation of Section 1 of the Sherman Act for limiting the possibilities of a judicial review at a public court? In the absence of any FTC decision or case law stemming from US courts, this is difficult to answer. In my opinion, a parallel can be drawn between insufficient possibilities of redress to judicial review in the bylaws of a trade association and the Supreme Court's judgment in *NW Wholesale Stationers v. Pac. Stationery* in which a trade association, its members and non-members did not provide procedural safeguards following a withdrawal of membership. As the latter situation did not violate Section 1

of the Sherman Act, it is far-fetched to assume that inadequate access to public courts would violate this provision. A violation of the CPLR and the FAA is more appropriate.[543]

Be that as it may, when a trade association extrajudicially punishes a member for seeking legal redress at a public court on the ground that there is, for example, insufficient referral to a broader arbitration agreement, a different conclusion could be drawn. Then, depending on the nonlegal sanction chosen, Section 1 of the Sherman Act could be violated by the responsible trade association and its members.

### *E. A rule-of-reason analysis under Section 1 of the Sherman Act*

Since the Supreme Court's judgment in *Standard Oil Co. of New Jersey* v. *United States* and *United States. v. American Tabaco Co.*, defendants of antitrust scrutiny under Section 1 of the Sherman Act can, as an exception to this indiscriminatory prohibition, raise a rule of reason defence focusing on the effect and conduct of the measure.[544] This entails two elements: first, a rule of reason justification is not a separate defence that may be produced after a finding of illegality under Section 1 of the Sherman Act.[545] In fact, it is something that is considered at the stage of illegality on the basis of all the arguments provided by defendants from the outset.[546] Second, once a finding of a *per se* violation is not applicable, not only will the

543 In Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614 (1985) the Supreme Court ruled that once a party decides to arbitrate a statutory claim (*e.g.* antitrust issue) an arbitration agreement should be generously construed and must offer this individual or undertaking access to all substantive rights afforded by statute. In my opinion, this ruling must be interpreted to signify that the bylaws of a trade association should also afford all legal methods to obtain judicial redress in a public court. Limiting access to public courts in the bylaws of a trade association contradicts the CPLR and the FAA.

544 Standard Oil Co. of New Jersey v. United States, 221 U.S. 1 (1911); United States v. American Tobacco Company, 221 U.S. 106 (1911).

545 This defence is not similar to EU Competition Law, namely Article 101 (3) TFEU, which can be commenced at the request of a defendant after a finding of anti-competitiveness pursuant to Article 101 (1) TFEU.

546 K. Rißmann, "*Die kartellrechtliche Beurteilung der Markenabgrenzung*", Munich: Herbert Utz Verlag 2008, p. 108. This limits the broad scope of application of Section 1 of the Sherman Act at the stage of illegality.

harmfulness of a specific conduct be considered, but also its beneficial effects or procompetitive justification grounds.[547]

Whether indeed the trade associations researched and their members can justify their complicity in ousting an industry actor from the market by dint of blacklists, withdrawals of membership, refusals to allow expelled member to reobtain membership on the basis of an additional entry condition and refusals to deal is a matter of interpretation. Even though there is general consensus about the two-stage structure of a rule-of-reason defence,[548] what constitutes a valid justification is unclear and surprisingly underexplored.[549]

## I. First step of the rule-of-reason defence: The existence of visibly plausible procompetitive benefits

The first step of a procompetitive justification concerns the determination of US courts to consider whether the rule-of-reason standard or the more severe conclusive presumption of net anticompetitive effects is applicable (*i.e. per se* illegality standard).[550] Drawing the boundary between both doctrines is not easy. Yet, the Supreme Court's judgment in *Broadcast Music, Inc. v. CBS, Inc.*, provides much needed clarity.[551] When a restraint of trade probably has on its face procompetitive attributes even if a conclusive rule-of-reason analysis is not appropriate, then a *per se* illegality is more fitting.[552]

As discussed in Part II, Chapter 6, D, I, II and III, the anticompetitive harm inflicted upon disloyal members that did not comply with arbitral awards by the use of blacklists, withdrawals of membership, refusals to deal with expelled members on the basis of an additional entry condition

---

547 R. H. Allensworth, "The Commensurability Myth in Antitrust", *Vanderbilt Law Review, Vol. 69, No. 1* 2016, p. 5 (citation 7).

548 An exception to this clarity refers to the observation of the Supreme Court's judgment in California Dental Ass'n v. Federal Trade Commission, 526 U.S. 756, 780 (1999). In its judgment, the Court explains that the quality of proof required depends on the circumstances.

549 J. M. Newman, "Procompetitive Justifications in Antitrust Law", *Social Science Research Network* 2017, p. 7.

550 California Dental Ass'n v. Federal Trade Commission, 526 U.S. 756, 763 (1999).

551 Broadcast Music, Inc. v. CBS, Inc., 441 U.S. 1 (1979).

552 See also R. A. Givens, "*Antitrust: An Economic Approach*", New York: Law Journal Press 2005, p. 4-48.28.

and refusals to deal initiated by the trade associations researched and executed by their members should be weighed against the procompetitive benefits of specialized commercial arbitration. This is because in the absence of these nonlegal sanctions,[553] specialized commercial arbitration would prove ineffective which could jeopardize the complete operability of PLSs.

## II. Second step of the rule-of-reason defence: Illustration that the visibly plausible efficiency or benefit cannot exist without the anticompetitive risk

After the establishment that blacklisting, withdrawing membership, refusing to deal with an expelled member on the basis of an additional entry condition and refusing to deal with an ostracized member have visible plausible effects, the likelihood and magnitude of recognizable efficiencies must be considered against the overall effect on competition in the relevant market.[554] Furthermore, it must be established whether these efficiencies are sufficient to offset the market foreclosure of targeted industry actors.

Before we can go into this analysis, it must be established in more depth what the specific efficiencies which are being realized by dint of nonlegal sanctions in specialized commercial arbitration are. While this might appear difficult to ascertain, reference should be made to the rationale of present-day PLSs as were described in Part I, Chapter 1, C of this research. Following this discussion, it was explained that a present-day PLS can emerge when such private initiative increases contractual security and significantly lowers distribution and transaction costs when compared to State-enforced contract law. In more detail, with regard to commodities industries in which industry actors have formed trade associations, these arguments play a pivotal role. By establishing a system of specialized commercial arbitration to resolve conflicts between the members of a relevant trade association, relying on out of court settlements for these industry actors has proven to be a more efficient alternative to cumbersome, time-in-

553 It is not sure whether refusals to deal are necessarily beneficial or merely inflict unnecessary additional harm on a targeted industry actor. For the sake of argument, this conduct will be considered against the rule-of-reason yardstick.

554 K. Mathis, "*Law and Economics in Europe: Foundations and Applications*", Dordrecht: Springer 2014, p. 374.

tensive and costly judicial redress in court. Given that blacklisting, withdrawing membership, refusing to deal with an expelled member on the basis of an additional entry condition and refusing to deal with an ostracized member are the only means to ensure the success of this system, these nonlegal sanctions also have a pivotal role in ensuring the same efficiencies a PLS tends to create.

Despite these obvious benefits, it requires a study of US case law to determine whether the four types of nonlegal sanctions (i) qualify as permissible pro-competitive grounds for a rule-of-reason analysis pursuant to Section 1 of the Sherman Act; and (ii) whether they can justify the harmful and anticompetitive effect placed on targeted members.[555]

### 1. Efficiency defence: Consumer or total welfare justification

To determine whether increased transactional security and lowered distribution and transaction costs are justified as procompetitive benefits under Section 1 of the Sherman Act, it is necessary to understand the objective that antitrust laws should promote. Perhaps the best definition of the early objective was laid down in a Report of the Attorney General's National Committee to Study the Antitrust Laws.[556] In this Report, it was explained that antitrust law should promote competition in open markets and must

---

555 The Court's ultimate goal is to balance the procompetitive and anticompetitive effects of potential unlawful conduct. See Craftsmen Limousine v. Ford Motor Co., 491 F.3d 380, 389 (8th Cir. 2007); Stop & Shop Supermarket Co. v. Blue Cross & Blue Shield of R.I., 373 F.3d 57, 61 (1st Cir. 2004); Fraser v. Major League Soccer, 284 F.3d 47, 59 (1st Cir. 2002); The competitive conditions in the market before and after the restraint must be compared with the restraint's history, nature, purpose, economic impact as well as the availability of a less restrictive alternative. See N. A. Armstrong, Jr., J. D. Carroll, and C. C. Yook, "Sherman Act Section 1 Fundamentals", *LexisNexis* 2019, p. 3; It is sufficient to establish that a specific conduct's procompetitive benefits outweigh its anticompetitive harm. See American Bar Association, "*Antitrust Health Care Handbook, Fourth Edition*", Chicago: American Bar Association 2010, p. 50-51. It is sufficient to establish that a specific conduct's procompetitive benefits outweigh its anticompetitive harm.

556 Attorney General's National Committee to Study the Antitrust Laws, "Report of the Attorney General's National Committee to Study the Antitrust Laws", *Attorney General's National Committee to Study the Antitrust Laws* 1955; This is a 400-page document that describes almost all facets of antitrust doctrine and enforcement. For more information, see T. E. Kauper, "The Report of the Attorney

be seen as a policy "*against undue limitations on competitive conditions*".[557] Although this objective was seen as uncontroversial by a variety of authors, including, *inter alia*, *Hofstadter*[558], *Kahn*[559]*and Kaysen* and *Turner*[560], in 1979 this changed when the Supreme Court in *Reiter v. Sonotone Corp.* accepted the consumer welfare standard.[561] In this case the US acting as amici curiae supported the petitioners and took the position that the "*primary purpose of the Sherman Act was consumer protection*".[562]

Nowadays, according to *Blair & Sokol*, the main goal of the Sherman Act is to protect not only consumer welfare but also total welfare.[563] Strikingly, no goal is necessarily dominant over the other, especially since there is a lot of confusion about what the appropriate objective of the Sherman Act is and what should serve as the yardstick for a rule-of-reason defence.[564] Throughout its case law, the Supreme Court does not provide any clarity and seems to apply either justification ground arbitrarily.[565] Fortunately, with regard to the nonlegal sanctions initiated by the trade associations researched and executed by their members, choosing between both grounds is redundant. Extrajudicial enforcement benefits both consumer welfare,

---

General's National Committee to Study the Antitrust Laws: A Retrospective", *Michigan Law Review*
*Vol. 100, No. 7* 2002, p. 1867.

557 Attorney General's National Committee to Study the Antitrust Laws, "Report of the Attorney General's National Committee to Study the Antitrust Laws", *Attorney General's National Committee to Study the Antitrust Laws* 1955, p. 1, 3.

558 R. Hofstadter, "*The Paranoid Style in American Politics and Other Essays*", Cambridge: Harvard University Press 1965. Hofstadter was a supporter of the enactment of the Sherman Act.

559 A. E. Kahn, "Market Power and Economic Growth: Guides to Public Policy", *Antitrust Bulletin, Vol. 8* 1963.

560 C. Kaysen and D. F. Turner, "*Antitrust Policy: An Economic and Legal Analysis*", Cambridge: Harvard University Press 1959.

561 Reiter v. Sonotone Corp., 442 U.S. 330 (1979).

562 Brief for the United States As Amici Curiae Supporting Petitioners, Reiter, 442 U.S. 330 (1979) (No. 78-690), 1979 WL 213494, para. 12.

563 R. D. Blair, D. D. Sokol, "The Rule of Reason and the Goals of Antitrust: An Economic Approach", *UF Law Scholarship Repository* 2012, p. 476.

564 Ibid; See, for example, R. H. Bork, "Legislative Intent and the Policy of the Sherman Act", *The Journal of Law and Economics, Vol. 9* 1966. Blair and Sokol argue that Judge Bork confusingly considers total welfare as synonymous with consumer welfare in many of his judgments; An example is the Supreme Court's decision in Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877 (2007).

565 R. D. Blair and D. D. Sokol, "The Rule of Reason and the Goals of Antitrust: An Economic Approach", *UF Law Scholarship Repository* 2012, p. 480.

which entails the equivalent to consumer surplus and total welfare, which implies the equivalent to consumer plus producer surplus and economic efficiency.[566] This is particularly true because a system of specialized commercial arbitration in which arbitral awards are guaranteed under the threat of nonlegal sanctions significantly reduces transaction costs for the members of the trade associations researched when compared to its public court system alternative. It is clear that this benefits the economic position of these individuals and/or undertakings. In addition, it lowers the costs of end-users of commodities products. Subsequently, nonlegal sanctions positively impact the two most important goals of the Sherman Act, namely consumer welfare and total welfare. Given the willingness of US courts to consider these objectives in a rule-of-reason analysis under Section 1 of the Sherman Act, a defence should spotlight both antitrust aims.

2. Total welfare and consumer welfare vs. collective boycotts of targeted industry actors

It is true that specialized commercial arbitration provided by the trade associations researched enhances total welfare and consumer welfare. But does this mean that increased efficiency justifies the collective boycotting of industry actors that do not comply with arbitral awards? This question will be answered by focusing on each of the four relevant types of extrajudicial enforcement. In this framework, the role of the trade associations researched and their members will be discussed together.

a. Blacklisting

The main aim of blacklisting is to hamper the reputation of a wrongdoer and thwarts its business opportunities in the relevant commodities market. Whereas the extent of the gravity of this anticompetitive act depends on whether a blacklist is available only to its members or to any third party as well, one thing is sure: having a bad standing can give rise to a serious foreclosure effect for a blacklisted member of one of the trade associations researched on the relevant second-tier commodities market. This raises the following question: Is the practice of blacklisting reasonably necessary to

566 K. Heyer, "Consumer Welfare and the Legacy of Robert Bork", *The University of Chicago Press* 2014, p. 20.

achieve an increase in total welfare and consumer welfare that outweigh the anticompetitive effects?[567]

In my opinion, present-day PLSs exist because State-enforced law has failed to provide an efficient solution for industry actors active in specific commodities markets. In these markets, market participants have organized themselves in trade associations which represent their interests. Specialized commercial arbitration in the event of a conflict between members has proven to be crucial to obtaining a fast, cost-friendly and anonymous decision. For this system to be effective, on the ground that enforcement of awards would often require a lengthy and insecure procedure involving at least the court of enforcement and the court of recognition under the framework of the New York Convention, and since parties are often globally dispersed, the threat of being blacklisted would appear reasonably necessary to realize the procompetitive benefits. Less severe alternatives such as a hefty fine or a reprimand are ineffective.[568] It is only when an industry actor's reputation is at peril, is payment of arbitral awards feasible.

Unfortunately, case law of US courts does not help in determining how a rule-of-reason analysis under Section 1 of the Sherman Act should be conducted with regard to the practice of blacklisting. The reasons are twofold: first, decisions that focused on an illegal exchange of information, such as the Supreme Court's judgments in *Eastern States Retail Lumber Dealers' Ass'n v. United States* and *Fashion Originators Guild of America (FOGA)* with regard to trade associations and in *Eastern States Retail Lumber Dealers' Ass'n v. United States* where the members of a trade association originate from a time before the introduction of a rule-of-reason standard. Second, case law to determine the illegality of an information exchange/blacklisting after the introduction of such a defence is non-existent.

As a result of this lack of clarity owing to an absence of case law, it is difficult to forecast whether the FTC and US courts would be willing to accept a rule-of-reason defence pertaining to the blacklisting of disloyal

567 N. Shemtov, "*Beyond the Code: Protection of Non-Textual Features of Software*", Oxford: Oxford University Press 2017, p. 65.

568 There is clear risk that a hefty fine or a reprimand do not trigger a recalcitrant losing party in arbitral proceedings to pay an award. If confronted with an additional monetary sum following non-payment of an arbitral award, such an industry actor will most likely not be swayed to pay the penalty. Punishing bad behaviour with a reprimand would be equally ineffective. Such a sanction is not severe enough to ensure that a system of specialized commercial arbitration functions.

members of a trade association. The following table states the main arguments for and against its permissibility that both institutions should balance.

| Arguments that justify a legality of blacklisting pursuant to Section 1 of the Sherman Act | Arguments against a legality of blacklisting pursuant to Section 1 of the Sherman Act |
|---|---|
| 1. Blacklisting is the least severe effective measure to guarantee that a system of conflict resolution through specialized commercial arbitration can operate. | 1. Blacklisting can result in market foreclosure for a targeted member of a trade association. |
| 2. Blacklisting is necessary to maintain a system of specialized commercial arbitration that benefits total welfare and consumer welfare. | 2. Non-payment of an award should not result in market foreclosure. It is disproportionate to the principles of proportionality and subsidiarity. Blacklisting is a too severe sanction. |
| 3. In most markets, being blacklisted does not have social ramifications. Members of a trade association are often globally dispersed and alien to one another. | 3. In some markets, being blacklisted can also have social ramifications. It can disrupt interpersonal relationships within close-knit groups. |
| 4. When a wrongdoer's (company) name is published in a blacklist which is only accessible for members of the relevant trade association, market foreclosure is limited. | 4. When a wrongdoer's (company) name is published in a publicly accessible list, the likelihood of market foreclosure increases. |
| 5. Many industry actors that are placed on a blacklist are already bankrupt and are often non-members. It is unlikely that additional reputational harm will be inflicted upon them.[569] The foreclosure effect should be mitigated. | 5. Even though many industry actors that are blacklisted are bankrupt and/or classify as non-members, the foreclosure effect of this type of extrajudicial enforcement on liquid members is still severe. |

On the basis of this table one can draw the conclusion that for every argument in support of permissibility under Section 1 of the Sherman Act there is also a counter-argument. Yet, blacklisting is the least severe measure to operate specialized commercial arbitration that fosters total welfare and consumer welfare due to efficiency gains. Even though blacklisted market participants bear reputational harm and can be ousted from the relevant commodities market, this type of extrajudicial enforcement is reasonably necessary to achieve the two most prominent goals of the Sherman Act. Inclusion on a blacklist is to be reasonably expected following non-payment of an arbitral award, and disloyal industry actors still have the possibility to ask a public court to strike down this measure. However, a

569 See, for example, ICA List of Unfulfilled Awards: Part 1 (https://www.ica-ltd.org/safe-trading/loua-part-one/). When delving into the liquidity status of market participants included in this list, many are bankrupt.

trade association and its members can still be held accountable for a violation of Section 1 of the Sherman Act when the dissemination of the name of a wrongdoer is not structured in the least restrictive manner. In particular, five requirements must be complied with to meet this provision. First, blacklists should not be made publicly available, but accessible for members only. Second, it would be better to allow a third party to collect, handle and disseminate the names of a wrongdoer in a blacklist, instead of a trade association which is often biased. Third, the dissemination of the names of disloyal industry actors in a blacklist should only occur after clear deadlines have lapsed and a final warning. Fourth, when the effect of blacklisting also targets an industry actor's social standing, more reluctance should be shown. Fifth, every blacklisted member should be given the opportunity to ask for an internal appeal to object to such a decision. Currently, as it stands, the trade associations researched and their members can be held accountable for a violation of Section 1 of the Sherman Act. This is because the practice of blacklisting is not structured in the least restrictive form. If both groups of actors were to introduce these changes, total welfare and consumer welfare benefits would outweigh the boycotting of wrongdoers vis-à-vis the dissemination of the names of wrongdoers in blacklists. Subsequently, Section 1 of the Sherman Act would not be violated.

### b. Membership rules and barriers for market access

It does not require much emphasis to determine that a withdrawal of membership has more far-reaching consequences for a targeted member belonging to a relevant trade association. Without access to the facilities of one of the trade associations researched, not only will crucial services such as specialized commercial arbitration, networking events and the possibility to contract under standardized contracts be unavailable, it is not uncommon that a disloyal industry actor's reputation deteriorates beyond repair. An expulsion, be it temporary or indefinite, signals untrustworthiness and an unwillingness to fulfill obligations. Consequently, a disloyal market participant's market presence, financial strength and profitability, and track record of compliance with financial and legal obligations are at jeopardy.[570] This seriously affects the financial liquidity of targeted industry ac-

570 B. Bossone, "The Role of Trust in Financial Sector Development", *Policy Research Working Paper 2200* 1999, p. 18. Although factors that affect the reputa-

tors and may in some cases even result in bankruptcy. The imposition of additional entry requirements following a withdrawal of membership compared to the those imposed on normal membership applicants exacerbate the exclusionary effects

Regardless of the total welfare and consumer welfare benefits of having a system of specialized commercial arbitration for the members of the trade associations researched in place, similar to the practice of blacklisting it is essential to answer the following question: Is a withdrawal of membership and difficulties to regain membership following such an imposition reasonably necessary to achieve an increase in total welfare and consumer welfare that outweigh the anticompetitive effects? Answering this question should focus on both stages: the actual suspension and termination of membership and the denial of membership of an expelled member on the basis of an additional entry barrier. This question is answered in the following two Paragraphs.

### i. Withdrawal of membership

As the Supreme Court affirmed in *NW Wholesale Stationers v. Pac. Stationery*, a withdrawal of membership is permissible when it is considered a reasonable rule that makes a particular market more competitive and is efficiency-enhancing without having predominant exclusionary effects. The Court went on to argue that when an association has market power and access to its services can be perceived as an essential facility, it would be difficult to conclude that a trade association can impose a withdrawal of membership.

Applying this logic to suspension and termination of membership initiated by the trade associations researched is not straightforward. It necessitates that the services provided by these associations classify as essential facilities and that the associations have market power. Before discussing whether ostracized market participants lose access to an essential facility, it must first be discussed if the essential facility doctrine can be applied within the scope of Section 1 of the Sherman Act, or if Section 2 of the Sherman Act is more appropriate. Without conducting an in-depth examina-

---

tion capital were discussed with regard to financial intermediaries, these variables are useful to determine the extent of reputational harm following a withdrawal of membership from one of the trade associations researched.

tion, *Enaux* explains this doctrine can be applied under both provisions,[571] but that that it may only be applied to the first provision when a monopolistic alliance of competition jointly controls an essential facility and prevents competition.[572]

The co-action between the trade associations researched – acting as joint ventures – and their members fall under this rule. This is because the members have a direct influence on the policy of each relevant trade association and jointly control the services provided by the associations. But does this mean that the services are essential? The Court of Appeals of the District of Columbia Circuit in *Hecht v. Pro-Football, Inc*. answered this question by providing the following definition: "*To be "essential" a facility need not be indispensable; it is sufficient if duplication of the facility would be economically infeasible and if denial of its use inflicts a severe handicap on potential market entrants*."[573] When applying this definition to the situation of punishing recalcitrant members of the trade associations researched that did not adhere to an arbitral award, access to the services provided by these associations is equivalent to an essential facility. The reasons are two-fold: first, there are no feasible alternatives when access to one of these associations is suspended or terminated.[574] Second, denial of services would place wrongdoers at an enormous competitive handicap.

Regardless of the anticompetitive effects that a denial of the services of one of the relevant trade associations researched produces, in my opinion, a withdrawal of membership in some cases can be viewed as a feasible method to punish disobedient industry actors that are insufficiently deterred after the dissemination of that actor's name in a blacklist. For some industry actors that were already close to a bankruptcy, reputational harm is not always important. This is because once a member has sufficient

---

571 American Bar Association, "*Model Jury Instructions in Civil Antitrust Cases*", Chicago: American Bar Association 2005, p. C-35.

572 C. Enaux, "*Effiziente Marktregulierung in der Telekommunikation: Möglichkeiten und Grenzen der Ruckführung sektorspezifischer Sonderregulierung in das allgemeine Wettbewerbsrecht*", Münster: Lit Verlag 2004, p. 148.

573 Hecht v. Pro-Football, Inc., 570 F.2d 982, 992 (D.C. Cir. 1977). For a more in-depth discussion pertaining to the essential facility doctrine, Part 2, Chapter 7 of this research discusses this doctrine with regard to Section 2 of the Sherman Act. This is because Section 2 of the Sherman Act is the more appropriate legal basis to apply this concept; A specific case in which the essential facility doctrine was discussed under Section 1 of the Sherman Act refers to the judgment of the District Court of Minnesota in United States v. Otter Tail Power Co., 331 F. Supp. 54, 61 (D. Minn. 1971). In appeal, this approach was not mentioned.

574 For this reason some may even argue that access to the facilities is indispensable.

monetary funds, this individual or company can request to be taken off the list by paying the arbitral award and any related penalties. In addition, such an unreliable and disloyal industry actor continues to have access to all the services provided by the trade association. To guarantee the successful operation of a system of specialized commercial arbitration, a suspension or withdrawal of membership would function as an additional safeguard in situations in which a threat of being blacklisted is inept at ensuring compliance with arbitral awards. Whether this type of extrajudicial enforcement is reasonably necessary to offset the anticompetitive harm inflicted upon targeted members is questionable. Much will depend on the considerations of the FTC and/or US courts. In the following table the most important arguments in support of and against ostracism are presented.

| **Arguments that justify a legality of a withdrawal of membership pursuant to Section 1 of the Sherman Act** | **Arguments against a legality of a withdrawal of membership pursuant to Section 1 of the Sherman Act** |
|---|---|
| 1. Withdrawals of membership provide a successful measure to ensure compliance with arbitral awards when blacklisting is ineffective (*e.g.* bankruptcy). | 1. Besides the reputational harm, cancelling all services provided by a relevant trade association carries a risk of completely ousting a member from the second-tier relevant commodities market. Taking away an essential facility is unlawful. |
| 2. Withdrawals of membership are necessary to maintain a system of specialized commercial arbitration that benefits total welfare and consumer welfare. | 2. Non-payment of an award should not result in a withdrawal of membership. It is disproportionate to the principles of proportionality and subsidiarity. Withdrawing membership is a too severe sanction. |
| 3. In most markets, having one's membership suspended or terminated does not result in social ramifications. Members of a trade association are often globally dispersed and alien to one another. | 3. In some markets, having one's membership suspended or terminated can also have social ramifications. It can disrupt interpersonal relationships within close-knit groups. |
| 4. Often, a withdrawal of membership decision is not published. Added reputational harm is not to be expected, because industry actors are globally active and may be unaware of the suspension or termination. | 4. When a trade association publishes the decision that it has suspended or terminated membership, all members and sometimes even non-members will not likely conduct trade with such a market participant. Reputational harm inflicted upon a targeted individual or company is not unlikely. |
| 5. Many industry actors that have their membership suspended or terminated are bankrupt. It is only a symbolic measure that chiefly contributes to the overall compliance with arbitral awards. | 5. Having one's membership suspended or terminated takes away the chance that a member subject to a withdrawal of membership decision becomes financially sound midst such a withdrawal of membership. |

| | |
|---|---|
| 6. Historically, individuals have been ostracized.[575] This measure is not exclusively reserved for the commodities trade. It would be unwise to prohibit withdrawals of membership. | 6. Historical examples do not justify the anticompetitive harm inflicted upon targeted members. |

There is no easy answer to establish that the procompetitive benefits of a withdrawal of membership outweigh its anticompetitive consequences. From my point of view, a withdrawal of membership is a measure that is reasonably necessary to ensure the success of specialized commercial arbitration. This is particularly true if including the name of a market participant on a blacklist is unsuccessful in guaranteeing compliance and avoiding an evasion of the principle pertaining to the sanctity of contracts. It is of paramount importance to close any loophole that can impair the operability of a PLS. Total welfare and consumer welfare arguments should outweigh the anticompetitive harm done to disloyal members. Only when there is a threat of ostracism will compliance with arbitral awards increase. However, owing to the importance of being a member of one of the trade associations researched, any withdrawal of membership can eliminate a rival from the market. The trade associations researched and their members are both subject to a potential antitrust scrutiny pursuant to Section 1 of the Sherman Act and should not take a legality of a suspension or termination for granted. The FTC and US courts will on a case-by-case basis take into consideration the impact of an expulsion from the market and the necessity of that expulsion in a concrete situation.

To ensure that a withdrawal of membership falls outside of the antitrust radar, in my view, four steps should be considered. First, a withdrawal of membership should not be an automatic consequence of non-payment of an arbitral award, but should only be applied when blacklisting is ineffective in a concrete case.[576] Second, it must be researched on a case-by-case basis whether another less intrusive measure can ensure enforcement of an arbitral award.[577] If yes, this measure should be preferred. Third, possibili-

575 For an historical example of a banishment, see Part I, Chapter 2, B, II.

576 It would be recommended to task a committee of specifically selected, impartial and unbiased members with deciding whether a withdrawal of membership is just in a specific situation.

577 An example would be to debar a wrongdoer from using a standardized contract of or derived from a relevant trade association, attending its networking events and using its arbitral services in another case when such an industry actor does not pay an additional monetary sum each time.

ties for internal appeal against an arbitral award should be put in place.[578] Fourth, as is the focus in the next Paragraph, when membership is indefinitely terminated re-application for membership should not be made too difficult. Put differently, a withdrawal of membership procedure based on clearly defined, transparent, non-discriminatory reviewable criteria that allows for cumulative penalties enforceable in national courts, with a final threat of a suspension, or in the worst case scenario when non-compliance is combined with other misconduct, an indefinite expulsion would be justifiable provided that the trade association has objective, reasonable and legitimate reasons for doing so and the rules and criteria are fair and neutral (*i.e.* do not favour certain members over others). Furthermore, expelled members should be given the chance to request recourse in public courts.

### ii. Denial of membership for expelled members on the basis of an additional entry condition

An expulsion is a severe measure that can oust a market participant from the market. Any targeted industry actor should be given the chance to ask for re-admission to membership when that actor again fulfils all membership requirements and a reasonable period time has elapsed. Allowing a Board of Directors to decide whether an ostracized industry actor can be re-admitted to the trade association is highly arbitrary. This measure as well as not accepting member applications for a period of two years contributes to stifling competition for targeted individuals and/or companies. Membership rules should be equal, fair, non-discriminatory and legitimate.[579] Denying reapplication for membership of expelled members on the basis of an additional entry condition seems to go beyond this aim.

Be that as it may, members of a trade association can have a valid interest in not accepting a wrongdoer back in their midst. For an expulsion to be a sufficient deterrent, regaining membership should not be made too easy. Therefore, also here, it is necessary to balance the procompetitive benefits of denying a reapplication for membership of an expelled member

578 While an absence of due process is permissible under Section 1 of the Sherman Act, in my opinion, the possibility of an internal appeal against an arbitral award would decrease the chance that membership of a wrongdoer is suspended or terminated. It would be wise to include this possibility in the bylaws of a trade association.

579 See Part II, Chapter 6, D, II, 2, a.

on the basis of an additional entry barrier against the anticompetitive consequences for ostracized former members. To succeed, the task of navigating this difficult legal, regulatory and subjective balancing exercise requires clear guidance. The following two tables present the arguments for and against an illegality under Section 1 of the Sherman Act of the two additional entry barriers imposed by the trade associations researched, namely (i) the lapse of a period of two years following an expulsion; and (ii) the approval of a Board of Directors.

| **Arguments that justify imposing a lapse of a two-year time period following an expulsion in order to reapply for membership under Section 1 of the Sherman Act** | **Arguments against the imposition of a lapse of a two-year time period following an expulsion in order to reapply for membership under Section 1 of the Sherman Act** |
|---|---|
| 1. The imposition of a two-year period to reapply for membership is reasonably necessary to make an expulsion effective. If targeted wrongdoers were able to immediately reapply for membership, the functionality of this type of extrajudicial enforcement would be rendered (to some degree) ineffective. | 1. If an expelled member again complies with all the membership requirements, pays the arbitral award and any related penalties, it would not be reasonably necessary to impose a two-year waiting period. This would unduly harm the financial standing of a terminated former member. |
| 2. Because a two-year waiting period is necessary to ensure the effect of an expulsion, the enforcement of awards of specialized commercial arbitration is better guaranteed. This enhances total welfare and consumer welfare. | 2. Albeit that specialized commercial arbitration enhances total welfare and consumer welfare, once an expelled former member qualifies as a member, it would be unreasonable to oust him from the market for a long period. |
| 3. A two-year period is proportionate and a reduced period would not contribute to the deterrent effect of an expulsion. | 3. A two-year period is excessively long. It would be better to either abolish a period altogether, or reduce it to, for example, six months.[580] By doing so, the foreclosure effect of expelled former members is reduced. |
| 4. It is reasonably necessary to make an exception to the rule that membership rules should be equal and non-discriminatory. Without such a rule, an expulsion is insufficiently deterring and would be rendered ineffective. This can undermine the enforcement of arbitral awards of specialized commercial arbitration. In addition, it can induce members not to pay an arbitral award. | 4. Given that membership rules should be equal for all applicants and must not discriminate, imposing a two-year period which only applies to expelled former members is contrary to this rule. This follows from the Supreme Court's judgment in *NW Wholesale Stationers v. Pac. Stationery*. |

580 A period of six months would still guarantee the effect of an expulsion and would give an expelled former member the possibility to demonstrate that it is a reliable business partner.

| **Arguments that justify the necessity of an approval of a readmission of membership by the relevant Board of Director after an expulsion under Section 1 of the Sherman Act** | **Arguments against the necessity of an approval of a readmission of membership by the relevant Board of Director after an expulsion under Section 1 of the Sherman Act** |
|---|---|
| 1. When a member is expelled from a trade association, tasking the Board of Directors with assessing whether a reinstatement of membership is fair and just is not only necessary, but also democratically sound. Arbitrators are the legal representatives of trade associations and should be given the right to approve re-admission to membership. This would increase the severity of an expulsion and strengthen the enforcement with arbitral awards. In addition, it would enhance total welfare and consumer welfare. | 1. Allowing the Board of Directors to deny an expelled former member from reobtaining membership, even though such an industry actor satisfies all membership requirements and pays the arbitral award and any related penalties, is discriminatory and unfair. These individuals can arbitrarily oust an industry actor from the market. |
| 2. A trade association should be selective in allowing industry actors to become members. This is especially true in the event a member has proven to be unreliable and unwilling to pay an arbitral award. The relevant Board of Directors should critically review a reapplication for membership to protect the reliability of specialized commercial arbitration. | 2. There is a risk that the relevant Board of Directors tasked with approving re-admission to membership of an expelled former member are motivated by personal resentment against a former member, capricious decision-making and the mood of the directors on a given day. It would be unwise to give such body the possibility to deny membership to such an industry actor, as it can result in market foreclosure. |
| 3. To ensure that an expulsion sufficiently deters members from not complying with an arbitral award, allowing the relevant Board of Directors to approve a re-admission to membership is reasonably necessary. There must be an exception to the legal rule provided by the Supreme Court's judgment in *NW Wholesale Stationers v. Pac. Stationery*. | 3. Given that membership rules should equal for all applicants and must not discriminate, allowing the relevant Board of Directors to strike down a membership reapplication of an expelled member is contrary to this rule. This follows from the Supreme Court's judgment in *NW Wholesale Stationers v. Pac. Stationery*. |

Imposing additional entry barriers on expelled members to re-obtain membership should be approached with reservation. It has an increased risk of over-punishing a former member subject to an expulsion and foreclosing market access. Anticompetitive harm is especially to be expected when a Board of Directors is able to arbitrarily and capriciously deny a re-admission to membership. In my opinion, such a freedom of discretion violates Section 1 of the Sherman Act and can even entail that an expelled former member will never be able to become a member again. This is not only disproportionate, but also an unreasonable method to ensure the successful operation of specialized commercial system, which contributes to the enhancement of total welfare and consumer welfare. Instead of allowing a Board of Directors to deny a reapplication for membership, an independent third-party panel (not connected with the relevant trade association)

should be tasked with doing this by taking clearly defined, equally applicable, transparent, non-discriminatory criteria into account, such as (i) the current liquidity status of the former member; (ii) an unwillingness to pay the fine for non-compliance with the arbitral award; and (iii) evidence of probable disloyalty in the future.

With regard to the two-year period following an expulsion, a violation of Section 1 of the Sherman Act is not so clear-cut. Without an interim period following the enforcement of this measure and a reapplication for membership, expulsions would be rendered inefficient and would not deter wrongdoers. A targeted industry actor can then immediately following an expulsion satisfy all membership requirements, pay the arbitral award and any related penalties and be re-admitted. Yet, in my opinion, a two-year period is too long and should be reduced given the consequence that an expelled former member loses access to an essential facility. An alternative would be to impose a six-month timeframe for non-payment of an award and if this is combined with previous other misconduct a time period of one year.[581] All things considered, it is possible to make a successful rule-of-reason defence by a relevant trade association and its members and both actors can justify the imposition of a time period if the length of that period is more proportionate to the gravity of a denial of an essential facility.

### c. Refusal to deal with an expelled member

The instruction of a trade association to its members not to conduct business with an expelled member is a far-reaching measure. Its effect on targeted former members is even more severe than an expulsion.[582] An impossibility to conduct business with any member of one of the trade associations researched eradicates the financial standing of a targeted industry actor. This results in market elimination altogether. Despite the anticompetitive nature of a refusal to deal, it must be assessed whether this mea-

581 Examples refer to situations in which an expelled member had already in the past been warned for not paying the yearly fee, committed theft or fraud, intentionally damaged property of members belonging to a relevant trade association, and has threatened others.

582 This is because a refusal to deal with members follows a withdrawal of membership. So it is an additional nonlegal sanction.

sure is merely an instrument for suppressing competition, or if it is reasonably necessary to enhance total welfare and consumer welfare.

The importance of a balancing-exercise that is not only indissociable from, but truly embedded in, antitrust analysis is the most obvious method to compare whether procompetitive benefits outweigh the anticompetitive effects of a refusal to deal with an ostracized member. The following table presents the arguments for and against an illegality under Section 1 of the Sherman Act of this type of extrajudicial enforcement.

| **Arguments that justify the imposition of a refusal to deal with ostracized members of a trade association imposed upon its members under Section 1 of the Sherman Act** | **Arguments against the imposition of a refusal to deal with ostracized members of a trade association imposed upon its members under Section 1 of the Sherman Act** |
|---|---|
| 1. Following a withdrawal of membership, targeted industry actors can still conduct business with the members of a trade association. To punish those that have broken the most essential rule of a trade association, namely to pay an outstanding award, expulsion is not always a sufficient deterrent. It is when an industry actor can no longer conduct trade with the member of a trade association, the best possible compliance with arbitral awards of specialized commercial arbitration can be expected. Hence, it is reasonably necessary to enforce this type of nonlegal sanction. | 1. The imposition of a refusal to deal with ostracized members is too severe and unnecessarily reduces the competitive status of targeted industry actors. An expulsion which fulfils all the appropriate safeguards is already a sufficient deterrent. Why add unnecessary financial and reputational harm? The assumption that more preclusive measures such as a refusal to deal are reasonably necessary can be rebutted. |
| 2. Because a refusal to deal with an ostracized industry actor is necessary to guarantee maximum compliance, the enforcement of awards of specialized commercial arbitration is better guaranteed. This enhances total welfare and consumer welfare. | 2. Albeit that a refusal to deal with ostracized members will increase the threat of non-compliance with an arbitral award, thereby benefiting the operability of specialized commercial arbitration which enhances total welfare and consumer welfare, the financial harm placed upon expelled market participants chiefly outweighs a contentious rise in the compliance with arbitral awards. |

| | |
|---|---|
| 3. US courts dance around the topic of whether to treat a refusal to deal as a *per se* violation or allow a rule-of-reason analysis. Its unbalanced treatment of *stare decisis* adds to the vagueness of how to perceive a refusal to deal under Section 1 of the Sherman Act.[583] It would be better to draw a clear-cut yardstick. To this extent, a good example would be to establish that any refusal to deal is tolerable when it was clear before the wrongful act what triggered this type of extrajudicial enforcement and that at least some procompetitive benefits such as improved total welfare and consumer welfare are being produced. In light of this necessary guidance, any member of a trade association which has included the possibility of a refusal to deal after a withdrawal of membership is well aware that both types of nonlegal sanctions can be expected. In addition, increased compliance with arbitral awards enhances consumer welfare and total welfare. It is not illogical to exculpate any trade association and its members for their role in executing a refusal to deal. | 3. Absent guidance by the FTC and US courts it is not easy to formulate a clear-cut yardstick of how to assess a refusal to deal with an ostracized member. A definition should be as restrictive as possible, because of the harmful effects of a refusal to deal on targeted industry actors, which are clearly not pernicious. Only when absent a refusal to deal is increased total welfare and consumer welfare unlikely[584], a rule rule-of-reason analysis can successfully exculpate a trade association and its members. It does not need much clarification that this is not the case for a refusal to deal with ostracized members. The dissemination of the name of a wrongdoer in a blacklist or withdrawing its membership already guarantees compliance with arbitral awards and, thus, enhances total welfare and consumer welfare. Albeit that a refusal to deal – arguably – to some degree increases the operability of specialized commercial arbitration, this is disproportionate to the anticompetitive effect on targeted industry actors. |

Contrary to the arguments in favour of illegality of a refusal to deal with ostracized members under Section 1 of the Sherman Act, one cannot deny the negative and restrictive effects for targeted industry actors. Not only is their financial standing worse compared with merely an expulsion, also the reputational damage inflicted upon them is more severe. Under antitrust doctrine this should be enough evidence to not legitimize a refusal to deal with an ostracized member. This type of extrajudicial enforcement is unnecessarily injurious to an ostracized member and in no way should be seen as proportionate to the wrong of not complying with an arbitral award. Alternative sanctions which provide less severe consequences for wrongdoers are available and have a comparable positive impact on consumer welfare and total welfare. Subsequently, a refusal to deal with ostracized members is not reasonably necessary to enhance both procompetitive benefits.

583 H. J. Hovenkamp, "The Rule of Reason", *Penn Law: Legal Scholarship Repository* 2018, p. 96.

584 There must be an essential causality between the refusal to deal and an increase in total welfare and consumer welfare.

## F. Key findings

All of the six trade associations researched operate a system of specialized commercial arbitration in which awards are enforced by use of nonlegal sanctions.[585] Although there are some differences between these associations in which modes of extrajudicial enforcement are available, the following six nonlegal sanctions are discernible. First, the dissemination of the name of a wrongdoer in a blacklist. Second, a withdrawal of membership. Third, a refusal to allow an expelled member to reobtain membership on the basis of an additional entry condition. Fourth, a refusal to deal with an ostracized member. Fifth, entering the premises of a wrongdoer without being invited and without a warrant. Sixth, albeit not a legal sanction, but treated as such for reasons of structure, limiting adequate access to public courts prior to arbitral proceedings and after an award. Without being affected by the observation that from the outset neither the FTC nor US courts have ever considered the illegality of these measures under Section 1 of the Sherman Act, this Chapter has aimed to shed some light on a potential unlawfulness under this provision which prohibits all contracts, combinations, and conspiracies in restraint of trade.[586] This was done by focusing on four steps: first, to determine whether the actors involved in initiating and executing the nonlegal sanctions qualify as a corporation or individual. Second, to establish whether there is a necessary concurrence of wills. Third, to assess whether the trade associations researched, their members and non-members, for their participating in the six types of nonlegal sanctions, can be held liable for a violation of Section 1 of the Sherman Act. Fourth, to discuss whether their participation in each anticompetitive measure realizes procompetitive benefits which outweigh the anticompetitive harm for targeted wrongdoers.

585 See Part II, Chapter 6, A.

586 On the ground that only *Richman* has ever considered the anti-competitiveness of blacklisting following non-compliance with an arbitral award under Section 1 of the Sherman Act, the research is still embryonic. Neither the FTC and US courts nor legal doctrine has ever explored the lawfulness of the other types of extrajudicial enforcement typically available.

## I. Qualification as member or undertaking

It does not require any elaborate analysis to classify the members and non-members as individuals or undertakings.[587] For a trade association this is perhaps a bit more difficult.[588] A qualification as an undertaking requires, according to the Tenth Circuit Court of Appeals in *Gregory v. Port Bridger Rendezvous Association*, that this actor as well as its members are engaged in unilateral conduct. When applying this legal rule to the conduct of the trade associations researched, given that both actors have a role in imposing and enforcing nonlegal sanctions, it is unmistakable that such institutions are undertakings within the meaning of Section 1 of the Sherman Act.

## II. Collusion: "a concurrence of wills"

Section 1 of the Sherman Act also requires that there is either a contract, a combination in the form of trust or otherwise, or a conspiracy.[589] The execution of nonlegal sanctions by members of the trade associations researched amounts to a contract, because they have agreed to the bylaws and rules of these associations when obtaining membership.[590] This is especially true when members conduct trade under a standardized contract which refers to these bylaws and rules which include nonlegal sanctions. A non-member can also enter into a contract, but only to the extent this industry actor conducts trade on the basis of a standardized contract provided by a relevant trade association with one of its members.

A combination in the form of trust or otherwise, at first glance, is not suitable to define a necessary collusion. Yet, the word combination serves as a catch-all provision and can be used to classify the role of the trade associations researched in the imposition of nonlegal sanctions.[591] The main reason being that a trade association protects the interests of its members on a not-for-profit basis by providing services. For non-members such argumentation is not plausible.

---

587 See Part II, Chapter 6, B, I.
588 See Part II, Chapter 6, B, II.
589 See Part II, Chapter 6, C.
590 See Part II, Chapter 6, C, I.
591 See Part II, Chapter 6, C, II.

With regard to the third form of collusion, namely the existence of a conspiracy, the former two forms of collusion are more suitable to define the cooperation between the trade associations researched and their members in imposing and executing nonlegal sanctions.[592] Non-members also do not typically fall within the constraints of this concept, absent a lack of intent. Nevertheless, for the purpose of this research, they have conspired.

## III. The anti-competitiveness of nonlegal sanctions

Nonlegal sanctions have a clear risk of violating Section 1 of the Sherman Act.[593] This is especially true with regard to the practice of blacklisting,[594] withdrawals of membership,[595] refusals for expelled members to regain membership on the basis of an additional entry condition,[596] and refusals to deal with ostracized members.[597] These measures stifle the financial standing of a targeted industry actor and cause reputational harm. Due to the high risk of market foreclosure and limited possibilities to undo reputational harm, one might draw the conclusion that this is sufficient evidence to establish that unlike non-members, both the trade associations researched as well as their members engage in collective boycotts which are inherently illegal.

However, three arguments rebut this assumption in favour of a more lenient approach, namely a rule-of-reason analysis. First, a trade association and its members classify as a joint venture, which is typically subject to a rule-of-reason defence. Second, there has been a paradigm shift in how to treat a collective boycott. Whereas in the past the more stringent *per se* violation approach was favoured, the focus is now on the more lenient rule-of-reason analysis. Third, nonlegal sanctions appear necessary to operate a system of specialized commercial arbitration as efficiently as possible, which lowers transaction and distribution costs. For refusals to deal with ostracized members, it is more doubtful whether this practice is inherently prohibited or whether procompetitive benefits may be balanced against its anticompetitive effects. The existence of less grave alternatives and its haz-

592 See Part II, Chapter 6, C, III.
593 See Part II, Chapter 6, D.
594 See Part II, Chapter 6, D, I.
595 See Part II, Chapter 6, D, II, 1.
596 See Part II, Chapter 6, D, II, 2
597 See Part II, Chapter 6, D, III.

ardous effect on targeted industry actors may be sufficient to favour the former approach. Regardless, this type of extrajudicial enforcement was discussed in a rule-of-reason analysis. The reason being that in the event of doubt it is better to understand the full picture and assess whether its procompetitive benefits outweigh the anticompetitive harm placed upon targeted market participants. In contrast, entering the premises of a recalcitrant member of a trade association without a warrant is insufficient to violate Section 1 of the Sherman Act. In addition, even if not a nonlegal sanction, limiting adequate access to public courts prior to arbitral proceedings and after an award does not violate this provision.

## IV. Rule-of-reason defence

Section 1 of the Sherman Act ought to be deployed, not to subvert measures that are reasonably necessary to operate a system that enhances total welfare and consumer welfare, but to bust colluding quislings with sinecures in perpetuity.[598] This truism is the foundation on which to assess the proportionality of the practice of blacklisting, withdrawals of membership and subsequent refusals to re-admit expelled members to membership on the basis of an additional entry barrier and refusals to deal with ostracized member. Considering that specialized commercial arbitration lowers transaction and distribution costs,[599] which clearly benefits total welfare and consumer welfare[600] and by reason that judicial enforcement has proven to be inefficient and less severe measures imposed by a trade association are insufficient to guarantee compliance with awards, nonlegal sanctions appear reasonably necessary.[601] While this is true for the dissemination of the names of wrongdoers in non-public blacklists[602] and withdrawals of membership[603] when both extrajudicial measures are structured in the least restrictive manner, refusing to re-admit ostracized members to membership because a two-year period has not yet elapsed and a Board of Directors is unconvinced, is either too long or too arbitrary and capricious.[604] Such re-admission conditions are not reasonably necessary to en-

598 See Part II, Chapter 6, E.
599 See Part II, Chapter 6, E, II.
600 See Part II, Chapter 6, E, II, 1.
601 See Part II, Chapter 6, E, II, 2.
602 See Part II, Chapter 6, E, II, 2, a.
603 See Part II, Chapter 6, E, II, 2, b, i.
604 See Part II, Chapter 6, E, II, 2, b, ii.

sure compliance with arbitral awards of specialized commercial arbitration. They primarily result in market foreclosure for targeted industry actors and cannot be offset by the procompetitive benefits realized by such a system. Similarly, but even more obvious, obligating members of a trade association to refuse to deal with ostracized members is too rigid and severe.[605] Targeted wrongdoers not only lose all access to the facilities of a trade association, but also can no longer conduct trade with other members of that association, which encompasses the most important commodities traders in a specific industry. As a result, these individuals and/or undertakings are subject to a dramatic reduction in the loss of market access. Attributable to an exacerbated market foreclosure when compared with the other nonlegal sanctions, the principle of proportionality is infringed.

605 See Part II, Chapter 6, E, II, 2, c.

# Chapter 7: Monopolization of any Part of the Trade or Commerce under Section 2 of the Sherman Act

## *A. Introduction*

The conduct of the trade associations researched and their members in excluding industry actors by imposing and executing nonlegal sanctions may also violate Section 2 of the Sherman Act. At its core, this provision is a mosaic of three offences. The first is "monopolization", applicable when an undertaking has accumulated sufficient market shares to exclude competition.[606] The second is "attempted monopolization", which is fitting when a single entity in furtherance of its monopoly status acts with a dangerous probability of success.[607] The final unilateral conduct which is deemed illegal by Section 2 of the Sherman Act is a "conspiracy to monopolize", applicable when at least two participants have a specific intent to achieve a monopoly through concerted action.[608]

For the purpose of this research, the first two offences are of principal importance to assess the illegality of imposing nonlegal sanctions by the trade associations researched when boycotting industry actors on adjacent second-tier commodities markets. The third offence is suitable to determine misconduct of their members when executing nonlegal sanctions. To conduct such research, it will, first, be discussed whether the trade associations researched actually monopolize any part of the trade or commerce among the several states, or with foreign nations (Paragraph B).[609] Second,

606 R. Miller and G. Jentz, "*Cengage Advantage Books: Business Law Today: The Essentials*", Mason: Thomson West 2008, p. 674.

607 D. Woods, "Hybrid Single Entities and the Market Power Requirement for Conspiracies to Monopolize Following Fraser: Are Courts Putting Form over Substance?", *University of Illinois Law Review* 2004, p. 1262.

608 W. F. Adkinson, Jr., K. L. Grimm, and C. N. Bryan, "Enforcement of Section 2 of the Sherman Act: Theory and Practice", *FTC Working Paper* 2008, p. 4.

609 The trade associations researched and their members are undertakings and persons within the meaning Section 1 of the Sherman Act. See Part II, Chapter 6, B, I, II. This entails that both actors are also subject to Section 2 of the Sherman Act. An additional discussion is not required; Similarly, a concurrence of wills is not a component of the first two offences of Section 2 of the Sherman Act analysis and will not be discussed. With regard to a conspiracy to monopolize, the concept of an agreement will be touched upon; non-members do not fit within

it will be debated if these institutions attempt to monopolize any part of the trade or commerce among the several states, or with foreign nations (Paragraph C). Third, it will be pointed out whether the role of the members of the trade associations in executing judicial enforcement is contrary to Section 2 of the Sherman Act (Paragraph D). Fourth, the statements made and the arguments used in the previous Paragraphs will be summarized by presenting the most important key findings (Paragraph E).

### *B. Unlawful monopolization by the trade associations researched*

At its core, Section 2 of the Sherman Act prohibits any undertaking or person to acquire or maintain monopoly power illegally.[610] Interpretation of this definition was provided by the Supreme Court in *United States v. Grinnell Corp.*, following which monopolization consists of two elements: "*(1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident*".[611]

The imposition of nonlegal sanctions by the trade associations researched must be analysed against this yardstick. Be that as it may, the fact that such extrajudicial enforcement does not have an effect on the market for regulation and private ordering on which these associations operate, but has an effect on targeted industry actors on a second-tier adjacent commodities market renders a difficult non-equivocal analytical challenge to a review.

#### I. The possession of monopoly power in the relevant market

According to the above mentioned definition provided by the Supreme Court in *United States v. Grinnell Corp.*, but also in its decision in *Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, monopolization re-

---

the description of Section 2 of the Sherman Act and are outside of the scope of this Chapter.

610 U.S. Department of Justice, "Competition and Monopoly: Single-firm Conduct under Section 2 of the Sherman Act", *U.S. Department of Justice* 2008, p. 5.

611 United States v. Grinnell Corp., 384 U.S. 563, 570 (1966).

quires "*the possession of monopoly power in the relevant market*".[612] The most common way to determine this is first to define the relevant market and then analyse whether the trade association has monopoly power within that market.[613] Unfortunately, two problems prevent applying this approach easily. First, nonlegal sanctions are imposed by the trade associations which are active in the market for regulation and private ordering, but have an impact on disloyal industry actors active in adjacent second-tier commodities markets. Hence, it is unsure in which market the trade associations researched should possess a monopoly: in the first-tier market for regulation and private ordering or the second-tier commodities market.[614] Second, setting a specific percentage as the required market share is controversial.

### 1. Market definition: Monopoly leveraging

Typically, to fall within the ambit of Section 2 of the Sherman Act, unilateral action (*e.g.* nonlegal sanctions) should be imposed and felt within one and the same market. With regard to the trade associations researched, the situation is different. They use one market to be dominant in order to punish bad behaviour of their members in adjacent second-tier commodities markets. This raises the ensuing question whether the trade associations researched must also possess market power in the other market? If the answer to this question is affirmative, it would require a difficult and thought-provoking calculation of the market shares of their members in each relevant commodities market. To prevent this, the concept of "monopoly leveraging" provides a more straightforward solution. In consonance with this theory, monopoly leveraging is the use of monopoly power in one market in order to obtain a competitive advantage in another market by means of anticompetitive conduct.[615] Even though establishing anti-competitiveness pursuant to Section 2 of the Sherman Act is not

612 Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 407 (2004).

613 N. F. Diebold, "*Non-Discrimination in International Trade in Services: 'Likeness' in WTO/GATS*", Cambridge: Cambridge University Press 2010, p. 277.

614 Trade associations are active on the market for regulation and private ordering and their members on relevant commodities markets. While an oversimplified observation, it is correct.

615 J. H. Bogart, "*Circuit Conflicts in Antitrust Litigation*", Chicago: American Bar Association 2009, p. 34.

the aim under the first requirement of monopolization, this concept illustrates that it is sufficient for the trade associations researched to have a monopoly status in their respective markets for regulation and private ordering.

### 2. Market shares in the market for regulation and private ordering

Calculating the market shares for each of the trade associations researched is contentious, as it largely depends on each trade association's own indication of this amount and sometimes the literature. Absent other reliable sources, this is briefly discussed below for each of them.

#### a. The International Cotton Association

By taking a cursory glance at the "activity" or "about" section, it is unmistakable that the ICA sees itself as the world's leading association to help regulate the sale and purchase of raw cotton on the basis of a set of bylaws and rules, including, but not limited to, providing arbitration services on the market for regulation and private ordering.[616] As this may be an overexaggeration to attract more potential member undertakings, especially since it appears that countries with a large economy have similar trade associations,[617] reference should be made to the ICA membership directory of 2010.[618] In that directory, the ICA explains that today 60% of the world's cotton is still traded using these rules.[619] It would be wise to define the market of regulation and private ordering in the cotton industry in which the ICA is active, globally. While information is lacking about the amount of market shares the ICA has in the territory of the US, which is required to establish the existence of monopoly power under Section 2 of the Sherman Act, it is not unlikely that a similar amount of market shares

616 http://www.ica-ltd.org/about-ica/.

617 Important trade associations include: the Association Cotonnière Africaine (http://www.africotton.org/aca/en/), the China Cotton Association (http://english.china-cotton.org/) and the American Cotton Shippers Association (http://acsa-cotton.org/). For a full list of the trade associations that are members of the CICCA, see http://www.cicca.info/member_associations.php.

618 ICA, ICA membership directory, incorporating annual review, P. 12.

619 See also http://www.liverpoolmuseums.org.uk/maritime/exhibitions/cotton/traders/trading-rules.aspx.

can be detected when the market is defined regionally in the territory of the US.

### b. The Diamond Dealers Club

With regard to the US-based DDC, the mission statement (as can be found on its website) suggests that this association is the largest diamond trade organization in the United Stated and one of the leading diamond exchanges in the world.[620] In 1985, the DDC handled roughly 80% of all diamonds coming into the United States, with a worldwide purchase that amounted to $22 billion (*i.e.* 36% of the world market).[621] However, DDC membership has declined over the past two decades, from 2,000 to 1,200 undertakings.[622] Given the secrecy of this association, no recent information concerning market capitalization is available. Such lack of empirical data renders it difficult to measure market shares. However, one thing is sure: the DDC remains the largest operator on the market for regulation and private ordering in diamonds when the market is defined regionally in the territory of the US.[623]

---

620 https://www.nyddc.com/about-the-ddc.html.

621 http://articles.latimes.com/1985-08-18/business/fi-1708_1_diamond-prices; In 1979 also 80% of all diamonds were traded through the DDC in the US.

622 B. D. Richman et al, "*Journal of Legal Analysis, Vol. 9, Is. 2*", in: B. D. Richman (ed), "An Autopsy of Cooperation: Diamond Dealers and the Limits of Trust-based Exchange", Oxford: Oxford University Press 2017, p. 256.

623 When the market is defined globally, DDC market shares are significantly less. Given the competition of the Federation of Belgium Diamond Bourses (the "FBDB"), which holds 84% shares for the market for regulation and private ordering in rough diamonds and 50% market shares in polished diamonds globally, monopolization is not to be expected when the market is defined globally; SBD, "De Belgische Diamentnijverheid", *Algemene vergadering van SBD* 2014, p. 7; In 2012, the percentage of worldwide rough diamond that went through Antwerp amounted to 80%. See Antwerp World Diamond Centre, "Antwerp Diamond Masterplan – Diamonds love Antwerp 2020", *Antwerp World Diamond Centre* 2012, p. 5, 69, 148, 154. In the exchange of rough diamonds, Antwerp is the world leader; The Heritage Diamond Group (http://www.heritagediamonds.net/antwerp-diamond-bourse/) explains on its website that 85% of the world's rough and more than 65% of polished diamonds are exchanged in Antwerp; The Auction House of the Russian Federation (AHRF) explains that Antwerp is the most important centre for the diamond business is Antwerp. Approximately 80% of all diamonds that are processed and sold in the world are traded in this city. See https://www.auction-house.ru/en/news_analytics/rynok-almazov-mira/;

c. The Grain and Feed Trade Association

In my view, GAFTA is active on the global market for regulation and private ordering in agricultural commodities, spices and general produce because it perceives itself as an international organization that promotes trading for more than 1,700 international members that are located in 90 countries worldwide.[624] Even though it does not appraise its own market share, a rough calculation is redundant. This is because of the paucity of international competing trade associations that are active on the market for regulation and private ordering with regard to the grain and feed trade industry. When the market is defined regionally to the territory of the US, it is almost certain that similar levels of market power are held by GAFTA on the market for regulation and private ordering.

d. Federation of Cocoa Commerce

Although calculating market shares involves an exorbitant empirical-intensive enquiry, the literature agrees that virtually all international business in tangible cacao is conducted on the basis of standardized contracts for sales that were developed by the FCC and the Cocoa Merchants' Association of America (CMAA).[625] Subsequently, the FCC is active on the global market for regulation & private ordering in the cocoa trade. When the market is

---

The market capitalization of the FBDB has not changed over the last 15 years. Richman explains that "*Eight out of ten of the world's uncut diamonds and one in two polished diamonds pass through Antwerp, generating $36 billion in exports in 2004.*" See B. D. Richman, "How Community Institutions Create Economic Advantage: Jewish Diamond Merchants in New York", *Law & Social Inquiry* 383 2006, p. 18.

624 https://www.gafta.com/Membership.

625 S. T. Beckett, "*Industrial Chocolate Manufacture and Use – Fourth Edition*", Hoboken: Blackwell Publishing 2009, p. 25; S. T. Beckett, M. S. Fowler, and G. R. Ziegler, "*Beckett's Industrial Chocolate Manufacture and Use – Fifth Edition*", Hoboken: Wiley-Blackwell 2017, p. 28; https://www.icco.org/about-cocoa/trading-a-shipping.html. Also the International Cocoa Organisation (ICCO) supports the view that the FCC and the CMAA are the main international cocoa trade associations; R. Dand, "*The International Cocoa Trade*", Cambridge/Philadelphia/New Delhi: Woodhead Publishing Limited 2011, p. 97-98. The market influence of the FCC and the CMAA may change in the future due to the recently formed Cocoa Association of China (CAC). Despite its aim to publish contract terms, it has till now failed to do so.

defined regionally to the territory of the US, owing to an absence of US competing trade associations, it is also plausible that the majority of cocoa contracts affecting US trade are based on the standardized contracts of the FCC.

### e. London Metal Exchange

*Schofield* explains that the majority of global transactions are made on the basis of the contractual terms of the LME.[626] In addition, in 2018 *Revuelta* explains that more than 80% of global non-ferrous business is transacted through the LME, with an annual aggregate trading of about $10 trillion.[627] Hence, the LME is active on the global market for regulation and private ordering in the metal trade. When the market is defined regionally to the territory of the US, a similar market share amount can be expected.

### f. Federation of Oils, Seeds and Fats Association

Following only a cursory glance at the opening page of its website, FOSFA defines itself as "*a professional international contract issuing and arbitral body concerned exclusively with the world trade in oilseeds, oils and fats with 1,123 members in 90 countries*". [628] Its dominance can especially be confirmed by looking at the fact that an estimated 85% of all international trade in oilseeds, oils and fats are conducted using FOSFA contracts.[629] As a result,

---

626 N. C. Schofield, "*Commodities Derivatives: Markets and Applications*", Hoboken: John Wiley & Sons 2007, p. 75; See also F. A. Lees, "*Financial Exchanges: A Comparative Approach*", New York/Abingdon: Routledge 2012, p. 164; R. King, "*Jehovah Himself Has Become King*", Bloomington: AuthorHouse 2010, p. 252. The LME is the world's leading trade association active in non-ferrous metals. It facilitates on a busy day contracts worth more than $10 billion.

627 M. B. Revuelta, "*Mineral Resources: From Exploration to Sustainability Assessment*", Cham: Springer International Publishing AG 2018, p. 44; A similar empirical outcome relates to The London Metal Exchange, "A Guide to the LME", *The London Metal Exchange* 2013, p. 1; Other support for *Revuelta's* statement can be found in The London Metal Exchange, "A Guide to Trading LME", The London Metal Exchange 2016, p. 1.

628 https://www.fosfa.org/.

629 A. Lista, "*International Commercial Sales: The Sale of Goods on Shipment Terms*", Abingdon/New York: Routledge 2017, p. 10; Food and Agriculture Organization of the United Nations and World Health Organization in collaboration

FOSFA is active on the global market for regulation and private ordering in oilseeds, oils and fats. Also here, when the market is defined regionally to the territory of the US, it is likely that a large majority of US trade in oils, seeds and fats is conducted on the basis of standardized contracts provided by FOSFA.

### 3. Monopolization in the market for regulation and private ordering

To date, US courts differ on the market share required for monopoly power. The 6th Circuit Court of Appeals in *Spirit Airlines v. Northwest Airlines* and the 5th Circuit Court of Appeals in *Heattransfer Corp. v. Volkswagenwerk, A.G.* argued that holding more than 70% market share creates a *prima facie* showing of such a position.[630] Conversely, in *Blue Cross & Blue Shield v. Marshfield Clinic.*, the 7th Circuit Court of Appeals argued that "*Fifty percent is below any accepted benchmark for inferring monopoly power from market share*".[631] High entry barriers is a factor that affects this analysis as well.

With that said, all of the six trade associations researched are the most important players when the market of regulation and private ordering is defined regionally to the territory of the US. Two of them hold probably more than 70% market shares when the market is defined regionally,[632]

---

with the National Institute for Public Health and the Environment (Netherlands), "*Development of Criteria for Acceptable Previous Cargoes for Fats and Oils*", Food and Agriculture Organization of the United Nations and World Health Organization in collaboration with the National Institute for Public Health and the Environment (Netherlands) 2007, p. 20; J. R. Pritchard, "Oilseed quality requirements for processing", *Journal of the American Oil Chemists' Society* 1983, p. 322. In 1983, 80% of all international trade on oilseeds, oils and fats was conducted on the basis of FOSFA contracts; A. Baldwin, "*World Conference on Emerging Technologies in the Fats and Oils Industry*", In: E.C. Campbell (red.), "Trade Association Rules - Impact on International Trade", Urbana: American Oil Chemists' Society 1986, p. 24. In 1986, FOSFA contracts amounted to a market share of around 80% in the international trade of oilseeds, oils and fats.

630 Spirit Airlines v. Northwest Airlines, 431 F.3d 917, 935-936 (6th Cir. 2005); Heattransfer Corp. v. Volkswagenwerk, A.G., 553 F.2d 964, 981 (5th Cir. 1977).

631 Blue Cross & Blue Shield v. Marshfield Clinic, 65 F.3d 1406, 1411 (7th Cir. 1995); This has been reiterated by the 11th Circuit Court of Appeals in Bailey v. Allgas, Inc., 284 F.3d 1237, 1250 (11th Cir. 2002). In its judgment, the Court argued that "*A market share at or less than 50 percent is inadequate as a matter of law to constitute monopoly power*".

632 This is true for the LME and FOSFA.

whereas the other four have either 60% market share,[633] are without serious competitors,[634] or its members trade almost exclusively on the basis of the association's standardized contracts.[635] These observations in combination with market foreclosure effects when an industry actor is targeted by nonlegal sanctions is enough evidence to conclude that these trade associations researched hold monopoly power in the markets for regulation and private ordering concerning the US territory.

## II. Anticompetitive conduct

Following the Opinion of Justice Scalia in the Supreme Court's judgment in *Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, "*the possession of monopoly power will not be found unlawful unless it is accompanied by an element of anticompetitive conduct*".[636] This entails that the rather difficult wording provided by the Supreme Court in *United States v. Grinnell Corp.*, which requires "*the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident*", should be interpreted to mean that Section 2 of the Sherman Act is violated when a monopolist's conduct results in anticompetitive effects by harming the competitive process.[637] There is only one problem: no consensus exists on what is considered anticompetitive.[638] Four theories are available to measure such harm. First, the effects balancing test which focuses on the overall impact of unilateral conduct on consumers or net effects on consumer welfare, and whether this is

633 The ICA.
634 GAFTA and the DDC.
635 FCC.
636 Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 407 (2004); R. L. Miller, "*Cengage Advantage Books: Business Law Today, The Essentials: Text and Summarized Cases – 11th Edition*", Boston: Cengage Learning 2015, p. 617. The main reason being that it would be unwise to punish any company that is efficient and well managed and, hence, has a strong financial position.
637 Aspen Publishers, "A*ntitrust: Keyed to Pitofsky, Goldschmid, and Wood's Trade Regulation: Cases and Materials Fifth Edition*", New York: Aspen Publishers 2004, p. 71.
638 U.S. Department of Justice, "Competition and Monopoly: Single-firm Conduct under Section 2 of the Sherman Act", *U.S. Department of Justice* 2008, p. 34.

sufficient to offset any potential adverse effects.[639] Second, the profit-sacrifice and no-economic-sense tests which draw the thin line between merely aggressive competition and prohibited conduct that damages the competitive process in the sense that both theories ask the question whether there are less restrictive alternatives available and if the non-exclusionary profits are greater than the harm.[640] Third, the equally efficient competitor test in which one party must prove that unilateral conduct is likely to exclude an equal or more efficient competitor from the market, whereas the other party must provide evidence that procompetitive benefits outweigh anticompetitive harm.[641] Fourth, the disproportionality test which determines whether anticompetitive harm is disproportionate to economic and consumer benefits.[642]

Fortunately, choosing one theory to assess the illegality of nonlegal sanctions imposed by the trade associations researched is immaterial. All of them contain a rule-of-reason analysis by balancing the generated procompetitive benefits against anticompetitive harm.[643] Before explaining each of the four forms of extrajudicial enforcement as to whether the bounds of Section 2 are contravened, it is first necessary to refer back to the concept of monopoly leveraging. This is because the unilateral actions of the trade associations researched do not have an impact on actors operating on the same market for regulation and private ordering, but on targeted industry operators active on the adjacent second-tier commodities markets.

---

639 S. C. Salop, "Exclusionary Conduct, Effect on Consumers, and the Flawed Profit-Sacrifice Standard", *73 Antitrust L. J.* 2006, p. 330.

640 U.S. Department of Justice, "Competition and Monopoly: Single-firm Conduct under Section 2 of the Sherman Act", *U.S. Department of Justice* 2008, p. 39. It is possible to approach the profit-sacrifice and no-economic-sense test as two separate tests. Here, however, owing to its similarities both have been discussed together.

641 R. A. Posner, "*Antitrust Law, Second Edition*", Chicago: University of Chicago Press 2001, p. 194-195.

642 Amicus Curiae Briefs in Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398 (2004). See https://www.justice.gov/atr/case-document/brief-united-states-and-federal-trade-commission-amici-curiae-supporting-0.

643 This is to some degree similar to the approach in Section 1 of the Sherman Act. The defendant must provide all information regarding procompetitive benefits. Yet, in this Chapter the chosen structure differs. The anti-competitiveness of nonlegal sanctions will be discussed at the same time with a balancing of its procompetitive benefits generated. This is because there is no discussion if monopolization is subject to a *per se* or rule-of-reason standard under Section 2 of the Sherman Act. A rule-of-reason standard is the norm under this provision.

1. Monopoly leveraging doctrine: Attributing liability for a violation of Section 2 of the Sherman Act to the trade associations researched for utilizing a monopoly position in one market to punish wrongdoers operating on a different market

As already briefly touched upon in the monopolization requirement as discussed above,[644] the theory of monopoly leveraging provides the best yardstick to measure unilateral conduct that has an effect on actors operating on another market. From a historical perspective, the doctrine was first introduced by the Supreme Court in *United States v. Griffith*.[645] In its judgment, the Court affirmed that having a monopoly in one market cannot be used to foreclose competition, or to destroy a competitor in another market.[646] While this created a legal hiatus as to whether the two requirements of monopolization need to be present, or if the theory of monopoly leveraging creates a stand-alone prohibition, the Eastern District of Louisiana District Court *In re Educ. Testing Serv.*,[647] the District of Columbia Court of Appeals in *Covad Communications Company v. Bell Atlantic Corp.*,[648] and the 11th Circuit Court of Appeals in *Morris Communications Corp. v. PGA Tour*[649] ruled that a single entity can only be held liable for monopoly leveraging when both monopolization requirements are fulfilled.

Against this background, due to the fact that the unilateral conduct of the trade associations researched falls within the ambit of the doctrine of monopoly leveraging as elaborated by US courts, the two-tier test of monopolization must be fulfilled to hold these associations liable for violation of Section 2 of the Sherman Act. Whereas the existence of monopoly power is confirmed, the next Paragraph focuses on the unlawfulness of nonlegal sanctioning as imposed by the trade associations researched by applying the four theories of anti-competitiveness for each restriction. In addition, the overarching legal rule provided by US courts is introduced.

644 See Part II, Chapter 7, B I, 1.
645 United States v. Griffith, 334 U.S. 100 (1948).
646 United States v. Griffith, 334 U.S. 100, 107-108 (1948).
647 In re Educ. Testing Serv. Litig., 429 F. Supp. 2d 752, 759 (E.D. La. 2005).
648 Covad Communications Company v. Bell Atlantic Corp., 398 F.3d 666, 672 (D.C. Cir. 2005).
649 Morris Communications Corp. v. PGA Tour, 364 F.3d 1288, 1294 (11th Cir. 2004).

2. The anti-competitiveness of nonlegal sanctioning attributable to the trade associations researched and the existence of a rule-of-reason defence

An analysis of the anti-competitiveness of nonlegal sanctioning and the availability of a rule-of-reason defence will bear many similarities with the discussion pertaining to their unlawfulness pursuant to Section 1 of the Sherman Act. This is because for both provisions balancing procompetitive benefits against the anti-competitiveness harm placed upon targeted wrongdoers plays a central role.[650] However, there is one important difference: the standard of determining whether unilateral conduct is or is not permissible under Section 2 of the Sherman Act is more clearly defined.[651] In this regard, the 8th Circuit Court of Appeals in *Trace X Chemical, Inc. v. Canadian Industries* must be mentioned.[652] In its judgment, the Court ex-

650 A rule-of-reason analysis cannot only be used to justify the anti-competitiveness of certain nonlegal sanctions pursuant to Section 1 of the Sherman Act, it also governs most monopolization claims under Section 2 of the Sherman Act. See United States v. Microsoft Corp., 253 F.3d 34, 59 (D.C. Cir. 2001); See also Standard Oil Co. of New Jersey v. United States, 221 U.S. 1, 62 (1911). The Court ruled that *"when the second section [of the Sherman Act] is thus harmonized with and made as it was intended to be the complement of the first, it becomes obvious that the criteria to be resorted to in any given case for the purpose of ascertaining whether violations of the section have been committed is the rule of reason, guided by the established law*"; See also R. M. Hilty, A. Früh, "Lizenzkartellrecht: Schweizer Recht. gespiegelt am US-amerikanischen und europäischen Recht", Bern: Stämpfli Verlag AG 2017, p. 64; According to Fifth Circuit Court of Appeals in Mid-Texas Communications v. Am. Tel. Tel., 615 F.2d 1372, 1389 n. 13 (5th Cir. 1980), this entails that a similar rule-of-reason analysis must be carried out under both provisions.

651 This is merely an assumption that can be rebutted. Regardless of this uncertainty, in my opinion, the yardstick with regard to Section 2 of the Sherman Act is more precise by virtue of two reasons: first, a monopoly is not necessarily bad for competition, whereas an agreement between competitors usually is. As a result, drafting a legal rule to assess an infringement of Section 2 of the Sherman Act is more straightforward, as the focus should be on normal business conduct or not. For the establishment of illegality under Section 1 of the Sherman Act such a rule does not exist. There are many legal rules on how to approach an infringement pursuant to Section 1 of the Sherman Act. Second, there is more antitrust case law pertaining to a Section 1 of the Sherman Act violation than a Section 2 of the Sherman Act infringement. Hence, it is logical than there is more divergence in terms of having a clear-cut legal rule with regard to the former provision than the latter provision.

652 Trace X Chemical v. Canadian Industries, 738 F.2d 261 (8th Cir. 1984).

plained that anticompetitive conduct is conduct without a legitimate business purpose, which is not an ordinary business practice typically used in a competitive market.[653] In addition, the Court ruled that anticompetitive intent is insufficient to reach the conclusion that conduct contravenes Section 2 of the Sherman Act,[654] unless according to the 7th Circuit Court of Appeals in *Ball Memorial Hospital, Inc. v. Mutual Hospital Insurance, Inc.*, unilateral conduct is also rational for a non-dominant company.[655] Put differently, in line with the reasoning of the 6th Circuit Court of Appeals in *MCI Communications Corp. v. AT&T*, when a non-monopolist finds unilateral conduct of a monopolist beneficial then it is - arguably - legitimate.[656]

Against this background, for each of the types of nonlegal sanctions described in this research, it will be argued whether they are considered ordinary business practices of the trade associations researched or atypical harmful anticompetitive conduct. As Part II, Chapter 6 of this research outlines, there are many arguments that must be balanced against each other. To prevent a discussion that mirrors and overlaps with that in the previous Chapter, the analysis of whether the role of the trade associations researched in initiating the practice of blacklisting, withdrawing membership, denying membership for expelled members on the basis of an additional entry condition, refusing to deal with an ostracized member and entering the premises of a wrongdoer to collect evidence violates Section 2 of the Sherman Act, will be less thorough.[657]

### a. Blacklisting

Each of the six trade associations researched includes the names of wrongdoers for not complying with an arbitral award in a blacklist. Does this mean that it is standard business practice and thereby permissible under Section 2 of the Sherman Act? In my opinion, providing an answer can best be done by approaching this question from the perspective of two groups. The first group comprises those individuals who advocate unimpeded competition (*i.e.* the liberalists). Subsequently, the practice of black-

653 Trace X Chemical v. Canadian Industries, 738 F.2d 261, 266 (8th Cir. 1984).
654 Trace X Chemical v. Canadian Industries, 738 F.2d 261, 268 (8th Cir. 1984).
655 Ball Memorial Hospital, Inc. v. Mutual Hospital Insurance, Inc., 784 F.2d 1325, 1338-1339 (7th Cir. 1986).
656 MCI Communications Corp. v. AT&T, 708 F.2d 1081, 1113 (7th Cir. 1982).
657 United States v. Microsoft Corp., 253 F.3d 34, 59 (D.C. Cir. 2001).

listing should be considered as unilateral conduct of a trade association to ensure the enforcement of arbitral awards of specialized commercial arbitration. It is not convincing that any non-monopolist company (here: targeted wrongdoer) would disagree with such an observation because without this method of extrajudicial enforcement, the whole arbitration system is at risk of being ineffective.

The second group (*i.e.* the institutionalists) consists of individuals who apply the four theories of anti-competitiveness to conduct more comprehensive research in order to address the overgeneralization and superficial reasoning of the first group. In view of this, blacklisting is the least restrictive measure to ensure the success of specialized commercial arbitration, which in turn enhances total welfare and consumer welfare (*i.e.* the profit-sacrifice and no-economic-sense tests). Both procompetitive benefits offset the adverse effects placed upon blacklisted wrongdoers, even though this type of unilateral conduct can exclude such a competitor from the other members of a relevant trade association from an adjacent second-tier commodities market (*i.e.* the effects-balancing test and the equally efficient competitor test). The anticompetitive harm is proportionate to realize economic and consumer benefits (*i.e.* the disproportionality test).

Whichever group is chosen matters. The second group undertakes a far more detailed research and must be preferred, whereas the first group is not useful here. Albeit that blacklisting is indeed the least restrictive of all the extrajudicial measures, how it is structured by the trade associations researched is not. Five recommendations must be made in order to escape antitrust liability under Section 2 of the Sherman Act. First, blacklists should not be made publicly available, but accessible for members only. Second, it would be better to allow a third party to collect, handle and disseminate the names of a wrongdoer in a blacklist, instead of a trade association which is often biased. Third, the dissemination of the names of disloyal industry actors in a blacklist should only occur after clearly defined deadlines have lapsed and a final warning. Fourth, when the effect of blacklisting also targets an industry actor's social standing, more reluctance should be shown. Fifth, every blacklisted member should be given the opportunity to ask for an internal appeal to object to such decision.

### b. Membership rules and barriers for market access

With regard to membership rules and barriers for market access, the following two Paragraphs focus on whether a withdrawal of membership and

difficulties in being re-admitted to membership after such an expulsion are considered anticompetitive within the meaning of Section 2 of the Sherman Act.

### i. Withdrawal of membership

The majority of the trade associations researched have included the possibility to ostracize a wrongdoer in their bylaws and rules.[658] As a result, a targeted industry actor has a substantial risk of being ousted from the relevant adjacent second-tier commodities market. Considering that Section 2 of the Sherman Act is primarily aimed at preventing harm done to competition by excluding market participants, the restrictiveness of an expulsion must not be underestimated.[659] Whereas the liberalists' view is in favour of exculpating any of the trade associations researched that engage in ostracizing a member, the reasons being that expulsions are common in many commodities industries and are well within the competences of these associations to organize a model of extrajudicial enforcement that is as effective as possible to punish disobedient industry actors (*i.e.* freedom of association), the institutionalists would not reach such a conclusion prematurely. Instead, they would apply the four theories of anti-competitiveness as a yardstick to consider a violation of Section 2 of the Sherman Act.

Before conducing such a balancing exercise, the extent of the anti-competitiveness must be encapsulated. To do so, the essential facility doctrine plays a pivotal role. This theory is applicable when a denial of access to an essential facility enables a monopolist to extend its monopoly in an adjacent market.[660] In establishing liability under this doctrine for the trade associations which impose a withdrawal of membership on a recalcitrant member, the 7th Circuit Court of Appeals in *MCI Communications Corp. v. ATCT* reiterated US case law and summarized previous mandatory aspects developed in the judgments of US courts in a test consisting of four

658 GAFTA does not engage in suspending or terminating membership, unlike the other trade associations researched.

659 W. F. Adkinson, Jr., K. L. Grimm, and C. N. Bryan, "Enforcement of Section 2 of the Sherman Act: Theory and Practice", *Working Paper* 2008, p. 3.

660 D. Gabel and D. F. Weiman, "*Opening Networks to Competition: The Regulation and Pricing of Access*", New York: Springer Science+Business Media 1998, p. 190.

prongs.[661] Subsequently, to assess when a refusal of access to an essential facility constitutes actionable monopolization, this test requires the "*(1) control of the facility by the monopolist; (2) a competitor's inability to reasonably duplicate the facility; (3) the monopolist's denial of the facility's use to the competitor; and (4) the feasibility of providing access to the facility*".[662]

Whereas in Part II, Chapter 6, II, b, i all of the four requirements were discussed in a concise review, given that the essential facility doctrine is more appropriate with regard to Section 2 of the Sherman Act, a more detailed discussion is required. Unfortunately, this is a rather arbitrary and difficult task. None of the prongs of the four-step essential facility doctrine test are sufficiently clear to give practical guidance.[663] What constitutes "essential", "reasonable duplication", "denial" and "feasibility" are ill-defined and can vary from case to case. In my opinion, *Lao* provides the best way to interpret whether a monopolist refuses access to an essential facility.[664] *Lao* summarizes the four prongs in three prongs, namely in terms of essentiality: a denial of access, "non- rivalrousness", and feasibility.[665] With regard to the first requirement, a facility is essential when control of it has the potential to eliminate competition and when duplication of the facility is not reasonably possible.[666] This follows also from the previously discussed judgment of the Court of Appeals of the District of Columbia Cir-

---

661 MCI Communications Corp. v. ATCT, 708 F.2d 1081 (7th Cir. 1983); The judgment serves as a clarification. See S. M. Colino, "*Competition Law of the EU and UK*", Oxford: Oxford University Press 2019, p. 393.

662 MCI Communications Corp. v. ATCT, 708 F.2d 1081, 1132 (7th Cir. 1983); The test was developed as an obiter dictum. See C. Enaux, "*Effiziente Marktregulierung in der Telekommunikation: Möglichkeiten und Grenzen der Rückführung sektorspezifischer Sonderregulierung in das allgemeine Wettbewerbsrecht*", Münster: Lit Verlag 2004, p. 156; Subsequent US court judgements have reiterated this test. See, for example, Intergraph Corp. v. Intel Corp., 195 F.3d 1346, 1356, 1357 (Fed. Dis. 1999); City of Anaheim v. S. Cal. Edison Co., 955 F.2d 1373, 1380 (9th Cir. 1992); City of Malden v. Union Elec. Co., 887 F.2d 157, 160 (8th Cir. 1989); Ferguson v. Greater Pocatello Chamber of Commerce, Inc., 848 F.2d 976, 983 (9th Cir. 1988).

663 E. Hope, "*Competition and Trade Policies: Coherence or Conflict*", London/New York: Routledge 2005, p. 61.

664 M. Lao, "Search, Essential Facilities, and the Antitrust Duty to Deal", *Northwest Journal of Technology and Intellectual Property, Vol. 11, Is. 5* 2013, p. 298-304.

665 Ibid., p. 301. *Lao* considers the first two requirements under the four-step essential facility doctrine under the concept of "essentiality". He does this by arguing that the infeasibility of duplication requirement is "*almost inextricable from the essentiality concept*".

666 Ibid., p. 298.

cuit in *Hecht v. Pro-football, Inc*. When applying this definition to assess whether the services provided by the trade associations researched are essential, two arguments corroborate such finding. First, there are no feasible alternatives following a withdrawal of membership for a targeted industry actor. Second, it is clear that access to the services is vital to being competitive within the relevant adjacent second-tier commodities market for such a wrongdoer.

The second requirement of the essential facility doctrine, namely the denial of access, does not normally give rise to misinterpretation by US courts.[667] This entails that a withdrawal of membership can be seen as a denial of access to the services of a relevant trade association. Pertaining to the feasibility requirement, the 9th Circuit Court of Appeals in *City of Anaheim et al v. Southern California Edison* ruled that it should be interpreted to mean that the monopolist has "no valid business reason" for denying access to the facility.[668] This entails that such unilateral conduct must be balanced against efficiency justifications, or the four theories of anti-competitiveness. While approaching each of them separately is appropriate, a succinct discussion is satisfactory. A withdrawal of membership addresses the loophole in enforcement when blacklisting alone is not sufficient to ensure compliance with an arbitral award. Subsequently, it has a positive impact on maintaining an efficient and successful system of specialized commercial arbitration. This enhances total welfare and consumer welfare. Adverse effects for targeted industry actors do not outweigh these positive effects *(i.e.* the effects-balancing test) if there are procedural safeguards in place comparable to those described in Part II, Chapter 6, E II, 2 b, i.[669] There are also no alternative methods of extrajudicial enforcement available when blacklisting is ineffective and the exclusionary profits for a relevant commodities market are greater than the harm inflicted upon a targeted wrongdoer (*i.e.* the profit-sacrifice and no-economic-sense test). Expulsions are likely to exclude a targeted recalcitrant member from the market, but the procompetitive benefits offset such harm (*i.e.* the equally efficient competitor test). Put differently, the anticompetitive harm is propor-

667 Ibid., p. 301. Only in the case of search, this requirement is not that easy to fulfil (*e.g.* Google search inquiry, etc.).

668 City of Anaheim et al v. Southern California Edison 995, F2d 1373, 1380 (1992).

669 These are (i) the imposition of a withdrawal of membership only when blacklisting is ineffective; (ii) a case-by-case imposition; (iii) an imposition of a withdrawal of membership only when internal appeal possibilities are exhausted; and (iv) regaining membership following an expulsion is not made too difficult.

tionate to the economic and consumer benefits generated (*i.e.* the disproportionality test).

However, the manner in which withdrawals of membership are structured by the trade associations researched does not take the least restrictive form. Instead, a withdrawal of membership procedure should be based on clearly defined, transparent, non-discriminatory reviewable criteria that allow for cumulative penalties enforceable in national courts, with a final threat of a suspension, or in the worst case scenario when non-compliance is combined with other misconduct, an indefinite expulsion provided that the trade association has objective, reasonable and legitimate reasons for doing so which are based on fair and neutral criteria (*e.g.* do not favour certain members over others). In addition, expelled members should be given the chance to request an internal appeal tribunal to review such a decision and must be advised of the possibility to ask for recourse in public courts. If these recommendations are adhered to, it is unlikely that the trade associations researched violate Section 2 of the Sherman Act.

### ii. Denial of membership for expelled members on the basis of an additional entry condition

When it is made more difficult for an ostracized member to regain membership and, as a result, access to an essential facility is unnecessarily denied, this can be incongruous with Section 2 of the Sherman Act. Any trade association should not impose overly burdensome and gratuitous entry requirements for wrongdoers.[670] The lapse of a period of two years following an expulsion and the approval by a Board of Directors tend to bar disloyal former members from easily re-obtaining membership. Whereas both measures are restrictive, it is the latter entry condition that can be seen as the most harmful. It carries the risk of refusing access to an essential facility without explanation, valid grounds and is based on arbitrary decision-making. Regardless of the fact that it renders an expulsion a better deterrent, as regaining membership may be indefinitely excluded once an arbitral board is satisfied, serious anticompetitive effects are inevitable for

670 For the reason that only two of the trade associations researched impose additional re-entry barriers following a withdrawal of membership, the liberalists' approach is not applicable. Such an imposition is not standard business practice. Subsequently, the focus is on the institutionalists' approach by applying the four theories of anti-competitiveness.

targeted industry actors. It is unreasonable and disproportionate to guarantee a well-functioning system of specialized commercial arbitration, which enhances total welfare and consumer welfare (*i.e.* the disproportionality test). Adverse effects for ostracized former members that are arbitrarily denied re-obtaining membership outweigh both efficiency gains (*i.e.* the effects-balancing test). Arbitrarily denying re-admission to membership for an expelled member is also likely to exclude this wrongdoer from the market (*i.e.* the equally efficient competitor test). This is because of the necessity to have access to the services/essential facility of a relevant trade association. Less restrictive measures are also available to guarantee the effectiveness of a withdrawal of membership (*i.e.* the post-sacrifice and no-economic-sense test). Instead of allowing a Board of Directors to deny a reapplication for membership, an independent third-party panel (not connected with the relevant trade association) should be tasked with doing this by taking clearly defined, equally applicable, transparent, non-discriminatory criteria into account, such as (i) the current liquidity status of the former member; (ii) an unwillingness to pay the fine for non-compliance with the arbitral award; and (iii) evidence of probable disloyalty in the future.

Concerning the lapse of a two-year waiting period in order to re-apply for membership following an expulsion, one must again conduct a balancing exercise by applying the four theories of anti-competitiveness. Absent any waiting period, any expulsion would be rendered ineffective. Once an ostracized member satisfies the entry requirements, readmission to membership is possible. This raises the ensuing question: Why not allow the trade associations researched to impose a waiting period before an expelled member can reapply for membership? In my opinion, it is not unfair to give a trade association the possibility to enforce a waiting period on wrongdoers, but its duration makes it anticompetitive (*i.e.* the disproportionality test). It would be better to impose a less restrictive alternative by imposing a six-month timeframe for non-payment of an award or, if this is combined with previous other misconduct, a time period of one year (*i.e.* the profit-sacrifice and no-economic-sense test). This ensures the success of a withdrawal of membership which in turn ensures a successful operational system of specialized commercial arbitration that enhances total welfare and consumer welfare. Both benefits offset the adverse effects caused by a denial of regaining membership/access to an essential facility during the waiting period (*i.e.* the effects-balancing test and the equally efficient competitor test).

c. Refusal to deal with an expelled member

Only one of the trade associations researched instructs its members not to conduct business with an expelled member. As a result, one can conclude that it is not a typical business practice in the commodities trade. The liberalists' view must not be followed. Instead, the anti-competitiveness of such unilateral conduct must be assessed against the four theories as employed by the institutionalists. Reaching a different conclusion when compared with Section 1 of the Sherman Act is unlikely.[671] The anticompetitive impact for targeted industry actors is significant. But more so, it is not necessary to guarantee the success of specialized commercial arbitration. The practice of blacklisting and expulsions are sufficient to do so and constitute less restrictive alternatives (*i.e.* the profit-sacrifice and no-economic-sense test). The overall impact of a refusal to deal with an ostracized member is so severe that it clearly cannot be justified by total welfare and consumer welfare benefits as generated by specialized commercial arbitration (*i.e.* the effects-balancing test). Such harm is also disproportionate to attain both benefits (*i.e.* the disproportionality test) and excludes an industry competitor from the market without sufficiently generating these benefits (*i.e.* the equally efficient competitor test). No structural changes can exempt trade associations which orchestrate such a measure from antitrust liability pursuant to Section 2 of the Sherman Act.

d. Entering the premises of a recalcitrant industry actor without a warrant

Similar to Section 1 of the Sherman Act, despite some reputational harm not being unlikely when other industry actors hear about the premises of a recalcitrant industry actor being entered without a warrant, it is difficult to quantify the level of business harm for a targeted wrongdoer. Such conduct does not fit within the anti-competitiveness standard pursuant to Section 2 of the Sherman Act. Neither is it standard business practice of the trade association researched, nor are the four theories of anti-competitiveness applicable.

671 See Part II, Chapter 6, E, II, 2, c for the reasons why a refusal to deal with an ostracized member violates Section 1 of the Sherman Act.

### III. Interim conclusion

All of the six trade associations researched are engaged in anticompetitive "monopolization" to the extent they disseminate the names of wrongdoers in blacklists, withdraw membership, refuse a reapplication for membership of an expelled member on the basis of a denial by a Board of Directors, or because a two-year period has not elapsed, and refuse to deal with an ostracized member. Besides the last measure which cannot be justified, if the first three extrajudicial measures are not structured in the least restrictive manner, the responsible trade association violates Section 2 of the Sherman Act.

## *C. The functioning of the concept of illegal attempted monopolization as a safety net when one or more of the trade associations researched does not hold sufficient market power to establish monopolization*

In the event the FTC and/or US courts reach a different decision with regard to the existence of monopoly power held by one or more of the trade associations in the market for regulation and private ordering concerning the US territory, these institutions can still be held accountable under Section 2 of the Sherman Act when they participate in an anticompetitive attempt to monopolize.[672] For the purpose of this Chapter, these trade associations are referred to as "residual trade associations". However, to violate this provision different requirements must be fulfilled. According to the Supreme Court in *Spectrum Sports, Inc. v. McQuillan,* these necessitate that (i) there is a specific intent to monopolize; (ii) a dangerous probability of achieving monopoly power exists; and (iii) the defendant has participated in anticompetitive conduct.[673]

### I. Specific intent to monopolize

With regard to the first requirement, "the specific intent to monopolize", there must not be proof of actual monopolization, but instead whether

672 Both concepts do not require bilateral action. See United States v. American Airlines, Inc., 743 F.2D, 1114, 1116-1117 (5th Cir. 1984).

673 Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447, 456 (1993).

there is a specific intent to produce monopoly power.[674] However, neither a mere possession of market power is synonymous with a specific intent,[675] nor is an intent to prevail over one's competitor[676], or engaging in vigorous competition[677] sufficient to satisfy this element. There are two ways to prove whether the "specific intent to monopolize" requirement is complied with: first, by looking at the nature of the unilateral conduct imposed by the relevant residual trade association. According to this method, there must be evidence that the intention of the conduct is to restrain competition unreasonably.[678] Absent such exclusionary or anticompetitive conduct, it is not possible to support a finding of specific intent.[679] Second, specific intent may also be corroborated by looking in the business documents of an offender. Even though documents made by lower level officials without authority do not bear sufficient evidence to establish a specific intent[680] and regardless of the fact that isolated documents produced by a company's official are inadequate to prove a specific intent,[681] coherent documents made by officials of a relevant trade association provide good indicators.

That being said, with reference to residual trade associations, it is not only necessary to establish whether they have a specific intent to monopolize in relevant markets for regulation and private ordering, but also in the relevant adjacent second-tier commodities markets. This follows from the theory of monopoly leveraging, as was discussed in Part II, Chapter 7, B, I, 1 by virtue of illegal "monopolization". Unfortunately, establishing whether this element is fulfilled is rather difficult. Very few judgments of US courts have confirmed the presence of this element.[682] With reference to the regionally-defined relevant markets for regulation and private ordering, if residual trade associations do not have sufficient market power to speak of monopolization, in the event these institutions impose any anti-

674 General Industries Corp., 810 F.2d 795, 801 (8th Cir. 1987).
675 Hunt-Wesson Foods, Inc. v. Ragu Foods, Inc., 627 F.2d 919 (9th Cir. 1989).
676 General Industries Corp., 810 F.2d 795, 801 (8th Cir. 1987).
677 Adjusters Replace-A-Car, Inc. v. Agency Rent-A-Car, Inc., 735 F.2d 884, 887-888 (5th Cir. 1984).
678 General Industries Corp., 810 F.2d 795, 801 (8th Cir. 1987).
679 Satellite Television & Associated Resources, Inc. v. Continental Cablevision, 714 F.2d 351, 358 (4th Cir. 1983).
680 MCI Communications Corp. v. AT&T, 708 F.2d 1081, 1143 (7th Cir. 1982).
681 Conoco, Inc. v. Inman Oil Company, Inc. 774 F.2d 895, 905 (8th Cir. 1985).
682 R. D. Blair and D. D. Sokol, "*The Oxford Handbook of International Antitrust Economics – Vol. 2*", Oxford: Oxford University Press 2015, p. 156.

competitive nonlegal sanction on wrongdoers that are active on relevant adjacent second-tier commodities markets, a specific intent to monopolize can be established in the first and also the second market.[683] Because the relevant residual trade association can only ensure compliance with its arbitral awards when (i) it holds a near monopoly type of position in the relevant market for regulation and private ordering; and (ii) a sufficiently large group of industry actors are deterred from being subjected to any type of nonlegal sanction on the relevant adjacent second-tier commodities market, a specific intent to monopolize exists on both markets. Documents made by officials, such as, with regard to the DDC a letter published by its managing director, indicating the impact of this trade association and discussing this association's current and long-term objective can be used to establish the presence of specific intent on the relevant market for regulation and private ordering.[684] With respect to the relevant adjacent second-tier commodities market, such a letter by one of the other trade associations' officials can also not be excluded.

## II. Dangerous probability of achieving monopoly power

Under the second element of "attempted monopolization", the FTC and/or US courts must determine whether there is a dangerous probability that the attempt to monopolize will be successful. This is necessary to distinguish aggressive conduct, which may produce procompetitive benefits, from anticompetitive behavior, which does not.[685] As a requirement, a residual trade association must possess to some degree market power[686] (i)

683 Of course, any US court can reach a different outcome.

684 https://www.nyddc.com/ddc-news–events/rapaport-qa-with-david-lasher-managing-director-of-the-new-york-diamond-dealers-club. This is merely an example as it is unlikely that the DDC does not hold a monopoly position in the market for regulation and private ordering on the US territory.

685 P. H. LaRue, H. M. Applebaum, T. Calvani, W. D. Collins, J. T. Halverson, T. W. Johnston, J. A. Jones, J. F. Rill, W. M. Sayre, L. Schlitt, and R. A. Whiting, "*The Robinson-Patman Act: Policy and Law – Vol. 1*", Chicago: American Bar Association 1989, p. 25.

686 M. Dolmans, "*The Dominance and Monopolies Review*", London: Law Business Research Ltd 2014, p. 368. The required amount of a dangerous probability of achieving monopoly power is less than the standard of market power with reference to monopolization; See also McGahee v. N. Propane Gas Co., 858 F.2d 1487, 1505 (11th Cir. 1988).

from the time an anticompetitive nonlegal sanction is imposed;[687](ii) which is sufficient to illustrate a serious threat of monopolization;[688] and (iii) if it is held in a market which is susceptible for monopolization and not highly competitive.[689]

Against this background, even if one of the trade associations researched does not hold a monopoly position in the market for regulation and private ordering on the US territory, it is likely that such an association still has a dangerous probability of achieving market power in that market. This is because the market for regulation and private ordering concerning the US territory for all of the trade associations researched is not highly competitive and the degree of market power possessed by them can be seen as constituting a serious threat of monopolization. There is, however, one peculiarity: the nonlegal sanctions imposed by such an association do not target industry actors in the same market, but instead punish industry actors active in a relevant adjacent second-tier commodities market. According to the theory of monopoly leveraging, this doctrine is applicable when the near monopoly position in one market helps create a dangerous probability of a monopoly in the second market.[690] This raises the ensuing question: Do the industry actors that conduct business on the basis of the rules and bylaws of the relevant remaining trade association possess such a near monopoly position in the latter market? In my opinion, without access to such an association which provides a plurality of (facilitating) services, it is difficult to be competitive on the second-tier market. Most industry actors would prefer to contract under these rules. Despite the existence of other trade associations offering similar services, it may very well be possible that a near monopoly position can be established. If so, there is a dangerous probability of achieving monopoly power.

---

687 P. E. Areeda and H. Hovenkamp, "*Antitrust Law –Vol. 3*", New York: Aspen Publishers 2008, p. 446.

688 R. L. Miller, "*Business Law Today, Comprehensive: Text and Cases: Diverse, Ethical, Online, and Global Environment – 10th Edition*", Stamford: Cengage Learning 2015, p. 886.

689 United States v. Empire Gas Corp., 537 F.2d 296 (8th Cir. 1976). This is a price-fixing judgment and not comparable to nonlegal sanctions. Yet, the logic of this case can be transposed to the situation of the imposition of nonlegal sanctioning by the relevant remaining researched trade association.

690 M. Dolmans, "*The Dominance and Monopolies Review*", London: Law Business Research Ltd 2014, p. 373.

### III. Anticompetitive conduct (and rule-of-reason)

With regard to the requirement that residual trade associations must have participated in anticompetitive conduct, the same logic must be applied as in the study of anti-competitiveness within the concept of monopolization.[691] The focus is again on exclusionary conduct absent a legitimate business purpose under the theory of monopoly leveraging.[692] Subsequently, a trade association engaged in the dissemination of the names of wrongdoers in publicly available blacklists, withdrawals of membership, denial of a reapplication for membership of an expelled member on the basis of a denial by a Board of Directors, or because a two-year period has not elapsed is engaged in anticompetitive conduct when these measures are not structured in the least restrictive manner. When a trade association instructs its members to refuse to deal with an ostracized member, this is even more clearly evident. Establishing anticompetitive conduct cannot be avoided.

### IV. Interim conclusion

With regard to residual trade associations for which in the unlikely event no monopolization can be established in the markets for regulation and private ordering concerning the US territory, the existence of an unlawful attempt to monopolize serves as a catch-all provision. Whereas anticompetitive conduct and a specific intent to monopolize are not contentious, the same cannot be said for the third and last element, namely the dangerous probability of achieving monopoly power. Whereas a near monopoly position in the markets for regulation and private ordering concerning the US territory can be established, in the relevant adjacent second-tier commodities markets reaching such a decision is debatable. Whichever line of reasoning is followed, it impacts the outcome of whether residual trade associations violate Section 2 of the Sherman Act by undertaking an unlawful attempt to monopolize.

---

691 See Part II, Chapter 7, B, II.

692 E. T. Sullivan, "*Nonprice Predation under Section 2 of the Sherman Act*", Chicago: American Bar Association 1991, p. 55.

### D. Unlawful conspiracy to monopolize by members of the trade associations researched

Section 2 of the Sherman Act is principally aimed at unilateral action, which is reflected in the concept of "monopolization" and "attempted monopolization". The reason being that anticompetitive concerted action is usually prosecuted under Section 1 of the Sherman Act.[693] There is, however, an important exception to this rule: when individuals and/or undertakings engage in anticompetitive concerted action which is directed at the acquisition of monopoly power, Section 2 of the Sherman Act is equally applicable.[694] This is referred to as "conspiracy to monopolize". While this concept is of no importance to determine whether the trade associations researched can be held accountable for their role in the imposition of non-legal sanctions under Section 2 of the Sherman Act, it is a good method to determine potential unlawfulness of their members in the execution of these extrajudicial measures under this provision.

According to the 2nd Circuit Court of Appeals in *Volvo North America Corp. v. Men's Int'l Prof'l Tennis Council* and the 9th Circuit Court of Appeals in *Hunt-Wesson Foods, Inc. v. Ragu Foods, Inc.*, three conjunctive elements must then be fulfilled.[695] First, the existence of an agreement between two or more parties.[696] Second, a specific intent to monopolize. Third, at least one overt act in furtherance of the agreement. Whereas the 7th Circuit Court of Appeals in *Great Escape, Inc. v. Union City Body* and the 10th Circuit Court of Appeals in *Olsen v. Progressive Music Supply, Inc.* even require the fulfilment of a fourth element, namely that there must be an "effect upon a substantial amount of interstate commerce",[697] this last element will not be discussed concerning the members of the trade associations researched. The reasons for this are two-fold: first, it is inconsistent with the rule developed by the Supreme Court's judgment in *American To-*

693 L. J. Oswald, "*The Law of Marketing – 2th Edition*", Mason: South-Western Cengage Learning 2010, p. 112.

694 U.S. Department of Justice, "Competition and Monopoly: Single-firm Conduct under Section 2 of the Sherman Act", *U.S. Department of Justice* 2008, p. 5.

695 Volvo North America Corp. v. Men's Int'l Prof'l Tennis Council, 857 F.2d 55, 74 (2d Cir. 1988); Hunt-Wesson Foods, Inc. v. Ragu Foods, Inc., 627 F.2d 919, 926 (9th Cir. 1980).

696 See also The Yale Law Journal Company, "Intra-Enterprise Conspiracy under the Sherman Act", *The Yale Law Journal Company, Vol. 63, No.* 3 1954, p. 372.

697 Great Escape, Inc. v. Union City Body., 791 F.2d 532, 540-541 (7th Cir. 1986); Olsen v. Progressive Music Supply, Inc., 703 F.2d 432, 438 (10th Cir. 1983).

*bacco Co. v. United States* which does not necessitate the establishment of an "*actual exclusion of competitors*".[698] Second, only two judgments have supported the existence of an additional requirement, whereas the majority of US court decisions have not.

By taking this into account, the following Paragraphs discuss the three elements which are necessary to determine if the role the members of the trade associations researched in executing nonlegal sanctions constitutes an illegal "conspiracy to monopolize" under Section 2 of the Sherman Act. Determining the degree of market power, establishing a dangerous probability of success, or creating a market definition is unnecessary.[699]

## I. The existence of an agreement between two or more parties

The evidence required to prove an agreement in a claim of conspiracy to monopolize is similar to that of Section 1 of the Sherman Act, since a written contract, a combination, or a conspiracy fulfils this requirement.[700] As was described in Part II, Chapter 6, B, I, II and III, the members of the trade associations researched have entered into a written contract to execute nonlegal sanctions imposed by a trade association. This is true because these industry actors have agreed to adhere to the bylaws and rules of a relevant trade association in which such extralegal measures are incorporated when becoming a member. But even more so when members contract on

698 American Tobacco Co. v. United States, 328 U.S. 781, 809 (1946); Conversely, in my opinion, the judgment of the United States District Court of California in Standfacts Credit Services, Inc. v. Experian Information, 405 F.Supp.2d 1141 (Standfacts Credit Services, Inc. v. Experian Information, 405 F.Supp.2d 1141 (C.D. Cal. 2005) is an important exception to this observation. The Court requires a "causal antitrust injury" as a fourth requirement; This legal rule is a reiteration from the 9th Circuit Court of Appeals judgment in Paladin Assoc., Inc. v. Mont. Power Co., 328 F.3d 1145, 1158 (2003).

699 See United States v. Consolidated laundries Corp., 291 F.2d 563, 573 (2d Cir. 1961) [emphasis]; However, the uselessness of conducting a market definition is debatable. See, for example, J. L. Harwell, "The Relevant Market Concept in Conspiracy to Monopolize Cases under Section 2 of the Sherman Act", *The University of Chicago Law Review* 1977, p. 808-812.

700 T. V. Vakerics, "*Antitrust Basics*", New York: Law Journal Press 2006, p. 5-3; See also, Nova Designs, Inc. v. Scuba Retailers Association, 202 F.3d 1088, 1092 (9th Cir. 2000). Therein, the 9th Circuit Court of Appeals ruled that when no agreement under Section 1 of the Sherman Act exists, then there is also no agreement under Section 2 of the Sherman Act.

the basis of standardized contracts which refer to a broader arbitration agreement that includes nonlegal sanctions.

## II. Specific intent to monopolize

The Eastern District of Illinois District Court in its judgment in *Choiceparts, LLC v. General Motors Corp*. explained that "*concerted action by knowing participants who have a specific intent to achieve a monopoly*" is required to prove a specific intent to monopolize under a conspiracy to monopolize claim.[701] Alternatively, the District Court for the Western District of Missouri in *United States v. Kansas City Star Company* argued that a specific intent signifies "*that the defendants must have done certain things in monopoly as their objective, which, if successfully performed, could result in actual monopolization*".[702] In my opinion, both definitions provide insufficient guidance on the necessary degree of intent which is required. While one could argue that a specific intent is similar to a claim of "attempted monopolization", as was mentioned above, should not a different threshold be applicable to measure the required amount when it involves a single actor as opposed to market participants acting in concert?[703] Unfortunately, neither legal doctrine nor US courts have provided much needed elucidation. It appears that again the restrictiveness of unilateral conduct and documentary evidence must be used to analyse whether a specific intent to monopolize exists. Even though the latter option can be used to prove fulfilment of this element, the former option is more obvious. This is because the 7th Circuit Court of Appeals in *Great Escape, Inc*. provided well-articulated guidance to measure when restrictive conduct is synonymous with a specific intent to monopolize. Following this judgment, this is the case when conduct "*has no legitimate business justification other than to destroy or to damage competition,*"[704] or violates Section 1 of the Sherman Act.[705]

---

701 Choiceparts v. General Motors Corporation, No. 01 C 0067 (N.D. Ill. 2005), para. 12. The specific intent to monopolize requirement is considered as an element of heightened intent.

702 United States v. Kansas City Star Company, No. 18444 (D. Kans. 1953).

703 D. T. Hibner, Jr., "Litigation as an Overt Act in Furtherance of an Attempt to Monopolize", *Ohio State Law Journal, Vol. 38, Nr. 2* 1977, p. 246.

704 Great Escape v. Union City Body Co., Inc., 791 F.2d 532, 541 (7th Cir. 1986). This is called predatory conduct.

705 E. T. Sullivan, "*Nonprice Predation under Section 2 of the Sherman Act*", Chicago: American Bar Association 1991, p. 58.

In consideration of the foregoing, the members of the trade associations researched execute nonlegal sanctions imposed by these institutions. As a result, these members engage in a concerted action to drive disloyal industry actors out of the market and even out of business.[706] This is true with regard to the dissemination of the names of wrongdoers in publicly available blacklists, withdrawals of membership, denials of membership for expelled members on the basis of a denial by a Board of Directors, or because a two-year waiting period has not elapsed, if not structured in the least restrictive manner. Furthermore, this is also true pertaining to refusals to deal with expelled members. These measures do not have a legitimate business justification other than to destroy or to damage competition. On the ground that they violated Section 1 of the Sherman Act, a specific intent to monopolize is established. Members that execute these extrajudicial measures do so with a specific intent to achieve a monopoly.

### III. Overt act in furtherance of the agreement

The last argument which is required to establish whether the members of the trade associations researched can be held accountable for a conspiracy to monopolize for their role in executing anticompetitive nonlegal sanctions requires "*the commission of at least some overt act in furtherance of the conspiracy*".[707] Even this formulation might appear vague, the Supreme Court in *Yates v. United States* explained that this should be interpreted to mean that that the conspiracy is simply at work.[708] Further proof in support of this was given in *Lafave & Scott*.[709] According to both actors, "*if the agreement has been established but the object has not been attained, virtually any act will satisfy the overt act* [in furtherance of the agreement] *requirement*".[710] This is because its form which derives from the agreement is not important.

As it appears that both US case law and legal doctrine interpret the "overt act in furtherance of the agreement" requirement as a symbolic

706 A good illustration of this can be found in United States v. Consolidated Laundries Corp., 291 F.2d 563, 572-573.
707 Key Enterprises of Delaware v. Venice Hosp, 919 F.2d 1550, 1564 (11th Cir. 1990).
708 Yates v. United States 354 U.S. 298, 334 (1957).
709 W. R. Lafave and A.W. Scott, Jr., "*Substantive Criminal Law - 2nd Edition*", St. Paul: West Publishing Company 1986.
710 Ibid., p. 549.

catch-all element, the participation of the members of a trade association in executing anticompetitive nonlegal sanctions which arise from any relevant agreement is sufficient to satisfy the third element of a conspiracy to monopolize. Albeit that some might argue that the use of such a general observation is inappropriate, in my opinion, using a more in-depth form of argumentation is redundant.

### IV. Interim conclusion

Members of the trade associations researched can be held accountable for their role in executing nonlegal sanctions directed at disloyal industry actors under Section 2 of the Sherman Act. In the event a wrongdoer is extrajudicially punished by a relevant trade association, to the extent such measure or measures are anticompetitive and cannot be offset by procompetitive benefits, that trade associations' members engage in concerted action with the aim to acquire monopoly power. This is because their role in the execution of the measure or measures satisfies the three-element conjunctive test which is required to establish an illegal "conspiracy to monopolize". They have entered into a written agreement, have a specific intent to monopolize by executing anticompetitive nonlegal sanctions, and are engaged in overt acts in furtherance of the agreement.

## *E. Key findings*

Apart from the possibility to prosecute the trade associations researched and their members under Section 1 of the Sherman Act when they impose and execute anticompetitive nonlegal sanctions to discipline recalcitrant industry actors, Section 2 of the Sherman Act provides an alternative legal basis to hold both actors accountable with regard to antitrust law. As a requirement, the trade associations researched must have unlawfully "monopolized" or have "attempted to monopolize" and their members should have committed an illegal "conspiracy to monopolize".[711]

On the basis of the theory of monopoly leveraging, it is likely that all of the six trade associations researched have engaged in an illegal monopoly by disseminating the names of wrongdoers in publicly available blacklists, withdrawing membership without precautions and due process, arbitrarily

711 See Part II, Chapter 7, A.

denying, or requiring excessively long waiting period for reapplication for membership and instructing their members to refuse to deal with an ostracized member.[712] However, in the unlikely event that at least one of the trade associations researched does not hold a monopoly position, any anticompetitive attempt to monopolize is also illegal under Section 2 of the Sherman Act.[713] This concept serves as a safety net when the required amount of monopoly power is not reached. When such a residual trade association imposes nonlegal sanctions on wrongdoers, an attribution of liability under this provision requires the fulfilment of three conjunctive elements. Whereas the first two requirements are undeniably met, which consist of the existence of anticompetitive conduct[714] and a specific intent to monopolize,[715] the same cannot be said with regard to the dangerous probability of achieving monopoly power.[716] This is because even though it is presumed that any residual trade association has a near monopoly position in the relevant market for regulation and private ordering concerning the US territory, when this institution imposes anticompetitive nonlegal sanctions, its effects are not felt within the same market, but by disloyal industry actors operating on an adjacent second-tier relevant commodities market. This is where the theory of monopoly leveraging plays a central role. This theory requires that in such situation, the near monopoly position in the first market must create a dangerous probability of a monopoly in the second market. Unfortunately, it is unsure whether such a position is held on the latter market. Much depends on arguing whether their members are dependent on the services of a relevant residual trade association to speak of a near monopoly position. If this is confirmed, the element of dangerous probability of achieving monopoly power is satisfied and the residual trade association can be held accountable for an illegal attempt to monopolize when imposing anticompetitive nonlegal sanctions.

This is more obvious to attribute an infringement of Section 2 of the Sherman Act when the members of the trade associations researched execute anticompetitive nonlegal sanctions.[717] In such scenario they conspire to monopolize, because they fulfil the three-part test. Not only have they entered into a written agreement[718] and have a specific intent to monopo-

712 See Part II, Chapter 7, B.
713 See Part II, Chapter 7, C.
714 See Part II, Chapter 7, C, I.
715 See Part II, Chapter 7, C, II.
716 See Part II, Chapter 7, C, III.
717 See Part II, Chapter 7, D.
718 See Part II, Chapter 7, D, I.

lize,[719] but they also took part in overt acts in furtherance of the agreement.[720]

A rule-of-reason analysis to allow the trade associations researched and their members to escape antitrust illegality under Section 2 of the Sherman Act is available. Whereas refusals to deal with expelled members can never be justified, this is not true by virtue of the other three nonlegal sanctions which restrict Section 2 of the Sherman Act. When these measures are structured in the least restrictive manner, it is unlikely that both actors can be held accountable for a violation of this provision. With reference to the dissemination of the names of wrongdoers in a blacklist, such a list should not be made publicly available, but accessible for members only. Furthermore, a third party should be tasked with the collection, handling and dissemination of the names of a wrongdoer in a blacklist after clearly defined deadlines have lapsed, and a final warning. Lastly, the possibility of internal appeal against such a decision should be introduced and more reluctance should be shown when an industry actor's social standing would be affected.

With regard to withdrawals of membership, such a procedure should be based on clearly defined, transparent, non-discriminatory reviewable criteria that allow for cumulative fines enforceable in national courts, with a final threat of a suspension, or in the worst case scenario when non-compliance is combined with other misconduct, or an indefinite expulsion provided the trade association has objective, reasonable and legitimate reasons for doing so which are based on fair and neutral criteria (*e.g.* do not favour certain members over others). Moreover, ostracized members should be given the chance to request an internal appeal tribunal to review such a decision and must be advised of the possibility to request recourse in public courts.

Regarding a refusal to allow an expelled member to reobtain membership, because a period of two years following a withdrawal of membership has not elapsed, or a Board of Directors declines this re-application, a two-year period should be changed to a six-month standstill (or if this is combined with other misconduct a one-year) period. In addition, an independent third-party panel (not connected with the relevant trade association) should be tasked with considering a reapplication for membership for expelled members on the basis of clearly defined, equally applicable, transparent, non-discriminatory criteria, such as (i) the current liquidity status

719 See Part II, Chapter 7, D, II.
720 See Part II, Chapter 7, D, III.

of the former member; (ii) an unwillingness to pay the penalty for non-compliance with the arbitral award; and (iii) evidence of probable disloyalty in the future.

In sum, depending on how egregious the impact of nonlegal sanctions and a reasonable necessity to enhance total welfare and consumer welfare, it is not impossible that the trade associations researched and their members will be faced with liability under Section 2 of the Sherman Act. Comparable to Section 1 of the Sherman Act, much will depend on the willingness of the FTC and/or US courts to do so. Both actors could favour a more capacious, or develop a much more constrictive, yardstick to attribute a violation of this provision. However, even though all four nonlegal sanctions violate Section 2 of the Sherman Act based on how they are currently structured, when the dissemination of the names of wrongdoers in a blacklist, withdrawals of membership and denials to re-admit ostracized members on the basis of an additional entry are structured in the least restrictive form, antitrust liability under this provision is precluded. This is not true pertaining to refusals to deal with expelled members.