Part III:
Study of EU Competition Law

Chapter 8: The Scope of Application of European Competition Law

A. The nucleus of European Competition Law: a brief overview

Only a few areas of law garner as much press exposure as EU Competition Law.[721] This evolution bears testimony to its rise as a critical issue throughout Europe. Today, the constraints imposed by EU Competition Law have become imperative for the good functioning of the internal (or single) market and are instrumental in furthering efficiency and consumer welfare.[722] The EU substantive rules dealing with cartels and abuse of a dominant position[723] have ensured, in the past decades, unity in the application of comparable laws in European States. Yet, much of the success of these provisions of EU Competition Law depends on practical enforcement.[724]

Article 105(1) TFEU entrusts the Directorate General for Competition of the European Commission (the "Commission") with "the application of the principles laid down in Articles 101 and 102 [TFEU]". This entails that the Commission is given a pivotal role in the enforcement of EU Competition Law.[725] Unlike civil courts, the task of which is to safeguard the individual rights of private individuals, the Commission is the administrative authority the main objective of which is to act in the public interest (*i.e.* to

721 D. Geradin, A. Layne-Farrar, and N. Petit, "*EU Competition Law and Economics*", Oxford: Oxford University Press 2012, p. 1.

722 According to Article 3(3) TEU, European Competition Law must guarantee a system of undistorted competition, in order to promote the single market objective. This single market imperative is, as described by the EU Commission, one of the "EU's biggest assets". See R. Whish, D. Bailey, "*Competition Law: Eight Edition*", Oxford: Oxford University Press 2015, p. 54.

723 Also State aid has led to harmonization pertaining to the application of competition law among EU Member States. This area of competition law will not be elaborated on in this research.

724 A. Looijestijn-Clearie, C. S. Rusu, and M. Veenbrink, "*Boosting the Enforcement of EU Competition Law at the Domestic Level*", Newcastle upon Tyne: Cambridge Scholars Publishing 2017, p. 2.

725 M. Lorenz, "*An Introducion To EU Competition Law*", Cambridge: Cambridge University Press 2013, p. 45.

protect competition from restrictions in the interest of consumers and welfare).[726]

It has various competences, including acting in sensitive and high profile antitrust cases, issuing notices[727] and guidelines, drafting block exemptions,[728] and submitting legislative proposals to the Parliament and the Council for the adoption of Directives and Regulations.[729] Interestingly, it has a margin of discretion to set priorities in its enforcement activity.[730]

On a national level, National Competition Authorities ("NCAs") are the hands and feet of the Commission.[731] This is because NCAs must apply EU Competition Law as soon as it is applicable in a given case (*i.e.* if there is an effect on trade between Member States). According to Article 3(1) of Regulation 1/2003, such an obligation cannot be invalidated when NCAs apply national law as well.[732]

It does not come as a surprise that the EU Commission and NCAs are responsible for the great majority of competition cases throughout Europe. However, this co-action gives rise to some questions. First, who ensures that they use the powers granted to them to protect us appropriately, justly and fairly. Second, who can certify that we never need to be protected

726 A. Jones and B. E. Sufrin, "*EU Competition Law: Text, Cases, and Materials*", Oxford: Oxford University Press 2014, p. 1073.

727 See P. L. Landolt, "*Modernised EC Competition Law in International Arbitration*", The Hague: Kluwer Law International 2006, p. 237. Commission Notices do not have binding effect (i.e. are non-mandatory), but are, in practice, taken seriously by undertakings. Undertakings normally heed the Commission's interpretation of the application of EU competition law given its immense experience. Also, because it is the principal enforcer of this area of law.

728 C. Ehlermann, I. Atanasiu, "*European Competition Law Annual 2002: Constructing the EU Network of Competition Authorities*", Oxford/Portland: Hart Publishing 2004, p. 261.

729 This must be in accordance with the ordinary legislative proposal as laid down in Article 294 TEU. For an overview of the ordinary legislative procedure, see T. Dubowski, "*Białystok Law Books 2 Constitutional Law Of The European Union*", Bialystok: Temida 2 2011, p. 116-120.

730 See CFI 27 September 2006, Case T-204/03 (Haladjian Frères v Commission), [2006], ECR II-03779, para. 28; GC 23 November 2011, case T-320/07 (Jones et al v. Commission), [2011], ECR II-00417, para. 115; Commission Decision of 19 June 2015 relating to a proceeding under Articles 101 and 102 TFEU, Case No AT.39864 (BASF), para. 26.

731 W. Sauter, "*Coherence in EU Competition Law*", Oxford: Oxford University Press 2016, p. 256.

732 Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [now Article 101 and 102 TFEU] [OJ 2003, No L 001], p. 0001-0025.

from them?[733] To solve both issues, the Court of Justice of the European Union (the "CJEU") was established. This judicial arm comprises the General Court ("GC") and the European Court of Justice (the "ECJ"). Together they have various competences, including imposing fines, interpreting and annulling decisions adopted by the Commission in conjunction with Article 263 TFEU.[734]

Since the main players are now identified and described, it is imperative to analyse whether the trade associations researched, their members and non-members can attract the attention of the EU Commission and, ultimately, the CJEU. This is the case when their participation in regulated behaviour violates Articles 101 and 102 TFEU. Given that there are no reported precedents in which either or both Articles have been employed to bar trade associations from using such behaviour, this is not an easy task. In other words, it is relatively uncertain whether the three actors for their role in the six nonlegal sanctions can be held liable for a group boycott and/or an abuse of a dominant position. Much will depend on comparing and analysing decisional practice and guidance given by the Commission and scrutinizing case law of the CJEU.

B. Introduction

To ponder the idea of how and to what extent the "core" antitrust rules (*i.e.* Articles 101 and 102 TFEU) can be used to determine whether the trade associations researched for their role in the imposition of nonlegal sanctioning and their members and non-members for their role in the execution of those sanctions can be held accountable, it must first be examined whether these three actors and their extrajudicial measures fall within the *ratione personae* of EU Competition Law.[735] Therefore, it is necessary to examine the boundaries of this area of law. Perhaps the best approach to

733 The Roman poet Juvenal described this fundamental issue of what law seeks to address as "Quis custodiet ipsos custodes?" (Who will guard the guards themselves?). See L. Watson and P. Watson, "*Juvenal: Satire 6*", Cambridge: Cambridge University Press 2014, 196. This book provides a (literal) translation from Latin into English.

734 For an overview of how the appellate system of the CJEU works, see M. Lorenz, "*An Introduction to EU Competition Law*", Cambridge: Cambridge University Press 2013, p. 51-52.

735 To avoid excessive repetition of the term competition law/rules, reference to the expression "antitrust law/rules" will be made intermittently. The expression is

conduct such an examination requires that these actors be beyond the scope of competition law from the outset, unless they fulfil two boundaries. The first is referred to as the legal boundary (Paragraph C), which necessitates that the trade associations researched, their members and non-members must be defined as an undertaking. The second boundary comprises economically quantifiably thresholds developed by the Commission and the CJEU (*i.e.* effect on trade between Member States) (Paragraphs D & E).[736]

C. Legal boundary

Before the application of EU competition law takes effect, one must examine whether the trade associations researched, their members and non-members exceed the legal boundaries of Articles 101 and 102 TFEU. A crucial delimitation concerns the concept of "undertaking". This means that the Commission can only claim competence when the three actors qualify either as undertakings or as an association of undertakings pursuant to Article 101 TFEU. In contrast, when this cannot be established, the Commission has no authority to conduct a review.

I. Members of the trade associations researched and non-members

To establish whether the members and non-members of the trade associations researched are considered undertakings within the meaning of Articles 101 and 102 TFEU, they must fall under the legal rule provided by the ECJ in *Klaus Höfner*.[737] According to this case, an undertaking means "*any entity engaged in an economic activity, regardless of its legal status and the*

borrowed from US law, where it is generally referred to as antitrust law – even if, *stricto sensu* and *lato sensu* one cannot compare both legal systems.

736 W. Sauter, "*Coherence in EU Competition Law*", Oxford: Oxford University Press 2016, p. 75-87.

737 A. Jones, "The Boundaries of an Undertaking in EU Competition Law", *European Competition Journal* 2015, p. 302. Peculiarly, regardless of the centrality of the concept of undertaking in EU Competition Law, its actual definition was omitted from the lexicon of the TFEU. Rather, the meaning of the term has been left for elucidation by the CJEU.

way in which it is financed".[738] While this wording is easy to comprehend, in my opinion, it can be refined around two excessively broad elements: first, an "entity", which includes commercial bodies, civil companies, or public institutions[739] and, second, the carrying out of an "economic activity" by offering goods and services on a given market.[740] That being said, it is beyond a reasonable doubt that the members of the trade associations researched and non-members fulfil both elements insofar as they are not private individuals.[741] Not only are they commercial bodies, but they also operate on commodities markets with the main aim to maximize profit (*i.e.* economic activity). Subsequently, such members of the trade associations researched and non-members are considered undertakings within the meaning of Articles 101 and 102 TFEU.

738 ECJ 23 April 1991, Case C-41/90 (Klaus Höfner and Fritz Elser v. Macrotron GmbH), [1991] ECR I-1979, para. 21; ECJ 16 November 1995, Case C-244/94 (Federation Française des Sociétés d'Assurance, Société Paternelle Vie, Union des Assurances de Paris-Vie, Caisse d'Assurance et de Prévoyance Mutuelle des Agriculteurs and Ministère de l'Agriculture et de la Pêche), [1995] ECR I-4013, para. 14; ECJ 11 December 1997, Case C-55/96 (Job Centre coop. arl.), [1997] ECR I-7119, para. 21; ECJ 19 February 2002, Case C-309/99 (J. C. J. Wouters, J. W. Savelbergh and Price Waterhouse Belastingadviseurs BV v. Algemene Raad van de Nederlandse Orde van Advocaten, intervener: Raad van de Balies van de Europese Gemeenschap), [2002] ECR I-1577, para. 46; ECJ 11 July 2006, Case C-205/03P (Federación Española de Empresas de Tecnología Sanitaria (FENIN) v. Commission of the European Communities, [2006] ECR I-6295, para. 25; ECJ 10 September 2009, Case C-97/08P (Akzo Nobel NV et al v. Commission of the European Communities), [2009] I-08237, para. 54.

739 D. Geradin, A. Layne-Farrar, and N. Petit, "*EU Competition Law and Economics*", Oxford: Oxford University Press 2012, para. 1-134.

740 ECJ 16 June 1987, Case 118/85 (Commission of the European Communities v. Italian Republic), [1987] ECR 2599, para. 7; ECJ 18 June 1998, Case C-35/96 (Commission of the European Communities v. Italian Republic), [1998] ECR I-3851, para. 36; ECJ 11 July 2006, case C-205/03P (Federación Española de Empresas de Tecnología Sanitaria (FENIN) v. Commission of the European Communities), [2006] ECR I-6295, para. 25; CFI 12 December 2006, Case T-155/04 (SELEX Sistemi Integrati SpA v. Commission of the European Communities), [2006] ECR II-04797, para. 50.

741 Unlike US Antitrust Law (*i.e.* Section 1 of the Sherman Act), EU Competition Law cannot be used to assess the anti-competitiveness of conduct produced by merely private individuals.

II. Trade associations

Establishing whether the legal boundary is fulfilled for the trade associations researched, the approach pertaining to Article 101 and to Article 102 TFEU differs. With regard to Article 101, this requires evidence that these associations bring together a group of undertakings. The mere fact that an association brings together a group of individuals is not enough. By focusing on the trade associations researched and their members, it is clear that the associations can be considered associations of undertakings. Their members operate under the umbrella of these associations.

To establish whether the trade associations researched fulfil the legal boundary to invoke Article 102 TFEU is a more difficult task. The main reason being that this provision does not apply to associations of undertakings, but requires that these associations – standing alone – are considered undertakings. Unfortunately, two issues prevent an easy qualification under this concept: first, because the trade associations researched operate on a not-for-profit basis, one can say that they do not engage in an independent economic activity. Second, even if the trade associations researched could be classified as undertakings within the meaning of Article 102 TFEU, do their services not fall within the public authority exemption?[742] These associations offer public services in a now privatized market.

In my opinion, the first issue can be rebutted by looking at the ECJ judgment in *Van Landewyck v. Commission*. In that judgment, the Court explained that a pursuit of profit is not required to prove that an entity is engaged in an economic activity. On the ground that a trade association is an entity,[743] even though the trade associations researched do not have profit maximization as their main objective, given their role in supplying services to industry actors operating on an adjacent second-tier commodities markets, they are undertakings. With regard to the second issue, it may very well be possible that the public authority exemption is applicable. This entails that regardless of the classification as an undertaking, the services provided by the trade associations researched which includes nonlegal sanctions are excluded from the scope of Article 102 TFEU because they fall within the essential prerogatives of the State (*i.e.* essential function of the

742 ECJ 29 October 1980, joined cases 209 to 215 and 218/78 (Heintz van Landewyck SARL et al v. Commission of the European Communities), [1980] ECR 3125, para. 88.

743 The legal structure of an entity is not important. Trade associations are also considered entities.

State).[744] On the one hand, as said above, all of the trade associations researched carry out services which were are necessary for the general public in former State-run commodities markets. Due to inefficiency, overstaffing and a drain on public budget, these markets were privatized. As a result, whereas the trade associations researched only exist with the permission of States, they still perform essential State functions. Put differently, the trade associations researched are public undertakings and should be excluded from antitrust scrutiny under Article 102 TFEU. On the other hand, in my opinion, the trade associations researched provide their services (including nonlegal sanctioning to ensure the operability of specialized commercial arbitration) across countries. They were established to accommodate the needs of globally dispersed industry actors. They do not fit within the typical function of the State and are to a large degree detached from the State. Their operability within a PLS is sufficient proof of this. Moreover, as the study of US Antitrust Law has demonstrated, the effect of nonlegal sanctioning on targeted wrongdoers can result in market foreclosure. It would be unwise to not classify the trade associations researched as non-public undertakings. Any other conclusion would prevent the Commission and/or the ECJ from scrutinizing the potential hazardous impact of extrajudicial enforcement at such an early stage. This is contrary to the goal to take the competitive interest of every industry operating on a relevant market into account.

In sum, the trade associations researched are associations of undertakings within the meaning of Article 101 TFEU and undertakings within the meaning of Article 102 TFEU. The legal boundary is complied with.

D. Economic boundaries: the effect on trade between Member States

As a final step before being able to assess whether the trade associations researched, their members and non-members can be held accountable for

744 ECJ 18 March 1997, Case C-343/95 (Cali e Figli), [1997] ECR I-1547, para. 22-23. In this judgment, the Court ruled that an entity exercises public powers where the activity "*is a task in the public interest which forms part of the essential functions of the State*" and where the activity "*is connected by its nature, its aim and the rules to which it is subject with the exercise of powers* […] *which are typically those of a public authority*"; See also I. E. Wendt, "*EU Competition Law and Liberal Professions: an Uneasy Relationship?*", Leiden: Koninklijke Brill NV 2013, p. 220; G. Monti, "*EC Competition Law*", Cambridge: Cambridge University Press 2007, p. 486.

their respective roles in imposing and executing nonlegal sanctions under Articles 101 and 102 TFEU, some economic boundaries must be complied with. The next two Paragraphs (Paragraphs I and II) describe the approach adopted by the Commission and by the Commission. Subsequently, it will be established (Paragraph III) whether the trade associations researched, their members and non-members have an effect on trade between Member States by applying both approaches to these actors.

I. Interpretation by the Court of Justice of the European Union

An economic boundary that needs elaboration concerns the more jurisdictional in nature concept of "effect on trade between Member States". Ever since the CJEU's judgment in *Consten and Grundig*, "inter-state trade effect" has been applied as an autonomous and separate criterion in EU Competition Law.[745] While the criterion is elusive in all Treaty provisions concerning substantive competition rules, it is most commonly used pertaining to Articles 101 and 102 TFEU.[746]

In later judgments, the Court of Justice developed a yardstick to define when an effect on trade is present. According to the Court, "[…] *it must be possible to foresee with a sufficient degree of probability on the basis of a set of objective factors of law or fact that it may have an influence, direct or indirect, actual or potential, on the pattern of trade between Member States, such as might prejudice the realization of the aim of a single market in all the Member*

745 R. Wesseling, "*The Modernisation of EC Antitrust Law*", Oxford/Portland: Hart Publishing 2000, p. 116-117. In *Consten and Grundig* the Court with regard to the effect on trade in the context of Article 81 EC (currently Article 101 TFEU) determined "*whether the agreement is capable of constituting a threat, either direct or indirect, actual or potential, to freedom of trade between Member States in a manner which might harm the attainment of the objectives of a single market between States*". See ECJ 13 July 1966, joined cases 56 and 58-64 (Établissements Consten S.à.R.L. and Grundig-Verkaufs-GmbH v. Commission of the European Economic Community), [1966] ECR 429, p. 341. This definition was meant to establish when the competition law of the EU or Member States is applicable. See J. B. Cruz, "*Between Competition and Free Movement*", Oxford/Portland: Hart Publishing 2002, p. 89.

746 The test for effect on trade is more commonly used in relation to Article 101 TFEU, but it has also been applied under Article 102 TFEU. For an example of a case pertaining to Article 102, see Commission Decision of 18 July 1988 relating to a proceeding under Article 86 of the EEC Treaty, Case No IV/30.178 (Napier Brown - British Sugar).

States".[747] At first glance, one may come to the conclusion that this definition might seem ambiguous, as it can entail that intra Union trade must be affected negatively (*i.e.* reduced or restricted) or positively. Fortunately, in *Ferriere Nord SpA,* the ECJ in a moment of lucidity provided much-needed clarity.[748] The Court explained that it is not required that trade between Member States is actually affected, but it is sufficient that the practice is capable of having that effect.[749] Moreover, the Court in *Consten and Grundig* decided that an effect on trade can also be established when an agreement or practice causes an increase in trade.[750]

Apropos the case studies discussed, it can immediately be seen that it is unclear where to draw a clear and unequivocal line concerning what constitutes an appreciable effect on interstate trade. The Court of Justice in *Völk v. S.P.R.L. Ets J. Vervaecke* attempted to close this legal gap by introducing the doctrine of appreciability in relation to Article 101(1) TFEU.[751] On the merits of the case, the Court developed a "de minimis standard" or "safe harbour" by explaining that an agreement falls outside the prohibition of Article 101(1) TFEU when it only has an insignificant effect on the internal market.[752]

747 ECJ 11 July 1985, Case 42/84 (Remia BV et al v. Commission of the European Communities), [1985] *ECR* 2566, para. 22; ECJ 25 January 2007, Case C-407/04P (Dalmine SpA v. Commission of the European Communities), [2007] ECR I-829, para. 90.

748 ECJ 17 July 1997, Case C-219/95P (Ferriere Nord SpA v. Commission of the European Communities), [1997] ECR I-04411, para. 19.

749 Ibid; This was later confirmed in ECJ 21 January 1999, Case C-216/96 (Carlo Bagnasco et al v. Banca Popolare di Novara soc. coop. arl. (BNP) et al), [1999] ECR I-135, para. 48; ECJ 23 November 2006, Case C-238/05 (Asnef-Equifax, Servicios de Información sobre Solvencia y Crédito, SL, Administración del Estado v. Asociación de Usuarios de Servicios Bancarios (Ausbanc)), [2006] ECR I-11125, para. 43.

750 ECJ 13 July 1966, joined cases 56 and 58-64 (Établissements Consten S.à.R.L. and Grundig-Verkaufs-GmbH v. Commission of the European Economic Community), [1966] ECR 429, p. 341.

751 ECJ 9 July 1969, case 5-69 (Franz Völk v S.P.R.L. Ets J. Vervaecke), [1969] ECR 295.

752 Ibid., para. 5-7.

II. Interpretation by the Commission

Even though the Court's reasoning is perspicuous, it neither quantified the required level nor did it provide clarity whether it applies to Article 102 TFEU.[753] This among other reasons is why the Commission published Guidelines on the effect on trade concept contained in Articles [101 and 102 TFEU] ("Guidelines on Inter-State Trade").[754] The Guidelines provide guidance in common situations and set out the methodology on the effect on trade concept by referring to case law of the EU courts.[755] Although non-binding and non-exhaustive, they further converge and harmonize the effect on trade concept throughout the European Union. Importantly, they state that the doctrine of effect on trade applies to Articles 101 and 102 TFEU, where a minimum level of cross-border effects within the EU is established.[756]

For determining when the doctrine is applicable, three aspects are of importance.[757] First, "*there must be an impact on cross-border activity involving at least two EU countries*" (trade between EU countries).[758] Second, "*it must be possible to foresee with a sufficient degree of probability on the basis of a set of objective factors of law or fact that the agreement or practice may have an influence, direct or indirect, actual or potential, on the pattern of trade between EU countries*".[759] This is the notion of "may affect". Last, the concept of appreciability must be fulfilled. Parameters to corroborate such finding include (i) the position and the importance of the relevant undertaking on the market for the products concerned; (ii) the nature of the agreement and practice; (iii) the nature of the products covered; and (iv) the market position of the undertakings concerned.[760]

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753 E. Berry, M. J. Homewood, and B. Bogusz, "*Complete EU Law: Text, Cases, and Materials*", Oxford: Oxford University Press 2017, p. 610.

754 Commission Notice — Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty (now Articles 101 and 102 TFEU) of 27 April 2004, [OJ 2004, No. C 101/07].

755 N. Foster, "*Blackstone's EU Treaties and Legislation 2014-2015*", Oxford: Oxford University Press 2014, p. 609.

756 Commission Notice — Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty (now Articles 101 and 102 TFEU) of 27 April 2004, [OJ 2004, No. C 101/07], para. 6-7.

757 Ibid., para. 18.

758 Ibid., para. 21.

759 Ibid., para. 23.

760 Ibid., para. 44-45.

1. Commission Recommendation on SMEs and the positive and negative rebuttable presumption of non-appreciability

While it is true that the Guidelines on inter-state trade do not provide quantitative rules on when trade is appreciably affected, they do provide examples of situations where trade is normally not capable of being appreciably affected pursuant to Article 101 TFEU. First, as defined in the Commission Recommendation concerning the definition of micro, small and medium-sized enterprises or any future recommendation replacing it ("Commission Recommendation on SMEs"), agreements between small and medium-sized undertakings do not affect trade between Member States.[761]

Second, the Guidelines set out a negative rebuttable presumption of non-appreciability.[762] This arises where the (1) aggregate market share of the parties on any relevant market within the EU affected by the agreements does not exceed 5 percent; and (2) the parties' aggregate annual Community turnover is below 40 million.[763] The presumption continues to apply where the turnover threshold is exceeded during two successive calendar years by no more than 10 percent and the market share threshold by no more than 2 percent.

The Guidelines also set out a positive rebuttable presumption of appreciability in the case of agreements that by their very nature (*i.e.* by object) are capable of affecting trade between Member States. This arises in the event both thresholds are exceeded. However, this positive rebuttable presumption is no longer true, as the ECJ in *Expedia* stated that agreements, which restrict competition by object, "always" have an appreciable effect on competition.[764]

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761 Ibid., para. 50; Commission Recommendation concerning the definition of micro, small and medium-sized enterprises or any future recommendation replacing it of 20 May 2003, [OJ 2003, No. L 124], p. 36.

762 Commission Notice — Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty (now Articles 101 and 102 TFEU) of 27 April 2004, [OJ 2004, No. C 101/07], para. 50.

763 Ibid., para. 52.

764 ECJ 13 December 2012, Case C-226/11 (Expedia Inc. v. Autorité de la concurrence et al), [2012] ECR I-795, para. 16-17, 35-37. In this judgment, the ECJ explained that the "effect on trade" requirement is fulfilled, in the event of "restrictions by object". In other words, the availability of the de minimis safe harbour was narrowed-down in terms of its application and impact.

2. The De Minimis Notice

In June 2014, the Commission, in an attempt to clarify the scope of the "effect on trade" doctrine, published a revised notice, namely the Commission Notice on Agreements of Minor Importance which do not Appreciably Restrict Competition under Article 101(1) TFEU (the "De Minimis Notice").[765] In its Notice, the Commission follows the reasoning of the ECJ in *Expedia* and stated that object restrictions are always deemed appreciable,[766] whereas effect restrictions below an aggregated market share of 10% in horizontal cases are not deemed appreciable.[767] Conversely, the de minimis doctrine does not apply in relation to Article 102 TFEU.[768] While providing a clear statement that the Commission will apply these principles in its own decisions, the De Minimis Notice is not treated as legally binding on the Community judiciary.[769]

III. Do the extrajudicial measures imposed by the trade associations researched and executed by their members and non-members have an effect on Community trade?

By keeping in mind the framework of the economic boundaries as outlined by the CJEU and the Commission, it must be examined whether the trade associations researched, their members and non-members, when imposing and executing nonlegal sanctions, have an appreciable effect on trade and, hence, trigger the scope of application of Articles 101 and 102 TFEU. While all actors prefer non-interference by dint of laissez-faire or

765 Commission Notice on Agreements of Minor Importance which do not Appreciably Restrict Competition under Article 101(1) TFEU (de minimis) of 30 August 2014 [OJ 2014, No. C 291/1].

766 Ibid., para. 2.

767 Ibid., para. 8 (a). See also A. Gideon, "*Higher Education Institutions in the EU: Between Competition and Public Service*", Liverpool/Singapore: T.M.C. Asser Press 2017, p. 74.

768 In ECJ 6 October 2015, Case C-23/14 (Post Danmark A/S v. Konkurrenceråd et), [2015] 651, p. 70-73 the ECJ found that the setting of an appreciability (de minimis) threshold for the purposes of determining whether there is an abuse of a dominant position is not justified. Although pertaining to rebates, in my opinion, the Court's observation conforms to the line of established and controversial case law.

769 P. J. Slot and M. Farley, "*An Introduction to Competition Law*", Oxford/London/Portland: Hart Publishing 2017, p. 56.

tacit acquiescence of the EU Commission, their roles in nonlegal sanctioning can constitute an effect on trade between Member States. Therefore, to fall within the reach of the effect on trade doctrine, the following three elements must be fulfilled which can be distilled from Articles 101 and 102 TFEU, the case law of the CJEU and the Notice on Inter-State Trade.[770]

1. The concept of trade

This requirement is met, because all of the six trade associations researched, their members and even non-members engage in cross-border activities.

2. The presence of "may affect"

When imposing nonlegal sanctions on wrongdoers, the trade associations researched are "most likely" capable of having a direct or indirect, actual or potential, influence on the pattern of trade between Member States. This view receives support from the fact that little evidence needs to be adduced by the Commission to satisfy this requirement.[771] The same can be said for their members when executing nonlegal sanctions. For non-members this is more difficult to establish. Their role in the execution of extrajudicial measures is more dubious. Yet, their role in executing nonlegal sanctions at least may have an influence, direct or indirect, actual or potential, on the pattern of trade between EU countries. This is especially true when these actors are aware if an industry actor is extrajudicially sanctioned and, as a result, not conduct business with that company.

770 See also van Bael & Bellis (firm), "*Competition Law of the European Community*", The Hague: Kluwer Law Internationaal 2005, p. 101.

771 Only in ECJ 26 November 1975, Case 73-74 (Groupement des fabricants de papiers peints de Belgique et al v. Commission of the European Communities), [1975] ECR 1491, para. 32 was this requirement not fulfilled. The ECJ ruled that the Commission's definition of inter-state trade was defined insufficiently precisely.

3. The concept of appreciability

The trade associations researched, their members and non-members fulfil this requirement in relation to Article 101 TFEU when their role in the imposition and execution of nonlegal sanctions has as their object the prevention, restriction or distortion of competition. Although an onerous task, the following Chapter contains an in-depth examination of whether a restriction of competition by object can be established.[772] Conversely, if their practices restrict competition by effect pursuant to Article 101 TFEU,[773] it must be established *argumentum e contrario* that the trade associations researched, their members and non-members satisfy two requirements. First, that their aggregate Community market share exceeds 10 percent (*i.e.* de minimis) and, second, that their annual Community turnover exceeds 40 million euro.[774] Such a two-fold test is omitted in relation to Article 102

772 See Part III, Chapter 9, C.

773 This will be analysed in the following Chapters.

774 The two-tier test to prove the existence of appreciability typically requires proof of shares and turnover. Unfortunately, this is a rather complicated and daunting task. This is because the Commission will be required to examine whether both indicators are met by defining the relevant market. See M. M. Dabbah, "*International and Comparative Competition Law*", Cambridge: Cambridge University Press 2010, p. 71; usually, it is necessary to define the relevant market in order to appraise whether an agreement is caught by Article 101(1) TFEU. See Slaughter and May, "An overview of the EU competition rules – A general overview of the European Competition rules applicable to cartels, abuse of dominance, forms of commercial cooperation, merger control and State aid", *Slaughter and May* 2016, p. 8, 14; With regard to the three actors, a much more simplified overview will be given to see whether the two appreciability requirements are met by them separately; For further information on how to conduct a proper market analysis and important observations, see ECJ 14 February 1978, Case 27/76 (United Brands Company and United Brands Continental BV v. Commission of the European Communities), [1978] ECR 207, para. 10; Commission Notice on the definition of relevant market for the purposes of Community competition law of 9 December 1997 [OJ 1997, No. C 372/5]. Market definition requires an examination of the product and geographical market; A. Ezrachi, "E*U Competition Law: An Analytical Guide to the Leading Cases*", Oxford/Portland: Hart Publishing 2014, p. 33. Market definition is important to identify the boundaries of competition and to provide a framework in which effects may be determined; Commission Notice on the definition of relevant market for the purposes of Community competition law of 9 December 1997 [OJ 1997, No. C 372/5], para. 7; Competition Appeal Tribunal 19 March 2002, Case 1005/1/101 (Aberdeen Journals Limited v. Director General of Fair Trading), [2002] CAT 4, para. 96-97. The product market is defined as one which "*comprises all those products and/or services which are regarded as interchangeable or substitutable by the consumer,*

TFEU. In line with this provision, market shares are only relevant in the material examination of what amounts to dominance as opposed to the scope of application.[775]

a. Nonlegal sanctions as effect restrictions

An agreement between competitors usually falls outside the scope of Article 101(1) TFEU where the joint market share of them falls below 10% and where their joint annual Community turnover does not exceed 40 million euro. When the members of the trade associations researched execute nonlegal sanctions to punish wrongdoers that operate on the same commodities markets as they do, it is likely that both thresholds are met (except in the EU diamond market in which the members of the DDC operate).[776] This is because these industry actors are members of the most important globally active trade associations which represent their interests and many

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by reason of the product' characteristics, their prices and their intended use"; Commission Notice on the definition of relevant market for the purposes of Community competition law of 9 December 1997 [OJ 1997, No. C 372/5], para. 8. A geographic market concerns the geographical area in which undertakings are involved with the supply and demand of products and services in which the same conditions of competition apply and which can be distinguished from neighbouring areas; Commission Notice on the definition of relevant market for the purposes of Community competition law of 9 December 1997 [OJ 1997, No. C 372/5], para. 6. Even though the Commission's Notice on market definition is guiding, it is important to note that the understanding of market definition by the Commission may differ from the practice of the CJEU. This is because European courts are not bound by the Notice. The Commission has a crucial role in defining the relevant market. In particular, because it involves a complex economic assessment. In appeal, the CJEU only has limited review possibilities. However, it can assess whether economic data is accurate, reliable and coherent. See CFI 9 September 2009, Case T-301/04 (Clearstream Banking AG and Clearstream International SA v. Commission of the European Communities), [2009] ECR II-3155, para. 47. In this case reference is made to CFI 17 September 2007, case T-201/04 (Microsoft Corp. v. Commission of the European Communities), [2007] ECR II-3601, para. 482.

775 See Part II, Chapter 8, B, I.

776 90 percent of the members of the DDC live in the tristate area of New York, New Jersey and Connecticut. See https://www.nyddc.com/ddc-news—events. Hence, in my opinion, it is unlikely that the market share threshold by the members of the DDC is met in the territory of the EU; The presence of an agreement for the members of the trade associations researched is discussed in Part III, Chapter 9, B, I.

of them prefer to receive their services.[777] Non-members also satisfy the two-tier requirement when they have entered into an agreement. It is without doubt that not all of the market participants are members of the trade associations researched, because some may prefer to not belong to a specific group, whereas others are members of competing trade associations active in some of the commodities markets researched.[778]

Establishing whether the trade associations researched satisfy the two appreciability requirements when they impose nonlegal sanctions on wrongdoers is far more contentious. This is because the trade associations researched operate on the market for regulation and private ordering concerning specific commodities industries on EU territory, whereas extrajudicial measures have an impact on targeted industry actors operating on adjacent second-tier commodities markets on EU territory. Obviously, this raises a problem: appreciability typically requires that the instigator of conduct has an effect on an industry actor that is active in the same market. The trade associations researched do not possess market power in the commodities markets, but satisfy the market share threshold in the markets for regulation and private ordering concerning specific commodities on EU territory.[779] In my opinion, this alone cannot be an obstacle to absolving the trade associations researched when they impose nonlegal sanctions. Their involvement in imposing extrajudicial measures has an appreciable impact on targeted wrongdoers and, hence, has an appreciable effect on the commodities markets researched when these markets are defined regionally to the territory of the EU. Subsequently, unilateral conduct of the trade associations researched meets the appreciability requirement insofar as its conduct can be defined as an agreement. This is explained in the next Chapter.[780]

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777 See Part II, Chapter 7, B, I, 2.

778 It would require arduous research to calculate the market shares of non-members in comparison to those of members in each of the commodities industries researched. Therefore, non-members are deemed to possess more than 10% market shares and have more than an annual Community turnover of 40 million euro. The presence of an agreement for the members of the trade associations researched is discussed in Part III, Chapter 9, B, I and III.

779 Although EU-wide shares are unaccounted for, global empirical percentages and statements indicate the crucial role of these associations in international trade. Accordingly, establishing Community market shares can be considered extraneous and superfluous. It is also likely that the fairly low Community threshold is met, despite the trade associations researched operating on a not-for-profit basis.

780 See Part III, Chapter 9, B, II.

E. Key findings

Safeguarding the EU internal market against unacceptable conduct is quintessential for the EU Member States.[781] Upon a belief that an undistorted free market economy will further economic growth and benefit consumers, potential anti-competitive nonlegal sanctions imposed by the trade associations researched and executed by their members and non-members can infringe two core prohibitions of EU Competition Law: first, Article 101 TFEU and, second, Article 102 TFEU. Before going into a substantive analysis of whether indeed both provisions are infringed upon, the framework of the scope of application of both Articles must be extended. To claim authority as to whether this is the case, the Commission – being the principal enforcer of EU Competition Law – must provide evidence that, first, the legal boundary and, second, economic boundaries are fulfilled.[782]

The legal boundary, on the one hand, is exceeded by the members of the trade associations researched and non-members pursuant to Articles 101 and 102 TFEU.[783] Industry actors belonging to both groups of actors are undertakings within the meaning of both provisions because they engage in economic activities. This is not true when they are not entities, but are private individuals. Then, the legal boundary is not met. Determining whether the trade associations researched go beyond the legal boundary requires a more arduous reasoning.[784] Whereas these trade associations are associations of undertakings within the meaning of Article 101 TFEU and thus exceed the legal boundary, this concept does not exist under Article 102 TFEU. Put differently, to fall within the legal bounds of Article 102, the trade associations must be classified as undertakings. Given their functioning as umbrella organizations for different undertakings, such a qualification is not problematic. An absence of profit maximization as an underlying motive when providing services to their members also does not change this outcome. Whereas one could argue that services provided by the trade associations researched which include nonlegal sanctions are excluded from the scope of Article 102 TFEU because they fall within the essential prerogatives of the State (*i.e.* essential function of the State), in my opinion, they do not. The trade associations researched were formed to ac-

781 See Part III, Chapter 8, A.
782 See Part III, Chapter 8, B.
783 See Part III, Chapter 8, C, I.
784 See Part III, Chapter 8, C, II.

commodate the needs of globally active industry actors that operate in specific commodities markets. Hence, the trade associations are detached from the State and operate within a PLS. Moreover, due to the harmful effects for targeted wrongdoers, it would be imprudent to treat the trade associations researched as public undertakings. This would prevent an antitrust review on the merits. Consequently, the trade associations researched are undertakings within the meaning of Article 102 TFEU.

Exceeding the economic boundaries (*i.e.* the concept of the effect on inter-state trade), on the other hand, requires a more burdensome task for the Commission.[785] This is because the Commission must take the interpretation of this concept given by the CJEU into account which is profoundly less specific with regard to the appreciability standard.[786] In line with the CJEU's reasoning, the Commission must explain that the nonlegal sanctions imposed by the trade associations researched and executed by their members and non-members are capable of having the effect of hindering trade.[787] Whereas the definition used by the CJEU consists of overtly vague norms that need clarification through their application, the Commission needs to fulfil three elements before it can assess conduct under Articles 101 and 102 TFEU. These prerequisites can be found in the Guidelines on Inter-State Trade.

First, the Commission must establish that the three groups of actors are engaged in cross-border activity.[788] It deserves no further explanation that this requirement is fulfilled. Second, nonlegal sanctioning must be capable of having a direct or indirect, actual or potential, influence on the pattern of trade between Member States.[789] Given that little evidence is needed to satisfy this requirement and only once in the history of the CJEU has this requirement not been fulfilled, nonlegal sanctioning by the trade associations researched, their members and non-members can potentially influence Community trade. Obviously, when a member undertaking of a trade association gets punished for disloyal behaviour, market access and, thus, inter-state trade can be impeded. In turn, member undertakings of the trade associations researched have increased security when contracting and lower transaction and distribution costs. This also has an influence on Community trade.

785 See Part III, Chapter 8, D.
786 See Part III, Chapter 8, D, I.
787 See Part III, Chapter 8, D, II.
788 See Part III, Chapter 8, D, III, 1.
789 See Part III, Chapter 8, D, III, 2.

Third, the last concept to fall within the reach of the effects on interstate trade doctrine necessitates that the trade associations researched, their members and non-members fulfil the "appreciability" (*i.e.* de minimis) requirement.[790] Pursuant to Article 102 TFEU such an examination is redundant, in particular, due to the fact that the Commission must consider this criterion under the dominance requirement. Conversely, in relation to Article 101 TFEU, for the Commission to have authority to assess the potential anti-competitiveness of nonlegal sanctioning, the concept of appreciability is crucial. In this regard, the De Minimis Notice is guiding. Importantly, to understand when nonlegal sanctions which are imposed by the trade associations researched and executed by their members and non-members fulfil this criterion, it is at times difficult to make a distinction between restrictions by object and by effect.[791]

When the conduct of these undertakings can be classified as restrictions by object, in line with the judgment in *Expedia*, which forms the basis of the Commission's stance in its De Minimis Notice, the appreciability requirement is automatically fulfilled. However, where a nonlegal sanction has an effect on trade, this is not so obvious. The Commission must then undertake an assessment of whether self-regulatory sanctioning has an appreciable effect on trade. This requires evidence that the members of the trade associations researched possess – jointly – more than 10% market shares in each relevant EU commodities market. In addition, they must generate more than 40 million euro in annual turnover on that market. Despite an absence of clear data, the members of the trade associations researched satisfy both requirements (except the members of the DDC). This is because the majority of industry actors prefer to belong to the most important trade association which ensures efficiency gains to them. Non-members also fulfil both requirements when they have entered into an agreement. In some commodities markets, there are competing trade associations and some industry actors may prefer to not belong to a specific association. With regard to the trade associations researched, despite their operating on the markets for regulation and private ordering concerning specific commodities on EU territory and not on the second-tier adjacent commodities markets within which their extrajudicial measures take effect, these associations of undertakings meet the appreciability requirement. It would be unwise to exclude the possibility of antitrust scrutiny

790 See Part III, Chapter 8, D, III, 3.
791 See Part III, Chapter 8, D, III, 3, a.

under Article 101 TFEU when such unilateral conduct has an appreciable effect on targeted wrongdoers.

In sum, nonlegal sanctioning methods imposed by the trade associations researched and executed by their members and non-members falls within the scope of EU Competition Law. More specifically, conformity with Articles 101 and 102 TFEU can be examined by the Commission (and in appeal, the CJEU). This is because the legislative Community framework consisting of legal and economic boundaries is "unequivocally" applicable. In other words, the Commission is empowered to carry out its task of ensuring that both Articles vis-à-vis guaranteeing market freedom and benefitting consumers are complied with. This substantive analysis is the focus of the next Chapter.

Chapter 9: Anticompetitive Agreements under Article 101(1) TFEU

A. *Introduction*

Article 101 (1) TFEU regulates the culpability of undertakings that participate in agreements harmful to the functioning of the internal market. In other words, this provision prohibits agreements between undertakings, which have the restriction of competition as their object or effect. To scrutinize whether the trade associations researched, their members and non-members violated this prohibition for their participation in extrajudicially sanctioning a disloyal industry actor, it is, first, essential to answer the question whether they colluded (Paragraph B) and, second, whether their agreements restrict competition (Paragraphs C-H).[792]

B. *Collusion: "a concurrence of wills"*

Collusion plays a central role under Article 101(1) TFEU because it focuses on prohibiting any form of cooperation between undertakings that leads to prevention, restriction or distortion of competition within the internal market. While this might appear a broad catch-all provision, a concurrence of wills must take one of the three different forms described in Article 101(1) TFEU. These are (i) an "agreement between undertakings"; (ii) a "decision by an association of undertakings"; and (iii) a "concerted practice".[793]

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792 A similar approach was followed in C. Barnard and S. Peers, "*European Union Law*", Oxford: Oxford University Press 2017, p. 521.

793 ECJ 8 July 1999, Case C-49/92P (Commission of the European Communities v. Anic Partecipazioni SpA), [1999] ECR I-4125, para. 112, 132, 133. In this case the ECJ held that "*whilst the concepts of an agreement and of a concerted practice have particularly different elements, they are not mutually incompatible* […] *the [General Court] did not therefore have to require the Commission to categorise either as an agreement or as a concerted practice each form of conduct found but was right to hold that the Commission has been entitled to characterise some of those forms of conduct as principally "agreements" and others as "concerted practices* […] *it must be pointed out that that this interpretation is not incompatible with the restrictive nature*

In practice, however, there is no need to identify whether a particular behaviour falls within one of these categories considered in Article 101(1) TFEU.[794] This is because the EU Commission tends to make a general distinction between independent conduct and collusion only.[795] Regardless of this approach, to assess whether the trade associations researched, their members and non-members have cooperated when extralegally punishing a recalcitrant industry actor, it is better to establish for each of these actors which form of collusion can be established within the meaning of Article 101 (1) TFEU.

I. Agreement between undertakings

The concept of "agreement between undertakings" is not legally defined in European law, but it has been extensively interpreted by the CJEU. According to the CFI, an agreement encompasses anything which encapsulates the "*faithful expression of the joint intention of the parties*"[796], irrespec-

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of the prohibition laid down in [Article 101 TFEU] […] *Far from creating a new form of infringement, the arrival at that interpretation merely entails acceptance of the fact that, in the case of an infringement involving different forms of conduct, they meet different definitions whilst being caught by the same provision and being all equally prohibited*". Moreover, the Commission in Commission Decision of 5 December 2001, Case No IV/37.614/F3 PO (Interbrew and Alken-Maes), para. 223 noted that "The concepts of "agreement" and "concerted practice" are variable and may overlap. Realistically, it may even be impossible to make such a distinction, since an infringement may simultaneously have the characteristics of both forms of prohibited behaviour, whereas taken separately, some of its elements may correctly be regarded as one rather than the other form. It would also be artificial from an analytical point of view to split what is clearly a continuous, collective enterprise with a single objective into several forms of infringement. A cartel may for instance constitute an agreement and a concerted practice at the same time.

794 See ECJ 23 November 2006, Case C-238/05 (Asnef-Equifax v. Ausbanc), [2006] ECR I-11125, para. 32. In this case the ECJ ruled that "*a precise characterisation of the nature of the cooperation at issue is not liable to alter the legal analysis to be carried out under Article [101 TFEU]*".

795 M. Lorenz, "*An Introduction to EU Competition Law*", Cambridge: Cambridge University Press 2013, p. 76.

796 CFI 6 April 1995, Case T-141/89 (Tréfileurope Sales SARL v. Commission of the European Communities), [1995] ECR II-791, para. 96.

tive of its form[797]. In other words, it is not only confined to binding or oral contracts of whatever kind, but also includes tacit collusion (acceptance) or acquiescence of unilateral policies. In many ways it is comparable to the existence of a contract under Section 1 of the Sherman Act.[798] As a result, the same logic can be applied. When one of the trade associations researched imposes any type of nonlegal sanction on a recalcitrant industry actor, it is in fact their members that execute such measure or measures. The reason for this is the members have expressly agreed to respect the by-laws and rules of the relevant trade association at the time of obtaining membership in which nonlegal sanctions are included. Moreover, when members conduct business with other members (or non-members) on the basis of a standardized contract from a relevant trade association, this is perhaps even more obvious. Such a document typically refers to a broader arbitration agreement which includes nonlegal sanctions. That being said, albeit that one can make an argument that new members are not expected to understand all the membership rules upon admittance and could argue that they have no knowledge of extrajudicial sanctioning, such logic should be rebutted. Members ought to be aware of the methods to punish disloyal market participants for not complying with an arbitral award.[799] Hence, the members of the trade associations researched entered into an agreement between undertakings.

Establishing an agreement for non-members is more difficult. Such market participants are not members of a trade association and have not

797 ECJ 6 January 2004, joined cases C-2/01 P and C-3/01P (Bayer v. Commission), [2004] ECR I-23, para. 101-102. In this case the ECJ ruled that a unilateral policy can constitute an agreement pursuant to Article 101 TFEU. Therefore, "*it is necessary that the manifestation of the wish of one of the contracting parties to achieve an anti-competitive goal constitute an invitation to the other party, whether express or implied to fulfil that goal jointly*". In other words, an unilateral invitation may constitute an agreement when it is expressly or tacitly accepted by the other party. It occurs when the conduct of the addressee reveals support to the unilateral course of conduct. An *argumentum e contrario* drawn from this definition entails that, in the event the other party reacts against an unilateral course of conduct, no agreement can be deemed to be constituted. See also M. Horspool and M. Humphreys, "*European Union Law*", Oxford: Oxford University Press 2012, p. 438, 439

798 See Part II, Chapter 6, C, I.

799 This is to some degree similar as ECJ 12 July 1979, joined cases 32/78, 36/78 to 82/78 (BMW Belgium SA et al v. Commission of the European Communities), [1979] ECR 2435, para. 36. Following this case, BMW Belgium instructed its dealers to refrain from dealing with non-approved dealers. Despite some pressure from BMW Belgium, its dealers could refuse to enter into this agreement.

agreed to abide by its rules and rules, which include extrajudicial sanctions. Only when a non-members enters into an agreement with a member of a relevant trade association on the basis of a standardized contract of this association which refers to a broader arbitration agreement that includes nonlegal sanctions, is there sufficient evidence of an agreement between undertakings within the meaning of Article 101(1) TFEU.

II. Decisions by associations of undertakings

The second category of collusion envisaged in Article 101(1) TFEU does not aim to cover direct forms of coordination (*e.g.* agreements or concerted practices) by undertakings, but institutionalized forms (*i.e.* acting through collective structures) of coordination. Whereas this description is not useful to define the behaviour of members and non-member undertakings in executing nonlegal sanctions, it is perfectly suitable to describe the cooperation of the trade associations researched when they impose any type of nonlegal sanction on an industry actor.[800] This is on the grounds that the imposition of nonlegal sanctions (i) originates from the governing body of a trade association;[801] (ii) the decisions are formal or informal;[802] and (iii) the trade associations researched are able to dictate a certain market economic behaviour applicable to their members.[803]

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800 See Part II, Chapter 6, C, II. Albeit more obvious with regard to Article 101 TFEU, a decision by an association of undertakings is to a large degree similar to a combination in the form of trust or otherwise which is appropriate to describe the form of collusion by the trade associations researched under Section 1 of the Sherman Act.

801 Trade associations have sometimes been used as a vehicle by companies to collude. See M. M. Dabbah, "*EC and UK Competition Law: Commentary, Cases and Materials*", Cambridge: Cambridge University Press 2004, p. 69; The membership rules of trade associations have the effect of regulating standards and behaviour. See E. Berry, M. J. Homewood, and B. Bogusz, "*Complete EU Law: Text, Cases, and Materials*", Oxford: Oxford University Press 2017, p. 596.

802 D. Cahill, V. Power, and N. Connery, "*European Law*", New York: Oxford University Press 2011, p. 164.

803 C. Cucu, "Agreements, Decisions and Concerted Practices: Key Concepts in the Analysis of Anti-competitive Agreements", *Lex ET Scientia International Journal, Vol. 20, Issue* 1 2013 p. 222. A decision must be interpreted broadly; When one of the trade associations researched imposes a nonlegal sanction on a wrongdoer, the economic behaviour of its members towards such an industry actor is influenced. Typically, such members are less likely to conduct trade with a targeted undertaking.

III. Concerted practices

When the trade associations researched and their members orchestrate nonlegal sanctions, such conduct is defined as decisions by associations of undertakings with regard to the relevant trade association and agreements between undertakings pertaining to its members. There is no need to assess whether they have engaged in a concerted practice. This is different, however, for non-members that did not conduct trade on the basis of a standardized contract with a member of one of the trade associations researched. Applying the two forms of cooperation mentioned above is unsatisfactory. Much more can they have engaged in a concerted practice by discontinuing or avoiding trade with a targeted extrajudicially sanctioned industry actor. Whether such a change in commercial behaviour by non-members is sufficient to amount to a concerted practice depends on the various methods of interpretation communicated by the CJEU and in legal doctrine.

To start this discussion, the concept of concerted practice should be defined as a catch-all provision[804] to situations where parties without any formal agreement "*knowingly substitute practical cooperation for the risks of competition*".[805] In other words, it aims to forestall the possibility of undertakings evading the application of Article 101 TFEU by colluding in a manner falling short of an agreement. Strictly etymologically, the concept of concerted practice entails the conscious and deliberate cooperation of undertakings with a certain market behaviour. Albeit that this is rather vague and difficult to evidence, the CJEU developed a fathomable definition. In *Dyestuff* the ECJ defined the term concerted practice as "*a form of coordination between undertakings, which without having reached the stage where an agreement properly so-called has been concluded, knowingly substitutes practical cooperation for the risks of competition*".[806] One year later, in the *Sugar Cartel*

804 W. Frenz, "*Handbook of EU Competition Law*", Berlin/Heidelberg: Springer Verlag Berlin Heidelberg 2016, p. 270.

805 See ECJ 14 July 1972, Case 48/69 (Imperial Chemical Industries Ltd. v. Commission of the European Communities), [1972] ECR 619, para. 64; There are a lot of similarities with the concept of conspiracy pertaining to Section 1 of the Sherman Act. See Part II, Chapter 6, C, III.

806 ECJ 14 July 1972, Case 48-69 (Imperial Chemical Industries Ltd. v. Commission of the European Communities), [1972] ECR 619, para. 64.

case the CJEU revisited this concept and gave a more detailed definition.[807] The ECJ explained that there must be a form of coordination or practical cooperation between undertakings and that such collusion must be achieved through a direct or indirect contact between the undertakings concerned.[808] Absent a preponderance of evidence, the standard of proof that the Commission has to meet can be considered as "not very high".[809] Moreover, the Commission does need to show that the concerted practice has anti-competitive effects on the market.[810]

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807 ECJ 16 December 1975, joined cases 40 to 48, 50, 54 to 56, 111, 113 and 114-73 (Coöperatieve Vereniging "Suiker Unie" UA et al v. Commission of the European Communities), [1975] ECR 1663.

808 Ibid., para. 174. The ECJ ruled that "*it does however strictly preclude any direct or indirect contact between* […] *operators, the object or effect whereof is either to influence the conduct on the market of an actual or potential competitor or to disclose to such a competitor the course of conduct which they themselves have decided to adopt or contemplate adopting on the market*". This definition was understood in literature as consisting of three separate requirements that need to be fulfilled. See van Bael & Bellis (firm), "*Competition Law of the European Community*", The Hague: Kluwer Law Internationaal 2005, p. 52.

809 With regard to the standard of proof, the Court in ECJ 7 January 2004, joined cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P, (Aalborg Portland et al v. Commission of the European Communities), [2004] ECR I-123, para. 81 ruled that according to settled case law, "*It is sufficient for the Commission to show that the undertaking concerned participated in meetings at which anti-competitive agreements were concluded, without manifestly opposing them, to prove to the requisite standard that the undertaking participated in the cartel. Where participation in such meetings has been established, it is for that undertaking to put forward evidence to establish that its participation in those meetings was without any anti-competitive intention by demonstrating that it had indicated to its competitors that it was participating in those meetings in a spirit that was different from theirs*".

810 ECJ 8 July 1999, Case C-199/92P (Hüls AG v. Commisson of the European Communities), [1999] ECR I-4287, para. 163-166. The ECJ stated that a concerted practice falls under Article 101 TFEU, "*even in the absence of anti-competitive effects on the market*". In this regard, the Court used three arguments. "*First, it follows from the actual text of that provision that, as in the case of agreements between undertakings and decisions by associations of undertakings, concerted practices are prohibited, regardless of their effect, when they have an anti-competitive object. Next, although the very concept of a concerted practice presupposes conduct by the participating undertakings on the market, it does not necessarily mean that that conduct should produce the specific effect of restricting, preventing or distorting competition. Lastly, that interpretation is not incompatible with the restrictive nature of the prohibition laid down in Article 81(1) EC* [now Article 101(1) TFEU] […] *since, far from extending its scope, it corresponds to the literal meaning of the terms used in that provision*".

Against this background, defining the conduct of non-members that did not contract on the basis of a standardized contract with a member of a relevant trade association as a concerted practice within the meaning of Article 101(1) TFEU is rather contentious. If an (unintentional) joint adjustment of a market strategy by non-members is already considered a concerted practice, this runs the risk that every seemingly small shred of evidence substantiating a common market adjustment is enough to substantiate collusion within the meaning of Article 101(1) TFEU. In spite of this observation, if one would allow non-members to escape antitrust scrutiny at this early stage by denying the presence of a concerted practice, it would immunise them and prevent the Commission and the CJEU from delving into an antitrust analysis for the participation of non-members in the execution of nonlegal sanctions. Accordingly, non-members that did not contract with a member of a trade association on the basis of the trade association's standardized contract have colluded in the form of a concerted practice.

C. *Prevention, restriction or distortion of competition: The existence of an illegal horizontal agreement and collective boycott*

Nonlegal sanctioning has the potential to oust an industry actor from any relevant commodities market and in some markets even harms social relationships within a close-knit society. This alone is sufficient to justify a thorough analysis of whether nonlegal sanctioning is considered anticompetitive. To provide a comprehensive analysis comparable to Section 1 of the Sherman Act[811], the focus will be on the collection and dissemination of the names of wrongdoers in blacklists, withdrawing membership, denying membership for expelled members on the basis of an additional entry condition, refusing to deal with ostracized members, entering the premises of recalcitrant industry actors without a warrant, and limiting adequate access to public courts prior to arbitral proceedings and after an award.

I. Restrictions by object or effect

Before researching whether the trade associations researched, their members and non-members violate Article 101 (1) TFEU, it is necessary to un-

811 See Part II, Chapter 6, D.

derstand the difference between restrictions by object and effect. In this regard, the ECJ in *Société Technique Minière (L.T.M.) v. Maschinenbau Ulm GmbH (M.B.U.)* must be mentioned.[812] In its judgment, the Court ruled that a restriction by object is given when an agreement or concerted practice is so deleterious to competition that negative effects on the internal market are assumed, whereas a restriction by effect is established when the anticompetitive effects of specific conduct on the market are proven.[813] These non-cumulate, but alternative requirements[814] - arguably - bear similarities to the *per se* rule and effects rule applied by the FTC and US courts when dealing with a claim relating to Section 1 of the Sherman Act.

When assessing whether conduct violates Article 101(1) TFEU by object or effect, the Commission and in appeal the CJEU must first consider the former rule before applying the second rule. This is because "*there is no need to take account of the concrete effects of an agreement once it appears that it has as its object the prevention, restriction or distortion of competition*".[815] To determine whether an "object" restriction exists, the purpose of the agreement must be examined in light of the legal and economic context,[816] the wording of the provision of the agreements concerned and the objectives they are intended to attain,[817] without taking into account the actual and

812 ECJ 30 June 1966, Case 56/65 (Société Technique Minière (L.T.M.) v. Maschinenbau Ulm GmbH (M.B.U.)), [1966] ECR 235.

813 Ibid., p. 249.

814 Ibid. The ECJ ruled that "*these are not cumulative but alternative requirements, indicated by the conjunction 'or', leads first to the need to consider the precise purpose of the agreement, in the economic context in which it is to be applied*". See also Communication from the Commission – Notice – Guidelines on the application of Article 81(3) of the Treaty [now Article 101 (3) TFEU] of 27 April 2004, [OJ 2004, No. C 101/97], para. 20.

815 ECJ 13 July 1966, joined cases 56 and 58-64 (Établissements Consten S.à.R.L. and Grundig-Verkaufs-GmbH v. Commission of the European Economic Community) [1966] ECR 299, p. 342.

816 ECJ 28 March 1984, joined cases 29 and 30/83 (Compagnie Royale Asturienne des Mines SA and Rheinzink GmbH v. Commission of the European Communities), [1984] ECR 1979, para. 26; ECJ 4 June 2009, Case C-8/08 (T-Mobile Netherlands BV, KPN Mobile NV, Orange Nederland NV and Vodafone Libertel NV v. Raad van Bestuur van de Nederlandse Mededingingsautoriteit), [2009] ECR I-4529, para. 27.

817 ECJ 20 November 2008, Case C-209/07 (Competition Authority v. Beef Industry Development Society Ltd and Barry Brothers (Carrigmore) Meats Ltd.), [2008] ECR I-8637, para. 21. Importantly, the ECJ ruled that "*an agreement may be regarded as having a restrictive object even though it does not have the restriction of com-*

concrete effects of the agreements.[818] To elaborate on this, non-exhaustive guidance on what constitutes a restriction by object can be found in Commission block exemptions, guidelines and notices.[819]

If conduct does not have the object of harming competition, the consequences of the agreements should then be considered. For it to be caught by Article 101 TFEU, it is then necessary to show that "*competition has in fact been prevented or restricted or distorted to an appreciable extent*".[820] To determine the effects on competition, both actual and potential effects must

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petition as its sole aim but also pursues other legitimate objectives […] *It is only in connection with Article 81(3) EC [now Article 101(3) TFEU] that matters* […], *if appropriate, be taken into consideration for the purposes of obtaining an exemption from the prohibition laid down in Article 81(1) EC [now Article 101(1) TFEU]*".

818 ECJ 30 January 1985, Case 123/83 (Bureau national interprofessionnel du cognac v. Guy Clair), [1985] ECR 391, para. 22; ECJ 28 June 2005, joined cases C-189, 202, 205-208 and 213/02P (Dansk Rørindustri A/S et al v. Commission of the European Communities), [2005] ECR I-5425, para. 145; ECJ 7 February 2013, Case C-68/12 (Protimonopolný úrad Slovenskej republiky v. Slovenská sporiteľňa a.s), ECLI:EU:C:2013:71, para. 17.

819 See, in particular, the Communication from the Commission – Notice – Guidelines on the application of Article 81(3) of the Treaty [now Article 101(1) TFEU] of 27 April 2004, [OJ 2004, No. C 101/97], para. 21-22. In this Notice the Commission summarizes case law and gives some policy statements by explaining that "*Restrictions of competition by object are those that by their very nature have the potential of restricting competition. These are restrictions which in light of the objectives pursued by the Community competition rules have such a high potential of negative effects on competition that it is unnecessary for the purposes of applying Article [101](1) to demonstrate any actual effects on the market. This presumption is based on the serious nature of the restriction and on experience showing that restrictions of competition by object are likely to produce negative effects on the market and to jeopardise the objectives pursued by the Community competition rules. The assessment of whether or not an agreement has as its object the restriction of competition is based on a number of factors. These factors include, in particular, the content of the agreement and the objective aims pursued by it. It may also be necessary to consider the context in which it is (to be) applied and the actual conduct and behaviour of the parties on the market. In other words, an examination of the facts underlying the agreement and the specific circumstances in which it operates may be required before it can be concluded whether a particular restriction constitutes a restriction of competition by object. The way in which an agreement is actually implemented may reveal a restriction by object even where the formal agreement does not contain an express provision to that effect. Evidence of subjective intent on the part of the parties to restrict competition is a relevant factor but not a necessary condition*"; See also the Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements of 14 January 2011, [OJ 2011, No. C 11/01].

820 ECJ 30 June 1966, Case 56/65 (Société Technique Minière (L.T.M.) v. Maschinenbau Ulm GmbH (M.B.U.)), [1966] ECR 235, p. 249.

be taken into account[821] in the context in which they occur, in light of the situation which would have existed in the absence of the agreement[822] with special emphasis on the economic and legal context of such agreements.[823] In addition, the CFI ruled that in examining the restrictive effects "*the nature of the products or services concerned, as well as the real operating conditions and the structure of the market concerned*" should be thoroughly assessed.[824] It is therefore necessary to examine, first, what the competition would have been in the absence of the agreement and, second, whether the impact of the agreement on competition can be sufficiently substantiated.[825]

II. Collection and dissemination of market information

It is clear that in a market where operators disseminate detailed and (potentially) commercially sensitive information, sharing data can facilitate collusion, or even lead to an agreement in violation of Article 101(1) TFEU.[826] But can the same conclusion be drawn when one of the trade

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821 ECJ 28 May 1998, Case C-7/95P (John Deere Ltd v. Commission of the European Communities), [1998] ECR I-311, para. 77; Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements of 14 January 2011, [OJ 2011, No. C 11/01], para. 26.

822 ECJ 25 November 1971, Case 22-71 (Béguelin Import Co. v. S.A.G.L. Import Export), [1971] ECR 949, para. 17. See, in particular, CFI 2 May 2006, Case T-328/03 (O2 (Germany) GmbH & Co. OHG v. Commission of the European Communities), [2006] ECR II-1231, para. 69. In this case the CFI ruled that the analysis of "*taking into account of the competition situation that would exist in the absence of the agreement, does not amount to carrying out an assessment of the pro- and anti-competitive effects of the agreement and thus to applying a rule of reason, which the Community judicature has not deemed to have its place under Article [101(1) TFEU]*".

823 ECJ 12 December 1967, Case C-23/67 (SA Brasserie de Haecht v. Consorts Wilkin-Janssen), [1967] ECR 525, p. 415.

824 GC 24 May 2012, Case T-111/08 (MasterCard, Inc. et al v. European Commission), [2012] ECR II-000, para. 87; CFI 2 May 2006, Case T-328/03 (O2 (Germany) GmbH & Co. OHG v. Commission of the European Communities), [2006] ECR II-1231, para. 66.

825 CFI 2 May 2006, Case T-328/03 (O2 (Germany) GmbH & Co. OHG v. Commission of the European Communities), [2006] ECR II-1231, para. 73.

826 J. Drexl and F. Di Porto, "*Competition Law as Regulation*", Chelthenham/Northampton: Edward Elgar Publishing 2015, p. 296; A. Jones and B. E. Sufrin,

associations researched places a recalcitrant industry actor on a blacklist? Though a great deal of case law reflects on the difficult relationship between an illicit exchange of information and this provision, the Commission, NCAs and the CJEU have not dealt with the blacklisting of member undertakings for not complying with arbitral awards, which blacklisting is imposed by trade associations and executed by its members and non-members.[827] To address this, the focus in this Paragraph is to discuss (relatively) comparable case law where the exchange of information through (regulatory) circulars constituted an infringement of Article 101(1) TFEU and more fitting cases, where the publication of default lists for non-adhering to bylaws/regulatory terms by trade associations either violated or did not violate this provision. A potential antitrust infringement attributable to the trade associations researched, their members and non-members for their respective roles in the dissemination of market information through a blacklist will be discussed separately.

"*EU Competition Law: Text, Cases, and Materials*", Oxford: Oxford University Press 2016, p. 163.

827 Generally, exchanges of information are about prices, production and sales, costs, investments and capacities. See, *inter alia*, ECJ 16 December 1975, joined cases 40 to 48, 50, 54 to 56, 111, 113 and 114-73 (Coöperatieve Vereniging "Suiker Unie" UA et al v. Commission of the European Communities), [1975] ECR 1663; ECJ 31 March 1993, joined cases C-89/85, C-104/85, C-114/85, C-116/85, C-117/85, C-125/85, C-126/85, C-127/85, C-128/85 and C-129/85 (Ahlström Osakeyhtiö et al v. Commission), [1993] ECR I-01307; Commission Decision of 13 July 1994 relating to a proceeding under Article 85 of the EC Treaty [now Article 101 TFEU], Case No IV/C/33.833 (Cartonboard); Commission Decision of 30 November 1994 relating to a proceeding under Article 85 of the EC Treaty [now Article 101 TFEU], Case No IV/33.126 and 33.322 (Cement); ECJ 28 May 1998 (John Deere Limited v. Commission of the European Communities), [1998] ECR I-3111; ECJ 8 July 1999, Case C-49/92P (Commission of the European Communities v. Anic Partecipazioni SpA), [1999] ECR I-4125; CFI 15 March 2000, joined cases T-25/95, T-26/95, T-30/95, T-31/95, T-32/95, T-34/95, T-35/95, T-36/95, T-37/95, T-38/95, T-39/95, T-42/95, T-43/95, T-44/95, T-45/95, T 46/95, T-48/95, T-50/95, T-51/95, T-52/95, T-53/95, T-54/95, T-55/95, T-56/95, T-57/95, T-58/95, T-59/95, T-60/95, T-61/95, T-62/95, T-63/95, T-64/95, T-65/95, T-68/95, T-69/95, T-70/95, T-71/95, T-87/95, T-88/95, T-103/95 and T-104/95 (Cimenteries CBR et al v. Commission), [2000] ECR II-491; ECJ 2 October 2003, Case C-194/99P (Thyssen Stahl AG v. Commission of the European Communities), [2003] ECR I-10821.

1. Blacklists by trade associations

In the bylaws of all of the trade associations researched there is a clause included that either obligates, or empowers, these associations to blacklist recalcitrant industry actors when such undertakings do not satisfy arbitral awards from specialized commercial arbitration. When a nonlegal sanction is imposed, there is a clear risk that a relevant trade association violates Article 101(1). The reasons are two-fold. First, the Commission in its guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements ("Guidelines on Horizontal Cooperation Agreements") referred to the exchange of information as one of the six most common types of horizontal restraints incompatible with the provisions of Article 101.[828] Second, the dissemination of market information through a blacklist has raised antitrust concerns such as in the ECJ's judgment in *Asnef-Equifax/Ausbanc*[829] and the Commission's, CFI's and ECJ's judgments in *Compagnie Maritime Belge*.[830]

828 Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements of 14 January 2011, [OJ 2011, No. C 11/01], para. 5; See also A. Fatur, "*EU Competition Law and the Information and Communication Technology Network Industries*", Oxford: Hart Publishing 2012, p. 112; Regardless of the fact that the Commission in its Guidelines on horizontal cooperation agreements refers to exchange of information as part of the activities of a cartel, this document is not very useful other than stating that an exchange of information is a common type that infringes Article 101(1) TFEU. This is mainly engendered by two reasons: first, the Guidelines do not contain a definition of what constitutes a cartel. Second, whereas the Guidelines speak of qualification as a restriction by object or effect, there is no reference made to a situation comparable to the practice of blacklisting by the trade associations researched. Support given by the Guidelines on applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements of 14 January 2011 [OJ 2011, No. C 11/01], para. 72-94 to determine under which category of restriction the practice of blacklisting falls is ill-matched. A qualification as a restriction by either object or effect is impossible without considering the decisional practice of the Commission and the case law of the CJEU.

829 ECJ 23 November 2006, Case C-238/05 (Asnef-Equifax, Servicios de Información sobre Solvencia y Crédito, SL and Administración del Estado v. Asociación de Usuarios de Servicios Bancarios (Ausbanc)), [2006] ECR I-11125.

830 Commission Decision of 23 December 1992 relating to a proceeding pursuant to Articles 85 [now Article 101 TFEU], Case No IV/32.448 and IV/32.450 (Cewal, Cowac and Ukwal) and 86 [now Article 102 TFEU], Case No IV/32.448 and IV/32.450 (Cewal) of the EEC Treaty; CFI 8 October 1996, joined cases T-24/93, T-25/93, T-26/93 and T-28/93 (Compagnie Maritime Belge Transports SA and

Before delving into the legal reasoning of both cases, it should be mentioned that already an exchange of information through a circular gives rise to competition law concerns. A good illustration of this is the French NCA's decision in *Lucie-Ilec* (autorité de la concurrence).[831] In that decision, the NCA ruled that sharing information concerning views of an association with members on the potential unlawful anti-competitive behaviour of a specific non-member is contrary to EU Competition Law, insofar as a concerted action is recommended.[832] Even though this decision provides some general guidance on how to deal with an information exchange, it is rather far removed from the factual situation that an association blacklists an industry actor operating on a second-tier commodities market. Therefore, the next two Paragraph thoroughly discuss the more closely (but not entirely) related ECJ judgment in *Asnef-Equifax/Ausbanc* and the Commission's decisional practice and CJEU's line of reasoning in *Compagnie Maritime Belge*.

Compagnie Maritime Belge SA v. Commission of the European Communities), [1996] ECR 11-1201; ECJ 16 March 2000, joined cases C-395/96P, C-396/96P (Compagnie Maritime Belge Transports SA et al v. Commission of the European Communities), [2000] ECR I-1365; Commission Decision of 30 April 2004 relating to a proceeding under Article 82 of the EC Treaty [now Article 102 TFEU], Case No COMP/D/32.448 and 32/450 (Compagnie Maritime Belge); CFI 1 July 2008, Case T-276/04 (Compagnie Maritime Belge SA v. Commission of the European Communities), [2008] ECR II-1277.

831 Decision N° 05-D-33 of 27 June 2005 on practices implemented by Ilec.

832 Ibid., p. 6. The French NCA ruled that this does not dissuade member undertakings from entering into a contract with the reported undertaking (Lucie) and can, therefore, not be classified as a boycott; The NCA ruled that the dissemination of information is permissible when it aims to help members to perform their activity. See also Décision N° 98-D-73 of 25 November 1998 on a referral and a request for interim measures submitted by the National Employers' Union of dental technicians; To a lesser degree of importance, see the Opinion of the Advocate-General Poiares Maduro of 23 May 2007, Case C-438/05 (International Transport Workers' Federation v. Viking Line ABP et al), [2008] IRLR 143, para. 7. In that Opinion, the Advocate-General stated that the exchange of information through a circular by the International Transport Workers' Federation (ITF) to persuade other trade unions not to enter into negotiations with one of its members (Viking Line) effectively precluded – pertaining to the principle of solidarity – any possibility of this company to deal with another trade union. While infringements of EU Competition Law were not discussed, this opinion provides an explanatory description of an information exchange, which could potentially be of interest to establish a violation of Article 101(1) TFEU.

a. Asnef-Equifax/Ausbanc

In *Asnef-Equifax/Ausbanc*, the ECJ considered an online register of the Spanish association of financial institutions (ASNEF) that set up an electronic register of credit information that disclosed the history of potential customers.[833] The effect was that each bank was aware of each potential client's credit history and took this into account when negotiating further loans. It is common ground that this system makes relevant information about existing or potential borrowers available to credit providers and has the ability to blacklist bad customers.[834]

While the ECJ stressed that such registers do not have, by their very nature, the object of restricting or distorting EU Competition Law within the meaning of Article 101(1) TFEU, a doctrine was introduced to establish when they do "not" have the effect of doing so.[835] In other words, the ECJ ruled that an information exchange of credit agencies is permissible when (i) relevant markets are not highly concentrated;[836] (ii) the identity of lenders is not disclosed, directly or indirectly;[837] and (iii) the conditions of access to the registry are non-discriminatory for all operators on the market, in law or in fact.[838] Following this line of reasoning, the ECJ explained that it cannot be inferred solely from the existence of an information exchange that such conduct classifies as a collective boycott prohibited under Article 101(1) TFEU.[839] This is also because the Court found that clients may check and, where necessary, correct or delete harmful information concerning them.[840]

Whereas the ECJ shed light on the fine line between anti-competitive behaviour and genuine business in the exchange of clients' financial information, it is doubtful how the exchange of information in a blacklist which is imposed by the trade associations researched must be assessed against this background. To adumbrate how the EU Commission and the

833 ECJ 23 November 2006, Case C-238/05 (Asnef-Equifax, Servicios de Información sobre Solvencia y Crédito, SL and Administración del Estado v. Asociación de Usuarios de Servicios Bancarios (Ausbanc)), [2006] ECR I-11125, para. 7.
834 Ibid., para. 46.
835 Ibid., para. 47-48.
836 Ibid., par. 58. See also ECJ 2 October 2003, Case C-194/99P (Thyssen Stahl AG v. Commission of the European Communities), [2003] ECR I-10821, para. 84.
837 Ibid., para. 59.
838 Ibid., para. 60.
839 Ibid., para. 62.
840 Ibid., para. 63.

CJEU would assess the imposition of such a measure is uncertain and even obscure. The reason being that even though the dissemination of the names of wrongdoers in blacklists which is initiated by the trade associations researched reduces costs, as members can select faithful contracting parties, such a measure differs from the exchange of information in *Asnef-Equifax/Ausbanc*. This is because the banks disseminated information about the solvency and creditworthiness of clients (*i.e.* non-members) as opposed to the names of members. However, one should not disregard the legal ruling from *Asnef-Equifax/Ausbanc* altogether.

When trying to look through the lens of the decision-maker in this judgment, in an attempt to transpose this ruling to fit the situation of that of the trade associations researched, their involvement in blacklisting appears illegitimate pursuant to Article 101(1) TFEU by effect. The reasons are three-fold: first, disseminating the names of wrongdoers in blacklists has the potential to oust targeted industry actors from the market. Second, the trade associations researched possess high levels of market concentration on the market for regulation and private ordering concerning EU territory.[841] Because many industry actors that operate on relevant adjacent second-tier commodities markets are members of these associations, the exclusionary effect for targeted member undertakings is exacerbated. Third, albeit depending on the availability of a blacklist to the general public or limited only to members, when undertakings are blacklisted in publicly accessible lists (*e.g.* the ICA) this is more harmful than when they are placed on a secret list, because it would allow non-member undertakings as well as any other third party to be informed about the reliability of conducting trade with a blacklisted company instead of only the members.

b. Compagnie Maritime Belge

Perhaps having an even closer connection to the dissemination of the names of undertakings in a blacklist by the trade associations researched concerns the two different, but similar, proceedings in *Compagnie Maritime Belge*. In these cases, the Associated Central West Africa Lines (CEWAL) shipping conference, which at the material time had more than 90% percent of the market operated, *inter alia*, "fighting ships" schemes pursuant to which it offered liner services at special rates different from their normal rates. These rates were lower than that of its main competitor

841 See part III, Chapter 8, D, III, 3, a.

Grimaldi & Cobelfret (G&C).[842] The purpose of this regulatory strategy was to deter shippers and consignees from using (at least occasionally) the services of other independent lines.[843] If a shipper still used the services of another line which was not a member of CEWAL, that shipper would be blacklisted.

It follows from the decisions of the Commission and the CFI that, *inter alia*, due to the exclusionary nature of blacklisting, an abuse of a dominant position was found.[844] Regardless of the fact that it is evident that when a trade association has considerable market share, both the Commission and the CFI favour the establishment of an infringement pursuant to Article 102 TFEU, some remarks can be made with regard to this line of reasoning. This is because the suggestion of CEWAL to its members, both directly and indirectly, which has as an effect to prevent members from doing business with third parties can also be considered as an anti-competitive agreement in violation of Article 101(1) TFEU. Therefore, the reasoning in *Compagnie Maritime Belge* is tantamount to discuss whether the trade associations researched violate Article 101(1) TFEU when they disseminate the names of recalcitrant market participants in a blacklist.[845] This is important not only because such undertakings can no longer compete under the

842 D. Geradin and N. Petit, "Price Discrimination under EC Law: The Need for a Case-by-Case Approach", *Coleurope* 2005, p. 15. For a background of this Article, see K. Czaprack, "*Intellectual Property and the Limits of Antitrust: A Comparative Study of US and EU Approaches*", Chelthenham/Northampton: Edward Elgar Publishing 2009, p. 32. Cewal members operated liner services between Zaire (the current name is the "Republic of Congo"), Angola and other European ports in the North Sea. CEWAL had implemented a cooperation agreement with Ogefrem (the Zairian shipping authority), which had as its effect that all goods shipped between Cewal ports were exclusively carried out by Cewal members.

843 CFI 8 October 1996, joined cases T-24/93, T-25/93, T-26/93 and T-28/93 (Compagnie Maritime Beige Transports SA and Compagnie Maritime Belge SA v. Commission of the European Communities), [1996] ECR 11-1201, para. 170.

844 Commission Decision of 23 December 1992 relating to a proceeding pursuant to Articles 85 [now Article 101 TFEU], Case No IV/32.448 and IV/32.450 (Cewal, Cowac and Ukwal) and 86 [now Article 102 TFEU], Case No IV/32.448 and IV/32.450 (Cewal) of the EEC Treaty, para. 86; CFI 8 October 1996, joined cases T-24/93, T-25/93, T-26/93 and T-28/93 (Compagnie Maritime Beige Transports SA and Compagnie Maritime Belge SA v. Commission of the European Communities), [1996] ECR 11-1201, para. 172, 182-183.

845 Another interesting judicial decision that concerned the practice of blacklisting concerns CFI 27 September 2006, Case T-204/03 (Haladjian Frères SA v. Commission of the European Communities), [2006] ECR 11-3779, para. 34, 36. This case involved Caterpillar, a US company which designs, develops, engineers,

same conditions with other industry actors that operate on the same relevant commodities market, but also because it has clear exclusionary effects. This hints at a violation of Article 101(1) TFEU by effect. Differences such as the fact that in *Compagnie Maritime Belge* not industry actors which operate on the same market, but third parties got blacklisted and the different reason for such a measure should be disregarded.

c. Statement

The practice of blacklisting with reference to the legal proceedings in *Asnef-Equifax/Ausbanc* and *Compagnie Maritime Belge* is different from the situation of the trade associations researched. Yet, the effect of blacklisting is similar, namely to punish bad behaviour and to warn actors (*i.e.* banks, shippers/consignees or other industry actors) not to deal with disloyal individuals and/or undertakings. As the Commission and the CJEU have not, to date, defined the practice of blacklisting as a restriction by object, it is not unlikely that both institutions in the future will classify the dissemination of the names of industry actors, as is done by any of the trade associations, as a restriction by effect. Any different outcome would prevent a full-fledged analysis of justification grounds under Article 101(3) TFEU, even though there are benefits to total welfare and consumer welfare which are generated by an effective system of specialized commercial arbitration in which awards are typically complied with under the threat of blacklisting. Whether this measure occurs in public or private lists is not important at this stage. Both manifestations of blacklists infringe Article 101(1) TFEU by effect.

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manufactures, markets and sells among others construction machines via a worldwide dealer network. This included the United States, the EU/EFTA area and Africa. While prices varied between these geographic zones, it induced a number of resellers to take advantage of the differences from one zone to another. To prevent this, Caterpillar sent its dealers a blacklist (*i.e.* the list of inter-zone sellers), which was updated at intervals, of resellers involved in inter-zone sales. It should be noted that this case was assessed in relation to a vertical relationship and will inevitably differ from one in relation to a horizontal agreement. Therefore, the merits of the case only give an illustrative example of blacklisting pertaining to the trade associations researched.

2. Execution of blacklists by members of trade associations

The practice of blacklisting is initiated by the trade associations researched, but is only successful when their members execute such measure. Without their members, these trade associations are merely empty vehicles that cannot efficaciously blacklist recalcitrant industry actors for not complying with arbitrational awards. The reason for this is that in this scenario it is unlikely that industry actors would change their commercial (and sometimes social) behaviour towards a targeted wrongdoer. In addition, members have the power to change the bylaws of any of the trade associations researched and strike down clauses which permit/obligate these institutions to blacklist disloyal undertakings. Subsequently, member undertakings have a crucial role to play in the effectiveness of blacklisting. It is for this reason that members participate in an anti-competitiveness agreement between undertakings every time a trade association blacklists a wrongdoer. Even though the decisional practice of the Commission and case law of the CJEU do not clarify whether members infringe Article 101(1) TFEU when they execute the dissemination of the name of a wrongdoer in a blacklist, they participate in a collective boycott in violation of Article 101(1) TFEU. This is true when the names of recalcitrant industry actors are placed in private and public blacklists.

3. Execution of blacklists by non-members

Comparable to the analysis of Section 1 of the Sherman Act when considering the illegality of non-members for their role in the execution of blacklisting, two situations must be discussed.[846] The first pertains to the situation in which a member of one of the trade associations researched conducts trade with a non-member on the basis of such an association's standardized contract which is linked to a broader arbitration agreement in which there is a clause on blacklisting and the former actor gets blacklisted. Whereas a non-member has no possibility to rescind a blacklisting clause and owing to the situation that such an undertaking is often not aware that a standardized contract is linked to an arbitration agreement which includes a blacklisting clause, Article 101(1) TFEU is not infringed upon.

846 See Part II, Chapter 6, D, I, 3.

The same conclusion can be drawn with regard to non-members that in no way are connected to a relevant trade association which disseminates the names of disloyal industry actors in a blacklist and merely act upon that information. Albeit that an aversion to conduct trade with such an industry actor is likely, this is not enough to violate Article 101(1) TFEU. It would preposterously broaden the scope of Article 101(1) TFEU and carries the risk that any industry actor, no matter what its involvement, could violate this Article 101(1).

III. Membership rules and barriers for market access

Having outlined the first competition law concern in the face of all-capturing, ever applicable competition rules, a withdrawal of membership and a refusal of an expelled member to reobtain membership on the basis of an additional entry condition are discussed in this Paragraph. This is because the trade associations researched, their members and non-members could infringe Article 101(1) TFEU.

1. Withdrawal from a trade association

a. Withdrawal by a trade association

Trade associations must be able to put an end to the privileges of members that in a serious way fail to comply with its bylaws and rules. Expelling those undertakings that are no longer *bona fide* members of the industry, or ostracizing those undertakings the activities of which harm or are likely to harm the interests of the association must not necessarily infringe Article 101(1) TFEU.[847] It is insufficient to identify conduct as an illegal anti-competitive collusion when the bylaws and rules of a trade association solely, without further tendency to reduce or discourage competition, allow for the expulsion of members that contravene the association's "gener-

847 An example of this can be found in Paragraph 3(5)(b) of the Statutes of Verband der Sachversicherer. This provision "*provides for the expulsion of a member for serious or repeated failure to comply with the statutes or conduct which is grossly contrary to the interests of the Association*". See the Opinion of the Advocate-General Darmon of 20 November 1986, case 45/85 (Verband der Sachversicherer v. Commission of the European Communities), [1987] ECR 405, p. 438.

al policy".[848] However, expelling a member from a trade association may also be seen as harmful. An example is when rules provide the possibility to withdraw membership for vague "disloyal behaviour".[849]

To assess whether the trade associations researched infringe Article 101(1) TFEU, it is necessary to consider the objective criteria of membership established by the Commission in nine cases concerning London commodities markets.[850] The Commission established three requirements that must be complied when a trade association withdraws the member-

848 Order of the President of the CFI of 21 January 2004, case T-245/03R (Fédération Nationale des Syndicats d'Exploitants Agricoles (FNSEA) et al v. Commission of the European Communities), [1996] ECR I-4971, para. 45. This is in line with settled case law. See Order of the President of the CFI of 14 December 2000, case T-5/00 R (Nederlandse Federatieve Vereniging voor de Groothandel op Elektrotechnisch Gebied v. Commission of the European Communities), [2000] ECR II-4121, para. 56, 64. In that case, "*members were bound to abide strictly by the provisions of the articles of association, the internal rules and the decisions of the Board of Directors and meetings*". Both orders have been confirmed in the Order of the President of the CFI of 21 January 2004, case T-217/03R (Federation nationale de la coopération bétail v. Commission of the European Communities), [2004] ECR II-241, para. 52-54.

849 In Danish Competition Council of 30 January 2008, (Lokale Pengeinstitutter (the Association of Local Banks, Savings Banks and Coopertive Banks in Denmark; the Association) the trade association's bylaws stipulated that its Board could withdraw membership for demonstrating "*a lack of collegial behaviour*". See H. Peyt and N. Nørager, "Current Developments in Member States", *European Competition Journal 4* 2008, p. 332.

850 Commission Decision of 13 December 1985 relating to a proceeding under Article 85 of the EEC Treaty [now Article 101 TFEU], Case No IV/27.590 (London Sugar Futures Market Limited); Commission Decision of 13 December 1985 relating to a proceeding under Article 85 of the EEC Treaty [now Article 101 TFEU], Case No IV/27.591 (London Cocoa Terminal Market Association Limited); Commission Decision of 13 December 1985 relating to a proceeding under Article 85 of the EEC Treaty [now Article 101 TFEU], Case No IV/27.592 (Coffee Terminal Market Association of London Limited); Commission Decision of 13 December 1985 relating to a proceeding under Article 85 of the EEC Treaty [now Article 101 TFEU], Case No IV/27.593 (London Rubber Terminal Market Association Limited); Commission Decision of 10 December 1986 relating to a proceeding under Article 85 of the EEC Treaty [now Article 101 TFEU], Case No IV/29.688 (The London Grain Futures Market); Commission Decision of 10 December 1986 relating to a proceeding under Article 85 of the EEC Treaty [now Article 101 TFEU], Case No IV/30.176 (The London Potato Futures Association Limited); Commission Decision of 10 December 1986 relating to a proceeding under Article 85 of the EEC Treaty [now Article 101 TFEU], Case No IV/31.614 (The London Meat Futures Exchange Limited); Commission Decision of 10 December 1986 relating to a proceeding under Article 85 of the EEC

ship of an industry actor in order not to violate Article 101(1) TFEU.[851] First, a trade association can only propose an expulsion when it is accompanied by the reasons for such action. Second, any withdrawal of membership must be accompanied by the reasons for such action.[852] Third, a trade association must provide appropriate possibilities of representation after an expulsion (*e.g.* reconsideration of this decision).[853] Fourth, a trade association must establish an appropriate appeal procedure and, depending upon the facts, recourse to the courts.[854] In addition to these requirements, the Commission in *Ship classification* required two additional conditions that a trade association must comply with following the withdrawal of membership of a disloyal industry actor.[855] These are setting clear deadlines for the revocation of membership and the independent appeal board following a withdrawal formation of an.[856] Moreover, in the *International Dental Exhibition* the Commission ruled that the withdrawal of membership after a single infringement must be abolished from the bylaws of a trade association if this association wishes not to contravene the aim of Article 101(1) TFEU, namely to bolster competition within the internal market.[857]

Against this background, since the clauses of the trade associations researched permit these associations to ostracize members for not complying with arbitral awards, it is not unlikely that imposing a withdrawal of membership infringes Article 101(1) TFEU by effect. An expulsion amounts to an illegal coordinated group boycott, because it prevents market access and

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Treaty [now Article 101 TFEU], Case No IV/29.036 (The GAFTA Soya Bean Meal Futures Association); Commission Decision of 4 December 1986 relating to a proceeding under Article 85 of the EEC Treaty [now Article 101 TFEU], Case No IV/30.439 (Petroleum Exchange of London Limited).

851 See, for example, Commission Decision of 10 December 1986 relating to a proceeding under Article 85 of the EEC Treaty [now Article 101 TFEU], Case No IV/31.614 (The London Meat Futures Exchange Limited).

852 Ibid., para. 12.

853 Ibid.

854 Ibid., para. 18. See also the Commission Decision of 2 December 1977 relating to a proceeding under Article 85 of the EEC Treaty [now Article 101 TFEU], Case No IV/147 (Centraal Bureau voor de Rijwielhandel), para. 28.

855 Commission Decision of 14 October 2009 relating to a proceeding under Article 81 of the EC Treaty [now Article 101 TFEU] and Article 53 of the EEA Agreement, Case No COMP/39.416 (Ship classification).

856 Ibid., para. 3(f)-(g).

857 Notice pursuant to Article 19(3) of Council Regulation No 17 (Î) of 9 January 1999 concerning Case No IV/F-1/36.160 (International Dental Exhibition), para. 8.

forecloses future commerce through the signalling of untrustworthiness to other merchants.[858] To make things worse, the majority of the trade associations researched provide insufficient guarantees following a withdrawal of membership. Only two (and arguably three when considering the ICA) out of six of the trade associations researched allow an internal appeal following a withdrawal of membership.[859] In addition, it can be argued that a life-time ban after a single infringement is contrary to the aim of Article 101(1) TFEU by effect.

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

All of the trade associations researched can (and sometimes must) impose withdrawal of membership on a recalcitrant member following non-compliance with an arbitral award. Yet, the competence to impose this extrajudicial measure can easily be taken away from a trade association when its members jointly agree to abolish a clause in the bylaws and rules which permits such conduct. This raises the ensuing question: Is this observation sufficient to conclude that members can also be held accountable for a violation of Article 101(1) TFEU by effect in the event one of the trade associations researched imposes withdrawal of membership?

Whereas decisional practice of the Commission and case law of the CJEU focus on the conduct of a trade association and are silent on the liability of its members, this question must be answered in the affirmative. Members of a trade association have a crucial role to play in orchestrating withdrawals of membership. Regardless of the act that they are not standing directly behind a smoking gun, their indirect influence in boycotting a targeted member of a trade association should not be underestimated. Whether the Commission and/or CJEU will reach a similar conclusion has yet to be seen. Much will depend on whether they are willing to pursue individual members of a trade association following an expulsion.

858 B. D. Richman, "*Stateless Commerce: The Diamond Network and the Persistence of Relational Exchange*", Cambridge: Harvard University Press 2017, p. 14.

859 See Part I, Chapter 3, G, II.

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

Non-members are neither directly involved in the imposition of a withdrawal of membership nor do they have a role in its enforcement comparable with the members of a relevant trade association. Only if this group of industry actors is aware of a decision to withdraw membership and individual undertakings adjust their business policy against the interests of an expelled member, is there a risk that additional reputational harm is placed upon such an undertaking. This is particularly the case because it would isolate targeted wrongdoers even more than absent such behaviour. Despite some of the trade associations researched publishing a decision to withdraw membership,[860]it would be unwise to say that every non-member violates Article 101(1) TFEU by effect. Not only because it would broaden the scope of this Article well beyond its coverage in the sense that market-adjusting strategy of undertakings, which is a normal feature in every market, would now be seen as anticompetitive, but also because every non-member could infringe Article 101(1) TFEU by effect.

When a non-member conducts trade with a member of a trade association on the basis of a standardized contract which is linked to a broader arbitration agreement in which a withdrawal of membership is laid down and the member undertaking is expelled, some might draw the conclusion that Article 101(1) TFEU is violated. Yet, in my opinion, this can be rebutted on the basis of two arguments. First, non-members are often not aware that a standardized contract is linked to a broader arbitration agreement in which the measure of expulsion is included. Second, non-members cannot annul an expulsion clause which is incorporated in the bylaws and rules of a trade association.

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

a. Access restrictions by a trade association

In the event an undertaking is denied re-admittance as a member of a trade association after its membership was withdrawn for not complying with an arbitral award from that trade association's system of specialized commercial arbitration, Article 101(1) TFEU could be infringed. This applies

860 See Part I, Chapter 3, G, II.

in particular when membership of a trade association is necessary to compete in the specific market in which this undertaking operates.[861] While this is the case with regard to all of the trade associations researched, denying readmission for expelled members must underlie all of the membership conditions which apply to normal applicants insofar as they are (i) voluntary;[862] based on (ii) clear; (iii) objective;[863] and (iv) qualitative crite-

861 See Commission Decision of 2 December 1977 relating to a proceeding under Article 85 of the EEC Treaty [now Article 101 TFEU], Case No IV/28.948 (Cauliflowers), para. II (4). In this case membership of a trade association of dealers in vegetable products was necessary in order to gain access to an auction in France. The effect was to prevent new dealers from obtaining market access. See also van Bael & Bellis (firm), "*Competition Law of the European Community*", The Hague: Kluwer Law Internationaal 2005, p. 438.

862 Commission Decision of 10 July 1985 relating to a proceeding under Article 2 of Council Regulation (EEC) No 1017/68 applying rules of competition to transport by rail, road and inland waterway, Case No IV/31.029 (French inland waterway charter traffic: EATE levy), para. 51; In appeal, see ECJ 20 May 1987, Case 272/85 (Association nationale des travailleurs indépendants de la batellerie (ANTIB) v. Commission of the European Communities), [1987] ECR 2201, para. 25, 27-38; See also Pharmaceutische Handelsconventie' (PHC), Eighth Report on Competition Policy 1978, p. 73. In this case PHC's rules contained a provision that forced non-members that want to trade with PHC members, manufacturers, dealers and importers to become members of PHC. In conjunction they must accept the obligations of this trade association. Understandably, this raised barriers to competition, as membership was not voluntary.

863 CFI 21 March 2001, Case T-206/99 (Métropole Television SA v. Commission of the European Communities), [2001] ECR II-1057, para. 37. In this case the Court stated that membership rules must be "*objective and sufficiently determinate so as to enable them to be applied uniformly and in a non-discriminatory manner vis-à-vis all potential active members*"; This definition was based on settled case law. See ECJ 25 October 1977, Case 26-76 (Metro SB-Großmärkte GmbH & Co. KG v. Commission of the European Communities), [1977] ECR 1875, para. 20; Also, but not pertaining to access to a trade association, the Commission in Commission Decision of 31 July 2001 relating to a proceeding under Article 81 of the EC Treaty [now Article 101 TFEU] and Article 53 of the EEA Agreement, Case No COMP/37.462 (Identrus), para. 46 found no infringement of Article 101(1) TFEU. This is because access to Identrus infrastructures is open to all, provided that they meet the objective criteria; Moreover, this has been confirmed in the literature. See, for example, C. Ehlermann and L. Gosling, "*European Competition Law Annual 1998: Regulating Communications Markets*", Portland: Hart Publishing 2000, p. 476.

ria; (v) without being restrictive;[864] and (vi) are easily discernible.[865] In addition, the trade associations are obliged to provide written justification for denying re-admittance to membership with the possibility to be subject to an independent process review.[866]

That being said, the lapse of a period of two years following a withdrawal of membership and the freedom of discretion by a Board of Directors of a trade association to decline re-admission apply, which are only imposed by some of the trade associations researched on those industry actors that have been subject to a withdrawal of membership, does not correspond with these rules.[867] Imposing a two-year time period to be re-admitted as a

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864 Commission, Competition in a media sector, press releases RAPID "Antitrust: Commission welcomes steps taken by collective rights management bodies in Hungary and Romania to improve competition" (to access: http://europa.eu/rapid/pressReleasesAction.do?reference=IP/11/284&format=HTML&aged=0&language=EN). In that press release, the Commission explained that the international association of national performers' collective management organization (SCAPR) had adopted certain membership clauses that would be restrictive of competition; Another example of a restrictive membership clause concerns the refusal of a trade association to grant access to undertakings that are members of competing associations. See, by analogy, *inter alia*, GC 12 April 2013, case T-442/08 (International Confederation of Societies of Authors and Composers (CISAC) et al v. European Commission), [2013] 5 CMLR, para. 12, 20. In this case the Court ruled that a membership clause that prevented collecting societies from not accepting as a member an author affiliated with another collecting society, was contrary to Article 101(1) TFEU; See also Commission Decision of 16 July 2008 relating to a proceeding under Article 81 of the EC Treaty [now Article 101 TFEU] and Article 53 of the EEA Agreement, Case No COMP/C2/38.698 (CISAC), para. 18, 125. In this case, the Commission decided that a provision that prevented members of another contracting society from becoming a member of the International Confederation of Societies of Authors and Composers (CISAC) was in violation of Article 101(1) TFEU.

865 Organisation for Economic Co-operation and Development, "Latin American Competition Forum", *DAF/COMP/LACF* 2011, p. 21.

866 National British Cattle and Sheep Breeders' Association, Twenty-second Report on Competition Policy 1992, Annex III, p. 416. In this case, the Commission achieved non-discriminatory access for undertakings of the British National Sheep Breeders' Association and the British National Cattle Breeders' Association to the activities of 200 affiliated breeders' societies. The two associations ensured that reasons for a rejection of any application would be given and that such restrictions would be subject to appeal on a non-discriminatory basis; See also Commission Decision of 2 December 1977 relating to a proceeding under Article 85 of the EEC Treaty [now Article 101 TFEU], Case No IV/147 (Centraal Bureau voor de Rijwielhandel), para. 28.

867 See Part II, Chapter 3, G, II.

member is discriminatory vis-à-vis all first-time membership applicants and is too restrictive. It infringes Article 101(1) TFEU by effect. The same arguments can be made when the Board of Directors of a trade association declines to readmit an expelled member. However, such a rule is also not clear, not objective, not easily discernible and is not based on qualitative criteria. It enables such a body to grant and refuse a reapplication for membership arbitrarily. This clearly is in violation of Article 101 TFEU by effect and perhaps even by object. Despite both types of restrictions being possible, not hindering a determination of the procompetitive benefits of a capricious denial of membership against its anticompetitive foreclosure effects, the former option is preferred. With regard to the obligation that trade associations must explain in writing why they refuse a reapplication for membership and the possibility of an appeal, none of them grant these rights to their former members that were expelled. This is further evidence that mitigating the risk of market foreclosure pertaining to targeted industry actors is not the aim of these associations.

In addition to these additional re-entry requirements, some of the standard entry requirements which apply to all applicants also do not correspond with the membership rules. The following table explains which of these entry requirements are in violation of Article 101(1) TFEU by effect.

Standard entry requirements that all trade associations have in common	**Violation of Article 101(1) TFEU?**
1. Connection with the secondary commodities market which the trade association represents	No. Decisional practice of the Commission and case law of the CJEU remain silent on whether this is illegal. In my opinion, it can be seen as a clear, objective and qualitative criteria that is not too restrictive and is easily discernible. This is also in line with the judgment of the ECJ in *Ordem dos Técnicos Oficiais de Contas v. Autoridade da Concorrência*.[868]
2. An application for membership.	No. Without an application, obtaining membership is impossible.

868 ECJ 28 February 2013, Case C-1/12 (Ordem dos Técnicos Oficiais de Contas v. Autoridade da Concorrência), [2013] 4 CMLR 20, para. 99.

3. Entry fee	No. Only when an entry fee is charged, which is so high that it can be seen as too restrictive and bears no relation to the normal cost of membership, is Article 101(1) TFEU is infringed. This is not the case with regard to the trade associations researched. Their entry fees are not unreasonably restrictive of competition.[869]
Standard entry requirements that not all trade associations have in common	**Violation of Article 101(1) TFEU?**
1. Support by at least two members of the relevant trade association	Maybe. This rule could obstruct new members from competing in the relevant commodities market.
2. Minimum duration of experience in the relevant commodities market	Maybe. This rule could obstruct new members from competing in the relevant commodities market.
3. Satisfy the Board of Directors and a 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. As a result, it forecloses market access for membership applicants.

In sum, the trade associations researched can be held accountable for a violation of Article 101(1) TFEU by effect to the extent they impose additional entry barriers for re-admittance following a withdrawal of membership without providing reasons for a denial and not allowing for an appeal against such a decision. Furthermore, any other membership rule that makes admission for certain types of membership applicants more difficult than for others might also distort market access and result in a violation of Article 101(1) TFEU by effect. Yet, owing to this uncertainty, such rules will not be considered in an analysis under Article 101(3) TFEU.

b. Access restrictions by members of a trade association

Members of the trade associations researched can change the bylaws and rules of these associations. Therefore, they can also abolish rules allowing a trade association to impose additional re-entry barriers on ostracized former members. In the event one of the trade associations researched denies a reinstatement of membership while either a period of two years has not elapsed following an expulsion, or when a Board of Directors does not favour reinstatement, the members also violate Article 101(1) TFEU by ef-

869 Although this is true, the Commission and/or the CJEU can always reach a different conclusion.

fect. This is regardless of the fact that to date decisional practice of the Commission and case law of the CJEU are focused on trade associations as the recipients of antitrust liability for restrictive access to membership rather than their members. The future will tell whether this is sufficient to excuse this group of actors.

c. Access restrictions by non-members

When one of the trade associations researched denies a re-application for membership because an additional entry barrier has not been complied with, non-members cannot be held accountable for a violation of Article 101(1) TFEU by effect. The reasons are two-fold: first, the Commission and the CJEU have never contemplated an illegality of non-members with regard to a comparable situation. Second, non-members are often not aware of a denial of a re-application for membership caused by additional entry barriers.

In the event a non-member enters into a standardized contract with a member of a trade association and this document is linked to a broader arbitration agreement that enables this association to impose additional re-entry barriers and the former member is denied re-admittance to the trade association for any of these grounds, the role of the non-member undertaking in the execution of such measure also does not violate Article 101(1) TFEU by effect. This is because, first, it is often unclear for non-members that a standardized contract is linked to a broader arbitration agreement which includes such a measure and, second, such undertakings cannot rescind clauses which permit a trade association to impose additional re-entry barriers.

IV. Refusal to deal with an expelled member

1. Refusal to deal by a trade association

It appears from the language of Article 101(1) TFEU that its prohibition also includes an instruction from one of the trade associations researched to its member undertakings to not conduct trade with an ostracized member. This is particularly true when analysing the Commission's decision in

Centraal Bureau voor de Rijwielhandel.[870] In that decision, a regulatory clause was struck down that prevented the members of a trade association of bicycle traders from trading in bicycles and related goods with a non-recognized firms.[871] This was seen as forming a closed and cohesive system, which had an appreciable restrictive effect on competition.[872] As a result, the trade association of bicycle traders violated Article 101(1) TFEU by object.[873]

By analogy to the reasoning of the Commission in this decision, it is likely that a regulatory clause by one of the trade associations researched that coerces members into not dealing with disfavoured ostracized member undertakings amounts to an anticompetitive decision of an association of undertakings which is in breach of Article 101(1) TFEU by object.[874] This *de facto* conclusion can be supported by looking at the decisional practice of the Commission and the case law of the CJEU. In line with the judicial decisions of both institutions, in my opinion, even less obvious, but to some extent similar, infringements contravened Article 101(1) TFEU. Examples include (i) a no-competition clause that appreciably impeded access for non-member undertakings;[875] (ii) the prevention of non-members from

870 Commission Decision of 2 December 1977 relating to a proceeding under Article 85 of the EEC Treaty [now Article 101 TFEU], Case No IV/147 (Centraal Bureau voor de Rijwielhandel).

871 Ibid., para. 6.

872 Ibid., para. 29.

873 Ibid., para. 36. The Commission ruled that "*The collective arrangements set up by the CBR system eliminate[s] competition in respect of a substantial part of the goods supplied on the Dutch market, since by far the majority of all the dealers, manufacturers, importers and agents in the bicycle industry are members of the CBR. Accordingly, the application for a declaration of exemption for the Algemeen Reglement under Article 85(3) of the EEC Treaty [now Article 101(3) TFEU] must be rejected*". Based on this legal rule, in my opinion, the Commission seems to classify a refusal to deal with a non-recognized company as a restriction by object.

874 For similarities with the *Centraal Bureau voor de Rijwielhandel* (supra), see Commission Decision of 21 November 1975 relating to a proceeding under Article 85 of the EEC Treaty [now Article 101 TFEU], Case No IV/256 (Bomée-Stichting), para. II. While this case pertains to vertical restraints, the Commission ruled that the practice of the trade association of perfumes, toiletries and cosmetics that obligated its members (manufacturers) to sell only to wholesalers and retailers accepting the association's sale conditions amounted to a restrictive market protection system, which has as its object and effect the restriction of competition pursuant to Article 101(1) TFEU.

875 Commission Decision of 28 October 1988 relating to a proceeding pursuant to Article 85 of the EEC Treaty [now Article 101 TFEU], Case No IV/B-2/31.424,

trading in the auctions of a specific Member State;[876] and (iii) the method of ensuring loyalty, in particular, by prohibiting members from joining competing cooperatives[877] and by exclusively dealing with members only.[878]

Hudson's Bay-Dansk Pelsdyravlerforening, para. 1 (a), 9, 10, 11; In appeal, see CFI 2 July 1992, case T-61/89 (Dansk Pelsdyravlerforening v. Commission of the European Communities), [1992] ECR II-1931, para. 64, 78. As regards this legal proceeding, the Commission and the CFI emphasized, *inter alia*, that a no-competition clause that in particular prohibited members from acting as collecting agents for competitors enforced by the association of Danish fur breeders made it very difficult for third parties to enter the Danish market.

876 Commission, Competition in a media sector, press releases RAPID "Dutch fishermen allowed to land and auction catches in foreign ports following Commission action" (to access: http://europa.eu/rapid/press-release_IP-01-84_en.htm?locale=EN). The Commission investigated the internal rules of a group of private associations (which represent the great majority of fishermen in the Netherlands) that forced fishermen to "sell all catches" to be auctioned through the Dutch fish auctions and excluded harbours, auctions and other service providers in other Member States from competing for Dutch catches. While this gave rise to competition concerns under Article 101(1) TFEU, the groups have amended their rules.

877 ECJ 15 December 1994, case C-250/92 (Gøttrup-Klim Grovvareforening et al v. Dansk Landbrugs Grovvareselskab AmbA (DLG)), [1994] ECR I-5641, para. 35. In this case a provision of a cooperative purchasing association restricted the opportunity for members to join competing cooperatives. Therefore, they were discouraged from obtaining supplies elsewhere. The ECJ ruled that this might have adverse effects on competition.

878 Joined Opinion of the Advocate-General Tesauro of 12 September 1995, joined cases C-319/93, C-40/94, C-224/94, and C-399/93 (Dijkstra v Friesland (Frico Domo) Coöperatie BA and Cornelis van Roessel et al v. De coöperatieve vereniging Zuivelcoöperatie Campina Melkunie VA and Willem de Bie et al v. De Coöperatieve Zuivelcoöperatie Campina Melkunie BA), [1995] ECR I-4515, para. 10, 31; ECJ 12 December 1995, Case C-399/93 (H. G. Oude Luttikhuis et al v. Verenigde Coöperatieve Melkindustrie Coberco BA), [1995] ECR I-4515, para. 3. This case revolved around a fee payable to a milk association (Coberco) after withdrawal or expulsion. This amounted to a violation of Article 101(1) TFEU, since it infringed the doctrine as developed in Gøttrup-Klim (see ECJ 15 December 1994, Case C-250/92 (Gøttrup-Klim Grovvareforening et al v. Dansk Landbrugs Grovvareselskab AmbA (DLG)), [1994] ECR I-5641, para. 14). This doctrine entailed that "*the restrictions imposed on members by the statutes of cooperative associations intended to secure their loyalty must be limited to what is necessary to ensure that the cooperative functions properly and in particular to ensure that it has a sufficiently wide commercial base and a certain stability in its membership*"; A reiteration of this wording can be found in the Opinion of the Advocate-General Jacobs of 28 January 1999, joined cases C-115/97, C-116/97 and C-117/97 and case

2. Execution of the refusal to deal by members of a trade association

When one of the trade associations researched instructs its members not to conduct business with an expelled member, these undertakings typically agree to comply with this rather severe measure under the threat of being extrajudicially punished themselves. As a result, a refusal to deal is only effective in the event members play a role in its execution. Albeit that decisional practice of the Commission and case law of the CJEU have not focused on the accountability of this group of actors, three reasons make their conduct unlawful under Article 101(1) TFEU by object. First, the members of the trade associations researched can rescind any clause that permits the trade association to which they belong from obligating these undertakings to not conduct trade with an expelled former member. Second, individual members can disregard the imposition of a refusal to deal with an ostracized former member irrespective of the threat of being extrajudicially sanctioned as well. Third, the execution of a refusal to deal with an expelled former member can be seen as an anticompetitive agreement between undertakings.

3. Execution of the refusal to deal by non-members

Non-members are not involved in the execution of a refusal to deal with an expelled member when one of the trade associations researched instructs its members to execute this measure. This is because this group of actors does not have the competence to abolish a clause in the bylaws and rules which permits the relevant trade association to impose such a measure, and non-members are often unaware of a refusal to deal with an ostracized member decision. The trade associations researched do not publish this type of extrajudicial sanctioning. Hence, it would be unwise to hold all non-members accountable for a violation of Article 101(1) TFEU for a potential discontinuation of or future stop on entering into commercial activities with a former member that can no longer trade with other members of that trade association.

If a non-member conducts trade with a member of a trade association on the basis of a standardized contract which is linked to a broader arbitration agreement which includes a refusal to deal with an expelled member

C-219/97 (Albany International BV v. Stichting Bedrijfspensioenfonds Textielindustrie), [1999] ECR I-5751, para. 272.

and the expelled member is extrajudicially sanctioned vis-à-vis this measure, a breach of Article 101(1) TFEU is unlikely. This is unlikely not only because a non-member is often unaware that a standardized contract is linked to a broader arbitration agreement which incorporates a refusal to deal with an expelled member measure, but also since such an undertaking has no competence to change a refusal to deal clause.

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

In the event one of the trade associations researched orders its officers to enter the premises belonging to a recalcitrant industry actor to find evidence why this undertaking did not comply with an arbitral award, this results in a loss of privacy. Furthermore, when other members and non-members become aware of such conduct, it adds reputational harm in the sense that both groups of actors might not conduct future trade with a wrongdoer.

Similar to Section 1 of the Sherman Act,[879] privacy issues are not covered by Article 101(1) TFEU. With regard to added reputational harm, it is also unlikely this Article is infringed by the trade associations researched, their members and non-members. There is no decisional practice of the Commission and case law of the CJEU that consider anti-competitiveness when officers of a trade association enter the premises of a member without a warrant. Moreover, it is difficult to measure the degree of reputational harm, and criminal law is more suitable to challenging entering an undertaking's premises without an invitation.

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

It is safe to say that much of the success of modern day PLSs can be attributed to a well-functioning system of specialized commercial arbitration provided by the trade associations researched. However, even though arbitration is a standard tool for resolving commercial disputes between member undertakings, a restricting access to ordinary courts can be seen as a

879 See Part II, Chapter 6, D, IV.

ground to substantiate an infringement of Article 101(1) TFEU.[880] This was clarified by the Commission in its notice on the *FIA* case,[881] and its guidance on FIFA,[882] following which arbitration must be voluntary with the possibility of recourse to national courts.[883]

1. Voluntary nature of specialized commercial arbitration

Most members of a trade association conduct trade with other members (and sometimes non-members) on the basis of standardized contracts provided by a relevant trade association. These contracts typically contain a clause which explains that any dispute between parties will be resolved in specialized commercial arbitration. As a result, some could argue that the voluntary nature of this type of arbitration is a fallacy. Whether this is true depends on the arguments used. Others might disagree and explain that parties are free to enter into a standardized agreement which is linked to a broader arbitration agreement. In my opinion, it is difficult to ascertain whether arbitration is sufficiently voluntary. The reason for this is that the Commission and the CJEU have not explained how the voluntary nature

880 According to the ECJs judgement in ECJ 1 June 1999, Case 126/97 (Eco Swiss China Time Ltd v. Benetton International NV), [1999] ECR I-3055, para 37, a Member State court system must ensure that arbitral awards comply with EU Competition Law (and in particular Article 101(1) TFEU). This is because an arbitral award inconsistent with the competition rules of the European Union is to be regarded as contrary to national rules of public policy.

881 Notice published pursuant to Article 19(3) of Council Regulation No 17 of 13 June 2001 concerning Case No COMP/35.163 (Notification of FIA Regulations), Case No COMP/36.638 (Notification by FIA/FOA of agreements relating to the FIA Formula One World Championship), and Case No COMP/36.776 (GTR/FIA), sect. 6.

882 Commission, Competition in a media sector, press releases RAPID "Commission closes investigations into FIFA regulations on international football transfers" (to access: http://europa.eu/rapid/press-release_IP-02-824_en.htm?locale=EN); Commission, concerning „Case IV / 36 583-SETCA-FGTB / FIFA" (to access: http://ec.europa.eu/competition/antitrust/cases/dec_docs/36583/36583_54_3.pdf).

883 A. Duval and B. v. Rompuy, "*The Legacy of Bosman: Revisiting the Relationship Between EU Law and Sport*", in: K. Pijetlovic (ed.), "EU Competition Law and Organisational Rules", T.M.C. Asser Press 2016, p. 148; Yet, it is not clear from both proceedings whether a denial of access to public courts (standing alone) is sufficient to violate Article 101(1) TFEU. A combination with other anticompetitive conduct might be required.

of arbitration should be interpreted. It might very well be possible that a violation of Article 101(1) TFEU by effect would be established (if combined with other anticompetitive conduct). If so, it is not only the trade associations researched, but also their members which can be held accountable for an infringement of this Article. This group of actors is able to change the standardized contracts by deleting a clause that is linked to a broader arbitration agreement. Non-members, however, are not able to change the standardized contracts which may be linked to a broader arbitration agreement with a member of a trade association, and, hence, do not breach Article 101(1) TFEU by effect.

2. Recourse to national courts

Some of the trade associations researched are very restrictive in the sense that they only allow judicial review at a public court when both parties in arbitral proceedings agree,[884] or in order to obtain security for an award.[885] This can be seen as providing insufficient recourse to national courts, as this policy violates the standards on recourse to public courts laid down in the Arbitration Act 1996. Other trade associations remain either silent[886] or provide an even better recourse to public courts than this legal document.[887] Put differently, whether a trade association sufficiently guarantees recourse to public courts prior to and after an arbitral award depends on whether the bylaws and rules do not limit the rights guaranteed in the Arbitration Act 1996. If yes, such a trade association can be held accountable for a violation of Article 101(1) TFEU by effect (if combined with other anticompetitive conduct). Members, on the one hand, also infringe Article 101(1) TFEU because they have the competence to change the bylaws and rules of a trade association. Non-members, on the other hand, (even though when a specific non-member enters into a standardized agreement which is linked to a broader arbitration agreement with a member of a trade association) cannot breach Article 101(1) TFEU since they do not have the competence to change the bylaws and rules of a trade association.

884 The ICA.
885 The LME.
886 FOSFA and the FCC.
887 GAFTA.

D. Rule-of-reason analysis under Article 101(1) TFEU

The trade associations researched and their members violate Article 101(1) TFEU when the trade associations (i) include the names of wrongdoers in blacklists; (ii) withdraw their membership, (iii) deny a subsequent reapplication for membership on the basis of an additional entry condition; (iv) instruct their members not to conduct trade with an ostracized member; and (iv) limit adequate access to public courts prior to arbitral proceedings and after an award. However, this observation might differ when benefits unrelated to competition, such as public or social policy (*i.e.* balancing of pro-competitive effects) can be taken into account prior to establishing an infringement by object or effect.[888] Despite some form of weighting pros and cons of anti-competitive collusion being allowed to determine the effects on competition,[889] it is unclear whether a rule-of-reason analysis must be conducted under Article 101(1) TFEU.

As can be traced back to US antitrust law, where the idea arose to mitigate the pervasive ascendency of Section 1 of the Sherman Act, especially by weighting pros and cons of anti-competitive behaviour, the existence of a balancing exercise under Article 101(1) TFEU is contentious.[890] *Prima facie*, a reconciliation of such a rule-of-reason analysis does not seem possible. This is particularly true when one looks at the works of *Goyder*,[891]

888 L. Nistor, "*Public Services and the European Union: Healthcare, Health Insurance and Education Services*", The Hague: T.M.C. Asser Press 2011, p. 183.

889 ECJ 12 December 1967, Case C-23/67 (SA Brasserie de Haecht v. Consorts Wilkin-Janssen), [1967] ECR 525, p. 415. The ECJ takes into account the economic and legal context, when considering the effects of an agreement.

890 The first ground-breaking fundamental comparative study between Section 1 of the Sherman Act and Article 101 TFEU was given by *René Joliet* in 1967. See R. Joliet, "*The Rule of Reason in Antitrust Law*", The Hague: Martinus Nijhof 1967, p. xx-198. In my opinion, this study provides a lucid, classic analysis of the transposition of the US rule-of-reason analysis under Article 85(1) of the Rome Treaty (now Article 101(1) TFEU).

891 D. G. Goyder, "*EC Competition Law, 3th Edition*", Oxford: Oxford University Press 1998, p. 145. In this book Goyder states that "*The United States Courts may take into account all the positive and negative features of the restraint, as well as the context in which it is applied, remaining as free from statutory restrictions as the courts of common law in assessing the local validity of contractual restraints between vendor and purchaser or employer and employee. By comparison, the Commission must operate within a rigid conceptual framework which allows less freedom of manoeuvre and requires the restriction to pass, not one single balancing test, but a cumulative series of four separate tests*".

Blanco,[892] *Stucke*,[893] and *Colino*.[894] Other authors, however, endorsed the inclusion of a rule-of-reason analysis for reasons of fairness and exception.[895] Interestingly, this fragmentation of viewpoints is addressed in the case law of the CJEU and in the Commission's White Paper on Modernisation of the Rules implementing Articles 85 and 86 of the EC Treaty (now Articles 101 and 102 TFEU) (the 1999 White Paper), which is described below.[896]

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892 The criticism of *Goyder* has been reiterated in L. O. Blanco, "*Market Power in EU Antitrust Law*", Oxford/Portland: Hart Publishing 2011, p. 22. Weighting pros and cons under Article 101(1) TFEU would make Article 101(3) TFEU redundant.

893 For criticism raised against the rule-of-reason analysis under Section 1 of the Sherman Act, see M. E. Stucke, "Does the Rule of Reason Violate the Rule of Law?", *U.C. Davis Law Review, Vol. 42* 2009, p. 1422. His main critique concerns the absence of clear criteria that makes a case-by-case examination necessary. This gives rise to legal uncertainty. In my opinion, such an assessment also applies to the inclusion of a rule-of-reason analysis under Article 101(1) TFEU, as this provision does not contain clear criteria antithetical to Article 101(3) TFEU. Given the bifurcated structure of Article 101 TFEU, both provisions must be seen as fundamentally different.

894 S. M. Colino, "*Cartels and Anti-Competitive Agreements, Volume 1*", in: C. Callery (ed), "Should the European Union Embrace or Exorcise Leegin's "Rule of Reason"?", Abingdon/New York: Routledge 2012, p. 101. *Colino* states that this would conflate Art. 101 (1) and (3) into one provision akin to Section 1 of the Sherman Act.

895 See I. E. Wendt, "*EU Competition Law and Liberal Professions: an Uneasy Relationship?*", Leiden: Koninklijke Brill NV 2013, p. 269. The argument in favour of transposition of a rule-of-reason analysis under Article 101(1) TFEU pertains to the issue that this provision has been applied too broadly. In essence it catches all agreements, not excluding those beneficial to competition. In line with this reasoning, weighting pros and cons under Article 101(1) TFEU is imperative for a fairer assessment of anti-competitive collusion; See also T. Ackermann, "*Art. 85 Abs. 1 EGV und die rule of reason - Zur Konzeption der Verhinderung, Einschränkung oder Verfälschung des Wettbewerbs*", Cologne/Berlin/Bonn/Munich: Heymanns 1997, p. 2ff, 211ff. He proposes a three-step or four-step test. This requires that (i) an anti-competitive effect (ii) may be exempted from the prohibition of Article 101(1) TFEU in the event of benefits to competition, (iii) when the impairment is reasonably necessary for the purpose of achieving that objective. However, (iv) only as a consistency test and to correct absolutely intolerable results, weighting advantages and disadvantages is permissible. In line with his doctrine, a rule-of-reason analysis under Article 101(1) TFEU is only lawful to prevent extreme results.

896 Commission, "White Paper on Modernisation of the Rules implementing Article 85 and 86 of the EC Treaty [now Articles 101 and 102 TFEU]" of 28 April 1999, [OJ 1999, No. C 132/01].

I. Court of Justice of the European Union

With the start of the modernization process of EU Competition Law, the ECJ adopted a "more economic approach".[897] Consequently, but also to address the time-consuming and burdensome notification procedure of the Commission,[898] the two-tier structure of Article 101 TFEU (first applying Article 101(1) and then Article 101(3) TFEU) was "partially" undermined by the ECJ. This was done by introducing some form of balancing pro- and anti-competitive effects under Article 101(1) TFEU. In particular, the ECJ approved several agreements that, notwithstanding their restrictiveness, were pro-competitive under Article 101(1) TFEU.[899]

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897 K. K. Patel and H. Schweitzer, "*The Historical Foundations of EU Competition Law*", Oxford: Oxford University Press 2013, p. 209. The ECJ has paid more attention to the effects of competition on a specific market, following the debate on introducing a "more economic approach".

898 A. Kaczorowska, "*European Union Law*", Abingdon/New York: Routledge-Cavendish 2008, p. 774.

899 ECJ 30 June 1966, Case 56/65 (Société Technique Minière (L.T.M.) v. Maschinenbau Ulm GmbH (M.B.U.)), [1966] ECR 235, p. 249. To determine the effects of an exclusive distribution agreement under Article 101(1) TFEU, the precise purpose of the agreement in the economic context in which it was applied had been taken into account; ECJ 28 January 1986, Case 161/84 (Pronuptia de Paris GmbH v. Pronuptia de Paris Irmgard Schillgallis), [1986] ECR 353. The ECJ took into account the pro-competitiveness of restraints related to franchising under Article 101 (1) TFEU; ECJ 8 June 1982, Case 258/78 (L.C. Nungesser KG and Kurt Eisele v. Commission of the European Communities), [1982] ECR 2015. The Court endorsed the benefits of an exclusive licence under Article 101(1) TFEU; ECJ 11 July 1985, case 42/84 (Remia BV et al v. Commission of the European Communities), [1977] ECR 1875. The Court ruled that a non-compete obligation connected to the sale of a business was declared pro-competitive and thus, permissible under Article 101(1) TFEU; The ECJ also implicitly applied the rule-of-reason analysis under Article 101(1) TFEU in ECJ 15 December 1994, Case C-250/92 (Gøttrup-Klim Grovvareforening et al v. Dansk Landbrugs Grovvareselskab AmbA (DLG)), [1994] ECR I-5641. In that judgment, the Court held that the membership clause of an association that proscribed members joining another association that competed in the same industry had beneficial effects on competition; See also CFI 15 September 1998, joined cases T-374/94, T-375/94, T-384/94 and T-388/94 (European Night Services Ltd (ENS) et al v. Commission of the European Communities), [1998] ECR II-1533. Some balancing of benefits and harm was allowed concerning a cooperative joint venture.

However, even though a rule-of-reason analysis was partially allowed by the ECJ with reference to these cases,[900] the ECJ rejected the balancing of benefits under Article 101(1) TFEU in *Metropole*.[901] The Court ruled that Article 101(3) TFEU would lose much of its effectiveness if such an examination had to be carried out under Article 101(1) TFEU. Therefore, weighing pro-competitive and anti-competitive efficiencies must occur exclusively under the third limb of Article 101 TFEU.[902] This line of reasoning was more recently reiterated in *van den Bergh*[903] and *O2*.[904] However, the CFI reaffirmed that (i) legal and economic factors;[905] (ii) the impact of an agreement on existing and potential competition; and (iii) the competition situation in the absence of that agreement must be taken into account.[906]

Further contradictions with the CFI's decision in *Metropole* and to some extent eroding and overruling the balancing-exclusivity given to Article 101(3) TFEU, the ECJ in *Wouters* ruled that public policy/interest benefits for a Member State must be contemplated under Article 101(1) TFEU.[907] Moreover, the Court ruled that for the purpose of the latter provision, "*account must first of all be taken of the overall context in which the decision of the association of undertakings was taken or produces its effects. More particu-*

900 Interestingly, albeit not relating to competition law, in ECJ 20 February 1979, Case C-120/78 (Rewe Zentrale v. Bundesmonopolverwaltung für Branntwein), [1979] ECR 649 (popularly referred to as the *Cassis de Dijon* case) the ECJ introduced a rule-of-reason analysis concerning the free movement of goods pursuant to Article 34 TFEU, in connection with Article 36 TFEU. This legal rule illustrates that a rule-of-reason analysis is not something new for the CJEU.

901 CFI 18 September 2001, Case T-112/99 (Métropole télévision (M6) et al v. Commission of the European Communities), [2001] ECR II-2459, para. 76.

902 Ibid., para. 74.

903 CFI 23 October 2003, Case T-65/98 (Van den Bergh Foods Ltd v. Commission of the European Communities), [2003] ECR II-4653, para. 107.

904 CFI 2 May 2006, Case T-328/03 (O2 (Germany) GmbH & Co, OHG v. Commission of the European Communities), [2006] ECR 1231, para. 69.

905 CFI 23 October 2003, Case T-65/98 (Van den Bergh Foods Ltd v. Commission of the European Communities), [2003] ECR II-4653, para. 84.

906 CFI 2 May 2006, Case T-328/03 (O2 (Germany) GmbH & Co, OHG v. Commission of the European Communities), [2006] ECR 1231, para. 71.

907 ECJ 19 February 2002, Case C-309/99 (J. C. J. Wouters, J. W. Savelbergh and Price Waterhouse Belastingadviseurs BV v. Algemene Raad van de Nederlandse Orde van Advocaten), [2002] ECR I-1577, para. 110. The Court decided that "*a national regulation* […] *adopted by a body such as the Bar of the Netherlands does not infringe Article 85 (1) of the Treaty* [now Article 101 (1) TFEU], *since that body could reasonably have considered that that regulation, despite the effects restrictive of competition that are inherent in it, is necessary for the proper practice of the legal profession, as organised in the Member State concerned*".

larly, account must be taken of its objectives […] *It has then to be considered whether the consequential effects restrictive of competition are inherent in the pursuit of those objectives*".[908] In the more recent *Meca Medina*, in a similar way Community goals were balanced under Article 101(1) TFEU.[909] However, this case differs from *Wouters*, as the Court did not balance pro- and anti-competitive effects, but justified the restraint on the ground of economic freedom.[910]

Against this background, since the CJEU has never officially annulled the CFI's decision in *Metropole*, it is unclear whether a rule-of-reason analysis must be conducted pursuant to Article 101(1) TFEU. However, it is clear that some weighing of pro- and anti-competitive effects is permissible under this Article. Interestingly, and giving rise to more legal uncertainty, the CFI in *Braserie Nationale* explained that the transposition of the US rule of reason to Article 101(1) TFEU concerning agreements that "by object" constitute a restriction of competition must be rejected.[911] It is yet to be seen whether this case establishes a legal precedent (*i.e. stare decisis*) for the weighting of benefits and harm, when collusion "by effect" restricts competition within the internal market.

II. Commission

In order to promote the decentralization of the application of Article 101 TFEU by allowing more competences for the NCAs and Member State courts, the Commission launched the process of modernization in its 1999

908 Ibid., para. 97; This is reiterated in ECJ 18 July 2006, Case C-519/04P (David Meca-Medina and Igor Majcen v. Commission of the European Communities), [2006] ECR I-6991, para. 42.

909 C. Townley, "*Article 81 EC and Public Policy*", Portland: Hart Publishing 2009, p. 64; ECJ 18 July 2006, Case C-519/04P (David Meca-Medina and Igor Majcen v. Commission of the European Communities), [2006] ECR I-6991, para. 45. The Court ruled that anti-doping rules by the International Olympic Committee were compatible with Article 101 (1) TFEU, "*since they are justified by a legitimate objective*". Such a limitation is necessary to ensure healthy rivalry between athletes and to guarantee the competitiveness of sport.

910 T. Heremans, "*Professional Services in the EU Internal Market: Quality Regulation and Self-Regulation*", Oxford: Hart Publishing 2012, p. 327.

911 CFI 27 July 2005, joined cases T-49/02 to T-51/02 85 (Brasserie nationale SA (formerly Brasseries Funck-Bricher and Bofferding) et al v. Commission of the European Communities), [2005] ECR II-3033, para. 85.

White Paper.[912] Therein, the Commission supported the establishment of a bifurcated system of the current Article 101 TFEU. The first limb of this Article contains an assessment of whether collusion can be seen as anti-competitive, whereas the third limb allows for *ex post* supervision or exemption of a restrictive practice.[913] Even though this structure clearly rules out a rule-of-reason analysis under Article 101(1) TFEU for the reason that Article 101(3) TFEU must not be evaded, balancing under Article 101(1) can be carried out in line with the "limited" case law of the CJEU. In particular, anent the ECJ'S decisions in *Nungesser* and *Pronuptia.*[914] It is clear that this way to interpret Article 101(1) TFEU creates confusion because it adds to the confusion of whether a rule-of-reason analysis is allowed under the first limb. This worsened when the Commission issued its Guidelines on the Application of Article 81(3) [now Article 101(3) TFEU]. In those Guidelines, this Commission stated that balancing pro-competitive and anti-competitive effects must be conducted "exclusively" pursuant to Article 101(3) TFEU.[915]

III. Summary evaluation

It follows from the CJEU's approach in *Metropole* and the policy statement of the Commission that a rule-of-reason analysis under Article 101(1) TFEU must be strongly rejected. There are, however, two exemptions: first, economic and legal factors may be taken into account. Second, public policy/interests may be considered. These grounds are of particular importance to assess the anti-competitiveness of nonlegal sanctioning committed by the trade associations researched and their members.

In sum, an extensive rule-of-reason analysis under the first limb of Article 101 TFEU must not be contemplated. This is because there is a risk that a party under scrutiny can more easily escape the application of Article 101

912 C. Ehlermann and I. Atanasiu, "European Competition Law Annual 2000: The Modernisation of EC Antitrust Policy", Portland: Hart Publishing 2000, p. 141.

913 A. Albors-Llorens, "*EC Competition Law and Policy*", Abingdon: Routledge 2002, p. 152.

914 Commission, "White Paper on Modernisation of the Rules implementing Articles 85 and 86 of the EC Treaty [now Articles 101 and 102 TFEU]" of 28 April 1999, [OJ 1999, No. C 132/01], para. 57.

915 Communication from the Commission – Notice – Guidelines on the application of Article 81(3) of the Treaty [now Articles 101(1) TFEU] of 27 April 2004, [OJ 2004, No. C 101/97], para. 11.

TFEU compared to the more stringent test in Article 101(3) TFEU. In particular, since the Article 101(3) requires two positive and two negative cumulative conditions to be fulfilled.[916] Owing to the limited guidance offered by the CJEU and the Commission, for the purpose of this research, balancing pros and cons will be done exclusively under the third limb of Article 101(3) TFEU. This provision is tailored to measure the efficiencies that collusion generates through the use of four cumulative conditions that are lucid, clear and sound.

E. Key findings

When trade associations impose nonlegal sanctions on disloyal industry actors for not complying with an arbitral award, it is not impossible that these associations as well as their members and non-members can be held accountable for a violation of Article 101(1) TFEU. This is true when such measures have the "object" or "effect" of preventing, restricting or distorting competition within the internal market. To date, neither the Commission nor the CJEU has ever ruled on the eligibility of extrajudicial measures after a member undertaking of a trade association failed to comply with an award of specialized commercial arbitration. Fortunately, many parallels can be drawn between this situation and prior decisional practice and guidance given by the Commission and the CJEU. To exceed the bounds of Article 101(1) TFEU, two conditions must be fulfilled: first, the trade associations researched, their members and non-members must have colluded. Second, a lack of redeeming virtue must be substantiated by establishing an infringement of Article 101(1) TFEU by object or effect.[917]

With regard to the collusion requirement, which can be seen as a preliminary constituent, anytime one of the trade associations researched imposes a nonlegal sanction on a wrongdoer that operates in a specific commodities market, this conduct is sufficient to qualify as a decision by an association of undertakings within the meaning of Article 101(1) TFEU.[918] The reason for this is that regulatory measures (i) come from the governing bodies of the trade associations researched; (ii) are formal (*i.e.* the bylaws);

916 C. Ehlermann and I. Atanasiu, "*European Competition Law Annual 2004: The Relationship Between Competition Law and the (Liberal) Professions*", Portland: Hart Publishing 2006, p. 454.
917 See Part III, Chapter 9, A.
918 See Part III, Chapter 9, B, II.

and (iii) impose a certain market economic behaviour on their members. Also, its members and non-members that conduct trade with a member on the basis of a standardized agreement that is linked to a broader arbitration agreement, which includes nonlegal sanctions, have then cooperated owing to their role in the enforcement. This qualifies as an agreement between undertakings, because there is a faithful expression of the joint intention of parties in writing.[919] Furthermore, to ensure that non-members which did conduct trade with a member of a trade association that imposed a nonlegal sanction on a wrongdoer escape antitrust scrutiny at an early stage, their role in the execution, which is mostly of an indirect nature by breaking (all) commercial ties with a recalcitrant industry actor qualifies as a concerted practice within the meaning of Article 101(1) TFEU.[920] This is because there is some form of collaboration, without having reached the stage than an agreement has been concluded. Put differently, all of the three actors have satisfied the collusion requirement.

Next, given that the mere existence of an agreement or decision is insufficient to establish an infringement of Article 101(1) TFEU, the second requirement requires scrutiny of whether the participation of the three actors in each specific type of nonlegal sanction violates Article 101(1) by object or effect.[921] The importance of this dichotomy should not be underestimated, as the former type of restriction, on the one hand, in contradiction to the effect of restricting competition, is much more severe and cannot be justified pursuant to Article 101(3) TFEU. This concerns when an agreement, by its nature and all readily ascertainable surrounding circumstances, is apt to seek effect.[922] An effect restriction, on the other hand, focuses on the effects of specific conduct and can be justified when the fourtier requirements laid down in Article 101(3) TFEU are fulfilled. Whether the nonlegal sanctions constitute an infringement of one, or both types is not easily discernible, as neither the Commission nor the CJEU has declared such conduct in violation of Article 101 TFEU. However, one thing is sure: they have a clear risk of exceeding the scope of what may be considered permissible conduct under the first limb of this Article. While this statement is too broad, the anti-competitiveness of the trade associations

919 See Part III, Chapter 9, B, I.
920 See Part III, Chapter 9, B, III.
921 See Part III, Chapter 9, C.
922 See Part III, Chapter 9, C, I; See also P. L. Landolt, "*Modernised EC Competition Law in International Arbitration*", The Hague: Kluwer Law International 2006, p. 46.

researched, their members and non-members with regard to each nonlegal sanction was meticulously discussed against analogous decisional practice of the Commission and case law of the CJEU.

The first measure that was reviewed pertains to the inclusion of the names of recalcitrant industry actors in blacklists.[923] Whereas any exchange of information was seen as one of the six most common types of horizontal restraints incompatible with Article 101(1) TFEU according to the guidelines on horizontal cooperation agreements, the ECJ judgment in *Asnef-Equifax/Ausbanc* and the decisions of the Commission and the CFI's and ECJ's judgments relating to *Compagnie Maritime Belge* provide good guidance to assess the liability of the trade associations researched under Article 101(1) TFEU when they disseminate the names of a wrongdoer in a blacklist for not complying with an award from specialized commercial arbitration. Even though both cases are not similar to such an exchange of information, the effect of such a measure is similar.[924] This is to punish bad behaviour and to warn industry actors against conducting trade with disloyal actors. In more detail, when one of the trade associations researched disseminates the names of a wrongdoer in a members-only, or public, blacklist, this constitutes a restriction by effect, because in line with the ECJ judgment in *Asnef-Equifax/Ausbanc* these associations possess high levels of market power in the market for regulation and private ordering concerning the EU territory and can oust a targeted industry actor from the relevant second-tier adjacent commodities market.[925] Furthermore, in keeping with *Compagnie Maritime Belge,* the practice of blacklisting has exclusionary effects and ensures that targeted wrongdoers can no longer compete with other industry actors active on that market.[926] Following the imposition of the practice of blacklisting, the members of the relevant trade association can also be held accountable for a violation of Article 101(1) TFEU by effect.[927] This group of actors has the competence to change the bylaws of this associations and can amend or abolish a clause which permits the trade association to blacklist a wrongdoer. When they do not, they participate in an illegal collective boycott. For non-members an attribution of liability under Article 101(1) TFEU by effect must be denied when this group of actors has not entered into a standardized contract with members of a

923 See Part III, Chapter 9, C, II, 1.
924 See Part III, Chapter 9, C, II, 1, c.
925 See Part III, Chapter 9, C, II, 1, a.
926 See Part III, Chapter 9, C, II, I, b.
927 See Part III, Chapter 9, C, II, 2.

trade association.[928] Similarly, when a specific non-member has conducted business on the basis of a standardized contract with a member of the relevant trade association and this association included the name of that member in a blacklist, a breach of Article 101(1) is also not established.

The second nonlegal sanction is the withdrawal of membership, thus expelling a member from the association.[929] Any withdrawal of membership imposed by one of the trade associations researched amounts to an illegal coordinated group boycott, because it prevents market access and forecloses future commerce through the signalling of untrustworthiness of other merchants.[930] Moreover, the majority of the trade associations researched insufficiently guarantee public recourse to courts following expelling a member and do not have an internal appeal procedure in place to re-assess such a measure. This, in combination with the restrictiveness of an expulsion, is sufficient to determine that any expulsion imposed by one of the trade associations researched violates Article 101(1) TFEU by effect. Members can also be held liable under Article 101(1) for their role in executing an expulsion.[931] Their ability to change a clause in the bylaws of a trade association that permits an expulsion substantiates their participation in a collective boycott which restricts Article 101(1) TFEU by effect. Non-members have no role in the execution of an expulsion of a member from one of the trade associations researched, except when an undertaking that falls under this group conducts trade on the basis of a standardized contract which is linked to a broader arbitration agreement that includes such a measure and the other party (the former member) is expelled.[932] Yet, even then such an undertaking does not enter into an illegal agreement between undertakings in violation of Article 101(1) TFEU.

With reference to the third nonlegal sanction, namely denying membership for expelled members on the basis of an additional entry barrier, decisional practice and guidance of the Commission and case law of the CJEU require that the rules relating to the admission of members must be easily discernible and voluntary based on clear, objective and qualitative criteria, without being too restrictive to not infringe Article 101(1) TFEU by effect.[933] To the extent the trade associations researched impose additional

928 See Part III, Chapter 9, C, II, 3.
929 See Part III, Chapter 9, C, III.
930 See Part III, Chapter 9, C, III, 1, a.
931 See Part III, Chapter 9, C, III, 1, b.
932 See Part III, Chapter 9, C, III, 1, c.
933 See Part III, Chapter 9, C, III, 2, a.

barriers for re-entry following a withdrawal of membership, such as a lapse of a period of two years following expulsion and an arbitrary denial for readmission to membership by a Board of Directors, this rule is not complied with. Furthermore, the trade associations researched do not provide reasons for a denial and do not provide for an internal appeal against a refusal. As a result, they can be held accountable for a violation of Article 101(1) TFEU by effect. Similarly, their members can also be held accountable for a violation for Article 101(1).[934] This group of actors can amend or abolish clauses in the bylaws of a trade association that allow the association to impose additional re-entry barriers. This amounts to an illegal group boycott in violation of Article 101(1) TFEU by effect. Typically, non-members do not violate Article 101(1), unless an undertaking belonging to this group has conducted trade on the basis of a standardized contract which is linked to a broader arbitration agreement that includes additional entry measures following withdrawal of membership and the other party (the former member) is targeted.[935] However, in such a scenario, a non-member has also not participated in an illegal agreement between undertakings in breach of Article 101(1) TFEU.

The fourth extrajudicial measure that was reviewed concerns the instruction of a trade association to its members not to conduct business with an ostracized member.[936] In line with the Commission's decision in *Centraal Bureau voor de Rijwielhandel* this instruction from this institution infringes Article 101(1) TFEU by object. A violation of Article 101(1) can also be attributed to the members of such a trade association.[937] This is because they can amend or abolish any clause that permits such an association to impose a refusal to deal with an expelled member on them, or disregard this extrajudicial measure and continue trade despite the risk of being sanctioned. If not, they participate in an illegal agreement between undertakings in breach of Article 101(1) TFEU by object. A non-member that conducted trade with a member on the basis of standardized contract which is linked to a broader arbitration agreement in which a refusal to deal with an ostracized member is laid down does not breach this provision insofar as this party is targeted with such a measure.[938] The same is true with regard to all other non-members.

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934 See Part III, Chapter 9, C, III, 2, b.
935 See Part III, Chapter 9, C, III, 2, c.
936 See Part III, Chapter 9, C, IV, 1.
937 See Part III, Chapter 9, C, IV, 2.
938 See Part III, Chapter 9, C, IV, 3.

The fifth nonlegal sanction that was described pertains to entering the premises of a recalcitrant industry actor without a warrant.[939] While it can hamper the reputation of such a wrongdoer, it falls outside the scope of Article 101(1) TFEU. As a result, the trade associations researched, their members and non-members are compliant with Article 101(1).

The sixth type of conduct that was discussed is not a nonlegal sanction, but can also infringe Article 101(1) TFEU by effect and refers to limiting adequate access to public courts prior to arbitral proceedings and after an award.[940] In this regard, the Commission in its notice on the *FIA* case and its guidance on FIFA explained that arbitration must be voluntary with the possibility of recourse to national courts in order not to breach this provision. Whereas the voluntary nature of arbitration is doubtful, recourse to public courts is not provided by all of the trade associations researched. Two trade associations are clearly in violation of this rule, two trade associations remain silent and one trade association is compliant. Members can also be held accountable for limiting sufficient recourse to public courts because they have the competence to change the bylaws of a trade association. Non-members clearly do not have this competence.

Although five out of the six of the types of conduct described above are in violation of Article 101(1) TFEU, would this be different if some sort of balancing exercise had been permitted in this Paragraph with regard to restrictions by effect?[941] It must be said that weighing pro-competitive efficiencies and anti-competitive conduct is rather contentious at this stage. When reading the wording of Article 101(1), it is immediately clear that such a rule-of-reason analysis should be rejected. Article 101(1) TFEU does not contain grounds for exemption. Moreover, the Commission in its 1999 White Paper explains that Article 101(1) TFEU should be interpreted grammatically and does not leave room for any form of balancing.[942] The aim of the legislature was to create a bifurcated architecture that entitled parties, after a finding of anticompetitive collusion, the competence to seek impunity under the third limb of Article 101 TFEU. The CJEU, in *Metropole*, *van den Bergh* and *O2*, supported this stance.[943] In spite of neither the Commission nor the CJEU having officially renounced this viewpoint, they permitted some limited form of balancing in order to nullify

939 See Part III, Chapter 9, C, V.
940 See Part III, Chapter 9, C, VI.
941 See Part III, Chapter 9, D.
942 See Part III, Chapter 9, D, II.
943 See Part III, Chapter 9, D, I.

the effects repugnant to free competition. An example of this flexible approach can be found in *Wouters* and *Meca Medina*. Following both cases, the ECJ argued that legal and economic factors must be taken into account when an agreement restricts competition "by effect". This requires a determination of existing and potential competition as well as the situation prior and after the conclusion of an agreement. This must be done by focusing on the objectives of an agreement and by contemplating its overall context. While true, the following Chapter will exclusively consider whether the "by effect" restrictions discussed, including disseminating the names of wrongdoers in a blacklist, withdrawing membership and subsequently denying membership for expelled members on the basis of an additional entry barrier, and limiting adequate access to public courts prior to arbitral proceedings and after an award can be justified under Article 101(3) TFEU.

Chapter 10: Exemption under Article 101(3) TFEU

A. Introduction

Article 101(2) TFEU provides for the nullity of agreements that are found to be contrary to Article 101(1) TFEU. However, regardless of the fact that the Article 101(2) has an absolute character[944] and whereas the effects of a nullification have *ipso jure* a clear *erga omnes* effect,[945] the trade associations researched and their members can justify their anticompetitive participation in blacklisting, withdrawing membership, denying a reapplication for membership for expelled members on the basis of an additional entry condition, and limiting adequate access to public courts prior to arbitral proceedings and after an award which clearly violates Article 101(1) TFEU by effect, if the requirements laid down in either of the following two exemption routes are fulfilled. The first route exonerates such illegal collusion if it falls within the scope of the Block Exemption Regulation ("BER") (Paragraph B). The second route necessitates the fulfilment of four cumulative conditions which are laid down in Article 101(3) TFEU (Paragraph C).

B. BER: Research and Development and Specialization Agreements

EU law revolves around two well-established types of BERs with regard to horizontal cooperation which are currently in force under Regulation 2821/71,[946] namely (i) the research and development BER ("RDBER");[947]

944 ECJ 25 November 1971, Case 22-71 (Béguelin Import Co. v. S.A.G.L. Import Export), [1971] ECR 949, par. 29. The Court stated that "*an agreement which is null and void by virtue of this provision has no effect as between the contracting parties and cannot be set up against third parties*".

945 A. Komninos, "*EC Private Antitrust Enforcement: Decentralised Application of EC Competition Law by National Courts*", Portland: Hart Publishing 2008, p. 151.

946 Council Regulation (EEC) No 2821/71 of the Council of 20 December 1971 on application of Article 85(3) of the Treaty [now Article 101(3) TFEU] to categories of agreements, decisions and concerted practices, [OJ 1971, No. L 285].

947 Commission Regulation (EU) No 1217/2010 of 14 December 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to certain categories of research and development, [OJ 2010, No. L 335/36].

and (ii) the specialization agreements BER ("SABER").[948] Both documents were introduced to ameliorate the administrative burdens of companies that operate in the EU. In addition, they curtail the workload of the Commission.[949]

Worth mentioning here is the involvement of the trade associations researched and their members in the imposition and execution of nonlegal sanctions does not qualify under either block exemption. In detail, as can be seen in Article 1(1)(a) of the RDBER, in conjunction with Article 1(1)(m) of the RDBER, the imposition and execution of nonlegal sanctions cannot be classified as research and development agreements. This is because the trade associations researched and their members did not agree to carry out joint research and development, but merely disciplined unwanted behaviour of industry actors.[950] Furthermore, the extrajudicial measures of both actors also do not fall within the scope of the SABER. Article 1(1) of the SABER applies only to unilateral specialization agreements,[951] reciprocal specialization agreements,[952] or joint production agreements[953] regarding the production and distribution of goods.

948 Commission Regulation (EU) No 1218/2010 of 14 December 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to certain categories of specialisation agreements, [OJ 2010, No. L 335/43].

949 L. A. DiMatteo, "*International Business Law and the Legal Environment: A Transactional Approach*", Abingdon: Routledge 2016, p. 251.

950 Commission Regulation (EU) No 1217/2010 of 14 December 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to certain categories of research and development, [OJ 2010, No. L 335/36], Article 1(1)(m) (emphasis added).

951 Commission Regulation (EU) No 1218/2010 of 14 December 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to certain categories of specialisation agreements, [OJ 2010, No. L 335/43], Article 2(1)(a). This entails that "*one party agrees to fully or partly refrain from producing certain products and to purchase them from the other party*".

952 Ibid., Article 2(1)(b) of the SABER. This necessitates that "*two or more parties on a reciprocal basis agree to fully or partly refrain from producing certain but different products and to purchase them from the other parties*".

953 Ibid., Article 2(1)(c) of the SABER. This requires that "t*wo or more parties agree to produce certain products jointly*".

C. Assessment of pro- and anti-competitive effects under Article 101(3) TFEU

As seen above, anti-competitive nonlegal sanctions imposed by the trade associations researched and executed by their members cannot be exempted under the BERs mentioned above. However, Article 101(3) TFEU can also declare Article 101(1) TFEU inadmissible when pro-competitive benefits of extrajudicial measures which restrict Article 101(1) by effect outweigh the anticompetitive effects.[954] As a requirement, four cumulative conditions must be met. First, the agreement must contribute to improving the production or distribution of goods (or services), or to promoting technical or economic progress. Second, consumers must be allowed a fair share of the resulting benefits. Third, any restrictions imposed must be indispensable to attain the preceding objectives. Fourth, the agreement must not be capable of eliminating competition in relation to a substantial part of the products in question.

Unfortunately, all four requirements are imprecise without further regulatory and judicial interpretation. This is particularly true when focusing on the two main ways of how to interpret the four-tier test laid down in Article 101(3) TFEU with great assiduity.[955] On the one hand, the literature explains that the point of departure is a broad and generic test that allows a multitude of other policies, as opposed to purely economic ones to be taken into account.[956] On the other hand, the Commission in its Guidelines on the Application of Article 81(3) [now Article 101(3) TFEU] prefers

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954 See Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [now Articles 101 and 102 TFEU] [OJ 2003, No L 001], Article 1(2); Before 2003, the Commission had the sole power to declare Article 101(1) TFEU inapplicable. See Council Regulation No 17/62, First Regulation Implementing Articles 85 and 86 of the Treaty [now Articles 101 and 102 TFEU], [OJ 1962, No 87 28], Art. 4; J. Stuyck, H. Gilliams, and E. Ballon, "*Modernisation of European Competition Law: The Commission's Proposal for a New Regulation Implementing Articles 81 and 82 EC*", Antwerp/Oxford/New York: Intersentia 2002, p. 108 (For a reiteration in the literature); However, as from 2003 the Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [now Articles 101 and 102 TFEU] [OJ 2003, No L 001], Article 3 (2) also bestowed this competence on national courts and NCAs (*i.e.* the decentralization of competition law).

955 U. Neergaard, E. Szyszczak, J. W. van de Gronden, and M. Krajewski, "*Social Services of General Interest in the EU*", The Hague: T.M.C. Asser Press 2013, p. 280.

956 Some examples of important policies include: consumer protection, industrial policy, public safety, culture, fair trading and environmental protection.

"a more economic approach" that was influenced by the Harvard School of thought.[957] Following this line of reasoning, an effects-based approach must be followed. This entails that only the economic goal of consumer welfare should be taken into account. Put differently, only agreements that yield economic benefits can take advantage of the escape route laid down in Article 101(3) TFEU.[958]

While it is impossible to conclude that the role of the trade associations researched and their members in the imposition and execution of nonlegal sanctions which is in violation of Article 101(1) TFEU by effect can be justified on the basis of such a general observation pursuant to Article 101(3) TFEU, it must be discussed whether the requirements of Article 101(3) are fulfilled for each anticompetitive conduct. Here, the decisional practice and guidance given by the Commission and case law of the CJEU is guiding.[959]

Two remarks must be made before going into an in-depth analysis of whether both actors can evade *ipso jure* nullity after a violation of Article

957 A. S. Papadopoulos, "*The International Dimension of EU Competition Law and Policy*", Cambridge: Cambridge University Press 2010, p. 272. The Harvard School was the first to propose that the use of data to determine the conduct of companies and the performance on the market are crucial indicators to make a distinction between perfect competition and a monopoly (*i.e.* the static model). The major focus of this US theory was on high entry barriers and concentrated markets; U. Neergaard, E. Szyszczak, J. W. van de Gronden, and M. Krajewski, "*Social Services of General Interest in the EU*", The Hague: T.M.C. Asser Press 2013, p. 280. For a good EU example of "the more economic approach", see the Guidelines on the Application of Article 81(3) [now Article 101(3) TFEU].

958 J. Basedow and W. Wurmnest, "*Structure and Effects in EU Competition Law: Studies on Exclusionary Conduct and State Aid*", Alphen aan den Rijn: Kluwer Law International 2011, p. 15. This was an important step in helping to empower NCAs and national courts to apply Article 101(3) TFEU (*i.e.* to facilitate the decentralization process). When determining exclusively the effects on a given market, these institutions to not have to make a trade-off between different policy goals; A. Al-Ameen, "*Antitrust: The Person-centred Approach*", Heidelberg/New York/Dordrecht/London: Springer International Publishing Switzerland 2014, p. 73. To improve antitrust enforcement, the Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [now Articles 101 and 102 TFEU] [OJ 2003, No L 001] was introduced. This functional structure was called "Modernisation".

959 This view is supported by *Christopher Townley* in C. Townley, "*Article 81 EC and Public Policy*", Portland: Hart Publishing 2009; For a reiteration of this theory, see A. Gideon, "*Higher Education Institutions in the EU: Between Competition and Public Service*", The Hague: T.M.C. Asser Press 2017, p. 75 (note 159).

101(1) TFEU by effect with regard to the extrajudicial measures discussed. First, the defendant in legal proceedings must invoke the third limb of Article 101 TFEU as a defence.[960] Consequently, this party must convince the Commission that there is a preponderance of evidence to allow for a justification[961] and that all four cumulative criteria are met.[962] Second, while every type of collusion may in principle benefit from Article 101(3) TFEU,[963] the Guidelines on the Application of Article 81(3) [now Article 101(3) TFEU] elucidate that anti-competitive agreements that have as their "object" the restriction of competition "*are likely to produce negative effects on the market and to jeopardise the objectives pursued by the Community com-*

960 D. Hildebrand, "*The Role of Economic Analysis in the EC Competition Rules*", Alphen aan den Rijn: Kluwer Law International 2009, p. 301. Undertakings are required to undertake a self-assessment of whether their restrictive agreement that infringed Article 101(1) TFEU might benefit from an exemption under Article 101(3) TFEU.

961 See, in particular, ECJ 7 January 2004, joined cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P, (Aalborg Portland et al v. Commission of the European Communities), [2004] ECR I-123, para. 78. In its judgment, the Court stated that "*it should be for the undertaking or association of undertakings invoking the benefit of a defense against a finding of an infringement to demonstrate that the conditions for applying such defense are satisfied, so that the authority will then have to resort to other evidence*"; For a more detailed definition, see ECJ 17 January 1984, joined cases 43/82 and 63/82 (Vereniging ter Bevordering van het Vlaamse Boekwezen, VBVB, and Vereniging ter Bevordering van de Belangen des Boekhandels, VBBB, v. Commission of the European Communities), [1984] ECR 19, para. 52. The Court ruled that "*it is in the first place for the undertaking concerned to present to the Commission the evidence intended to establish the economic justification for an exception, and if the Commission has objections to raise, to submit alternatives to it*".

962 CFI 27 November 1998, Case T-290/94 (Fort James France, formerly Kaysersberg SA v. Commission of the European Communities), [1997] ECR II-2137, para. 178–179. This case is illustrative of the implication that applicants must provide more evidence than merely contesting the Commission's findings. Even though this is, in my opinion, also true with regard to Article 101(3) TFEU, this case relates to Article 102 TFEU.

963 CFI 15 July 1994, Case T-17/93 (Matra Hachette SA v. Commission of the European Communities), [1994] ECR II-595, para. 85. The Court stated that an agreement "*which is anticompetitive in intent or has an anti-competitive effect on a given market*" can both be exempted under Article 101 (3) TFEU; For a reiteration of this legal rule, see Commission Decision of 8 July 2009 relating to a proceeding under Article 81 of the EC Treaty [now Article 101 TFEU], Case No 39.401 (E.ON/GDF), para. 265.

petition rules".[964] Accordingly, it is rather axiomatic that the four-stage test laid down in the third limb of Article 101 TFEU is not fulfilled. This is particularly true when collusion harms consumers. [965] As a consequence, the Commission can refrain from conducting a full-fledged investigation of the competitive impact with regard to the refusal to deal with ostracized members when imposed by one of the trade associations researched and executed by its members.[966]

I. First condition: efficiency gains

The first condition that must be fulfilled by the trade associations researched and their members in order to benefit from the exemption of Article 101(3) TFEU, insofar as they disseminate the names of wrongdoers in blacklists, withdraw membership, deny reapplications for membership for expelled members on the basis of an additional entry condition, and limit adequate access to public courts prior to arbitral proceedings and after an award, requires that any of these measures improves the production or distribution of goods (or services),[967] or ameliorates technical or economic progress. In other words, there must be some efficiency gains flowing from the restrictive practice/agreement.[968] This can be demonstrated when an agreement reduces costs (i) resulting from the introduction of new produc-

964 Communication from the Commission – Notice – Guidelines on the application of Article 81(3) of the Treaty [now Article 101(3) TFEU] of 27 April 2004, [OJ 2004, No. C 101/97], para. 21; D. Gerard, "Effects-based enforcement of Article 101 TFEU: the "object paradox"", Kluwer Competition Law Blog 2012, p. 1. Even though object restrictions are open to justification under Article 101(3) TFEU, such exemption has never been granted.

965 I. Kokkoris and I. Lianos, "*The Reform of EC Competition Law: New Challenges*", Alphen aan den Rijn: Kluwer Law International 2010, p. 402-403.

966 J. Bourgeois and D. Waelbroeck, "*Ten years of effects-based approach in EU competition law - State of play and perspectives*", in: H. Zenger and M. Walker (ed) "Theories of Harm in European Competition Law: A Progress Report", Brussels: Groupe de Boeck 2013, p. 195.

967 The first limb of Article 101(3) TFEU applies by analogy to services. See the Communication from the Commission – Notice – Guidelines on the application of Article 81(3) of the Treaty [now Article 101(3) TFEU] of 27 April 2004, [OJ 2004, No. C 101/97], para. 21

968 The Commission refers to the first condition as "efficiency gains". See the Communication from the Commission – Notice – Guidelines on the application of Article 81(3) of the Treaty [now Article 101(1) TFEU] of 27 April 2004, [OJ 2004, No. C 101/97], para. 50-51.

tion technologies and methods;[969] (ii) through the creation of synergies by means of integrating existing assets;[970] (iii) by dint of developing economies of scale[971] and/or economies of scope,[972] (iv) when collusion allows for better planning or production;[973] and (v) by method of joint purchasing of materials and joint distribution.[974] In addition, those efficiency gains may also be established by substantiating evidence of improved quality or innovations.[975]

Regardless of the focus on a strict economic approach, as demonstrated in the Guidelines on the Application of Article 81(3) [now Article 101(3) TFEU],[976] other non-economic benefits which are created or fostered through an agreement are only peripheral to the principle that competitive restrictions can only be justified by efficiency gains.[977] Examples include the environment, public health, development and assistance of the third world and employment. A minor role in contemplating non-economic

969 Ibid., para. 64.
970 Ibid., para. 65.
971 Ibid., para. 66.
972 Ibid., para. 67.
973 Ibid., para. 68. This increases capacity utilization and reduces the need to hold expensive inventory.
974 Commission Decision of 11 June 1993 relating a proceeding pursuant to Article 85 of the EEC Treaty [now Article 101 TFEU], Case No IV/32.150 (EBU/Eurovision System), para. 59-67.
975 T. Ottervanger, "Socially Responsible Competition: Competition law in a changing society", *Markt & Mededinging* 2010, p. 9.
976 See in detail the Communication from the Commission – Notice – Guidelines on the application of Article 81(3) of the Treaty [now Article 101(3) TFEU] of 27 April 2004, [OJ 2004, No. C 101/97], para. 11, 33 and 50. Paragraph 11 pertains to determining the pro-competitive benefits produced by an agreement and assessing whether pro-competitive effects outweigh the anti-competitive effects. Paragraph 33 explains that "*efficiencies may create additional value by lowering the cost of producing an output, improving the quality of the product or creating a new product. When the pro-competitive effects of an agreement outweigh its anti-competitive effects the agreement is on balance pro-competitive and compatible with the objectives of the Community competition rules*". Paragraph 50 stipulates that the purpose of the first condition of Article 101(3) TFEU "*is to define the types of efficiency gains that can be taken into account*".
977 Ibid., para. 42. The Commission only intended to include non-economic goals when they supplement the economic benefits of an agreement. It did so by defining that "*goals pursued by other Treaty provisions can be taken into account to the extent that they can be subsumed under the four conditions of Article 81(3)* [now Article 101(3) TFEU]" (emphasis added).

benefits can best be explained by the dearth of decisional practice of the Commission and case law of the CJEU.[978]

To prevent the first condition under Article 101(3) TFEU from becoming superfluous, the Commission, indirectly, offered concise and preponderant guidance by requiring that any party wishing to fulfil this provision must explain (a) the nature of the efficiencies claimed; (b) the link between the agreement and the efficiencies; (c) the likelihood and magnitude of each efficiency claimed; and (d) how and when each efficiency would be achieved.[979]. To discuss whether the trade associations researched and their members satisfy this evidential barrier for their role in the imposition and execution of nonlegal sanctions, this Chapter proceeds along the following lines: first, it discusses the nature of the efficiency claimed (*i.e.* (a)). Second, it describes the subsequent "inextricably linked" criteria (*i.e.* (b), (c) and (d)) in one Paragraph.

1. The nature of the efficiencies claimed

To qualitatively assess whether nonlegal sanctions imposed by the trade associations researched and executed by their members satisfy the first limb of the evidential test, both actors must show – separately – that these measures have "*appreciably objective advantages*" as opposed to the disadvantages owing to its impact on competition.[980] Put differently, both actors

978 An example of a case where the Commission ascribed weight to a non-economic objective (*i.e.* promoting a collective environmental benefit) accruing from an agreement when assessing the first condition under Article 101(3) TFEU concerns the Commission Decision of 24 January 1999 relating to a proceeding under Article 81 of the EC Treaty [Article 101 TFEU] and Article 53 of the EEA Agreement, Case No IV.F.1/36.718 (CECED), para. 55-57.

979 Communication from the Commission – Notice – Guidelines on the application of Article 81(3) of the Treaty [now Article 101(3) TFEU] of 27 April 2004, [OJ 2004, No. C 101/97], para. 51.

980 ECJ 13 July 1966, joined cases 56 and 58-64 (Établissements Consten S.à.R.L. and Grundig-Verkaufs-GmbH v. Commission of the European Economic Community), [1966] ECR 429, p. 348; This has, *inter alia*, been reiterated in ECJ 6 October 2009, joined cases C-501/06P (GlaxoSmithKline Services Unlimited v. Commission of the European Communities), C-513/06P (and Commission of the European Communities v. GlaxoSmithKline Services Unlimited), C-515/06P (European Association of Euro Pharmaceutical Companies (EAEPC) v. Commission of the European Communities), and C-519/06P (Asociación de exportadores españoles de productos farmacéuticos (Aseprofar) v. Commission of the European Communities), [2009] ECR I-09291, para. 7.

must demonstrate that nonlegal sanctions actually and sufficiently outweigh negative consequences or inconveniences that nonlegal sanctions may cause (*i.e.* appreciability).[981] Furthermore, these associations and members must explain that they are not the only ones to benefit from the extrajudicial measures (*i.e.* subjective advantages),[982] but the Community as a whole (*i.e.* objective advantages).[983]

That being said, although nonlegal sanctions often result in market foreclosure for targeted wrongdoers, they also can generate significant benefits (or efficiencies). In particular, they guarantee an optimal allocation and distribution of goods. This is realized by reducing transaction costs by having a reliable and efficient system of specialized commercial arbitration in place in which arbitral awards are protected by means of extrajudicial measures. By allowing an effective alternative as opposed to cumbersome, time-consuming and expensive litigation in court (*i.e.* by addressing externalities) to some degree Pareto efficiency is achieved.[984] Subsequently, it is

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981 ECJ 29 October 1980, joined cases 209 to 215 and 218/78 (Heintz van Landewyck SARL et al v. Commission of the European Communities), [1980] ECR 3125, para. 185. The standard that was introduced in this case entails that benefits "*are likely sufficiently to compensate for the stringent restrictions which it imposes on competition*".

982 This follows as an *argumentum e contrario* from ECJ 13 July 1966, joined cases 56 and 58-64 (Établissements Consten S.à.R.L. and Grundig-Verkaufs-GmbH v. Commission of the European Economic Community), [1966] ECR 429, p. 348; L. O. Blanco, "*Market Power in EU Antitrust Law*", Oxford/Portland: Hart Publishing 2011, p. 104.

983 Ibid; Commission Decision of 11 March 1998 relating to a proceeding under Articles 85 and 86 of the EC Treaty [now Articles 101 and 102 TFEU], Case No IV/34.073, IV/34.395 and IV/35.436 (Van den Bergh Foods Limited), para. 224; Communication from the Commission – Notice – Guidelines on the application of Article 81(3) of the Treaty [now Article 101(3) TFEU] of 27 April 2004, [OJ 2004, No. C 101/97], para. 49 (emphasis added).

984 V. Pareto, "*Manual of Political Economy*", New York: Kelley 1906. Pareto optimality, made famous by the Italian economist *Vilfredo Pareto*, entails that "*an outcome is pareto efficient if it is not possible to make someone better off without making someone else worse off*"; B. Nguyen and A. Wait, "*Essentials of Microeconomics*", Abingdon/New York: Routledge 2016, p. 77. While this theory only allows for the balancing of efficiencies, without weighing up efficiency against other socially desirable objectives, it is perhaps not the most equitable, fair, or best market outcome; Furthermore, full Pareto efficiency is not achieved. Any regulatory sanctioned industry actor is deprived of obtaining access to a relevant commodities market. Consequently, given that at least someone is worse off is contrary to the idea of Pareto efficiency, which necessitates that not a single person or undertaking may be harmed.

not wrong to argue that nonlegal sanctions achieve appreciable objective advantages and benefit the Community as a whole within the meaning of the first requirement of Article 101(3) TFEU. Under the third requirement, which focuses on the concept of indispensability, a closer investigation may reach a different conclusion.

2. Sufficient link and likelihood and magnitude of the efficiency

While it is clear that the nonlegal sanctions which restrict Article 101(1) TFEU by effect are important to ensure that any losing party complies with awards issued by specialized commercial arbitration and, hence, reduce transaction costs, the trade associations researched and their members must – separately – explain that the extrajudicial measures have a sufficient[985] and direct[986] causal link with these efficiencies. Moreover, both actors must demonstrate the likelihood and magnitude of each efficiency claimed and explain how and when each efficiency would be achieved.[987]

In consideration of the foregoing, the trade associations researched and their members will have no problem substantiating this. All of the anti-competitive measures researched which restrict Article 101(1) TFEU by effect have a sufficient and direct causal link with these efficiencies. Specialized commercial arbitration is inoperative without the threat of being blacklisted, having membership withdrawn, being denied re-admission to membership on the basis of an additional entry condition and/or having adequate access to public courts limited prior to arbitral proceedings and after an arbitral award. As a result, lowered transaction costs are not realized. It is also likely that the extrajudicial measures discussed generate

985 Communication from the Commission – Notice – Guidelines on the application of Article 81(3) of the Treaty [now Article 101(3) TFEU] of 27 April 2004, [OJ 2004, No. C 101/97], par. 53.

986 Ibid., para. 54.

987 Ibid., para. 55. Both evidential barriers "*allow the decision-maker to verify the value of the claimed efficiencies, which in the context of the third condition of Article 81(3)* [now Article 101(3) TFEU] *must be balanced against the anti-competitive effects of the agreement* […]. *Given that Article 81(1)* [now Article 101(1) TFEU] *only applies in cases where the agreement has likely negative effects on competition and consumers (in the case of hard-core restrictions such effects are presumed) efficiency claims must be substantiated so that they can be verified*".

these rather significant efficiencies.[988] In this regard, the restrictive nature of these measures is of no importance. This follows from the decision of the Commission and the judgment of the ECJ in *FEDETAB*,[989] following which anticompetitive measures/agreements that seriously restrict competition, but allow for "*a more effective distribution*", fulfil the first requirement of Article 101(1) TFEU.[990]

II. Second condition: consumer pass-on

The protection of consumer interest is seen by the EU competition authorities as the most important driver for competition policy. This has, *inter alia*, been reflected by the former Commissioner for Competition Policy, *Mario Monti*. He explained that "*the goal of competition policy in all its aspects is to protect consumer welfare*".[991] This goal also finds its genesis in the

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988 Ibid., para. 55. Both evidential barriers "*allow the decision-maker to verify the value of the claimed efficiencies, which in the context of the third condition of Article 81(3)* [now Article 101(3) TFEU] *must be balanced against the anti-competitive effects of the agreement* […]. *Given that Article 81(1)* [now Article 101(1) TFEU] *only applies in cases where the agreement has likely negative effects on competition and consumers (in the case of hard-core restrictions such effects are presumed) efficiency claims must be substantiated so that they can be verified*".

989 Commission Decision of 20 July 1978 relating to a proceeding under Article 85 of the EEC Treaty [now Article 101(1) TFEU], Case No IV/28.852 (GB-Inno-BM/Fedetab), Case No IV/29.127 (Mestdagh-Huyghebaert/Fedetab), Case No IV/29.149 (Fedetab Recommendation); ECJ 29 October 1980, joined cases 209 to 215 and 218/78 (Heintz van Landewyck SARL et al v. Commission of the European Communities), [1980] ECR 3125.

990 Commission Decision of 20 July 1978 relating to a proceeding under Article 85 of the EEC Treaty [now Article 101(1) TFEU], Case No IV/28.852 (GB-Inno-BM/Fedetab), Case No IV/29.127 (Mestdagh-Huyghebaert/Fedetab), Case No IV/29.149 (Fedetab Recommendation), par. 123; ECJ 29 October 1980, joined cases 209 to 215 and 218/78 (Heintz van Landewyck SARL et al v. Commission of the European Communities), [1980] ECR 3125, para. 183; This deduction was given by L. O. Blanco, "*Market Power in EU Antitrust Law*", Oxford/Portland: Hart Publishing 2011, p. 104.

991 M. Monti, EC Commissioner for Competition, "*The Future for Competition Policy in the European Union*", Speech, 9 July 2001, p. 2 (europa.eu/rapid/press-release_SPEECH-01-340_en.pdf); See also N. Kroes, EC Commissioner for Competition, "*European Competition Policy – Delivering Better Markets and Better Choices*", Speech, 15 September 2005, p. 2 (http://europa.eu/rapid/press-release_SPEECH-05-512_en.htm). She explained that "*consumer welfare is now well established as the standard the [European] Commission applies when assessing* […] *in-*

Americanization of the Commission's policy. By focusing on the US Chicago School developed formula of consumer protection, EU competition authorities embrace the essential role of this concept.[992] An illustration can be found in the second condition of Article 101(3) TFEU. This Article provides that agreements, practices or conditions which aspire to the exception must provide consumers a fair share of the resulting benefit.[993] In other words, when one of the trade associations researched and its members seeks to fulfil the second requirement laid down in Article 101(3) TFEU, they must prove that nonlegal sanctions pass on efficiencies to consumers (*i.e.* consumers receive a fair share of the resulting benefit).[994] Establishing whether this is true depends on two factors: first, there must be consumers. Second, the consumers must receive a fair share of these efficiencies.

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fringements of the Treaty rules on cartels and monopolies"; The pivotal role of consumer protection in EU Competition law has also been reiterated, in the literature, by, for example, Philip Lowe. See P. Lowe, "The design of competition policy institutions for the 21st century — the experience of the European Commission and DG Competition", *Competition Policy Newsletter No. 3* 2008, p. 6. He mentioned that the promotion of consumer welfare, in the Commission's view, is the ultimate objective in the area of competition law.

992 A. Weitbrecht, "From Freiburg to Chicago and Beyond—the First 50 Years of European Competition Law", *European Competition Law Review* 2008, p. 85. This paradigm shift was never subject to public debate by the Commission and occurred without interference by the legislature.

993 A. Jones and B. E. Sufrin, "*EU Competition Law: Text, Cases, and Materials*", Oxford: Oxford University Press 2016, p. 247; Communication from the Commission – Notice – Guidelines on the application of Article 81(3) of the Treaty [now Article 101(1) TFEU] of 27 April 2004, [OJ 2004, No. C 101/97], para. 39. While the Guidelines on the Application of Article 81 (3) [now Article 101(3) TFEU] clearly indicate that the second condition (*i.e.* fair share for consumers) must only be considered after it has been determined that the restrictions incorporated in an agreement are indispensable (i.e. the third condition), this research follows the structure of Article 101(3) TFEU.

994 Communication from the Commission – Notice – Guidelines on the application of Article 81(3) of the Treaty [now Article 101(1) TFEU] of 27 April 2004, [OJ 2004, No. C 101/97], para. 83-104.

1. The scope of the term "consumers"

The concept of "consumers" is interpreted broadly to include final consumers[995] and occasionally intermediate consumers (*e.g.* wholesalers[996] and retailers[997]).[998] Such an extensive definition is justified by the axiom pursued by EU Competition law, namely to safeguard market participants against deleterious agreements.[999] While a broad scope of the term "consumers" is provided by the CJEU in its case law, a more detailed definition can be found in the Guidelines on the Application of Article 81(3) [now Article 101(3) TFEU]. In those Guidelines, by reflecting on the overarching consumer welfare goal,[1000] consumers are defined as legal or natural persons acting in a professional or private capacity.[1001] In other words, consumers can be defined as those who purchase or obtain a good or service from an actor that is located higher up the economic chain.[1002] When read-

995 CFI 22 April 1993, Case T-9/92 (Automobiles Peugeot SA and Peugeot SA v. Commission of the European Communities), [1993] ECR II-493, para. 27. The Commission generally refers to "final consumers" when dealing with the second condition of Article 101(3) TFEU.

996 Wholesalers are parties that sell in bulk quantities.

997 Retailers are parties that sell in small quantities.

998 See, *inter alia*, Commission Decision of 18 July 1975 relating to a proceeding under Article 85 of the EEC Treaty [now Article 101 TFEU], Case No IV/21.353 (Kabelmetal-Luchaire), para. 11; Commission Decision of 9 July 1980 relating to a proceeding under Article 85 of the EEC Treaty [now Article 101 TFEU], Case No IV/27.958 (National Sulphuric Acid Association), para. 47.

999 G. Monti, "*EC Competition Law*", Cambridge: Cambridge University Press 2007, p. 99.

1000 D. Leczykiewicz and S. Weatherill, "*The Images of the Consumer in EU Law: Legislation, Free Movement and Competition Law*", Oxford/Portland: Hart Publishing 2016, p. 70.

1001 Communication from the Commission – Notice – Guidelines on the application of Article 81(3) of the Treaty [now Article 101(1) TFEU] of 27 April 2004, [OJ 2004, No. C 101/97], para. 84. "*The concept of "consumers" encompasses all direct or indirect users of the products covered by the agreement, including producers that use the products as an input, wholesalers, retailers and final consumers, i.e. natural persons who are acting for purposes which can be regarded as outside their trade or profession. In other words, consumers within the meaning of Article 81(3)* [now Article 101(3) TFEU] *are the customers of the parties to the agreement and subsequent purchasers. These customers can be undertakings as in the case of buyers of industrial machinery or an input for further processing or final consumers as for instance in the case of buyers of impulse ice-cream or bicycles*".

1002 J. Drexl, W. S. Grimes, and C. A. Jones, "*More Common Ground for International Competition Law?*", Chelthenham/Northampton: Edward Elgar Publishing 2011, p. 52.

ing the Commission's wording, it seems incontrovertible that almost every user[1003] qualifies as a consumer apart from the parties to a deleterious agreement.[1004] However, the meaning of this concept is not always straightforward and confusion remains. This is particularly true for decisions from the CJEU,[1005] as well as for legal critics.[1006] Notwithstanding

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1003 L. O. Blanco, "*Market Power in EU Antitrust Law*", Oxford/Portland: Hart Publishing 2011, p. 106. The concepts of "user" and "consumer" are interchangeable, even though in the competition laws of some Member States the former word is chosen (*e.g.* in Spain "usarios", in France "utilisateurs"), whereas in other Member States the latter word is used (*e.g.* in Germany "Verbraucher").

1004 However, this truisms can be rebutted. See Commission Decision of 5 December 1979 relating to a proceeding under Article 85 of the EEC Treaty [now Article 101 TFEU], Case No IV/29.011 (Rennet), para. 30. In that Decision, the Commission gave a description of when parties and consumers (users) are synonymous. In detail, it explained that "*purchasers of rennet and colouring agents for cheese, who may or may not be members of the Cooperative, and purchasers of cheese produced by members of the Cooperative, have had a fair share of the benefit resulting from the agreement*".

1005 An example is the Opinion of the Advocate General of 19 February 2009, Case C-8/08 (T-Mobile Netherlands BV et al v. Raad van bestuur van de Nederlandse Mededingingsautoriteit) [2009], ECR I-04529, para. 55. In that Opinion, AG *Kokott* described that the Dutch Court (College van Beroep voor het bedrijfsleven) by submitting a referral for a preliminary ruling and the defendants (KPN and Vodafone) made the argument that the exchange of information and concerted practice to determine the remuneration of dealers had no impact on final consumers. Accordingly, their agreement did not infringe Article 101(1) TFEU; This defence was not followed by the Court. See ECJ 4 June 2009, Case C-8/08 (T-Mobile Netherlands BV et al v. Raad van bestuur van de Nederlandse Mededingingsautoriteit) [2009] ECR I-04529, para. 36. The Court explicitly ruled that "*it is not possible on the basis of the wording of Article 81(1) EC* [now Article 101(1) TFEU] *to conclude that only concerted practices which have a direct effect on the prices paid by end users are prohibited*".

1006 An interesting discussion relates to the absence of a distinction between customers and consumers under Article 101(3) and the competition policy of the Commission. See P. Akman, ""Consumer" versus "Customer": the Devil in the Detail", *ESRC Centre for Competition Policy Working Paper No. 08-34* 2008, p. 8. While both only talk about consumers, this term encompasses final consumers (or customers). Moreover, it also includes intermediate consumers. This creates confusion, as two different concepts refer to the same term; See also P. Akman, "*The Concept of Abuse in EU Competition Law: Law and Economic Approaches*", Oxford/Portland: Hart Publishing 2012, p. 127. The Commission generally does not make the distinction between final users and intermediate users, but refers to "consumers". This is problematic, as the goal of the former is about the broad notion of satisfaction, whereas the goal of the latter concerns the maximisation of profits.

the opaque wording chosen by both institutions, in accordance with this research, one thing is clear: defining the concept of consumers so widely to encompass the public interest, or the general interest should be avoided.[1007] Stretching the concept of consumer so widely would unhinge, *inter alia*, the Commission, the CJEU and parties in antitrust proceedings. The reason being that it would be unclear for them how to differentiate between the first and second conditions of Article 101(3) TFEU.

Another notable trend that paved the way for greater clarity and a more coherent application of the rules is the ECJ's judgment in *Asnef-Equifax/ Ausbanc*. Before this case it was unclear whether individual consumers, or the total number of consumers (*i.e.* the society as a whole) in a relevant market needed to obtain benefits from an agreement.[1008] Fortunately, the Court provided much needed guidance and stipulated that "*it is the beneficial nature of the effect on all consumers in the relevant markets that must be taken into consideration, not the effect on each member of that category of consumers*".[1009] In other words, emphasis is placed on the benefits that consumers, in general, obtain from an agreement.[1010] Although it is clear that benefits must be felt by consumers in the same market that the deleterious agreement affects, the ECJ in *Mastercard* explained that consumers in other markets can also be affected.[1011] This is particularly relevant when there is an undisputed interaction between both markets (*i.e.* when both markets are intertwined).[1012]

1007 L. O. Blanco, "*Market Power in EU Antitrust Law*", Oxford/Portland: Hart Publishing 2011, p. 107.

1008 A. Jones and B. E. Sufrin, "*EU Competition Law: Text, Cases, and Materials*", Oxford: Oxford University Press 2014, p. 259.

1009 ECJ 23 November 2006, Case C-238/05 (Asnef-Equifax, Servicios de Información sobre Solvencia y Crédito, SL, Administración del Estado v. Asociación de Usuarios de Servicios Bancarios (Ausbanc)), [2006] ECR I-11125, para. 70 (emphasis added).

1010 Note the difference between this standard and the "average" consumer standard, which was developed in EU free movement law. An example of the latter concerns ECJ 23 March 2010, joined cases C-236/08 to C-238/08 (Google Inc. v. Louis Vuitton Malletier SA et al), [2010] ECR I-02417, para. 3.

1011 ECJ 11 September 2014, Case C-382/12P (MasterCard Inc. et al v. European Commission), [2014] ECLI:EU:C:2014:2201.

1012 Ibid., para. 242.

2. Pass-on benefits (the concept of "fair share")

To assess whether benefits flowing from a deleterious agreement/measure can be passed on to consumers, the notion of "fair share" plays a central role. According to the Commission, by applying a narrow-cost-benefit analysis[1013], "*the pass-on benefits must at least compensate consumers for any actual or likely negative impact caused to them by the restriction of competition found under Article 101 (3) TFEU*".[1014] In this context, the final result after the negative and positive impact on consumers (*i.e.* the net effect) must "at least" be equal from the affected consumers' point of view.[1015] If they are below this equal position, the second condition cannot be accomplished.[1016] This is also reiterated in the ECJ's landmark decision in *Consten and Grundig*. In its judgment, the Court held that the benefits of competition must "*show appreciable objective advantages of such a character as to compensate for the disadvantages which they cause in the field of competition*".[1017]

Although the ECJ in *JCB Service* explained that not all benefits of an agreement must reach consumers,[1018] for, *inter alia*, undertakings such an evidential threshold may prove to be an onerous task.[1019] This is because it is difficult to accurately calculate the consumer pass-on rate without hav-

1013 L. Ankersmit, "*Green Trade and Fair Trade in and with the EU: Process-based Measures within the EU Legal Order*", Cambridge: Cambridge University Press 2017, p. 208.

1014 Communication from the Commission – Notice – Guidelines on the application of Article 81(3) of the Treaty [now Article 101(1) TFEU] of 27 April 2004, [OJ 2004, No. C 101/97], para. 85.

1015 Ibid.

1016 *Nicolaides* explains that the second condition in Article 101(3) TFEU is a filter, eliminating all agreements "*that fail to provide sufficient benefits to consumers*". See P. Nicolaides, "The Balancing Myth: The Economics of Article 81(1) & (3)", *Legal Issues of Economic Integration* 2005, p. 134-143.

1017 ECJ 13 July 1966, joined cases 56 and 58-64 (Établissements Consten S.à.R.L. and Grundig-Verkaufs-GmbH v. Commission of the European Economic Community), [1966] ECR 429, p. 348; For a reiteration of this wording, see CFI 23 October 2003, Case T-65/98 (Van den Bergh Foods Ltd v. Commission of the European Communities), [2003] ECR II-4653, para. 139.

1018 ECJ 21 September 2006, Case C-167/04P (JCB Service v. Commission of the European Communities), [2006] ECR I-8935, para. 162-163.

1019 Before the modernization of EU Competition Law, the evidential standard which was required to interpret the pass-on rate pertaining to the second condition of Article 101(3) TFEU was much lower. Hence, it was more easily satisfied. See M. Ioannidou, "*Consumer Involvement in Private EU Competition Law*

ing to rely on advanced economic calculations. To solve this, the Commission explained that "*Undertakings are only required to substantiate their claims by providing estimates and other data to the extent reasonably possible, taking account of the circumstances of the individual case*".[1020] Moreover, the Commission went on to explain that when the other three conditions of Article 101(3) TFEU are met, a full-fledged analysis of the second condition of Article 101(3) is superfluous for undertakings.[1021]

Insofar as an agreement is not likely to increase prices for consumers, in assessing whether a "fair share" is passed on, the Commission uses a sliding-scale approach. This necessitates the following rule: "*the greater the restriction of competition found under Article [101(3)] the greater must be the efficiencies and the pass-on to consumers*".[1022] In other words, consumers will suffer more when the impact of an agreement on competition is significant.[1023] The passing-on requirement must also occur within a reasonable time; the longer it takes for the gains to be passed on, the less likely they will be taken into account.[1024]

Also worth mentioning, the analytical framework that the Commission uses to analyse a pass-on to consumers differs between cost efficiencies and qualitative efficiencies. With regard to the former, the Commission takes into account (i) the characteristics and structure of the market; (ii) the nature and magnitude of the efficiency gains; (iii) the elasticity of demand, and (iv) the magnitude of the restriction of competition.[1025] For qualitative efficiencies, on the other hand, the Commission evaluates the compensa-

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Enforcement", Oxford: Oxford University Press 2015, p. 34; For an example of this "relatively" low threshold in the case-law of the ECJ, see ECJ 25 October 1977, case 26-76 (Metro SB-Großmärkte GmbH & Co. KG v. Commission of the European Communities), [1977] ECR 1875, para. 47. In this case, the Court ruled that the mere improvement in supply was sufficient to satisfy the second condition of Article 101(3) TFEU.

1020 Communication from the Commission – Notice – Guidelines on the application of Article 81(3) of the Treaty [now Article 101(1) TFEU] of 27 April 2004, [OJ 2004, No. C 101/97], para. 94.

1021 Ibid., para. 90.

1022 Ibid; for a reiteration of this rule, see the Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements of 14 January 2011, [OJ 2011, No. C 11/01], par. 103.

1023 Communication from the Commission – Notice – Guidelines on the application of Article 81(3) of the Treaty [now Article 101(1) TFEU] of 27 April 2004, [OJ 2004, No. C 101/97], para. 92.

1024 Ibid., para. 87.

1025 Ibid., para. 96.

tion for consumers caused by the anti-competitive effects of an agreement either (a) by means of sufficiently creating value, or (b) by introducing new products or achieving a higher quality of products.[1026]

3. An efficient allocation of resources to countervail the negative effects of nonlegal sanctions imposed by the trade associations researched and executed by their members

Efficient competition is imperative for consumers, since it enables them to benefit from greater innovation, higher quality of products and services and lower prices.[1027] As a result, the aim of an efficient spectrum policy in the EU is to accommodate the benefits of consumers by "*enhancing consumer welfare and by ensuring an efficient allocation of resources*".[1028] The trade associations researched and their members have a crucial role in the promotion of these objectives.[1029] By offsetting high costs of monitoring compliance for undertakings that a system of specialized commercial arbitration in which awards are enforced by imposing nonlegal sanctions achieves, member undertakings of these associations do not have to resort to cumbersome, time- consuming and expensive litigation in court. This significantly reduces transaction costs for these companies. But does this mean that also these efficiencies are passed on to consumers?

If member undertakings of the trade associations researched have to resort to litigation in court rather than specialized commercial arbitration, the cost of doing business is higher and less economical. This would harm final consumers, because these members will most likely pass on losses to them. As a result, distribution costs will increase. To analyse such pass-on

1026 Ibid., para. 102.

1027 ICN Advocacy Working Group, "Explaining the Benefits of Competition to the General Public", *International Competition Network* 2017, p. 3.

1028 Communication from the Commission – Notice – Guidelines on the application of Article 81(3) of the Treaty [now Article 101(1) TFEU] of 27 April 2004, [OJ 2004, No. C 101/97], par. 13; *Hawk* assumes that consumer welfare and achieving an efficient allocation of goods are two sides of the same coin. See B. E. Hawk, "*International Antitrust Law & Policy: Fordham Corporate Law 2003*", Huntington: Juris Publishing 2004, p. 423.

1029 For an overview of benefits that are generated by trade associations, see TradeAssociationForum, "The Benefits of Trade Associations", *TradeAssociationForum* 2009, p. 2, 4.

costs, it is important to explain the game theory provided by *Cirace*.[1030] He demonstrated that "*if all firms in a competitive industry have higher costs, and the industry sells products that consumers greatly desire, the quantity purchased will be little changed after a price rise* […]*, so the higher costs will be totally passed on to consumers*".[1031] Absent extrajudicial measures, this theory is applicable by virtue of three reasons: first, members of these associations will incur higher costs. Second, these members sell products that final consumers desire. Third, there is no proof that the quantity of products will change after an increase in price. As a result of falling within the description of this three-tier test, final consumers have to deal with higher prices for industry products when a system of specialized commercial arbitration is not safeguarded under the threat of nonlegal sanctions. Vice versa, if awards are extrajudicially enforced within a system of specialized commercial arbitration, lower prices are passed on to final consumers.[1032] This lowers distribution costs. These measures guarantee appreciable objective advantages for these individuals. Notwithstanding the anticompetitive harm placed on recalcitrant industry actors, this is sufficient to establish that the trade associations researched and their members fulfil the second requirement of Article 101(3) TFEU. In this situation, a general conclusion is sufficient and there is no need to establish for each extrajudicial measure whether it results in a pass-on for consumers. With regard to the next requirement, this approach will differ.

III. Third condition: Indispensability - without restriction, elimination or significant reduction of efficiencies

After making a detailed assessment of the efficiency claim and before the issue of pass-on to consumers,[1033] the third condition under Article 101(3)

1030 J. Cirace, "*Law, Economics, and Game Theory*", Lanmore: The Rowman & Littlefield Publishing Group, Inc. 2018, p. 238.

1031 Ibid.

1032 With regard to "prices", *Jones & Pickering* explain that "*the lower the price, all other things being equal, the greater the consumer benefit*". See T. T. Jones, J. F. Pickering, "The Consumer's Interest in Competition Policy", *Journal of Consumer Studies and Home Economics* 1979, p. 98.

1033 For the purpose of the Guidelines on the Application of Article 81(3) [now Article 101(3) TFEU] it is considered appropriate to invert the order of the third (*i.e.* indispensability) and second condition (*i.e.* pass-on to consumers) of Article 101(3) TFEU.

TFEU requires that the anticompetitive extrajudicial measures imposed by the trade associations researched and executed by their member must be "indispensable"[1034] to achieve the efficiency gains claimed.[1035] To apply this concept, the Guidelines on Article 81(3) EC [now Article 101(3) TFEU] require that the trade associations researched and their members provide evidence, for each extrajudicial measure which they impose and execute on a wrongdoer, that this restriction of Article 101(1) TFEU by effect is indispensable to achieve the efficiencies referred to first condition in Article 101(3) TFEU.[1036] Put differently, according to the Commission's decision in *Telefónica/Portugal Telecom*, "*the question when analysing indispensability under Article 101 (3) of the Treaty is* […] *whether the restriction is indispensable to attain the efficiencies in question*".[1037]

To apply this test, the trade associations researched and their members must substantiate that each extrajudicial measure which they impose and execute on a recalcitrant industry actor is the least restrictive option.[1038]

1034 Before the introduction of the Guidelines on Article 81(3) [now Article 101(3) TFEU], "indispensability" was interpreted by the GC as synonymous with "strictly necessary". See CFI 23 February 1994, joined cases T-39/92 and T-40/92 (Groupement des Cartes Bancaires "CB" and Europay International SA v. Commission of the European Communities), [1994] ECR II-49113, para. 114; The EU Commission only referred to "necessary" with regard to interpreting indispensability. See CFI 15 September 1998, joined cases T-374/94, T-375/94, T-384/94 and T-388/94 (European Night Services Ltd (ENS) et al v. Commission of the European Communities), [1998] ECR II-1533, para. 203.

1035 Indispensability is an important balancing threshold. See C. Townley, "*Article 81 EC and Public Policy*", Portland: Hart Publishing 2009, p. 273.

1036 Communication from the Commission – Notice – Guidelines on the application of Article 81(3) of the Treaty [now Article 101(1) TFEU] of 27 April 2004, [OJ 2004, No. C 101/97], para. 73.

1037 Ibid; Commission Decision of 23 January 2013 relating to a proceeding under Article 101 of the Treaty on the Functioning of the European Union, Case No COMP/39.839 (Telefónica/Portugal Telecom), para. 444.

1038 This is a proportionality test. The term "proportionality" was introduced by the Court in CFI 15 July 1994, Case T-17/93 (Matra Hachette SA v. Commission of the European Communities), [1994] ECR II-595, para. 135. The Court stated that "*any adverse effects on competition* […] *are proportionate to the contribution made by it to economic or technical progress*"; A clearer reiteration can be found in the Opinion of the Advocate-General Kirschner of 21 February 1990, Case T-5I/89 (Tetra Pak Rausing SA v. Commission of the European Communities), [1990] ECR II-309, para. 72; This approach has been reiterated in the literature. See, for example, S. Kingston, "*Greening EU Competition Law and Policy*", Cambridge: Cambridge University Press 2012, p. 280. *Kingston* explains that indispensability involves the principle of proportionality.

Blanco call this the "less restrictive alternatives test".[1039] While a vague concept, the Commission provides guidance in two ways: first, it equates "indispensability" with "reasonably necessary".[1040] Second, it explains in its Guidelines on the application of Article 81(3) of the Treaty [now Article 101(1) TFEU] that a party that invokes Article 101(3) TFEU must by looking from the perspective of "*any rational undertaking*"[1041] clarify that there are no economically practicable and less restrictive means of achieving the claimed efficiencies.[1042] Albeit that this definition is still too broad, inextirpable and vague, the Commission provided further guidance. It explicated that "*It will only intervene where it is reasonably clear that there are realistic and attainable alternatives.* [As a result,] *The parties must only explain and demonstrate why such seemingly realistic and significantly less restrictive alternatives to the agreement would be significantly less efficient.*"[1043]

That being said, it must be established with regard to the dissemination of the names of wrongdoers in a blacklist, withdrawals of membership, denials of readmission to membership for expelled members on the basis of an additional entry condition and limiting adequate access prior to arbitral proceedings and after an award, which clearly restrict Article 101(1) TFEU

1039 L. O. Blanco, "*Shipping Conferences under EC Antitrust Law: Criticism of a Legal Paradox*", Portland: Hart Publishing 2007, p. 375; *Lianos* & *Geradin* call this the requirement of "less restrictive alternatives". See I. Lianos and D. Geradin, "*Handbook on European Competition Law: Substantive Aspects*", Cheltenham/Northampton: Edward Elgar Publishing 2013, p. 160.

1040 Communication from the Commission – Notice – Guidelines on the application of Article 81(3) of the Treaty [now Article 101(1) TFEU] of 27 April 2004, [OJ 2004, No. C 101/97], para. 78; See also American Bar Association, "*Federal antitrust guidelines for the licensing of intellectual property*", Chicago: American Bar Association 2010, p. 71. The Commission takes a pragmatic point of view when interpreting indispensability.

1041 The Commission does not focus on the parties to an agreement, but uses the yardstick of "*any rational undertaking in a similar situation*".

1042 Communication from the Commission – Notice – Guidelines on the application of Article 81(3) of the Treaty [now Article 101(1) TFEU] of 27 April 2004, [OJ 2004, No. C 101/97], para. 75.

1043 Ibid; The objectives achieved by a deleterious agreement must first be recalled. See Commission Decision of 12 December 1988 relating to a proceeding under Article 85 of the EEC Treaty [now Article 101 TFEU], Case No IV/27.393 and IV/27.394 (Publishers Association - Net Book Agreements), para. 73; In appeal, the AG of the ECJ reiterated that the concept of indispensability "*can be properly assessed only if there is clarity as to the objectives of the agreement in question*". See the Opinion of the Advocate-General Lenz of 16 June 1994, Case C-360/92P (The Publishers Association v. Commission of the European Communities), [1995] ECR I-23, para. 43.

by effect when directed at an industry actor, that these measures – separately - are reasonably necessary to achieve lowered transaction costs. Put differently, the focus is on whether there are less restrictive alternatives and whether, absent its imposition and execution, these efficiencies are eliminated or significantly reduced.[1044] The following Paragraphs explain for each of the extrajudicial measures whether they are indispensable within the meaning of the third requirement of Article 101(3) TFEU. The role of the trade associations researched and their members will not be separately discussed. Importantly, to avoid a duplicative discussion, many arguments will be borrowed from the previous discussion pertaining to the rule-of-reason analysis pursuant to Section 1 of the Sherman Act.[1045]

1. Blacklisting

On the one hand, disseminating the names of recalcitrant industry actors in a blacklist has debilitating effects on such wrongdoers. Above all, their future business decisions and competitive freedom are negatively influenced.[1046] On the other hand, blacklisting wrongdoers is unavoidable to have an efficient system of specialized commercial arbitration which lowers transaction and distribution costs. This raises the ensuing question: Is the practice of blacklisting wrongdoers reasonably necessary to achieve these efficiency gains, or is there a less restrictive alternative? It is difficult to draw a line between pro-competitive and anticompetitive exchanges of information.[1047] Hence, it is a daunting task to reason[1048] when dissemina-

1044 Ibid., para. 79; Here, the Commission applies a sliding scale approach: the more restrictive the restraint, the stricter the indispensability test.

1045 See Part II, Chapter 6, E, II, 2. However, refusals to deal with an expelled member will not be discussed. Unlike with regard to Section 1 of the Sherman Act, this nonlegal sanction violates Article 101(1) TFEU by object and cannot be justified under Article 101(3) TFEU.

1046 I. E. Wendt, "*EU Competition Law and Liberal Professions: an Uneasy Relationship?*", Leiden: Koninklijke Brill NV 2013, p. 512.

1047 L. Ritter and W. D. Braun, "*European Competition Law: A Practitioner's Guide*", The Hague: Kluwer Law International 2005, p. 249; The problem is that such a value-laden balancing exercise would compare incommensurable factors. See I. Lianos and D. Geradin, "*Handbook on European Competition Law: Substantive Aspects*", Cheltenham/Northampton: Edward Elgar Publishing 2013, p. 160.

1048 Reasoning is synonymous with arguing. It means to justify, to give reasons pro and con, to criticize, to verify, to demonstrate and to deliberate. See C. Perel-

tion of the names of a wrongdoer in a blacklist is legitimate.[1049] This is because less severe alternatives such as a reprimand or a penalty are too soft and do not ensure that industry actors comply with arbitral awards of specialized commercial arbitration. Only when an industry actor's commercial reputation is at risk, conformity with arbitral awards is probable. To make things clearer, it is necessary to weigh arguments for and against the indispensability of blacklisting under the third requirement of Article 101(3) TFEU. Here, the same arguments can be used which were presented with regard to the rule-of-reason analysis of blacklisting under Section 1 of the Sherman Act.[1050]

Arguments that confirm the indispensable nature of blacklisting pursuant to Article 101(3) TFEU.	**Arguments against the indispensable nature of blacklisting pursuant to Article 101(3) TFEU.**
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 too severe a sanction.
3. In most markets, being blacklisted does not result in 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 the blacklist are already bankrupt and are often non-members. It is unlikely that additional reputational harm will be inflicted on them. 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.

man, "*Justice, Law, and Argument: Essays on Moral and Legal Reasoning*", Dordrecht: D. Reidel Publishing Company 1980, p. 59.

1049 F. Ferretti, "*EU Competition Law, the Consumer Interest and Data Protection: The Exchange Consumer Information in the Retail Financial Sector*", Heidelberg/New York/Dordrecht/London: Springer 2014, p. 47.

1050 See Part II, Chapter 6, E, II, 2, a; The arguments presented in the table with regard to Section 1 of the Sherman Act are reproduced verbatim in this table.

Despite there being a counterargument against every argument, as seen in this table, there is no less severe alternative measure to ensure that awards from specialized commercial arbitration are complied with. Disseminating the names of wrongdoers in closed, non-public blacklists is reasonably necessary to lower transaction costs. However, when the trade associations researched and their members include the names of wrongdoers in publicly available list, this is not the least restrictive alternative. The reason is that it is difficult (or impossible) to delete freely circulating information which would not only be available for the members of the associations, but also for every private person and public undertaking on a global scale.[1051] Even though a blacklisted industry actor may get taken off the list, "the internet never forgets".[1052] Future consumers and undertakings that want to deal with a formerly blacklisted company can change their commercial strategy on the basis of such information (*e.g.* by breaking off contract negotiations).[1053]

Support of the indispensable nature of blacklisting by comparing it with online review forums must be declined. This will be the focus in the next Paragraph, even though it could have also been discussed with regard to the legality of blacklisting under Section 1 of the Sherman Act.

1051 S. van der Hof, B. van den Berg, and B. Schermer, "*Minding Minors Wandering the Web: Regulating Online Child Safety*", The Hague: T.M.C. Asser Press 2014, p. 136.

1052 C. Molenaar, "*E-Marketing: Applications of information technology and the internet within marketing*", Abingdon: Routledge 2012, p. 105.

1053 This is not as straightforward, when looking at what may happen in the future. Much depends on how the internet advances. It is possible that internet will open up more for consumers, thereby enabling them to access information on blacklisted industry actors more readily (*e.g.* one easy search query). Accordingly, blacklisting can be even more restrictive than how it is now. See J. P. Martínez, "*Net Neutrality: Contributions to the Debate*", Madrid: Fundación Telefónica 2011, p. 139; On the contrary, it is also very well possible that legislation pertaining to online privacy protection will play a more pivotal and mature role in the nearby future. This could "potentially" lead to less restrictive effects for blacklisted industry actors. In particular, because information of those mentioned in such lists will not be so readily available. See K. Chen, A. Fadlalla, "*Online Consumer Protection: Theories of Human Relativism: Theories of Human Relativism*", New York: IGI Global 2009, p. 278.

a. The juxtaposition with online evaluation forums

Traditionally, consumers shared information about products and services among themselves on an informal basis (*i.e.* word-of-mouth information).[1054] This produced regulatory effects, especially when the information consisted of negative feedback. Yet, companies did not often suffer reputational harm, because word-of-mouth information did not easily extend across the society (or indeed the world). This changed in the computer-mediated era, because new media allows consumers to obtain information about goods and services from a vast, geographically dispersed group of people besides from the people they know.[1055] Particularly, by engaging in online forums and review sites, consumers share their opinions and write down their thoughts on products and services, be they positive or negative, anonymous or not.[1056] Such a popular[1057] form of consumer interaction with one another through virtual communities does not only increase the value of companies, but also has detrimental effects on a compa-

1054 I. Nee, "*Managing Negative Word-of-Mouth on Social Media Platforms: The Effect of Hotel Management Responses on Observers' Purchase Intention*", Bremen: Springer Fachmedien Wiesbaden 2016, p. 2.

1055 C. M. K. Cheung and M. K. O. Lee, "Online Consumer Reviews: Does Negative Electronic Word-of-Mouth Hurt More?", *Association for Information Systems* 2008, p. 2; T. Hennig-Thurau, K. P. Gwinner, G. Walsh, and D. D. Gremler, "Electronic Word-of-mouth via Consumer-Opinion Platforms: What Motivates Consumers to Articulate Themselves on the Internet", *Wiley Periodicals* 2004, p. 39. In their article, the authors explain that an electronic word of mouth circulation of information encompasses "*any positive or negative statement made by potential, actual or formers customers about a product or company which is made available to multitude of the people and institutes via the internet*"; This is the most widespread definition of electronic word of mouth information according to *Trenz and Berger*. See M. Trenz and B. Berger, "Analyzing Online Customer Reviews – An Interdisciplinary Literature Review and Research Agenda", *ECIS* 2013, p. 2.

1056 Examples, *inter alia*, include purchase and review sites (*e.g.* Amazon), strict review sites (*e.g.* Tripadvisor/Yelp), social sharing sites (*e.g.* Youtube/Flickr) and blogging sites (*e.g.* Facebook/Twitter). See L. Robinson, Jr. "*Marketing Dynamism & Sustainability: Things Change, Things Stay the Same*", Heidelberg/Dordrecht/New York/London: Springer 2012, p. 304.

1057 Two reasons explain the success of electronic word of mouth information: first, increased popularity by consumers to read online reviews of other consumers. Second, consumers more than ever like to disseminate information. See Anonymous, "*How to Deal with Negative Electronic Word-Of-Mouth?*", Norderstedt: GRIN Verlag 2011, p. 4.

ny's standing.[1058] In other words, it may act as an online reputation mechanism.[1059] Whereas positive information may encourage consumers to buy a product or service, negative electronic word-of-mouth (eWOM) information may discourage consumers from buying products.[1060] Evidence of such an effect can be supported by an empirical questionnaire that illustrated that 61% of consumers check online forums before making a purchase decision.[1061]

Against this background, it is clear that one cannot neglect the resemblance between this method of virtual sanctioning with the blacklisting of defaulting industry actors by the trade associations researched and their members. Both measures impede market accessibility of undertakings and regulate the behaviour of market recipients. At first glance, a comparison between both forms of regulatory sanctioning mechanisms may seem useful and appropriate. However, in my opinion, it can be seen as an oversimplification, mainly because this view does not take the full spectrum into account. Four differences prevent an unequivocal, scientifically true comparison.[1062] First, whereas through online valuation forums "consumers" can do reputational damage to undertakings, the trade associations researched and their members blacklist industry actors active in the same commodities market as the latter group of actors (*i.e.* the consumer-industry actor fallacy). Second, given the anonymity of consumers who dissemi-

1058 W. Currie, "*Value Creation from E-Business Models*", in: N. Madeja and D. Schoder, "Value creation from Corporate websites: how different features contribute to success in e-Business", Oxford: Elsevier 2004, p. 216.

1059 M. D. Lytras, E. Damiani, J. M. Carroll, D. Avison, R. D. Tennyson, A. Dale, A. Naeve, P. Lefrere, F. Tan, J. Sipior, and G. Vossen, "*Visioning and Engineering the Knowledge Society - A Web Science Perspective*", Berlin/Heidelberg: Springer-Verlag 2009, p. 501.

1060 I. Lee, "*Encyclopedia of E-Commerce Development, Implementation, and Management, Band 1*", Hershey: IGI Global 2016, p. 1985.

1061 T. Jung and M. C. tom Dieck, "*Augmented Reality and Virtual Reality: Empowering Human, Place and Business*", Cham: Springer International Publishing AG 2018, p. 148.

1062 Similar reticence is required with regard to the German system that prevents over-indebtedness from consumers. This is called the Protective Society for General Credit Assurance (SCHUFA) and rates the ability of those individuals to pay. Once registered in the personal information system, it will be more difficult for consumers to get, *inter alia*, bank loans. Accordingly, this credit system can be seen as a form of regulating behaviour. Despite being of interest, it will not be scrutinized in more detail. For an overview, see N. Jentzsch, "*Financial Privacy: An International Comparison of Credit Reporting Systems*", Berlin/Heidelberg: Springer-Verlag 2006, p. 89-94.

nate information via online valuation forums, it is more difficult to determine the credibility of their information as compared to the blacklisting of industry actors (*i.e.* the anonymity of the sender fallacy).[1063] Third, consumers active on online valuation forums encompass an indefinite number of persons who are spatially separated and scattered worldwide, whereas the trade associations researched and their members belong to a closed group (*i.e.* the open-closed group fallacy). Fourth, consumers give positive and negative information about products and services via online valuation forums, whereas the dissemination of the names of recalcitrant industry actors in blacklist only follows after non-compliance with an arbitral award (*i.e.* the institutional discrepancy fallacy).

2. Membership rules and barriers for market access

a. Withdrawal of membership

Withdrawal of membership is a severe measure that can oust a targeted member of a trade association from the relevant second-tier commodities market. It is not easy to establish whether this conduct is indispensable to lower transaction costs. To provide guidance, comparable to the legality of withdrawals of membership pursuant to Section 1 of the Sherman Act,[1064] the following table presents the most important arguments for and against the indispensable nature of a withdrawal of membership.[1065]

1063 R. Sumangla and A. Panwar, "*Capturing, Analyzing, and Managing Word-of-Mouth in the Digital Marketplace*", Hershey: IGI Global 2016, p. 172.

1064 See Part II, Chapter 6, E, II, 2, b, i.

1065 Differences with regard to the table which includes the arguments for and against the legality of expulsions under Section 1 of the Sherman Act are twofold. First, with regard to indispensable nature pursuant to Article 101(3) TFEU, the goal is not to increase total welfare and consumer welfare, but to reduce transaction costs (see the second requirement). Second, the seventh argument is not included with regard to Section 1 of the Sherman Act.

Arguments that prove the indispensable nature of a withdrawal of membership pursuant to the third requirement of Article 101(3) TFEU.	**Arguments against the indispensable nature of a withdrawal of membership pursuant to the third requirement of Article 101(3) TFEU**
1. Withdrawals of membership provide a successful measure to ensure compliance with an arbitral award 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 lowers transaction costs	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 too severe a 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 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 amidst a withdrawal of membership.
6. Throughout history individuals have been ostracized.[1066] 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 anti-competitive harm inflicted upon targeted members.
7. The mere absence of procedural safeguards does not entail that withdrawals of membership are not indispensable to lower transaction costs. Any targeted industry actor can challenge an expulsion at public court, even though the relevant trade association does not enable this former member to do so.	7. The majority of the trade associations researched offer insufficient guarantees following a withdrawal of membership. In detail, recourse to public courts and the possibility of an internal appeal are not offered/explained following an expulsion.

On the basis of this table, the arguments in support of a withdrawal of membership are more convincing. Expulsions are reasonably necessary to lower transaction costs. This is because enforcement of arbitral awards from specialized commercial arbitration is better safeguarded, which in

1066 For an historical example of a banishment, see Part 1, Chapter 2, B, II.

turn enables the specialized commercial arbitration system to function more efficiently. However, as it stands, the trade associations researched and their members do not structure the dissemination of the names of wrongdoers in the least restrictive manner. In my opinion, there is a less restrictive option: a 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, 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). In addition, expelled members should be given the chance to ask an internal appeal tribunal to review such a decision and be advised of the possibility to seek recourse in public courts. If these changes are introduced, blacklisting is indispensable to lower transaction costs and satisfies the third requirement under Article 101(3) TFEU.

b. Denial of readmission to membership

A denial of a reapplication for membership following an expulsion must be based on voluntary, clear, objective and qualitative criteria which are easily discernible and not too restrictive.[1067] Furthermore, when denied, the relevant industry actor must be able to ask for an independent process review to reconsider the membership reapplication. To understand whether denials of reapplication for membership, such as, a lapse of a two-year period following an expulsion and the necessity to obtain an approval from a Board of Directors of a trade association, are indispensable to lower transaction costs, the arguments for and against both additional entry barriers must be laid down. This is done in the following two tables, which bear a great degree of similarity to the discussion on the legality of both barriers pursuant to Section 1 of the Sherman Act.[1068]

1067 See Part III, Chapter 9, C, III, 2, a.

1068 See Part II, Chapter 6, E, II, 2, b, ii. However, there are some differences: First, the second argument with regard to the lapse of a two-year period following an expulsion focuses on a decrease of transaction costs under Article 101(3) TFEU rather than an increase of total welfare and consumer welfare under Section 1 of the Sherman Act. Second, the fourth argument against the permissibility of a lapse of a two-year period does not refer to the US case of NW Wholesale Stationers v. Pac. Stationery. Instead, it does not link to any EU

Arguments that justify the indispensable nature of a lapse of a two-year time period following an expulsion in order to reapply for membership to lower transaction costs under the third requirement pursuant to Article 101(3) TFEU.	**Arguments against the imposition of a lapse of a two-year time period following an expulsion in order to reapply for membership to lower transaction costs under the third requirement pursuant to Article 101(3) TFEU**
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 membership requirements, pays the arbitral award and any related penalties for non-compliance, it would be reasonably unnecessary to impose a two-year waiting period. This would unduly harm the financial standing of a ostracized former member.
2. Because a two-year waiting period is necessary to ensure the effect of an expulsion, the enforcement of awards from specialized commercial arbitration is better guaranteed. This lowers transaction costs.	2. Albeit that specialized commercial arbitration lowers transaction costs, once an expelled former member qualifies as a member, it would be unreasonable to oust that member 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.[1069] 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 the same for all members and non-discriminatory. Without such a rule, an expulsion is an insufficient deterrent and would be rendered ineffective. This could undermine the enforcement of arbitral awards from specialized commercial arbitration. In addition, it can induce members not to pay an arbitral award.	4. Given that membership rules should the same for all applicants and must not discriminate, imposing a two-year period which only applies to expelled former members is contrary to this rule.

case. Third, the third argument with regard to an approval of readmission to membership by the relevant Board of Directors, unlike Section 1 of the Sherman Act, does not refer to NW Wholesale Stationers v. Pac. Stationery.

1069 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 in support of the indispensable nature of an approval of readmission to membership by the Board of Directors after an expulsion to lower transaction costs under the third requirement pursuant to Article 101(3) TFEU.	**Arguments against the indispensable nature of an approval of readmission to membership by the board of director after an expulsion to lower transaction costs under the third requirement pursuant to Article 101(3) TFEU.**
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 a trade associations and should be given the right to approve a re-admission to membership. This will increase the severity of an expulsion and strengthen enforcement of arbitral awards. In addition, it will enhance total welfare and consumer welfare.	1. Allowing the Board of Directors to deny an expelled former member from being re-admitted to 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. A 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 Board of Directors tasked with approving a re-admission to membership of an expelled former member is 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 a 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 a Board of Directors to approve a re-admission to membership is reasonably necessary.	3. Given that membership rules should be the same for all applicants and must not discriminate, allowing a Board of Directors to deny a membership application of an expelled member is contrary to this rule.

Whereas both tables illustrate that many arguments can be made in support of or against the indispensable nature of a lapse of a two-year period following an expulsion and the necessity of a Board of Directors to approve reapplication, both barriers are not the least restrictive methods. This is particularly true when, on the one hand, a Board of Directors can arbitrarily and capriciously deny a re-admission to membership. This could even mean that when a Board of Directors dislikes an expelled former member, this individual or undertaking can never become a member again, with all the related anticompetitive consequences. It would be better to exclusively allow an independent third-party panel (not connected with the relevant trade association) to deny a reapplication for membership on the basis of clearly defined, equally applicable, transparent, non-discriminatory criteria, such as (i) the current liquidity status 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 fu-

ture.[1070] Furthermore, preliminary approval pending a full examination would reduce the harmful effects for expelled former members of a trade association. A waiting period, on the other hand, to reapply for membership may perhaps be seen as reasonably necessary to ensure the success of an expulsion and, thereby, to safeguard a system of specialized commercial arbitration which lowers transaction costs. However, a denial of access for two years is overly excessive. A least restrictive barrier would be to impose a six-month standstill period following non-payment of an award, or if this is combined with other misconduct, a one-year period.

If trade associations and their members were to impose and execute both entry barriers without structuring it the same way as above, it is unlikely that the Commission or the CJEU would support their indispensable nature to lower transaction costs. If yes, the third requirement of Article 101(3) TFEU is fulfilled.

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

Specialized commercial arbitration must be voluntary and not limit recourse to public courts. However, the trade associations researched and their members do not respect this legal rule. The reasons are two-fold: first, the majority of trade between members of the trade associations researched (and sometimes with a member and non-member) is done on the basis of standardized contracts that are linked to broader arbitration agreements which stipulate that any dispute must be decided in arbitration. Second, only two of the six trade associations researched offer an equivalent recourse to public courts prior to arbitral proceedings and after an award compared with the Arbitration Act 1996, whereas the other four associations either remain silent or offer less judicial protection. While – arguably – sufficient to violate Article 101(1) TFEU by effect, this raises the ensuing question: Is limited access to public courts prior to arbitral proceedings and after an award indispensable to lower transaction costs? A

1070 See ECJ 28 February 2013, Case C-1/12 (Ordem dos Técnicos Oficiais de Contas v. Autoridade da Concorrência), ECLI:EU:C:2013:127, para. 99. The ECJ stated that "*as regards the conditions for access to the market of compulsory training for chartered accountants, the objective of guaranteeing the quality of the services offered by them could be achieved by putting into place a monitoring system organised on the basis of clearly defined, transparent, non-discriminatory, reviewable criteria likely to ensure training bodies equal access to the market in question*".

PLS is an efficient alternative to State adjudication when a trade association acting in that State establishes a system of specialized commercial arbitration to resolve member vs. member and member vs. non-member conflicts. This lowers transaction costs. If any party to a dispute were allowed to seek recourse at a public court prior to arbitral proceedings and after an award, specialized commercial arbitration would become ineffective. In such a scenario, any party could go to a public court before commencement of arbitral proceedings and could contest arbitral awards. To overcome this, limiting access to State courts is important. Only when a trade association exclusively limits recourse to public courts when both parties in proceedings agree, or in order to obtain security for an award, are such rules not indispensable to lower transaction costs. A justification of an arguable violation of Article 101(1) TFEU by effect is not possible. When a trade association and its members at least offer a similar protection of recourse to public courts comparable with the Arbitration Act 1996, the third requirement laid down in Article 101(3) TFEU is fulfilled.

IV. Fourth condition: no elimination of competition

The last condition of Article 101(3) TFEU requires that the extrajudicial measures imposed by the trade associations researched and executed by their members must not be able to substantially eliminate competition between parties.[1071] This entails that if both actors are able to eliminate competition in a substantial part of the market in question, an exemption does not appear warranted.[1072] While the criterion may appear vague, its goal is to ensure that effective competition remains in the relevant market. To overcome this lack of clarity, guidance is offered with regard to four concrete benchmarks. These are presented in the following table:

1071 Communication from the Commission – Notice – Guidelines on the application of Article 81(3) of the Treaty [now Article 101(1) TFEU] of 27 April 2004, [OJ 2004, No. C 101/97], para. 105.

1072 M. M. Dabbah, "*EC and UK Competition Law: Commentary, Cases and Materials*", Cambridge: Cambridge University Press 2004, p. 105. This differs to some extent from the wording chosen by the Commission. According to the Guidelines on Article 81(3) EC [now Article 101(3) TFEU], an "*agreement must not afford the undertakings concerned the possibility of eliminating competition in respect of a substantial part of the products concerned*".

No.	Elimination of competition	No elimination of competition
1[1073]	When long-term losses outweigh short-term efficiency gains, the less likely a party satisfies the fourth condition in Article 101(3) TFEU.	When long-term losses do not outweigh short-term efficiency gains, the more likely a party satisfies the fourth condition in Article 101(3) TFEU.
2[1074]	If efficiency-related benefits flowing from anticompetitive conduct are ancillary to the protection of competition and rivalry, the less likely a party satisfies the fourth condition in Article 101(3) TFEU.	If efficiency-related benefits flowing from anticompetitive conduct are not ancillary to the protection of competition and rivalry, the more likely a party satisfies the fourth condition in Article 101(3) TFEU.
3[1075]	The greater the likelihood that anticompetitive conduct will reduce competition in a market and the more the degree of competition was already weakened prior to the adoption of a nonlegal measure, the less likely a party satisfies the fourth condition in Article 101(3) TFEU.	The less likely that anticompetitive conduct will reduce competition in a market and the lesser the degree of competition was already weakened prior to the adoption of a nonlegal measure, the more likely a party satisfies the fourth condition in Article 101(3) TFEU.
4[1076]	The more aggregated market power of the colluding actors, the less likely a party satisfies the fourth condition in Article 101(3) TFEU.	The less aggregated market power of the colluding actors, the more likely a party satisfies the fourth condition in Article 101(3) TFEU.

Whether or not the researched trade associations and their members pertaining to the anticompetitive extrajudicial measures which restrict Article

1073 A. Jones and B. E. Sufrin, "*EC Competition Law: Text, Cases, and Materials*", Oxford: Oxford University Press 2008, p. 281. In my opinion, such a rule is impracticable, vague and even platitudinous.

1074 Communication from the Commission – Notice – Guidelines on the application of Article 81(3) of the Treaty [now Article 101(1) TFEU] of 27 April 2004, [OJ 2004, No. C 101/97], para. 105.

1075 Ibid., para. 107.

1076 Even though Article 102 TFEU is specifically tailored to prevent the abuse of market power, a market power analysis is permissible under the fourth condition in Article 101(3) TFEU. In particular, because the "no elimination of competition" criterion is an autonomous concept of EU law. See R. Whish and D. Bailey, "*Competition Law: Eight Edition*", Oxford: Oxford University Press 2015, p. 174; The concept of the "elimination of competition" is narrower than the existence of a dominant position under Article 102 TFEU. See CFI 28 February 2002, Case T-395/94 (Atlantic Container Line AB et al v. Commission of the European Communities), [2002] ECR II-595, para. 330 and CFI 30 September 2003, joined cases T-191/98, T-212/98 to T-214/98 (Atlantic Container Line AB et al v. Commission of the European Communities), [2003] ECR II-3275, para. 939; However, this does not mean that when all the four conditions in Article 101(3) TFEU are fulfilled, scrutiny under Article 102 TFEU is not possible. See ECJ 16 March 2000, joined cases C-395/96P, C-396/96P (Compagnie Maritime Belge Transports SA et al v. Commission of the European Communities),

101(1) TFEU by effect, but are structured in such a way that they are indispensable to lower transaction costs can provide evidence that the fourth condition of Article 101 (3) TFEU is fulfilled, much will depend on whether the above-mentioned benchmarks exonerate both actors. Consequently, the following table will apply these criteria to [i] the dissemination of the names of wrongdoers in a blacklist; [ii] withdrawals of membership; [iii] refusals to regain membership following an expulsion on the basis of an additional entry condition; and [iv] inadequate access to public courts prior to arbitral proceedings and after an award. For reasons of simplicity and logic, the extrajudicial measures will be discussed together and not separately.

No.	Do the extrajudicial measures eliminate competition?
1	No. All of the extrajudicial measures generate lower transaction costs by ensuring the success of specialized commercial arbitration. These efficiency gains are not of a short-term nature.
2	No. Lowering transaction cost is more important than punishing disloyal actors. This can best be explained by the overarching rule of utilitarianism (*i.e.* the principle of "utility").[1077] According to this theory, the option that produces the greatest good for the greatest number must always be chosen. Given that regulatory sanctioned industry actors are only small in numbers compared to the members of the trade associations researched, it is very unlikely that rivalry and competition are significantly reduced and impaired.
3	No. There is a not a great likelihood that anticompetitive conduct will reduce competition in the commodities markets. Only disloyal industry actors are targeted. A weakened degree of competition before the adoption of the extrajudicial measures is also improbable.

[2000] ECR I-1365, para. 130; Moreover, Article 101(3) TFEU cannot exempt an abuse of a dominant position under Article 102 TFEU. See, for example, CFI 30 September 2003, joined cases T-191/98, T-212/98 to T-214/98 (Atlantic Container Line AB et al v. Commission of the European Communities), [2003] ECR II-3275, para. 1456; See also Routledge, "Code-Sharing Agreements in Scheduled Passenger Air Transport–The European Competition Authorities' Perspective", *European Competition Journal* 2006, p. 279. The Commission takes into account (i) market shares; (ii) opposing market power from competitors; (iii) actual or potential competition; and (iv) market access/barriers to entry.

1077 B. Gert, "*Morality: Its Nature and Justification*", New York/Oxford: Oxford University Press 1998, p. 120;
M. Mendonca and R. N. Kanungo, "*Ethical Leadership*", New York: Open University Press 2007, p. 15. The theory of utilitarianism was made famous by *David Hume* and suggests that the "end justifies the means". Much criticism can be raised against such an approach. In particular, because it fails to determine the righteousness and morality of acts; P. Tittle, "*Ethical Issues in Business: Inquiries, Cases, and Readings*", Petersborough: Peg Tittle 2000, p. 41. However, it is the most suitable yardstick to compare alternatives.

4	Yes. The trade associations researched and their members on each respective market hold significant market power.

Even though the market power of the trade associations researched and their members suggests that extrajudicial measures could eliminate competition, this argument – standing alone – is insufficient to prevent any other conclusion than to say that the fourth requirement pursuant to Article 101(3) TFEU is fulfilled. Extrajudicial measures when structured in the least restrictive manner, so that they fulfil the third requirement of Article 101(3) do not eliminate competition.

V. Conclusion

When a trade association and its members disseminate the names of wrongdoers in a blacklist, withdraw membership, deny readmission of expelled members to membership on the basis of an additional entry condition, and limit adequate access to public courts prior to arbitral proceedings and after an award, albeit that these extrajudicial measures infringe Article 101(1) TFEU, both actors can successfully make a justification defence under Article 101(3) TFEU. The reason for this is this method of enforcement lowers transaction costs and passes on this efficiency to final consumers. Moreover, when structured in the least restrictive manner, these measures are also indispensable to lower such costs. Lastly, these measures do not eliminate competition.

D. Key findings

An immediate, far-reaching and very much noticeable consequence for a violation of Article 101(1) TFEU concerns the fact that an anticompetitive agreement is automatically null and void pursuant to the second paragraph of Article 101(1).[1078] Bearing in mind that the nullity can be relied upon by everyone and has retroactive and prospective effects, the trade associations researched and their members must try to persuade the Commission (and, when relevant, in appeal, the CJEU) that their role in anticompetitive collusion/nonlegal sanctioning can be exempted. This impunity can happen in two ways: first, when the agreement falls within the safe

1078 See Part III, Chapter 10, A.

harbour of the RDBER and SABER. Second, when the collusive conduct satisfies the four-step assessment pursuant to Article 101(3) TFEU.

With regard to both BERs, the trade associations researched and their members are not eligible to exculpate themselves.[1079] In particular, because both actors do not carry out joint research and development and do not participate in any form of specialization agreement for the production and distribution of goods. Unfortunately, such a conclusion cannot be nearly as easily drawn in relation to the balancing clause enshrined in Article 101(3) TFEU, which exonerates anticompetitive agreements/extrajudicial measures that bring improvements in the production or distribution of goods, or promote technical or economic progress.[1080] At first glance, the provisions of Article 101(3) seem applicable owing to the assumption that the increased economic benefits for the members of the trade association researched appear to overshadow the negative harm done to extrajudicially targeted industry actors. Whether this is true depends on the balancing of all extrajudicial measures which restrict Article 101(1) TFEU by effect against the four requirements enshrined in the third paragraph of Article 101(3).

The first condition that must be satisfied refers to the notion of "efficiency gains".[1081] This requires that the role of the trade associations researched and their members in disseminating the names of wrongdoers in a blacklist, withdrawing membership, denying former members readmission to membership on the basis of an additional entry condition, and limiting adequate access to public courts prior to arbitral proceedings and after an award reduces transaction costs. Fortunately, this can be confirmed on the basis of two reasons: First, all of these extrajudicial measures achieve appreciable objective advantages, because without them specialized commercial arbitration would be ineffective.[1082] Second, there is also a sufficient link between nonlegal sanctions and lowered transaction costs.[1083] As a result, the first requirement under Article 101(3) TFEU is fulfilled.

The second requirement that must be fulfilled to set aside the nullity flowing from the anticompetitive extrajudicial measures concerns the concept of a "fair share for consumers".[1084] This entails that consumers must

1079 See Part III, Chapter 10, B.
1080 See Part III, Chapter 10, C.
1081 See Part III, Chapter 10, C, I.
1082 See Part III, Chapter 10, C, I, 1.
1083 See Part III, Chapter 10, C, I, 2.
1084 See Part III, Chapter 10, C, II.

have sufficiency benefitted from the lowered transaction costs. In the absence of nonlegal sanctions to punish disloyal behaviour, higher prices will be passed on to final consumers.[1085] The reasons are three-fold: First, the cost of doing business for members of the trade associations researched increases without an efficient system of specialized commercial arbitration. Second, these members sell products which consumers desire. Third, a change of the quality of products following a price increase is unmerited. Due to the lowering of distribution costs for consumers, the trade associations researched and their members fulfil the second requirement pursuant to Article 101(3) TFEU.

The third condition that must be satisfied requires that the extrajudicial measures be indispensable to lower transaction costs.[1086] This requires that it must be assiduously assessed with regard to each measure if it is reasonably necessary to achieve this efficiency, or if there is a less restrictive alternative available. Disseminating the names of disloyal industry actors in a blacklist seems to correspond with this requirement, if this document is only accessible for the members of the relevant trade association.[1087] The reason is that there are no effective less restrictive measures to enforce arbitral awards from specialized commercial arbitration. Reprimands and penalties are ineffective. Interestingly, a comparison with online evaluation forums is unfounded.[1088] None of the current rules of the trade associations researched and their members with regard to withdrawals of membership are indispensable to lower transaction costs.[1089] This is because there is a less restrictive way of structuring this nonlegal sanction. This is by setting up a procedure based on clearly defined, transparent, non-discriminatory reviewable criteria that allows for cumulative penalties enforceable in national courts, with a final threat of 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 based on fair and neutral criteria (*e.g.* do not favour certain members of others). Furthermore, expelled members should be allowed the possibility of an internal appeal against an expulsion decision and be advised of the possibility of recourse in public courts.

1085 See Part III, Chapter 10, C, II, 3.
1086 See Part III, Chapter 10, C, III.
1087 See Part III, Chapter 10, C, III, 1.
1088 See Part III, Chapter 10, C, III, 1, a.
1089 See Part III, Chapter 10, C, III, 2, a.

With regard to refusing a reapplication for membership following an expulsion by a Board of Directors or when a period of two years following an expulsion has not elapsed, both barriers are not indispensable to lower transaction costs. Denying a reapplication for membership should be done on the basis of clearly defined, equally applicable, transparent, non-discriminatory criteria, such as (i) the current liquidity status 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.[1090] Furthermore, preliminary approval pending a full examination would reduce the harmful effects for expelled former members of a trade association. A waiting period of two years is too long and restrictive. It would be better to impose a six-month standstill period following non-payment of an award, or if this is combined with other misconduct, a one-year period. If these changes are introduced, the third requirement pursuant to Article 101(3) TFEU is fulfilled.

Concerning limiting adequate access to public courts prior to arbitral proceedings and after an award, this measure is indispensable to guarantee the success of specialized commercial arbitration.[1091] If parties could go to public court in both scenarios, this carries the risk of making arbitration redundant. Yet, access to public courts must be at least equal to the standards provided in the Arbitration Act 1996. If so, the third requirement pursuant to Article 101(3) TFEU is fulfilled.

The fourth and last requirement that must be observed necessitates that the extrajudicial measures imposed by the trade associations researched and executed by their members must not be able to substantially eliminate competition.[1092] Fortunately, this condition does not raise any concern. The extrajudicial measures lower transaction costs, which situation is not of a short-term nature. This efficiency outweighs the harm inflicted on disloyal industry actors by applying the theory of utilitarianism and there is a slight likelihood that competition on the market will be reduced. A weakened degree of competition before the adoption of the extrajudicial measures is also unlikely.

In sum, all of the regulatory measures fulfil the four conditions pursuant to Article 101(3) TFEU insofar as they are modified to a certain extent where relevant.[1093] As they stand now, it is unlikely that the Commission

1090 See Part III, Chapter 10, C, III, 2, b.
1091 See Part III, Chapter 10, C, III, 3.
1092 See Part III, Chapter 10, C, IV.
1093 See Part III, Chapter 10, C, V.

and in appeal the CJEU will leave them untouched. This can result in hazardous consequences, given that then the nullity of Article 101(2) TFEU applies.[1094]

1094 B. Thorson, "*Individual Rights in EU Law*", Oslo: Springer International 2016, p. 131.

Chapter 11: Abuse of a Dominant Position under Article 102 TFEU

A. Introduction

When imposing nonlegal sanctions on disloyal industry actors, the trade associations researched (and not their members since their role in the execution of such measures does not fit within the required description of collective dominance or an oligopoly)[1095] can also act inconsistently with Ar-

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1095 The members of the trade associations researched (which consist of many industry actors) do not hold collective dominant positions in the second-tier commodities markets because they do not qualify as oligopolies. This is because an oligopoly (*i.e.* collective dominance) can only emerge in concentrated markets with few market competitors. See N. Dunne, "*Competition Law and Economic Regulation: Making and Managing Markets*", Cambridge: Cambridge University Press 2015, p. 177; Despite the concept of oligopoly (or collective dominance) finding its origin in Merger Control, the CJEU explained that this concept has the same meaning within Article 102 TFEU. More specifically, the CJEU applied the tripartite modified Airtours test as developed in CFI 6 June 2002, Case T-342/99 (Airtours plc. v. Commission of the European Communities), [2002] ECR II-2585, para. 62 (emphasis added) to Article 102 TFEU. See CFI 26 January 2005, Case T-193/02 (Laurent Piau v. Commission of the European Communities), [2005] ECR II-209, para. 111; For a reiteration, even though relating to different circumstances, see ECJ 10 July 2008, Case C-413/06P (Bertelsmann AG and Sony Corporation of America v. Independent Music Publishers and Labels Association (Impala)), [2008] ECR I-4951, para. 124: For more information on how to substantiate collective dominance, see M. Lorenz, "An Introduction to EU Competition Law", Cambridge: Cambridge University Press 2013, p. 208. In his view, this requires a connection between the undertakings to jointly infringe Article 102 TFEU (i) when two or more economic entities (read: undertakings) are united by economic links and are collectively dominant on a specific market (CFI 10 March 1992, joined cases T-68/89, T-77/89 and T-78/89 (Società Italiana Vetro SpA, Fabbrica Pisana SpA and PPG Vernante Pennitalia SpA v. Commission of the European Communities), [1992] ECR II-01403, para. 35); (ii) if the undertakings are united so that they adopt the same conduct on the market (ECJ 27 April 1994, Case C-393/92 (Municipality of Almelo et al v. NV Energiebedrijf Ijsselmij), [1994] ECR I-1477, para. 42); and (iii) the existence of collective dominance may "*flow from the nature and terms of an agreement, from the way in which it is implemented and, consequently, from the links or facts which give rise to a connection. Nevertheless, the existence of an agreement or of other links in law is not indispensable to a*

ticle 102 TFEU relating to an abuse of a dominant position.[1096] Although Article 102 is mutually applicable in conjunction with Article 101 TFEU (*i.e.* the concurrence of legal provisions), it provides distinctive requirements[1097] and consequences that derive from a divergent narrative.[1098] Whereas in Article 101 TFEU the focus is on anticompetitive collusion, Article 102 TFEU applies where certain conduct is engaged in unilaterally by a trade association.[1099] In other words, Article 102 encompasses a monopoly position held by a trade association.[1100] While this may appear a very broad definition, one can spotlight and derive two major require-

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finding of a collective dominant position; such a finding may be based on other connecting factors and would depend on an economic assessment and, in particular, on an assessment of the structure of the market in question" (ECJ 16 March 2000, joined cases C-395/96P, C-396/96P (Compagnie Maritime Belge Transports SA et al v. Commission of the European Communities), [2000] ECR I-1365, para. 45).

1096 Article 102 TFEU is a directly applicable provision of EU law, enforceable in national courts of EU Member States. See, *inter alia*, CFI 10 July 1990, Case T-51/89 (Tetra Pak Rausing SA v. Commission of the European Communities), [1990] ECR II-309, para. 42; ECJ 19 January 2004, Case C-453/00 (Kühne & Heitz NV v. Produktschap voor Pluimvee en Eieren), [2004] ECR I-837, para. 20.

1097 Articles 101 and 102 TFEU can be applied to the same anticompetitive conduct. See N. Foster, "*Foster on EU Law*", Oxford: Oxford University Press 2015, p. 381.

1098 However, akin to Article 101 TFEU, the protection of competition in the interest of consumers is also the core objective of Article 102 TFEU. See, for example, ECJ 21 February 1973, Case 6-72 (Europemballage Corporation and Continental Can Company Inc. v. Commission of the European Communities), [1973] ECR 215, para. 26.

1099 D. Leczykiewicz and S. Weatherill, "*The Involvement of EU Law in Private Law Relationships*", in: O. Odudu (ed), "Competition Law and Contract: The EU Defence", Oxford/Portland: Hart Publishing 2013, p. 395.

1100 Article 102 TFEU also includes the participation in an oligopolistic market. However, this will not be of interest in this Chapter; For more information on oligopolies, see N. Dunne, "*Competition Law and Economic Regulation: Making and Managing Markets*", Cambridge: Cambridge University Press 2015, p. 177. Oligopolies emerge in concentrated markets with few market competitors; Other characteristics of oligopolies include (i) high barriers to entry; (ii) high degree of interdependence between market competitors; (iii) homogenous or highly differentiated products; and (iv) price stability within the market. See R. Jayaram and N. R. Kotwani, "*Industrial Economics and Telecommunication Regulations*", New Delhi: PHI Learning Private Limited 2012, p. 41; Many markets are oligopolistic. See R. Whish and D. Bailey, "*Competition Law: Eight Edition*", Oxford: Oxford University Press 2015, p. 595; Despite the concept of oligopoly (or collective dominance) finding its origin in Merger Control, the

ments from the wording of Article 102 TFEU. First, the existence of a dominant position in the relevant product market. Second, the abuse of such a dominant position.[1101]

When applying the two-part test to determine the anti-competitiveness of extrajudicial measures imposed on wrongdoers by the trade associations researched, the first step is to investigate whether or not these associations hold dominant positions (Paragraph B). This can be done by outlining the general framework of what constitutes a dominant position. Subsequently, whether these associations abuse their dominant positions (Paragraph C) will be determined. Here, understanding the historical roots of Article 102 TFEU, the wording of this provision, case law of the CJEU and modern economic thinking provide guidance.[1102] Furthermore, the Commission's Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty[1103] [now Article 102 TFEU] to abusive exclusionary

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CJEU explained that this concept has the same meaning within Article 102 TFEU. More specifically, the CJEU applies the tripartite modified Airtours test as developed in CFI 6 June 2002, Case T-342/99 (Airtours plc. v. Commission of the European Communities), [2002] ECR II-2585, para. 62 (emphasis added) to Article 102 TFEU. See CFI 26 January 2005, Case T-193/02 (Laurent Piau v. Commission of the European Communities), [2005] ECR II-209, para. 111; For a reiteration, even though relating to different circumstances, see ECJ 10 July 2008, Case C-413/06P (Bertelsmann AG and Sony Corporation of America v. Independent Music Publishers and Labels Association (Impala)), [2008] ECR I-4951, para. 124.

1101 In more detail, perhaps the most fitting test to gain a thorough grasp of what amounts to an abuse of a dominant position pursuant to Article 102 TFEU can be found in M. Lorenz, "*An Introduction to EU Competition Law*", Cambridge: Cambridge University Press 2013, p. 189. *Lorenz* explains that "*it follows from the wording of Article 102 TFEU that the following conditions are met to establish a violation: (i) a dominant position on the relevant market must be held by one or more undertakings; (ii) the position must be held in the internal market or a substantial part of it; (iii) abuse of the dominant position; (iv) actual or potential effect on trade between Member States*".

1102 For a similar approach, see P. Akman, "*The Concept of Abuse in EU Competition Law: Law and Economic Approaches*", Oxford/Portland: Hart Publishing 2012, [Abstract].

1103 The text of Article 82 EC and Article 102 TFEU are similar, with one minor distinction. The archaic reference to "incompatible with the common market" is changed by the current wording "incompatible with the internal market". See C. Ehlermann and M. Marquis, "*European Competition Law Annual 2007: A Reformed Approach to Article 82 EC*", Oxford/Portland: Hart Publishing 2008, p. xxv. Although this book dates from before the TFEU, it compared Article 82 EC with Article 102 TFEU before Article 102 entered into force.

conduct by dominant undertakings (the "Commission's Guidance") will be analysed, as well as its post-reform decisional practice.[1104] After that, three categories of objective justifications for the trade associations researched to not violate Article 102 TFEU are discussed. The first category is relevant when anti-competitive conduct results in efficiencies for the members of the trade associations researched and a net gain for the consumers of these industry actors. The second category relates to the protection of a legitimate commercial interest and, the third category concerns the objective necessity defence. This Chapter ends with a conclusion (Paragraph D).

B. *The existence of a dominant position in the relevant market which impacts the EU territory*

To assess whether the trade associations researched hold dominant positions in the relevant markets for regulation and private ordering which impact the EU territory, the concept of "paramount market position" and "market shares" must be considered.[1105] Therefore, the case law of the CJEU and the Commission's Discussion Paper on the application of Article 82 of the Treaty [now Article 102 TFEU] to exclusionary abuses (the "Discussion Paper") must be examined.[1106] This Paragraph is structured as follows: first, dominance is defined based on the guidance given by CJEU and the decisional practice of the Commission (Paragraph I). Second, dominance is clarified on the basis of the Discussion Paper (Paragraph II). Third, whether the trade associations researched are dominant within the meaning of Article 102 TFEU is discussed (Paragraph III).

1104 Communication from the Commission — Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty [now Article 102 TFEU] to abusive exclusionary conduct by dominant undertakings of 24 February 2009, [OJ 2009, No. C 45].

1105 M. Mackenrodt, B. C. Gallego, and S. Enchelmaier, "*Abuse of Dominant Position: New Interpretation, New Enforcement Mechanisms*?", in: P. Këllezi (ed), "Abuse below the Threshold of Dominance? – Market Power, Market Dominance, and Abuse of Economic Dependence", Berlin/Heidelberg: Springer 2008, p. 88.

1106 European Commission, "DG Competition discussion paper on the application of Article 82 of the Treaty [now Article 102 TFEU] to exclusionary abuses", *European Commission* 2005.

I. Guidance by the CJEU and the decisional practice of the Commission

The definition of dominance was considered in detail by the ECJ in *United Brands (Chiquita)*.[1107] In that judgment, the Court interpreted this criterion as "*A position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by affording it the power to behave to an appreciable extent independently of its competitors, customers and ultimately of its consumers*".[1108] In other words, according to *Joelson*, it follows from this wording that undertakings which are able to behave in a market in a strategically independent way and have considerably greater market shares than that of competitors are dominant.[1109] In *Hoffman-La Roche*, the ECJ even argued that "*very large shares are in themselves and save in exceptional circumstances evidence of the existence of a dominant position*".[1110] Following this case, it seems that a high market share is sufficient to show dominance in a market which impacts the EU territory. Nonetheless, the Court disqualified this statement in two important ways.[1111] First, it stated that market shares are not necessarily decisive and must be considered in conjunction with other factors.[1112] Second, a large amount of market shares must exist for "some time".[1113]

1107 ECJ 14 February 1978, Case 27/76 (United Brands Company and United Brands Continental BV v. Commission of the European Communities), [1978] ECR 207.

1108 Ibid., para. 38.

1109 This conclusion was drawn by *Joelson* in M. R. Joelson, "*An International Antitrust Primer: A Guide to the Operation of United States, European Union and Other Key Competition Laws in the Global Economy*", Alphen aan den Rijn: Kluwer Law International 2006, p. 371.

1110 ECJ 13 February 1979, Case 85/76 (Hoffman-La Roche & Co. AG v. Commission of the European Communities), [1979] ECR 461, para. 41.

1111 M. M. Dabbah, "*EC and UK Competition Law: Commentary, Cases and Materials*", Cambridge: Cambridge University Press 2004, p. 330.

1112 ECJ 14 February 1978, case 27/76 (United Brands Company and United Brands Continental BV v. Commission of the European Communities), [1978] ECR 207, par. 66; ECJ 13 February 1979, case 85/76 (Hoffman-La Roche & Co. AG v. Commission of the European Communities) [1979] ECR 461, par. 39, 48. Other factors include the absence of potential competition, a technological lead over competitors and the existence of an elaborate sales network; ECJ 9 November 1983, case C-322/81 (NV Nederlandsche Banden Industrie Michelin v Commission of the European Communities), [1983] ECR 3461, par. 37. In determining the position of dominance, the structure of demand and supply in the market as well as competitive conditions must be contemplated.

In later case law, the Commission and the CJEU described more precisely how many market shares are required to establish a presumption of dominance. Both institutions also explained when such a presumption can be rebutted by presumed dominant undertakings. In line with this reasoning, to understand whether the trade associations researched (which qualify as undertakings within the meaning of Article 102 TFEU) are dominant in their relevant markets for regulation and private ordering which impact the EU territory, it is fundamental to quantify the amount of market shares needed to establish dominance. To this end, a brief overview of the Commission's decisional practice and the case law of the CJEU can be found in the following table:

EU Market Shares	Case	Dominant Position
< 10%	*Metro II*[1114]	Too small to be capable of establishing a dominant position in the absence of exceptional circumstances
20-40%	*Hoffmann-La Roche*[1115]	A dominant position cannot be ruled out when additional factors are present. However, it is very unlikely that a dominant position can be established
39.2%	*Virgin/ British Airways*[1116]	Dominant position, because the closest competitor only had 5.5% market shares.

1113 The requirement that a large amount of shares must exist for „some time" will not be discussed. In particular, because the researched trade associations have a relatively steady amount of market shares.

1114 ECJ 22 October 1986, Case 75/84 (Metro SB-Großmärkte GmbH & Co. KG v. Commission of the European Communities), [1986] ECR 3021, para. 85-86.

1115 See European Commission, IXth Report on Competition Policy, para. 22. This report explains whether an undertaking that has market shares between 20-40% is dominant; Reference is made to ECJ 13 February 1979, Case 85/76 (Hoffman-La Roche & Co. AG v. Commission of the European Communities) [1979] ECR 461, para. 57-58 (emphasis added). In this case, Roche (*i.e.* an undertaking) had an approximate market share of 20-40%. In its judgment, "*the Court felt that there was inadequate evidence of dominance*". The Commission interpreted this wording to mean that an undertaking can be dominant, when other factors are present.

1116 Commission Decision of 14 July 1999 relating to a proceeding under Article 82 of the EC Treaty [now Article 102 TFEU], Case No IV/D-2/34.780 (Virgin/ British Airways), para. 87-88, 90-91; According to *Blanco*, this is the lowest amount of market shares where dominance was established. See L. O. Blanco, "*Market Power in EU Antitrust Law*", Oxford/Portland: Hart Publishing 2011, p. 56. However, given the fact that the market shares that are required to establish a dominant position is rather arbitrary, future decisional practice of the Commission and the CJEU can change this amount of market shares.

40-45%	*United Brands*[1117]	Although these market shares on their own are insufficient to establish dominance, certain additional factors (on the basis of thorough economic analysis) can substantiate a dominant position.
> 50%	*Akzo*[1118]	Strong presumption of dominance, except in exceptional circumstances
70-80%	*Hilti*[1119]	Clear indication of dominance

II. The Discussion Paper

The Commission tends to follow the case law of the CJEU in the Discussion Paper, even though the intention was not to restate the law, but to steer the Commission's approach.[1120] According to this document, "*market shares provide useful first indications of the market structure and of the competitive importance of various undertakings on the market*".[1121] When elucidating at which market shares dominance can be established, the Commission explained that an undertaking which holds more than 50% EU market shares is considered dominant.[1122] Importantly, this presumption requires that competitors active within the same relevant market hold a much smaller market share within the EU. In the event an undertaking holds below 40% EU market shares, even though below this threshold it is more unlikely that dominance is found compared to market shares between 40% and 50%, such an undertaking can still be dominant.[1123] One thing is clear, when an undertaking has below 25% market shares, it is unlikely that dominance can be attributed to that company.[1124]

1117 ECJ 14 February 1978, Case 27/76 (United Brands Company and United Brands Continental BV v. Commission of the European Communities), [1978] ECR 207, para. 108, 113-117.

1118 ECJ 3 July 1991, Case C-62/86 (AKZO Chemie BV v. Commission of the European Communities), [1991] ECR I-3359, para. 60.

1119 CFI 12 December 1991, Case T-30/89 (Hilti AG v. Commission of the European Communities), [1991] ECR II-1439, para. 92.

1120 J. Basedow and W. Wurmnest, "*Structure and Effects in EU Competition Law: Studies on Exclusionary Conduct and State Aid*", Alphen aan den Rijn: Kluwer Law International 2011, p. 71.

1121 European Commission, "DG Competition discussion paper on the application of Article 82 of the Treaty [now Article 102 TFEU] to exclusionary abuses", *European Commission* 2005, para. 29.

1122 Ibid., para. 31.

1123 Ibid.

1124 Ibid.

That being said, the explanation given by the Commission corresponds with the case law of the CJEU. However, *Jones & Sufrin* consider it contentious due to two misrepresentations.[1125] First, whilst the ECJ in *Akzo* explains that only "exceptional circumstances" can rebut dominance, when an undertaking has more than 50% market shares, the Commission narrows this down to one circumstance: the market shares of competitors should not be low. Second, the Discussion Paper did not rule out dominance below 40% market shares contrary to the general trend in the case law of the CJEU.

III. The unequivocal dominance of the trade associations researched in the EU markets for regulation and private ordering

Now that the concept of dominance has been defined by considering both the CJEU's and the Commission's approach, it is necessary to examine whether the trade associations researched hold dominant positions on the markets for regulation and private ordering which impact the EU territory. Fortunately, this is relatively straightforward and uncomplicated due to the worldwide (and, therefore, EU-wide) pre-eminent position of most of these trade associations, supported by high amounts of market shares. More specifically, the two trade associations with the highest amount of global market shares are the LME and FOSFA, with market shares of 80% and 85% respectively. Even though empirical evidence regarding Community market shares is lacking and despite the complexity of interchangeability, they provide a clear indication that the ECJ's developed threshold of 70-80% EU-wide market shares in *Hilti* is exceeded. At EU level, there are no other associations active that can be considered competitive in the same markets for regulation and private ordering with these associations. Accordingly, there is a clear indication of dominance in relation to Article 102 TFEU. A multi-factor analysis is redundant.

Similarly, albeit a bit less clear, a strong presumption of dominance can be established for the ICA. This can be substantiated by the fact that the market shares of this association is probably above the 50% Community market share threshold as developed in *Akzo,* but below the required 70% *Hilti* threshold. This is because this trade association holds 60% global market shares in the global market for regulation and private ordering.

1125 A. Jones and B. E. Sufrin, "*EC Competition Law: Text, Cases, and Materials*", Oxford: Oxford University Press 2008, p. 404.

Whereas transposing global market shares to substantiate Community shares must be treated with a certain amount of caution, a lack of EU competitors substantiates that the 50% EU-wide market share threshold is achieved. Hence, there is a strong presumption of dominance. Exceptional circumstances that allow for a refutation are vague, doubtful and impractical. This is because of two main reasons: first, exceptional circumstances are not defined following *Akzo*. Second, only a non-binding (*i.e.* soft law) Discussion Paper described that exceptional circumstances apply to the situation when rivals hold a more than low percentage of market shares.

For GAFTA and the FCC, neither empirical evidence regarding global nor Community market shares can be found. Yet, it is rather obvious that both associations hold a strong position within their respective EU market for regulation and private ordering. With regard to GAFTA, no serious competitors exist and, with regard to the FCC, virtually all international contracts are performed on the basis of that association's bylaws. Despite it being unclear whether both associations fulfil the 70% *Hilti* threshold, it deserves no further examination that at least the 50% *Akzo* threshold is exceeded. For the purposes of this research, the dominance of GAFTA and the FCC is unequivocally presumed in their respective EU markets for regulation and private ordering.

With regard to the DDC, it is unlikely that this association holds an amount of EU market shares which is required to establish dominance. The reason being that the FBDB is the dominant association on the EU territory in the market for regulating and private ordering.

C. The existence of an abuse of a dominant position in the market

Article 102 TFEU does not prohibit bare dominance (*e.g.* constituted by large market shares held by the trade associations researched), but seeks to prevent the abuse of a dominant position that is incompatible with the internal market.[1126] This concept is not easy to define, as it is both con-

1126 A. Bavasso, "*Communications in EU Law: Antitrust Market Power and Public Interest*", The Hague: Kluwer Law International 2003, p. 164; S. D. Anderman, "*The Interface Between Intellectual Property Rights and Competition Policy*", Cambridge: Cambridge University Press, p. 40. Although this book is about intellectual property rights, *Anderman*, irrespective of this area of law, interpreted the abuse requirement pursuant to Article 102 TFEU by stating that "*the mere possession of extensive market power, if lawfully acquired, does not amount to an abuse*".

tentious, vague[1127] and subject to change from the outset.[1128] Accordingly, to understand whether the trade associations researched abused their dominant positions, the current understanding of this concept must first be explained (Paragraph I). This must be done through an ordoliberal lens. At the end of this Paragraph, the proof required for finding an exclusionary abuse is discussed. Subsequently, whether the imposition of nonlegal sanctions by the trade associations researched is synonymous with the exclusionary abuse of a refusal to grant access to an essential facility is examined (Paragraph II). Lastly, a discussion follows of whether there is a sufficient causal connection between the dominance of the trade associations researched on the EU markets for regulation and private ordering and the imposition of an exclusionary abuse on adjacent second-tier commodities markets (Paragraph III).

I. The current understanding of the "abuse" concept through an Ordoliberal lens

The earliest inclusion of the abuse (of a dominant position) concept can be found in Article 86 of the Treaty Establishing the European Economic Community (the "Rome Treaty" or "EEC").[1129] This provision can be traced back, even though it is not generally agreed, to the ideas of German

1127 P. Behrens, "The ordoliberal concept of "abuse" of a dominant position and its impact on Article 102 TFEU", *Econstor* 2015, p. 5.

1128 P. L. Parcu, G. Monti, and M. Botta, "*Abuse of Dominance in EU Competition Law: Emerging Trends*", Cheltenham/Northampton: Edward Elgar Publishing 2017, p. 2.

1129 The Treaty Establishing the European Economic Community of 25 March 1957; K. Davies, "*Understanding European Union Law*", Abingdon/New York: Routledge 2016, p. 54. The Rome Treaty is a primary source of EU law; G. W. Comanor, K. Jacquemin, and A. Jenny, "*Competition Policy in Europe and North America*", New York: Hardwood Academic Publishers GmbH 1990, p. 231. According to Article 86 EEC, the abuse of a dominant position is prohibited. Dominance – standing alone – is not sufficient to substantiate a violation of this Article; Great Britain. Dept. of Trade and Industry, "*Abuse of Market Power: A Consultative Document on Possible Legislative Option*", Richmond: H.M. Stationery Office 1992, p. 7. The aim of such a prohibition system is to declare conduct automatically unlawful, when undertakings abuse their dominant position.

Ordoliberalism.[1130] When looking at the wording of Article 86 EEC, four examples can be found when an abuse of a dominant position can be substantiated. These refer to "*(a) the direct or indirect imposition of any inequitable purchase or selling prices or of any other inequitable trading conditions; (b) the limitation of production, markets or technical development to the prejudice of consumers; (c) the application to parties to transactions of unequal terms in respect of equivalent supplies, thereby placing them at a competitive disadvantage; or (d) the subjecting of the conclusion of a contract to the acceptance, by a party, of additional supplies which, either by their nature or according to commercial usage, have no connection with the subject of such contract*". Given that in that time it was unclear whether or not this list was exhaustive and how an abuse could be defined, much depended on how the Commission and the CJEU articulated this concept.[1131] This insecurity almost lasted for two decades after the adoption of the Rome Treaty.

1130 W. Möschel, "Competition Policy from an Ordo Point of View", *German Neo-Liberals and the Social Market Economy* 1989, p. 146. The main objective of German ordoliberalism concerns the protection of economic freedom of action of all market players; P. Marsden, "*Handbook of Research in Trans-Atlantic Antitrust*", Cheltenham: Edward Elgar 2006, p. 268. The influence of this philosophical school on the concept of abuse pursuant to Article 86 EEC is a much debated topic in the literature. Even though it deserves a thorough analysis, this would deflect attention from the central focus of this research. Therefore, summary arguments for and against the influence of German Ordoliberalism on Article 102 TFEU will be given by the, in my opinion, most important authors; D. J. Gerber, "Law and Competition in Twentieth Century Europe: Protecting Prometheus", Oxford: Oxford University Press 1998, p. 264. *Gerber* stated that EU Competition Law can be traced back to German Ordoliberalism, because of three main reasons: first, the German influence of the competition law provisions in the Rome Treaty. Second, Article 86 EEC was related to ordoliberal thought. Third, *Hans von der Groeben*, who was clearly a German Ordoliberal, was appointed the first Commissioner for Competition Policy of the Commission; P. Akman, "*The Concept of Abuse in EU Competition Law: Law and Economic Approaches*", Oxford/Portland: Hart Publishing 2012, p. 59, 63. *Akman*, however, denied that an ordoliberal viewpoint had an influence on the concept of abuse. In particular, because ordoliberalism contravenes efficiency, which is the core principally in relation to Article 102 TFEU. This can be derived from the *travaux préperatoires* of the Rome Treaty; P. Behrens, "The ordoliberal concept of "abuse" of a dominant position and its impact on Article 102 TFEU", *Econstor* 2015, p. 20. *Behrens* explains that it is without doubt that ordoliberal thinking influenced Article 102 TFEU.

1131 P. I. Colomo, "The Law on Abuses of Dominance and the System of Judicial Remedies", *Yearbook of European Law, Vol. 32, No. 1* 2013, p. 389; L. Warlouzet, "The Centralization of EU Competition Policy: Historical Institutional-

Fortunately, in *Continental Can* the ECJ finally gave much needed clarification.[1132] In is judgment, the Court stated that the four examples laid down in Article 86 EEC are a non-exhaustive enumeration of what constitutes an abuse of a dominant position.[1133] The Court went on to explain that an abuse may occur when an undertaking used its dominant position to fetter competition, irrespective of the aim and procedure by which it is achieved.[1134] Despite that fact that this wording, though clearly corresponding with German Ordoliberalism,[1135] must be understood in light of the system and objectives of the Rome Treaty, as well as the spirit, general scheme and wording of Article 86 EEC, it is rather vague and broad.[1136]

1. The proof required for finding an exclusionary abuse

Within a decade after *Continental Can*, the ECJ in *Hoffman La Roche*[1137] and *Michelin 1*[1138] elaborated the abuse concept by focusing on exclusion-

ist Dynamics from Cartel Monitoring to Merger Control (1956–91)", *Journal of Common Market Studies, Vol. 54, No. 3* 2016, p. 731.

1132 ECJ 21 February 1973, Case 6-72 (Europemballage Corporation and Continental Can Company Inc. v. Commission of the European Communities), [1973] ECR 215. One must take into consideration that this case concerned a merger between two horizontally competing undertakings and was decided before the Merger Control Regulation was adopted. In light of current law, it is very well possible that a different outcome would be reached. Regardless of this unpredictability, the ECJ provided guidance on how the concept of abuse needs to be interpreted. In my opinion, it can be considered as a highly relevant yardstick nowadays.

1133 Ibid., para. 26.

1134 Ibid., para. 26-27.

1135 Q. Wu, "*Competition Laws, Globalization and Legal Pluralism: China's Experience*", Oxford/Portland: Hart Publishing 2013, p. 28; A. Jones and B. E. Sufrin, "*EU Competition Law: Text, Cases, and Materials*", Oxford: Oxford University Press 2016, p. 37. By protecting an „effective competition structure" Article 86 EEC reflects the ordoliberal view to foster economic freedom by means of safeguarding competition in the internal market and protecting competitors.

1136 Ibid., para. 22.

1137 ECJ 13 February 1979, Case 85/76 (Hoffman-La Roche & Co. AG v. Commission of the European Communities) [1979], ECR 461.

1138 ECJ 9 November 1983, Case 322/81 (NV Nederlandsche Banden Industrie Michelin v. Commission of the European Communities), [1983] ECR 3461.

ary abuses.[1139] In *Hoffman La Roche*, the ECJ formulated three criteria to establish an abuse: first, the conduct must be capable of influencing the structure of the market.[1140] Second, there must be "*recourse to methods different from those which condition normal competition in products or services on the basis of the transactions of commercial operators*".[1141] Third, the conduct must be able to have "*the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition*".[1142] Although the Court's reasoning offered guidance when conduct is capable of restricting competition, it failed to offer a clear yardstick as to what type of exclusionary effect is required.[1143] Despite this legal uncertainty still remaining unsolved today, *Hoffman La Roche* is the leading decision concerning exclusionary abuses pursuant to Article 102 TFEU (formerly known as Article 82 EC, or Article 86 EEC).[1144]

However, the effect on trade criteria (*i.e.* the third criteria) has to some extent been broadened and clarified. In *Michelin 1*, the ECJ stated that an undertaking has a "*special responsibility not to allow its conduct to impair gen-*

1139 M. Mackenrodt, B. C. Gallego, and S. Enchelmaier, "*Abuse of Dominant Position: New Interpretation, New Enforcement Mechanisms?*", in: H. K. S. Schmidt (ed), "Private Enforcement – Is Article 82 EC special?", Berlin/Heidelberg: Springer 2008, p. 151; M. Andenas, P. Marsden, and M. Hutchings, "*Current Competition Law Volume II*", London: British Institute of International and Comparative Law 2004, p. 359.

1140 ECJ 13 February 1979, Case 85/76 (Hoffman-La Roche & Co. AG v. Commission of the European Communities), [1979] ECR 461, para. 91. "*The concept of abuse is an objective concept relating to the behaviour of an undertaking in a dominant position which is such as to influence the structure of a market as a result of the very presence of the undertaking in question, the degree of competition is weakened*".

1141 Ibid; J. Bourgeois and D. Waelbroeck, "Ten years of effects-based approach in EU competition law State of play and perspectives", in: A. Meij and T. Baum, "Balancing Object and Effect Analysis in Identifying Abuses of a Dominant Position under Article 102 TFEU", Brussels: Groupe de Boeck 2013, p. 164. Even today, this notion of "competition on the merits" can be considered vague and largely unclear.

1142 Ibid.

1143 R. Nazzini, "*The Foundations of European Union Competition Law: The Objective and Principles of Article 102*", Oxford: Oxford University Press 2011, p. 170.

1144 J. Bourgeois and D. Waelbroeck, "*Ten years of effects-based approach in EU competition law State of play and perspectives*", in: A. Meij and T. Baum, "Balancing Object and Effect Analysis in Identifying Abuses of a Dominant Position under Article 102 TFEU", Brussels: Groupe de Boeck 2013, p. 162.

uine undistorted competition on the common market".[1145] Moreover, in *Michelin II,* the CFI found that abuse does not need to have an "actual effect" on the internal market, but must be "capable" of having that effect.[1146] This has been reiterated by the CFI in *British Airways*.[1147] *Ullrich* calls such a move towards an increased emphasis on the effects of an abuse, the shift from a form-based approach to a full-fledged effects-based approach.[1148] Albeit that the CFI's line of reasoning has been followed by the Commission in its guidance on Article 102 TFEU, it is necessary to make a distinction between the object and effect of an exclusionary abuse.[1149] An example of a case that focused on the object of an exclusionary abuse is the judgment by the GC in *AstraZeneca*.[1150] In this judgment, the Court ruled that be-

1145 ECJ 9 November 1983, Case 322/81 (NV Nederlandsche Banden Industrie Michelin v. Commission of the European Communities), [1983] ECR 3461, para. 57.

1146 CFI 30 September 2003, Case T-203/01 (Manufacture française des pneumatiques Michelin v. Commission of the European Communities), [2003] ECR II-4071, para. 239; See also, in appeal, ECJ 15 March 2007, Case C-95/04P (British Airways plc v. Commission of the European Communities), [2007] ECR I-2331, para. 77.

1147 CFI 17 December 2003, Case T-219/99 (British Airways plc v. Commission of the European Communities), [2003] ECR II-05917, par. 293. The CFI stated that "*It is sufficient* […] *to demonstrate that the abusive conduct of the undertaking in a dominant position tends to restrict competition, or, in other words, that the conduct is capable of having, or likely to have, such an effect*".

1148 H. Ullrich, "*The Evolution of European Competition Law: Whose Regulation, Which Competition?*", Cheltenham/Northampton: Edward Elgar Publishing 2006, p. 348.

1149 Communication from the Commission — Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty [now Article 102 TFEU] to abusive exclusionary conduct by dominant undertakings of 24 February 2009, [OJ 2009, No. C 45], para. 22. This approach, like Article 101(1) TFEU, must be followed with regard to the finding of an exclusionary abuse. The Commission stated that "*There may be circumstances where it is not necessary for the Commission to carry out a detailed assessment before concluding that the conduct in question is likely to result in consumer harm. If it appears that the conduct can only raise obstacles to competition and that it creates no efficiencies, its anti-competitive effect may be inferred. This could be the case, for instance, if the dominant undertaking prevents its customers from testing the products of competitors or provides financial incentives to its customers on condition that they do not test such products, or pays a distributor or a customer to delay the introduction of a competitor's product*".

1150 GC 1 July 2010, Case T-321/05 (AstraZeneca AB and AstraZeneca plc v. European Commission), [2010] ECR II-2805.

haviour that by its object restricts competition,[1151] supported by evidence in view of an economic or regulatory context[1152] is sufficient to establish an abuse of a dominant position, irrespective of its effect on competition.[1153]

II. The exclusionary abuse of refusal to grant access to an essential facility when the trade associations researched impose nonlegal sanctions

The most relevant type of exclusionary abuse to determine the anti-competitiveness of extrajudicial measures imposed by the trade associations researched concerns the "refusal to grant access to an essential facility". By disciplining disloyal industry actors, especially by (i) blacklisting; (ii) withdrawing membership; (iii) denying reapplication for membership on the basis of an additional entry barrier; and (iv) instructing members to refuse to deal with expelled members, one could argue that given the dominance of the associations and the impact of these measures which leads to market foreclosure by making access to the services provided by these associations impossible (*i.e.* (ii) and (iii)), or more difficult (*i.e.* (i) and (iv)), the role of the trade associations researched in the imposition of each type of nonlegal sanction amounts to exclusionary abuse by denying an essential facility.[1154] Whether this is indeed true depends on the applicability of three condi-

1151 Ibid., para. 360.
1152 Ibid., para. 824.
1153 Ibid., para. 826.
1154 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 do not constitute exclusionary abuses within the meaning of Article 102 TFEU. The first measure is not severe enough to foreclose market access and the second measure does not result in market foreclosure for a wrongdoer. With regard to refusing an essential facility, see V. Hagenfeld, "*EC Competition Law - the Essential Facilities Doctrine: To what extent is the Essential Facilities Doctrine established in Community law and how has its application under Article 82 EC evolved over time*", Munich: GRIN Verlag GmbH 2009, p. 3; P. A. McNutt, "*Law, Economics and Antitrust: Towards a New Perspective*", Cheltenham/ Northampton: Edward Elgar Publishing 2005, p. 136. *McNutt* explains that the aim of the essential facility doctrine is to prevent, in practice, "*insuperable barriers to entry for competitors*".

tions.[1155] First, the existence of a "facility" (*i.e.* the nature and characteristics of the facility). Second, the "essentiality" of the facility. Third, whether "competition is eliminated" with regard to the four extrajudicial measures, if imposed by one of the trade associations researched. Unfortunately, this is not an easy task. According to *Dabbah*, the essential facility doctrine is highly controversial.[1156]. In addition, *Lorenz* argued that the refusal to grant access to an essential facility does not apply to extrajudicial measures imposed by a trade association, but refers to market hindrance on a downstream market.[1157]

1. Nature and characteristics of the facility

To determine whether the trade associations researched have abused their dominant position, the first condition that must be fulfilled necessitates that their services offered can be classified as a "facility". From an antediluvian comprehension of this concept, especially by looking at early decisional practice of the Commission, a restrictive interpretation was favoured. Only when (parts of) infrastructure, or valuable and hard to duplicate raw material is offered by a dominant undertaking, can the existence of a facility be established.[1158] Some examples include airports,[1159]

1155 The additional condition that the facility must be used for a 'new' product is not a workable condition and, hence, will not be discussed. Especially, because such a condition was not considered in relation to the imposition of nonlegal sanctions by a trade association, but was mentioned only by the ECJ pertaining to the licensing of intellectual property rights. See ECJ 29 April 2004, Case C-418/01 (IMS Health GmbH & Co. OHG v. NDC Health GmbH & Co. KGIMS), [2004] ECR I-05039, para. 37, 47.

1156 M. M. Dabbah, "*EC and UK Competition Law: Commentary, Cases and Materials*", Cambridge: Cambridge University Press 2004, p. 351.

1157 M. Lorenz, "*An Introduction to EU Competition Law*", Cambridge: Cambridge University Press 2013, p. 237.

1158 M. M. Dabbah, "*Module B: Abuse of a dominant position*", London: University of London Press 2012, p. 33; V. Hatzopoulos, "The EU essential facilities doctrine", *College of Europe* 2006, p. 19.

1159 *E.g.* Commission Decision of 26 February 1992 relating to a procedure pursuant to Articles 85 and 86 of the EEC Treaty [now Articles 101 and 102 TFEU], Case No IV/33.544 (British Midland v. Aer Lingus), para. 5, 26-27.

railways,[1160] seaports,[1161] intangible networks (*e.g.* distribution network)[1162] and tangible networks (*e.g.* pipelines).[1163] In the course of time, due to privatization and market liberalization, the Commission and the CJEU relaxed the restrictive definition of facility in three proceedings.[1164] First, in *GVG/FS* the Commission explained that not only a railway structure was considered a facility, but also other assets at stake.[1165] These include, *inter alia*, staff, drivers and trains. Second, in the ECJ's judgment in *IMS Health,* the Court argued that also the structure of a database falls

1160 For a recent example, see Commission, press release IP/ 17/3622 of 2 October 2017 "Commission fines Lithuanian Railways €28 million for hindering competition on rail freight market" (to access: http://europa.eu/rapid/press-release_IP-17-3622_en.htm).

1161 *E.g.* Commission Decision of 21 December 1993 relating to a proceeding pursuant to Article 86 of the EC Treaty [now Article 102 TFEU], Case No IV/34.689 (Sea Containers v. Stena Sealink), para. 66, 75; T. Jiang, "*China and EU Antitrust Review of Refusal to License IPR*", Antwerp: Maklu-Publishers 2015, p. 88. *Sea Containers v. Stena Sealink* was the first case concerning the essential facility doctrine; Commission Decision of 21 December 1993 relating to a proceeding pursuant to Article 86 of the EC Treaty [now Article 102 TFEU], Case No IV/34.689 (Sea Containers v. Stena Sealink), para. 12.

1162 *E.g.* ECJ 26 November 1998, Case C-7/97 (Oscar Bronner GmbH & Co. KG v. Mediaprint Zeitungs- und Zeitschriftenverlag GmbH & Co. KG, Mediaprint Zeitungsvertriebsgesellschaft mbH & Co. KG and Mediaprint Anzeigengesellschaft mbH & Co. KG), [1998] ECR I-07791, para. 24, 37.

1163 *E.g.* Commission, press release IP/01/1641 of 23 November 2001 "Commission settles Marathon case with Thyssengas" (to access: http://europa.eu/rapid/press-release_IP-01-1641_en.htm); Commission, press release IP/04/573 "Commission settles Marathon case with Gaz de France and Ruhrgas" (to access: http://europa.eu/rapid/press-release_IP-04-573_e.htm).

1164 V. Hatzopoulos, "The EU essential facilities doctrine", *College of Europe* 2006, p. 20; The CJEU has never expressly used the term essential facility, unlike the Commission. See V. Hagenfeld, "*EC Competition Law - the Essential Facilities Doctrine: To what extent is the Essential Facilities Doctrine established in Community law and how has its application under Article 82 EC evolved over time*", Munich: GRIN Verlag GmbH 2009, p. 3; C. Graham, F. Smith, and F. M Smith, "*Competition, Regulation and the New Economy*", in: E. Derclaye (ed), "Abuse of a dominant Position and IP Rights", Oxford/Portland: Hart Publishing 2004, p. 74.

1165 Commission Decision of 27 August 2003 relating to a proceeding pursuant to Article 82 of the EC Treaty [now Article 102 TFEU], Case No COMP/37.685 (GVG/FS), para. 132, 141, 152.

within this term.[1166] Third, in *Microsoft* the Commission and the CFI found that even a server operating system could be classified as a facility.[1167]

That being said, by broadening the concept of facility a bit of a catch-all term emerged. Subsequently, it is unconvincing to argue that the services provided by the trade associations researched do not fall within its scope. There are two reasons for this: first, depriving the Commission and the CJEU of a useful method to address the potential anti-competitiveness of imposing extrajudicial measures by the trade associations researched pursuant to Article 102 TFEU should be prevented at all cost. Second, legal doctrine presupposes the formation of general broad principles to include situations that are not covered by a specific rule.[1168]

2. The essentiality, indispensability or objective necessity of the facility

The next condition which needs to fall within the scope of the essential facility doctrine necessitates that the services offered by the trade associations researched are essential, indispensable, or objectively necessary. Here, the interpretation provided by the Organisation for Economic Co-operation

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1166 ECJ 29 April 2004, Case C-418/01 (IMS Health GmbH & Co. OHG v. NDC Health GmbH & Co. KGIMS), [2004] ECR I-05039, para. 46. Although the Court discussed the essentiality of a facility, this implies that a facility is present.

1167 Commission Decision of 24 May 2004 relating to a proceeding pursuant to Article 82 of the EC Treaty [now Article 102 TFEU] and Article 54 of the EEA Agreement against Microsoft Corporation, Case No COMP/C-3/37.792 (Microsoft), para. 18; CFI 17 September 2007, Case T-201/04 (Microsoft Corp. v. Commission of the European Communities), [2007] ECR II-3601, para. 1313 (emphasis added). By denying work group server operating systems access to information to operate their software on Windows desktop PCs, a facility can be established; M. Stoyanova, "*Competition Problems in Liberalized Telecommunications: Regulatory Solutions to Promote Effective Competition*", Alphen aan den Rijn: Kluwer Law International 2008, p. 144. *Stoyanova* interprets the Microsoft decision by describing that a facility can be established by a wide range of factual circumstances that show strategic behaviour of a dominant undertaking.

1168 E. Zamir and D. Teichman, "*The Oxford Handbook of Behavioral Economics and the Law*", Oxford: Oxford University Press 2014, p. 440. This argument should be applied with caution. On the grounds that legal doctrine is not self-evident, it is unsustainable to determine general principles axiomatically.

and Development (the "OECD") and the Commission are guiding.[1169] With regard to the OECD, a facility is considered indispensable or essential, "*if without access there is, in practice, an insuperable barrier to entry for competitors of the dominant company, or if without access competitors would be subject to a serious, permanent and inescapable competitive handicap which would make their activities uneconomic*".[1170] In contrast, when there is an economic alternative, no such barriers exist and the facility is considered non-essential.[1171] For the Commission, the essentiality of a facility can be substantiated if a potential substitute in the downstream market can counterbalance negative consequences of the refusal in the long-term.[1172]

In consideration of the foregoing, it is clear that the facilities offered by the trade associations researched are essential, indispensable, or objectively necessary.[1173] Due to their market dominance and the absence of viable economic alternatives, an insuperable barrier to entry befalls extrajudicially sanctioned industry actors operating on second-tier commodities mar-

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1169 I. Haracoglou, "*Competition Law and Patents: A Follow-on Innovation Perspective in the Biopharmaceutical Industry*", Cheltenham/Northampton: Edward Elgar Publishing 2008, p. 135.

1170 Organisation for Economic Co-operation and Development, "The Essential Facilities Concept", *OCDE/GD(96)113* 1996, p. 97.

1171 Ibid; A comparable approach was embraced by the Commission relating to the telecommunications sector. More specifically, in the Notice on the application of the competition rules to access agreements in the telecommunications sector of 22 August 1998 [OJ 1998, No. C265/02], para. 68, a facility that cannot be replicated by reasonably means and is essential for reaching consumers (and for competitors to carry out their business) is essential.

1172 Communication from the Commission — Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty [now Article 102 TFEU] to abusive exclusionary conduct by dominant undertakings of 24 February 2009, [OJ 2009, No. C 45], para. 83.

1173 One can reach a different conclusion when examining, exclusively, early decisional practice. One example is the Commission Decision of 21 December 1993 relating to a proceeding pursuant to Article 86 of the EC Treaty [now Article 102 TFEU], Case No IV/34.689 (Sea Containers v. Stena Sealink), para. 41. In this Decision, the Commission defined an essential facility as "*a facility or infrastructure, without access to which one cannot provide services to their customers*". When applying this legal rule to the situation of the researched trade associations, the essentiality of a facility cannot be proven. This is because absent access, extrajudicially sanctioned industry actors can still provide service to their customers, albeit in a less economic manner.

kets if access to the services of these institutions were to become more difficult or impossible.[1174]

3. Elimination of (effective) competition

The third condition that is required to determine whether the trade associations researched violate the essential facilities doctrine requires that the self-regulatory measures function as "bottlenecks" to gain access to an essential facility (*i.e.* eliminate competition).[1175] To ascertain how much proof is required to establish such an infringement, the Commission and the CJEU developed two different approaches. First, the rigid approach, which calls for an elimination of "all" competition in the downstream market.[1176] Second, the more flexible approach, which underlines the like-

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1174 Interestingly, according to the ECJ 26 November 1998, Case C-7/97 (Oscar Bronner GmbH & Co. KG v. Mediaprint Zeitungs- und Zeitschriftenverlag GmbH & Co. KG, Mediaprint Zeitungsvertriebsgesellschaft mbH & Co. KG and Mediaprint Anzeigengesellschaft mbH & Co. KG), [1998] ECR I-07791, para. 43, alternatives must be contemplated, regardless of whether they are economically less advantageous; In my opinion, this formulation is unwise from an economic perspective, because the term essentially presupposes the most important facility rather than an economically lesser option. This entails for the trade associations researched that, although extrajudicially sanctioned industry actors can get access to other trade associations active on the market, given the overwhelming dominance of the associations researched this would be unwise; For support of this conclusion, see P. Areeda, "Essential Facilities: An Epithet in Need of Limiting Principles", *Antitrust Law Journal, Vol. 58, No. 3* 1989, p. 853. *Areeda* explains that it is decisive whether practical alternatives can be established rather than imperfect ones. Please be aware that his argumentation refers to US Antitrust Law and should be transposed to the EU essential facility doctrine with due diligence; S. P. Waller, "Areeda, Epithets, and Essential Facilities", *Wisconsin Law Review* 2008, p. 368. This theory can be considered influential.

1175 The necessity of this condition is not commonly accepted. *O'Donoghue* and *Padilla* argue that it is superfluous to assess whether there is an elimination of competition, because once a facility is essential, indispensable or objectively necessary such a finding is obvious. See R. O'Donoghue and A. J. Padilla, "*The Law and Economics of Article 82 EC*", Oxford: Hart Publishing 2006, p. 440-442.

1176 ECJ 6 April 1995, joined cases C-241/91P and C-242/91P (Radio Telefis Eireann (RTE) and Independent Television Publications Ltd (ITP) v. Commission of the European Communities), [1995] ECR I-00743, para. 56-57; ECJ 26 November 1998, case C-7/97 (Oscar Bronner GmbH & Co. KG v. Mediaprint Zeitungs- und Zeitschriftenverlag GmbH & Co. KG, Mediaprint Zeitungsvertriebsgesellschaft mbH & Co. KG and Mediaprint Anzeigengesellschaft mbH

lihood to eliminate effective competition in the market (*i.e.* the risk of an elimination of competition).[1177] Despite both approaches having been developed with regard to a refusal to license intellectual property rights/information, the impact of this measure differed. With regard to the first approach, as decided in *Magill*, *Bronner* and *IMS Health*, all effective competition on the downstream market was eliminated immediately or within a few days after the refusal of access.[1178] With regard to the second approach, in line with the Commission's decision and CFI's judgment in *Microsoft*, even though there were other operators left on the market, competitors were placed at a negative disadvantage. [1179] In other words, they were effectively eliminated from the market.

Against this background, the latter approach is of importance to determine whether nonlegal sanctions imposed by the trade associations researched eliminate competition by hindering access to an essential facility pursuant to Article 102 TFEU.[1180] Subsequently, it will be established for each of these measures whether Article 102 is infringed.

& Co. KG), [1998] ECR I-07791, para. 41; Strikingly, in the more recent ECJ 29 April 2004, Case C-418/01 (IMS Health GmbH & Co. OHG v. NDC Health GmbH & Co. KGIMS), [2004] ECR I-05039, para. 38 the ECJ explained that the exclusion of "any" competition should be used as a yardstick.

1177 Commission Decision of 24 May 2004 relating to a proceeding pursuant to Article 82 of the EC Treaty [now Article 102 TFEU] and Article 54 of the EEA Agreement against Microsoft Corporation, Case No COMP/C-3/37.792 (Microsoft), para. 589, 984; CFI 17 September 2007, case T-201/04 (Microsoft Corp. v. Commission of the European Communities), [2007] ECR II-3601, para. 105, 275, 280; This is closely related to the CFI's judgments in *Michelin II* and *British Airways*, in which the Court explained that an exclusionary abuse does not need to have an actual effect on the internal market, but must be capable of having that effect.

1178 T. Jiang, "*China and EU Antitrust Review of Refusal to License IPR*", Antwerp: Maklu-Publishers 2015, p. 141. *Jian* only refers to *Magill* and *IMS Health*, but this should also include the ECJ's judgment in *Bronner*.

1179 CFI 17 September 2007, Case T-201/04 (Microsoft Corp. v. Commission of the European Communities), [2007] ECR II-3601, para. 442.

1180 Although the stringent and more flexible approach to interpret the elimination of competition concept was developed in light of the licensing of intellectual property rights and, therefore, bears no resemblance to the situation of foreclosing access to the services of the trade associations researched by imposing nonlegal sanctions, it does provide a general theory that can (but not necessarily must) be considered applicable to assess these measures. However, one must be cognizant of the dangers of law in a vacuum (*i.e.* infringing the principle of legal certainty). See, for example, A. Ottow, "*Market and Competition Authorities: Good Agency Principles*", Oxford: Oxford University Press 2015, p. 154.

a. Blacklisting

Once a disloyal industry actor is blacklisted by one of the researched trade associations, it will be difficult to find a member of that institution who or that is willing to conduct trade with him or it. As a result, access to specialized commercial arbitration, which is the core service provided by such an institution, is made more difficult. This is because once an industry cannot enter into a standardized contract with a member of a relevant trade association, potential future conflicts cannot be solved in specialized commercial arbitration. This forecloses market access to an essential facility and is likely to eliminate effective competition in the relevant second-tier commodities market.[1181]

1181 The decisional practice of the Commission and the case law of the CJEU in *Compagnie Maritime Belge* provide some support for this conclusion. However, (i) both institutions refrained from explicitly mentioning the essential facility doctrine; and (ii) blacklists were drawn up to coordinate different behaviour compared to the dissemination of market information by the trade associations researched. More specifically, in *Compagnie Maritime Belge* blacklists were drawn up to ensure 100% loyalty with the shipping conference Cewal. This was done by depriving disloyal shippers, who used the services of a competing shipping conference, from getting access to its adequate services. The Commission and the CJEU argued that such a practice to ensure loyalty resulted in an exclusionary abuse pursuant to Article 102 TFEU. Contrarily, with regard to the situation of the trade associations researched, names of disloyal industry actors were disseminated after not conforming with an arbitral award from specialized commercial arbitration. Despite this disparity, in my opinion, although one cannot overlook that both blacklists have a similar exclusionary aim, it is uncertain whether the ruling in *Compagnie Maritime Belge* can be used to illustrate that the dissemination of the names of wrongdoers in a blacklist by the trade associations researched eliminated competition by refusing access to an essential facility. In particular, because Cewal's practice of blacklisting disloyal shippers was only found in breach of Article 102, since it aggravated even further the terms imposed under the loyalty contract. Standing alone, it was found insufficient to constitute an abuse. In my view, when reading the *ratio decidendi* it is apparent that blacklisting is a factor to establish an abuse pursuant to Article 102 TFEU. Given that the trade associations researched also withdraw membership and one even coerces members not to deal with excluded members, it may very well be possible that a similar conclusion can be reached. See CFI 8 October 1996, joined cases T-24/93, T-25/93, T-26/93 and T-28/93 (Compagnie Maritime Beige Transports SA and Compagnie Maritime Belge SA v. Commission of the European Communities), [1996] ECR 11-1201, para. 170, 172, 182, 185; Opinion of the Advocate-General Fennelly of 29 October 1998, joined cases C-395/96P, C-396/96P (Compagnie Maritime Belge Transports SA et al v. Commission of the European Communities), [2000]

b. Membership rules and barriers for market access

i. Withdrawal of membership

Once one of the six trade associations researched imposes withdrawal of membership on a recalcitrant industry actor, this undertaking or individual member will be denied access to all the services provided by the association. Obviously, such a measure eliminates effective competition in the relevant second-tier commodities market. This is because such an industry actor is placed at a competitive disadvantage.

ii. Denial of readmission to membership of expelled members on the basis of an additional entry condition

If an expelled former member of a trade association wishes to be readmitted to membership and that association denies an application for membership on the basis of an additional entry barrier, access to its services/essential facility is again denied. This eliminates effective competition in the relevant second-tier commodities market, because it places a targeted industry actor at a competitive disadvantage.

c. Refusal to deal with an expelled member

In the event a trade associations instructs its member to refuse to deal with an expelled member, the expelled member will not be able to have access to the services/essential facility of this association due to the expulsion, but will also most likely not be able to conduct trade on the basis of a standardized contract with any member. Subsequently, future conflicts will not be resolved in specialized commercial arbitration. This places a targeted industry actor at a competitive disadvantage and is likely to eliminate effective competition in the relevant second-tier commodities market. Irrespective of the fact that object restrictions are not discussed by the Commission and the CJEU with regard to a refusal to deal with an essential fa-

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ECR I-1365, para. 143, 144, 151, 152, 162; Commission Decision of 30 April 2004 relating to a proceeding under Article 82 of the EC Treaty [now Article 102 TFEU], Case No COMP/D/32.448 and 32/450 (Compagnie Maritime Belge), para. 35-36.

cility, the legal rule adopted by the GC in *AstraZeneca*, which suggests that exclusionary abuses can also restrict Article 102 TFEU by object, is sufficient to establish that an instruction of a trade association to refuse to deal with an expelled member restricts Article 102 in such a manner.

III. Existence of a causal connection between market power of the trade associations researched and an exclusionary abuse on adjacent second-tier commodities markets

The trade associations researched, except for the DDC, hold dominant positions in the EU markets for regulation and private ordering, which aim to represent the interests of their members active in adjacent second-tier commodities markets. By imposing nonlegal sanctions on disloyal industry actors by the trade associations researched, not the former markets, but the latter markets are impacted.[1182] This raises the ensuing question: Does an exclusionary abuse that is committed in the market where dominance was established, but has effects in a non-dominated second-tier market, have a sufficient causal link?[1183] Although no express guidance can be found in the wording of Article 102 TFEU to necessitate that dominance and an abuse of a dominant position must be held and felt within the same market, the case law of the CJEU provides sufficient elucidation. In *Tetra Pak* the ECJ held that dominance in one market and an abuse felt in a distinct, but associated market is sufficient when special circumstances exist.[1184] Even though the Court failed to explain in detail what such circumstances

1182 According to *Monti*, this is also relevant with regard to leveraging and tying. For an explanation, see G. Monti, "*EC Competition Law*", Cambridge: Cambridge University Press 2007, p. 192; An overview of scenarios involving adjacent markets pursuant to Article 102 TFEU can also be found in R. Whish and D. Bailey, "*Competition Law: Eight Edition*", Oxford: Oxford University Press 2015, p. 175.

1183 R. Nazzini, "*The Foundations of European Union Competition Law: The Objective and Principles of Article 102*", Oxford: Oxford University Press 2011, p. 185. There must be a link between dominance and an abuse.

1184 ECJ 14 November 1996, Case C- 333/94 P (Tetra Pak International SA v. Commission of the European Communities), [1996] ECR I-5951, para. 27; A. Ezraichi, "*Article 82 EC: Reflections on its Recent Evolution*", Oxford/Portland: Hart Publishing 2009, p. 124. *Ezraichi* reiterates the ECJ's ruling in *Tetra Pak* by explaining that an abuse could not only occur in the market where dominance was established, but also in a related (secondary) market.

are, it was careful to stress that when two markets are linked, a causal connection is established.[1185]

That being said, regardless of the fact that such a link *prima facie e*xists between the EU markets for regulation and private ordering on which the trade associations researched are active and the adjacent second-tier commodities markets on which their members operate, two reasons deny the existence of a causal connection. First, these associations do not hold market shares on the adjacent second-tier commodities markets. Second, the associations offer representation services as opposed to providing products (*i.e.* different product features). However, in my opinion, these rebuttal factors can be ignored altogether. Specialized commercial arbitration provided by the trade associations researched is quintessential for their members to operate on their relevant adjacent second-tier commodities markets. In contrast, representing the interests of their members by the associations is redundant and impossible when there are no members active in the relevant commodities markets. Accordingly, a sufficient link exists between the markets on which the trade associations researched are active and the neighbouring commodities markets on which their members operate.

IV. "Objective justification" of the refusal to grant access to the facilities offered by the trade associations researched

Even though a written exception to excuse a refusal of access to an essential facility offered is omitted from the wording of Article 102 TFEU,[1186] the

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1185 ECJ 14 November 1996, Case C- 333/94 P (Tetra Pak International SA v. Commission of the European Communities), [1996] ECR I-5951, para. 31; For further guidance, see the Opinion of the Advocate-General Ruiz-Jarabo Colomer of 27 June 1996, Case C-333/94P ((Tetra Pak International SA v. Commission of the European Communities), [1996] ECR I-5951, para. 57. The link between the dominated market and the abuse on the associated market must be a close one. It must be established on a case-by-case basis, by taking into account: the (i) market share of the dominant undertaking on the secondary market; (ii) characteristics of the products; (iii) use of the dominant position of the undertaking in one market to penetrate the associated market; (iv) supply and demand structure of the markets; and (v) the dominant undertaking's degree of control on the linked market.

1186 W. Sauter, "*Coherence in EU Competition Law*", Oxford: Oxford University Press 2016, p. 101. Opinion of the Advocate-General Jacobs of 28 October 2004, Case C-53/03 (Synetairismos Farmakopoion Aitolias & Akarnanias

Commission and the CJEU have explained that conduct that can be "objectively justified" does not constitute an abuse.[1187] There are three categories of justifications which must be considered.[1188] First, an efficiency defence.[1189] Second, the protection of a legitimate commercial interest and, third, the objective necessity of an abuse. The goal of this Paragraph is to determine which category is most suitable to justify a denial of access to the services/essential facility of the trade associations researched in the event such these associations impose nonlegal sanctions on disloyal industry actors. Therefore, a balancing exercise must be conducted between the abusiveness of such a refusal and compensating positive effects.

1. Efficiency defence: lower transaction and distribution costs?

According to the Discussion Paper, an efficiency defence is permissible when efficiencies (i) are realized or are likely to be realized as a result of the conduct concerned; (ii) are indispensable; (iii) benefit consumers; and (iv) do not eliminate competition.[1190] Whereas this test is modelled after Article 101(3) TFEU, it is possible to similarly argue that indeed the denial of an essential facility following an imposition of nonlegal sanctions by the

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(Syfait) et al v. GlaxoSmithKline plc und GlaxoSmithKline AEVE), [2005] ECR I-4609, para. 72. AG Jacobs also explains that the abuse under Article 102 TFEU suggests that a negative conclusion has already been reached, as opposed to the more neutral terminology concerning Article 101 TFEU, which requires the prevention, distortion or prevention of competition. Therefore, it is unwise to talk about an exemption, but rather that certain conduct does not fall within the category of abuse.

1187 See, for example, ECJ 14 February 1978, Case 27/76 (United Brands Company and United Brands Continental BV v. Commission of the European Communities), [1978] ECR 207, para. 168, 208, 236.

1188 R. O'Donoghue and A. J. Padilla, "*The Law and Economics of Article 82 EC*", Oxford: Hart Publishing 2013, p. 282-283.

1189 This parallels the exemption possibility under Article 101 (3) TFEU, as explained in I. E. Wendt, "*EU Competition Law and Liberal Professions: an Uneasy Relationship?*", Leiden: Koninklijke Brill NV 2013, p. 384; See also N. Kroes, EC Commissioner for Competition, "Preliminary Thoughts on Policy Review of Article 82", Speech, 23 September 2005, p. 5 (http://europa.eu/rapid/press-release_SPEECH-05-537_en.htm?locale=en).

1190 European Commission, "DG Competition discussion paper on the application of Article 82 of the Treaty [now Article 102 TFEU] to exclusionary abuses", *European Commission* 2005, par. 84. These four conditions are similar to Article 101 (3) TFEU.

trade associations researched is legitimate. This is because an efficient system of specialized commercial arbitration in which awards are enforced by nonlegal sanctions lowers transaction and distribution costs and outweighs any potential anticompetitive effects placed upon targeted industry actors.[1191]

Unfortunately, this finding is not unanimously shared in legal doctrine. *Gormsen*, *inter alia*, argues that the idea of an efficiency defence is debatable.[1192] She starts her thought-provoking analysis with explaining that the test for efficiency is about whether the conduct "eliminates effective competition" and not whether conduct is efficient.[1193] She then argues that such a standard entails that an efficiency defence is meaningless if Article 102 TFEU is exclusively understood – which is most likely – to protect economic freedom.[1194] Weighting efficiencies is then beyond the bounds of possibility, in practice. In my opinion, however, the overarching goal of EU Competition Law must be to benefit consumers rather than to protect economic freedom. This is in line with the general understanding of how

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1191 Communication from the Commission — Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty [now Article 102 TFEU] to abusive exclusionary conduct by dominant undertakings of 24 February 2009, [OJ 2009, No. C 45], para. 27. Interestingly, the term "defence" has been removed by the Commission; However, N. Kroes, EC Commissioner for Competition, "Exclusionary abuses of dominance - the European Commission's enforcement priorities", Speech, 25 September 2008, p. 4 refers to the term efficiency defence (http://europa.eu/rapid/press-release_SPEECH-08-457_en.htm?locale=en).

1192 L. L. Gormsen, "*A Principled Approach to Abuse of Dominance in European Competition Law*", Cambridge: Cambridge University Press 2010, p. 56-57; For a denial of an efficiency defence, see also CFI 30 September 2003, joined cases T-191/98, T-212/98 to T-214/98 (Atlantic Container Line AB et al v. Commission of the European Communities), [2003] ECR II-3275, para. 1112. This judgment was, however, adopted before the Discussion Paper and the Commission's guidance on Article 102 TFEU.

1193 Communication from the Commission — Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty [now Article 102 TFEU] to abusive exclusionary conduct by dominant undertakings of 24 February 2009, [OJ 2009, No. C 45], para. 29; See also ECJ 21 February 1973, Case 6-72 (Europemballage Corporation and Continental Can Company Inc. v. Commission of the European Communities), [1973] ECR 215, para. 26. In that judgment, the ECJ explains that the strengthening or using of a dominant position must not eliminate effective competition.

1194 L. L. Gormsen, "*A Principled Approach to Abuse of Dominance in European Competition Law*", Cambridge: Cambridge University Press 2010, p. 56.

to perceive EU Competition Law.[1195] Accordingly, an efficiency defence that encompasses similar conditions as Article 101(3) TFEU must be endorsed.[1196] The trade associations researched can justify any refusal of access to their essential facilities (with the exception of a refusal to deal with expelled members) once they impose nonlegal sanctions on wrongdoers by invoking such a defence, unless these measures are not structured in the least restrictive manner.[1197]

2. The protection of a legitimate commercial interest

The trade associations researched pursue their members' collective economic interests by lowering transaction costs and benefit consumers by reducing distribution costs. However, it is debatable whether such benefits empower these associations to invoke the second category of defence, namely the protection of a legitimate commercial interest. Criticism to refute an application is based on three arguments: first, contrary to the ECJ's ruling in *United Brands*, the trade associations researched do not protect an "own" commercial interest, but safeguard the interests of their members.[1198] Second, the protection of a legitimate commercial interest has

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1195 J. Drexl, W. Kerber, and R. Podszun, "*Competition Policy and the Economic Approach: Foundations and Limitations*", in: D. Zimmer (ed), "Consumer welfare, economic freedom and the moral quality of competition law – comments on Gregory Werden and Victor Vanberg", Cheltenham/Northampton: Edward Elgar Publishing 2011, p. 72.

1196 Nonetheless, one can argue whether the existence of an efficiency defence must assessed after an abuse is established pursuant to Article 102 TFEU, or amidst the appraisal of this condition; *Paulis* explains that the burden of proof is on the persons invoking an efficiency defence. This seems to suggest that efficiencies must be considered after a finding of an abuse of a dominant position pursuant to Article 102 TFEU. See E. Paulis, Deputy Director for the Directorate-General for Competition, "The Burden of Proof in Article 82 cases", Speech, 6 September 2006, p. 5 (http://ec.europa.eu/competition/speeches/text/sp2006_014_en.pdf).

1197 This must be done on the basis of the recommendations pertaining to the third condition of Article 101(3) TFEU. See Part III, Chapter 10, C, III.

1198 ECJ 14 February 1978, Case 27/76 (United Brands Company and United Brands Continental BV v. Commission of the European Communities), [1978] ECR 207, para. 189. The ECJ refers to an own commercial interest. See also, *inter alia*, CFI 8 October 1996, joined cases T-24/93, T-25/93, T-26/93 and T-28/93 (Compagnie Maritime Beige Transports SA and Compagnie Maritime Belge SA v. Commission of the European Communities), [1996] ECR 11-1201,

never been accepted by the Commission and the CJEU to justify nonlegal sanctions imposed by a trade association. Most decisional practice and case law relates to a refusal to supply. Third, the principle of proportionality has been infringed upon when a trade association does not organize a nonlegal sanction in the least restrictive manner.[1199]

Despite clear evidence against the application of a protection of a legitimate commercial interest defence, these three arguments can be contradicted. With regard to the first refutation, the requirement that an "own" business interest must be protected must be interpreted more flexibly. This is because these trade associations are not able to justify their refusal to grant access to an essential facility under a traditional understanding of this defence. In my opinion, due to the close proximity of the market on which the trade associations researched are active and the second-tier commodities markets on which their members are active, safeguarding an "own" commercial interest also encompasses the protection of the interests of the member undertakings. The associations are merely a vehicle through which their members collectively protect their business interests.

With regard to the second refutation, the mere fact that most cases relate to a refusal to supply does not preclude the possibility that a protection of a commercial interest defence can be made by the trade associations researched. Law is in constant motion and it may very well be possible that the Commission or the CJEU will – at least – consider such a defence.[1200]

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para. 107; ECJ 16 September 2008, joined cases C-468/06 to C-478/06 (ot. Lélos kai Sia EE et al v. GlaxoSmithKline AEVE Farmakeftikon Proionton, formerly Glaxowellcome AEVE), [2008] ECR I-7139, para. 50; CFI 9 September 2009, Case T-301/04 (Clearstream Banking AG and Clearstream International SA v. Commission of the European Communities), [2009] ECR II-3155, para. 132.

1199 The concept of proportionality was introduced by the ECJ in ECJ 14 February 1978, Case 27/76 (United Brands Company and United Brands Continental BV v. Commission of the European Communities), [1978] ECR 207, para. 190; The best definition of this concept was given in the Opinion of the Advocate-General Kirschner of 21 February 1990, Case T-5I/89 (Tetra Pak Rausing SA v. Commission of the European Communities), [1990] ECR II-309, para. 68. Proportionality is given when "*the undertaking in a dominant position may act in a profit-oriented way, strive through its efforts to improve its market position and pursue its legitimate interests. But in so doing it may employ only such methods as are necessary to pursue those legitimate aims. In particular it may not act in a way which, foreseeably, will limit competition more than is necessary.*"

1200 While obvious, the constant motion of law is, for example, confirmed by A. Barak, "*The Judge in a Democracy*", Princeton/Woodstock: Princeton University Press 2006, p. 113.

Last, when nonlegal sanctions are structured in the least restrictive manner, they do not go beyond the goal to ensure the protection of a commercial interest. Hence, these self-regulatory measures seem justified.

In sum, arguments can be made both for and against potential application of the protection of a legitimate commercial interest defence. It is uncertain how the Commission and the CJEU would deal with such a request. As a result, focusing on an efficiency defence seems more appropriate. However, this does not mean that the second type of defence becomes completely redundant. Every shred of evidence or argumentation in support of an exemption should be used.

3. The objective necessity of an abuse

The objective necessity defence was introduced by the ECJ in *Centre belge d'études de marché*.[1201] Although the Court failed to provide sufficient guidance on how to interpret this category of exemption, two decades later the Commission in its Discussion Paper provided much needed clarification.[1202] By referring to the CJEU judgments of *Hilti* and *Tetra Pak*, the Commission argued that health and safety considerations can offset the negative effects of an abuse [of an essential facility].[1203] That being said, the imposition of nonlegal sanctions by the trade associations researched does not attain one or both public interest considerations. Consequently, no ob-

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1201 ECJ 3 October 1985, Case 311/84 (Centre belge d'études de marché - Télémarketing (CBEM) v. SA Compagnie luxembourgeoise de télédiffusion (CLT) and Information publicité Benelux (IPB), [1985] ECR 3261, para. 27.

1202 European Commission, "DG Competition discussion paper on the application of Article 82 of the Treaty [now Article 102 TFEU] to exclusionary abuses", *European Commission* 2005, para. 80.

1203 CFI 12 December 1991, Case T-30/89 (Hilti AG v. Commission of the European Communities), [1991] ECR II-1439, para. 118; CFI 6 October 1994, Case T-83/91 (Tetra Pak International SA v. Commission of the European Communities), [1994] ECR II-00755, para. 83-84, 138; More recently, for example, in the Commission Decision of 22 June 2011 relating to a proceeding under Article 102 of the Treaty on the Functioning of the European Union (TFEU), Case No COMP/39.525 (Telekomunikacja Polska), para. 874 no clarification was given which public interests can result in an objective necessity defence. The Commission only defined this category of defence in vague terms by stating that "*A given conduct is objectively necessary where the dominant undertaking is able to show that the alleged abusive conduct is actually necessary on the basis of objective factors external to the dominant undertaking and is proportionate*".

jective necessity defence can be made. Whether or not other public interests such as the wellbeing of end-consumers can change this conclusion is unlikely.[1204] Furthermore, to date, neither the Commission nor the ECJ has exempted an abuse of an essential facility under Article 102 TFEU by arguing that conduct was objectively necessary.[1205]

D. Key findings

Unlike the members of the trade associations researched which cannot be held accountable for their role in the execution of nonlegal sanctions in the absence of collective dominance (oligopolies), it is not inconceivable that the imposition of nonlegal sanctions by the trade associations researched could be classified as abuses of dominant positions in violation of Article 102 TFEU.[1206] This is particularly true when these measures infringe the goal of maintaining effective and undistorted competition within the EU.[1207] At first reading, this provision manifests itself as a simple rule of law, since it would appear that only two requirements are needed, namely dominance and an abuse of a dominant position. Furthermore, Article 102 contains an easy to comprehend non-exhaustive enumeration of conduct which may be abusive. However, by taking a closer look, it is not so straightforward as to provide evidence that extrajudicial measures imposed by the trade associations researched qualify as abuses of dominant positions. Difficulties arise in at least four respects: first, it is difficult to measure how many market shares are required to substantiate dominance with regard to the trade associations researched. Second, it is difficult to establish if the imposition of nonlegal sanctions constitute exclusionary abuses. Third, it is uncertain whether dominance on the EU markets for regulation and private ordering on which the trade associations researched are active and the abuse of these positions, which has an impact on non-dominated adjacent second-tier commodities markets on which their

1204 One can make an argument that since the regulatory measures are necessary to ensure an efficient allocation of products, the wellbeing of end-consumers is fostered. This is because end-consumers benefit from lower prices.

1205 A. Jones and B. E. Sufrin, "*EU Competition Law: Text, Cases, and Materials*", Oxford: Oxford University Press 2016, p. 372.

1206 See Part III, Chapter 11, A.

1207 ECJ 21 February 1973, Case 6-72 (Europemballage Corporation and Continental Can Company Inc. v. Commission of the European Communities), [1973] ECR 215, para. 25.

members are active is sufficiently causal. Fourth, there is no possibility of obtaining an exemption when reading the wording of Article 102 TFEU, even though decisional practice and guidance offered by the Commission and case law of the CJEU permit some defences to justify an abuse of a dominant position.

To understand whether or not these difficulties are sufficiently addressed at EU level and whether extrajudicial measures imposed by the trade associations researched violate Article 102 TFEU, three components are of importance. These are the existence of (i) dominance; (ii) an exclusionary abuse; and (iii) possible justifications. With regard to the establishment of dominance, it is necessary to establish whether the trade associations researched hold dominant positions in their EU markets for regulation and private ordering.[1208] Put differently, these associations must hold a high degree of market power that is referred to as "dominance". According to the ECJ judgments in *United Brands* and *Hoffman-La Roche*, such a position of strength can be substantiated by calculating market shares.[1209] Due to the worldwide (and, therefore, EU-wide) pre-eminent position of most of the trade associations researched, regardless of the fact that there is no concrete evidence of market shares held in the EU markets for regulation and private ordering and that economic models to measure market power are notoriously difficult to apply and fathom, this is unproblematic.[1210] All of the trade associations researched, except for the DDC, hold a dominant position in these markets. To be more concrete, this Chapter divided these associations into four classes. The first class contains the trade associations researched that each hold more than 80% global market shares in their markets for regulation and private ordering, which are interchangeable with EU market shares. These include the LME and FOSFA. Such high amounts of market shares exceed the 70-80% Community market share threshold as was decided by the CFI in *Hilti*. As a consequence, irrespective of opposing facts, dominance is established. The second class encompasses those trade associations that do not exceed the standard developed in *Hilti*, but hold more than 50% EU market shares. This class comprises the ICA. While this association holds more than 50% global market shares, also here, these shares were seen as interchangeable with Community shares. Hence, there is a strong presumption that the ICA is dominant in accordance with the ECJ's judgment in *Akzo* and the Com-

1208 See Part III, Chapter 11, B.
1209 See Part III, Chapter 11, B, I.
1210 See Part III, Chapter 11, B, III.

mission's Discussion Paper. A rebuttal of this presumption should not be contemplated. Exceptional circumstances such as "a more than low market share of competitors" are absent and can be considered ill-defined.

With regard to the third and most controversial class of the trade associations researched, namely GAFTA and the FCC, no evidence of global and Community market shares can be determined. While some may consider an absence of such a market power indicator too uncertain to establish dominance, in my opinion, such a viewpoint can be contradicted. Due to the strong market position of both associations, supported with evidence that suggests that they are market leaders, it is very likely that at least the 50% Community market share threshold as was developed in *Akzo* is fulfilled. Accordingly, both associations hold dominant positions in their respective EU markets for regulation and private ordering. The fourth and last class concerns the DDC, which clearly does not have a dominant position in the relevant EU market for regulation and private ordering. The FBDB is the leading trade association in that market.

Regarding the second component, which requires that nonlegal sanctions imposed by the dominant trade associations researched must be abusive within the meaning of Article 102 TFEU,[1211] the ECJ in *Hoffman La Roche*, *Michelin I* and the CFI in *Michelin II* and *British Airways* provide guidance.[1212] Similar to the aim of self-regulatory sanctioning by the trade associations researched to punish disloyal behaviour, the focus of the CJEU was on exclusionary behaviour. The CJEU explained that this can be substantiated when (i) conduct is capable of influencing the structure of the market; (ii) there is recourse to methods different from those which condition normal competition in products or services on the basis of the transactions of commercial operators; and (iii) conduct is able to have, or capable of having, the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition. Be that as it may, this Chapter has decided not to assess whether nonlegal sanctions imposed by the trade associations researched fulfil this tripartite test. This is because nonlegal sanctions do not really fit within the three partite test, but are better qualified as denials of an essential facility.[1213]

Once the dominant trade associations researched impose nonlegal sanctions on wrongdoers, access to the services of these associations is made more difficult, or impossible, depending on the type of extrajudicial mea-

1211 See Part III, Chapter 11, C.
1212 See Part III, Chapter 11, C, I.
1213 See Part III, Chapter 11, C, II.

sure. Although the essential facility doctrine has never been employed by the Commission and the CJEU under similar circumstances, the imposition of nonlegal sanctions on disloyal industry actors qualifies as denial of an essential facility when three requirements are fulfilled.[1214] First, the services offered by these associations must be classified as a facility.[1215] Whereas from an older perspective, the focus was on airports, railways, seaports, intangible networks and tangible networks, in more recent times a broader understanding of this criterion is favoured. Examples include the ECJ's judgment in *IMS Health* and the Commission's and CFI's reasoning in *Microsoft*. On the basis of these cases, one can argue that the services offered by the dominant trade associations researched qualify as a facility. Moreover, two arguments in favour of such an attribution can be given. First, it is irrational to deprive the Commission and the CJEU of a useful method to analyse an infringement of Article 102 TFEU by applying a more restrictive comprehension of a facility. Second, the content of a norm (here: the wording of a facility) can change over time. Hence, previously unknown situations could fall within the scope of a facility.

The second requirement that must be fulfilled under the essential facility doctrine requires that the services offered by the dominant trade associations researched be indispensable, essential, or objectively necessary.[1216] This requires that access to a facility must be refused resulting in an insuperable barrier to obtain access to an essential facility, or a serious, permanent and inescapable competitive handicap (*i.e.* trading on non-economic grounds). It is clear that when access to the services of the dominant trade associations researched is made more difficult, or impossible, and given their market dominance and the absence of viable economic alternatives, an insuperable barrier befalls extrajudicially sanctioned industry actors operating on the second-tier commodities markets. This places such industry actors at an inescapable competitive handicap. As a result, the services/facility offered by the trade associations researched are essential, indispensable, or objectively necessary.

1214 V. Hagenfeldt, "*EC Competition Law - the Essential Facilities Doctrine: To what extent is the Essential Facilities Doctrine established in Community law and how has its application under Article 82 EC evolved over time?*", Munich: Grin Verlag 2009, p. 4. The application of the essential facility doctrine should be of an exceptional nature, subject to conditions and meticulous contemplation.

1215 See Part III, Chapter 11, C, II, 1.

1216 See Part III, Chapter 11, C, II, 2.

Third, the extrajudicial measures must eliminate competition in a substantial part of the internal market.[1217] To substantiate evidence as to whether this condition is fulfilled, two approaches are guiding: the rigid approach, which entails that all competition must be eliminated and the more flexible approach, which requires that competition is "effectively" eliminated. Despite both approaches having been developed pertaining to a refusal to license intellectual property rights/information, they can be tailored to function as a yardstick to determine whether the imposition of nonlegal sanctions by the dominant trade associations researched eliminates competition by hindering access to an essential facility pursuant to Article 102 TFEU. The dissemination of the names of wrongdoers in a blacklist makes access to the services of the responsible dominant trade association more difficult, because members of this association are more unwilling to conduct trade with a blacklisted disloyal industry actor on the basis of a standardized contract.[1218] As a result, potential future disputes are not resolved in specialized commercial arbitration. This eliminates effective competition. Withdrawals of membership and denials of readmission to membership for an expelled member on the basis of an additional entry condition ensure that a targeted industry actor has no access to the services of the relevant dominant trade association.[1219] This clearly eliminates effective competition. A refusal to deal with an expelled member carries in its wake that such an industry actor cannot conduct trade with a member of the relevant dominant trade association.[1220] This makes it impossible to enter into a standardized contract and clearly places a targeted wrongdoer at a competitive disadvantage. While one can argue that this eliminates effective competition in the relevant second-tier commodities market, along the lines of the GC in AstraZeneca – arguably –a refusal to deal with members can even restrict competition by object.

It is without doubt that nonlegal sanctions qualify as refusals of access to an essential facility. Yet, there is a causation problem: Can the dominance felt by the trade associations researched in their EU markets for regulation and private ordering and the imposition of nonlegal sanctions by these associations on wrongdoers active in (non-dominated) adjacent second-tier commodities markets be seen as sufficiently causal?[1221] This question must

1217 See Part III, Chapter 11, C, II, 3.
1218 See Part III, Chapter 11, C, II, 3, a.
1219 See Part III, Chapter 11, C, II, 3, b, i and ii.
1220 See Part III, Chapter 11, C, II, 3, c.
1221 See Part III, Chapter 11, C, III.

be answered in the affirmative. According to the ECJ in *Tetra Pak*, a causal relationship can be established regardless of whether dominance and an abuse are felt within different, but associated markets when there are special circumstances. Along the lines of this case, it is inconceivable to deny causation between the EU markets for regulation and private ordering and the adjacent second-tier commodities markets. The reason is that the dominant trade associations researched optimize the functioning of their members on each relevant commodities market by, in particular, coordinating and facilitating a system of specialized commercial arbitration. In addition, the proximity of both markets can also be corroborated by converse argument. As an illustration, when in the unlikely event, but by assuming for the sake of argument that, all members of the dominant trade associations researched leave their relevant markets, it is clear that also these associations will disappear. On that premise, since the trade associations cannot exist without their members, both markets can be seen as intrinsically close. Accordingly, a "hypothetical" *conditio sine qua non* nexus can be established between the dominance of these associations and the abuse felt in the closely-related commodities markets. Consequently, every time one of the dominant trade associations researched imposes a nonlegal sanction on a recalcitrant industry actor, it refuses access to an essential facility in violation of Article 102 TFEU.

Justifications for a violation of Article 102 TFEU relate to three different categories.[1222] The first category can be invoked when efficiency compensates for the distortion of competition.[1223] Despite some authors suggesting that Article 102 TFEU is more about the protection of economic freedom as opposed to protecting consumers, unlike Article 101(3) TFEU an efficiency defence should consist of the same conditions with reference to Article 101(3). Since the dominant trade associations researched lower transaction and distribution costs, the extrajudicial measures described above (with the exception of a refusal to deal with expelled members) can be justified when they are structured in the least restrictive manner possible.

The second category that allows for a justification requires that when the dominant trade associations research impose nonlegal sanctions on wrongdoers, and, hence, refuse access to an essential facility, they have done so to protect an "own" legitimate commercial interest.[1224] It appears that nonlegal sanctions cannot be justified by invoking such a defence be-

1222 See Part III, Chapter 11, C, IV.
1223 See Part III, Chapter 11, C, IV, 1.
1224 See Part III, Chapter 11, C, IV, 2.

cause of three reasons. First, these associations do not protect an own legitimate commercial interest, but that of their members. Second, protection of an own commercial interest has never been used by the Commission and the CJEU to justify similar exclusionary abuses. Third, the principle of proportionality has been infringed when a trade association does not organize a nonlegal sanction in the least restrictive manner. After extensive review, however, all three arguments can be refuted. First, given that the markets on which the associations and their members operate are closely related, it is conceivable to relax the terminology of an "own" legitimate commercial interest to also include that of such industry actors. Second, an absence of decisional practice by the Commission and case law of the CJEU does not entail that both institutions deny the presence of such a defence. Third, when a trade association imposes nonlegal sanctions in the least restrictive manner, the principle of proportionality has been complied with. Whichever line of reasoning is favoured by the Commission and the CJEU is open for debate. It is highly recommended to at least provide evidence to both institutions so that the second category of defence is satisfied. The third and last category of defence which explains that health and safety reasons in line with the CJEU's judgments in *Hilti* and *Tetra Pak* can justify an abuse, is not applicable with regard to the imposition of nonlegal sanctions on wrongdoers resulting in refusals of access to an essential facility.[1225]

In sum, nonlegal sanctions imposed by the trade associations researched on recalcitrant industry actors violate Article 102 TFEU when such measures are not structured in the least restrictive manner. Because wrongdoers lose access to the services of the relevant trade associations, these associations refuse access to an essential facility every time they impose a nonlegal sanction. Notwithstanding, it seems that the efficiency defence and to a lesser extent the protection of an own legitimate interest defence provide escape routes.

1225 See Part III, Chapter 11, C, IV, 3.