Part IV:
Summary, Conclusions and Best Practice Guidelines

https://doi.org/10.5771/9783748926245-429, am 19.11.2024, 12:51:44
Open Access – (cc) BY – https://www.nomos-elibrary.de/agb

https://doi.org/10.5771/9783748926245-429, am 19.11.2024, 12:51:44
Open Access – (cc) BY – https://www.nomos-elibrary.de/agb

Chapter 12: A Succinct Summary of the Research

A. A case study based review of present-day PLSs

History underpins that many forms of private initiatives, or early PLSs, existed prior to their modern-day encapsulation.[1226] Examples that support this observation can be found by reference to the system of self-regulation within the Oikos in classical Athens,[1227] the flexibility and risk allocation with regard to lease contracts in the agriculture sector in the Roman Empire,[1228] *Lex Mercatoria* in Middle Ages,[1229] and the nonlegal sanctioning of disloyal workers by industrialists from the late 18th through the 19th century in Europe (*i.e.* the Industrial Revolution).[1230] While some might argue that these precedents are merely anomalies and that opting out of the public legal system is a mere fallacy, in this day and age PLSs can be found in over 50 industries.[1231] In each of them, industry actors have established a trade association with the aim to protect their collective interest, specifically through the adoption of bylaws and rules applicable to all members, the formulation of standardized contracts and, most importantly, instead of being subject to adjudication in public courts, a system of specialized commercial arbitration to resolve disputes between members and sometimes between a member and a non-member.

This research has narrowed down these industries by focusing on six trade associations which represent the interests of their members that operate in specific commodities industries, such as the cotton, diamond, grain and feed, cocoa, metal, and oils and fats industry. These are the ICA, the DDC, GAFTA, the FCC, the LME and FOSFA. Interestingly, all of them have two crucial features in common: First, they have set up a system of specialized commercial arbitration and, second, they have introduced nonlegal sanctions to punish non-conformance with their awards. By doing so,

1226 See Part I, Chapter 1, A.
1227 See Part I, Chapter 1, A, I.
1228 See Part I, Chapter 1, A, II.
1229 See Part I, Chapter 1, A, III.
1230 See Part I, Chapter 1, A, IV.
1231 See Part I, Chapter 2, A.

https://doi.org/10.5771/9783748926245-429, am 19.11.2024, 12:51:44
Open Access – (cc) BY – https://www.nomos-elibrary.de/agb

these trade associations as well as their members and – arguably – non-members operate PLSs as substitutes for the public court system.[1232]

B. Similarities and differences between the trade associations researched

Before a statement on the limits of nonlegal sanctioning and the introduction of the central research question, this research has then provided a broad overview of the differences and similarities of these associations.[1233] This is because not all of the trade associations researched are structured in the same way and such a broad discussion is a necessary bulwark against unclarity relating to an incoherent conception of how they function, how they have set up a system of specialized commercial arbitration, the types of nonlegal sanctions available to ensure compliance with arbitral awards, and the reasons to impose such extrajudicial measures. This was done by focusing on seven distinct but related features. First, with regard to their legal structure, four out of six of the trade associations researched are UK-based not-for-profit "private limited liability companies by guarantee", whereas the other two are either a not-for-profit UK-based "private company limited by shares", or a not-for-profit New York-based "incorporated company".[1234] Second, with reference to entry requirements, all of the six trade associations researched have three entry conditions in place: First, candidates need to be able to substantiate some form of connection/experience to the commodities traded in the relevant industry.[1235] Second, candidates must file an application for membership, including an explanation, *inter alia*, under which membership category they fall. Third, candidates must pay an entry/registration fee. Furthermore, two of the trade associations researched require additional entry conditions such as the proposal by at least two members of the relevant trade association, a minimum of two years' experience in the particular commodities trade and an approval by the Board of Directors.

Third, concerning the structure and composition of the arbitration tribunal, all have introduced a system of specialized commercial arbitration which is applicable when disputes arise out of standardized contracts provided by these trade associations, even though one of these institutions

1232 See Part I, Chapter 3, A.
1233 See Part I, Chapters 2 and 3.
1234 See Part I, Chapter 3, B.
1235 See Part I, Chapter 3, C.

https://doi.org/10.5771/9783748926245-429, am 19.11.2024, 12:51:44
Open Access – (cc) BY – https://www.nomos-elibrary.de/agb

favours mediation over arbitration.[1236] With regard to first-tier arbitration, the trade associations can be divided into two groups.[1237] The first group consists of those trade associations which are solely responsible for appointing the arbitration panel of three qualified arbitrators. The second group of trade associations allows both parties to agree to sole arbitration, or allows either party to name an arbitrator. In this aspect, the naming of a third arbitrator differs: Some allow this arbitrator to be selected by the relevant trade association, whereas others either instruct the associations to do so when one party requests this and at least one arbitrator deems this necessary, or only permit the naming of a referee in the event of disagreement between the two arbitrators. Concerning second-tier arbitration, five out of the six trade associations researched provide a possibility of internal appeal to review an arbitral award.[1238] However, the number of arbitrators differs: a tribunal is typically comprised of five, three, or between two and four arbitrators. Regardless of whether first- or second-tier arbitration is applicable, the majority of trade associations require that arbitrators are members, have practical experience in the industry, and have completed exams.[1239]

Fourth, pertaining to the place or arbitration and applicable law, specialized commercial arbitration is held at the place in the country in which the trade association is established, its premises, or exceptionally where the parties subject to arbitration opt for.[1240] For the trade associations researched this is either England and Wales, or the premises of the trade association in London/Liverpool/New York. The applicable law is determined by the place of arbitration. Considering the trade associations researched, this is either England or New York. Fifth, with regard to the finality of arbitration or the possibility of (some) legal redress in public courts, the trade associations researched differ in terms of restrictiveness.[1241] Two UK-based trade associations only allow for judicial review by public courts when consensus between the parties is reached, or to obtain security of an arbitral award. This does not comply with the Arbitration Act 1996, because it goes below the standard provided in this law. This Act allows a broader basis to seek legal redress at a public court both prior to

1236 See Part I, Chapter 3, D.
1237 See Part I, Chapter 3, D, I.
1238 See Part I, Chapter 3, D, II.
1239 See Part I, Chapter 3, D, III.
1240 See Part I, Chapter 3, E.
1241 See Part I, Chapter 3, E, III.

https://doi.org/10.5771/9783748926245-429, am 19.11.2024, 12:51:44
Open Access – (cc) BY – https://www.nomos-elibrary.de/agb

the commencement of arbitral proceedings (*i.e.* when a defence to negate a stay of proceedings is justifiable and when the arbitration tribunal has no substantive jurisdiction) and after an arbitral award is provided (*i.e.* when there is a lack of substantive jurisdiction of the arbitration tribunal, when proceedings were unfair and –arguably – if the arbitration clause in the standardized agreements insufficiently refers to a broader arbitration agreement and when a full review of the arbitrator's factual and legal determinations is permissible). With regard to two other UK-based trade associations, this is more difficult to say, despite their explicitly permitting a review by public courts to ensure the enforcement of an award at the English High Court and to replace an arbitrator in first- or second-tier arbitration at the English Court. The reason is that both associations remain silent about the possibilities to ask for recourse in a public court. The remaining UK-based trade association is in conformity with the Arbitration Act 1996 and the New York based trade association probably corresponds with Article 75 of the CPLR and the FAA.

Sixth, concerning the types of nonlegal sanctions, six nonlegal sanctions can be detected in the bylaws and rules of the trade associations researched to punish wrongdoers for not complying with an arbitral award from specialized commercial arbitration.[1242] These are (i) the dissemination of the names of disloyal industry actors in blacklists; (ii) withdrawals of membership (iii) denials for re-admittance to membership for expelled members on the basis of an additional entry barrier; (iv) refusals to deal with an expelled member; (v) entering the premises of wrongdoers without a warrant; and although not an extrajudicial measure, but included for reasons of structure (vi) limiting adequate access to public courts prior to arbitral proceedings and after an award. Yet, not all the trade associations researched have included these measures and have structured them in the same way. With regard to the practice of blacklisting, all of the six trade associations have included this measure.[1243] The majority of them do so on a publicly available section of the trade association's website/on the wall of the trading hall, and one does this on a section of the website which is only accessible for its members. Furthermore, half of the trade associations researched are obligated to do so following non-compliance with an award, the other half "may" impose such a measure. Concerning the withdrawal of membership, five out of six of the trade associations researched permit

1242 See Part I, Chapter 3, G.
1243 See Part I, Chapter 3, G, I.

https://doi.org/10.5771/9783748926245-429, am 19.11.2024, 12:51:44
Open Access – (cc) BY – https://www.nomos-elibrary.de/agb

such an extrajudicial sanction.[1244] In this regard, the directors/Board of Directors/Council (whichever is the relevant body) may impose an expulsion and sometimes may or must, although the majority of associations do not, publish this decision on the website of the relevant trade association. Only one of the trade associations researched permits an internal appeal against a withdrawal of membership. With regard to subsequent denials for readmission to membership for expelled members on the basis of an additional entry barrier, only one trade association has barriers in place.[1245] These relate to the necessity to ask a Board of Directors to reinstate membership and the lapse of a period of two years following a withdrawal of membership. About a refusal to deal with an expelled member, only one of the trade associations researched can impose such a sanction following the dissemination of a member's name in a blacklist, or an expulsion.[1246] Along the same lines, but different given an absence of specific requirements, only one trade association has included the possibility to enter the premises of a wrongdoer without a warrant.[1247]

Seventh, considering the reasons for nonlegal sanctions, the trade associations researched must be divided into two groups.[1248] The first group comprises five of the six trade associations researched which represent members active in commodities markets in which futures play a significant role. The second group consists of one of the trade associations which represents its members active on a commodities market in which trust is even more important. With regard to the first group, to hedge this risk of usual price fluctuations, these associations provide standardized contracts/terms for their members (and sometimes even non-members) to exchange a specific quantity of commodities at a predetermined price and specified time in the future.[1249] This can be problematic if the buyer and the seller were to negotiate an average price and in the future, owing to a scarcity/abundance of the commodities, the latter/former industry actor would gain more profit by selling to another buyer/buying from a different seller. Then, a contract deviation cannot be excluded when expected legal fees do not offset this monetary advance. The enforcement of arbitral awards from specialized commercial arbitration by imposing nonlegal sanctions pro-

1244 See Part I, Chapter 3, G, II.
1245 See Part I, Chapter 3, G, III.
1246 See Part I, Chapter 3, G, IV.
1247 See Part I, Chapter 3, G, V.
1248 See Part I, Chapter 3, H.
1249 See Part I, Chapter 3, H, I.

https://doi.org/10.5771/9783748926245-429, am 19.11.2024, 12:51:44
Open Access – (cc) BY – https://www.nomos-elibrary.de/agb

vides a much better alternative. Another reason to explain why extrajudicial sanctioning is a better option for the first group of trade associations relates to the New York Convention. Because industry actors which contract on the basis of futures are often active in different States, if an awards need to be enforced in public court, the court located in one country must enforce the award and the court located in the other country must recognize that enforcement decision in accordance with the New York Convention. This procedure takes too long and bears the risk that the second court would refuse to recognize the enforcement decision. Nonlegal sanctioning does not raise such problems.

In consideration of the remaining trade association which represents the interests of industry actors in a market in which trust is essential, the reasons for nonlegal sanctioning to ensure compliance with arbitral awards from specialized commercial arbitration relate to the necessity to have trustworthy traders even more so than in relation to the first group of trade associations.[1250] The reasons are three-fold: First, the value of the commodities traded is very high. Second, commodities transactions are expeditious. Third, members are part of a close-knit society.

C. The antitrust limits of nonlegal sanctioning

By taking these features of the trade associations researched into account, much of the success of specialized commercial arbitration must be attributed to nonlegal sanctions. Without such extrajudicial measures, compliance with arbitral awards is insufficiently guaranteed. Furthermore, these measures are necessary to resolve the prisoner's dilemma of the adverse impact of opportunistic behaviour.[1251] However, nonlegal sanctions also negatively affect the commercial reputation (and sometimes even social standing) of targeted industry actors.[1252] Given that all of the trade associations researched are major players and represent the interests of industry actors that operate in commodities markets, nonlegal sanctions can result in a loss of access to these markets for such undertakings and/or individuals. Despite some viewing these measures as laudable, their relatively severe impact on wrongdoers when imposed by the trade associations researched and executed by their members and non-members could be banned under

1250 See Part I, Chapter 3, H, II.
1251 See Part I, Chapter 4, B.
1252 See Part I, Chapter 4, A.

https://doi.org/10.5771/9783748926245-429, am 19.11.2024, 12:51:44
Open Access – (cc) BY – https://www.nomos-elibrary.de/agb

the two most influential systems of competition law in the world, namely US Antitrust Law and EU Competition Law.[1253] In particular, the role of the three actors in the imposition and execution of nonlegal sanctions could violate Sections 1 of the Sherman Act when these nonlegal sanctions classify as contracts in restraint of trade or commerce among US states or foreign nations.[1254] Furthermore, the trade associations researched could be held accountable for their imposition of nonlegal sanctions when these measures qualify as anticompetitive monopolization, or an unlawful attempt to monopolize under Section 2 of the Sherman Act. Section 2 can also attribute liability for members of trade associations in the execution of extrajudicial enforcement when they fall within the description of illegal conspiracies to monopolize any part of the trade or commerce among US states or foreign nations. In addition, the role of the trade associations researched, their members and non-members in the imposition and execution of extrajudicial measures can classify as illegal anticompetitive agreements pursuant to Article 101 TFEU.[1255] Moreover, the imposition of such measures by the trade associations researched and the execution of these measures by their members could attribute liability for both actors when these measures qualify as abuses of dominant positions in violation of Article 102 TFEU.

Even though, to date, the FTC, US courts, the Commission, or the CJEU have yet to even considered the anti-competitiveness of nonlegal sanctioning by assessing the role of the three actors, this does not mean that the participation of all three actors in extralegal sanctioning is permissible.[1256] It may very well be possible that antitrust scrutiny and subsequent findings of illegality are just a matter of time. To overcome this lack of clarity, the research question was formulated as follows: "*Do the trade associations researched, their members and non-members, for their role in the imposition and execution of nonlegal sanctions, infringe US Antitrust Law and EU Competition Law and, if yes, can they justify these extrajudicial measures?*" Answering this question will clearly contribute to the general understanding of whether trade associations, their members and non-members involved in nonlegal sanctioning should fear they are in violation of competition law (*i.e.* guidance for compliance with competition law).[1257] Furthermore, it promotes

1253 See Part I, Chapter 4, C.
1254 See Part I, Chapter 4, A, I.
1255 See Part I, Chapter 4, A, II.
1256 See Part I, Chapter 4, D.
1257 See Part I, Chapter 5, D, I.

https://doi.org/10.5771/9783748926245-429, am 19.11.2024, 12:51:44
Open Access – (cc) BY – https://www.nomos-elibrary.de/agb

transparency for these three actors[1258] and will clarify what the actors that infringe US Antitrust Law and EU Competition Law must do to escape antitrust liability under both legal regimes by formulating best practice guidelines.[1259]

D. Restraint of trade or commerce under Section 1 of the Sherman Act

To reach the conclusion that the trade associations researched and their members and non-members, for their role in the imposition and execution of nonlegal sanctions, violate Section 1 of the Sherman Act, first, all three actors must qualify as a corporation or individual.[1260] Second, there must be a concurrence of wills. Third, it must be assessed whether the role of the three actors in the imposition and execution of nonlegal sanctions is inherently illegal or qualifies for a rule-of-reason defence. Fourth, it must be discussed whether anticompetitive extrajudicial measures can be justified under a rule-of-reason analysis.

With regard to the qualification as an individual or undertaking, the members of the trade associations researched and non-members easily fall within this description.[1261] Regardless of the fact that this is a bit more troublesome for these associations, they qualify as undertakings within the meaning of Section 1 of the Sherman Act. This follows from the 10th US Circuit Court of Appeals in *Gregory v. Port Bridger Rendezvous Association*, because they as well as their members are engaged in unilateral conduct, namely the imposition and execution of nonlegal sanctions.

Concerning the requirement that there must be a concurrence of wills, the imposition of nonlegal sanctions by the trade associations researched and the execution of these sanctions by their members and non-members must qualify as a contract, a combination in the form of trust or otherwise or a conspiracy.[1262] Whichever form of collusion is suitable to define the conduct of the three actors varies. The execution of nonlegal sanctions by members of the trade associations researched amounts to a contract, because this group of actors has agreed to the bylaws and rules of these asso-

1258 See Part I, Chapter 5, D, II.
1259 See Part I, Chapter 5, D, III.
1260 See Part II, Chapter 6, A.
1261 See Part II, Chapter 6, B, I.
1262 See Part II, Chapter 6, C.

https://doi.org/10.5771/9783748926245-429, am 19.11.2024, 12:51:44
Open Access – (cc) BY – https://www.nomos-elibrary.de/agb

ciations when obtaining membership.[1263] This is particularly true when members conduct trade under a standardized contract which refers to these bylaws and rules which include nonlegal sanctions. A non-member can also enter into a contract, but only to the extent this industry actor conducts trade with a member of a relevant trade association on the basis of a standardized contract provided by that relevant trade association. A combination in the form of trust is suitable to define the role of the trade associations researched in the imposition of nonlegal sanctions.[1264] While appearing to be not applicable at first glance, the word combination serves as a catch-all concept and includes the trade associations researched, since they protect the interests of their members by providing services on a not-for-profit basis. For non-members, such argumentation is not plausible. The third form of collusion, namely the existence of conspiracy, is inappropriate to describe the forms of collusion of the trade associations researched and their members.[1265] Non-members also do not typically fall within the constraints of this concept due to a lack of intent. However, for the purpose of this research, they have conspired.

With regard to the imposition of nonlegal sanctions by the trade associations researched and the execution of those measures by their members and non-members, the trade associations and their members – separately – violate Section 1 of the Sherman Act[1266] when disseminating of the names of wrongdoers in a blacklist,[1267] withdrawing membership,[1268] denying readmission to membership of expelled former members on the basis of an additional entry condition,[1269] and refusing to deal with ostracized members.[1270] These extrajudicial measures harm the commercial reputation (and sometimes social standing) of targeted industry actors and result in financial harm. The main reason is that the involvement of the trade associations researched and their members in the imposition and execution of nonlegal sanctions on disloyal industry actors forecloses their access to the relevant commodities markets. While some could argue that the extrajudicial measures described constitute per se violations of Section 1 of the Sherman Act, three arguments rebut this assertion in favour of a more le-

1263 See Part II, Chapter 6, C, I.
1264 See Part II, Chapter 6, C, II.
1265 See Part II, Chapter 6, C, III.
1266 See Part II, Chapter 6, D.
1267 See Part II, Chapter 6, D, I.
1268 See Part II, Chapter 6, D, II, 1.
1269 See Part II, Chapter 6, D, II, 2
1270 See Part II, Chapter 6, D, III.

https://doi.org/10.5771/9783748926245-429, am 19.11.2024, 12:51:44
Open Access – (cc) BY – https://www.nomos-elibrary.de/agb

nient approach, namely that the measures violate Section 1, but that their impact on targeted wrongdoers must be weighed against their generated procompetitive benefits (*i.e.* rule-of-reason analysis). First, the trade associations researched and their members classify as joint ventures, which are typically subject to a rule-of-reason analysis. Second, there has been a paradigm shift in how to treat collective boycotts. Whereas in the past the more stringent per se violation approach was favoured, the focus is now on the more lenient rule-of-reason analysis. Third, nonlegal sanctions appear necessary to operate a system of specialized commercial arbitration as efficiently as possible, a system which lowers transaction and distribution costs. Albeit that refusals to deal with ostracized members are very severe and it is quite obvious that the other extrajudicial measures are less restrictive, this measure that violates Section 1 of the Sherman Act was also discussed in a rule-of-reason analysis. In contrast, the participation of all three actors in entering the premises of a recalcitrant member of a trade association without a warrant and limiting adequate access to public courts prior to arbitral proceedings and after an award does not attribute liability to them under Section 1.

In deploying a rule-of-reason analysis to assess whether it is feasible that the pro-competitive benefits related to the imposition of nonlegal sanctions by the trade associations researched and the execution of those measures by their members outweigh the anticompetitive harm placed on targeted recalcitrant industry actors,[1271] it must be discussed for each nonlegal sanction – separately – that such a measure is reasonably necessary to ensure the success of specialized commercial arbitration which lowers transaction and distribution costs[1272] and in turn benefits total welfare and consumer welfare.[1273] With regard to the dissemination of the names of wrongdoers in a blacklist, even though this is the least restrictive extrajudicial measure to guarantee compliance with an arbitral award, since penalties and reprimands are ineffective, the majority of the trade associations researched and their members can structure it in a less intrusive way for targeted industry actors.[1274] Especially five safeguards are necessary to reduce the reputational harm placed on blacklisted industry actors. First, blacklists should not be made publicly available, but accessible for members only. Second, it would be better to allow a third party to collect, han-

1271 See Part II, Chapter 6, E.
1272 See Part II, Chapter 6, E, II.
1273 See Part II, Chapter 6, E, II, 1.
1274 See Part II, Chapter 6, E, II, 2, a.

https://doi.org/10.5771/9783748926245-429, am 19.11.2024, 12:51:44
Open Access – (cc) BY – https://www.nomos-elibrary.de/agb

dle and disseminate the names of wrongdoers in a blacklist, instead of a trade association which is often biased. Third, the dissemination of the names of disloyal industry actors in a blacklist should only occur after the lapse of clear deadlines and a final warning. Fourth, when the effect of blacklisting also targets an industry actor's social standing, more reluctance should be shown. Fifth, every blacklisted member should be given the opportunity to ask for an internal appeal to object to such decision. Once a trade association and, in particular, its members do not structure the method of blacklisting in the bylaws and rules of the trade association in keeping with these safeguards, the dissemination of the names of wrongdoers in a blacklist cannot be justified by referring to its necessity to ensure an effective system of specialized commercial arbitration which benefits consumer welfare and total welfare. Then, the negative harm placed upon blacklisted industry actors outweighs these benefits. In contrast, once a trade association and its members abide by these blacklists, Section 1 of the Sherman Act is not violated.

A withdrawal of membership, on the other hand, is a bit more stringent than the dissemination of the name of a disloyal industry actor in a blacklist.[1275] Despite its restrictiveness for targeted members of a relevant trade association, such an extrajudicial measure is reasonably necessary to ensure the effectiveness of specialized commercial arbitration which benefits total welfare and consumer welfare. However, as it stands, none of the trade associations researched and their members structure it in the least restrictive manner. This would necessitate 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 that the trade association has objective, reasonable and legitimate reasons for doing so which are based on fair and neutral criteria (*e.g.* do not favour certain members over others). In addition, expelled members should be given the chance to ask an internal appeal tribunal to review such a decision and must be advised of the possibility to request recourse in public courts. If these changes are introduced, the trade associations researched and their members, when imposing and executing withdrawals of membership, would not violate Section 1 of the Sherman Act.

With regard to denying readmission to membership of an expelled member, because a period of two years following a withdrawal of member-

1275 See Part II, Chapter 6, E, II, 2, b, i.

https://doi.org/10.5771/9783748926245-429, am 19.11.2024, 12:51:44
Open Access – (cc) BY – https://www.nomos-elibrary.de/agb

ship has not elapsed, or a Board of Directors declines readmission, the trade associations researched and their members cannot justify such an extrajudicial method of sanctioning if it is structured in this manner.[1276] However, if a two-year period is changed to a six-month standstill (or if this is combined with other misconduct, a one-year) period following nonpayment of an award, the trade associations researched and their members would comply with Section 1 of the Sherman Act. Similarly, when instead of a Board of Directors, an independent third-party panel (not connected with the relevant trade association) denies 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 future, a refusal to reobtain membership for expelled members is necessary to ensure the success of specialized commercial arbitration which benefits total welfare and consumer welfare and does not outweigh the harm placed on targeted industry actors. If preliminary approval pending a full examination is also provided, the trade associations researched and their members would not violate Section 1 of the Sherman Act.

A refusal to deal with an ostracized member in no way can be justified under a rule-of-reason analysis under Section 1 of the Sherman Act.[1277] Such a measure ensures that a targeted industry can no longer conduct business with members of the relevant trade association, which results in a dramatic loss of market access and tremendous reputational damage. This violates the principle of proportionality and is not necessary to safeguard an efficient system of specialized commercial arbitration which benefits total welfare and consumer welfare.

E. Monopolization of any part of trade or commerce under Section 2 of the Sherman Act

Another provision which is of importance to assess the anti-competitiveness of nonlegal sanctions can be found in Section 2 of the Sherman Act. Section 2 provides an alternative legal basis to hold the trade associations researched and their members accountable for a violation of this Section when the trade associations have unlawfully "monopolized" or have "at-

1276 See Part II, Chapter 6, E, II, 2, b, ii.
1277 See Part II, Chapter 6, E, II, 2, c.

https://doi.org/10.5771/9783748926245-429, am 19.11.2024, 12:51:44
Open Access – (cc) BY – https://www.nomos-elibrary.de/agb

tempted to monopolize" and their members have committed an illegal "conspiracy to monopolize".[1278]

It is without doubt that the trade associations researched hold monopoly positions in the relevant US markets for regulation and private ordering.[1279] Despite nonlegal sanctions being felt by targeted disloyal industry actors active on adjacent second-tier commodities markets, on the basis of the theory of monopoly leveraging, this does not matter.[1280] The trade associations researched participate in illegal monopolies insofar as they disseminate the names of wrongdoers in blacklist, withdraw membership, deny readmission to membership of an expelled member if a two-year period following a withdrawal of membership has not elapsed, or a Board of Directors of the relevant trade association refuses to readmit the former member, and instruct members to refuse to deal with an ostracized member.[1281] When these measures are not structured in a similar manner as compared to the rule-of-reason analysis under Section 1 of the Sherman Act, they do not comply with the four theories to measure such harm.[1282] These are the effects-balancing test, the profit sacrifice and no-economic-sense tests, the equally efficient competitor test and the disproportionality test. Furthermore, with regard to withdrawals of membership and refusals on the basis of additional entry conditions, the trade associations researched refuse access to an essential facility.[1283]

However, in the unlikely event that at least one of the trade associations researched does not possess a monopoly position, any anticompetitive attempt to monopolize is also illegal under Section 2 of the Sherman Act.[1284] This concept serves as a safety net when the required amount of monopoly power is not reached. As a requirement, three conjunctive elements need to be fulfilled by such a residual trade association. These are: the existence of anticompetitive conduct,[1285] a specific intent to monopolize,[1286] and a dangerous probability of achieving monopoly power. [1287] Whereas the first two requirements are without any doubt met, the same cannot be said

1278 See Part II, Chapter 7, A.
1279 See Part II, Chapter 7, B, I, 2 and 3.
1280 See Part II, Chapter 7, B, II, 1.
1281 See Part II, Chapter 7, B, II, 2.
1282 See Part II, Chapter 7, B, II.
1283 See Part II, Chapter 7, B, II, 2, b, i and ii.
1284 See Part II, Chapter 7, C.
1285 See Part II, Chapter 7, C, I.
1286 See Part II, Chapter 7, C, II.
1287 See Part II, Chapter 7, C, III.

https://doi.org/10.5771/9783748926245-429, am 19.11.2024, 12:51:44
Open Access – (cc) BY – https://www.nomos-elibrary.de/agb

about the last requirement. This is because even though it is presumed that any residual trade association has a near monopoly position in the relevant market for regulation and private ordering concerning the US territory, when this association imposes anticompetitive nonlegal sanctions, the effects are not felt in the same market, but by disloyal industry actors operating on an adjacent second-tier relevant commodities market. This is where the theory of monopoly leveraging plays a central role. This theory requires that in such a situation, the near monopoly position in the first market must create a dangerous probability of a monopoly in the second market. While it is unclear whether such a position is held on the second market, it depends on whether its members are dependent on the services of a relevant residual trade association to speak of a near monopoly position. If yes, the dangerous probability of achieving monopoly power is satisfied and the residual trade association can be held accountable for an illegal attempt to monopolize pursuant to Section 2 of the Sherman Act when imposing anticompetitive nonlegal sanctions.

When the trade associations researched impose nonlegal sanctions on disloyal industry actors, their members can also be held accountable for violation of Section 2 of the Sherman Act.[1288] This group of actors has then conspired to monopolize, because they have entered into a written agreement,[1289] have a specific intent to monopolize,[1290] and took part in overt acts in furtherance of the agreement.[1291]

Comparable to Section 1 of the Sherman Act, a similar rule-of-reason analysis can exempt the trade associations researched and their members for a violation of Section 2 of the Sherman Act. This entails that with regard to the dissemination of the names of wrongdoers in blacklists, blacklists should not be made publicly available, but accessible for members only. Furthermore, it would be better to allow a third party to collect, handle and disseminate the names of wrongdoers in a blacklist, after the lapse of clear deadlines and a final warning, instead of a trade association which is often biased. Last, every blacklisted member should be given the opportunity to ask for an internal appeal to object to such a decision and when blacklisting also targets an industry actor's social standing, more reluctance should be shown.

1288 See Part II, Chapter 7, D.
1289 See Part II, Chapter 7, D, I.
1290 See Part II, Chapter 7, D, II.
1291 See Part II, Chapter 7, D, III.

https://doi.org/10.5771/9783748926245-429, am 19.11.2024, 12:51:44
Open Access – (cc) BY – https://www.nomos-elibrary.de/agb

For withdrawals of membership, to ensure that trade associations and their members escape antitrust liability under Section 2 of the Sherman Act, this would necessitate 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 which are based on fair and neutral criteria (*e.g.* do not favour certain members over others). Furthermore, expelled members should be given the chance to ask an internal appeal tribunal to review such a decision and must be advised of the possibility to request recourse in public courts.

Pertaining to denying readmission to membership of expelled members for the reasons that a period of two years following a withdrawal of membership has not elapsed, or a Board of Directors declines to readmit the former member, any trade association as well as their members should implement the following changes. Instead of empowering a Board of Directors to refuse a reapplication for membership, an independent third-party panel (not connected with the relevant trade association) should be tasked with doing this by taking clearly defined, equally applicable, transparent, non-discriminatory criteria into account, such as (i) the current liquidity status of the former member; (ii) an unwillingness to pay the penalty for non-compliance with the arbitral award; and (iii) evidence of probable disloyalty in the future. In addition, a two-year period should be changed to a six-month standstill (or if this is combined with other misconduct, a one-year) period. Refusals to deal with expelled members can never be justified under Section 2 of the Sherman Act.

F. The applicability of Articles 101 and 102 TFEU

To assess whether the trade associations researched, their members and non-members for their role in the imposition and execution of nonlegal sanctions on disloyal industry actors for non-compliance with an award can be held accountable under the two most important provisions of EU Competition Law, namely Articles 101 and 102 TFEU, these actors must trigger their scope of application.[1292] As a requirement, a legal boundary and multiple economic boundaries must be fulfilled.

1292 See Part III, Chapter 8, B.

https://doi.org/10.5771/9783748926245-429, am 19.11.2024, 12:51:44
Open Access – (cc) BY – https://www.nomos-elibrary.de/agb

The legal boundary is exceeded by the members of the trade associations researched and non-members pursuant to Articles 101 and 102 TFEU.[1293] 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 private individuals. Then, the legal boundary is not met. With regard to the trade associations researched, they are associations of undertakings within the meaning of Article 101 TFEU.[1294] However, this concept does not exist pertaining to Article 102 TFEU. Therefore, it must be established that the trade associations researched are 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 specialized commercial arbitration guaranteed under the threat of 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 accommodate the needs of globally active industry actors that operate in specific commodities markets. Hence, they are detached from the State and operate within a PLS. In addition, due to the harmful effects for extrajudicially sanctioned disloyal industry actors, 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.

Whether the three actors exceed the economic boundaries (*i.e.* the concept of the effect on inter-State trade) is a more difficult task for the Commission.[1295] The main reason is that this EU Competition Law enforcement institution must consider the interpretation of this concept given by the CJEU which is profoundly less specific with regard to the appreciability standard.[1296] 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 to hinder trade.[1297]

1293 See Part III, Chapter 8, C, I.
1294 See Part III, Chapter 8, C, II.
1295 See Part III, Chapter 8, D.
1296 See Part III, Chapter 8, D, I.
1297 See Part III, Chapter 8, D, II.

https://doi.org/10.5771/9783748926245-429, am 19.11.2024, 12:51:44
Open Access – (cc) BY – https://www.nomos-elibrary.de/agb

As a requirement, according to the Guidelines on Inter-State Trade, three elements need to be fulfilled to trigger the scope of application of Articles 101 and 102 TFEU. First, the Commission must establish that the three groups of actors are engaged in cross-border activity.[1298] It deserves no further explanation that this requirement is fulfilled. Second, the imposition and execution of nonlegal sanctions must be capable of having a direct or indirect, actual or potential, influence on the pattern of trade between Member States.[1299] Given that little evidence is needed to satisfy this requirement and only once in the history of the CJEU was this requirement not fulfilled, nonlegal sanctioning by the trade associations researched, their members and non-members can potentially influence Community trade. When a member of a trade association gets punished for disloyal behaviour, this will result in a loss of market access and, hence, inter-State trade is impeded. Furthermore, member undertakings of the trade associations researched can resolve disputes in the most efficient manner via specialized commercial arbitration which lowers transaction and distribution costs. This also has an influence on Community trade.

Third, the last concept to fall within the reach of the effects on inter-State trade doctrine necessitates that the trade associations researched, their members and non-members fulfil the "appreciability" (*i.e.* de minimis) requirement.[1300] With regard to Article 102 TFEU such an examination is not necessary, because the Commission must consider this criterion under the dominance requirement. However, pertaining to Article 101 TFEU, the concept of appreciability is crucial which is described in the De Minimis Notice. Here, a distinction must be made between restrictions by object and by effect in order to establish when nonlegal sanctions imposed by the trade associations researched and executed by their members and non-members satisfy this requirement.[1301]

If an extrajudicial measure is classified as a restriction by object, the appreciability requirement is automatically satisfied. This follows from the Commission's decision in *Expedia*. Conversely, when a nonlegal sanction has an effect on trade this is not so obvious. The Commission must then examine whether the members of the trade associations researched possess – jointly – more than 10% market shares in each relevant commodities on the territory of the EU. In addition, they must generate more than 40 mil-

1298 See Part III, Chapter 8, D, III, 1.
1299 See Part III, Chapter 8, D, III, 2.
1300 See Part III, Chapter 8, D, III, 3.
1301 See Part III, Chapter 8, D, III, 3, a.

https://doi.org/10.5771/9783748926245-429, am 19.11.2024, 12:51:44
Open Access – (cc) BY – https://www.nomos-elibrary.de/agb

lion euro annual turnover on that market. Notwithstanding an absence of evidence, the members of the trade associations researched, with the exception of the DDC, satisfy both thresholds. 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. With regard to the researched trade associations, even though they operate on the EU markets for regulation and private ordering and not on the second-tier adjacent commodities markets on which their extrajudicial measures take effect, these associations of undertakings meet the appreciability requirement. Any other conclusion would deprive the Commission of conducting an antitrust scrutiny.

In sum, nonlegal sanctions imposed by the trade associations researched and executed by their members and non-members trigger the scope of application of Articles 101 and 102 TFEU. This is because the legal and economic boundaries are satisfied. Put differently, the Commission is empowered to carry out an antitrust review to ensure that both Articles vis-à-vis guaranteeing market freedom and benefiting consumers are complied with.

G. Anticompetitive agreement under Article 101(1) TFEU

Every time one of the trade associations researched imposes a nonlegal sanction on a wrongdoer, that trade association as well as its members and non-members risk transgressing the bounds of the Article 101(1) TFEU. Despite the fact that, to date, neither the Commission nor the CJEU has ever ruled on the anti-competitiveness of extrajudicial measures to punish disloyal industry actors for not complying with an arbitral award, many parallels exist between this situation and prior decisional practice and guidance given by them. In more detail, to violate Article 101(1) TFEU two conditions must be satisfied: first, the trade associations researched, their members and non-members must have colluded. Second, their participation in nonlegal sanctions must violate Article 101(1) by object or effect. [1302]

With regard to the requirement of collusion, it is sufficient to qualify as a decision by an association of undertakings within the meaning of Article 101(1) TFEU when one of the trade associations researched imposes a non-

1302 See Part III, Chapter 9, A.

https://doi.org/10.5771/9783748926245-429, am 19.11.2024, 12:51:44
Open Access – (cc) BY – https://www.nomos-elibrary.de/agb

legal sanction on a wrongdoer that operates in a specific commodities market.[1303] This is because such a measure (i) comes from the governing bodies of a trade association; (ii) is formal (*i.e.* the bylaws); and (iii) imposes a certain market economic behaviour on its members. Following imposition of a nonlegal sanction by one of the trade associations researched, due to their role in the execution of this measure, members have also cooperated. Their faithful expression of the joint intention in writing classifies as an agreement between undertakings.[1304] Along the same lines, when a non-member conducts trade with a member of a relevant trade association on the basis of a standardized contract which is linked to a broader arbitration agreement which includes that nonlegal sanctions and the member is extrajudicially sanctioned, the non-member has also participated in the agreement between undertakings. However, if a trade association imposes a nonlegal sanction on a wrongdoer, also non-members that have not entered into a standardized contract with a member of a trade association have a role in its enforcement. Given that they break all commercial ties with a targeted industry actor, some form of collaboration exists, without having reached the stage than an agreement has been concluded. [1305] This qualifies as a concerted practice within the meaning of Article 101(1) TFEU.

With regard to the second requirement, it is necessary to establish that each nonlegal sanction violates Article 101(1) by object or effect.[1306] This dichotomy is of importance, because only the latter less severe form of restriction is eligible for a justification under Article 101(3) TFEU, whereas the former form of violation, which is about when an agreement by its nature and all readily ascertainable circumstances is apt to seek effect, does not. With regard to the dissemination of the names of wrongdoers in a blacklist, when one of the trade associations researched imposes this measure, a restriction by effect can be found.[1307] This follows from the ECJ's judgment in *Asnef-Equifax/Ausbanc*, because despite factual differences,[1308] these trade associations possess high levels of market power in the EU markets for regulation and private ordering and can oust a targeted industry actor from the relevant second-tier adjacent commodities market.[1309] In ad-

1303 See Part III, Chapter 9, B, II.
1304 See Part III, Chapter 9, B, I.
1305 See Part III, Chapter 9, B, III.
1306 See Part III, Chapter 9, C.
1307 See Part III, Chapter 9, C, II, 1.
1308 See Part III, Chapter 9, C, II, 1, c.
1309 See Part III, Chapter 9, C, II, 1, a.

https://doi.org/10.5771/9783748926245-429, am 19.11.2024, 12:51:44
Open Access – (cc) BY – https://www.nomos-elibrary.de/agb

dition, the Commission's and CJEU's judgments in *Compagnie Maritime Belge* provide guidance, following which (despite differences) the practice of blacklisting has exclusionary effects, since it ensures that targeted wrongdoers can no longer compete with other industry actors active on the relevant market.[1310] The members of the trade associations researched can also be held accountable for a violation of Article 101(1) TFEU by effect insofar as these trade associations disseminate the names of wrongdoers in a blacklist. [1311] Because of the competence of the members of a trade association to abolish a blacklisting clause in the bylaws of these associations, when the members do not, they execute an illegal collective boycott. Non-members cannot be held accountable for a violation of Article 101(1).[1312]

With regard to a withdrawal of membership, any expulsion imposed by one of the trade associations researched amounts to an illegal boycott, because the expulsion prevents market access and forecloses future commerce through the signalling of untrustworthiness of other merchants.[1313] Furthermore, the majority of the trade associations researched provide insufficient recourse to public courts following an expulsion and have no internal appeal procedure in place. All things combined, a withdrawal of membership violates Article 101(1) TFEU by effect. Similarly, their members also violate Article 101(1) for their role in the execution of this measure.[1314] When they abstain from abolishing a withdrawal of membership clause in the bylaws of the relevant trade association, they participate 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 of one of the trade associations researched.[1315]

With reference to the denial of readmission to membership after a withdrawal on the basis of an additional entry condition, decisional practice and guidance of the Commission and case law of the CJEU explain that 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.[1316] When one of the trade associations researched imposes a lapse of a two-year period

1310 See Part III, Chapter 9, C, II, I, b.
1311 See Part III, Chapter 9, C, II, 2.
1312 See Part III, Chapter 9, C, II, 3.
1313 See Part III, Chapter 9, C, III, 1, a.
1314 See Part III, Chapter 9, C, III, 1, b.
1315 See Part III, Chapter 9, C, III, 1, c.
1316 See Part III, Chapter 9, C, III, 2, a.

https://doi.org/10.5771/9783748926245-429, am 19.11.2024, 12:51:44
Open Access – (cc) BY – https://www.nomos-elibrary.de/agb

following an expulsion, or permits its Board of Directors to arbitrarily deny a reapplication for membership, this rule is not complied with. In combination with an absence of an internal appeal possibility against an expulsion decision and given that reasons for a denial are not given, this association violates Article 101(1) TFEU by effect. When its members did not abolish a clause which empowers the relevant trade association to deny a reapplication for membership on the basis of an additional entry condition, they participate in an illegal group boycott in violation of Article 101(1) TFEU by effect.[1317] Non-members do not violate this provision.

Concerning the instruction of a trade association to its members not to conduct business with an ostracized member, following the Commission's decision in *Centraal Bureau voor de Rijwielhandel*, this instruction violates Article 101(1) TFEU by object.[1318] Violation of this provision can then also be attributed to the members of such a trade association, because without abolishing a clause which permits such an association from instructing its members to refuse to deal with an expelled member, they are also liable.[1319] Non-members do not violate Article 101(1) TFEU. About entering the premises of a recalcitrant industry actor without a warrant, the trade associations researched, their members and non-members do not violate Article 101(1) TFEU.[1320] This is irrespective of the fact that such a measure can hamper the reputation of a targeted wrongdoer. Taking into account limiting adequate access to public courts prior to arbitral proceedings and after an award, the trade associations researched can be held accountable for a violation of Article 101(1) TFEU by effect.[1321] This is because the requirement that arbitration must not take away the possibility of recourse to national courts, as formulated by the Commission in its notice on the *FIA* case and its guidance on *FIFA*, is not complied with by all the trade associations researched. Two trade associations are clearly in violation of this rule, two trade associations remain silent and one trade association complies with the rule. Anytime a trade association does not offer recourse to public courts, its members can also be held accountable for a violation of Article 101(1) TFEU by effect. This is because they possess the competence to change the bylaws of a trade association and guarantee an ad-

1317 See Part III, Chapter 9, C, III, 2, b.
1318 See Part III, Chapter 9, C, IV, 1.
1319 See Part III, Chapter 9, C, IV, 2.
1320 See Part III, Chapter 9, C, V.
1321 See Part III, Chapter 9, C, VI.

https://doi.org/10.5771/9783748926245-429, am 19.11.2024, 12:51:44
Open Access – (cc) BY – https://www.nomos-elibrary.de/agb

equate access to public courts. Non-members clearly do not violate Article 101(1).

Unlike Section 1 of the Sherman Act, a full-fledged rule-of-reason balancing exercise is not permitted at this stage with regard to restrictions by effect. [1322] The reasons are two-fold: First, Article 101(1) TFEU does not contain exemption grounds in its wording. Second, the Commission in its 1999 White Paper and the CJEU in *Metropole*, *van den Bergh* and *O2* explains that Article 101(1) TFEU should be interpreted grammatically and does not leave room for any form of balancing.[1323] Even though the ECJ in *Wouters* and *Meca Medina* ruled that legal and economic factors must be taken into account when an agreement restricts Article 101(1) TFEU "by effect", this research has exclusively considered justification grounds with regard to the dissemination of the names of wrongdoers in a blacklist, withdrawals of membership, denials of readmission to membership following an expulsion on the basis of an additional entry barrier, and limiting adequate access to public courts prior to arbitral proceedings under Article 101(3) TFEU.

H. Exemption under Article 101(3) TFEU

Any agreement in violation of Article 101(1) is automatically null and void pursuant to Article 101(2) TFEU, unless the safe harbour laid down in the RDBER, the SABER, or the justification embodied in Article 101(3) TFEU is applicable.[1324] This entails that for each anticompetitive nonlegal sanction, when it is imposed by one of the trade associations researched and executed by their members, it must be established whether both actors can persuade the Commission (and, when relevant, in appeal the CJEU) that their role can be exempted.

Even though the RDBER and the SABER are not appropriate to exculpate the behaviour of the trade associations researched and their members, since 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,[1325] this is different in relation to the balancing clause enshrined in Article 101(3) TFEU, which exonerates anticompetitive

1322 See Part III, Chapter 9, D.
1323 See Part III, Chapter 9, D, II.
1324 See Part III, Chapter 10, A.
1325 See Part III, Chapter 10, B.

https://doi.org/10.5771/9783748926245-429, am 19.11.2024, 12:51:44
Open Access – (cc) BY – https://www.nomos-elibrary.de/agb

agreements/extrajudicial measures that infringe Article 101(1) TFEU by effect and bring improvements to the production or distribution of goods, or promote technical or economic progress.[1326] While it may appear that nonlegal sanctions are reasonably necessary to ensure an efficient system of specialized commercial arbitration which in turn benefits economic and consumer welfare, each measure must satisfy the four-tier test enshrined in Article 101(3) TFEU.

The first requirement that must be satisfied refers to the notion of "efficiency gains".[1327] This necessitates that the trade associations researched and their members for their role in the dissemination of the names of wrongdoers in a blacklist, withdrawals of membership, denials of readmission to membership of former members on the basis of an additional entry condition following an expulsion, and limiting adequate access to public courts prior to arbitral proceedings and after an award reduce transaction costs. Fortunately, establishing this is not complicated for two reasons: first, all of these extrajudicial measures achieve appreciable objective advantages, because without them specialized commercial arbitration would be ineffective.[1328] Second, there is also a sufficient link between nonlegal sanctions and lowered transaction costs.[1329] Subsequently, the first requirement under Article 101(3) TFEU is fulfilled.

The second requirement that must be satisfied pertains to the concept of a "fair share for consumers".[1330] This requires that consumers must have sufficiently benefitted from the lowered transaction costs. Fortunately, also this condition is rather straightforward. Without the nonlegal sanctions which infringe Article 101(1) TFEU by effect, higher prices will be passed on to end consumers.[1331] The reasons are three-fold: first, the cost of doing business for members of the trade associations researched increases in the absence of 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 not likely. Given that nonlegal sanctions lower the distribution costs of consumers, the trade associations researched and their members fulfil the second requirement pursuant to Article 101(3) TFEU.

1326 See Part III, Chapter 10, C.
1327 See Part III, Chapter 10, C, I.
1328 See Part III, Chapter 10, C, I, 1.
1329 See Part III, Chapter 10, C, I, 2.
1330 See Part III, Chapter 10, C, II.
1331 See Part III, Chapter 10, C, II, 3.

https://doi.org/10.5771/9783748926245-429, am 19.11.2024, 12:51:44
Open Access – (cc) BY – https://www.nomos-elibrary.de/agb

The third requirement that must be fulfilled necessitates that the extrajudicial measures which restrict Article 101(1) TFEU by effect are indispensable to lower transaction costs.[1332] Here, each nonlegal sanction must be reasonably necessary to achieve this efficiency and must be structured in the least restrictive manner. Obviously, this bears similarities with the rule-of-reason analysis under Section 1 of the Sherman Act pertaining to the nonlegal sanctions which have the effect to restrict this provision. With regard to dissemination of the names of disloyal industry actors in a blacklist, the majority of the trade associations researched and their members can structure it in a less intrusive way for blacklisted disloyal industry actors, despite such a measure being the least restrictive nonlegal sanction to ensure the success of specialized commercial arbitration.[1333] Especially five safeguards are necessary to reduce the reputational harm placed on blacklisted industry actors. First, blacklists should not be made publicly available, but accessible for members only. Second, it would be better to allow a third party to collect, handle and disseminate the names of wrongdoers in a blacklist, instead of a trade association which is often biased. Third, the dissemination of the names of disloyal industry actors in a blacklist should only occur after the lapse of clear deadlines and a final warning. Fourth, when the effect of blacklisting also targets an industry actor's social standing, more reluctance should be shown. Fifth, every blacklisted member should be given the opportunity to ask for an internal appeal to object to such a decision. When the trade associations researched and their members disseminate the name of a wrongdoer in a blacklist without respecting these safeguards, both actors most likely do not fulfil the third requirement under Article 101(3) TFEU. In contrast, when they adhere to these changes it is likely that the practice of blacklisting is indispensable to lower transaction costs. IN this regard, a comparison with online evaluation forums is unfounded.[1334]

In relation to withdrawals of membership, none of the trade associations researched and their members organize expulsions in a manner which is indispensable to lower transaction costs.[1335] This is because there is a less restrictive way of structuring this nonlegal sanction. This is done by setting up a procedure based on clearly defined, transparent, non-discriminatory reviewable criteria that allows for cumulative penalties enforceable in na-

1332 See Part III, Chapter 10, C, III.
1333 See Part III, Chapter 10, C, III, 1.
1334 See Part III, Chapter 10, C, III, 1, a.
1335 See Part III, Chapter 10, C, III, 2, a.

https://doi.org/10.5771/9783748926245-429, am 19.11.2024, 12:51:44
Open Access – (cc) BY – https://www.nomos-elibrary.de/agb

tional courts, with a final threat of a suspension, or in the worst case scenario when non-compliance is combined with other misconduct, an indefinite expulsion provided that the trade association has objective, reasonable and legitimate reasons for doing so which are based on fair and neutral criteria (*e.g.* do not favour certain members of others). Furthermore, expelled members should be given the possibility of an internal appeal against an expulsion decision and must be advised of the possibility to seek recourse in public courts. When the trade associations researched and their members introduce these changes, any withdrawal of membership fulfils the third requirement under Article 101(3) TFEU.

With regard to denying readmission of former expelled members to membership when a two-year period has not elapsed following a withdrawal of membership, or when the relevant Board of Directors of a trade association denies a reapplication for membership, both barriers are not indispensable to lower transaction costs. Instead of allowing a Board of Directors to capriciously deny a reapplication for membership, a refusal 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.[1336] Furthermore, preliminary approval pending a full examination should be introduced. A waiting period of two years is also 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 adhered to, any trade association which refuses a reapplication for membership of an expelled member on the basis of an additional entry barrier as well as its members comply with the third requirement pursuant to Article 101(3) TFEU.

In consideration of 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.[1337] If parties could go to a public court in both scenarios, this could make arbitration merely a hollow concept. Yet, access to public courts must be at least equal to the standards provided in the Arbitration Act 1996. If this is the case, the third requirement pursuant to Article 101(3) TFEU is fulfilled.

The fourth and last requirement that must be complied with requires that the nonlegal sanctions imposed by the trade associations researched

1336 See Part III, Chapter 10, C, III, 2, b.
1337 See Part III, Chapter 10, C, III, 3.

https://doi.org/10.5771/9783748926245-429, am 19.11.2024, 12:51:44
Open Access – (cc) BY – https://www.nomos-elibrary.de/agb

and executed by their members are not able to substantially eliminate competition.[1338] While efficiency outweighs the harm placed on disloyal industry actors by applying the theory of utilitarianism and given that there is a small likelihood that competition on the market will be reduced, this requirement is satisfied. All of the extrajudicial measures ensure the long-term success of specialized commercial arbitration, which lowers transaction costs, and a weakened degree of competition prior to the adoption of the extrajudicial measures is unlikely.

In sum, the trade associations researched and their members for their role in the imposition and execution of nonlegal sanctions can satisfy the four conditions pursuant to Article 101(3) TFEU insofar as they are structured in the least restrictive manner.[1339] However, as they are currently used, it is unlikely that the Commission and in appeal the CJEU would not consider them as anti-competitiveness. If so, they are null and void pursuant to Article 101(2) TFEU.

I. Abuse of a dominant position under Article 102 TFEU

Regardless of the fact that the members of the trade associations researched cannot be held accountable for their role in the execution of nonlegal sanctions, especially since they do not hold collective dominant positions (*i.e.* oligopolies) in the second-tier commodities markets, the same cannot be said for the trade associations themselves.[1340] This group of actors can infringe the two-tier test laid down in Article 102 TFEU which requires the presence of dominance and an abuse of a dominant position. Yet, four difficulties prevent an easy review. First, it is unsure what the sizes of the market shares are required to prove dominance for the trade associations. Second, it is not easy to establish that the imposition of nonlegal sanctions qualifies as exclusionary abuse. Third, it is questionable whether potential dominance held by the trade associations researched in the EU markets for regulation and private ordering and the abuse felt on adjacent second-tier commodities markets is sufficiently causal. Fourth, Article 102 TFEU does not contain grounds for justification, despite the fact that the decisional practice of and guidance given by the Commission and the case law of the CJEU permit defences to justify an abuse of a dominant position pursuant

1338 See Part III, Chapter 10, C, IV.
1339 See Part III, Chapter 10, C, V.
1340 See Part III, Chapter 11, A.

https://doi.org/10.5771/9783748926245-429, am 19.11.2024, 12:51:44
Open Access – (cc) BY – https://www.nomos-elibrary.de/agb

to Article 102. Solving these uncertainties at EU level is crucial to establish the imposition of nonlegal sanctions by the trade associations researched is illegal under Article 102 TFEU. Subsequently, three components must be addressed. These are the existence of: (i) dominance; (ii) an exclusionary abuse; and (iii) possible justifications.

With regard to the establishment of dominance for the trade associations researched, it is necessary to establish whether they hold dominant positions (*i.e.* a high degree of market power) in the EU markets for regulation and private ordering.[1341] This must be done by calculating market shares in line with the ECJ judgments in *United Brands* and *Hoffman-La Roche*.[1342] Albeit that economic models are difficult to apply, owing to the worldwide (and, therefore, EU-wide) importance of the trade associations researched, with the exception of the DDC, the requirement of dominance is satisfied.[1343] Two of the trade associations researched, the LME and FOSFA, hold more than 80% global market shares in the relevant EU markets for regulation and private ordering, which are interchangeable with EU market shares. As a result, they satisfy the dominance requirement in line with the CFI judgment in *Hilti*. The remaining three trade associations either hold more than 50% global market shares (the ICA), which is equivalent to EU market shares, or do not provide any evidence of global and EU market shares (GAFTA and the FCC), despite being the only actual trade association. Because there is a strong presumption of dominance, especially since the ECJ's judgment in *Akzo* and the Commission's Discussion Paper are adhered to, dominance can be established.

With reference to the second requirement, the ECJ's judgments in *Hoffman La Roche*, *Michelin I* and the CFI in *Michelin II* and *British Airways* provide guidance[1344] to assess whether the nonlegal sanctions imposed by the dominant trade associations researched are abusive pursuant to Article 102 TFEU.[1345] The CJEU focuses on exclusionary behaviour on the basis of a well-known test, which consists of three elements. First, conduct must be capable of influencing the structure of the market. Second, there cannot be recourse to methods different from those which condition normal competition in products or services on the basis of the transactions of commercial operators. Third, conduct must not be able to have or capable of having

1341 See Part III, Chapter 11, B.
1342 See Part III, Chapter 11, B, I.
1343 See Part III, Chapter 11, B, III.
1344 See Part III, Chapter 11, C, I.
1345 See Part III, Chapter 11, C.

https://doi.org/10.5771/9783748926245-429, am 19.11.2024, 12:51:44
Open Access – (cc) BY – https://www.nomos-elibrary.de/agb

the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition. Irrespective of the importance of this tripartite test, nonlegal sanctions do not really fit in the approach of this test. They much more qualify as denials of an essential facility.[1346] This is because when dominant trade associations impose nonlegal sanctions on a wrongdoer, access to the services of these associations is made more difficult, or impossible, depending on the type of extrajudicial measure. Even though the essential facility doctrine has never been employed by the Commission and the CJEU under similar circumstances, the imposition of such measures qualifies as denial of an essential facility when three requirements are fulfilled. The first requirement necessitates that the services offered by these associations must fall within the definition of a facility.[1347] Whereas from an older perspective, the focus was on airports, railways, seaports, intangible networks and tangible networks, in more recent judgments such as the ECJ's ruling in *IMS Health* and the Commission's and CFI's rulings in *Microsoft* the definition of what constitutes a facility has been broadened. Subsequently, it is likely that the services of the dominant trade associations researched qualify as a facility. In addition, two arguments support this conclusion. First, the content of a norm (here: the wording of a facility) can change over time which entails that previously unknown situations could fall within the scope of a facility. Second, it is unwise to prevent the Commission and the CJEU from applying a useful tool to establish an infringement of Article 102 TFEU by using a more restrictive understanding of the term facility.

The second requirement that must be satisfied under the essential facility doctrine necessitates that the services offered by the dominant trade associations researched are indispensable, essential, or objectively necessary.[1348] As a requirement, nonlegal sanctions must cause insuperable barriers to obtain access to an essential facility for targeted wrongdoers, or a serious, permanent and inescapable competitive handicap (*i.e.* trading on non-economic grounds) for such industry actors. Given the importance of membership of the trade associations researched in the wake of insufficient alternatives, this is not problematic. The facilities/services offered by the trade associations researched are essential, indispensable, or objectively necessary.

1346 See Part III, Chapter 11, C, II.
1347 See Part III, Chapter 11, C, II, 1.
1348 See Part III, Chapter 11, C, II, 2.

https://doi.org/10.5771/9783748926245-429, am 19.11.2024, 12:51:44
Open Access – (cc) BY – https://www.nomos-elibrary.de/agb

The third requirement demands proof of an elimination of competition in a substantial part of the internal market.[1349] Here, two approaches provide guidance. First, the rigid approach, which entails that all competition must be eliminated. Second, the more flexible approach, which requires that competition is "effectively" eliminated. Albeit both approaches specifically pertain to a refusal to license intellectual property rights/information, they are useful to determine whether nonlegal sanctions eliminate competition by hindering access to an essential facility pursuant to Article 102 TFEU. With regard to the dissemination of the names of disloyal industry actors in a blacklist, such a measure makes access to the services of the responsible dominant trade associations more difficult. The reason is that members of these associations are more reluctant to conduct trade with blacklisted market participants on the basis of a standardized contract.[1350] Hence, they lose access to specialized commercial arbitration which eliminates effective competition. For withdrawals of membership and subsequent denials of readmission to membership on the basis of an additional entry condition, this is even clearer, because targeted members lose all access to the services of the relevant dominant trade association.[1351] With regard to a refusal to deal with ostracized members, this extrajudicial measure makes it impossible to enter into a standardized contract and, hence, excludes access to the system of specialized commercial arbitration provided by the relevant dominant trade association.[1352] This eliminates competition in the relevant second-tier commodities market and, according to the GC in *AstraZeneca* (albeit debatable) can even be considered as a restriction by object.

Taking into account that all three requirements are fulfilled, these nonlegal sanctions block access to an essential facility. Yet, there is one problem: the trade associations researched hold dominant positions in the EU markets for regulation and private ordering whereas the imposition of nonlegal sanctions takes effect in adjacent (non-dominated) second-tier commodities markets.[1353] This raises the following question: Does this entail that there is insufficient causation? In line with the ECJ's judgment in *Tetra Pak,* this question can be answered in the affirmative. A causal relationship can be established regardless of whether dominance and an abuse

1349 See Part III, Chapter 11, C, II, 3.
1350 See Part III, Chapter 11, C, II, 3, a.
1351 See Part III, Chapter 11, C, II, 3, b, i and ii.
1352 See Part III, Chapter 11, C, II, 3, c.
1353 See Part III, Chapter 11, C, III.

https://doi.org/10.5771/9783748926245-429, am 19.11.2024, 12:51:44
Open Access – (cc) BY – https://www.nomos-elibrary.de/agb

are felt within different markets, as long as they are associated and special circumstances are present. In particular, two reasons corroborate that there is sufficient causation between dominance felt by the trade associations researched in the EU markets for regulation and private ordering and the abuses felt in the adjacent second-tier commodities markets. First, the dominant trade associations researched coordinate and facilitate a system of specialized commercial arbitration for their members. Second, if the trade associations researched did not have any members, they would also disappear. Because a lack of causation is unproblematic, every time one of the dominant trade associations researched imposes one of the nonlegal sanctions mentioned above on a disloyal industry actor, it refuses access to an essential facility in violation of Article 102 TFEU.

To escape antitrust liability under Article 102, three defences can justify refusals to an essential facility.[1354] To invoke the first defence, which is comparable to the analysis under Article 101(3) TFEU, the trade association must substantiate that nonlegal sanctions are necessary to ensure the success of specialized commercial arbitration which produces efficiencies and serves as a compensation for the distortion of competition.[1355] Fortunately, this is relatively straightforward. Because nonlegal sanctions lower transaction and distribution costs, the extrajudicial measures described above, with the exception of refusal to deal with expelled members, can be justified when they are structured in the least restrictive manner possible. A second defence that can be used by the trade associations researched to justify imposition of nonlegal sanctions necessitates that they have done so to protect an "own" legitimate commercial interest.[1356] Yet, its application is open to debate. Three reasons prevent its application. First, these associations do not protect an own legitimate commercial interest, but that of their members. Second, the 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. However, three arguments counter these arguments in favour of the second defence. First, since the markets on which the associations and their members operate are closely related, the terminology of an "own" legitimate commercial interest should be relaxed to also include that of such industry actors. Second, a lack of decisional practice by the

1354 See Part III, Chapter 11, C, IV.
1355 See Part III, Chapter 11, C, IV, 1.
1356 See Part III, Chapter 11, C, IV, 2.

https://doi.org/10.5771/9783748926245-429, am 19.11.2024, 12:51:44
Open Access – (cc) BY – https://www.nomos-elibrary.de/agb

Commission and case law of the CJEU does not mean that both institutions do not allow the second defence. Third, the principle of proportionality has been complied with if a trade association imposes nonlegal sanctions in the least restrictive manner. Because it is uncertain how the Commission and the CJEU would treat these arguments, trade associations should always provide evidence in favour of this defence when relevant. The third and last defence which establishes that health and safety reasons may warrant a defence is not applicable to justify the imposition of nonlegal sanctions.[1357]

In sum, every time one of the trade associations researched, except for the DDC, disseminates the names of a wrongdoer in a blacklist, withdraws membership and denies reapplication for membership following an expulsion on the basis of an additional entry condition, an infringement of Article 102 TFEU is likely if such measures are not structured in the least restrictive manner. Yet, when a trade association instructs is members to refuse to deal with an expelled member, a breach of Article 102 TFEU is established irrespective of its form. The efficiency defence and to a lesser extent the protection of an own legitimate interest defence provide escape routes for the first three nonlegal sanctions.

1357 See Part III, Chapter 11, C, IV, 3.

https://doi.org/10.5771/9783748926245-429, am 19.11.2024, 12:51:44
Open Access – (cc) BY – https://www.nomos-elibrary.de/agb

Chapter 13: Conclusions and Best Practice Guidelines

A. An answer to the central research question

This research was designed and carried out to answer the central research question, which is worded as follows: "*Do the trade associations researched, their members and non-members, for their role in the imposition and execution of nonlegal sanctions, infringe US Antitrust Law and EU Competition Law and, if yes, can they justify these extrajudicial measures?*" Answering this question was done by comparing the illegality of all three actors for their role in the imposition and execution of nonlegal sanctions under both legal systems on the basis of two methods, namely the library-based legal research method (*i.e.* gathering information from reported comparable decisional practice and case law, legislation and academic publications) and the comparative research method (*i.e.* comparing US and EU antitrust law). Put simply, although a trade association and its members violate the core provisions of US Antitrust Law (Sections 1 and 2 of the Sherman Act) and EU Competition Law (Articles 101 and 102 TFEU) when (i) a trade association instructs its members to refuse to deal with an expelled member; (ii) both a trade association and its members are involved in the dissemination of the names of disloyal industry actors in a blacklist; (iii) both a trade association and its members withdraw membership; and (iv) both a trade association and its members deny readmission of an expelled member to membership on the basis of an additional entry requirement, they do not necessarily violate these Articles. When measures (ii) – (iv) are structured in the least restrictive form (which is now not the case), the relevant trade association and its members guarantee an efficient system of specialized commercial arbitration which benefits total welfare and consumer welfare. This justifies any trade association and its members orchestrating one of these measures to ensure compliance with arbitral awards from specialized commercial arbitration. Both a trade association and its members violate Article 101 TFEU if, when they limit adequate access to public courts prior to arbitral proceedings and after an award, this conduct is not structured in the least restrictive form. Although this is not a nonlegal sanction but is treated as such throughout this research for reasons of structure, trade associations and their members cannot be held accountable for a violation of Sections 1 and 2 of the Sherman Act.

https://doi.org/10.5771/9783748926245-429, am 19.11.2024, 12:51:44
Open Access – (cc) BY – https://www.nomos-elibrary.de/agb

B. Introductory comments to draft best practice guidelines for compliance with US Antitrust Law and EU Competition Law

Trade associations are often scrutinized by the Commission and the FTC on account of suspicions that they are acting as a conduit for anti-competitive behaviour between members. Furthermore, members of such associations are frequently subject to antitrust inspection for entering into illegal anti-competitive agreements. Despite the fact that a system of specialized commercial arbitration achieves far greater efficiency than adjudication in public courts, the method of enforcement of awards, which takes the form of nonlegal sanctions, can attribute liability to trade associations and their members pursuant to Sections 1 and 2 of the Sherman Act and Articles 101 and 102 TFEU. This is problematic, as any violation of any of these provisions may have serious consequences. A trade association and each individual member can be held subject to excessive fines and (senior executives) could even face criminal charges and imprisonment.

To keep these negative consequences from happening, it is crucial that these trade associations as well as their members do not infringe US Antitrust Law and EU Competition Law when they impose and execute nonlegal sanctions. Therefore, it is necessary to recommend best practice guidelines for both actors which will enable them to escape antitrust liability under Sections 1 and 2 of the Sherman Act and Articles 101 and 102 TFEU. This will also help to minimize risks of infringement.

I. Differences between US Antitrust Law and EU Competition Law

Owing to the many similarities between US Antitrust Law and EU Competition Law, it is not necessary to recommend two separate guidelines for both legal systems. However, some differences between both legal systems must be taken into account when drafting best practice guidelines. These can be found in the following table.

Differences	US Antitrust Law	EU Competition Law
The subject of antitrust law	Undertakings and private individuals.	Undertakings only.
Refusal to deal with expelled members	A violation of Section 1 of the Sherman Act by effect. A justification is unsuccessful.	A violation of Article 101(1) TFEU by object. A justification under Article 101(3) TFEU is unnecessary.

https://doi.org/10.5771/9783748926245-429, am 19.11.2024, 12:51:44
Open Access – (cc) BY – https://www.nomos-elibrary.de/agb

Limiting adequate access to public courts prior to arbitral proceedings and after an award	Cannot infringe Section 1 of the Sherman Act.	Can infringe Article 101(1) TFEU.
Justification of nonlegal sanctions	Rule-of-reason analysis under Section 1 of the Sherman Act.	Separate and more extensive fourtier justification test under Article 101(3) TFEU.
Monopolization and abuse of dominance	Members of a trade association for their role in the execution of nonlegal sanctions can be held accountable under Section 2 of the Sherman Act.	Members of a trade association for their role in the execution of nonlegal sanctions cannot be held accountable under Article 102 TFEU.

II. Outline of the best practice guidelines

The core provisions of US Antitrust Law and EU Competition Law, namely Sections 1 and 2 of the Sherman Act and Articles 101 and 102 TFEU, treat extrajudicial measures imposed by trade associations and executed by their members in a largely similar manner. This is because when these measures are structured in the least restrictive way possible (with the exception of refusals to deal with expelled members), they are permissible.[1358] That being said, Paragraphs C and D include best practice guidelines for trade associations and their members engaged in nonlegal sanctioning to not infringe Sections 1 and 2 of the Sherman Act and Article 101 and 102 TFEU. This will be done on the basis of tables which inform both actors about what they should do (DOs) and refrain from doing (DON'Ts) for each legal sanction.

C. Best practice guidance for trade associations

I. The dissemination of the names of wrongdoers in a blacklist

When a trade association disseminates the names of an industry actor in a blacklist, the following precautions should be followed:

1358 With regard to inadequate access to public courts prior to arbitral proceedings and after an award, the approach under Section 1 of the Sherman Act and under Article 101(1) TFEU differ.

https://doi.org/10.5771/9783748926245-429, am 19.11.2024, 12:51:44
Open Access – (cc) BY – https://www.nomos-elibrary.de/agb

DOs	DON'Ts
DO disseminate the names of wrongdoers in a members-only non-public blacklist. This will reduce the reputational harm placed on a wrongdoer.	DON'T disseminate the names of wrongdoers in a public blacklist. This will place additional unnecessary harm on a wrongdoer.
DO allow an independent third party to collect, handle and disseminate the names of wrongdoers in a blacklist.	DON'T allow a specific body in a trade association to disseminate the names of wrongdoers in a blacklist.
DO provide a disloyal industry actor with clear deadlines and a final warning before disseminating that actor's name in a blacklist.	DON'T disseminate the name of a wrongdoer in a blacklist without first establishing clear deadlines and issuing a final warning.
DO show more reluctance *(e.g.* longer deadlines for payment of an award) when blacklisting an industry actor also targets his social standing.	DON'T forget that the practice of blacklisting can also infringe EU Competition Law and US Antitrust Law when it only affects the commercial reputation of an industry rather than also his social standing.
DO allow targeted wrongdoers with an internal appeal procedure to reassess whether dissemination of a wrongdoer's name in a blacklist is justified.	DON'T take away the possibility for blacklisted wrongdoers to allow a reassessment in an internal appeal procedure.
DO be aware that the dissemination of the names of wrongdoers in a blacklist should change depending on the future development of the internet. If the internet becomes less private than it now is, blacklisting industry actors should be more limited. If it becomes more private, blacklisting disloyal industry actors is more acceptable.	DON'T overlook future progress of the internet with regard to the practice of blacklisting.
DO understand that online valuation forums are inherently different than the dissemination of the names of disloyal industry actors in blacklist.	DON'T refer to online valuation forums to justify the practice of blacklisting by the trade associations researched.

II. Withdrawal of membership

When a trade association expels a member, the following recommendations should be followed:

DOs	DON'Ts
DO only withdraw membership when there are objective, reasonable and legitimate reasons for doing so and the rules and criteria are fair and neutral (*i.e.* do not favour certain members over others).	DON'T expel a member when others in a similar situation would not be targeted.
DO only use a withdrawal of membership as a last resort to ensure payment of an award. If penalties and blacklisting are ineffective, withdrawal of membership should be considered.	DON'T automatically withdraw membership of a recalcitrant industry actor.

https://doi.org/10.5771/9783748926245-429, am 19.11.2024, 12:51:44
Open Access – (cc) BY – https://www.nomos-elibrary.de/agb

DO consider a suspension before imposing expulsion on a disloyal member.	DON'T arbitrarily impose a suspension or an indefinite expulsion.
DO withdraw membership without publishing a decision of such measure.	DON'T publish the decision to withdraw the membership of a wrongdoer. This will add unnecessary reputational harm to such an individual or undertaking.
DO allow expelled members the possibility of an internal appeal procedure to review a withdrawal of membership.	DON'T reject an internal appeal possibility for expelled members.

III. Denial of readmission of expelled members to membership on the basis of an additional entry requirement

When a trade association refuses a reapplication for membership on the basis of additional entry barriers following an expulsion, the following recommendations should be followed:

DOs	DON'Ts
DO allow an independent third-party panel (not connected with the relevant trade association) to review/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 fine for non-compliance with the arbitral award; and (iii) evidence of probable disloyalty in the future.	DON'T allow a Board of Directors of a trade association to arbitrarily deny a reapplication for membership of an expelled former member.
DO apply the reapplication criteria equally to all expelled members. Put differently, eliminate any subjectivity in the decision whether to accept or refuse a reapplication for membership.	DON'T give the impression that one or more expelled members are being singled out for special treatment to be readmitted to membership.
DO allow preliminary approval pending a full examination.	DON'T automatically deny a reapplication for membership without considering all circumstances.
DO impose a six-month standstill period following non-payment of an award, or if this is combined with other misconduct, a one-year period.	DON'T deny a reapplication when a period of two years following an expulsion has not elapsed.
DO allow the possibility of an internal appeal when membership is refused on the basis of an additional entry barrier.	DON'T refuse an internal appeal procedure to reconsider a denial of readmission to membership on the basis of an additional entry barrier.

https://doi.org/10.5771/9783748926245-429, am 19.11.2024, 12:51:44
Open Access – (cc) BY – https://www.nomos-elibrary.de/agb

IV. Refusal to deal with an expelled member

When a trade association instructs its members to refuse to deal with an expelled member, the following recommendations should be followed:

DOs	DON'Ts
DO understand that instructing members to refuse to deal with an expelled member is in violation of EU Competition Law and US Antitrust Law.	DON'T instruct members to refuse to deal with an expelled member.
DO understand that instructing members to refuse to deal with an expelled member is unnecessarily injurious to ostracized members and in no way should be seen as proportionate to not complying with an arbitral award.	DON'T justify a refusal to deal with expelled members on the ground that it is necessary to deter disloyal members of a trade association when penalties, the dissemination of the names of industry actors in a blacklist and withdrawals of membership are ineffective.
DO expect that circulating a decision to refuse to deal with an expelled member to the general public is an even more severe violation.	DON'T make things worse by making a decision to refuse to deal with an expelled member publicly available.

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

When officers of a trade association enter the premises of a disloyal member to search for information in order to establish why this industry actor did not comply with an arbitral award, the following recommendations should be followed:

DOs	DON'Ts
DO expect entering the premises of a disloyal industry actor without a warrant to be of interest under US Antitrust Law and EU Competition Law. Criminal law is a more appropriate legal basis to assess such conduct.	DON'T let a potential violation of US Antitrust Law and EU Competition Law function as a deterrent to not enter the premises of a recalcitrant industry actor without a warrant.
DO instruct the responsible officers who carry out entering the premises of a disloyal industry actor to limit the reputational harm of targeted wrongdoers as much as possible.	DON'T instruct the responsible officers to carry out entering the premises of a disloyal industry actor without considering its reputational consequences
DO ensure that no decision following entering the premises of a recalcitrant industry actor is published.	DON'T publish a decision to enter the premises of a disloyal market participant, and that the decision has been carried out.

https://doi.org/10.5771/9783748926245-429, am 19.11.2024, 12:51:44
Open Access – (cc) BY – https://www.nomos-elibrary.de/agb

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

When a trade association provides limits adequate access to public courts prior to arbitral proceedings and after an award, the following recommendations should be followed:

DOs	DON'Ts
DO forecast that limiting adequate access to public courts prior to arbitral proceedings and after an award does not infringe Section 1 of the Sherman Act. A rule-of-reason analysis is unnecessary.	DON'T combine limiting adequate access to public courts prior to arbitral proceedings and after an award with other anticompetitive conduct. Then, such a measure could potentially violate Section 1 of the Sherman Act.
DO expect that it is unlikely that limiting adequate access to public courts prior to arbitral proceedings and after an award is in violation of Article 101 TFEU, unless the safeguards laid down in the Arbitration Act 1996 are not respected.	DON'T go below the standards of access to public courts laid down in the Arbitration Act 1996.

D. Best practice guidance for the members of a trade association

I. The dissemination of the names of wrongdoers in a blacklist

With regard to the dissemination of the names of an industry actor in a blacklist by a trade association, to prevent liability under US Antitrust Law and EU Competition Law for its members for their role in the execution of such an extrajudicial measure, the members should adhere to the following recommendations:

DOs	DON'Ts
DO change the bylaws to remove any clause in the bylaws and rules that empowers the relevant trade association to disseminate the name of a recalcitrant industry actor in a publicly available blacklist.	DON'T use a trade association as a vehicle to drive disloyal competitors out of the relevant commodities market by allowing this association to disseminate that competitor's name in a publicly available blacklist.
DO instruct the relevant trade association to put a clause in the bylaws and rules in place that allows an independent third party to collect, handle and disseminate the names of wrongdoers in a blacklist	DON'T empower the relevant trade association to allow a specific body in a trade association to disseminate the names of wrongdoers in a blacklist.

https://doi.org/10.5771/9783748926245-429, am 19.11.2024, 12:51:44
Open Access – (cc) BY – https://www.nomos-elibrary.de/agb

DO instruct the relevant trade association to put a clause in the bylaws and rules in place that provides a disloyal industry actor with clear deadlines and a final warning before disseminating that actor's name in a blacklist.	DON'T empower the relevant trade association to disseminate the name of a wrongdoer in a blacklist without issuing clear deadlines and a final warning.
DO change the bylaws and rules of the relevant trade association to ensure that disloyal industry actors that operate in a market in which social relationships are close, more reluctance (*e.g.* longer deadlines for payment of an award) is shown when blacklisting such a wrongdoer.	DON'T change a blacklisting clause in such a manner under the presumption that EU Competition Law and US Antitrust Law cannot be infringed when this extrajudicial measure affects only the commercial reputation of an industry and not also his social standing.
DO instruct the relevant trade association to introduce the possibility of an internal appeal procedure for blacklisted industry actors.	DON'T leave a clause in the bylaws and rules which prohibits or does not grant blacklisted wrongdoers the possibility of an internal appeal against the dissemination of the wrongdoer's name in a blacklist.
DO inform other members that future developments may require that the blacklisting clause included in the bylaws and rules of the relevant trade association be altered.	DON'T be silent with other members about the future progress of the internal appeal procedure with regard to the practice of blacklisting.

II. Withdrawals of membership

With regard to a withdrawal of membership imposed by a trade association, to prevent liability under US Antitrust Law and EU Competition Law for the role of its members in the execution of such an extrajudicial measure, the members should adhere to the following recommendations:

DOs	**DON'Ts**
DO include a clause in the bylaws and rules of the relevant trade association which empowers the association to terminate membership when there are objective, reasonable and legitimate reasons for doing so and the rules and criteria are fair and neutral (*i.e.* do not favour certain members over others).	DON'T insert an expulsion clause in the bylaws and rules of the relevant trade association which grants the association the arbitrary power to expel a member when others in a similar situation would not be targeted.
DO ensure that the expulsion clause laid down in the bylaws and rules of the relevant trade association only empowers the association to withdraw membership as a last resort to ensure payment of an award. Furthermore, this clause should state that only when penalties and blacklisting are ineffective, withdrawals of membership should be considered.	DON'T allow the continuance of a clause in the bylaws and rules of the relevant trade association which empowers the association to expel a disloyal member automatically following non-compliance with an award.

https://doi.org/10.5771/9783748926245-429, am 19.11.2024, 12:51:44
Open Access – (cc) BY – https://www.nomos-elibrary.de/agb

DO change the expulsion clause in the bylaws and rules of the relevant trade association in such a manner so that a suspension must be considered first before the imposition of an expulsion on a disloyal member.	DON'T permit a clause in the bylaws and rules of the relevant trade association which empowers the association to arbitrarily impose a suspension or an indefinite expulsion.
DO ensure that the expulsion clause laid down in the bylaws and rules of the relevant trade association stipulates that the association only withdraws membership, but does not publish a decision of such a measure.	DON'T allow an expulsion clause in the bylaws and rules of the relevant trade association which instructs the association to publish the decision to withdraw the membership of a wrongdoer.
DO ensure that the expulsion clause laid down in the bylaws and rules of the relevant trade association stipulates that expelled members can seek relief in an internal appeal procedure to review a withdrawal of membership.	DON'T permit a clause in the bylaws and rules of the relevant trade association that bars the possibility of an internal appeal for expelled members.

III. Additional entry barriers to being readmitted to membership after an expulsion

With regard to denial of a reapplication for membership on the basis of additional entry barriers following an expulsion, to prevent liability under US Antitrust Law and EU Competition Law for its members for their role in the execution of such an extrajudicial measure, the members should adhere to the following recommendations:

DOs	DON'Ts
DO include a clause in the bylaws and rules of the relevant trade association which instructs an independent third-party panel (not connected with this association) to review/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 future.	DON'T permit a clause in the bylaws and rules of the relevant trade association which empowers a Board of Directors of this association to arbitrarily deny a reapplication for membership of an expelled former member.
DO ensure that the additional re-entry barrier clause in the bylaws and rules of the relevant trade association applies reapplication criteria equally to all expelled members. Put differently, this clause should eliminate any subjectivity in the decision whether to accept or deny a reapplication for membership.	DON'T leave room for the relevant trade association to allow that one or more expelled members receive special treatment to be readmitted to membership, and others do not.
DO insert a clause in the bylaws and rules of the relevant trade association which allows for preliminary approval pending a full examination.	DON'T allow the existence of a clause in the bylaws and rules of the relevant trade association which empowers th association to automatically deny a reapplication for membership without considering all circumstances.

https://doi.org/10.5771/9783748926245-429, am 19.11.2024, 12:51:44
Open Access – (cc) BY – https://www.nomos-elibrary.de/agb

DO change a re-entry barrier clause in the bylaws and rules of the relevant trade association which instructs the association 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.	DON'T permit the existence of a re-entry barrier clause in the bylaws and rules of the relevant trade association which empowers the association to deny a reapplication when a period of two years following an expulsion has not elapsed.
DO insert a clause in the bylaws and rules of the relevant trade association which allows the possibility of an internal appeal when membership is denied on the basis of an additional entry barrier.	DON'T allow the existence of a clause in the bylaws and rules of the relevant trade association that does not provide an internal appeal procedure to review a denial of readmission to membership on the basis of an additional entry barrier.

IV. Refusal to deal with an expelled member

With regard to an instruction by a trade association to refuse to deal with other members, to prevent liability under US Antitrust Law and EU Competition Law for its members for their role in the execution of such an extrajudicial measure, the members should adhere to the following recommendations:

DOs	DON'Ts
DO delete any clause in the bylaws and rules of the relevant trade association which empowers the association to instruct its members to refuse to deal with an expelled member.	DON'T allow any clause in the bylaws and rules of the relevant trade association which empowers the association to instruct its members to refuse to deal with an expelled member.
DO inform the relevant trade association of a concerted unwillingness to refuse to deal with an expelled member in order not to violate US Antitrust Law and EU Competition Law.	DON'T adhere to an instruction of the relevant trade association to refuse to deal with an expelled member despite the consequences.
DO inform the relevant trade association that instructing members to refuse to deal with an expelled member is unnecessarily injurious to ostracized members and in no way should be seen as proportionate to non-compliance with an arbitral award.	DON'T accept that the relevant trade association justifies a refusal to deal with expelled members on the ground that it is necessary to deter disloyal members of a trade association when penalties, the dissemination of the names of industry actors in a blacklist, and withdrawals of membership are ineffective.
DO delete any clause in the bylaws and rules of the relevant trade association which empowers the association to circulate a decision to refuse to deal with an expelled member to the general public. This is an even more severe violation.	DON'T be negligent to inform the relevant trade association that making a decision to refuse to deal with an expelled member publicly available is particularly injurious for a targeted industry actor.

https://doi.org/10.5771/9783748926245-429, am 19.11.2024, 12:51:44
Open Access – (cc) BY – https://www.nomos-elibrary.de/agb

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

With regard to the situation when officers of a trade association enter the premises of a disloyal member without a warrant to search for information in order to establish why this industry actor did not comply with an arbitral award, to prevent liability under US Antitrust Law and EU Competition Law for its members for their role in the execution of such an extrajudicial measure, the members should adhere to the following recommendations:

DOs	DON'Ts
DO expect that entering the premises of a disloyal industry actor without a warrant is of no interest with regard to US Antitrust Law and EU Competition Law. Criminal law is a more appropriate legal basis to assess such conduct.	DON'T misinform other members and the relevant trade association that a potential violation of US Antitrust Law and EU Competition Law should function as a deterrent to not enter the premises of a recalcitrant industry actor without a warrant.
DO change the "entering the premises" clause in the bylaws and rules of the relevant trade association in such a manner so that it instructs the responsible officers of the association to carry out entering the premises of a disloyal industry actor with a warrant in such away as to limit the reputational harm of targeted wrongdoers as much as possible.	DON'T allow a clause in the bylaws and rules of the relevant trade association which instructs the responsible officers of the association to carry out entering the premises of a disloyal industry actor without a warrant without considering reputational consequences of such an action.
DO ensure that the "entering the premises" clause in the bylaws and rules of the relevant trade association does not authorize the association to publish a decision of this measure.	DON'T allow a clause in the bylaws and rules of the trade association which empowers the association to publish a decision that entering the premises of a disloyal market participant without a warrant has been carried out.

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

With regard to limiting adequate access to public courts prior to arbitral proceedings and after an award, to prevent liability under US Antitrust Law and EU Competition Law for its members for their role in the execution of such an extrajudicial measure, the members should adhere to the following recommendations:

https://doi.org/10.5771/9783748926245-429, am 19.11.2024, 12:51:44
Open Access – (cc) BY – https://www.nomos-elibrary.de/agb

DOs	DON'Ts
DO realize that members of the relevant trade association do not violate Section 1 of the Sherman Act when this association limits adequate access to public courts prior to arbitral proceedings and after an award.	DON'T conclude that in combination with other misconduct, members of the relevant trade association do not violate Section 1 of the Sherman Act when the association limits adequate access to public courts prior to arbitral proceedings and after an award.
DO ensure that the "recourse to public courts" clause in the bylaws and rules of the relevant trade association respects the safeguards laid down in the Arbitration Act 1996. Then, members of this association do not violate Article 101 TFEU.	DON'T allow a "recourse to public courts" clause in the bylaws and rules of the relevant trade association when it goes below the standards of access to public courts laid down in the Arbitration Act 1996.

https://doi.org/10.5771/9783748926245-429, am 19.11.2024, 12:51:44
Open Access – (cc) BY – https://www.nomos-elibrary.de/agb

https://doi.org/10.5771/9783748926245-429, am 19.11.2024, 12:51:44
Open Access – (cc) BY – https://www.nomos-elibrary.de/agb