Notice on Activities of Trade Associations and Compliance with Competition Law

Decision N/09/002

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The Competition Authority
An tÚdarás Iomaíochta

Table of Contents

Table of Examples

1. INTRODUCTION

1.1 This notice provides information and practical guidance for trade associations and their members regarding competition law. Trade associations can play a productive, pro-competitive role in the development of a sector, thus promoting the efficient functioning of the market.[1] On various occasions, however, the Competition Authority has encountered, in the course of its enforcement activities, situations where trade associations have coordinated, or have been used as a vehicle by which to coordinate, the activities of member firms, with the consequence that competition between these firms is restricted. In light of these experiences, the Competition Authority has specific concerns regarding activities of trade associations and their compliance with competition law.

1.2 The purpose of this notice is, therefore, to inform the business community about the limits that competition law places on joint or coordinated action by competitors. The notice identifies those forms of coordinated horizontal conduct which are absolutely prohibited by competition law, as well as forms of conduct which the Competition Authority considers to be of considerable concern.[2] Within the category of coordinated activities, it is firmly established that there are certain practices which are absolutely prohibited – such as price-fixing – as well as many practices which may have an anticompetitive effect, and are thus prohibited. This notice is intended to provide some insight into the enforcement priorities of the Competition Authority for this area, and to place interested parties on notice of when the Competition Authority may be expected to take enforcement action.

1.3 The notice sets out the basic provisions of competition law which may be applicable to the activities of trade associations and their members, indicating how and why these provisions may constrain such activities. Although competition law prohibits anticompetitive unilateral behaviour as well as anticompetitive agreements or collusion, the principal focus of the notice is on coordinated activity, as the primary concern with regard to the activities of a trade association is its potential coordinative role.

1.4 When a sector is experiencing trading difficulties, it is the experience of the Competition Authority that anticompetitive coordination between competitors is more likely to occur than otherwise. Yet, it is exactly in difficult economic times that value-for-money in the supply of goods and services is most needed by businesses and consumers alike. Even in an economic downturn, therefore, the principle remains the same: competitors are not permitted to collude to deny customers the benefit of lower prices or increased quality of goods or services. In view of current circumstances, prevention of anticompetitive horizontal coordination organised by or through trade associations is an enforcement priority for the Competition Authority.

1.5 Concerns relating to anticompetitive coordination may arise on two levels:

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[1] See Organisation for Economic Co-operation and Development *Potential Pro-Competitive and Anti-Competitive Aspects of Trade/Business Associations* (DAF/COMP(2007)45), published 4 November 2008, hereafter "OECD", for a detailed discussion of the role of trade associations.

[2] "Horizontal" coordination is coordinated activity taking place between competitors, that is, businesses operating at the same market level.

- The trade association may take a primary role in coordinating the activities of its members or in facilitating tacit collusion between them; or,

- Members may use the opportunities for contact and cooperation provided by the trade association to form anticompetitive agreements or engage in other forms of anticompetitive collusion among themselves.

1.6 Competition law is sufficiently broad to catch and prohibit both categories of conduct, and businesses cannot escape the prohibition on anticompetitive coordination simply by structuring their interactions in one form or another.

1.7 This guidance notice is published under section 30(1)(d) of the Competition Act 2002, pursuant to which it is a statutory function of the Competition Authority to publish notices containing practical guidance as to how the provisions of the Act might be complied with. The guidance provided herein is not intended as a substitute for legal advice, nor does it purport to alter or supersede the relevant competition law principles that have been laid down by the Irish and Community courts, as well as in the relevant Commission guidelines and notices. It represents, simply, the Competition Authority's considered view as to the likely application of competition law to the activities of a trade association, in view of the legal provisions to be outlined.

1.8 The remainder of the notice is structured as follows:

- Part 2 of this document sets out the applicable provisions of competition law, in particular the prohibition on anticompetitive coordination contained in section 4 of the Competition Act 2002 and Article 81 of the EC Treaty;

- Part 3 considers the concepts and roles of trade associations and professional bodies;

- Part 4 discusses the possible application of competition law to a variety of activities of trade associations and their members, together with hypothetical examples considering circumstances where competition law may be of application, and examples from the Competition Authority's enforcement record, illustrating situations where it has taken action in the past;

- Part 5 outlines how the Competition Authority deals with complaints and provides contact details.

2. APPLICABLE PROVISIONS OF COMPETITION LAW

2.1 The Competition Act 2002 ("the Act") contains two principal provisions that constrain the activities of trade associations and their members: section 4 of the Act prohibits anticompetitive *coordinated* conduct, whether occurring as a result of explicit agreement or indirect collusion between firms or other undertakings or through a group such as a trade association, while section 5 prohibits anticompetitive *unilateral* conduct by an undertaking which holds a dominant market position. This notice focuses on the prohibition of anticompetitive coordination.

2.2 Where a coordinated activity has an appreciable effect on trade between Member States of the European Union, Article 81 of the EC Treaty ("Article 81") may also apply. This provision, upon which section 4 of the Act is based, prohibits anticompetitive coordinated conduct between undertakings, or an association of undertakings, which affects trade in the Common Market.

2.3 Although there has been some debate about the limits of competition law relating to vertical restraints, that is, agreements between businesses operating at different levels of the distribution or production chain, as well as relating to unilateral conduct, such circumstances are clearly distinguished from situations involving horizontal coordination between competitors. It is uncontroversial that horizontal restraints are generally hardcore restrictions of competition, with only limited and clearly-defined exceptions, and that such restraints are deserving of criminal punishment. Moreover, economic theory mandates that in periods of economic upheaval, vigorous enforcement of the competition rules against anticompetitive horizontal coordination is as important as ever, perhaps even more so. Cartel-type practices cause present harm to consumers, without any saving grace in the form of positive offsetting effects in the future. There is no argument for treating such practices more leniently in troubled times; in fact, against such a background section 4 of the Act and Article 81 must be scrupulously enforced, to protect consumers and other businesses from the wholly self-serving activities of cartelists.[3]

2.4 It is useful to consider the various elements of section 4 and Article 81 in greater detail.

Why Trade Associations are covered by the competition law: Concept of "Undertaking" – the threshold jurisdictional issue

2.5 Section 4 of the Act and Article 81 apply only to "undertakings" or "associations of undertakings". The concept of undertaking is the threshold issue for the application of both Irish and EC competition law. Although, in practice, there is likely to be little difference in outcome between the application of Irish or EC competition to a particular activity or practice, a slightly different definition of undertaking is found in each.

2.6 For the purposes of the Act, an undertaking is defined as any individual, body corporate or unincorporated body which is engaged for gain in the production, supply or distribution of goods or the provision

[3] See Devlin, *Antitrust in an Era of Market Failure*, forthcoming in Harvard Journal of Law and Public Poilcy, available online at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1429539.

of a service.[4] EC law defines an undertaking as an entity which is engaged in an "economic activity",[5] a concept which excludes activities which are carried out for the purposes of social solidarity[6] or in the exercise of public authority.[7] An association of undertakings can be described as an organisation which consists of undertakings of the same general type, which makes itself responsible for representing and defending their common interests, *vis-à-vis* other economic operators, government bodies and the public in general.[8]

2.7 Where members of a trade association are for-profit firms which offer goods or services in the marketplace, these businesses will almost certainly constitute undertakings, falling within both Irish and EC competition law. Moreover, as the legal form of an entity is immaterial to its status under competition law, a trade association which is engaged for gain in trade or engaged in economic activity, as the case may be, will be considered an undertaking in its own right, for the purposes of that activity. This could be the case, even if, for example, the association was unincorporated. In any event, a trade association with a membership base composed of firms which each constitute undertakings will constitute an association of undertakings, for the purposes of both section 4 of the Act and Article 81.[9]

What behaviours or practices are not allowed under the competition rules: Section 4(1) & Article 81(1) Prohibition

2.8 Section 4(1) of the Act and Article 81(1) **prohibit and make void** all decisions taken by associations of undertakings, as well as agreements and concerted practices between undertakings, which have either the object or the effect of preventing, restricting or distorting competition.

2.9 The concept of **decision of an association of undertakings** is given a very wide interpretation under the case law. Decisions can include, not merely formal decisions adopted by an association under any procedures laid down in its constitution or founding documents, but also the constitution itself, any rules governing the association's operations, binding regulations made by the association and any non-binding recommendations made by it.[10]

2.10 Similarly, the concepts of **agreement** and **concerted practice** among undertakings have been interpreted widely. Agreements can include unwritten agreements and "gentlemen's agreements" as well as formal contracts. Moreover, an agreement entered into by a trade association may be held to amount to an agreement between its members.[11]

2.11 Agreements, concerted practices and decisions of associations of undertakings are prohibited under section 4(1) and Article 81(1) where they have the **object** or **effect** of **preventing**, **restricting** or **distorting competition**. Object ***or*** effect, in this instance, are alternative concepts, which means that it is necessary for only one of

[4] Section 3(1) of the Act.
[5] C-41/90 *Hofner & Elser v Macrotron GmbH* [1991] ECR-I-1979.
[6] C-159/91 *Poucet & Pistre* [1993] ECR I-637.
[7] C-343/95 *Cali e Figli Srl v Servizi Ecologici Porto di genova SpA* [1997] eCR I-1547.
[8] Opinion in C-309/99 *Wouters v Algemene Raad van de nederlandse Orde van Advocaten* [2002] ECR I-1577 (hereafter "*Wouters*") at paragraph 61.
[9] *BNIC* [1982] OJ L379/1.
[10] See, for example, 8/72 *Vereeniging van Cementhandelaren v Commission* [1972] ECR 977 and *Visa International – Multilateral Interchange Fee* OJ [2002] L 318/17.
[11] Cases 209/78 etc *Van Landewyck v Commission* [1980] ECR 3125.

the two elements to be satisfied on the facts.[12] Thus, where it can be shown that an agreement had the *object* of restricting competition, it will be prohibited, without it being necessary to go on to establish that the agreement also has the *effect* of restricting competition in a particular market, and *vice versa*.

2.12 "Object" restrictions are those whereby the very purpose of the agreement, practice or decision – the reason for cooperating with other firms – is to achieve something that restricts competition in a particular market. In other words, the arrangement limits the market independence of one or more economic operators in relation to any factor on which they compete.[13] This is an objective concept, meaning that the undertakings involved are not required to have the intention of limiting competition as such; rather, they must intend to achieve the purpose of the arrangement, which is, itself, restrictive of competition. The typical object restrictions are arrangements which fix prices, share markets or limits output by firms. However, there are no exhaustive categories of object restrictions, and so any agreement, practice or decision can fall within this limb of section 4(1) and/or Article 81(1), where it seeks to limit an aspect of competition between businesses.[14]

2.13 By contrast, "effect" restrictions are those whereby the purpose of the arrangement might not be said to be restrictive of competition, but the consequences of the arrangement, on the whole, tend to prevent or restrict or distort competition to an appreciable extent.[15] Whether an arrangement has such an effect is assessed taking into account all relevant market conditions that exist at that time.[16]

Are there exemptions?: Section 4(2) and Article 81(3) Exception Rule

2.14 Generally, vigorous competition between the players in an industry is likely to result in the greatest benefits to consumers. Yet, Irish and EC competition law acknowledges that cooperation between undertakings may, in certain instances, result in some benefits to consumers. To the extent that cooperation does not appreciably restrict, prevent or distort competition in the first place, it will fall entirely outside the prohibitions contained in section 4 and Article 81, and so is not prohibited by competition law. Moreover, even where coordination between undertakings has an anticompetitive objective or effect, under an exception rule found in both section 4(2) of the Act and Article 81(3) the arrangement will not be prohibited where the pro-competitive benefits resulting outweigh any anticompetitive aspects.

2.15 In order to identify circumstances in which this is likely to be the case, section 4(5) of the Act and Article 81(3) set out four cumulative conditions which, where satisfied, will exempt the coordination for the application of competition law. These criteria, which are to be applied having regard to all relevant market conditions, require that the agreement, concerted practice or decision must:

[12] Case 56/65 *LTM* [1966] ECR 235 at p. 249.
[13] Opinion in C-209/07 *The Competition Authority v Beef Industry Development Scheme (BIDS)*, judgment of 20 November 2008 (hereafter "*BIDS*"), Opinion delivered 4 September 2008, at paragraph 42.
[14] *BIDS*.
[15] *BIDS* at 15.
[16] T-374 *European Night Services v Commission* [1998] ECR II-3141.

i. Contribute to improving the production or distribution of goods or provision or services or to promoting technical or economic progress;

and

ii. Allow a fair share of the resulting benefits to accrue to consumers;

and

iii. Not impose on the undertakings concerned terms which are not indispensable to the attainment of those objectives;

and

iv. Not afford undertakings the possibility of eliminating competition in respect of a substantial part of the products or services in question.

2.16 A full examination of the application of each of these criteria is beyond the scope of this notice. Since the application of the exception rule can be complex, any entity which has reason to suspect that its activities may come within the ambit of section 4(1) of the Act or Article 81(1) is advised to consult its legal advisor as to the possible application of the section 4(5) and/or Article 81(3) exemption to its particular circumstances. In addition, the Commission has produced very useful, detailed guidelines on the application of Article 81(3), and by analogy, the exemption in section 4(2) in conjunction with section 4(5) of the Act.[17]

2.17 Three points, however, must be highlighted. Firstly, it is for the party seeking to rely on the exemption to raise the matter, and moreover, to provide sufficient evidence to support the claim that it applies on the facts. Secondly, the conditions are cumulative, which means that **all four** of the criteria must be satisfied before the exemption can be applied in a particular instance. Finally, while in principle any anticompetitive agreement, decision or concerted practice may be exempted where it satisfies each of the four conditions, in practice it is **highly unlikely** that arrangements involving **hardcore** "object" restrictions, like price fixing or the dividing up of markets between competitors, will satisfy each of the conditions. Therefore, it is only in exceptional circumstances that a hardcore restriction would be exempted on this basis.[18]

2.18 The Competition Authority has no power under the current Act to pre-approve proposed agreements, decisions or practices notified to it, which may have the object or effect of restricting competition but which benefit from exemption under section 4(2) of the Act. Similarly, the Commission no longer operates a notification procedure with respect to agreements falling under Article 81. Instead, firms, trade associations, professional bodies and other entities falling within the ambit of section 4(1) of the Act or Article 81(1) must "self-assess"

[17] Communication from the Commission, *Notice Guidelines on the application of Article 81(3) of the Treaty* (2004/C 101/08), hereafter "Article 81(3) Guidelines", available online at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2004:101:0097:0118:EN:PDF.
[18] Article 81(3) Guidelines at paragraph 46.

whether their arrangements comply with the requirements of that provision.

2.19 There are a number of "block exemption" regulations in place at the EC level, and declarations and a notice under the Act. The block exemption regulations exempt from the application of Article 81(1) agreements of a certain type – including vertical agreements,[19] motor vehicle distribution agreements,[20] horizontal research and development agreements,[21] horizontal specialisation agreements[22] and agreements for the licensing of technology[23] – which fulfil the criteria outlined in the relevant regulation, on the basis that those agreements are presumed to satisfy the four conditions for exemption in Article 81(3). The Competition Authority has issued comparable Declarations under section 4(3) of the Act in respect of vertical agreements[24] and exclusive purchasing agreements relating to motor fuels[25] and cylinder liquefied petroleum gas,[26] and a Notice on vertical agreements[27] under section 30(1)(d) of the Act. Again, trade associations and their members are advised to consult their legal advisors to determine whether a particular exemption may be applicable to their circumstances.

What practices or behaviours are considered most serious? Criminalisation – section 6(1) of the Act

2.20 There is a growing consensus, in Ireland and internationally, that criminal conviction and imprisonment is the most appropriate sanction for hardcore horizontal restrictions of competition through fixing price, sharing markets or limiting output – the "*explosive growth*" in anti-cartel enforcement has been described as "*one of the most significant developments in antitrust (or competition) law over the last decade*."[28] US competition authorities have for many decades prosecuted participants in hardcore cartel arrangements criminally; many European jurisdictions, not least Ireland, are following suit. Indeed, *DPP v Flanagan and Ors* (the *Galway Heating Oil* case), discussed at paragraph 2.25 below, saw the first successful criminal cartel trial to take place before a judge and jury in Europe. In *DPP v Manning*, McKechnie J in the Central Criminal Court identified a variety of "*very powerful reasons*" to impose custodial sentences in such cases, including the need to ensure effective deterrence, the inadequacy of

[19] Commission Regulation (EC) No 2790/1999 of 22 December 1999 on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices (OJ L336/364).
[20] Commission Regulation (EC) No 1400/2002 of 31 July 2002 on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices in the motor vehicle sector (OJ L203/30).
[21] Commission Regulation (EC) No 2659/2000 of 29 November 2000 on the application of Article 81(3) of the Treaty to categories of research and development agreements (OJ L304/7).
[22] Commission Regulation (EC) No 2658/2000 of 29 November 2000 on the application of Article 81(3) of the Treaty to categories of specialisation agreements (OJ L304/3).
[23] Commission Regulation (EC) No 772/2004 of 27 April 2004 on the application of Article 81(3) of the Treaty to categories of technology transfer agreements (OJ L123/11).
[24] Competition Authority *Declaration in Respect of Vertical Agreements and Concerted Practices* (Decision No. D/03/001), dated 5 December 2003.
[25] Competition Authority *Motor Fuels Category Declaration* (Decision No. D/08/001), dated July 1 2008.
[26] Competition Authority *Declaration in respect of Exclusive Purchasing Agreements for Cylinder Liquefied Petroleum Gas* (Decision No. D/05/001), dated 8 March 2005.
[27] Competition Authority *Notice in Respect of Vertical Agreements and Concerted Practices* (Decision No. N/03/002), dated 5 December 2003.
[28] ABA Section of Antitrust Law, *Antitrust Law Developments* 6th ed. (2007) ABA Book Publishing, Chicago, at p.733, fn. 1.

fines in securing compliance with the law, and encouraging cooperation with cartel investigations.[29]

2.21 Thus, section 6(1) of the Act makes it a criminal offence for an undertaking to enter into or implement an agreement, make or implement a decision or engage in a concerted practice contrary to section 4(1) of the Act or Article 81(1). There is a rebuttable presumption under section 6(2) of the Act that any agreement, concerted practice or decision that has the purpose of directly or indirectly fixing prices, limiting output or sales or sharing markets or customers has the object of restricting competition contrary to section 4(1) and/or Article 81(1). A sentence of up to **five years imprisonment** or a **fine of up to €4 million**, or both, may be imposed on any individual found guilty on indictment of this offence.

2.22 As section 6(1) creates an indictable offence relating to a company, any person convicted under the provision in the Circuit Court or higher is **automatically disqualified** for five years from acting as a company officer, such as a director, secretary, auditor or liquidator.[30]

2.23 Under section 7 of the Criminal Law Act 1997, an individual found guilty of aiding and abetting the commission of an offence is guilty in the same manner as if he himself had committed the actual offence. In its application to competition offences, this means that anyone who assists an undertaking to commit a competition offence is liable on conviction to the same penalties.

2.24 There have been a considerable number of successful prosecutions for hardcore anticompetitive behaviour to date. Criminal prosecution is, ultimately, a matter that lies at the discretion of the Director of Public Prosecutions (DPP). It would typically be appropriate in hardcore cartel cases, involving, for example, secret agreements between competitors to fix prices or divide up particular markets between them.

2.25 The *Galway Heating Oil* case,[31] for example, led to the successful prosecution, on foot of an investigation by the Competition Authority, of a range of companies and company directors for participating in a cartel that fixed the price of heating oil in Galway city and county. Coordination had been arranged by means of a trade association, the Connaught Oil Promotion Federation (COPF), which was formed to facilitate cartel meetings. Although the ostensible purpose of the COPF was to discuss industry concerns such as health and safety, insurance costs and the competitive threat posed by natural gas, price fixing also took place at COPF meetings, which were held at least monthly. To date, 17 convictions against individuals and companies have been secured in connection with this investigation; fines and suspended

[29] *Director of Public Prosecutions-v-Patrick Duffy and Duffy Motors (Newbridge) Limited,* at paragraph 42. Found on the Competition Authority website at: http://www.tca.ie/EnforcingCompetitionLaw/CriminalCourtCases/MotorVehicles/Citroen/Citroen.aspx

[30] Companies Act 1990, section 160(1). See McFadden, D. *How directors can be disqualified following competition cases* Competition Press, Vol. 14(8) pp. 158-161 for a discussion f the operation of this provision in competition cases.

[31] See Gorecki, P. and McFadden, D. *Criminal Cartels in Ireland: the Heating Oil Case* [2006] ECLR 631, and the Competition Authority's website at http://www.tca.ie/templates/index.aspx?pageid=856, for further details of these prosecutions.

prison sentences have been imposed by the court on the persons and entities involved.[32]

2.26 Criminal convictions have also been secured relating to price fixing activities by the Irish Ford Dealers Association (IFDA) and the Citroën Dealers Association (CDA). In both the IFDA and the CDA cartels, trade association meetings were used as the venue for price fixing agreements between competitors and the minutes of meetings of the two associations reflected those activities. In *DPP-v-Manning*, Denis Manning, the Secretary of the IFDA was convicted for aiding and abetting price fixing by the IFDA members and sentenced to 12 months in custody, suspended. Similarly, in the CDA cartel, the trade association meetings themselves were the place where illegal agreements were made in respect of maximum discounts from the recommended price, delivery charges, accessory prices, metallic paint, prices for trade-ins and the price of exports. At the sentencing in *DPP-v-Duffy*, Court found:

> *"At meetings of the Association, of which 48 were minuted, prices were agreed in respect of each of these items and then recorded. Thereafter a new revised price list would be printed and distributed by the Secretary to each member of the association. In addition, the Secretary produced a pocket card for internal use by the individual dealers showing what price should be asked for. This came to be known as the 'card price'. This routine was followed on every occasion upon which there was a price change. To underpin adherence to the objectives of the scheme, the association employed two independent companies to police its members so as to ensure compliance. These monitors carried out so called 'mystery shopping surveys' during which, disguised as genuine members of the public, they attended at a dealers premises and obtained a quote or price for any one or more of the products above mentioned. A report would then be submitted to the Secretary. Fines, which were specified for any breach, were originally set at £500 and later increased to £1,000 (€1,270)."*[33]

2.27 Convictions have been obtained and sentences imposed on seven individuals and six companies.

2.28 The Competition Authority has a cartel immunity programme which may provide immunity from criminal prosecution under the Act for self-reporting of unlawful cartels by participants. Further information about the programme is available on the Competition Authority's website at www.tca.ie.

What level of exposure might be expected? Civil Action – section 14 of the Act

2.29 Section 14 of the Act gives a civil right of action before the Irish courts to the Competition Authority and to any person who is aggrieved in consequence of a breach of section 4 of the Act. The injured party, whether it is an individual or a company, may seek a declaration or an

[32] See Competition Authority *Annual Report 2008* at p. 5 for further details.
[33] *Director of Public Prosecutions-v-Patrick Duffy and Duffy Motors (Newbridge) Limited,* at pararaphs 8 and 9. Found on the Competition Authority website at: http://www.tca.ie/EnforcingCompetitionLaw/CriminalCourtCases/MotorVehicles/Citroen/Citroen.aspx

injunction to bring to an end or prohibit infringing conduct, as well as damages for any losses suffered as a result of the breach. Section 14 states explicitly that exemplary damages – which are damages over and above the provable loss of the injured party, awarded to punish the defendant or deter it from breaking the law in the future – may be granted by the court.

2.30 At the European level, the Commission is eager to promote private damages actions by victims of competition law breaches, and is currently examining the issue in some detail.[34] Currently, whenever the Commission finds a breach of Article 81, victims of the infringement can rely on this decision as binding proof in civil proceedings for damages at the national level.[35]

2.31 Thus, any business or trade association engaging in anti-competitive coordination faces a strong possibility of being sued for very substantial damages by the victims of that illegal conduct, in addition to imprisonment and hefty criminal fines. They also run the risk of an action taken by the Competition Authority, and section 9(10) of the Act specifically permits both civil actions and criminal prosecutions to be brought in respect of the same matter.

[34] Information on the Commission's activities in the area of private damages can be found on its website at http://ec.europa.eu/competition/antitrust/actionsdamages/index.html.

[35] Pursuant to Article 16(1) of Regulation 1/2003. See the Commission's White Paper on *Damages actions for breach of the EC antitrust rules* COM(2008) 165 final, published 2 April 2008, at paragraph 2.3.

3. TRADE ASSOCIATIONS AND PROFESSIONAL BODIES

3.1 Trade associations consist of individuals and firms with common interests in trade, which join together to further their commercial or professional goals. Although the principal function of a trade association, typically, is to provide services to its members, trade associations also have industrial policy and political functions.[36]

3.2 Trade associations frequently perform many valuable functions, and through cooperation can significantly increase the efficiency and performance of a particular sector. Nevertheless, collaboration between otherwise competing firms raises the possibility that cooperation may overflow into coordination, thus lessening competition between these firms or in the market more generally. Consumer harm, in the form of raised prices or lower quality goods or services, is the almost inevitable consequence of such collusion. In a number of instances, moreover, trade associations have played a central role in the management of a cartel among their members.

3.3 Insofar as the members of a trade associations are businesses or self-employed professionals, as distinct from, say, employees, each individual member is an "undertaking" for the purposes of applying both Irish and EC competition law. The trade association itself would be an association of undertakings, for the purposes of section 4 of the Act and Article 81. A trade association might also constitute an undertaking in its own right, if it fulfils the relevant criteria.

3.4 At least for competition law purposes, trade associations, being composed of members which are themselves undertakings for the purposes of competition law, are entirely distinct from trade unions, being composed of members who are employees. As indicated, undertakings and associations of undertakings are both subject to the prohibitions on anticompetitive coordination contained in section 4 of the Act and Article 81. Employees are **not** undertakings for the purposes of either Irish or EC competition law. To the extent that a trade union acts as the representative of its employee members – in essence, as the agent of those members[37] – the trade union is considered neither an undertaking nor an association of undertakings for the purposes of either Irish or EC competition law. Conversely, to the extent that either a trade association or a trade union is itself engaged for gain in trade or engaged in economic activity, that entity is likely to constitute an undertaking for competition law purposes.

3.5 Self-employed persons, such as architects, barristers or doctors in private practice, act as undertakings for the purposes of competition law. Accordingly, where the members of a professional body are self-employed persons, that professional body will generally constitute an association of undertakings under competition law. In addition, where an organisation acts as the regulatory body of a profession as well as its representative body, and where its membership base is comprised, at least in part, of self-employed persons, the organisation would be

[36] OECD at p.7.
[37] Opinion in C-67/96 *Albany International BV v Stichting Bedrijfspensioensfonds Textielindustrie* [1999] ECR I-5751.

considered an association of undertakings for competition law purposes.[38]

3.6 By contrast, where a professional body acts entirely independently of the interests of the economic operators comprising its membership, and instead performs a wider public interest function, that body might not constitute an association of undertakings for those purposes.[39] This is generally an extremely narrow exception. It might apply, for example, where a professional body has a statutory power to make regulations for the profession, but it is obliged by statute to do so solely by reference to public interest criteria, and where the State has retained the power to make regulations itself which would override those of the professional body in the final instance.[40]

3.7 For reasons of simplicity, unless otherwise specified the phrase "trade association" will be used in the remainder of this document to refer to any organisation which constitutes an association of undertakings for the purposes of competition law, which may include a professional body when that body is acting in a non-public interest capacity.

[38] *Wouters*.
[39] C-35/99 *Arduino* at paragraph 37.
[40] *Wouters* at paragraph 68. See also *Hemat v the Medical Council* Unreported, High Court, (McKechnie J.) 11 April 2006.

4. INTERFACE BETWEEN ACTIVITIES OF TRADE ASSOCIATIONS AND COMPETITION LAW

4.1 The activities of a trade association usually span a variety of issues, many of which may fall outside the ambit of competition law entirely, or be fully compatible with the competition rules, provided cooperation remains within certain defined boundaries. However, because these activities involve a degree of horizontal cooperation between firms, organisations of this nature remain vulnerable to stepping outside the boundaries placed by competition law. The following comment from the Organisation for Economic Cooperation and Development illustrates how activities of a trade association have the potential to lead to a breach of the competition rules:

> *"Trade associations remain by their very nature exposed to antitrust risks, despite their many pro-competitive aspects. Participation in trade and professional associations' activities provide ample opportunities for companies in the same line of business to meet regularly and to discuss business matters of common interest. Such* ***meetings and discussions, even if meant to pursue legitimate association objectives, bring together direct competitors and provide them with regular opportunities for exchanges of views on the market, which could easily spill over into illegal coordination****. Casual discussions of prices, quantities and future business strategies can lead to agreements or informal understandings in clear violation of antitrust rules. It is for this reason that trade associations and their activities are subject to close scrutiny by competition authorities around the world."*[41] [Emphasis added]

4.2 This part of the notice examines some of the areas in which the activities of a trade association are likely to fall within the ambit of competition law, and indicates how and why the provisions of the Act and the EC Treaty limit such activity. In line with the principles outlined in paragraphs 2.11 to 2.13 above, certain forms of coordination arranged by or conducted under the ambit of a trade association may be restrictive of competition by their very nature, whereas other forms of coordination are considered anticompetitive only when full account is taken of the economic circumstances in which the coordination occurs, including the existing conditions of competition in a particular market.

4.3 Note that liability for anticompetitive coordination may arise on two levels: a trade association may be liable for a breach of competition law embodied in a decision taken by that association, while additionally or alternatively, the businesses comprising the membership of the association may be liable for a breach of competition law arising from an agreement or concerted practice between them.

Coordination on pricing

4.4 Price is the most obvious, and perhaps the key, area in which businesses compete with each other. Any form of price fixing is likely to have a detrimental effect on competition; as a result, detecting and

[41] OECD at p. 8.

sanctioning price fixing is a major enforcement priority for the Competition Authority. Horizontal price fixing, that is, price fixing between competitors, is a restriction of competition by object.[42] It is therefore prohibited under section 4(1) of Act and Article 81(1), without any need to show an effect on competition.[43]

4.5 Coordination on pricing can take many forms, for example;

- Through the setting of a "fixed" price, in the sense of a set amount in euro and cent to be charged;
- Through coordinated price increases;
- Through the setting of target or minimum prices;
- Through the prohibition or standardisation of rebates or discounting policies;
- Through the imposition of a coordinated surcharge; or,
- Through the freezing of prices at a certain level in order to resist downward pressures on prices.

4.6 Essentially, competition law prohibits any coordinated activity between competing firms which lessens the normal uncertainty that should exist between them in relation to pricing policies arrived at independently on the market.

4.7 Thus, firms are prohibited from entering into agreements which restrict the freedom of the contracting parties in relation to pricing in any way. Individual firms are also prohibited from engaging in a concerted practice in order coordinate pricing; this prohibits cooperation falling short of a formal agreement which nevertheless removes uncertainty between competitors as to prices to be charged. Trade associations are prohibited from taking any decision which coordinates pricing policies among members. The concept of a "decision" of a trade association is construed broadly, to include, for example, non-binding recommendations on prices that are made by the organisation.

4.8 Coordination on pricing between competitors is the paradigm example of cartel activity. As price cartels benefit only the cartelists concerned, to the injury of consumers, business customers and the wider economy, it is widely accepted that cartelists should face criminal penalties. Accordingly, undertakings and companies officers are liable to criminal prosecution pursuant to section 8 of the Act for participation in price cartels. McKechnie J in *DPP v Manning* described a price-fixing cartel as "*a crime against all consumers*", which did "*a shocking disservice to the public at large*."[44]

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[42] *BIDS*.

[43] While it is theoretically possible that a horizontal agreement, concerted practice or decision of a trade association or other association of undertakings relating to pricing might be exempted under the exception rule contained in section 4(2) and Article 81(3), in practice it is highly unlikely that such an arrangement would satisfy each of the four cumulative conditions required for exemption: see Article 81(3) Guidelines at paragraph 46. Interested parties are referred to the Article 81(3) Guidelines for a detailed analysis of the application of the each of the four conditions that must be satisfied for exemption.

[44] *Director of Public Prosecutions v. Denis Manning* (Unreported, High Court, 9th February 2007).

4.9 The Competition Authority's enforcement record demonstrates just how seriously it views price coordination between competitors. In addition to the many criminal cases taken by the DPP, for example, in 2009 the Competition Authority successfully took a civil action against two trade associations representing publicans in the State, which had committed their members to a price freeze in a period of marked deflation. Taking the view that competing firms should not coordinate their pricing policies, the Competition Authority took contempt of court proceedings against the trade associations, on foot of undertakings secured in settlement of a previous dispute. As a result of the Competition Authority's action, the price freeze was withdrawn, and the trade associations clarified for members that each publican was entirely free to set its own retail prices for alcoholic drinks.[45]

4.10 It is important to distinguish horizontal price coordination between competitors from the pro-competitive justifications advanced to defend some forms of vertical coordination on prices (for example, between manufacturers and retailers). In the recent *Leegin* decision, for example, the US Supreme Court removed vertical minimum resale price maintenance (RPM) from the category of agreements which are *per se* illegal, finding instead that all the circumstances of such an agreement should be weighed, to determine whether it constitutes a restraint of trade.[46] However, the Court in *Leegin*, noting "*the appreciated differences in economic effect between vertical and horizontal agreements*", was at pains to stress that the finding did **not** extend to horizontal price fixing, which "*is, and ought to be,* per se *illegal".*

4.11 Exemptions developed in the vertical context are, generally, wholly inapplicable within the horizontal context. Coordination between ostensibly competing businesses is entirely different to the necessary relationship that exists between a supplier and its distributors and/or retailers. Simply put, vertical arrangements create far fewer opportunities for businesses to combine their market power to restrict, distort or prevent competition. By contrast, horizontal coordination goes to the heart of competition between firms. In practice, there are far fewer forms of acceptable horizontal coordination than vertical coordination.

4.12 It may be noted that the Commission adopts a considerably more strict approach to RPM, for the purposes of EC competition law, than that espoused by the majority of the Court in *Leegin*.[47] Yet, regardless of whether one agrees with the approach in *Leegin* to the issue of vertical restraints, the judgment provides absolutely **no** support for the suggestion that horizontal agreements, especially with regards to pricing or other key competitive factors, should be subject to anything other than the strictest scrutiny. Indeed, the *Leegin* decision in fact reaffirms that such agreements are "*manifestly anticompetitive*" and *per se* illegal.

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[45] For further information on the case, including the full approved text of McKechnie J's judgment of 24 July 2009 in the High Court, see the Competition Authority's website at https://www.tca.ie/templates/index.aspx?pageid=1266&locale=0.

[46] *Leegin Creative Leather Products, Inc. v. PSKS, Inc.* (Case No. 06-480) Judgment of 28 June 2007, hereafter "*Leegin*".

[47] See Commission Notice *Guidelines on Vertical Restraints* (2000/C 291/01) at paragraphs 47 and 225-228.

Example 1: Anticompetitive Agreement not to Discount

There are about 20 suppliers in the blodget sector in Ireland. By general commercial practice, list prices for blodgets are high; discounts of up to 50% off the list prices are then granted by suppliers to customers. This practice leads to a lack of certainty in the sector. The Blodget Producers Group (BPG), a trade association composed of three-quarters of the blodget suppliers, including the five largest suppliers, believes that these pricing practices impair customer confidence and thus hinder the growth of the industry. Therefore, it imposes a "Clarity in Cost" policy for all of its members: a reduction in list prices by 30% across-the-board, with a ban on discounts greater than 25% below list price.

Does this policy breach competition law? Almost certainly. Trade associations have simply no business coordinating pricing policies of members. While trade associations are permitted to encourage members to adopt, individually, clear commercial policies towards customers, associations are not permitted to dictate or coordinate pricing by members. This extends to a coordinated reduction in list prices: individual economic operators are obliged to act strictly independently in setting their commercial policies on the market, and price is the key factor on which firms compete. The ban on discounting is particularly egregious, constituting a hardcore restriction of competition by object.

Example 2: Anticompetitive Indirect Price Fixing[48]

Five telecoms companies are licensed to provide interweb services in Ireland. Interweb customers have two options: annual subscription allowing for unlimited webbing, suited to heavy use, or "pay-as-you-web", suited to light use. Pay-as-you-web users purchase web credit in advance, online or through supermarkets and grocery stores. Retailers historically received 10% commission on the face-value of web credit sold through their stores, e.g., retailers got €1 for €10 credit. Representatives of the five interweb providers hold a meeting at which they discuss reducing retailer commission from 10% to 6%, but no agreement, as such, is reached. Within two weeks, Xenon, the largest provider, reduces retailer commission to 6%; over the next month, the four other providers follow suit.

Do the activities of the interweb providers in this example breach competition law? Quite probably. The coordinated decrease in commission rates is probably a concerted practice and is, in effect, a coordinated increase in the wholesale price of credit. This may be a restriction of competition even though the retail price of the product remains the same. Instead of relying on market forces to determine their profits, the providers are cooperating to increase their margins. As such, this appears to be an object restriction of competition. Although it is not necessary to establish anticompetitive effect in such circumstances, the coordination may well result in retailers imposing a surcharge on the face value of the credit, or increasing the prices of other goods or services to compensate for decreased margins on this product, or contribute to reduced staffing levels or opening hours, in a bid to reduce outgoings in tandem with reduced revenues.

[48] This example is based on the facts and law of C-8/08 *T-Mobile Netherlands BV and Others* (judgment of 4 June 2009).

Coordination on market allocation, output quantities and other non-price "object" restrictions

4.13 In addition to price fixing, two other categories of horizontal restrictions have been explicitly identified as restrictions of competition by object, namely, output limitations and the sharing of customers or markets.[49] Like price fixing, these practices are considered particularly harmful, because they directly interfere with the outcome of the competitive process.[50] Likewise, as with price fixing, prevention of these forms of horizontal restriction is a key enforcement priority of the Competition Authority.

4.14 Since the price of a good or service depends on the relationship between consumer demand and the availability of supplies of that product, a limitation of output by the producer is likely to cause the price to increase.[51] Output limitations might be achieved by, for example, the imposition of quotas, setting maximum permissible quantities of production or deliveries.

4.15 Market or customer sharing reduces the choice available to customers, leading to higher prices or reduced output.[52] This might be achieved, for example, by the allocation of defined market shares to firms operating within a particular territory, or through a policy whereby firms agree to not operate in each other's historic geographic territory or product areas, or to not "poach" each other's existing customers. Bid-rigging, or collusive tendering, is another type of prohibited market sharing.

4.16 A decision taken by a trade association which has the purpose of limiting the output of members, or of dividing up the market among its members, for example on a regional basis or by types of customers or sales, will be prohibited as a form of anticompetitive coordination. Similarly, competition law prohibits the individual members of a trade association from entering into an agreement or engaging in a concerted practice which limits output or divides up markets. This will be the case regardless of whether the intention is to restrict competition as such.

4.17 As with horizontal price fixing, coordinated market sharing or output limitations among competitors will rarely satisfy all four conditions for exemption set out in section 4(5) of the Act and Article 81(3).

4.18 As indicated previously, the list of categories of coordinated conduct that are restrictive of competition by object is not exhaustive. Potentially any arrangement between firms may be restrictive of competition by "object", where the purpose of the coordination is to achieve an outcome which is, in objective terms, a restriction of the normal competitive situation.

4.19 Where coordination is the result of a secret cartel arrangement between competitors, criminal prosecution under section 8 of the Act is likely, and appropriate, upon discovery.

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[49] *BIDS*.
[50] Commission Notice *Guidelines on the applicability of Article 81 of the EC Treaty to horizontal cooperation agreements* (2001/C 3/02), hereafter "Horizontal Guidelines", at paragraph 25.
[51] Faull & Nikpay (eds.) *The EC Law of Competition*, 2nd ed. (2007) Oxford University Press, Oxford, at paragraph 8.27.
[52] Horizontal Guidelines at paragraph 25.

Example 3: Anticompetitive Market Allocation

Alpha Ltd delivers milk door-to-door in north Dublin city and county. Beta Ltd delivers milk door-to-door in south Dublin city and county. Gamma Ltd delivers newspapers door-to-door throughout the whole of Dublin city and county. In a bid to drum up additional revenue, Alpha begins to supply milk to customers in parts of the south county in addition to its traditional routes; Beta offers its customers newspapers alongside their milk; and Gamma branches out to the supply of milk, initially to city centre customers only but with a view to expanding milk deliveries to all of its routes.

Customers are pleased to have greater choice, and have noticed that prices have gone down with the entry of competition. Conversely, the suppliers discover that the new offerings are not as profitable as anticipated, since they have each entered with lower prices than the incumbent supplier, and now that they are each facing competition for historic routes or products carried, they have been forced to reduce prices on these as well. The heads of Alpha, Beta and Gamma meet and agree a truce: each will leave the market it has most recently entered and will revert back to its traditional product offerings or routes.

Does this agreement breach competition law? Yes: it is a blatant example of market-sharing between competing firms, and as such, is a hardcore restriction of competition. Two varieties of market-sharing can be discerned in this example: dividing up markets along product lines, and along geographic lines. Not only is this agreement prohibited by competition law, both the firms and the executives responsible are liable to be criminally prosecuted under section 6(1) of the Act.

Collective boycott

4.20 A collective boycott, organised between competing undertakings in order to place pressure on another competitor, a supplier or a buyer, is a form of output limitation, and thus, a restriction of competition by object.[53] In its enforcement work, the Competition Authority has encountered many circumstances in which competitors are alleged to have colluded in a collective boycott. Where such allegations are proven, the Competition Authority takes the view that significant consumer harm is likely to result, and therefore, prevention and/or punishment of collective boycotts is a key enforcement priority of the Competition Authority.

4.21 The *Irish Road Hauliers Association (IRHA)* case provides a good example of an anticompetitive collective boycott. In May 1997, the Competition Authority began investigating complaints that the members of the IRHA had agreed minimum rates for the transport of freight and would not provide services to customers at rates below these levels. In June 1997, a large number of hauliers began blockading Dublin Port, in a move which the Competition Authority believed was intended to secure customers' agreement to the proposed rates. The Competition Authority was granted an *ex parte* injunction against the IRHA and a number of individual hauliers to end the blockade. The case was settled in October 1998, when the IRHA agreed to a High Court declaration that they had engaged in a concerted practice to fix prices for road haulage services, and furthermore, gave undertakings not to engage in price fixing contrary to the Competition Act 1991 in the future.

[53] *Pre-insulated Pipes* [1999] OJ L24/1.

4.22 As reported in its *Annual Report 2008*,[54] in another instance the Competition Authority became suspicious of an anticompetitive concerted practice among community pharmacy contractors in a town in Ireland. Contractors provide community pharmacy services from retail pharmacies under the various schemes for the provision of prescription medicines to the public free of charge or subsidised by the State, which are administered by the Health Services Executive (HSE). It emerged during the Competition Authority's investigation that these contractors had met and discussed a reduction in remuneration for community pharmacy services proposed by the HSE; following the meeting, one contractor circulated a sample letter to be sent to the HSE threatening suspension of participation in the schemes, which each contractor then sent to the HSE. The Competition Authority took the view that this amounted to a concerted practice among the contractors, contrary to section 4 of the Act. It secured a series of "Agreement and Undertakings" with the contractors, under which the contractors agreed not, in the future, to engage in any concerted action which might breach the Act, and the Competition Authority undertook not to initiate legal proceedings against the parties so long as they complied with their undertakings.

4.23 Collective boycotts, or threats of such withdrawal, are frequently used as a mechanism by which to impose, or reinforce, other forms of horizontal restrictions by object. In the *IRHA* case, for example, the collective boycott (a form of output limitation) was used by road hauliers to impose on buyers a price which had been fixed by the competing undertakings. A collective boycott or withdrawal of services by ostensibly competing businesses is likely to trigger an investigation by the Competition Authority, where circumstances indicate that some form of coordination may have occurred, and that the practice may have the object or effect of restricting competition.

4.24 It is important to distinguish an anticompetitive boycott or collective withdrawal of services by undertakings subject to the prohibition contains in section 4(1) and Article 81(1) from a legitimate strike organised by trade unions and/or employees under the Industrial Relations Act 1990. As previously noted, the actions of employees do not fall under competition law. However, collusion between firms ostensibly in competition with each other, in order to restrict competition between them, quite clearly falls within Irish and/or EC Competition law.

[54] Available online on the Competition Authority's website at: http://www.tca.ie/NewsPublications/AnnualReports/AnnualReports.aspx.

Example 4: Anticompetitive Boycott of a Purchaser[55]

The (fictional) Association of Criminal Legal Aid Advocates (ACLAA) is composed of self-employed legal advocates who provide services on behalf of the State to criminal defendants qualifying for legal aid. Advocates are paid a fixed fee by the State for this service. Although membership of ACLAA is not compulsory, in practice all advocates in the State are members of the association. The governing committee of ACLAA is of the view that the fixed fee paid by the State to criminal legal aid advocates is inadequate, and decides to campaign for a 25% increase. A ballot of members is conducted, which indicates that three-quarters of members are prepared to take "strike" action, by refusing to take on new cases, until a 25% increase is agreed by the Minister for Justice. After a public announcement by the Minister that an increase in fees is unjustified, ACLAA informed members that, effective immediately, they are to take on no further legal aid work from the State, pending resolution of the dispute over fees.

ACLAA, composed of self-employed professionals who are undertakings under competition law, is an association of undertakings. The decision of ACLAA to declare a "strike" – which is, of course, not a real strike as governed by the Industrial Relations Acts but instead a coordinated withdrawal of services by competitors – is an object restriction of competition: it is a restriction of output intended to support an attempt to fix prices. This is prohibited under competition law. Any underlying agreement or concerted practice between competing advocates to withdraw their services would also be prohibited. The section 4(2)/Article 81(3) exemption is highly unlikely to apply on the facts.

Collective negotiation

4.25 Particular problems arise where large numbers of self-employed suppliers provide services for or on behalf of a large buyer, such as an insurance company or the State. Frequently, the impulse of the smaller players is to coordinate and collectively negotiate terms and conditions of supply with the more powerful buyer. Despite frequent claims to the contrary, negotiation of this manner is not a form of "collective bargaining", which occurs between employers and employees and is compatible with competition law. Instead, collective negotiation which involves a large number of ostensibly independent service providers falls to be considered under, and in many instances is incompatible with, competition law.

4.26 Collective negotiation is problematic because it typically involves, essentially, agreement between competing service providers as to the level of fees, and other contractual conditions, that will be accepted by service providers from the buyer. Through coordination, service providers can force buyers to pay higher prices than are paid in circumstances of normal competition. Where the buyer is a private company, such as a health insurance company purchasing medical care from physicians, this inflated price is almost inevitably passed on to consumers, for example in the form of higher insurance premiums. Where the buyer is the State, the inflated price is passed on to consumers in the form of higher taxes or cuts in public spending.

4.27 The Competition Authority has considerable experience in this area. Different issues arise depending on whether the buyer is an undertaking that is itself subject to competition law, or the State, which in many instances is not subject to competition law when

[55] This example is based on the facts and findings in *Federal trade Commission v. Superior Court Trial Lawyers Association* 493 US 411 (1990).

purchasing goods or services to be used for public purposes. Collective negotiations with a buyer that is itself an undertaking were considered in the Competition Authority's consultation on the setting of medical fees with private health insurers; interested persons are referred to the consultation document[56] and subsequent notice providing Guidance in respect of Collective Negotiations relating to the Setting of Medical Fees[57] for further information on the application of competition law to such activity. Collective negotiations with the State were considered in the Competition Authority's consultation on collective action in the community pharmacy sector; again, interested persons are referred to the consultation document[58] and subsequent Notice in Respect of Collective Action in the Community Pharmacy Sector[59] for information on this topic.

4.28 In order to avoid the various competition law problems associated with collective negotiations by self-employed persons, the Competition Authority recommends use of the "messenger model" for the setting of fees and other contractual terms and conditions. The messenger model allows for a degree of collective input, is likely to result in an outcome that is acceptable to all parties involved, and where structured correctly, takes place entirely in compliance with competition law. Under the messenger model, a third party – the "messenger" – obtains from each service provider, individually, the level of fees that it requires to provide services for or on behalf of the buyer. The messenger provides this information to the buyer, which uses it to devise a fee scale for reimbursement for services provided. Each service provider is then offered the choice to participate, given the fees offered by the buyer; service providers choose, on an individual basis, whether or not to participate. All communications between the messenger and individual service providers must remain confidential vis-à-vis other servicer providers, so that no service provider knows what any other requires. As long as each service provider acts absolutely independently when providing information to the messenger, and again when deciding whether to participate, a service provider participating in this process will act in compliance with competition law.

Participation in anticompetitive meetings

4.29 As the quotation in paragraph 4.1 above illustrates, inasmuch as trade associations provide their members with an opportunity to meet and engage in discussions with their competitors on a regular basis, there is an attendant risk that the topic of conversation will, at some juncture, turn to factors in relation to which the parties compete. It may be the case that attendees expressly agree to fix prices, share markets or limit output, in which case that agreement will be prohibited by section 4(1) of the Act and/or Article 81(1), and is very unlikely to be exempted on the basis of the exception rule. In addition, both section 4(1) of the Act and Article 81(1) also apply to "concerted practices", which are forms of collusion falling short of

[56] Published 27 January 2006, available online on the Competition Authority's website at: http://www.tca.ie/NewsPublications/NewsReleases/NewsReleases.aspx?selected_item=18.
[57] Published 10 January 2007, available online on the Competition Authority's website at: http://www.tca.ie/templates/index.aspx?pageid=1074.
[58] Published 10 October 2008, available online on the Competition Authority's website at: http://www.tca.ie/NewsPublications/NewsReleases/NewsReleases.aspx?selected_item=228.
[59] Published 23 September 2009, available online on the Competition Authority's website at: https://www.tca.ie/templates/index.aspx?pageid=1272&locale=0.

agreements properly so-called. Even if competitors do not agree to a common plan defining their action on the market, their conduct is liable to be prohibited by competition law where the firms knowingly adhere to collusive devices which facilitate the coordination of their commercial behaviour.[60]

4.30 The consequence of such a wide definition of collusion is that, where firms participate in meetings that have an anticompetitive outcome (for example, price-fixing), each firm in attendance at the meeting is presumed to have subscribed to what was agreed, regardless of whether it has explicitly done so, unless it has publicly and unequivocally distanced itself from what was agreed at the meeting.[61] A firm may distance itself from the outcome of an anticompetitive meeting by a public announcement that it does not subscribe to the anticompetitive objective agreed, or the methods to implement it, and moreover, does not wish to be invited to future meetings of that nature.

4.31 A simple discussion between competitors, at which commercially sensitive information is exchanged, such as pricing or sales figures, may amount to an anticompetitive concerted practice, even in the absence of any formal agreement as regards the future market action of the firms involved. It is presumed that undertakings taking part in such concertation and remaining active in the market will take account of the information exchanged with competitors in determining their own conduct on the market, all the more so when the concertation occurs on a regular basis and over a long period.[62]

4.32 To the extent that concertation involves a hardcore restriction of competition by price-fixing, market-sharing or limiting of output, cartelists are liable to criminal prosecution under section 8 of the Act.

4.33 In addition to the liability of individual members of a trade association, where anticompetitive coordination is encouraged or facilitated by that trade association, the organisation may be held responsible for its involvement in the breach of competition law.[63] A trade association which holds regular meetings at which discussions relating to any commercially sensitive issues between competitors are likely to occur should consider putting in place a competition law compliance programme, to ensure that interactions between members remain within the parameters imposed by competition law.

[60] Case T-7/87 *Hercules v Commission* [1991] ECR 1711, hereafter "*Hercules*", at paragraph 242.
[61] *Hercules* at paragraph 232.
[62] Case C-199/92 P *Huls v Commission*, [1999] ECR I-4287 at paragraphs 158-166.
[63] See, for example, the Commission's decision in *Roofing Felt* [1986] OJ L232/15.

Example 5: Anticompetitive Concerted Practice Resulting from Participation in Meeting[64]

The Organisation of Widget Producers (OWP) meets quarterly to discuss technical matters relating to widget manufacturing. Executives from the four principal widget manufacturers in Ireland, firms A, B, C and D, attend these meetings. At the conclusion of one meeting, Executive A noted that prices had fallen markedly in the preceding six months. He said that firm A was under pressure from its customers to reduce prices further, because of falling prices of competitors, but felt another price decrease was unsustainable. Executive B commented that the trading environment was difficult; he wondered aloud whether any business could survive further price decreases. Executive C mentioned that, to turn a profit that year, firm C would need a 15% increase in widget prices. Executive B answered that firm B was similarly placed, and that it would probably bring in a price increase within the next four weeks. Executive D remained in the room while the conversation took place, but said nothing. In the two months after the meeting, firms A, B, C and D increased prices by an average of 13%.

In this example, all four firms are guilty of engaging in an anticompetitive concerted practice. As the practice relates to price, it is an object restriction of competition, and therefore it is not necessary to consider whether it had any anticompetitive effect on the market. Although Executive D did not actively participate in the conversation when pricing issues were discussed, she remained present and moreover, did not distance herself from the interchange that had occurred. Without clearly indicating to her colleagues that firm D wished to take no part in the resulting coordination, it is presumed that firm D took account of the matters discussed at the meeting when determining its action on the market.

Information exchanges

4.34 A common function of trade associations is the collection and collation of statistical and other information about a particular sector. This material might be used for a variety of legitimate purposes, such as support for a lobbying effort, to develop strategies for expansion and development, or to identify problematic areas within a sector in order to devise solutions. Indeed, the availability of market information is generally viewed as critical to the development of a competitive environment.[65]

4.35 An information exchange between competing undertakings, particularly where commercially sensitive information is shared, nevertheless represents a significant culture shift from the "normal" conditions of vigorous competition between competitors. Information exchanges require firms to make counterintuitive sacrifices – allowing competitors to access commercial information that in the normal course would be protected as a business secret – in order to receive an extraordinary bonus in return, namely, the equivalent business secrets of their competitors (albeit, typically, in a highly aggregate form).

4.36 Consequently, the exchange of information between competing firms by means of a trade association can lead to two related types of problems under competition law: it may facilitate outright collusion between competing members of a trade association, or it may increase market transparency to the point where, even without direct or indirect

[64] Many Community cartels decisions contain events of this nature; for a recent example see the *Candle Waxes* Commission Decision of 1 October 2008 (Case COMP 39.181), available at http://ec.europa.eu/competition/antitrust/cases/decisions/39181/provisional_public_version.pdf.
[65] OECD at p. 35.

collusion between competitors, competition no longer functions adequately in the market.

4.37 Where an information exchange occurs in tandem with practices that have the object of restricting competition, such as price fixing, output limitations or market sharing, it may function as a cartel enforcement mechanism. The exchange of information might allow cartel participants to monitor whether their competitors are adhering to agreed prices, output quotas or territorial restrictions on sales. In such a case, the information exchange decision, agreement or practice is assessed in combination with the assessment of the other restrictive practices.

4.38 In the absence of complementary anticompetitive practices, an information exchange may still fall foul of competition law where it reduces the degree of uncertainty in the market to such an extent as to render normal competition responses redundant. Competition law requires that independent economic operators must act strictly independently on the market; by contrast, an information sharing arrangement may result in market transparency to such a degree that firms can prejudge with sufficient accuracy the likely market actions of their competitor. In order to determine whether an information exchange has the effect of restricting competition in a particular market, it is necessary to take into account all of the circumstances in which it operates, including the type of information involved, the method by which it is shared and the structure of competition in the relevant market more generally.

Example 6: Information Exchange Probably Compatible

The Organisation of Chartered Acupuncturists (OCA) regulates the practice of acupuncture in Ireland, awards "chartered" status and provides business support services to chartered acupuncturists, the majority of which are self-employed. OCA hears anecdotal reports of a significant downturn in business for acupuncturists. To determine the extent, and adapt services for members accordingly, it commissions an accounting firm to survey its members, who are asked to disclose, for each of the past three years, figures for total appointment hours worked and total revenue, as well as overheads subdivided into seven categories including rent and insurance. Members are also asked for comments about particular business difficulties they are facing under various categories. The surveys are returned to the accounting firm anonymously, which aggregates the data and provides it to OCA. Based on this information, OCA designs a number of training and business development courses for its members, and arranges a number of group discounts for members with insurance, computing and other goods and service provides. Although the headline aggregated figures for each year are provided to members, to illustrate the increasing costs and declining revenues, the breakdown of figures is kept confidential.

In this instance, OCA acts as an association of undertakings, rather than in a purely regulatory capacity. However, these activities are likely compatible with competition law – either they fall outside the prohibition on anticompetitive coordination or are exempted by section 4(2) of the Act/ Article 81(3). The market for acupuncturist services is not concentrated, and barriers to entry are not high, once the relevant qualifications have been obtained. The collection of information in this instance has a genuine, legitimate purpose – to enable OCA to assist its members to become more efficient in their businesses – and it does not facilitate or result in a restriction of competition. Particularly, the information does not increase the transparency of the market to any significant extent: acupuncturists remain as uncertain as ever as to the likely actions of competitors.

Example 7: Information Exchange Probably not Compatible[66]

There are seven blidget suppliers in the State. Demand for blidgets has been stagnant or declining for several years; coupled with significant brand loyalty and the need for suppliers to put in place a considerable after-sales service network throughout the State, the result is that there has been no new entry into the sector in years. In order to identify "efficiency-drivers", the Blidget Association of Ireland (BAI) establishes an information exchange network, which collects and aggregates sales data from each blidget supplier, then breaks down the data by product, territory and time period and distributes this information to members. Although the data remains anonymous, due to the concentrated nature of the market and because the information is broken down to such an extent, in many instances it is possible to identify individual retails sales and market shares.

Although the agreement/decision to run the network may not have the *object* of restricting competition, in this market it probably has a restrictive *effect*. The detailed information exchanged creates considerable market transparency between suppliers, which is likely to destroy what hidden competition remains. Moreover, it may create a barrier to entry and expansion. Non-members of the network seeking to enter the market are disadvantaged because they do not have access to useful and detailed data, yet joining the network obliges suppliers to provide sensitive commercial information to the incumbent suppliers. Unless BAI can establish substantial efficiencies outweighing anticompetitive effects of the arrangement, the network will probably be prohibited by the competition rules.

4.39 A trade association intending to gather, aggregate and subsequently disseminate to its members sensitive commercial information, such as business costs or sales figures, under an information exchange arrangement, is advised to seek legal advice as to the compatibility with competition law of its proposed scheme. In considering this question, trade associations may wish to take account of the following factors:

i. The degree of commercial sensitivity involved in the information to be gathered – the more sensitive the information, the greater the risks to competition.

ii. The age of the information – the more current the information, the more likely it is to cause competition problems. Conversely, the sharing of historic information that would not reveal or impact upon the current or future market behaviour of a firm is likely to be permitted.

iii. The frequency with which the information is collected and compiled.

iv. Whether the method of gathering the information allows for its confidentiality to be preserved; for example, a survey that is privately completed and returned anonymously by each member may raise fewer issues than a show of hands or oral presentation at a face-to-face meeting.

v. Whether the information compiled is already publicly available, and whether this is in an aggregated or disaggregated form.

[66] This example is based on the facts and findings in *UK Agricultural Tractors Registration Exchange* case, 92/157/EEC Commission Decision of 17 February 1992.

vi. The degree to which results will be broken down along regional or specific product lines – the more detailed the analysis involved, the greater the market transparency that may result.

vii. The extent to which the information compiled is subsequently conveyed to members, the media and/or channels through which this takes place, and the frequency of distribution.

viii. The number of players in the market: in more concentrated markets with fewer competing firms, the distribution of detailed market data may allow for the identification of figures that can be narrowed down to a particular firm, which may create significant risks to competition.

ix. The nature of the product concerned: where goods or services are fairly homogeneous in nature, with little product differentiation, the exchange of market data has a greater potential for restrictive effect than in markets involving highly differentiated goods or services.

x. The degree of competition in the market more generally: an information exchange may pose fewer problems in a highly competitive and/or growing market than in one which already displays oligopolistic tendencies and/or is stagnating or in decline.

4.40 Where an information exchange agreement has the effect of restricting competition, it may still be exempted where the criteria set out in section 4(5) and/or Article 81(3) are satisfied on the facts. It must be emphasised that these criteria are cumulative, and so all four must be satisfied for the exemption to apply, which is not always simple to establish.

Industry-wide standard-setting

4.41 Another common function of trade associations is the formulation and supervision of common or minimum standards for an industry. Standardisation agreements have as their primary objective the definition of technical or quality requirements with which current or future products, product processes or methods may comply.[67] These might relate, for example, to product interoperability or to the granting of a quality mark administered by the trade association.

4.42 Typically, competition law looks favourably on decisions of a trade association or an agreement or practice between its members which relate to the adoption of non-compulsory standards through a procedure which is non-discriminatory, open and transparent. Such arrangements are likely to fall entirely outside the ambit of section 4(1) of the Act and/or Article 81(1).[68] Conversely, where standardisation grants the trade association and/or firms involved joint control over production or innovation, thus restricting their ability to compete, and/or excluding third party suppliers, then the arrangement may come within the purview of competition law. This might be the case where, for example, the decision of a trade association to lay down certain standards for a particular industry has the object or effect

[67] Horizontal Guidelines at paragraph 159.
[68] Horizontal Guidelines at paragraph 163.

of restricting members' freedom to differentiate their product offerings.[69]

4.43 Where a standardisation arrangement has an anticompetitive object or effect, it may still benefit from exemption by satisfying all four of the conditions set out in section 4(5) of the Act and/or Article 81(3). Where standardisation results in genuine, demonstrable efficiencies, where access to the standard is available on reasonable terms, and where there is a non-discriminatory justification for choosing one particular standard over another, there is a substantial likelihood that the arrangement will satisfy the exemption criteria.[70] Conversely, a restrictive standard-setting arrangement that is an element of a broader restrictive agreement aimed at excluding actual or potential competitors will be prohibited by section 4(1)/Article 81(1), and moreover, will likely fail to qualify for exemption.[71]

Example 8: Standardisation Probably Compatible

Widgets make use of an accessory product, gadgets, which typically are required to be replaced every three months. Previously, every widget producer made its own gadgets, and gadgets produced for one brand of widget were not interchangeable with other brands. Customers find this frustrating, and so the Organisation of Widget Producers (OWP), the trade association for the widget supply sector, decides to develop a single standard for gadgets. Having considered all of the designs in use amongst the various producers, its settles upon the most efficient gadget design in the market, the G1, and adopts this as the "open standard" for the industry. Although producers are not required to manufacture widgets to G1 standard, if they choose to do so they can apply for the "Top Widget" quality mark, which is maintained and promoted by OWP.

This standardisation agreement/decision does not appear to restrict competition at all, and so will probably fall entirely outside the purview of competition law.

Example 9: Standardisation Not Compatible

Widgetator, a widget producer, designs a low-cost version of the widget which uses two gadgets rather than the usual four. Widgetator manufactures its widget to G1 standard, and is awarded the "Top Widget" quality mark. Its widget proves extremely popular, and within three months Widgetator had more than tripled its market share. Other widget producers are unhappy, and at an OWP meeting held to discuss standards in the industry, a majority of producers vote to amend the conditions for award of the "Top Widget" mark, to include a requirement that widgets must utilise at least four gadgets.

This "standardisation" agreement is, in fact, a thinly disguised attempt to exclude a low-cost competitor from the market. As such, it had the object of restricting competition, and moreover, cannot be justified on an efficiencies basis. Therefore, this agreement will be a breach of competition law.

[69] See the *Roofing Felt* cartel case ([1986] OJ L232/15) for an example of this.
[70] Horizontal Guidelines at paragraph 169 to 175.
[71] Horizontal Guidelines at paragraph 165.

Group Purchasing

4.44 Group purchasing arrangements are often formed so that members may negotiate better buying terms with suppliers, especially with respect to prices. While any conduct that involves coordination among competitors may fall foul of section 4(1) of the Act and/or Article 81(1), even on buying prices as opposed to selling prices, group purchasing arrangements are frequently regarded as pro-competitive.[72]

4.45 Group purchasing arrangements raise two principal concerns under the competition rules; first in relation to the relevant selling market(s) and second in relation to the relevant purchasing market. The relevant selling market is the market or markets that the members of the purchasing group sell on, while the relevant purchasing market is the market with which the cooperation is directly concerned.[73] The precise boundaries of the both the selling market and the purchasing market will depend principally upon the behaviour of end consumers, in the case of the selling market, and all purchasers in the case of purchasing market. A complete treatment of market definition is beyond the scope of this Notice. The reader is directed to the European Commission's guidance on the definition of the relevant market.[74]

4.46 The concern that group purchasing arrangements raise in relation to the selling market(s) is that such arrangements have the potential to facilitate coordination, especially on price. This is more likely to be a concern where the input(s) purchased by the group represent a substantial share of the cost of producing the relevant output; the standardisation of input costs could facilitate collusion on retail prices.[75] If the members of the group purchasing arrangement are not competitors in their respective selling markets, then competition concerns are unlikely to arise. However, for trade associations, where members are typically competitors, this is a factor that requires due consideration.

4.47 In relation to the purchasing market, the competition concern raised by group purchasing arrangements is that they may lead to excessive buyer power. A high degree of buyer power over suppliers is undesirable if, for example, supply prices are forced below the competitive level. Of particular concern would be an exercise of buyer power by the purchasing group that forecloses access to suppliers for other customers or raises other customers' costs, especially other customers who are competitors in downstream selling market(s).[76]

4.48 There are no absolute market share thresholds indicating when a group purchasing arrangement will result in the creation of market power. However, the European Commission have indicated in their Horizontal Guidelines that group purchasing arrangements leading to a combined market share of less than 15% in both the purchasing and selling markets are unlikely to raise concerns under the competition rules.[77]

[72] Horizontal Guidelines at paragraph 116.
[73] Horizontal Guidelines at paragraph 119.
[74] Commission Notice on the *definition of relevant market for the purposes of Community competition law* (OJ C372 of 09.12.1997).
[75] Horizontal Guidelines at paragraph 128.
[76] Horizontal Guidelines at paragraph 129.
[77] Horizontal Guidelines at paragraph 130.

4.49 Where a group purchasing arrangement has an anticompetitive object or effect, it may still benefit from exemption by satisfying all four of the conditions set out in section 4(5) of the Act and/or Article 81(3). Because of the interdependencies that exist between buying and selling markets, a consideration of efficiencies would likely be complex. However, the likelihood of a group purchasing arrangement benefitting from an exemption is substantially reduced if in addition to the creation of substantial buyer, there is also weak competition on the selling market(s). The reason is that the cost savings arising due to the exercise of buyer power by the purchasing group are unlikely to be passed on to consumers.

4.50 Two final points are relevant to the consideration of group purchasing under the competition rules. First, group purchasing arrangements can take many forms, all of which carry the risk of anticompetitive coordination, though in different degrees. Some group purchasing simply involves the negotiation of deals with suppliers that members of the group can avail of. Others purchasing groups involve a greater degree of economic integration and behave more like wholesalers, going so far as to taking possession of stock and reselling to members at recommended prices for example. Regardless of the legal form of the buying arrangement, members of the arrangement must be cognisant of anticompetitive spillovers into other areas of their activities. In this regard, members of group purchasing arrangements, whether under the auspices of a trade association or not, need to be cognizant of the limitations placed on cooperation among competitors as outlined in this notice.

4.51 Second, where group purchasing arrangements impose restraints on members of the purchasing group as to how they behave on the selling market(s), competition concerns may arise. Such restraints, because they involve agreements between firms operating at different levels of a distribution or production chain, are called vertical restraints, in contrast to horizontal agreements between competitors who operate at the same level of a distribution or production chain. Vertical restraints that may raise competition concerns include for example, any attempts influence the resale price of goods purchased through the group arrangement. A complete treatment of vertical restraints is beyond the scope of this Notice. For further information the reader is referred to the European Commission's[78] and the Competition Authority's[79] guidance on vertical restraints.

[78] Commission Regulation (EC) No 2790/1999 of 22 December 1999 on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices (OJ L336/364).
[79] Competition Authority *Declaration in Respect of Vertical Agreements and Concerted Practices* (Decision No. D/03/001), dated 5 December 2003.

Example 10: Joint Purchasing Group Probably Compatible

There are five manufacturers of widgets in the State. Four of them are members of the SWP (Society of Widget Producers) and collectively they account for 80% of all widgets sold in the State. There is a necessary input required by all widget manufacturers, and indeed by all manufacturers, called JUICE. JUICE accounts for just 15% of the overall production costs for widget manufacturers.

Competition has recently been introduced to the JUICE market but the new entrants have been slow in making up market share and as yet do not offer JUICE at substantially better terms than the incumbent. The SWP decide to form a joint purchasing group for their members to negotiate better JUICE deals with the former State monopolist and new entrants.

On the facts, it appears unlikely that the joint purchasing arrangement would raise concerns under the competition rules. The SWP account for only a small proportion of the purchasing market. Further, while the membership of the SWP account for 80% of widget production in the selling market, the proportion of costs that JUICE accounts for is relatively small so that any risk of price coordination in the widget market as a result of the purchasing arrangement is small.

Example 11: Joint Purchasing Group Not Compatible

There are approximately 1,000 drinkit retailers in the State, supplied by just two drinkit manufacturers and distributers. Approximately 80% of drinkit retailers are represented by a trade association, the ADRI (Association of Drinkit Retailers of Ireland). The ADRI's membership carry on business in region X of the State. The remaining 20% of drinkit retailers are represented by the DRA (Drinkit Retailers Alliance) and carry on business in region Y of the State. Region X and region Y are distinct geographic markets. Cost of product accounts for a substantial portion of all costs for drinkit retailers.

As well as being active lobbyists on behalf of their members, the ADRI and the DRA also provide advice to their members on a variety of other issues that arise relating to the day-to-day operations of a drinkit retailing business.

At an AGM of the ADRI, a number of members raise the possibility of establishing a group purchasing arrangement under the auspices of the ADRI so that ADRI members may more effectively bargain with the two drinkit manufacturers and distributers. Would such an arrangement raise concerns under the competition rules?

On the facts, such an arrangement would raise concerns. On the selling market, the joint purchasing arrangement would account for almost all of the drinkit retail market in region X. Moreover, drinkit accounts for a substantial portion of costs for drinkit retailers. A joint purchasing arrangement along the lines suggested by ADRI members presents a serious risk of price coordination by drinkit retailers in region X and would tend to strongly outweigh any potential benefits of any enhanced buyer power *vis-à-vis* the two drinkit manufacturers and distributers.

A similar proposal is made at the AGM of the DRA. The members of the DRA making the proposal are aware of the issues encountered by the ADRI when considering a joint purchasing arrangement. However, DRA members wonder if the option might still be open to them since they have a much smaller membership. It appears likely that a joint purchasing arrangement established under the auspices of the DRA would also fall foul of the competition rules. The reason is the same as before. Even though the DRA membership only covers 20% of the State, for the purposes of considering how competition is affected, the relevant market is the region Y, where DRA members have nearly 100% market share.

5. CONTACT DETAILS

Confidentiality

5.1 Information provided is always treated in strictest confidence. It is Competition Authority policy not to:

- Discuss individual investigations;
- Reveal the identity of a complainant during an investigation;
- Name organisations or individuals under investigation; nor,
- Give information to the media.

5.2 The Competition Authority asks you to do the same. You should not indicate to those suspected of involvement in anti-competitive activities that you have made, or intend to make, a complaint to the Competition Authority. This will only serve to alert a cartel or dominant business, possibly resulting in the removal of evidence.

What will the Competition Authority do?

5.3 Members of trade association as well as the public, employees, individual businesses, public representatives, Government Departments and public agencies are all invited to report suspected anti-competitive behaviour to the Competition Authority.

5.4 As a first step, the Competition Authority will check that the issue of concern can be dealt with under competition law. Where the issue is within the Competition Authority's remit, it may be resolved quickly without the need for legal action. Some issues require a more detailed evaluation in order to assess their significance. A few cases proceed all the way to court. Every effort is made to complete investigations as quickly as possible.

5.5 The Competition Authority's operates a screening system to focus resources on the substantive cases while ensuring that the rest are dealt with quickly but fairly. In all matters, the Competition Authority's focus is to protect the competitive process throughout the economy for the wider public interest. The Competition Authority does not act on anyone's behalf, like a solicitor does. Thus, the Competition Authority does not:

- Give legal advice - this is the role of the legal profession;
- Comment publicly on whether it is investigating a particular alleged anti-competitive behaviour or not; nor,
- Comment on the progress of any investigation.

More Information

5.6 More information on the Competition Authority is available on our website www.tca.ie

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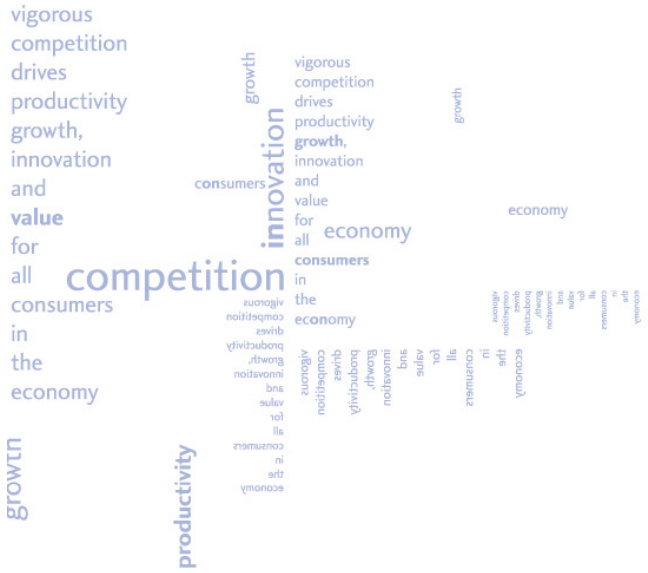

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