Competition law aspects
of association work
- a guide for

Revised February 2010

Contents

A. Introduction

I. Higher liability risk

A new EU regulation on the **enforcement of competition law** came into effect on May 1, 2004. It prescribes that a **fine of up to 10% of annual turnover** will be imposed on companies involved in an infringement of competition law.

Not only express agreements which restrict competition are prohibited between the member undertakings of an association. Meetings of associations are also deemed to **increase the risk of uniform behaviour** if competitors in the association exchange information and discuss their common interests. In the worst case, an unobjectionable exchange of experiences can constitute the **preliminary stage** to a concerted practice. Resolutions of associations which infringe the ban on cartels are null and void and allow the antitrust authorities to issue prohibitive injunctions and/or to impose fines.

To protect not only eu.bac, but also its members from fines, indemnification claims and a bad reputation in the eyes of the public, meetings of the association must therefore keep strictly within the legal boundaries.

II. Authorities and private individuals more willing to prosecute cartels

Recent investigations have shown that the antitrust authorities are willing to prosecute infringements of competition laws more rigorously than before and to impose harder sanctions. In light of the stricter rulings of the new enforcement regulation, a single breach of antitrust law can already have significant economic repercussions. It is therefore essential that not only eu.bac employees who attend or lead association meetings know which conduct and behaviour is not appropriate under competetion laws. This is equally important for representatives of companies who attend the events held by the association. Since the new regulation on the

enforcement of competition law has abolished the previous application and approval system, in future the antitrust authorities will concentrate their resources first and foremost on **prosecuting cartels**. It is to be expected that customers or parties damaged by a cartel will be more likely to file **complaints**. As antitrust behavior is more likely to become public knowledge, cartel members will also make more frequent use of **leniency regime** than before. If they report an inadmissible agreement to the antitrust authorities that has not yet been discovered, they do not have to fear a fine. In this way, the antitrust authorities are likely to uncover illegal cartels more quickly.

III. Objective of the guide

This guide is intended as a **preventative means** to avoid conflicts with competition law. It will highlight **the most important aspects of the work of the association** which are relevant for antitrust law purposes and suggests **concrete courses of action** to ensure that the members will act within the law (see Part B). The objective of this guide is to ensure that neither eu.bac nor the member companies involved in association meetings infringe competition law. Every infringement of competition law not only damages the association and its members, but under certain circumstances also entails a **risk of personal liability** for the company representatives involved in an illegal agreement. Even the general manager of a company may be made personally liable if it is proved that he is responsible due to organisational or supervisory negligence for behaviour of his employees that infringes antitrust law. This guide should thus also help general managers of eu.bac member companies to fulfil their **oversight duties**.

However, the guide can only screen some important areas of the work in association bodies for aspects of antitrust relevance and only provide **general behaviour guidelines**. The peculiarities of a specific case or of the industry concerned may be assessed differently. **Cases of doubt can and should, however, be checked by a legal adviser at any time.** eu.bac employees who organise or lead association

meetings will receive internal training about the areas of association work of relevance from a competition-law perspective.

Finally, please note that association work only represents one area of a company's activity in which the requirements of competition law need to be considered. The guide does not, however, look at other relevant aspects of business practice such as distributor's or license contracts, the existence of a strong market or market-dominating position, etc.

B. Aspects of association work of relevance from a competition law perspective

EXECUTIVE SUMMARY

- Not only express **agreements** are illegal**.** The **exchange of sensitive data** may also be unacceptable. This applies in particular to prices and price components, company strategies and internal company data which competitors can use to their **strategic advantage**.

- **Position papers** qualify as a **recommendation of the association.** They must not lead to **uniform behaviour** by the members companies. It is, however, permitted to reproduce the **actual market situation,** provided it is not possible to draw conclusions about the individual members.

- **Voluntary commitments** can negatively affect **the freedom of choice** both of the companies and of the consumers in an unacceptable manner and **make it more difficult** for potential competitors **to enter the market.**

- When mentioning **contractual conditions** in **guidelines,** care should be taken that only **non-binding examples** are given.

- To determine whether **statistics** infringe competition law, the following **questions** should be **considered.** If any of them can be answered in the affirmative, there is at least some indication that they are not acceptable:

  - **Is only a small number** of companies involved in the procedure?
  - **Is it possible to draw conclusions about prices** or **price components** (discounts, credit notes, terms of payment)?
  - Are the data being exchanged very **recent**?
  - Is there a pronounced **classification by product category** so that not only a general market overview is given?
  - Is the **geographical classification** relatively narrow or is the market information procedure even broken down into **regional markets**?

- **Press releases** may present a **market development** in an objective and appropriate manner. **One-sided recommendations for action** without presenting alternative responses, on the other hand, should be avoided.

- When **promoting trade fairs** eu.bac should make appropriate **positive statements** about the favoured trade fairs rather than negative comments about the rival fairs. **Association circulars, press releases and interviews** to support a fair should be scrutinised to ensure that they cannot be seen as a boycott or a preliminary stage to an illegal agreement between member companies.

- Potential **association members** can only be rejected if they do not satisfy objective **membership requirements according to the statutes** or their joining would **damage the reputation of the association.**

- An **obligation** of the members of a **purchasing co-operative** to purchase the goods or services procured by the co-operative is not permitted. Co-operatives between **non-competitors or SMEs** are, however, generally acceptable. When the **joint market share exceeds approx. 15%** it has to be examined whether the co-operative is justified by the existence of **economic efficiencies** which are passed on to the consumer.

- **Individual company data** will only be passed with the **consent of the companies concerned.**

I. Exchange of information at association meetings

1. Issue

It is extremely difficult to specify precisely what **information** can be **exchanged** at association meetings without, as a member company, running the risk of infringing competition law. Not only express **agreements**, e.g. various companies agreeing not to offer a discount of more than X% on a certain product, are illegal. This is clearly a price agreement. **But even the mere exchange of sensitive data**, in particular prices and price components (such as cost information), can be **problematic**. This applies even if no agreements are entered into beyond the exchange of information. This is because:

The antitrust authorities see **no need** for competitors to exchange sensitive data. If they do so anyway, they create **market transparency** which is not desirable from a competition-law perspective. By exchanging such information there is already a **risk of uniform behaviour** or the harmonisation of price levels.. Although the fines for the mere exchange of sensitive data might not be as high as for more extensive agreements, the exchange can nevertheless under certain circumstances be seen as a **preparatory action for a cartel agreement at a later point in time.** This applies if **spontaneous comments** of certain participants give the association meeting a certain momentum, e.g. the wish is expressed that a certain price level is not exceeded. Such comments can quickly lead to uniform behaviour if the other participants of the meeting agree with them. An explicit agreement may then be made at a later stage, possibly outside the association. Even then, the antitrust authorities may classify the association meeting as **a substantial preparatory act for an agreement that infringes competition law.** The association would be accused of creating a platform for illegal agreements and could be fined accordingly.

2. Unacceptable exchange of data

The following data may not be exchanged:

- The exchange of **prices and price** components, in particular discounts or cost or volume information that has an impact on price setting.

- The **announcement of company strategies** and future market behavior if this information is not normally accessible to competitors and which competitors could use to their own **strategic advantage.** This holds true in particular if knowledge of the company strategy allows them to **develop and implement their own counter-strategy.** Such counter-reactions on the market should, in the opinion of the antitrust authorities, be based solely on perceived actual market behaviour and not on information supplied directly by the competitor.

- Finally, the exchange of **other sensitive internal company data** is not permitted. This includes, for example, the announcement of **price increases,** i.e. percentage price increases of certain products. **Business expectations** for the next year are classified as sensitive if they do not pertain to the company as a whole or the whole product range but to specific products or specific markets. It is particularly critical if in addition reasons are given, e.g. for a positive forecast (reduction of prices, etc.). These are **strategies** which the company would normally keep secret and the announcement of which allows competitors to take counter-action.

  This does not mean that sensitive data can not be provided for purposes of creating statistics. Sensitive data should not, however, be announced at association meetings. Such information might be reported within the framework of market information procedures where the participating association members receive aggregated figures in an anonymous form if the corresponding rules related to such procedures are considered (see IV.). Also

in this regard, the provision of even aggregated price information can be very critical.

3. Acceptable exchange of data

It is, on the other hand, permitted to **discuss general economic data** at association meetings and to **discuss current legal developments** and their consequences for the member companies. Here too though, agreements may not be made on how members will behave in future if a certain law comes into force. **Discussions about lobby activities** of eu.bac, the preparation of a general **industry overview** and the **exchange of easily accessible data** to be found for example in published annual company reports (sales of the past fiscal year, etc.) are also permitted. If, on the other hand, the information being discussed can only be obtained with difficulty or through special contacts, it would be problematic to pass on this information at an association meeting. In case of doubt, members should contact a legal adviser.

However, not only pricing agreements between member companies are illegal. A **recommendation by an industry association** may also infringe competition law. A position paper may be considered to be such a recommendation if it gives the companies, to whom the recommendation is directed at, the impression that they should adhere to the recommendation and consequently has the effect of creating uniform market behaviour, particularly uniform pricing behaviour. Every member company must be at liberty to set its own prices. An industry association may not make any recommendations that result in all its **members taking these as a guideline,** thus achieving the **same result as a price agreement** between companies. Moreover, customers could refer to an official eu.bac paper in which customary industry prices are reproduced in a potential complaint to antitrust authorities.

4. Conclusion

- Not only express **agreements** are illegal**.** The **exchange of sensitive data** may also be unacceptable. This applies in particular to prices and price components, company strategies and internal company data which competitors can use to their **strategic advantage**.

II. Voluntary commitment using the uniform utilisation of a new material as an example

1. Legal position

The antitrust authorities have fundamental **concerns** about voluntary commitments undertaken by industry, at least that is if they pursue political or other goals, which are otherwise generally achieved by enacting standards. Such commitments are generally assumed to be inadmissible if the **freedom of action of those involved** is unacceptably restricted or if **perceptible effects on third parties** are evident.

For example, companies come to an agreement on **the utilisation of a new material in the interest of product safety.** At the same time, the agreement contains a **contractual restriction** because the material used to date may no longer be used. As a result of the voluntary commitment, the possibility of the companies involved to choose their material themselves has been restricted, and thus also to determine the characteristics of their products. In addition, the uniform use of the new material would restrict the **choice of the consumer.** From the perspective of the antitrust authorities, the aim of achieving product safety in this case does not necessarily carry more weight than the restricted choice of the customer as a result of the introduction of the new material. Another problem is that a new seller of the old material would effectively have no chance of getting into the relevant market because its product would not be accepted due to the voluntary commitment. The commitment would then constitute an **inadmissible market entry barrier**.

Apart from this competition issue, there is also a **product liability** aspect to this example. If the companies participating in the voluntary commitment transmit the message that the new material is considerably safer than the old one, this could **lead to an obligation** to at least draw the attention of old customers to the new standard, depending on the constellation of the case, to even convert **products already in circulation to the new material.** If products already in circulation cause damage and if this is also attributable to the old material, it will be very difficult to hold the company concerned harmless because it has itself already drawn attention to the improved state of the art and possible safety risks.

2. Conclusion

Voluntary commitments can restrict the **choice** both of the companies involved and of the consumers in an unacceptable fashion and make it **more difficult** for potential competitors to **enter the market**.

III. General terms and conditions

1. Conditions of associations

Many associations regularly publish general terms and conditions of business and sale which can be used by the individual member companies. It would, however, represent an **infringement of competition laws** if the members of the association were to make a **commitment to use these conditions**. Even if no such commitment is made, the use of general terms and conditions can be of relevance if, for example, prices are fixed in them, or if in fact the members refuse to deviate from these conditions. As it is no longer possible to have such conditions approved by the Antitrust Offices, their **in-house review** by the association will be even more important than before.

2. List of contractual conditions in the association guide

General terms and conditions published by an association are guidelines which members are free to follow or not. When referring to contractual conditions, e.g. payment conditions, in association guidelines, the **impression must not be given** that they are **customary industry contractual clauses** which must be strictly applied in practice without deviation. There is a risk here that the member companies concerned will introduce their "**clauses of their choice"** in the hope that they will then be **easier to impose on their customers** because they are printed in an association publication. In light of this, it may be advisable to supplement such a guide by the following or similar wording:

> "The clauses in this publication are merely non-binding examples which were supplied by member companies. Their inclusion in the guide does not suggest that they are commonly used in the industry. The clauses can therefore not simply be used as model wording. Particularly as regards warranty, liability and terms of payment, there are numerous other conceivable constellations. Which clauses can be used, possibly in a modified form, needs to be assessed on the basis of the specific contract and the underlying matter in the specific case.“

3. Conclusion

- Contractual conditions mentioned in **guides** are **non-binding examples** only.

- **May not create the impression** that an association’s general terms and conditions are binding.

IV. Market information procedures, in particular statistics

1. Introduction

Market information procedures, in particular in the form of **statistics,** can be important for the member companies of eu.bac because they are often used as a basis for their independent **economic decisions**. To obtain this information, **several member firms co-operate** by exchanging the relevant market data via eu.bac as an **institutionalised reporting centre**. eu.bac analyses the data, summarises them and passes them on to the companies involved in an **aggregate and anonymous form**.

As regards the appraisal of statistics from a competition law perspective, unfortunately there are **no clear rulings** stating that the statistics are fundamentally acceptable if there are X number of reporting companies, and that they are not acceptable if this threshold is undercut. In this situation, a **case-by-case assessment** is needed, focusing less on the legal appraisal of the matter than on an **economic analysis of the relevant markets and market participants.** Such an assessment is primarily performed by eu.bac as reporting centre.

2. Assessment of market information procedures

The following **principles,** which are based on the decisions made by the German Federal Anti Trust Office in practice, can assist when assessing when national statistics are clearly acceptable and when they are in a "grey area". These principles should be fundamentally similar under other European competition law rules.

a. Principles

In the eyes of the antitrust authorities, the exchange of market information in a relatively **concentrated market** is generally apt to giving the reporting companies **information about the market position and the strategies of their competitors** and thus to noticeably restricting competition. Information, in particular about sales

recorded in the various distributor territories of a sales network, represents **business secrets.** When such sales are reported, there is a risk that it will also be possible to **determine the sales of the competitors and their distributors.** This is reinforced still further if the data are reported at **short time intervals** and the reporting area is broken down into **relatively small regional markets** in which only a **small number of suppliers** are represented. The legality of statistics is clearly in doubt if every supplier knows the other companies working in the regional market. Under such structural conditions, the antitrust office tends to assume that the suppliers want to come to an arrangement with their competitors to avoid fierce price competition which would otherwise necessarily ensue. The Federal Antitrust Office takes the view that **transparency** as regards quantities sold and sales generated facilitates such an arrangement.

The **number of business transactions** on which the statistics are based or the period covered must be calculated in such a way that it is not possible to draw **conclusions about the details of the individual transactions,** in particular prices, suppliers and customers. If there are only a **small number of suppliers** in a reporting territory, the successful sales expansion of one supplier can lead to a perceptible drop in market share of one or several other suppliers. If, for example, a reporting company offers particularly favourable prices in order to expand its market share, the competitors may on no account **learn of this strategy from the statistics,** enabling them to take appropriate countermeasures. Creating transparency of this sort would definitely make the statistics unacceptable.

b. Corporate independence

It is important to ensure that the **corporate independence** of the participating reporting companies is guaranteed. For statistical purposes, **participants from a group of companies** count as one company. It should, however, be taken into account that groups can obtain an **insight into the business policy** of other companies via any **participation** they may have in small and medium-sized companies. This already holds true if they have interests of 10% or less in, for example, GmbHs (limited liability companies) or GmbH & Co. KGs (limited

partnerships with a limited liability company as general partner). Their general managers must, upon request, give every shareholder immediate **information about the affairs of the company** and allow them to inspect all books. In light of this, it makes sense in principle to stipulate a **minimum number (at least 5, see c) of independent reporting companies** to ensure that a reporter cannot use the aggregated figures (sales volume and/or turnover) in conjunction with any data it may already have to draw conclusions about the figures of the other reporting companies. In addition, the reporting companies should inform eu.bac in good time of any changes in shareholders.

c. Result

If it is at all possible to derive something like a generally applicable rule from the current decisions of the German Federal Antitrust Office, for example, the following applies:

- In an oligopolistic market, i.e. in a market with few competitors, a **reporting system with only five independent participants** may already lie in a grey area from a competition law perspective. In such cases, the antitrust office suggests making the reporting system **rougher** by either taking larger reporting territories as a basis or extending the time period until the aggregated data is passed on.

- In a non-oliogopolistic market, a **reporting system with five independent participants** will generally be acceptable. Whether a market information procedure with fewer reporting companies is still permitted, would have to be examined on an individual basis.

- If there are **too few reporting companies** within a certain reporting period, the compilation of statistics should be suspended until a sufficient number of companies have reported their data.

3. Conclusion

a. Unacceptable market information procedures

What are referred to as **identifying** market information procedures, in particular price reporting systems, which allow conclusions to be drawn about the reporting companies are not permitted. In the opinion of the antitrust authorities, this eliminates secret competition which would lead to an undesirable stabilisation and harmonisation of price levels. In this context, there are **three basic rules:**

1. The more **specifically** the products can be distinguished and the more **immediately** the data is used, the greater the **market transparency** and the more likely it is to be able to draw conclusions about competitors in contravention of competition laws.

2. In markets with **few suppliers and high market shares** market information procedures are more likely to be unacceptable than in markets with many suppliers and low market shares.

3. The **shorter the time lapse** until the results of the market information procedure are announced to the companies, the more problematic.

When determining whether a market information procedure infringes competition law the following **questions should be considered.** If one can answer some of them in the affirmative, there is at least some indication that the market information procedure is not acceptable:

- **Are only a small number** of companies involved in the procedure?
- **Is it possible to draw conclusions about prices** or **price components** (discounts, credit notices, payment terms)?
- Are the data being exchanged very **up to date**?
- Is there a clear **classification by product categories,** rather than giving just a general market overview?

- Is the **geographical classification** relatively specific or is the market information procedure even broken down into **regional markets?**

b. Acceptable market information procedures

The following market information procedures, on the other hand, are acceptable from a competition law perspective

- **Market statistics** limited to determining and disclosing the **total volume** of a market.

- **General comparisons** along the lines of benchmarking which are not linked to price recommendations.

All other market information procedures are in a **kind of "legal grey area".** Often, defining what is acceptable and what is illegal behaviour is extremely difficult and requires case-by-case assessment. As reporting centre, eu.bac will generally make such an assessment.

V. Press reports

1. Legal position

Many associations regularly issue press reports or circulars on topical issues. Wording should be avoided here which could be interpreted as **uniform behaviour** or an agreement between the member companies in response to developments in a certain market. Likewise, eu.bac may not make any such **recommendations**. Formulations, for example, that price adjustments at the eu.bac member companies are unavoidable, should therefore be avoided. The same applies to statements that companies see themselves compelled to pass on additional burdens to the customers. Ultimately, it must be left up to each company to decide how to **respond**

to the changed market situation. For example, even if a price increase for the company's own products is probable, it is by no means mandatory.

In light of this, the association takes care that press releases or information letters objectively describe the **development in a market,** and that they do not call for certain economic responses. They must not awake the impression that a certain approach had been agreed within the individual professional associations. On the other hand, it is permissible to present **alternative responses** to the market development. However, again the association may not come out in favor of one particular course of action.

2. Conclusion

- Press releases must present **market developments** in an objective and correct way. **Biased recommendations for action** without drawing attention to alternative responses, on the other hand, are to be avoided.

- A legal advisor should review all draft Press releases of the association.

VI. Trade fair policy

1. Issue

a. Boycott

Support of a certain trade fair by eu.bac may not lead to a **boycott** of rival fairs. For a boycott to be assumed, there is no need to expressly name or identify the trade fair. It is sufficient if the member companies being addressed **can identify the trade fair** in question with **reasonable certainty.** The key question is, however, when do recommendations of eu.bac to its members to take part in a certain trade fair as exhibitor or visitor constitute a boycott of other trade fairs. Here it is decisive how the

addressee would understand the statement of the association. In particular, explicit criticism of a trade fair could already been interpreted as a call to a boycott.

b. Agreements

When **holding events** at which trade fair policy is on the agenda, it should be considered that not only concrete agreements or express resolutions of the member companies not to exhibit at a certain trade fair are an infringement of the ban on cartels. **Actual market behaviour** can also be tantamount to an agreement to behave in certain way. For example, if a large number of companies which have exhibited at a trade fair for many years suddenly stop doing so. In this case, the discernible effects on the trade fair market are indicative of an agreement that infringes competition law. Even a **circular of the association, a press release or an interview** in which a trade fair is presented in a negative light may be interpreted as the preliminary stage to an illegal agreement between association members. Again, caution is advisable here.

2. Possible solutions

Since an illegal boycott or such an agreement can lead to **warnings and high claims for damages from the boycotted party,** the following rules should be used as a guide for the trade fair policy of eu.bac :

It is permissible,

- íf eu.bac promotes or supports a **central trade fair**.

- if **general** i**nformation** about the concept of the favoured trade fair is given. It is quite acceptable to emphasise **special advantages** of this concept, provided this is done in an appropriate fashion.

- if the information is restricted to **true facts in the public domain**. In that case, even critical aspects may be expressed. Any additional negative judgement should however be omitted.

- if a **comparison** of the favoured trade fair with a rival fair only compares **material, relevant, objectively verifiable and typical features** of the trade fairs. Moreover, to be comparable the trade fairs being compared must have the **same orientation** and the rival fair may not be dismissed in general terms.

- if **only general opinions** are being surveyed to establish to what extent member companies are satisfied with a certain trade fair concept.

It is **not permissible,** on the other hand,

- if, e.g. the companies attending an information event of the association **adopt a resolution or agree** only to exhibit at a certain trade fair in future. Nor may eu.bac make **recommendations** that the companies may not attend or exhibit at the rival trade fair for certain reasons. Despite the promotion of a trade fair by eu.bac, the companies must be **free to participate** at all the relevant trade fairs.
- if the association makes **derogatory statements** about other trade fairs, particularly in an **unreasonable manner** with the objective of defamation.

- if eu.bac makes an undertaking to the trade fair company to **exclusively** promote the trade fair favored by the association or its member companies. It is, however, possible to **support** the trade fair company in its efforts to maintain or build up a certain trade fair as **central trade fair**.

- if the participants of an association meeting are asked whether or not they intend to attend certain trade fairs. **Revealing the willingness** of important or numerous companies to **participate** could exert pressure on the others.

3. Conclusion

- In its promotion of trade fairs, eu.bac should make **positive statements** about its favoured trade fair rather than negative statements about the rival fairs.

- Planned **circulars of the association, press releases and interviews** should be scrutinised to ensure that they cannot be viewed as a boycott or preliminary stage to an illegal agreement between the member companies. In case of doubt, the legal department should be consulted.

VII. Rejection of potential new member companies

1. Legal position

Working groups and professional association are often faced with the problem whether they are **obligated to accept a potential new eu.bac member,** in particular the European sales subsidiaries of a foreign company, who has made an application to join. According to most rules of procedure, a company **can** become a member, which indicates a certain **discretionary scope.** However, this must be exercised without discrimination. The **ban on discrimination** under competition law prescribes that industry associations may not refuse the application of a company to join if the rejection represents objectively unjustified unequal treatment and that would put the company concerned at a inequitable disadvantage against the competition.

It would in particular be **unequal treatment** if subsidiaries or sales companies of foreign companies had previously been allowed to join the working group or professional association, but in a specific case a company is not allowed to join. Rejecting membership like this would only be permissible if there were an **objective justification**. Here it is a case of **weighing up the interests** between those of the applicant for membership and those of the association not to accept the applicant. The inequality of treatment underlying the rejection may be justified by two types of reasons:

First, during the application process the applicant already **fails to meet objective membership criteria** set forth in the bylaws of the association. Second, exclusion or rejection would be possible if there are reasons inherent in the individual peculiarities of the applicant which stand in the way of its acceptance. Rejection would, for example, be justified if the acceptance of a certain company would **damage the reputation of the association.** Another conceivable reason would be if it would lead to considerable disharmony within the association. In this case, it is not however sufficient if the acceptance of the new member would merely be frowned upon by the existing members. Rather, the activity of the working group or the professional association would have to be effectively **blocked** because **information** previously provided is **withheld** on account of the new member, thus making participation in association meeting unattractive. If a number of companies threaten to leave, this could under certain circumstances justify rejecting a new member.

Finally, refusing to accept an application to join only infringes the anti-discrimination rulings if at the same time the company that has been rejected is **unreasonably disadvantaged** in competition as a result. Because associations generally provide their members with a wide range of support and assistance services with a view to improving their competitive position, the rejection of a membership application to join an association or working group in its specialist field will as a rule already **put the applicant at a disadvantage** because, unlike its competitors, it does not have access to the support services of the association.

2. Conclusion

- Potential **new association members** can only be rejected if they do not satisfy the **membership criteria set forth in the statutes** or their membership would **damage the reputation of the association**.

VIII. Purchasing co-operatives

1. Introduction

If purchasing co-operation agreements of independent companies are capable of **perceptibly influencing market conditions**, they constitute cartel agreements which under European law can infringe Art. 81 EC Treaty. On the one hand, the **harmonisation of demand behaviour** following the decision of co-operative members not to hold their own purchasing negotiations represents a **restriction of demand competition.** On the other, through the harmonisation of purchasing conditions, it also restricts competition on the supply side. Often purchasing co-operatives not only deal with purchasing, but also with marketing and sales. This relates, for example, to advertising or the integration of the members in the strategy of the group head office. Such **effects on the supply market** of the co-operative partners can also be illegal if they go beyond the restraint on competition associated with joint procurement.

As a principle, the advertising means used by the co-operative should be restricted to individual campaigns and may not constitute the main part of the advertising efforts of its members. However, the head office of the purchasing co-operative can carry out a common supraregional advertising campaign which would overstretch the individual members. Any other form of co-operation may be a problem. In isolated cases, it may be permissible for **small and mid-sized companies to join together** to improve their competitive position against large companies. A purchasing cooperative which mainly consists of large companies will generally infringe the ban on cartels.

2. Agreement of an obligation to buy

An obligation to buy is an agreement under which co-operative members undertake to purchase procured goods or services. Not only **contractual procurement obligations** are not allowed, **economic ties** which are tantamount to a contractual obligation to buy are also illegal. In some cases, it may however prove extremely difficult to differentiate between what is legally permitted and what is not.

It is decisive here that the members of the co-operative must remain **fundamentally free in their choice of supplier.** Otherwise, the members are deemed to be unreasonably tied. It would therefore be necessary for members to be free to conclude their own direct transactions with the contractual suppliers.

3. Implications of co-operation

Co-operation must not materially affect competition on the market concerned. In particular, the effects of **co-ordinated demand behaviour** need to be examined here. Again, it may be difficult to draw the line. It may be necessary to **assess different markets separately** for various products or ranges of goods purchased by the same co-operative. The market share on the respective demand market is based on the sales volume which the co-operative head office influences. In addition, the total purchases of the companies involved have to be considered.

Low **market shares** may lead to a material restraint on competition if it is not possible or reasonable for the suppliers to switch to other customers. Where co-operatives are merely responsible for the organisation and billing of the goods procurement while the negotiation of procurement terms is left up to the members, a higher market share will generally be acceptable.

4. Appraisal from a European law perspective

The European Commission generally also considers that purchasing co-operatives of smaller and mid-sized companies promote competition. This no longer applies as soon as large companies are involved. Purchasing agreements of companies that are **neither current nor potential competitors** are not treated as strictly. Purchase agreements generally fall under the ban on cartels if they are used as a means to disguise a cartel, to enforce forbidden price fixing, production limitation or market division. Under EU law, both the **purchasing and demand markets** as well as the **downstream sales markets** of the parties involved have to be considered. The

definition of the relevant demand markets is determined by the **possibilities of the suppliers to switch to other customers.**

The European Commission does not apply a fixed **market share threshold** which always indicates that a critical market force has been established. However, if the **parties involved have a joint market share of more than 15%** both on the demand and on the sales markets it does consider that there has probably been an infringement of the ban on cartels. Although this does not automatically mean that the co-operative is illegal, an intensive examination of the competitive implications and proof of economic efficiencies would be required, including an evaluation of market concentration and the countervailing power of strong suppliers. An exemption from the ban on cartels may, for example, be possible if market circumstances suggest that it will be possible to **pass on the lower purchasing prices to the consumer.** This does not apply to cost savings due solely to the exercise of market domination and which are of no benefit to the customer.

5. Conclusion

- An **obligation** of the members of a **purchasing co-operative** to buy the purchased goods or services is not permitted.

- Co-operation between **non-competitors or SMEs,** on the other hand, is generally allowed.

- When the **joint market share exceeds approx. 15%** it has to be examined whether the co-operative is justified by the existence of **economic efficiencies** which are passed on to the consumer.

IX. Compliance with rules and regulations at association meetings

1. Principles

Typically, numerous rival companies will meet at eu.bac meetings. On occasion, it may be very tempting to **exchange sensitive company data or to discuss market strategies. Member should refrain from doing so,** since such behaviour generally represents an **infringement of competition law,** and the companies concerned must be aware of the high **risk of fines** and possible **claims for damages from third parties.** Also, as soon as the public is informed about investigation proceedings of the antitrust authorities, **negative press reports** can also be extremely damaging to the companies concerned and the association. From the point of view of the companies, it is only advisable to take part in meetings that have been officially organised by eu.bac, or with its support, and at least one association employee is in attendance.

In light of this, it is not only important to develop a fundamental feeling for substantive antitrust law. **Compliance with certain formal rules** can help to organise and hold association meetings without infringing competition law.

2. Preparation of association meetings

Prior to every association meeting, the eu.bac employee responsible for the meeting should distribute an **official invitation**, including an **agenda**. The points of the agenda to be discussed there should be listed in as much detail as possible. It is the responsibility of the **eu.bac employee to ensure** that the agenda does not contain any aspects which might be objectionable from a competition law perspective. Here it is important to pay attention to **clear and unambiguous wording.** It is particularly important to avoid competition-law indifferent agenda points being given an semblance of illegality by an unfortunate choice of wording. For example, a permissible objective report on the economic situation after an increase in steel prices should not be subsumed under the agenda point "Agreement on steel prices" or the like. This would give the impression that illegal resolutions or agreements are to be made at the association meeting. Such an invitation could already give the

antitrust authorities reason to initiate investigations. Special attention should therefore be paid to wording. In case of doubt, a legal advisor should be consulted.

Before the association meeting, the eu.bac employee responsible for the organisation should consider to what extent the topics on the agenda of the group of association members expected to attend could **result in critical situations from a competition law perspective.** Before the meeting, it is therefore advisable to simulate **possible counter-reactions** of the eu.bac chair of the meeting.

3. Behaviour during association meetings

At the beginning of the meeting, the participants could be briefly **instructed** that they should behave in a way that does not infringe competition law. If despite cautioning **spontaneous comments** are nevertheless made (often a meeting can gain its own momentum), leading to a situation which could infringe competition law, the association member in charge of the meeting is required to intervene immediately. The following **counter-reactions** are conceivable:

- The chair of the meeting can **initially suspend the discussion** and **postpone** it until a later point in time. This would be particularly appropriate if there is any **uncertainty** about whether or not a certain form of behaviour contravenes competition law.

- At the same time, the chair of the meeting should announce that he will **clarify** the problematic aspects of this matter with the **legal advisor** before the next meeting.

- Should there be a **spontaneous exchange of sensitive company data,** e.g. of prices or price components, the chair of the meeting should **refer** to the relevant **market information procedures** of eu.bac, in particular statistical procedures. He should explain to the member association the possibilities of collecting data in future anonymously which will then be passed on to the companies in a summarised form without coming into conflict with competition law.

- A final measure would be the **temporary interruption** or **termination of the** meeting.

If, under exceptional circumstances, it should not be possible to avoid **discussion of sensitive areas,** a legal advisor should be present during the meeting of the association. Otherwise, it is the responsibility of the eu.bac employee leading the meeting to prevent unacceptable agreements from being made. In this respect, he should be aware that involvement in behaviour infringing competition law can lead to **personal liability** and possible **claims for damages**. It should thus be in the association employee's own interest to ensure that association meetings do not infringe competition law. This holds true independent of a labour-law appraisal of the involvement of eu.bac employees infringements of competition law.

4. Recording requirements

Resolutions taken at the meeting **must also be recorded in the minutes** so that the discussions leading up to the resolution are verifiable. On the one hand, the impression can thus be avoided that the association meeting is some sort of "conspiratorial meeting". On the other, detailed minutes can be used in investigation procedures **as proof of how the meeting actually went.** This may help to exonerate eu.bac or its members of the accusation of behaviour infringing competition law. Again, like the invitation, attention should be paid here to **clear and unambiguous wording** and that the course of the meeting is reproduced correctly.

5. Informal discussions

Finally, there may be **no informal discussions** "off the agenda" about topics of relevance from a competition law perspective. The authorities do not only investigate for resolutions recorded in the minutes. A **standardised market development** may be seen as an indication of an agreement. Even if the minutes do not contain any reference to it, it can be assumed with some degree of probability that any hand-

written notes of the company representatives who attended the association meeting also point to oral agreements. It is therefore wrong to assume that oral cartel agreements are hard to detect. Often **companies have their only reporting duties** which obligate employees to communicate the main contents of an association meeting to their company. As a rule, this is often done by email which is widely distributed.

6. Conclusion

If the requirements presented above are not complied with, there is an increased risk that not only member companies who were involved in such an agreement will be **fined** but also eu.bac and, from the perspective of **personal liability,** the association employees involved as well.

X. Right of information of the antitrust authorities

1. Legal position

Both the National Competition Authorities and the European Commission have the right to demand information in connection with matters of relevance for competition law purposes or to **inspect documents.** The antitrust authorities make use of this right of information not only when prosecuting cartels, but also in particular in **investigations in connection with mergers and acquisitions. eu.bac might receive inquiries from the antitrust authorities** about the economic situation of member companies or about the relevant product markets. By law, the association is only allowed to provide information about the statutes, resolutions and the number and names of its members. This means that in principle the antitrust authorities cannot demand **information about the economic circumstances of the association members.** It is, however, possible to pass on market data generated by

the association, including **statistics,** to the antitrust authorities which reflect market conditions in a more general form.

eu.bac can only give the antitrust authorities information about **concrete market shares** with the express **agreement of the companies concerned.** In this case, it is advisable to sit down with all the companies concerned and to prepare the information intended for the antitrust authorities together. The opinions of the companies concerned often differ widely so that it is frequently not possible to prepare a **common statement.** In this case, the association has to **clearly express the conflicting opinions.**

2. Conclusion

- The association only supplies the antitrust authorities with **general market data**. **Specific company data** is only provided with the **approval of the companies concerned.**