# THE ASSOCIATIONS OF UNDERTAKINGS - A FAVOURABLE ENVIRONMENT FOR THE DEVELOPMENT OF ANTICOMPETITIVE AGREEMENTS

**Gabriel UNGUREANU, PhD.**
Bioterra University, Bucharest, Romania
Police Academy "Alexandru Ioan Cuza", Bucharest, Romania
*gabiungureanu@yahoo.com*

**Abstract**
*This article focuses on the ways in which the associations of undertakings can prevent the infringements of competition rules, given that the anticompetitive agreements have often been facilitated by meetings of competitors at events or by meetings organized by professional associations for their own purpose. This paper briefly presents the theoretical concepts that facilitate its understanding (undertaking, association of undertakings, decisions by associations of undertakings) and advocates for the implementation of programs to comply with competition rules within companies and professional associations.*
**Keywords:** *competition, undertaking, anticompetitive agreements, associations of undertakings, compliance program.*

## Introductory aspects

In a market economy, competition between undertakings plays a very important role with regard to the adaptation of supply and demand, the division of labour between undertakings and, implicitly, it guarantees consumers welfare, in achieving an optimal distribution of existing resources and in the efficiency of some parameters such as price, production, quality, variety or innovation [1]. This is also the reason why states have developed a competition policy, thus outlining the notion of competition law to discipline the confrontation between companies/professionals facing the market in the fight to win, retain or expand customers network.

At European Union (EU) level, competition policy is governed by primary law [2], with competition being considered "the normal means of ensuring economic balance and progress" [3].

It is well known that cooperation between undertakings enable more efficient work and enhances innovation. Thus, in order to develop and become more efficient, undertakings, especially small and medium-sized enterprises (SMEs), join together into associations of undertakings.

The most professional association, especially trade associations, take an active role in shaping the way their industry works. They promote product standards and best practices, standard terms and conditions of sale, development codes of ethics or promote common interests in relation to legislative power. In the vast majority of cases, cooperation between these undertakings does not oppose to the competition law.

However, in view of the functioning of the associations, on the one hand, the meetings of the association create a favourable framework for concluding anticompetitive agreements and, on the other hand, through decisions adopted by the association of undertakings, certain economic behaviour on the market may be imposed on its members.

Therefore, the company's culture of competition law is vital for the proper functioning of the internal market. In addition, national competition authorities need to play an active role in raising awareness of the need to comply with competition law rules and provide practical advice in this regard.

Both EU law and Romanian law prohibit all agreements between undertakings [4], decisions of associations of undertakings and concerted practice [5] which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market (art. 101 par. 1 TFEU) or which have as their object or may have as their effect the restriction, prevention or distortion of competition on the Romanian market or on a part of it (art. 5 Law no. 21/1996) [6].

**The notions of undertaking, associations of undertakings, decision of associations of undertakings**

In shaping the notions specific to Competition Law, the EU Court of Justice has played an important role. Thus, in the context of competition law, „the undertaking" means "any entity engaged in an economic activity, regardless of legal status or method of financing" [7] and "the economic activity" means any activity consisting in offering goods and services on a given market [8].

The association of undertaking is a long-term association between several natural persons, who carry out economic activities, organized in one of the forms provided by law (authorized natural persons, individual or family enterprise) or between

legal persons, who share their material contribution, knowledge or their contribution to the work, for carrying out any activity of common or general interest [9]. A professional group represents an association of undertakings if it adopts rules that are the expression of their will and seek to obtain a specific behavior from them in their economic activity [10].

The notion of association covers a fairly wide range. For competition rules to apply to an association of undertakings, it does not have to be in a specific legal form, but there must be two elements [11]:

• a structural or organizational element. Thus, an association must have a long-lasting corporate structure, which distinguishes it from an agreement between two or more companies.

• a functional element, in the sense that its activities aim at or have an impact on an economic activity. However, it is not necessary for an association to be present in a market.

In practice, the association of undertakings covers not only trade associations but also a myriad of bodies with statutory, disciplinary, regulatory and executive duties. The public law status of an association is not relevant in the sense of EU competition law, but the exercise of public power is not an economic activity [12]. As we have seen, self-employed persons and members of liberal professions (lawyers, notaries, bailiffs, doctors, accountants, insolvency practitioners, architects, etc.) are, from the point of view of competition law, considered to be undertakings [13].

It should be emphasized that the application of competition rules is not excluded when an association is assigned certain tasks of public interest, by law, with a view to the application of public policies [14].

Whatever its name (recommendations, guidelines, resolutions, directives, internal regulations, statutory rules, articles of incorporation, oral exhortation etc.), a decision of an association of undertakings is an act of collective will; it emanates from the competent body of that association (according to its statute). The decisions of the association of undertakings are reprehensible insofar as they have the vocation to impose on their members a certain behaviour on the market, even if they, apparently, do not leave this impression.

According to practice, a recommendation of an association of enterprises can be considered as a manifestation of the common will of its members, but not any recommendation can constitute a decision of the association of enterprises within the meaning of art. 101 paragraph 1 of TFEU.

Among the most common actions of professional associations likely to infringe competition rules are those which have as their effect or object the harmonization of the behaviour of their members on the market in order to fix the price [15], to allocate distribution markets[16], to limit the production or sales [17] or the bid-rigging [18], and also the boycott [19] or the refusal of applications for membership [20].

**Creating a culture of competition within associations of undertakings**

In order to prevent infringements of competition rules, both the European Commission and national competition authorities are working to encourage companies to create a true culture of competition within them, as well as in associations of which they are part.

Thus, companies are encouraged to develop compliance programs [21]. These compliance programs are often developed in reaction to past infringements or even after fines have been imposed. More, they are seen as an essential element of good corporate governance.

There is no “one size fits all” model of Compliance program. That program needs to be tailor-made to the company or association concerned. It is specific to each company because it has to reflect its needs to ensure compliance and develop its own strategy.

The existence of a Compliance program does not protect the company from any sanctions if it infringes the competition rules [22]. It can be regarded as good practice in granting an attenuating circumstance in setting the fine, if its implementation is effective, but the mere existence of that will not be considered as an attenuating circumstance [23].

In order to draw up a Compliance program, certain steps must be followed, of which we list: detailed self-assessment to identify the risks of infringing competition rules; risk level assessment; the necessary measures to eliminate the risks; planning

and elaboration of the compliance program that corresponds to the purpose of the association; program implementation and staff training; periodic review of the program.

## Conclusion

The associative environment, through its specificity, brings together companies or professionals who are currently competing to win, expand and retain customers. There is a risk that the meetings within the association will be the starting point in reaching an anticompetitive agreement that would take one of the forms prohibited by law: agreements between undertakings, decisions made by associations of undertakings and concerted practice.

Implementing a program to comply with competition rules within the association is the optimal solution for association members, as well as the step towards creating a true culture of competition within it, as well as in the field/branch in which it operates.

**References:**

[1] Romanian Competition Council, Guide on compliance with competition rules by associations of undertakings, http://www.consiliulconcurentei.ro;
[2] The Treaty on the Functioning of the European Union (TFEU), art. 101-109, Official Journal of the European Union C 326, 26.10.2012 (Consolidated version),
[3] Nicolas-Vullierme, Laurance, Droit de la concurrence, Vuilbert, Paris, 2008, p. 10.
[4] Agreement refers to an explicit or implicit arrangement between firms normally in competition with each other to their mutual benefit. Agreements to restrict competition may cover such matters as prices, production, markets and customers. These types of agreements are often equated with the formation of cartels or collusion and in most jurisdictions are treated as violations of competition legislation because of their effect of increasing prices, restricting output and other adverse economic consequences (https://www.concurrences.com/en/glossary/agreement-notion-en).
[5] The concerted practice is a form of coordination between undertakings of their economic behaviour in a certain market which, without reaching the stage of achieving a proper agreement, leads to the disappearance or reduction of the competition uncertainties that would have existed if undertakings would have established autonomously their market behavior (Cucu, Cristina, ”Agreements”, “decisions” and “concerted practices”: key concepts in the analysis of anticompetitive agreements, p. 11, http://lexetscientia.univnt.ro/download/475_2013_LESIJ_XX_1_art.003.pdf
[6] Republished in the Official Journal of Romania, no. 153 of February 29, 2016.
[7] C-41/90 Höfner, paragraph 21.
[8] Joined Cases C-180/98 to C-184/98 Pavlov and Others [2000] ECR I-6451, paragraph 75.
[9] Romanian Competition Council, Guide on compliance with competition rules by associations of undertakings, paragraph 1.2.2.
[10] C-309/99, Wouters, paragraph 64.
[11] Romanian Competition Council Guide on compliance with competition rules by associations of undertakings, , paragraph 1.2.3.
[12] C-309/99, Wouters, paragraph 57;
[13] Chartered accountants carry on an economic activity and are, therefore, undertakings for the purposes of Article 101 TFEU. The complexity and technical nature of the services they provide and the fact that the practice of their profession is regulated cannot alter that conclusion (Causa Ordem dos Técnicos Oficiais de Contas, C-1/12, paragraph 37-38).

[14] The Decision of the Romanian Competition Council no. 47/2.11.2010, paragraph 88 (https://www.juridice.ro/wp-content/uploads/2017/09/Dec-447-CC.pdf).

[15] The Commission sanctioned the Belgian Association of Architects trough the decision of 24 June 2004 for setting tariffs considering that the recommended tariffs restrict competition as it facilitates price coordination (Decision of the Belgian Competition Council no. 98/ D/25, BOCCRF of 16 July 1998).

[16] The Association of Cement Producers and its members agreed that each producer should sell products only on its national territory, the surplus production being exported to third countries (Cases IV/33.126 and 33.322, Cement, JOEC L343//20.12.2004).

[17] Market division schemes or customer allocation schemes are anticompetitive agreements where companies divide markets amongst themselves. Each company is generally given a market that is exclusively theirs. (Case IV 29988, Italian Flat Glass, OJ EC1980 L383).

[18] Bid-rigging is a form of price fixing and market allocation. It occurs when two or more companies agree that, in response to a call for bids or tenders, one or more of them will not submit a bid, withdraw a bid or submit a bid at artificially high prices arrived at by agreement. (European Commission, Guidance on restrictions of competition "by object" for the purpose of defining which agreements may benefit from the de minimis notice, p.11). Members of a civil engineering association in the Netherlands (SPO) agreed the conditions of participation in tenders and how the member choose to submit a tender for a particular contract was "protected" from any attempt by the client to negotiate the terms of the contract (Case IV/ 31.572 and 32.571, Building and construction industry in the Netherlands, https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:1992:092:0001:0030:EN:PDF).

[19] A collective boycott occurs when a group of competitors agree to exclude an actual or potential competitor (https://www.concurrences.com/en/glossary/boycott). The European Commission has fined the *Ordre national des pharmaciens* (ONP) and its governing bodies for hindering the development of groups of laboratories in this market (Case 39510, ONP, paragraph 238).

[20] The new members of the *Syndicat des Expéditeurs de Saint-Malo* could not be admitted until after a favourable decision of a majority of the members of the Board of Directors, which consists of 12 members of the Syndicat appointed by the general meeting. The Commission considered that it could be assumed that the majority of the member distributors of the federation would not vote for the acceptance of new members, given that such a measure would have resulted in a decrease in their market shares, as well as a possible increase in starting prices of lots put up for auction (Case IV/28.948 – Cauliflowers, paragraph I.A.4. and II.5).

[21] European Commission, Compliance matters. What companies can do better to respect EU competition rules (https://op.europa.eu/en/publication-detail/-/publication/78f46c48-e03e-4c36-bbbe-aa08c2514d7a); Romanian Competition Council, Guidance on compliance with competition rules (http://www.consiliulconcurentei.ro/uploads/docs/items/bucket13/id13010/ghid_privind_conformarea_cu_regulile_de_concurenta_decembrie.pdf).

[22] Case C-189/02 P Dansk Rørindustri, paragraph 373.

[23] Joined Cases T-101/05 and T-111/05, BASF and UCB, paragraph 52.