Mandatory antitrust liability under EU competition law of trade association members in case of infringement by the trade association

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1. Introduction

Business associations have been common practice in Europe since the Middle Ages under collegial forms of *guilds*, *guilda*, *gremios* and other denominations. Business and professional associations are a natural place for economic operators in any given sector to meet and share common problems and solutions. Competition law has naturally scrutinised business and trade associations because they present the particular feature, precisely, of bringing together companies which are actual or potential competitors. From a competition law standpoint, agreements, recommendations, information exchanges, etc, taking place between competitors and facilitated by trade associations have led to a myriad of antitrust cases on both sides of the Atlantic.

Surprisingly though, little heed has been paid in the past by firms to the potential antitrust liabilities or implications of joining trade associations (although this may be changing). What happens to an association and to its members when the association is fined for breaching competition law?

Associations are governed by the civil laws of Member States. The general rule, at least under the national laws of some Member States, is that association members are not liable for the association's debts. Rather, the association responds of its own debts with its own assets. Members of the governing bodies of the association acting on behalf of the association are liable vis-à-vis the association, the association members and third parties of any harm or debt acquired as a result of negligent or intentional conduct.[1]

Hence, the general rule (which may vary depending on the Member State) is that the debts and liabilities of an association belong to the association itself. Such a general rule admits variations in case the harm can be imputed to a governing member who has acted intentionally or negligently. Some additional variations apply as *lex specialis* under EU competition law and also under the national competition laws of some Member States. Indeed, there is a rather hidden, rather obscure, provision of EU competition law, which has apparently rarely been used, but which may have a long reach and draconian practical implications for companies operating in Europe. Under this rule, if a company is a member of a trade association, that company may be found to be liable for fines resulting from breaches of competition law imposed on the trade association of which that company is a member. The company finding itself in such a situation (which may arise fairly often in practice) is very likely to be found liable, since these associations often lack any substantial economic capacity, and in many instances association members are unlikely to reach any understanding to finance the association's fine.

In this short article, the practical implications of this mandatory subsidiary liability regulated by EU competition law are explained. In view of the few precedents available on the point, I draw on general principles of law and on the logical interpretation of the relevant legal provisions. I have also attempted to provide some comparative law perspective, although of the main EU jurisdictions considered (France, Germany, Italy, Spain and the UK) only Spain seems to have adopted a special provision in its national competition law devoted to liability of associations and association members.

2. Regulation under competition law

a. EU law

Article 23.4 of Regulation 1/2003[2] states that payment of a fine to a trade association: (i) must be requested from the association concerned on the first place; (ii) if the association is not solvent, it is obliged to call for contributions from its members to cover the amount of the fine; (iii) if the individual members do not contribute within the time limit set by the European Commission, the latter may claim the fine directly from *any* of the association members who held positions in the governing body of the association at the time the anti-competitive conduct took place; and (iv) if all of the above fails, the Commission may claim the fine from any member of the association who is active in the market where the infringement occurred; (v) members of the association may avoid liability and shall therefore not pay when they show that they have not implemented the infringing

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[1] In Spain, for instance, Organic Law 1/2002, of March 22, 2002, regulating the right of association.

[2] Council Regulation (EC) 1/2003, of 16 December 2002, on the implementation of the rules on competition laid down in Articles 81 and 82 [currently 101, 102] of the Treaty [2003] OJ L1/1.

decision of the association *and* either were not aware of its existence or have actively distanced themselves from it before the investigation on the matter started.

Article 23.4 Regulation 1/2003 should be read in conjunction with recital 30 of EC Regulation 1/2003, which states that:

> "In order to ensure effective recovery of fines imposed on associations of undertakings for infringements that they have committed, it is necessary to lay down the conditions on which the Commission may require payment of the fine from the members of the association where the association is not solvent. In doing so, *the Commission should have regard to the relative size of the undertakings belonging to the association and in particular to the situation of small and medium-sized enterprises. Payment of the fine by one or several members of an association is without prejudice to rules of national law that provide for recovery of the amount paid from other members of the association.*"

Recital 30 of Regulation 1/2003 suggests, importantly, that in those circumstances when members of the trade association are liable to pay an antitrust fine for conduct by the association, the general principle of proportionality is to be weighed in. This principle would considerably reduce the risk that the entirety of a fine must be borne by one single, or a few, members of the fined association. The interplay of recital 30, cited, and of the general principle of proportionality consistently accepted by the case law of the European Court of Justice,[3] would imply that, when an association is unable to pay, and the conditions for subsidiary liability of members are met, payment should be sought from the association's members jointly, taking into account their economic size and possibly their individual circumstances. The joint and several liability, which art.23.4 of Regulation 1/2003 apparently establishes, may have to be moderated in practice in most cases in order to ensure a proportionate, and also equal, execution of the fine.

An additional consideration in view of art.23.4 Regulation 1/2003 refers to the general principle of presumption of innocence.[4] Arguably, the legal provision under discussion may not be compliant with the principle of presumption of innocence, since it is condemning trade association members on the basis that they are members of the governing bodies of the association or that they are simply members of the association active in the relevant market. However, in most cases those members will be guilty of the infringement by action or negligent omission, unless of course they can prove that they did not participate or did not implement the association decision and that either they were not aware of it or actively distanced itself from that conduct. In those circumstances, the presumption of innocence seems to be respected by art.23.4 Regulation 1/2003, provided that the members of the trade association have an opportunity to be heard in case the fine is claimed against them on a subsidiary basis (and in that hearing they have an opportunity to prove that indeed they did not participate, nor did they implement the conduct, nor that they distanced themselves from it). Where an investigation is conducted by the Commission or an NCA (using a legal basis comparable to art.23.4 Regulation 1/2003) against a trade association, sufficient evidence to meet the relevant standard under the antitrust laws will have to be collected to find an infringement by the association and that evidence will normally involve the members of the managing body of the association. In that context, the burden of proof is on the accusing Authority to evidence intent on the part of the association and the members of its governing bodies. A more likely reversal of the burden of proof may operate under the third sub-paragraph of art.23.4 (*After the Commission has required payment under the second subparagraph, where necessary to ensure full payment of the fine, the Commission may require payment of the balance by any of the members of the association which were active on the market on which the infringement occurred*). Under that sub-paragraph, association members may be required to pay an antitrust fine merely due to the fact that they are members of the association. Could the right to be presumed innocent be breached under this paragraph? Arguably, liability is being found without guilt. However, the fourth sub-paragraph of art.23.4 Regulation 1/2003 substantially alleviates any possible wrongdoing by enabling trade association members to provide evidence in their discharge. But a possible reversal of the burden of proof does appear to be operated under the third sub-paragraph of art.23.4. To remedy this potential breach of the right to be presumed innocent, the Commission, and the NCAs resorting to similar procedures, would do well in finding (ex ante) evidence of breach by association members under the (sometimes tenuous) standard of proof applicable in competition matters. If the Commission/NCA acts in such a manner and the relevant company has the possibility to be heard, arguably the chain of responsibility established by art.23.4 will be proportionate to attain the end of enabling enforcement of competition law (*effect utile*). It is a field, which, when applied in practice, undoubtedly could give rise to practical problems.[5]

The European Commission has on one occasion ruled on the matter in a 2010 Decision in the *LABCO/ONP* case.[6] That case, however, sheds little light on how the subsidiary liability of association members is to be applied. It was the first time the Commission applied

[3] See for instance judgment of the European Court of Justice of October 24, 1973, *Balkan Import Export GmbH v Hauptzollamt Berlin Packhof* (5/73) [1973] E.C.R. 1091.
[4] Principle common to the constitutional orders of Member States, enshrined in art.6 of the European Convention of Human Rights and largely accepted as applicable in antitrust proceedings, for instance judgment of the European Court of Justice of July 8, 1999, *Huls AG v Commission of the European Communities* (C-199/92 P) [1999] E.C.R. I-4287.
[5] See the reflections of F. Löwhagen in his work "Las asociaciones de empresas en el Derecho de la competencia español: conceptos básicos y regimen sancionador" (2010) 14 *Gaceta Jurídica de la Unión Europea y la Competencia* 43.
[6] Commission Decision of December 8, 2010, *Labco/ONP*, case COMP/39510.

art.23.4 of Regulation 1/2003 and the Commission, stating that fact, imposed a low fine and no details transcended on how the subsidiary liability of association members was applied.

Article 23.4 of Regulation 1/2003 seems to have been considered only tangentially by the European Court of Justice, when dealing with mother/subsidiary company liability.[7] In that case, the validity of art.23.4 was not questioned; it was only apparently taken for granted that the kind of liability for acts of others regulated by art.23.4 was fine since this liability was included in a legal provision such as Regulation 1/2003.

b. National laws

Some national laws in Europe do not seem to contain an equivalent provision to that indicated under Regulation 1/2003 and seem to defer on the matter to the application of the relevant national civil law rules on associations and liability of members. In the UK, for instance, there is not an equivalent to art.23.4 of Regulation 1/2003, yet the rule appears to be subsidiary liability of trade association members as a "civil debt":

> "The involvement of an association of undertakings in an infringement of Article 81 and/or the Chapter I prohibition may result in financial penalties being imposed on the association itself, its members or both."

And:

> "If the penalty is not paid within the date specified by the OFT, and an appeal against the imposition or amount of the penalty within the time allowed has not been brought or such an appeal has been made and the penalty upheld, the OFT may commence proceedings to recover the required amount as a civil debt."[8]

Neither have we been able to identify provisions similar to art.23.4 Regulation 1/2003 in other major jurisdictions such as France, Germany or Italy.

Other national laws in Europe, however, replicate more or less literally the drafting of art.23.4 of Regulation 1/2003. That is the case in Spain, where there seems to be a little bit of experience in the application of this provision. Hence, the following is drafted in view of national enforcement precedents. Whether or not those precedents may be followed or applied under EU competition law is a matter that will be seen in the future. The laws of Member States are in principle not binding on the European regulators or courts, although in some instances, common legal traditions of Member States may be a legal source.[9] In any event, the national precedents we refer to may at least be a reference of how to apply this difficult provision in practice.

A great deal of competition enforcement activity has been directed against associations in the last few years in Spain (e.g. trade associations in the transportation sector, cosmetics, IPRs collecting societies, fruits growers). Up to now, in Spain, most of those fines are limited in their amount to a €900,000 cap, since the respective conducts prosecuted took place under the law in force prior to the 2007 Competition Act. However, as associations are fined for conduct taking place already under the 2007 Competition Act, fines are likely to exceed that cap and conflicts between associations and their members (and between members themselves) are likely to arise. Based on our recent experience, when faced with a fine (and particularly if that fine is sizeable), association members are likely to try to avoid payment of their share of the fine at any cost, regardless of what happens to the association itself.

In recent months the Spanish Competition Authority (SCA) has issued a decision applying this provision in connection with an anti-competitive conduct case under Law 15/2007 on Competition (Competition Act) related to a particular type of wine grape.[10] There is also a decision related to the poliuretan foam cartel which marginally touches on the point.[11] In view of the applicable statute and the limited case law on the topic, our initial conclusions on this matter are as follows:

(1) It is not necessary that the association is declared insolvent by a commercial court. It is enough if the association unilaterally declares itself insolvent, for the system of subsidiary liability foreseen by the Competition Act to kick in.

(2) The wording of the provision indicates that the subsidiary liability by association members is a form of joint and several liability, so that in principle the SCA (or the European Commission mutatis mutandis under art.23.4 Regulation 1/2003) could choose to claim from a single member for the entire amount of the fine (and leave it to that infringer to claim back against the other members of the association later). But the provision also uses the word "may" indicating that the SCA may also choose to claim the amount of the fine from all or some of the association members and may do so equally or using a weighed system of some kind. The recent practice of the SCA appears to show that the SCA is aware that it could claim against a single association

[7] Judgment of the European Court of Justice of July 18, 2013, *Schindler Holding Ltd v European Commission* (C-501/11 P) [2013] 5 C.M.L.R. 39 and opinion of AG Kokott of April 18, 2013, *Schindler Holding Ltd v European Commission* (C-501/11 P) at point 87.

[8] Guide published at the time by the UK Office of Fair Trading, *Trade associations, professions and self-regulating bodies — Understanding competition law.*

[9] For instance judgments of the European Court of Justice of February 25, 1969, *Klomp v Inspektie der Belastingen* (C-23/68) [1969] E.C.R. 43 or May 14, 1974, *J Nold Kohlen- und Baustoffgrosshandlung v Commission of the European Communities* (4/73) [1975] E.C.R. 985.

[10] SCA Decision of March 13, 2014, case VS/0305/10.

[11] SCA Decision of February 28, 2013, case S/0342/11.

member (on the basis of the joint and several liability regulated by the statute), but it is aware that it also has a margin of discretion, and may not necessarily choose to claim against a single company. The SCA has hinted that it will be asking for payment on a subsidiary basis from all association members who cannot show they did not know/did not apply the illegal agreement; and guilty association members are being asked to pay amounts in proportion to their respective contributions to the association during the years of the infringement. Claiming the fine against all of the association members participating in the governing organs or, on a subsidiary basis, against those members active in the relevant market, would in normal circumstances be a less intrusive way of doing things and, arguably, would ensure better compliance with the proportionality principle and remaining general principles depicted above applying under both EU and national law.

(3) The only precedent under national Spanish law which deals with this matter in a thorough manner, in the wine grape case, cited, is quite specific on the facts in that the anti-competitive action by the association seemed to be more of the making of a single individual within the association than of the association as such, so the first requirement to avoid liability was easily satisfied. On that basis, the SCA seems quite ready to accept the non-participation/distancing defence from the association members. The SCA rules out individual liabilities of various members. This is quite encouraging for individual members, although of course the SCA may well be more stringent going forward depending on the particular facts of each case. Successful defences include the following:

(a) First, proof that an individual member ceased to be member of the relevant association prior to the facts is an admitted defence.

(b) Secondly, if the cessation as member of the association takes place subsequent to the petition by the member to leave the association, the latter is taken as relevant date, again a relevant point where associations take some time to process members' requests, or in those cases where the association makes it necessary to pay any outstanding membership fees prior to removing the requesting member from the association.

(c) Active distancing from the illegal recommendation or agreement and evidence of not having implemented the association's recommendation. This includes, for instance, evidence that the recommended pricing was not implemented, or that it was implemented only prior to the illegal recommendation or agreement. Evidence of active distancing is difficult to find in practice.

(4) If a member of a trade association was a successful leniency applicant, this does not shield that member from its subsidiary liability in case the association is insolvent. This may present the paradox that a company which is granted immunity ends up paying anyway if the relevant trade association is fined, but it is insolvent. Policy considerations regarding reduction of incentives for leniency aside, the SCA considers that the source of liability is not directly the conduct of the association member/leniency applicant (in connection with which the latter may have been granted immunity), but the conduct of the association (which in turn is insolvent) and the *ex lege* subsidiary liability of association members.

Conclusion

This area is of great practical importance for any company (since any company is likely to be a member of trade associations, many of which may find themselves in the spotlight for anti-competitive practices at one point or another). Unfortunately, little public guidance in the form of precedents is available under either EU or national law. However, based on the general principles applicable and based on the little precedent there is, the following should be taken into account by companies that are members of trade associations:

(a) The most obvious precaution to be taken by any company member of a trade association should be to make sure that the association it belongs to is compliant with antitrust laws. This may add a little bit of an additional burden on firms, but if the right safeguards are in place by making sure that any interaction of the member company with the association is compliant with competition law, the risk will be minimised. Collective recommendations and illegal information exchanges between competitors

by means of the trade association are amongst the most common types of anti-competitive conduct incurred by, or by means of, associations. Special attention should be devoted, therefore, to communications between the business and the trade association.

(b) Another layer of precaution should be added if a firm participates in the governing bodies of a trade association. If this is the case, obviously, special attention will have to be paid because, if the association is condemned for an antitrust infringement, companies which are members of the governing bodies will be amongst the first from whom the fine will be claimed should the association be insolvent.

(c) In case a firm becomes aware of an association infringement, it is key to have the right communication channels in place to enable that an appropriate response qualifying as "public distancing" takes place.