



# **PARTICIPATION IN TRADE ASSOCIATIONS ANTITRUST GUIDELINES**

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*It is the policy of ELA to strictly comply with applicable antitrust and competition laws, including the laws of the European Union and the national laws of each member country.*

*The competition laws are complex and their violation would be a serious matter.*

*Penalties for violation of these laws can be severe for ELA and its members.*

*The following guidelines, while not a restatement of the law, identify proper and improper conduct for ELA and its members (or their own members).*

*ELA will vigorously ensure that all its members do comply with these guidelines, and will expect its members to do the same.*

*In case of doubt on the conduct to follow, in house lawyers or legal advisers should be consulted.*

## INTRODUCTION

*The EUROPEAN LIFT ASSOCIATION is committed to the representation of the common interests of its members in full compliance with all applicable laws.*

*As a trade association, ELA serves a legitimate and useful purpose, and may legally engage in a wide variety of activities which serve the industry as long as it does not violate the competition laws of the EU or the countries in which its members (or their own members) have their home offices, produce, sell or operate as businesses. Competition laws are not intended to inhibit legitimate business activity. Their objective in all countries is to help preserve a free economy by encouraging competition in the market place. The various competition laws require that ELA refrains from any activity which might be construed as unlawfully limiting competition among individual companies or groups of companies, whether members of a European association, of a national association or not members of any association.*

*ELA can undertake many professional activities provided they do not result in a violation of the applicable competition laws. For example, ELA may legally collect statistics; however, the collection of such statistics could become illegal if improperly used thereafter by national associations or companies (for example in making illegal agreements, fixing prices or using them to distort competition, etc.). Since this is a difficult and complex field of law, the following guidelines are intended to provide members (and their own members) with a basic understanding of the relevant legislation so that they can avoid actions which could be in actual or apparent violation of competition laws.*

*No ELA member or committee member will knowingly or wilfully enter into any activity under the umbrella of ELA which might violate the competition laws.*

## ARTICLE 101, PARAGRAPH 1 OF THE TREATY ON THE FUNCTIONING OF THE EUROPEAN UNION

*“The following shall be prohibited as incompatible with the internal market: all agreements between undertakings, decisions by associations of undertakings and concerted practices 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, and in particular those which:*

- (a) directly or indirectly fix purchase or selling prices or any other trading conditions;*
- (b) limit or control production, markets, technical development, or investment;*
- (c) share markets or sources of supply;*
- (d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;*
- (e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.”*

The main EU provision affecting trade associations is paragraph 1 of Article 101 of the Treaty on the Functioning of the European Union (TFEU) which prohibits actions by associations which may limit competition. Article 101 TFEU does not only apply when undertakings enter into an agreement with each other but also when they act in concert through the intermediary of an association. In this context, recommendations of an association may also be illegal if such recommendations have as their object or effect the prevention, restriction or distortion of competition.

Two basic points should be borne in mind:

1. if the object or effect of the trade association's activities is found to unduly affect competition, the activity will be declared illegal, regardless of the good intentions of the members,
2. no formal agreements between members (or between their own members) are necessary since, under the concept of concerted practices, an agreement may be implied by the actions of the parties.

Acting through a trade association does not provide members with any special protection under competition laws. Members cannot do anything through a trade association that they could not do with each other individually.

Moreover, the competition law environment in which undertakings and trade associations operate has changed. Under the EU's current procedural rules, it is no longer possible to apply to the European Commission to have an agreement individually exempted from Article 101(1) TFEU. Instead, undertakings and trade associations have themselves to assess whether their agreements or actions are capable of infringing Article 101(1) TFEU and whether they meet the conditions to benefit from an individual exemption.



At the same time, the European Commission and national competition authorities have been granted stronger powers to enforce the EU competition rules. In particular, the European Commission has the power to request information from undertakings; to conduct unannounced inspections at the premises of undertakings and the homes of their employees; and to take statements from undertakings' employees. Finally, the consequences of infringing the EU competition rules can be serious, particularly in terms of the imposition of fines on the parties.

This changing legal environment makes it all the more necessary that undertakings and trade associations are aware of the limits that Article 101 TFEU places on their conduct.

We therefore set out below a list of do's and don'ts for your review and to ensure full compliance. We also set out advice on the exchange of information within trade associations. Any exception to these rules or sensitive matters must first be discussed with your company's legal advisor or the ELA Legal Committee.

## DO's

- a. **DO** circulate an agenda well in advance of each meeting and if there is any sensitive subject, have it reviewed by your Legal Advisor.
- b. **DO** keep accurate minutes of all meetings and circulate them to all attendees.
- c. **DO** discuss and/or develop common industry approaches to the following matters:
  - activities contributing to the progress of the whole elevator industry,
  - initiation of new legislation, modification of existing legislation or reaction to proposed legislation, both at national and supranational levels, participation in industry-wide litigation,
  - reduction of tariffs and other legal barriers to exports or imports,
  - research into the safety of materials or other technical aspects of our business,
  - information about the nature of the industry in general,
  - trends in public opinion,
  - institutional advertising, provided that this concerns the merits of the industry products as a whole and there is no restriction on undertakings' freedom to advertise individually,
  - representation of the ELA as participant or observer at other trade association meetings and activities (on which all these rules should equally apply),
  - organization or/and participation in displays at trade fairs and shows, provided no restrictions are imposed on participants' freedom to exhibit.
- d. **DO** object if an improper subject is raised.
- e. **DO** apply the same principles in discussions outside the formal association meetings.
- f. **DO** keep a list of your employees participating in ELA activities and make sure they are aware of their obligations.
- g. **DO** make sure that all ELA members, whatever their size, are equally treated and have access to the benefits resulting from participation in the Association.

## DON'Ts

- a. **DON'T** discuss, recommend or agree upon costs, purchasing or selling prices, price trends, price changes and their implementation and methods of calculation of discounts, rebates or trade margins.
- b. **DON'T** discuss, recommend or agree upon the use of any terms and conditions of purchase or sale, whether standard or not.
- c. **DON'T** discuss, recommend or agree upon the allocation or limitation of territories, customers or selling activities or parts and material sourcing.
- d. **DON'T** discuss, recommend or agree upon levels of production, inventory levels, production processes and methods, parts and materials, and technological developments or changes.
- e. **DON'T** discuss, recommend or agree upon controls or limitations on business methods or practices, such as advertising and "fair trading" practices.
- f. **DON'T** remain at any sessions where others engage in improper discussions, even if you are silent. Tell the others that the discussion is illegal and contrary to ELA policy, and leave in such a way that others will remember you left, either because it is on record or by making sure that everybody present realizes that you are leaving.
- g. **DON'T** discuss on a regular basis or engage in industry-wide joint research arrangements except as permitted in the DO'S section.
- h. **DON'T** engage in any vote which has as its purpose the exclusion of any member of the industry without valid reasons.
- i. **DON'T** discuss, recommend or agree to blacklist or boycott customers, competitors or suppliers.

## EXCHANGE OF INFORMATION WITHIN TRADE ASSOCIATIONS

A trade association must not be used as a forum for the exchange of competitively sensitive information between competitors. The exchange of such information could constitute a serious infringement of Article 101 TFEU as it gives rise to a risk of coordination between the commercial conduct of the undertakings concerned.

The following Information should **NEVER** be exchanged:

- information on price levels and discounts, including the extent and timing of any anticipated change in price;
- information on capacity and production costs, including the extent and timing of any anticipated change in capacity; or
- information relating to customers, sales and the timing of sales campaigns.

The rule of thumb is to **NEVER** exchange information that the disclosing undertaking considers confidential or commercially sensitive.

In certain circumstances, it may be permissible to compile statistics based on past information of this nature provided the information is aggregated (i.e., the information is compiled in such a way that it is impossible to determine the performance of individual undertakings). However, before establishing any such statistical scheme, legal advice should be sought from in house lawyers or the ELA Legal Committee.

In principle, it is permissible for members of a trade association to exchange technical information relating to products (e.g., information relating to product safety, new technical standards, etc) provided that this information is not competitively sensitive in nature. If in doubt, legal advice should be sought from in house lawyers or the ELA Legal Committee.

## SOME CASE LAW ILLUSTRATIONS

*“A recommendation of an association, even if it does not have a binding effect on its members, **cannot escape article [101](1) when compliance with the recommendation by the members has a profound influence on competition in the market in question.**”*

**IAZ International Belgium S.A. v. Commission, ECJ judgment of 8 November 1983.**

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*“The GPVA and its members held several meetings every year in which they set the rate of increase of the selling price of vegetable parchment in the Benelux and Danish markets. (...) While some GPVA member manufacturers did not supply any parchment in the Benelux and Danish markets, **the mere fact that they took part in the discussions** in which the price levels for those markets were fixed, and that they regularly received the price lists for those markets, **constitutes a violation of article [101](1)**. In effect, such behaviour implies the acceptance of a restriction of possibilities for competition on the part of the firms concerned.”*

**Vegetable Parchment, Commission Decision of 23 December 1977.**

*“Where the system of **reciprocal exchange of information among members** of an association includes the communication to competitors of information on production, research, development, consumption and terms of sale, such a system is sufficiently characterized as **a concerted practice prohibited by article [101](1)**.”*

**Vegetable Parchment, Commission Decision of 23 December 1977.**

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*In the Suiker Unie case, the Commission found that various sugar producers had engaged in a wide range of concerted practices aimed at controlling sugar supply and sharing markets in the Community. The Commission relied, among other things, on information exchanged between the producers revealing their intended market conduct. On appeal, the Court of Justice upheld the Commission's finding on this point, holding that Article [101] prohibits "any **direct or indirect contact between competitors**, the object or effect of which is to influence the conduct of an actual or potential competitor or to **disclose to such a competitor the course of conduct which they themselves have decided to adopt or contemplate adopting on the market.**"*

**Suiker Unie v. Commission, ECJ judgment of 16 December 1975**

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*"In the absence of the [information exchange], firms would have to compete in a market with some degree of uncertainty as to the exact place, degree and means of an attack by rivals. **This uncertainty is a normal competitive risk.** [...] There is thus a **prevention of hidden competition** which results necessarily from the [information exchange]."*

**UK Agricultural Tractor Registration Exchange, Commission Decision of 14 February 1992**

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*"[T]he Court considers that [...] **the information [exchanged]**, which relates in particular to sales made in the territory of each of the dealerships in the distribution network, is in the nature of **business secrets**. The Court also observes that [...] having regard to **its frequency and systematic nature** the exchange of information in question [...] **reduces, or even removes, the degree of uncertainty regarding the operation of the market**, which would have existed in the absence of such an exchange of information [...]"*

**John Deere v Commission, CFI judgment of 27 October 1994**

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*Heavy fines can be imposed in case of violation of articles [101] & [102]. In the Cartonboard case, fines totalling €131 million were imposed by the Commission on members of the “Product Group Paperboard” because the association had been established by the members for the sole **purpose** of disguising the **price fixing** and **market regulation** of their clandestine cartel. Some of the fines imposed by the Commission were reduced by the European Court of Justice on appeal.*

**Cartonboard, Commission Decision of 13 July 1994 and ECJ judgment of 16 November 2000.**

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*In the Vitamins case, the European Commission imposed fines totalling **€855 million** on eight vitamins producers for their participation in **a series of market-sharing and price-fixing cartels**. As a result of a parallel investigation by the US antitrust authorities, the eight vitamins producers settled **criminal litigation** brought before the US courts for **US\$900 million**. The eight cartel members now face a barrage of **civil claims** brought by vitamins purchasers before courts in the US, EU member states and elsewhere, which could expose them to substantial damages awards.*

**Vitamins, Commission Decision of 21 November 2001**



As the cases mentioned clearly indicate, violations of antitrust laws are actively pursued by the Commission and the Court and penalties can be heavy.

All members of a trade association should therefore be actively involved in the association's activities and responsible for the legality of such activities.

The above cases should not lead us to forget that belonging to an association can be a very rewarding activity in which companies should actively participate, as it can bring numerous benefits not only to its members but also to the community at large.

We trust these guidelines and the list of Do's and Don'ts will help the ELA members (and their own respective members) better focus on their rights and obligations.



The above comments are intended as guidelines and not as rules.

Every individual must use his/her own judgment and a reasonable amount of common sense in order to comply with competition laws, and avoid any violation of those laws.

If ever, there is doubt in your mind regarding the legality of an activity or discussion, or if you think you might be violating competition laws, discuss the matter with your company's Legal Advisor before proceeding.

We all have an obligation to see that the various activities of ELA are conducted in a legal manner.