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Responsible Business Conduct

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Competition Law and Responsible Business Conduct

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I. Introduction

This paper discusses the intersection between competition law and Responsible Business Conduct (RBC) standards, such as the OECD Guidelines for Multinational Enterprises (OECD Guidelines)¹ and the UN Guiding Principles on Human Rights and Business (UN Guiding Principles).² It will serve as the background documentation for the panel discussion on “Competition Law and Responsible Business Conduct” that will take place at the Global Forum on Responsible Business Conduct on 18/19 June 2015.

Responsible business conduct (RBC) means that businesses a) should make a positive contribution to economic, environmental and social progress with a view to achieving sustainable development and b) should avoid and address adverse impacts through their own activities and prevent or mitigate adverse impacts directly linked to their operations, products or services by a business relationship.

Firms engaged in RBC initiatives have raised questions on the intersection between competition law and RBC standards developed at international level. The concern is that competition law principles may chill RBC initiatives, particularly if these entail co-operating with other companies (and possibly competing companies) and participation in multi-stakeholder initiatives.

Assessing the compatibility of these initiatives with competition law principles is hard to do in the abstract. The analysis is inevitably fact-specific and depends on the applicable rules and practices of the jurisdiction concerned.³ Nevertheless the ability to cooperate in such initiatives has to take into consideration competition law and principles which prevent collaboration amongst enterprises if such collaboration has a detrimental effect on competition. In order to understand the framework in which competitors’ co-operation is generally analysed by competition authorities, this paper will address the following key questions:

- 1. What are the exact legal concerns under competition law in the context of collective action by companies pursuing social, environmental, labour or other improvements related to responsible business conduct?**
- 2. What questions should enterprises consider when assessing concerns under competition law with regard to their RBC initiatives?**
- 3. What steps can companies take to avoid competition law issues in relation to collective action related to responsible business conduct?**

¹ Available at <https://mneguidelines.oecd.org/text/>.

² Available at http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf.

³ According to the OECD Guidelines, “Enterprises should be aware that competition laws continue to be enacted, and that it is increasingly common for those laws to prohibit anti-competitive activities that occur abroad if they have a harmful impact on domestic consumers. Moreover, cross-border trade and investment makes it more likely that anti-competitive conduct taking place in one jurisdiction will have harmful effects in other jurisdictions. Enterprises should therefore take into account both the law of the country in which they are operating and the laws of all countries in which the effects of their conduct are likely to be felt.” OECD Guidelines, Chapter X – Competition, para 98.

II. Legal concerns under competition law in the context of RBC

The goal of competition policy is to contribute to overall welfare and economic growth by promoting market conditions in which the nature, quality, and price of goods and services are determined by competitive market forces. In addition to benefiting consumers and a jurisdiction's economy as a whole, such a competitive environment rewards enterprises that respond efficiently to consumer demand.

In general, competition laws and policies prohibit: a) hard core cartels/naked restrictions; b) other anti-competitive agreements; c) anti-competitive unilateral conduct that exploits or extends market dominance or market power; and d) anti-competitive mergers and acquisitions. Collaborative activities between independent competitors are generally reviewed under a) and b).

Both the OECD Guidelines and the UN Guiding Principles recommend that if an enterprise identifies a risk of contributing to an adverse impact, then it should take the necessary steps to cease or prevent its contribution and use its leverage to mitigate any remaining impacts to the greatest extent possible. "Leverage" can be exerted acting alone or in co-operation with other entities as a strategy to influence other enterprises to be more responsible. Beyond addressing adverse impacts, collaborative initiatives amongst businesses promoting RBC can also be an effective way of identifying RBC risks - particularly in the supply chain - and contributing to economic, environmental and social progress.

Box 1 – OECD Guidelines for Multinational Enterprises

According to the OECD Guidelines for Multinational Enterprises, enterprises should:

- Carry out **risk-based due diligence**, [...], to identify, prevent and mitigate actual and potential adverse impacts [...], and account for how these impacts are addressed.
- **Avoid causing or contributing to adverse impacts** on matters covered by the Guidelines, through their own activities, and address such impacts when they occur.
- **Seek to prevent or mitigate an adverse impact where they have not contributed to that impact, when the impact is nevertheless directly linked to their operations, products or services by a business relationship.**

Under the OECD Guidelines, the concept of "**leverage**" is essential for understanding risk management: *"If the enterprise identifies a risk of contributing to an adverse impact, then it should take the necessary steps to cease or prevent its contribution and use its leverage to mitigate any remaining impacts to the greatest extent possible. Leverage is considered to exist where the enterprise has the ability to effect change in the wrongful practices of the entity that causes the harm."*⁴

Meeting the expectation [to use leverage] would entail an enterprise, acting alone or **in co-operation with other entities**, as appropriate, to use its leverage to influence the entity causing the adverse impact to prevent or mitigate that impact.⁵

⁴ See OECD Guidelines, Chapter II, Commentary on General Policies, para. 19.

⁵ See OECD Guidelines, Chapter II, Commentary on General Policies, para. 20.

Competition law does not prohibit collaborative activities by companies unless they affect important parameters of competition. If RBC activities involve competitors co-ordination of companies' independent decisions on prices, volumes or where to / whom to sell, they would be viewed as a serious infringement of competition law. Any other co-operation activity would have to be assessed to balance alleged pro- and anti-competitive effects. Conducting such an assessment however is not a bright line exercise. Examples of some common forms of collaboration to promote RBC, and the legal concerns raised in relation to them, are provided below.

A. Participation in RBC initiatives through trade associations

Many joint activities between competitors take place in the context of the activities of trade associations, including collective activities which can be recognised as RBC strategies. Although their principal function is to provide services to their members, trade associations also have important 'industrial policy' and 'political' functions. Most trade associations take an active role in shaping the way their industry works. They promote product standards and best practices, and they define and promote standard terms and conditions of sale. They publish and enforce codes of ethics, and in some cases they formulate and enforce industry self-regulation. They issue recommendations to their members on a variety of commercial and non-commercial issues. These may include social, environmental, labour issues or other industry improvements. Trade associations also promote representing and protecting the interests of members in legislation, regulations, taxation and policy matters likely to affect them.

Trade associations remain by their very nature exposed to antitrust risks, despite their many pro-competitive aspects. Participation in trade and professional associations' activities provides ample opportunities for companies in the same line of business to meet regularly and to discuss business matters of common interest. Such meetings and discussions, even if meant to pursue the legitimate objectives of the association, bring together direct competitors and provide them with regular opportunities for exchanges of views on the market, which could easily spill over into illegal coordination. It is for this reason that trade associations and their activities are subject to close scrutiny by competition authorities around the world.

Competition enforcement is increasingly focussed on trade associations' practices that facilitate collusion among the members. Unduly restrictive membership rules, exchange of detailed and sensitive commercial information, exclusive or closed industry standards, marketing restrictions, and "ethical" codes regulating pricing or other trading practices that limit the members' ability to compete freely are among the antitrust-sensitive issues which most affect the activities of trade associations today.

B. Participation in industry initiatives implementing or promoting RBC

Industry initiatives are generally created to respond to a specific need or challenge rather than represent an industrial sector more generally and can be effective in responding to specific RBC issues. For example, some industry initiatives have sought to implement RBC recommendations such as those related to supply chain due diligence and ethical sourcing, including traceability systems, data tracking, factory or other site-level risk assessments. As multiple retailers likely source from the same suppliers, collaboration on these issues can avoid duplication of efforts and reduce burdens on actors throughout the supply chain. Such initiatives may even be mandated by national laws in producing or consuming countries, and designed specifically to implement international standards like the *OECD Guidelines for Multinational Enterprises* or the *OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas*. However where such initiatives lead to de facto market monopolisation by participating industries, antitrust concerns may be raised. For example, if an RBC-related certification initiative was introduced and producers

participating in the initiative subsequently grew to dramatically dominate the export market share of that product, anticompetitive behaviour may be implied.

C. Exerting leverage to encourage RBC

Applying leverage through concerted efforts among competitors with common suppliers, clients or other business relationships is expressly encouraged in international instruments on RBC. In practice, it has also proven to be an effective tool to drive improved social and environmental performance in global value chains. For example, investor activism has often been an effective tactic in promoting RBC in investee entities. Engagement by investors with their investee entities through various means to improve environmental and social performance is becoming common practice and can often result in real changes within investee entity operations.⁶ Broader divestment campaigns, specifically those targeting industries with climate impacts, such as coal, are also increasingly common and impactful. However recently industries targeted by such investor activism have suggested that divestment campaigns could be considered to be secondary boycotts under competition law.⁷

D. Engaging in dialogue and information sharing to facilitate RBC

Information exchange takes various forms such as data shared directly between competitors, data shared indirectly through a common agency or a third party or through the companies' suppliers or retailers. Information exchange can be beneficial for companies, for example by helping companies save costs by reducing their inventories, as well as for consumers, for example by reducing search costs and improving the ability to choose between competing products. Information sharing can also be highly valuable in facilitating RBC, for example in cases where multiple brands share suppliers and engage in due diligence efforts to ensure that these suppliers are upholding responsible business conduct practices. However, the increased transparency generated by information exchanges can also lead in certain situations to restrictions of competition when it enables companies to be aware of their competitors' market strategies.

II. Questions to consider regarding competition law concerns with respect to collaborative RBC initiatives

In determining whether there are may be issues raised with regard to competition law for collaborative initiatives promoting RBC the following questions may be useful.

1. Does the RBC collaboration or initiative involve an agreement between competitors?

The term "agreement" is rarely defined in competition legislation, but for horizontal agreements case-law generally refers to an explicit or implicit arrangement between firms normally in competition with each other (**actual competitors**). However agreements between **potential competitors** are also covered by competition law. If the companies involved in RBC collaboration or initiative are not actual or potential competitors, competition authorities would not object to them engaging in close cooperation.⁸

⁶ See generally, 21st Century Engagement: Investor Strategies for Incorporating ESG Consideration into Corporate Interactions, Blackrock and Ceres (2015).

⁷ Lenore Taylor, *Mining lobby may join industry push to ban environmental boycotts*, The Guardian April 18, 2014. Available at <http://www.theguardian.com/business/2014/apr/18/mining-lobby-may-join-industry-push-ban-environmental-boycotts>

⁸ Competition authorities may still have a concern with vertical restraints. If the companies involved in RBC strategies are not actual or potential competitors, competition concern are however less likely.

Agreements may be arrived at in an extensive formal manner, and their terms and conditions explicitly written down by the parties involved; or they may be implicit, and their boundaries nevertheless understood and observed by convention among the different members. An explicit agreement may not necessarily be an “overt” agreement, which is one which can be openly observed by those not party to the agreement. Indeed, most agreements which give rise to **anti-competitive practices** tend to be “covert” arrangements that are not easily detected by competition authorities. It is for this reason that competition authorities tend to be more sceptical if the conduct is completely private, although the simple fact that an agreement is overt, rather than covert, does not shield it from the application of law.

2. Can the agreement related to the RBC collaboration or initiative be viewed as a per se violation of competition law?

Agreements to restrict competition may cover matters such as prices, production, markets and customers. “Hard core” cartels or “naked restrictions” of competition are the most egregious violation of competition law. There is no formal definition of what a hard core cartel is, but the *1998 OECD Recommendation Concerning Effective Action against Hard Core Cartels* identifies as hard core practices **price fixing**, **bid rigging** (collusive tenders), **output restrictions**, and **market division** (or sharing). These practices are globally condemned because they prevent competition delivering its benefits to market and the economy as a whole, and cause participating firms to act collectively as a monopoly, or a near monopoly. In almost all cases, cartels are detrimental for consumers and for the economy and for this reason are considered *per se* violations of the law, i.e. violations which can never be justified under the competition rules.

Box 2 – Public and private agreements

A distinction needs to be drawn between public and private cartels.

In the case of **public cartels**, the government may establish and enforce the rules relating to prices, output and other such matters. **Export cartels** and **shipping conferences** are examples of public cartels. In many countries **depression cartels** have been permitted in industries deemed to be requiring price and production stability and/or to permit **rationalization** of industry structure and **excess capacity**.⁹ International commodity agreements covering products such as coffee, sugar, tin and oil are examples of **international cartels** which have publicly entailed agreements between different national governments. **Crisis cartels** have also been organized by governments for various industries or products in different countries in order to fix prices and ration production and distribution in periods of acute shortages. In contrast, **private cartels** entail an agreement on terms and conditions from which the members derive mutual advantage but which are not known or likely to be detected by outside parties. Private cartels in most jurisdictions are viewed as being illegal and in violation of **antitrust** laws.

In the context of RBC, price fixing concerns have often been raised with regards to industry collaboration on wages, shared financing for improvements on RBC issues among common suppliers, or other arrangements related to costs which may in turn impact price. For example while setting minimum wages is the responsibility of the governments, in several industries brands committed to ethical sourcing recognise that inadequate wages at a manufacturing or production level are serious

⁹ In Japan for example, such arrangements have been permitted in the steel, aluminum smelting, ship building and various chemical industries. Japan abolished antitrust exemptions for rationalization cartels and depression cartels in 1999. Public cartels were also permitted in the United States during the depression in the 1930s and continued to exist for some time after World War II in industries such as coal mining and oil production. Cartels have also played an extensive role in the German economy during the inter-war period.

issues and can be a driver behind other risks of adverse impacts in their operations. In the context of the apparel sector the need for living wages for workers in supplier factors has been a significant point of discussion in the wake of the Rana Plaza collapse which led to the death of 1,129 garment workers. Wage rates which do not provide adequate income to meet basic needs of workers are common in the apparel sector and encourage excessive overtime as well as deprive workers of the agency to refuse work, even in unsafe conditions. As garment factories generally supply to multiple sources, industry promotion of living wage at a manufacturing and production level would have to involve cooperation amongst brands and relators on worker wages.

Generally coordination of elements of cost (such as minimum salaries in a supply country) raises less concerns under competition law than co-ordination of downstream prices, however competition law may object if coordination of minimum salaries can have a significant impact on sales prices. This might be the case if the labour costs represent a significant part of the customer price. This is something that would have to be assessed on a case-by-case basis.

3. Does the agreement related to the RBC collaboration or initiative have an anti-competitive effect, regardless of the fact that it does not seek to restrict competition?

Competition law does not prohibit cooperation or agreements amongst competitors as such but only when these activities may have an anti-competitive effect, i.e. a detrimental impact on consumers' welfare. The fundamental reason is that not all agreements between firms are necessarily harmful to competition. While agreements on prices, production, markets and customers are generally prohibited *per se* (i.e. regardless of any possible justification) other forms of RBC co-ordination will be subject to an effects-based analysis. If a co-operation agreement is not prohibited *per se*, agencies will closely look at its actual and potential effects to determine whether there are appreciable restrictive effects on competition. For there to be restrictive effects on competition, the agreement must have, or be likely to have an appreciable adverse impact on at least one of the parameters of competition on the market, such as price, output, product quality and variety, or innovation. Such an analysis will start with the assessment of the nature of the agreement and the market power of the parties involved:

- The **nature** of an agreement relates to factors such as the scope and objective of the co-operation, the competitive relationship between the parties and the extent to which they combine their activities. These factors determine which kinds of possible competition concerns can arise.
- **Market power** is the ability to profitably maintain prices above competitive levels for a period of time or to profitably maintain output in terms of product quantities, product quality and variety or innovation below competitive levels for a period of time. Market power can sometimes result from reduced competition between the parties. Depending on the market position of the parties and the concentration in the market, competition authorities generally look at other factors such as the stability of market shares over time, entry barriers, the likelihood of market entry, and the countervailing power of buyers/suppliers.

For example, in the context of the information exchange, exchanges on market strategies, particularly where individualised information regarding intended future prices or quantities is exchanged, will normally be considered as a cartel and fined.¹⁰

However exchanges of all other types of information will be assessed as to their restrictive effects on competition based on a number of criteria and factors:

- **The type and nature of the information exchanged:** competitively sensitive information (i.e., information on the very nature of the business), such as prices, volumes and commercial strategies cannot be shared with competitors.
- **The level of detail of the information exchanged:** the higher the level of detail the higher the possibility for competitors to predict each other's future conduct and to adjust accordingly.
- **The reference period of the information exchanged:** the exchange of data regarding future strategies is more troublesome than the exchange of historical data.
- **The frequency of the exchange:** frequent data exchanges allow companies to better (and more timely) adapt their commercial policy to their competitors' strategy and therefore are more likely to lead to anticompetitive effects.
- **The concentrated nature of the market in which the parties to the exchange are active:** the more concentrated a market is, the easier it is for competitors to reach and enforce sustainable terms of coordination.
- **The nature of the products in question:** it is easier for companies to coordinate on a single, homogeneous product than on many differentiated products.
- **The beneficiaries of the information exchange:** agencies also take into account whether the exchange of information is of a private nature - this form of cooperation between firms normally improves only the seller's knowledge of the market - or has a wider public impact on customers as well, who will therefore be in a position to compare the various offers and increase the level of competition.

4. On balance do the pro-competitive effects of the agreement relating to the RBC collaboration or initiative outweigh the anti-competitive effects?

If in light of the nature of the agreement and the market power of the parties it is likely that the RBC initiative might have a restrictive effect on competition, the companies involved can show that the pro-competitive effects of the arrangement outweigh the restrictive effects to escape liability under competition law.

Such analysis might be complex and would require balancing alleged pro-competitive effects of the specific competitor's co-operation under review and its likely anti-competitive effects. In this context, companies could argue (and prove) that the efficiency gains from co-operation would outweigh the restrictive effects on competition and the indispensability of the restriction of

¹⁰ See OECD, Information Exchanges Between Competitors under Competition Law, 2010. Available at <http://www.oecd.org/daf/competition/cartels/48379006.pdf>

competition. Only if the anti-competitive effects of the agreement prevail over its pro-competitive effects would the competition authority prohibit the agreement.¹¹

This analysis requires that the parties show that:¹²

- the restrictive agreement must lead to **economic benefits**, such as improvements in the production or distribution of products or the promotion of technical or economic progress, i.e. efficiency gains;
- the restrictions must be **indispensable** to the attainment of the efficiency gains;
- **consumers** must receive a **fair share** of the resulting efficiency gains attained by indispensable restrictions;
- the agreement must offer the parties **no possible elimination of competition** in relation to a substantial part of the products in question.

Where all these conditions are met, the efficiency gains generated by an agreement will be considered to offset the restrictions of competition generated by it, and the authority would not object to the arrangement.

As noted, efficiency gains considered in a balancing test are generally purely economic in nature. However as the beneficial impacts of RBC initiatives are often likewise economic in nature this narrows analysis in not necessarily disadvantageous. Significant research exists and continues to be developed demonstrating the business case, and consumer preferences for products or services born of responsible business practices. For example in a recent survey of individuals who have bought or taken out a financial product or service around a half (51%) are likely to consider switching from their main financial provider if they have reason to believe their financial activities (e.g. lending, insuring) contribute to harmful social activities, such as human rights abuses, child labour or forced labour.¹³ These concerns are almost as strong switch factors as another main financial provider offering better rates, fees or conditions for a similar product or account. Additionally it has been shown that RBC can generate long-term efficiency gains. For example, according to a Harvard Business School study that tracked performance over the last 18 years, companies with strong environmental and social (ESG) performance outperformed companies with weak ESG performance, as measured in accounting terms.¹⁴

¹¹ Antitrust laws and competition authorities recognise that horizontal co-operation between competitors can lead to substantial economic benefits, as it can be a way for businesses to share risk, save costs, increase investments, pool know-how, enhance product quality and variety, and launch innovation faster. It can be a way to promote better market conditions in which business can compete fairly. On the other hand, horizontal co-operation agreements may lead to competition problems. For example, agreements between firms may be permitted to develop uniform product standards in order to promote economies of scale, increased use of the product and diffusion of technology. Similarly, firms may be allowed to engage in cooperative research and development (R&D), exchange statistical data and information or form joint ventures to share risks and pool capital in large industrial projects. These authorizations, however, are generally granted with the proviso that the agreement or arrangement does not form the basis for price fixing or other practices restrictive of competition.

¹² These criteria are taken from Article 101, paragraph 3, of the TFEU, but for all intents and purposes many jurisdictions use the same criteria despite differing wording in legal texts.

¹³ Ipsos Mori Surey, *Half of financial consumers likely to consider switching main provider if they have ethical concerns*, October 2014. Available at <https://www.ipsos-mori.com/researchpublications/researcharchive/3465/Half-of-financial-consumers-likely-to-consider-switching-main-provider-if-they-have-ethical-concerns.aspx>

¹⁴ Eccles G.R., Ioannou I. Serafeim G. "The Impact of a Corporate Culture of Sustainability on Corporate Behavior and Performance," Harvard Business School, November, 2011.

In practice, pro-competitive effects of RBC initiatives have been recognised in the past. The review of the Apparel Industry Partnership (2000)¹⁵ provides an interesting example. The Apparel Industry Partnership (“AIP”) includes United States apparel and footwear manufacturers, as well as labour unions, consumer, human rights, and religious organization representatives. It was formed to respond to a call from the US administration to address sweatshop manufacturing conditions, i.e., situations in which employees work long hours for low wages under unsafe or unhealthy working conditions. To address sweatshop conditions, the AIP established a Workplace Code of Conduct which defines “reasonable” or “humane” working conditions¹⁶ and allows firms that choose to comply with that Code for some or all of their products to advertise the fact of their compliance with the end customers.

In its Business Review Letter, the US Department of Justice declared that it had no intention to institute an antitrust enforcement action against the API in relation to the Code. In addition to other consideration it also recognized that the development of the Code will have pro-competitive effects, in that firms that advertise their adherence to the Code will provide useful information to those consumers who are concerned with the conditions under which apparel and footwear are produced.

Another related example of how restrictiveness on competition has been assessed in practice for an RBC initiative is provided in the Business Review letter for Fair Factories Clearing House.¹⁷ In 2006, the Fair Factory Clearing House (FFC) asked the US Department of Justice to issue a Business Letter Review concerning the operation of a database where its members could voluntary collect and share information about workplace conditions (e.g. information related to child labour, forced labour, wages and hours, health and safety, and workers’ rights) in manufacturing facilities around the globe. The initiative, which was a spill-over of the AIP initiative, would contribute to the elimination of “sweatshops” through the dissemination of information that would put individual companies in a better position to ensure that their suppliers meet the highest possible workplace standards.

The US Department of Justice declared that it had no intention to institute an antitrust enforcement action against the FFC initiative relying on these factual elements:

1. The FFC initiative was opened to all retailers and brands, and there were plans to extend the membership to factories, universities, standard setting organisations and buying agents.
2. The FFC initiative would be voluntary and members would have the option, not the obligation, to contribute information to the database.
3. The database will not “rate” factories but will only set out objective information about workplace conditions.
4. Information on competitors’ wage and hour would only be released in an aggregated form in order not to enable the identification of factory-specific information.

¹⁵ Available at <http://www.justice.gov/atr/public/busreview/4513.pdf>.

¹⁶ The proposed Workplace Code of Conduct provides that adherents will not use forced labor or child labor (as defined). Employees will not be subjected to physical or mental abuse or harassment, or various types of discrimination. Employers will maintain “a safe and healthy working environment”, and will recognize and respect the rights of employees to freedom of association and collective bargaining. Employers will pay employees the higher of legally required minimum wages or the prevailing industry wage. Employees may not be required to work more than the lesser of (a) 48 hours per week and 12 hours overtime or (b) the legal limits on regular and overtime work. Employees also will be entitled to at least one day off in every seven day period. Overtime will be compensated at the higher of the legally required level or at a rate equal to the regular hourly compensation rate.

¹⁷ Available at <http://www.justice.gov/atr/public/busreview/216720.pdf>.

5. Members would have to comply with an Antitrust Policy Statement, and infringement of the statement will be grounds for termination of membership.
6. Decisions regarding whether a particular member should or should not use a particular factory are made unilaterally by individual members and not by the FFC.
7. The effect on competition did not seem appreciable in light of the fact that labour cost accounts for less than 3% of the United States retail price of clothing and the *de minimis* relationship between labour cost and prices of other retail and goods manufactures by entities that might become members of the FFC.

Importantly, pro-competitive effects must be adequately demonstrated in order for them to pass scrutiny of a competition authority and must surpass any effects which restrict competition. This can be challenging when the pro-competitive argument rests on future, or “soft”, efficiency gains, which may be difficult to prove in the present. Additionally, the analysis can be relatively narrow; consumer preferences which favour RBC principles generally but not the initiative in question specifically may not pass scrutiny.

For example, in 2015 the Dutch supermarkets, poultry farmers, and broiler meat processors entered into an arrangement amongst each other regarding the selling of chicken meat produced under enhanced animal welfare-friendly conditions, the so-called ‘Chicken of Tomorrow’ standard. The higher animal welfare-friendly standards in the plans for the ‘Chicken of Tomorrow’ included slightly more space and slightly more litter on the floors, and the chickens live a couple of days longer. In addition, chicken farms had to take some environmentally friendly measures.

The Netherlands Authority for Consumers and Markets (ACM) believed that this concerted decision constituted a restriction to competition.¹⁸ One of the conditions for businesses to qualify for an exemption from the prohibition of cartels is that the benefits for consumers should exceed the harm inflicted on them such as fewer options for consumers and a higher cost price. The ACM examined whether the measures under the Chicken of Tomorrow standard were valued by consumers. The analysis revealed that consumers are prepared to pay more for animal-welfare and environmental improvements, but not for the measures of the Chicken of Tomorrow. On balance, consumers did not benefit from these arrangements. One particular element of these arrangements that the ACM did not agree with was that Dutch supermarkets would remove from the shelves poultry which did not meet the standard required under the Chicken of Tomorrow scheme.¹⁹

5. Are there public interest benefits produced by the RBC initiative that can be included in or override a balancing test?

RBC strategies respond to a variety of policy objectives, not all necessarily promoting market efficiencies. Non-competition values are important and, when constitutionally mandated, require deference by competition enforcers. However, competition agencies and courts have always interpreted these exemptions and/or defences narrowly, because accommodating these values may sometimes also impose costs on consumers.

¹⁸ Available at <https://www.acm.nl/en/publications/publication/13789/ACMs-analysis-of-the-sustainability-arrangements-concerning-the-Chicken-of-Tomorrow/>.

¹⁹ The Chairman of the Board of ACM, explained: *‘It is good that market participants launch sustainability initiatives. Consumers are offered more options because of them. In addition, producers are able to differentiate themselves. According to our study, it turns out that consumers are indeed willing to pay more for sustainable chicken meat as long as they know how it has been produced. So much can still be gained by providing better information. We are also observing that the market for sustainably-produced meat is very dynamic at the moment. I do not believe that it is necessary to make joint arrangements about removing regular chicken meat from supermarket shelves.’*

This means that very few jurisdictions incorporate a public policy test in the assessment of business conduct under their competition laws. Even the jurisdictions which have public policy test have interpreted and applied it in a narrow sense. It is unlikely that competition authorities would authorise, or decide not to challenge, a collaborative scheme that would be justified exclusively by non-efficiency objectives. Only if these other public policy considerations complement the efficiency gains from the agreement under review they will be considered by competition authorities and national courts.

While this was not always the case, over time OECD countries have shifted away from using competition law to promote what might be characterised as broad public interest objectives, and from the use of public-interest based authorisation procedures, exemptions or political over-rides (collectively, “public interest objectives”) as part of the competition law analysis. Most competition authorities do not consider in their analysis factors which extend beyond what appear to be the generally accepted “core” competition policy objectives of promoting and protecting the competitive process, and attaining greater economic efficiency. The business community shares this view, and according to the International Chamber of Commerce (ICC) “*in general, non-competition factors should not be applied in antitrust merger review.*”²⁰ This shift away from non-efficiency goals is reflected either in an elimination of, or less frequent or more restricted use of public interest tests or political over-rides in domestic competition laws that would permit (i) an anti-competitive merger or restrictive trade practice to proceed on the basis of broader public interest considerations; or (ii) a pro-competitive merger or trade practice to be blocked or remedied on the basis of such considerations.

The competition laws of Canada and of the United Kingdom are illustrative of this shift. Non-efficiency considerations were explicitly anchored in the competition statutes of these jurisdictions. The gradual abandonment of such considerations took similar, though non-identical, courses. In Canada, while the Competition Act refers to both efficiency and non-efficiency objectives, the efficiency objective is preferred in practice. Thus, Canadian competition law demonstrates that the explicit inclusion of non-economic objectives as an integral part of competition law does not necessarily lead to the pursuit and attainment of such objectives.²¹ In the U.K., the abandonment of non-efficiency, public interest, goals was accompanied by statutory reforms.²²

²⁰ See ICC/BIAC Comments on report of the US International Competition Policy Advisory Committee (2000), p. 2.

²¹ The Competition Act includes a “purpose clause” (Section 1.1) which clearly regards efficiency as only *one* purpose of maintaining and encouraging competition: “*The purpose of this Act is to maintain and encourage competition in Canada in order to promote the efficiency and adaptability of the Canadian economy, in order to expand opportunities for Canadian participation in world markets while at the same time recognizing the role of foreign competition in Canada, in order to ensure that small and medium-sized enterprises have an equitable opportunity to participate in the Canadian economy and in order to provide consumers with competitive prices and product choices.*” The Competition Tribunal and the Economic Council of Canada supported economic efficiency as the primary objective of competition law, finding that “*the main objective of competition policy should be that of obtaining the most efficient possible performance from the economy [...] in dynamic as well as static terms [...] and the avoidance of economic waste.*” (Economic Council of Canada, *Interim Report on Competition Policy* (Ottawa: Queen’s Printer, 1969). The subordination of non-efficiency concerns to the efficiency objective within Canadian competition policy is clearly demonstrated by the protection of small business. The “purpose clause” includes the equitable opportunity of small and medium-sized enterprises to participate in the economy among the objectives of the Act.

²² The Monopolies and Restrictive Practices (Inquiry and Control) Act 1948, and subsequently the Fair Trading Act 1973 introduced the “public interest test” for merger control, which “*comprised a variety of vague economic and socio-political concerns [and] was certainly not based on the need for certainty and predictability.*” For instance, the public interest test was employed, *inter alia*, for the protection of British “national champions”. The Acts provided for ministerial intervention in the merger control process, which contributed to the already apparent inconsistent and arbitrary decision-making on the basis of the malleable public interest test. In 2002, The Enterprise Act replaced the public interest test with an explicit competition-based test. The Act also limited the role of the Secretary of State in the merger control process, in order to remove political influence from that process. (See also Box 8)

Public interest objectives continue, however, to be embraced by some developing and transitioning countries. Possible explanations include greater influence of vested business interests in such countries and a more pressing need to promote one or more public interest objectives given the stage of economic development in such countries.

Box 3 – South Africa public interest clause

The South African competition law is a clear example of the unique role that non-efficiency objectives may have in transition and developing economies. According to the South African Competition Commission, *“a fundamental principle of competition policy and law in South Africa thus is the need to balance economic efficiency with socio-economic equity and development.”*²³

The “purpose clause” of the South African Competition Act explicitly refers to non-efficiency goals, such as promoting employment; ensuring that small and medium sized enterprises have an equitable opportunity to participate in the economy; and promoting a greater spread of ownership, in particular in order to increase the ownership stakes of historically disadvantaged persons.

According to the Act, the Competition Commission may exempt an agreement or practice, or category of agreements or practices, from the application of Chapter 2 of the Act, which covers restrictive practices and abuse of a dominant position. In addition, the Act provides that the promotion of such ability must be considered by the Commission or the Competition Tribunal when determining whether a merger can or cannot be justified on public interest grounds. However, such “affirmative action” has not been employed as a *sole* criterion in merger assessment.

Box 4 – The Australian authorisation provisions

The Australian Competition and Consumer Act (CCA) includes “authorization” provisions which provide for the Australian Competition and Consumer Commission (ACCC), or the Australian Competition Tribunal on review, to exempt conduct from the CCA on net “public benefit” grounds. ACCC has also published Authorization Guidelines²⁴ which explain the legal and analytical framework on the application of the provisions.

Broadly, the CCA requires the ACCC to be satisfied that the likely public benefits flowing from the proposed conduct for which authorisation is sought outweigh the likely public detriments flowing from that conduct. The CCA recognises that in certain circumstances arrangements which restrict competition can nonetheless be in the public interest, for example, where there is market failure or impediments to competition and addressing that market failure or those impediments can encourage economic efficiency and thus enhance welfare.

Public benefit is not defined in the CCA. However, the ACCC has traditionally given it a broad meaning. It is considered to include: *“[...] anything of value to the community generally, any contribution to the aims pursued by the society including as one of its principal elements (in the*

²³ See <http://www.compcom.co.za/about/>.

²⁴ Available at: <https://www.accc.gov.au/publications/authorisation-guidelines-2013>.

context of trade practices legislation) the achievement of the economic goals of efficiency and progress”.²⁵

Public detriment is also not defined in the Act but the ACCC considers its meaning as essentially the opposite of public benefit. In this regard the Tribunal has defined it as: “[...] any impairment to the community generally, any harm or damage to the aims pursued by the society including as one of its principal elements the achievement of the goal of economic efficiency [...]”.²⁶

In the context of RBC initiatives the ACCC granted authorisation until 2018 to the Homeworker Code Committee to permit the operation of a revised version of the Homeworkers Code of Practice (the Code). The Code is a mechanism within the textile, clothing and footwear industry designed to assist businesses to ensure that they and their outsourced supply chains (if any) comply with relevant awards and workplace laws. In particular, the provisions of the Code require compliance with relevant laws in relation to all workers directly engaged by a business, and in any outsourced supply chain, in order for the business to gain accreditation. An objective of these laws is to protect vulnerable workers, in particular, homeworkers.

The ACCC considered that the Code was likely to lead to public benefits by providing businesses with a means to efficiently ensure that they and their supply chains comply with the relevant workplace legal framework, and a means to efficiently signal this compliance. The ACCC also considered the public benefits that were likely to arise from reduced incidence of unlawful treatment of workers. The ACCC accepted that some public detriment was likely to arise from increased business costs but concluded that these detriments were limited. To reach such a conclusions it considered the following factors:

- the Code is voluntary, although the ACCC acknowledged that businesses in the outsourced supply chains may not regard it as such;
- retail signatories and accredited manufacturers are only able to agree to boycott other businesses who are not compliant with their legal obligations;
- the Code contains safeguards against inappropriate accreditation or boycott decisions; and
- the Code includes a dispute resolution mechanism.

On balance, the ACCC considered that the likely public benefits of the Code outweighed the likely public detriments, and granted accordingly an authorisation to operate the revised Code until 26 October 2018.

Competition authorities and national courts, however, generally do not authorise or exempt agreements, decisions or practices on public policy grounds if they directly oppose the core competition principles. Traditionally, if public policy considerations must prevail, competition law experts have argued that such externalities should be addressed through legislation or regulation rather than through a restriction of the competition enforcement powers of competition authorities. Moreover, competition authorities are probably not best placed to pursue policy objectives other than efficiency objectives, since they are technical and non-elected public bodies. For this reason in

²⁵ *Re 7-Eleven* (1994), ATPR 41-357 at [42,777]. According to the ACCC, efficiency is a concept that is usually taken to encompass “progress”; and that commonly efficiency is said to encompass allocative efficiency, production efficiency and dynamic efficiency.

²⁶ *Re. 7-Eleven Stores Pty Limited* (1994), ATPR 41-357 at [page 42] 42,683.

some jurisdictions while public policy issues are removed from the aegis of competition authorities, other regulators are given the power to waive competition law to promote specific public interest goals.

For example, although the UK is one of the countries which has explicitly removed public policy considerations from its competition law in 2008 the House of Lords approved the Intervention notice pursuant to section 42 of Enterprise Act, 2002 which added a third consideration to section 58 of the Act, granting to the Secretary of State (SoS) the power to waive competition law in the interest of “*maintaining the stability of the UK financial system*”. The provision was immediately used in the government sponsored merger between Lloyds TSB plc (Lloyds) and HBOS plc (HBOS). The Office of Fair Trading (OFT) in its report to the SoS affirmed that the “*test for reference to the CC on competition grounds contained in section 33 of the Act is met*”. That is to say, that ordinarily the merger would have attracted the applicable statutory thresholds. Despite that, the SoS decided that the “*benefits to the public interest [...] outweigh the potential for the merger to result in the anti-competitive outcomes identified by the OFT. As a result of this decision, no reference will be made to the Competition Commission*”, and so the merger was allowed to stand on public interest grounds.

5. Is the agreement related to the RBC collaboration or initiative exempt from competition law?

Not all types of business conduct are necessarily subject to antitrust enforcement. In several jurisdictions, competition law provides exemptions for certain co-operative arrangements between firms which may facilitate efficiency and dynamic change in the marketplace.²⁷

For example most jurisdictions recognise that companies cannot be asked to comply with antitrust laws if the alleged anti-competitive conduct is regulated by other statutes. Similarly, there are explicit exemptions which apply to labour law relations and government lobbying activity.

A. The regulated conduct defence

In many countries, courts have concluded that no antitrust liability can be found if the challenged private conduct (including conduct by trade associations) is determined by lawful public measures. Under the so-called “state action” or “regulated conduct” doctrines, companies are not liable under the antitrust statutes if their anti-competitive behaviour is required by a public measure and companies have no space for autonomous conduct. However, if the public measure merely encourages, or makes it easier to engage in autonomous anti-competitive conduct, antitrust liability can be established but the national legal framework may be taken into account as a ‘mitigating factor’ to reduce the fine imposed.

The regulated conduct defence is important to ensure that the state can exercise its sovereign power to apply regulation that it deems justified for economic and/or social reasons even though the regulation may conflict with competition policy. The defence is also important to ensure firms do not face multiple and inconsistent legal demands, in particular from regulations and competition law.

In the context of trade and professional associations, for example, many activities are established by law or find their justification in public policies. Some associations are expressly given powers by a public entity to set prices or other terms and conditions for exercising a commercial activity (e.g. meeting certain standards or certification requirements). The public entity in some cases is also asked to approve or veto a resolution by the industry association.

²⁷ See for example the EU block exemptions regulations at: <http://ec.europa.eu/competition/antitrust/legislation/legislation.html>.

Box 5 – State Action Defence in the EC

In Europe, the European Court of Justice (ECJ) was confronted with the issue of state measures with anti-competitive effects and their relationship with the competition provisions in the European Treaty since the seventies.²⁸ Most cases, however, discuss the state action doctrine, which outlaws state measures which hamper the effectiveness of the EC competition rules applicable to undertakings, rather than the state action defence, which immunises private behaviour fully determined by lawful public measures from the competition rules. According to the Court, “Member States may not enact measures enabling private undertakings to escape from the constraints imposed by Articles [101] to [106] of the Treaty”.²⁹

The scope of the duty of Member States not to enact or maintain state measures which may affect the application of the competition rules of the Treaty was clarified over the years by the European courts in a number of cases. In *Eycke*,³⁰ the ECJ re-stated the principle that the Treaty requires the Member States not to introduce or maintain in force measures, even of a legislative nature, which may render ineffective the competition rules and clarified that “such would be the case, [...], if a Member State were to require or favour the adoption of agreements, decisions or concerted practices contrary to Article [101] or to reinforce their effects, or to deprive its own legislation of its official character by delegating to private traders responsibility for taking decisions affecting the economic sphere”.³¹

As for the state action defence, the Court held that the defence is very narrow and it does not exempt private entities from antitrust liability as such. Under EU competition law, companies are not responsible if their anti-competitive behaviour is required by a public measure and companies had no space for ‘autonomous conduct’. However, undertakings are responsible under the EU competition rules and may incur fines if the public measure “merely encourages, or makes it easier for undertakings to engage in autonomous anti-competitive conduct”. In such cases, antitrust liability can be established but the national legal framework may be taken into account as a ‘mitigating factor’ to reduce the fine imposed.

Generally the regulated conduct defence only applies if the conduct is required by national legislation (be it by national law or administrative decision) and if the company has no discretion to act differently. It is therefore unlikely that the fact that the OECD and the UN recognise RBC as an international standard is sufficient to justify the adoption of RBC standards that might restrict competition, unless specifically mandated through national legislations or regulations.

B. Labour law exemptions

Some jurisdictions have formally recognised that labour law relationships are not covered by competition law.

In Japan, labour unions are not considered as undertakings for the purposes of the Japanese Anti-monopoly law. Therefore, activities by labour unions are not subject to competition law regulations

²⁸ See J. B. Cruz, *The State Action Doctrine*, in Amato & Ehlermann, *EC Competition Law – A Critical Assessment*, 2007, Hart Publishing, pp. 551-590.

²⁹ *Id.* at para 33.

³⁰ Case 267/86, *Van Eycke*, [1988] ECR 4769.

³¹ See para 16. The meaning of terms such as ‘requiring’ or ‘favouring’ an illegal conduct and ‘reinforcing’ the effects of such conduct or ‘delegating’ to private entities public regulatory functions was clarified in a number of cases: Case C-2/91, *Meng*, [1993] ECR I-5751; Case C-245/91, *Ohra*, [1993] ECR I-5851; Case C-185/91, *Reiff*, [1993] ECR I-5801.

by the interpretation of the law. The JFTC has also published its statements that the Japanese Anti-monopoly law does not apply to employment contracts/ employment relations.³²

In European Union, in the *Albany International* case,³³ the European Court of Justice in 1999 excluded from the application of the competition law provisions a collective labour agreement.³⁴ According to the Court it follows from an interpretation of the provisions of the European Treaty as a whole which is both effective and consistent that agreements concluded in the context of collective negotiations between management and labour in pursuit of such objectives must, by virtue of their nature and purpose, be regarded as falling outside the scope of the competition provision of the EU Treaty. In the United States, Section 20 of the Clayton Act immunizes collective activity by employees relating to a dispute concerning terms or conditions of employment.³⁵ Similarly, the Norris-LaGuardia Act of 1932³⁶ provides that courts in the United States do not have jurisdiction to issue restraining orders or injunctions against certain union activities on the basis that such activities constitute an unlawful combination or conspiracy under the antitrust laws.

Other jurisdictions limit the antitrust exemption only to the collective activity by employees. This is the case, for example, of Ireland,³⁷ where trade unions, namely associations of employees, are considered neither an undertaking nor an association of undertakings for the purpose of Irish competition law to the extent they act as the representative of respective employee members. In Denmark, The Competition Act does not extend to “pay and working conditions.”³⁸ As a practical matter this exempts collective bargaining by labour organizations from application of the prohibition against collective agreements. The exemption only applies to employer-employee agreements including collective bargaining by labour organizations, i.e. not agreements between companies.³⁹

C. Exemption for lobby activities

Fundamental rights of individuals and corporations, such as the right to form an association or to join an existing one, the right to express one’s views and opinions and the right to freely petition the

³² The press interview of the JFTC Secretary General on 28 March 2012 on an entry draft of baseball players. Available at http://www.jftc.go.jp/houdou/teirei/h24/01_03/kaikenkiroku120328.html (Japanese only). Q&A on issues related to the Great East Japan Earthquake. Available at <http://www.jftc.go.jp/soudan/shinsaikanren/23jishinga.html> (Japanese only).

³³ Cases C-67/96, C-115-117/97 and C-219/97.

³⁴ According to the Court “[i]t is beyond question that certain restrictions of competition are inherent in collective agreements between organisations representing employers and workers. However the social policy objectives pursued by such agreements would be seriously undermined if management and labour were subject to [Article 101 TFEU] when seeking jointly to adopt measures to improve conditions of work and employment.”

³⁵ 29 U.S.C. § 52. No restraining order or injunction shall be granted by any court of the United States, or a judge or the judges thereof, in any case between an employer and employees, or between employers and employees, or between employees, or between persons employed and persons seeking employment, involving, or growing out of, a dispute concerning terms or conditions of employment, unless necessary to prevent irreparable injury to property, or to a property right, of the party making the application, for which injury there is no adequate remedy at law, and such property or property right must be described with particularity in the application, which must be in writing and sworn to by the applicant or by his agent or attorney.

³⁶ 29 U.S.C. §§ 101-115.

³⁷ Notice on Activities of Trade Associations and Compliance with Competition Law (The Competition authority of Irish, Decision N/09/002, November 2009) 3.4 (Trade Associations and Professional Bodies) available at <http://www.tca.ie/images/uploaded/documents/N-09-002%20Notice%20on%20Activities%20of%20Trade%20Associations%20and%20Compliance%20with%20Competition%20Law.PDF>.

³⁸ Competition Act, 2013, Section 3. (“This Act shall not apply to pay and working conditions. For purposes of its on-going work, the Competition Council may, however, demand information from organizations and undertakings concerning pay and working conditions.”)

³⁹ In cases when the Competition Council considers if Section 3 is applicable it asks the parties to document that the agreement in question is agreed between an employer and an employee (or a labour organization).

government may collide with the main objective of competition laws, which is to promote competition for the benefit of consumers.

In order to preserve the right to petition governments, some jurisdictions have exempted from antitrust liability concerted efforts to secure government-imposed restraints on competition. For competitors to lobby the government to change the law in a way that would reduce competition cannot be a violation of the antitrust laws, unless the concerted action is a mere “sham” to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor. This doctrine, therefore, ensures that antitrust law does not impinge on the government decision making process, whether it be decisions by federal or state governments, which also depends on the ability of the business community to make its wishes known to their representatives.

Box 6 – Lobby activities and antitrust liability in the U.S.

The question of whether trade associations and their members should be subject to antitrust liability for seeking to influence the passage of an anti-competitive public measure was addressed for the first time by the Supreme Court in the United States in two cases in the early sixties: *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*⁴⁰ and *United Mine Workers of America v. Pennington*.⁴¹ The holdings in those two cases form the so-called *Noerr-Pennington* doctrine.⁴²

In *Noerr* and in *Pennington*, the Supreme Court recognised that liability under the Sherman Act may not be premised on concerted efforts to secure government-imposed restraints on competition.⁴³ In *Noerr*, the Court held that: (1) the Sherman Act does not prohibit efforts to influence the passage and enforcement of laws; and (2) insofar as disparagement of customers and the public was alleged to be part of a strategy to influence legislation and law enforcement, such disparagement was ‘incidental’ to petitioning and therefore protected as well.⁴⁴ The Court also emphasised that the fact that the motive behind the petitioning is to harm competitors was irrelevant, as ‘the right of the people to inform their representatives in government’ cannot be conditioned on the intent of that action. In *Pennington*, the Court extended the protection in *Noerr* beyond the legislative arena to prohibit an antitrust challenge to the petitioning of any public official.

Over time, the Supreme Court has clarified - and in some cases limited - the scope of the doctrine. In *California Motor Transport Co. v. Trucking Unlimited*,⁴⁵ the Court held that the doctrine applies also to concerted efforts to influence administrative and judicial proceedings as well as to efforts to influence legislative and executive actions. The Court, however, declined to apply the doctrine to lobbying efforts to affect the standard setting process of a *private* association.⁴⁶ The Court also limited the applicability of the doctrine “[...] where the alleged conspiracy is a mere sham to cover

⁴⁰ 365 U.S. 127 (1961).

⁴¹ 381 U.S. 657 (1965).

⁴² For a summary of the doctrine, see *Enforcement Perspectives on the Noerr-Pennington Doctrine*, An FTC Staff Report (2006), available at: <http://www.ftc.gov/opa/2006/11/noerr.htm>.

⁴³ The doctrine is rooted in the First Amendment of the US Constitution, which guarantees to the people the right to petition the government and to freely express its views in public. In addition, the doctrine is underpinned by the principle that competition rules regulate business activity and not political activity.

⁴⁴ 365 US at 135-144.

⁴⁵ 404 U.S. 508 (1972).

⁴⁶ See *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492 (1988).

*what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor and the application of the Sherman Act would be justified*⁴⁷ (so-called ‘sham’ exception).

Outside the US, references to the right to petition the government as a limit on antitrust action are fewer.⁴⁸ In the Europe Union, for example, the European Commission has not elaborated a Noerr-Pennington type doctrine.⁴⁹ Jurisdictions, however, recognise in practice that lobbying a government is part of the non-economic activities that are guaranteed under the constitutions of many countries as part of the right of association of enterprises. In Japan, for example, the JFTC clarified in its guidelines related to trade associations that “(t)rade associations may express their general demands or opinions to national or regional governments concerning the content of laws or systems or the way these are applied. Such expression does not in itself pose a problem in light of the Antimonopoly Act.”⁵⁰ Outside the US, only Israel has formally admitted the right to petition the government as an antitrust defence.⁵¹

⁴⁷ See *California Motor Transport Co. v. Trucking Unlimited* 404 U.S. 508 (1972), at 511. Recently, in *Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc.* (508 U.S. 49 (1993) (clarifying prior case law in that the test for invocation of the “sham” exception to the Noerr/Pennington Doctrine is whether the conduct at issue is deemed objectively baseless. It is not dependent upon subjective intent).

⁴⁸ Footnote 46 of the OECD Roundtable on Trade Associations in 2007 available at <http://www.oecd.org/regreform/sectors/41646059.pdf>

⁴⁹ William Cooney “Competition and the Noerr-Pennington Doctrine: When Should Political Activity Be Barred under European Community Competition Law?” 1 January, 2003 (Article excerpt available at <https://www.questia.com/library/journal/1P3-321223711/competition-and-the-noerr-pennington-doctrine-when>).

⁵⁰ Guidelines concerning the Activities of Trade Associations under the Antimonopoly-Act (October 30, 1995, Japan Fair Trade Commission), 12-6 (6) Expressing Demands or Opinions to National or Regional Governments, etc.).

⁵¹ In Israel, the General Director of the Israel Antitrust Authority issued an official statement regarding cooperation between competitors on lobbying. “*The statement acknowledges competitors rights to take common actions in order to promote their interests before the government, even if such actions are aimed at achieving anticompetitive results, e.g. increasing barriers to entry to the relevant market or restricting the number of competitors.*” Under the statement, such concerted actions taken by competitors will not be considered restrictive arrangements under their competition law under a certain conditions. Those conditions include the following: (i) the activity must be aimed at persuading the government to take/ not to take an action in its capacity as Government, (ii) only complete and reliable information will be presented; (iii) the activity must aim at promoting the common interest of all competitors, not the interest of any specific competitor; and (iv) the activity may not include exchange of information which might lead to anti-competitive outcome. See contribution of Israel to the OECD Roundtable on Trade Associations (OECD, 2007).

IV. Avoiding competition law issues in relation to RBC collaboration or initiatives

A. Seeking advice and guidance from competition enforcers

Only a few jurisdictions still allow for notifications of agreements between competitors for purpose of obtaining legal certainty by the competition authority as to whether the agreement is in compliance with the competition law. Generally, companies are required to self-assess compliance with competition rules and seek advice from internal/external counsel. However, most competition agencies are willing to consider providing informal guidance especially if there is genuine uncertainty on the application of the competition rules as the conduct presents novel or unresolved questions.

Legal certainty for companies on the scope of application of competition rules to specific conduct is very important as it contributes to the promotion of pro-competitive practices, whereby uncertainty risks chilling activities which benefit consumers and increase consumer welfare. Companies can seek the advice of competition authorities if they are in doubt as to whether a particular conduct or cooperative activity can be viewed as contrary to competition law and therefore raise regulatory risks. Most competition authorities have abandoned the practice of "voluntary" notifications of agreements for purposes of seeking an exemption from the application of competition rules and protection from legal actions. In most jurisdictions, a self-assessment approach prevails and companies must satisfy themselves that agreements they enter into are not in breach of the competition rules. Generally competition authorities do not comment on individual agreements and will not give legal comfort to companies in relation to their agreements.

However, in some jurisdictions it is still possible to obtain guidance from the authority in various forms. In the European Union, for example, where cases give rise to genuine uncertainty because they present novel or unresolved questions for the application of competition rules, companies can seek informal guidance from the European Commission.⁵² In the United States, individuals and companies concerned about the legality under the US antitrust laws of proposed business conduct may ask the Department of Justice for a statement of its enforcement intentions with respect to that conduct pursuant to the Department's Business Review Procedure.⁵³ Japan has a similar system for prior consultation on business activities.⁵⁴

Most authorities consider that that this type of guidance provides the business community an important opportunity to foster compliance with respect to the scope, interpretation, and application of the competition laws to particular proposed conduct. These procedures are in addition to the general transparency practices that have led many agencies to publish policy statements on the application of the law to ensure that companies can effectively self-assess compliance with the enforceable rules.

⁵² See Regulation 1/2003, Official Journal L1, 04 January 2003, p.1 – 25. See also Commission Notice on informal guidance relating to novel questions concerning Articles 81 and 82 of the EC Treaty that arise in individual cases (guidance letters), in Official Journal C/101, 27 April 2004, p. 78-80.

⁵³ 28 C.F.R. Section 50.6. More information on business reviews by the US Department of Justice can be found at <http://www.justice.gov/atr/public/busreview/>.

⁵⁴ Under the prior consultation system, when a company or an association consults the JFTC on whether a specific conduct which it is going to take would violate the Anti-monopoly Act in a specified form, the JFTC will provide the answer to the inquiry in writing. In order for a company or an association to utilize the consultation system, the following three requirements must be met: (i) The consultation is about a specific conduct it is going to take; (ii) it must show the authority specific and individual facts about the conduct it is going to take; and (iii) it needs to agree to publish its identity, the consultation, and the result of the consultation. If those conditions are met, the company or association will receive the answer from the JFTC in 30 days.

B. Practicing Transparency

As noted above competition authorities tend to be more sceptical of initiatives or agreements amongst competitors if conduct is completely private. Therefore transparency regarding RBC initiatives can be a useful way of mitigating competition concerns. Importantly the simple fact that an agreement is overt or that there is transparency around an initiative does not shield it from the application of law if it is indeed anticompetitive. However transparency can help bring to light potentially problematic issues and thus ensure they are addressed quickly.

C. Compliance Programs

As businesses have the responsibility to self-assess whether their conduct poses concerns under competition law they are encouraged to develop and implement compliance programs to ensure there is awareness of the risks and an understanding of how they should be managed at an organisational level. Guidance documents on how to best design and enforce compliance programs are often provided by competition authorities of specific jurisdictions. General guidance on best practices also exists.⁵⁵ Most large enterprises will likely already have established anti-trust compliance programs in place which can be reference or adapted for the purpose of specific collaborative initiatives regarding responsible business conduct.

⁵⁵ For example see the ICC Antitrust Compliance Toolkit, International Chamber of Commerce. Available at: <http://www.iccwbo.org/advocacy-codes-and-rules/areas-of-work/competition/icc-antitrust-compliance-toolkit/>

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