Introduction

For a society to exist at all, law, more than only national defence must be provided by the government.[1] This postulates that a public legal system is non-rivalrous[2] and non-excludable.[3] However, these seemingly rigid truisms can be undermined by even a cursory glance at history. In ancient, medieval and modern times many instances of pluralistic legal systems existed in which multiple sources of law were in competition within the same geographic area.[4] These systems created social order in the absence of a single centralized hierarchical legislature. In some instances, an ineffective government even resulted in the formation of private legal systems ("PLSs") – non-governmental institutions intended to regulate the behaviour of their members.[5] While one could say that non-State legal sys-

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1 B. Chaplan, "The Economics of Non-State Legal Systems", *Libertarian Alliance* 1997, p. 2; See also T. Hobbes, "*Philosophicall Rudiments Concerning Government and Society (De Cive)*", London: J.C. for R. Royston 1651, p. 85. Therein, *Thomas Hobbes* asserts this idea by stating that it pertains to the sovereign to establish the content of natural laws and organize their enforceability. He adduces this by stating that, what is to be called injury to a citizen, is not to be determined by natural, but by civil law.

2 M. Kolmar, "*Principles of Microeconomics: An Integrative Approach*", Cham: Springer International Publishing AG 2017, p. 140.

3 D. Robbins, "*Handbook of Public Sector Economics*", Boca Raton: CRC Press 2005, p.185.

4 In the medieval society that Prof. Berman investigates, canon law, royal law, feudal law, manorial law, mercantile law and urban law co-existed. None was automatically supreme over the others. See H. J. Berman, "*Law and Revolution: The Formation of the Western Legal Tradition*", Cambridge/London: Cambridge University Press 1983, p. 519; P. S. Berman, "*Global Legal Pluralism: A Jurisprudence Of Law Beyond Borders*", New York: Cambridge University Press 2012, p. 13. Such systems often existed in an uneasy relationship with the State legal system.

5 See A. Aviram, "The Paradox of Spontaneous Formation of Private Legal Systems", *John M. Olin Law & Economics Working Paper No. 192* 2003, p. 1-3 for an example of a Private Legal System that existed at the end of the 10th Century AD. In his work *Aviram* explains that due to the decline of the Carolingian Empire, a political vacuum emerged in which private warlords consolidated power and raised terror in the absence of an effective central government. In response to this situation, one of the world's first decentralized peace movements, Pax Dei (Latin for 'Peace of God') gained importance. Private warlords voluntarily observed rules regulating warfare,

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tems are historical anomalies, in modern times parallels have sprung up, albeit in a less dramatic form.

Even in fully developed market economies with a high degree of division of labour, formal legal rules, which are enforced by a branch of government in which judicial power is vested, "the judiciary", do not comprise the total picture. It is immediately evident that there are unmet legal needs in society, as an omniscient, infallible, omnipotent, and benevolent government that guarantees perfect enforcement does not exist. This utopia can especially be rebutted by looking at industry-wide arbitration systems established by some trade associations which represent the interests of industry actors in particular commodities industries such as the agricultural, cotton, cocoa, diamond, metal, and oilseeds, oils and fats trade.[6] Together with their members these institutions have set up very complex systems of specialized commercial arbitration which operate in the shadow of the law.[7] The most salient features of these systems share four similarities. First, fellow merchants are selected as arbitrators to decide industry disputes which originate from standardized contracts. Second, the arbitration system presumes to have authority over all industry conflicts. Third, these conflicts occur in industries in which a good reputation is crucial to operate on the market. Fourth, extrajudicial measures/

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and – in the event of non-adherence – were punished by means of social and religious ostracism; A. Marciano, "*Law and Economics: A Reader*", in: T. J. Zywicki (ed), "The Rise and Fall of Efficiency in the Common Law: A Supply-Side Analysis", Abingdon/New York: Routledge 2009, p. 364. It should, however, be noted that the dichotomy between private and public legal systems is not always that clear throughout history. An example would be 'The Statute of Staple' enacted in 1353 by the King of England, which provided for the establishment of arbitral merchant courts to resolve disputes arising in the markets of the most important articles of commerce in England, namely lead, tin, wool and woolfells. These courts applied the privately formed Law Merchant (or *Lex Mercatoria*) and customs, whereas common law courts were prohibited from hearing disputes arising from contracts on the staples markets.

6 These trade associations were perceived as operating in non-State legal systems by *Dietz*. See T. Dietz, "*Global Order Beyond Law: How Information and Communication Technologies Facilitate Relational Contracting in International Trade*", Oxford/Portland: Hart Publishing 2016, p. 192.

7 C. R. Drahozal, "Private Ordering and International Commercial Arbitration", *Penn State Law Review, Vol. 113:4* 2009, p. 1032.

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nonlegal sanctions[8] are used to punish non-compliance with arbitral awards.[9]

Even though specialized commercial arbitration is a less adversarial procedure to accommodate repeated-dealings and offers a more efficient, cost-friendly and secretive form of dispute resolution as opposed to public court adjudication,[10] not all of the aspects of such a system are without controversy. Extrajudicial measures to punish recalcitrant industry actors for not paying an arbitral award have an enormous impact on them.[11] Often, such industry actors are subject to (enormous) reputational harm and can even have their access to the services provided by the relevant trade association cancelled. This can cause targeted industry actors to lose access to the relevant commodities market. While extrajudicial measures are necessary to deter industry actors from failing to pay arbitral awards and are a more efficient method of enforcement as opposed to enforcement in public courts, every time trade associations impose such measures, these institutions as well as their members and – arguably – non-members for their role in the execution could violate US Antitrust Law and EU Competition Law.[12] More specifically, with regard to the US legal system, nonlegal sanctioning "can" make all three actors liable under Section 1 of the Sherman Act, which prohibits "*every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations*". In addition, it has the potential to attribute liability to trade associations and their members under Section 2 of the Sherman Act when extrajudicial sanctioning classifies, as an illegal monopoly, an anti-

8 For the purpose of this research, the terms extrajudicial measures and nonlegal sanctions are used interchangeably.

9 *Posner* refers to the enforcement of arbitral awards as private substitutes for judicial protection. See R. A. Posner, "*Economics Analysis of Law*", New York: Wolters Kluwer Law & Business 2014, par. 8.6.

10 P. Newmann, "*The New Palgrave Dictionary of Economics and the Law: Three Volume Set*", London: Palgrave Macmillan 2002, p. 93.

11 *Ellickson* describes this reliance on extralegal mechanisms as an alternative to, not an extension of, formal legal sanctions as "socials norms" or "order without law". See R. A. Posner, "*Law and Social Norms*", Cambridge/London: Harvard University Press 2000, p. 172. In *Ellickson's* empirical study of cattle ranchers and farmers in Shasta County, California even though rural neighbours did not rely on the law, they were cooperating in order to prevent lawsuits (*e.g.* payment of debt(s), payment of damage by landowners to the property of others). *Ellickson* interprets this as a rule requiring the "informal resolution of internal disputes", but argues that social norms are only efficient in close-knit groups.

12 A. Aviram, "The Paradox of Spontaneous Formation of Private Legal Systems", *John M. Olin Law & Economics Working Paper No. 192* 2003, p. 6-7.

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competitive attempt to monopolize, or as an outlawed conspiracy to monopolize any part of the trade or commerce among several States, or with foreign nations. Under EU Competition Law, trade associations, their members and – arguably – non-members engaged in nonlegal sanctioning can infringe Article 101 TFEU if such measures classify as "*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*". Furthermore, the first two actors can breach Article 102 TFEU if extrajudicial sanctioning classifies as an abuse of a dominant position.

Even if, at present, nonlegal sanctioning has never been subject to antitrust scrutiny by the responsible enforcement authorities of the USA (*i.e.* the FTC) and the EU (*i.e.* the Commission) and US courts and the CJEU, this does not preclude future prosecution under these laws. This is regardless of the discussion whether such silence is a metaphor for inaction, or entails that the responsible authorities and courts condone extrajudicial sanctioning. What matters is not whether these authorities and courts are willing to examine the potential anti-competitiveness of trade associations, their members and – arguably – non-members, but whether these actors transgress the bounds of US Antitrust Law and EU Competition Law. If so, their participation in this type of enforcement, in spite of its (at first glance) pivotal role in maintaining an efficient system of specialized commercial arbitration in which awards are adhered to, is illegal. This could make all three actors liable for excessive fines and sometimes even criminal charges under both legal systems. To alleviate or even prevent such repercussions, legal clarity and guidance should be provided to trade associations, their members and non-members when those actors impose extrajudicial sanctions on disloyal industry actors for not complying with arbitral awards. This is not only important for these actors, but it also contributes to the general understanding of whether non-State orchestrated sanctions are permissible and offers the responsible enforcement agencies and courts with useful guidance on how to treat such conduct. A change of the purpose of US Antirust Law and EU Competition Law over time and a potential (but unlikely) future swing in the antirust pendulum does not change these benefits.[13] An increase in legal clarity and transparency

13 It is difficult to predict how the definition, scope, nature, purpose and objective of US Antitrust Law and EU Competition Law will change in the future. A com-

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for all parties involved in nonlegal sanctioning under both present legal systems is more than appropriate.

To reach the conclusion that trade associations, their members and non-members violate US Antitrust Law and EU Competition Law for their participation in nonlegal sanctioning, the research is organized as follows. Part I (consisting of five Chapters) explains present-day PLSs by focusing on the salient features of six modern trade associations that provide systems of specialized commercial arbitration in which recalcitrant industry actors are extrajudicially punished for not complying with arbitral awards. Part I also introduces the central research question. To start this discussion, Chapter 1 maps out that private initiatives and PLSs are not present-day anomalies, but have occurred throughout history, such as with regard to self-regulation within the Oikos in classical Athens, the flexibility and the allocation of risk pertaining to lease contracts in the agriculture sector in the Roman Empire, *Lex Mercatoria* in Medieval Times and the Industrial Revolution in Modern Times. Subsequently, some general characteristics of present-day PLSs as well as the six types of nonlegal sanctions are briefly discussed. To this extent, the typology of extrajudicial measures describes the practice of blacklisting, withdrawing membership, refusing to re-admit expelled members on the basis of an additional entry barrier, refusing to deal with ostracized members, entering the premises of wrongdoers without a warrant and effectively limiting adequate access to public courts prior to arbitral proceedings and after an award.[14] Chapter 1 ends with stating the reasons for the existence of present-day PLSs by focusing on the inefficiency of the court system, increased demand for contractual security and a decrease in transaction and distribution costs.

In Chapter 2, six trade associations which operate in PLSs are selected from a plethora of other institutions which provide their members with specialized commercial arbitration and punish disloyalty of industry actors following non-compliance with arbitral awards with nonlegal sanctions. These include (i) the International Cotton Association ("ICA")[15]; (ii) the Diamond Dealers Club ("DDC")[16]; (iii) the Grain and Feed Trade Associa-

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plete overhaul of both legal systems is not impossible, which would subsequently prompt institutional change.

14 Whereas this last measure is not a nonlegal sanction/extrajudicial measure, as it is not imposed on a disloyal industry actor for not complying with an arbitral award stemming from specialized commercial arbitration, it will be treated as fitting within both terms throughout this research.

15 For the website of the ICA, see http://www.ica-ltd.org/.

16 For the website of the DDC, see http://www.nyddc.com/.

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tion ("GAFTA")[17]; (iv) the Federation of Cocoa Commerce ("FCC")[18]; (v) the London Metal Exchange ("LME")[19]; and (vi) the Federation of Oils, Seeds and Fats Association ("FOSFA").[20] For each of them, the trade association's history, legal form, institutional structure, membership requirements, system of specialized commercial arbitration, types of available nonlegal sanctions as well as the rationale for extrajudicial enforcement is explained. This contributes to a better understanding of how present-day trade associations which are active within PLSs function and to what extent these institutions opt out of the legal system. Furthermore, it broadens and increases the degree of congruence regarding the general characteristics of these trade associations. In an absence of such a case- based review, the purpose of this research, which is to examine the illegality of trade associations, their members and – arguably – non-members for their participation in nonlegal sanctioning under US Antitrust Law and EU Competition Law, cannot be achieved. Any different approach would contradict one of the most pronounced features of contemporary legal research which stresses the importance of a case-based review. Here, this case-based review is a study of different trade associations.[21]

In Chapter 3, the broad overview of Chapter 2 is summarized. The focus is on the legal form of the trade associations researched,[22] access to membership and the system of specialized commercial arbitration by looking at the structure and composition of the arbitration board (*i.e.* first-tier arbitration, second-tier arbitration and the qualification criteria for candidate arbitrators), the place of arbitration and applicable law and the finality of arbitration or the possibility of (some) legal redress in public courts. Furthermore, all types of nonlegal sanctioning which are used by the trade associations researched are highlighted as well as the reasons for such measures are outlined. This comprehensive overview is necessary to summarize the most critical issues and make the reader well aware of all similarities and differences between the trade associations researched in order to contribute to a better understanding of how trade associations active within present-day PLSs function. Without such a broad discussion, it is impossi-

17 For the website of GAFTA, see http://www.gafta.com/.
18 For the website of the FCC, see http://www.cocoafederation.com/.
19 For the website of the LME, see https://www.lme.com/.
20 For the website of FOSFA, see http://www.fosfa.org/.
21 The approach to this Chapter is to identify similarities and differences and does not require the author to provide his own opinion.
22 The six trade associations selected are referred to as the "trade associations researched" throughout this research.

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ble to understand the limits of nonlegal sanctioning in the diverse arena and would make this research rely on meta-theoretical assumptions rather than facts.

In Chapter 4, the boundaries of nonlegal sanctioning are explained by focusing on US Antitrust Law and EU Competition Law. This is done by discussing three aspects. First, the reasons for the selection of both legal systems. Second, an explanation why nonlegal sanctioning is a good method to resolve the prisoner's dilemma and the adverse impact of opportunistic behaviour. Third, a short discussion on which actors are involved in extrajudicial enforcement to clarify the addressees of potential antitrust liability. After narrowing down the focus and scope of the research subject, the central research question is introduced. In Chapter 5, the research design and research methods are discussed. Both topics feature critical issues which are crucial in this research, such as the reasons for the selection of the six cases (trade associations), a delimitation of what will be discussed pertaining to US Antitrust Law and EU Competition Law, a reflection on the central research question and the objectives of the research which pertain to increased transparency and guidance for all actors involved in nonlegal sanctioning to understand when they infringe the core provisions under both legal systems and to promulgate best practice guidelines for the actors that infringe these laws to escape from antitrust liability.

After this broad overview, Part II (comprising two Chapters) features a discussion of the hypothesis that the six trade associations researched, their members and – arguably – non-members breach US Antitrust Law every time the former actors impose a nonlegal sanction on a disloyal industry actor for not complying with an arbitral award stemming from specialized commercial arbitration. To do so, in Chapter 6 the six nonlegal sanctions are reviewed against the yardstick of Section 1 of the Sherman Act, which prohibits agreements in restraint of trade or commerce. To stimulate a thorough review, four main aspects are highlighted. First, which actors involved in nonlegal sanctioning can be held subject to antitrust scrutiny under Section 1 of the Sherman Act is discussed. Second, whether the trade associations researched, their members and non-members, satisfy the collusion requirement for their separate role in the participation of extrajudicial sanctioning is reviewed. Third, anti-competitiveness of all six types of nonlegal sanctions when they are imposed by the trade associations researched and executed by their members and – arguably – non-members is examined in detail. Fourth, whether the actors that impose anti-competitive nonlegal sanctions can use a rule-of-reason defence to exonerate their par-

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ticipation is probed. This then stimulates a broader understanding of whether such measures are permissible and what the actors can do to alleviate the risk of antitrust liability.

After this descriptive review of Section 1 of the Sherman Act, the intention of Chapter 7 is to reflect on the investigation into the illegality of the trade associations researched and their members due to their participation in nonlegal sanctions under Section 2 of the Sherman Act. With regard to the former group of actors, whether their role in the imposition of nonlegal sanctions amounts to unlawful monopolization and attempted anticompetitive monopolization is described. Owing to a plethora of problems, this is not an easy task. This is because it is unclear whether the trade associations researched hold monopoly positions or specifically intend to monopolize the markets for regulation and private ordering and it is unsure whether extrajudicial measures felt on adjacent second-tier commodities markets are considered anticompetitive conduct and are sufficiently causal.[23] Concerning the members of the trade associations researched, the focus here is on an unlawful conspiracy to monopolize. After establishing whether the trade associations researched and their members can be held accountable for a violation of Section 2 of the Sherman Act for their participation in nonlegal sanctioning, a rule-of-reason analysis is conducted. This will also contribute to the debate on whether nonlegal sanctions are allowed and, if not, how they can be structured so that the trade associations researched and their members can avoid antitrust liability.

In Part III (consisting of four Chapters) a comparable, but more thorough review is conducted with regard to the illegality of the trade associations researched, their members and – arguably – non-members, when they orchestrate nonlegal sanctions as opposed to US Antitrust Law. This is done by focusing on the two core provisions of EU Competition Law, namely Articles 101 and 102 TFEU. Chapter 8 explains whether the scope of application of both provisions is opened which enables the Commission to conduct a potential competition law scrutiny. To verify whether this is indeed the case, the aim is to see whether the trade associations researched, their members and non-members, fulfil the legal boundary, which focuses on the concept of undertaking and satisfy some economic boundaries.

While it is likely that the scope of Articles 101 and 102 TFEU is opened, Chapter 9 takes a closer look at the question whether the participation of

23 The six trade associations researched operate on the markets for regulation and private ordering, whereas their members operate on adjacent second-tier commodities markets.

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the trade associations researched, their members and – arguably – non-members, in the six nonlegal sanctions amounts to anticompetitive agreements under Article 101. This is done by determining whether each of the three group of actors – separately – satisfy the collusion agreement and whether their participation in the six types of nonlegal sanctions prevents, restricts or distorts competition by object of effect pursuant to Article 101(1) TFEU. Albeit that a justification is typically considered under Article 101(3) TFEU as soon as an illegality under the first tier of this provision is established, the existence of a rule-of-reason analysis under Article 101 (1) TFEU will also be discussed. This aims to contribute to the completeness of the research by delving into a plethora of concepts and promote knowledge-sharing.

Chapter 10 discusses whether the participation of the trade associations researched and their members in nonlegal sanctions which restrict Article 101(1) TFEU can be justified. To do so, the aim is to inspect two relevant block exemption regulations (BERs) and, in particular, to outline whether the exemption route laid down in Article 101(3) TFEU is applicable. Albeit that the former exemption possibilities are dealt swiftly, a more thorough analysis of the latter provision is conducted, which provides that Article 101(1) TFEU may be declared inapplicable when four cumulative conditions are satisfied. Although these requirements somehow mirror the rule-of-reason analysis under Section 1 of the Sherman Act, they are more rigid.

Following the discussion of whether the trade associations researched, their members and non-members violate Article 101 TFEU with regard to the six nonlegal sanctions, Chapter 11 assesses the existence of a violation of Article 102 TFEU by the former two group of actors because of these extrajudicial measures. This assessment is made by concentrating on the existence of a dominant position in the relevant market which impacts the EU territory and by putting emphasis on the existence of exclusionary abuses of such positions vis-à-vis refusals to grant access to an essential facility. Furthermore, to invigorate this discussion, objective justification defences are touched upon.

In Part IV (consisting of two Chapters) a succinct summary of the research, conclusions and best practice guidelines for trade associations and their members which orchestrate nonlegal sanctions to not transgress the bounds of US Antitrust Law and EU Competition Law will be given. Chapter 12 presents the results of the research in order to eschew extraneous findings and describe the most pertinent aspects as a means of stimulating reflection on the illegality of nonlegal sanctioning in PLSs under US Antitrust Law and EU Competition Law. This will be done by re-stating

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the key findings of every Chapter. Following this brief overview of the research, Chapter 13, first, answers the central research question concisely, clearly and specifically, which given the more broad but still succinct overview outlined in Chapter 12 is adequate and appropriate and, second, to develop best practice guidelines for trade associations and members on how to not exceed the bounds of US Antitrust Law and EU Competition Law when they orchestrate nonlegal sanctions against disloyal industry actors for not complying with an arbitral award stemming from specialized commercial arbitration. To do so, advice is given to both actors to adumbrate which of the six extrajudicial measures they should and should not use and, if appropriate, how they can structure nonlegal sanctions in a manner that complies with US Antitrust Law and EU Competition Law. Recommendations which require trade associations and members to be surreptitious even though a nonlegal sanction infringes one or both legal systems will not be included in the best practice guidelines. The intention is to develop a comprehensive set of recommendations proposals which do not promote illegal conduct to stay out off the radar of the responsible US and EU enforcement agencies. This discourages trade associations and their members to violate US Antitrust Law and EU Competition Law and subverts the fallacious belief of both actors that it is better to escape antitrust liability rather than to abide by both laws.

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