CROSSREF
ANTITRUST COMPLIANCE POLICY AND GUIDELINES

(adopted by the Crossref Board on January 28, 2009)*

This document contains Crossref's "Antitrust Policy," "Antitrust Guidelines" and "Antitrust Checklist" which together represent Crossref's antitrust compliance program. It is intended to educate Crossref members about the U.S. federal antitrust laws as well as the parallel European Union provisions that are applicable to Crossref's activities, and to serve as a basic guide to assist Crossref and its members in conducting Crossref meetings and activities in conformity with these laws.

ANTITRUST POLICY

It is Crossref's policy to comply strictly with all laws that relate to the conduct of its activities, including applicable antitrust laws. All Crossref members, officers, directors and staff must be familiar with these "Antitrust Guidelines" and agree to conduct all Crossref sponsored meetings and activities in strict accordance with the Guidelines and the Antitrust Checklist (see pp. 9-10). The Guidelines will be updated and revised by the Crossref Board as appropriate. The Guidelines are intended to provide basic guidance on U.S. and EU antitrust laws that may be applicable to Crossref activities. Legal counsel should be consulted in all cases involving specific situations, interpretations or advice. Although a Crossref staff member will attend all meetings, and counsel will attend meetings in which issues with antitrust implications are expected to be discussed, Crossref members are still also individually responsible for conducting their association activities in accordance with the applicable laws.

ANTITRUST GUIDELINES

Crossref is a trade association of primary publishers of scholarly literature. In any industry, the role of a trade association can be an important one, providing a forum for industry members to participate in efficiency-enhancing discussions and activities that can ultimately improve the quality of their products and services for consumers and promote competition. However, a trade association is by definition a group of competitors, and trade association activities carry with them the potential for antitrust violations by the association itself as well as by its members. Under U.S. and EU antitrust law, for example, associations as a class of business historically have been the single largest source of antitrust cases.

These Guidelines provide an overview of the antitrust laws most relevant to Crossref. Following these rules and guidelines will enable Crossref to minimize antitrust risk for the association and its members while still maximizing its effectiveness as a publishing industry association. To ensure compliance with this policy, Crossref staff will receive periodic briefings about and training in these

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* This policy was revised on February 22, 2016 to reflect the fact that Articles 81 and 82 of the EU Treaty are now Articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU). No substantive changes were made in the revision,

guidelines from counsel, and will engage the support of counsel in the implementation of these guidelines as appropriate.

I. Anticompetitive Agreements

Anticompetitive agreements are prohibited by Section 1 of the Sherman Act in the United States, and by Article 101 of the Treaty on the Functioning of the European Union (TEFU). In general, agreements that would violate Section 1 also would violate Article 101, and vice versa. There are some issues specific to Article 101, however, which are addressed separately in Part I. B., below.

A. Sherman Act Section 1

Section 1 of the Sherman Act forbids "[e]very contract, combination . . . or conspiracy, in restraint of trade or commerce." Certain agreements – particularly price fixing and bid rigging agreements – have been determined to always restrict competition, and therefore such agreements always violate the Sherman Act (and thus are illegal *per se*); other agreements violate Section 1 only if they unreasonably restrain trade, a determination that involves a balancing of the restrictions on competition against the benefits that arise from the restrictive agreement. To establish a "contract, combination . . . or conspiracy," there must be concerted action on the part of two or more independent entities. This concerted action requires conscious commitment to a common scheme designed to achieve an unlawful objective. By contrast, if the conduct in question is generated by a single actor and is wholly unilateral, then it falls outside the scope of Section 1 even if the conduct would otherwise be considered a restraint of trade. Of course, the conduct of a single actor could potentially be prohibited by Section 2 of the Sherman Act as discussed below in Part II.A.

The distinction between unilateral and concerted action can be difficult to discern. For trade associations specifically, for there to be concerted action, there must be evidence that association members were acting in their individual capacities in the scheme to achieve the unlawful objective. Simply being a member of an association does not amount to concerted action. However, if members make decisions for the association based on what they determine is best for their individual corporations rather than for the association as a whole, that will likely trigger antitrust issues. Less scrutiny is likely where the association and its members make decisions consistent with the association's independent economic interest and where the conduct being authorized is *reasonably related to furthering the legitimate goals of the association.*

For trade associations, the principal legal concern under Section 1 is that association members, acting not as members but as industry competitors, will make agreements with each other not to compete. These agreements come in many forms, some more obvious than others. The most egregious of these agreements have been deemed *per se* illegal, meaning that proof of the agreement to engage in the conduct is sufficient to establish the violation, regardless of whether the agreement is actually carried out, or is effective in achieving its goal. Legal counsel should always be consulted prior to even discussing these types of arrangements with competitors, and such agreements should never be entered into without prior review by antitrust counsel:
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- **Price fixing** – Competitors agree to raise, fix or otherwise maintain the prices at which their goods or services are sold. The competitors need not agree to charge exactly the same price, and not every competitor in an industry needs to join the conspiracy. Price fixing can take many

forms. Although not every agreement that restricts price competition violates Section 1, agreements between competitors that involve pricing will almost always come under increased scrutiny by courts and antitrust agencies.

- **Bid rigging** – Competitors agree in advance as to who will submit the winning bid, or otherwise conspire to reduce competition for bidding.

- **Output or sales restrictions** – Competitors agree to limit their production volumes, capacities or sales or otherwise restrict output.

- **Market allocation** – Competitors agree to divide markets among themselves by allocating specific customers or types of customers, products, or territories.

Even if an agreement does not fit into one of the categories above, it can still be considered illegal if its anticompetitive effects outweigh its pro-competitive benefits. For example, depending on the rationale behind the decisions, a trade association could trigger antitrust risk through a number of typical association activities, which could include:

- **Membership strategies** – Excluding or expelling entities from membership; restricting the membership rights of certain members.

- **Information exchanges** – Exchanging certain types of information with members/competitors (particularly with respect to prices; output; capacity, or costs).

- **Standard setting** – Setting industry standards, either mandatory or voluntary.

- **Selection of association vendors/strategic partners** – Setting selection criteria for association vendors; choosing not to deal with certain vendors/partners.

Unlike the *per se* illegal agreements, the legality of these activities is determined under the rule of reason, a method of analysis that is often hard to apply to specific situations, especially when the impact of the activity is prospective, and therefore uncertain. In determining whether the conduct fails the rule of reason analysis and imposes an unreasonable restraint on competition, courts weigh a number of factors, including (1) the condition of the industry before and after the restraint was imposed; (2) the reason this particular restraint was imposed; and (3) whether the conduct promotes or suppresses competition. Because of the complexity of analysis and the potential for seemingly legitimate conduct to come under antitrust scrutiny, counsel should be consulted regarding the legality of specific Crossref policies or decisions.

B. TEFU Article 101

TEFU Article 101 prohibits "all agreements between undertakings, decisions by associations of undertakings and concerted practices which … have as their object or effect the prevention, restriction or distortion of competition within the [EU]". The specific reference to "decisions by associations of undertakings" in Article 81 means that many of the activities of Crossref are potentially caught by the prohibition if their object or effect is considered anticompetitive. For example, non-binding trade association recommendations, codes of conduct and best practice guidelines have all been found to fall within the scope of Article 101, in addition to formal trade association decisions. Liability for breaches potentially attaches to both Crossref and its members. Genuinely unilateral behavior by a Crossref

member, however, falls outside the scope of Article 101, even if anticompetitive, and exclusively within the scope of Article 102 as discussed below in Part II.B.

A distinction is made under Article 101 between restrictions that are considered to have the "object" of restricting competition and those considered to have the "effect" of restricting competition. Restrictions by object are those that by their very nature have the potential of restricting competition and include the most serious or "hardcore" restrictions of competition. Once it has been established that an agreement has as its object the restriction of competition, there is no need to take account of its concrete effects. To this extent, object restrictions are similar to *per se* infringements under Section 1 of the Sherman Act and the types of restriction covered is similar including **Price fixing**, **Bid rigging, Output restriction** and **Market allocation** as discussed in Part I.A above. In addition, the following types of restriction are also considered object restrictions under Article 101:

- **Resale price maintenance** – Restrictions imposed by a supplier on the prices at which their products may be resold by independent resellers, other than restrictions on maximum resale prices and purely recommended resale prices (i.e. recommendations not linked to penalties, pressure or rewards for compliance).

- **Territorial restrictions on resale in the EU** – Where a customer or reseller is entitled to make sales in at least part of the EU, any limitation on the individual countries or territories within the EU to which it may resell (e.g. prohibitions on exports to certain countries) may be regarded as a very serious infringement of Article 81 on the basis that it conflicts with the fundamental goal of EU law of creating a single market within the EU. Such agreements should never be entered into without prior review by antitrust counsel.

Restrictions by effect will not be caught by Article 101 unless it can be established they are likely to have a restrictive effect on competition. The activities listed in Part I.A above as potentially illegal under Section 1 of the Sherman Act if their anticompetitive effects outweigh their pro-competitive benefits – **Membership strategies**, **Information exchanges**, **Standard setting** and **Selection of association vendors/strategic partners** – will potentially constitute effect restrictions for the purposes of Article 81 and the analysis will generally be similar to that under Section 1. As a result, counsel should be consulted regarding the legality of specific Crossref policies or decisions in these areas.

II. Single Firm Conduct

A single economic entity – either a firm, or an association – may violate the antitrust laws of the US (Sherman Act Section 2) and the EU (TFEU Article 102) if it possesses the requisite "market power" or "dominant position" to affect competition in a relevant market, and engages in certain forms of exclusionary conduct to preserve or reinforce that market power. In the EU, it may also be possible to violate the applicable provision by exploiting a dominant position (e.g., by charging prices that are excessively high). There has been more divergence in single firm enforcement between the US and the EU in recent years, and conduct acceptable in the US may run afoul of the EU antitrust rules.

A. Sherman Act Section 2

Section 2 of the Sherman Act prohibits the monopolization or attempted monopolization of a market by a single firm or actor, as well as conspiracies to monopolize. With the exception of the conspiracy section, Section 2 focuses on single entity activity, eliminating the need to establish a combination or conspiracy through concerted action. In order to bring a Section 2 monopolization claim, a plaintiff must establish: (1) the defendant's monopoly power; and (2) that the defendant acquired, enhanced or maintained that power through exclusionary conduct or predatory acts. Determining monopoly power involves a complex analysis to identify the boundaries of the product and geographic market in which Crossref participates, and the power it has in that market. Simply having a monopoly does not in and of itself violate Section 2. In addition to establishing monopoly power, a plaintiff must also demonstrate that the monopolist engaged in exclusionary or predatory conduct as the monopolist's basis for either acquiring or maintaining its market power. Given the nature of Crossref's DOI linking service, there are several types of potentially exclusionary conduct of which members should be particularly aware, including the following:

- **Refusal to deal/denial of "essential facilities."** With the Crossref linking service now an established part of the scholarly publishing industry, the potential exists for plaintiffs to view the service as an "essential facility" – a product or service that is operated by an alleged monopolist, access to which is essential for every industry actor to compete effectively. To establish liability under this doctrine, four elements must be present: (1) control of the facility by the monopolist; (2) a competitor's inability to reasonably duplicate the facility; (3) the monopolist's denial of the facility's use to the competitor; and (4) the feasibility of providing access to the facility. If the Crossref linking service is deemed an essential facility, this does not mean that access to the service can never be denied without facing antitrust risk. Obviously, if there are alternatives to the service available, the linking service would not be deemed "essential." In addition, a legitimate business reason for denying access to the facility could be a defense to a claim. Any denials should be decided using an objective set of criteria based on legitimate business reasons and pro-competitive concerns. Additionally, counsel should be involved at the outset of any discussions regarding such denials, and at every step in the decision-making process.

- **Tying.** Tying occurs when a firm conditions the sale of one product or service (the tying product) on the purchase of another product or service (the tied product). To be considered an illegal tying arrangement, the seller must have economic power in the market for the tying product with the effect that the buyer is forced to purchase both products from the seller even if it could have bought the tied product somewhere else for less, or declined to purchase it at all. If the buyer is free to purchase either product/service by itself, then there is no tying problem. Counsel should be involved in any discussions and decisions surrounding the tying or bundling of any Crossref products or services.

In addition to prohibiting monopolization, Section 2 of the Sherman Act also prohibits combinations or conspiracies "to monopolize any part of . . . trade or commerce." Establishing this claim requires: (1) existence of a conspiracy; (2) an overt act in furtherance of the conspiracy; and (3) specific intent to monopolize. Courts evaluate the conspiracy element similar to a Section 1 claim as described in Part I.A. above. In addition, actions that are illegal under Section 1 of the Sherman Act will suffice to establish an overt act in furtherance of the conspiracy. Specific intent can be established through direct evidence of the actor's state of mind, or it can be inferred from conduct that has no legitimate business purpose except to destroy competition. As with Section 1 conduct, members can avoid antitrust risk here by making decisions in the best interests of the association, based on the association's independent economic interest and rooted in a legitimate business purpose.

B. TFEU Article 102

Article 102 prohibits the "abuse" by any single company or undertaking of a "dominant position" in a market within the EU. Article 102 focuses on unilateral abuse of market dominance (although in principle it also covers the abuse by multiple undertakings of joint market dominance). To establish an infringement of Article 102, it is necessary to establish that the relevant undertaking both (i) holds a dominant position in the relevant antitrust market and (ii) has abused that dominance. Merely holding a dominant position, just as merely "being a monopolist," does not constitute an infringement. However, dominant firms do have a "special responsibility" to avoid behavior which might distort competition.

The process of determining dominance is similar to that of determining monopoly power under Section 2 of the Sherman Act, and involves similar determinations of the boundaries of the relevant product and geographic market. However, the assessment of dominance focus more strongly on market share and is generally considered somewhat easier to establish than monopoly power. In addition, the categories of behavior considered abusive for the purposes of Article 102 is not limited to exclusionary or predatory conduct (in contrast to the position under Section 2). Mere exploitation of dominance – e.g. through the charging of excessively high or discriminatory prices – may constitute an abuse of dominance. As a result, in addition to **Refusal to deal/denial of "essential facilities"** and **Tying** dealt with in Part II.A above, Crossref and its members should be aware of the following potential categories of abuse:

- **Discriminatory pricing.** The application of dissimilar terms to similar transactions involving similar parties without objective justification.

- **Excessive pricing**. Applying prices that are excessive in relation to the "economic value" of the underlying goods or services may, in principle, constitute an abuse. In practice, it is often difficult to establish the economic value of goods (particularly absent discriminatory pricing between certain customers or territories) and cases are relatively rare.

III. Enforcement and Penalties

A. Sherman Act Enforcement

The U.S. Department of Justice, the Federal Trade Commission, state attorneys general, and private entities harmed by the anticompetitive conduct of others may bring suit for violations of the Sherman Act. Violations of the Sherman Act may result in both criminal and civil penalties. Price-fixing and bid-rigging agreements are typically prosecuted by the Department of Justice as criminal violations, and penalties may range up to 10 years in prison for individuals as well as fines for corporations of $100 million or more. On the civil side, there is potential for huge class action litigations and triple damage awards. Even the appearance of impropriety can trigger large-scale investigations by the Department of Justice, the Federal Trade Commission and state attorneys general, resulting in expensive and time-consuming legal responses, as well as damage to the association's and the industry's reputation, regardless of the eventual outcome. It is important that all Crossref members and staff take all appropriate measures to minimize the risk of antitrust violations.

B. Article 101/102 Enforcement

Articles 101 and 102 may be enforced by the European Commission, by the national competition authorities of the EU Member States and by private entities seeking damages or injunctive relief. Both the European Commission and national competition authorities may impose administrative fines in relation to infringements of EU competition rules without first seeking authorization from the courts. The European Commission may impose fines of amounts up to 10% of worldwide group turnover. Although there are no criminal sanctions for breach of Articles 101 or 102, national competition laws in individual EU Member States such as the UK provide for criminal sanctions, in particular in relation to hardcore cartel activity such as price fixing, bid rigging, market sharing, or output restrictions. In the UK behavior of this sort may be punishable by up to 5 years in prison. Private enforcement of competition law in the EU through actions for damages, which has historically been rare, is becoming increasingly common.

IV. General Antitrust Code of Conduct

This section reviews the types of activities and practices that courts have found to constitute violations of the Sherman Act and of TFEU Articles 101 and 102. Crossref officers, staff and members must take extreme care to avoid even the appearance of engaging in these types of activities, as well as any others which could be construed as having an anticompetitive intent or purpose. In addition, Crossref members are responsible for reviewing the attached Antitrust Checklist that will be circulated to members on a regular basis (through periodic publication in member newsletters and by posting in the member section of the Crossref web site) and prior to member and committee meetings (by furnishing a copy with the meeting agenda).

Per se antitrust violations, and the EU counterpart of restrictions on competition by object, have traditionally included agreements among competitors that have the purpose and effect of "fixing prices," "allocating territories," or "boycotting third parties." Under the antitrust laws, "price fixing" includes much more than an agreement to set prices at a particular level, within a specific range, or in accordance with a particular formula. It potentially includes any agreement that tends to raise, fix, stabilize or otherwise affect price. Thus, even if the parties permit the price to vary somewhat under the agreement, the agreement is illegal if it has the effect of stabilizing the price among those participating in the conspiracy. Similarly, price fixing includes agreements to control other factors that directly or indirectly affect price, such as establishing production levels, setting uniform discounts, credit or warranty terms, or agreeing on matters relating to costs, especially when those costs account for a substantial percentage of the final price. At no time shall any discussion or agreement among Crossref members take place regarding product prices, price changes, supply and demand for products, or any other subjects bearing on pricing of products or services offered by individual member companies. Discussions of pricing of products or services offered by Crossref should occur only under supervision by and with advance guidance from counsel.

Territorial or market allocation involves an agreement among competitors operating at the same level of the market structure--such as manufacturers, distributors, etc.--to divide the market in such a way as to allow each party to the agreement to serve its share of the market without competition from the others. Such prohibited allocations in the past have been made on the basis of geographical boundaries or particular types of customers. No discussions or agreements shall take place concerning

allocation or division of geographical markets or other restrictions on representatives, distributors or customers for Crossref members' products.

Group boycotts or "refusals to deal" can also be considered per se violations in certain instances. This includes agreements or collective action to refuse to deal with certain suppliers, customers, or other competitors, or to undertake actions that tend to exclude certain participants from the marketplace or deny them access to a significant competitive benefit available to others in the market are prohibited. Crossref members shall not engage in any discussion or agreement concerning particular representatives, distributors, customers, or suppliers involving decisions to deny, limit or terminate business relations between any Crossref member and such entities. Counsel shall be notified prior to any discussion by Crossref concerning restricting or denying membership to any nonmember firm that competes in the industry or denial of access to any third-party (e.g. vendor/distributor).

Other antitrust problems may arise where trade association activities are undertaken that may have anticompetitive effects on non-members. Particular guidelines must be followed before undertaking any association project such as a standards development program, an industry survey or other statistical program, or petitioning industry or government organizations on matters that may have a competitive impact on non-members. Accordingly, counsel must be contacted before discussing or planning these programs.

Crossref operates to a large extent through committees, and participants in these committees need to be mindful that actions they take may be attributed to Crossref, and therefore create potential liability or exposure for Crossref. Crossref formally acts only through its Board of Directors, and no individual or Committee should communicate, either internally or externally, in a way that may be perceived as stating a formal position of Crossref that has not been adopted by the Board.

ANTITRUST CHECKLIST

As part of Crossref's antitrust compliance program, the following checklist highlights several basic antitrust principles for use by Crossref staff and members in the conduct of Crossref sponsored meetings and social gatherings. Because a trade association necessarily involves communications and collaboration among competitors, its activities must be undertaken with extreme care to avoid even the appearance of an anticompetitive purpose or intent. This checklist is not intended as a complete list of antitrust guidelines. Crossref's Antitrust Compliance Policy and Guidelines should be consulted for additional information, and counsel should be contacted in all cases involving specific situations, interpretations or advice.

I. Meeting Guidelines

Because trade association meetings have been alleged to be opportunities for competitors to conspire to violate the antitrust laws, special precautions are necessary to ensure that Crossref meetings do not involve any inappropriate topics or conduct. In particular, all Crossref meetings should be conducted as follows:

- Every meeting should use a written agenda that is prepared in advance. If Crossref staff concludes that issues with antitrust implications are likely to be discussed at the meeting, Crossref staff will have counsel review the agenda, and also review in advance of their distribution any documents or presentations to be handed out at meetings.

- At every Crossref committee meeting, written minutes will be taken by Crossref staff in order to accurately reflect meeting attendance and discussions. Crossref staff may request that these minutes be reviewed by counsel prior to distribution to Crossref members.

- Legal counsel will be in attendance at every Crossref annual meeting and at every meeting of Crossref's Board of Directors, Board Executive Committee and Membership and Fees Committee. Legal counsel may attend other meetings if counsel or Crossref staff determine issues with antitrust implications are likely to be discussed at the meeting.

- If issues with antitrust implications arise during meetings and Crossref staff, or one or more members believe that legal guidance should be obtained before proceeding, the issue should be tabled until such time as legal counsel has been obtained.

- Crossref members should not hold "rump sessions" or other informal member meetings before or after formal association meetings.

II. Prohibited Topics

At every Crossref meeting (whether business or social), there are certain topics that should be avoided to prevent even the appearance of an antitrust issue. If you have questions about whether a certain topic falls into one of these categories, you should first raise that issue with counsel.

A. Meeting Discussions/Information Sharing

- Do not agree on, or even discuss, prices or price related information, whether historical or future, related to members' individual employers/competitors.
- Do not agree on, or even discuss, costs, inventory levels, profit margins, capacity utilization or other similar information related to members' individual employers/competitors.
- Do not agree on, or even discuss, pricing policies or proposed or planned price changes related to the business of an individual employer/competitor.
- Do not agree on, or even discuss, ongoing or planned research, development, new product introductions, product improvements, or marketing approaches by individual employers/competitors.
- Do not agree on, or even discuss, limiting or eliminating competition.
- Do not agree on, or even discuss, past or future plans for bidding or not bidding on particular business as it relates to a particular employer/competitor.
- Do not agree on, or even discuss, allocation of or other limitations on sales to particular customers, territories or products.

B. Membership

- Do not agree on, or even discuss, the creation of any membership rules or restrictions unless they are based on an objective set of criteria and legitimately related to Crossref's overall business purpose/mission.
- Do consult legal counsel before instituting any changes to the qualifications for association membership.

C. Standard Setting/Industry Self-Regulation

- Do not agree on, or even discuss, the creation of any industry standards or regulations unless they are based on an objective set of criteria and legitimately related to Crossref's overall business purpose/mission.
- Do not create or modify industry standards or regulations based on the impact to a particular competitor or other industry participant (i.e., vendor/dealer). These discussions/decisions should be restricted to the impact on the industry as a whole, and whether Crossref's proposed participation and positions would benefit the industry, and be consistent with Crossref's mission.
- Do not create industry standards or regulations without affording notice and a right of appeal/review to any industry participants that may be affected (particularly for non-Crossref members).
- Do consult legal counsel before instituting any industry or member-specific standards, regardless of whether participation is mandatory or voluntary.

D. Dealing with Vendors/Distributors

- Do not agree on, or even discuss, refusals to do business with any third parties (customers, competitors or suppliers), including distributors, without first consulting legal counsel.
- Do not agree on, or even discuss, the creation of any vendor/partner selection criteria unless they are based on an objective set of criteria and legitimately related to Crossref's overall business purpose/mission.

- Do not agree on, or even discuss, the prices at which third parties, including distributors and other customers, may resell products.
- Do not agree on, or even discuss, restrictions on the territories within the EU to which third parties (including distributors and other customers) may resell products, without first consulting legal counsel.
- Do immediately disclose to the board and to legal counsel any conflict of interest you or your industry employer has, or may have, as it relates to the selection of any vendor/partner for Crossref business.