

OPINION OF THE COMMISSION

By Varney, Commissioner:

Respondents International Association of Conference Interpreters ("AIIC," as it is known by its French acronym) (IDF 1)¹ and its United States Region ("U.S. Region") are charged with violating Section 5 of the Federal Trade Commission Act ("FTC Act") by adopting and enforcing rules that govern how their members compete. We find that respondents' price-fixing practices and market allocation rules are *per se* unlawful agreements in restraint of trade and a violation of the FTC Act. We further find that the rules governing non-price terms and conditions of employment, business arrangements, and advertising must be analyzed under the rule of reason. Because the record evidence is insufficient to demonstrate a violation of law under the rule of reason, we dismiss the complaint allegations that those rules unlawfully restrain trade. In reaching these conclusions, we also find that AIIC's actions, which form the basis for this lawsuit, affect interstate commerce in the United States and are sufficient to confer specific personal jurisdiction; that respondents do not qualify for the "not-for-profit" exemption to the FTC's jurisdiction; and that respondents do not qualify for either the statutory or non-statutory labor exemption.

The order we enter prohibits respondents for a period of twenty (20) years from imposing any price-related or market allocation restraints in the United States.

1. BACKGROUND

The Commission's complaint in this matter, issued on October 25, 1994, charges the respondents with restraining competition among conference interpreters in the United States in violation of Section 5 of the FTC Act, 15 U.S.C. § 45 (1994), by conspiring with their members to fix the price and output of interpretation services in the United States. After pretrial discovery, 26 days of trial testimony, and pre- and post-trial motions, the record closed on May 16, 1996. Administrative Law Judge ("ALJ") James P. Timony issued a decision and proposed order on July 26, 1996.

¹ The following abbreviations are used in this opinion:

- ID -- Initial Decision of the ALJ
- IDF -- Numbered Findings in the ALJ's Initial Decision
- CX -- Complaint Counsel's Exhibit
- CXT -- Complaint Counsel's Exhibit -- English Translation
- RX -- Respondents' Exhibit
- Tr.

with local freelance interpreters, advertising, and payment for travel expenses, per diem, rest days and non-working days depending on whether the interpreter was away from a "professional address." ID at 95.

The ALJ found that each restraint was part of a scheme to raise the price of conference interpretation services and that these restraints had anticompetitive effects. Although the ALJ found that the "evidence obviates [the need for] extensive inquiry into market power, market definition or market share," ID at 95, he nevertheless went on to determine that some of the restraints are also unlawful under the rule of reason, specifically finding that the respondents have market power. ID at 122-23.

The ALJ concluded that respondents endeavor to improve interpreters' working conditions and income and therefore exist for the profit of their members. ID at 95. The ALJ noted that although some of respondents' actions resemble union activity, they are not exempt from antitrust scrutiny under the statutory or nonstatutory labor exemption because AIIC specifically chose to be a professional association -- not a union. ID at 95-96; IDF 505. The ALJ further found that "respondents waived the [labor exemption] defense by failing to raise it in pleadings or during the presentation of evidence." ID at 96. The ALJ also found that the Commission has specific jurisdiction over AIIC for acts performed, or with effects, in the United States and that the Commission may proceed against the U.S. Region, an unincorporated association, as part of AIIC. ID at 96.

Finally, the ALJ rejected respondents' arguments that they have abandoned all of the rules that were arguably unlawful (ID at 131), finding that respondents continue to maintain rules on fees and working conditions despite their attempts "to conceal price-fixing agreements in 'gentlemen's agreements' and 'market surveys,' 'unpublished' rates and a [draft pamphlet] called a 'Vademecum.'" ID at 96. The ALJ was unpersuaded that respondents' removal of some offending rules from their Basic Texts after the commencement of this investigation made an order unnecessary. ID at 131-33.

The respondents filed their appeal from the ALJ's Initial Decision on August 28, 1996. The respondents appeal all of the ALJ's jurisdictional findings, including his findings that the Commission has specific in personam jurisdiction over AIIC and that neither the statutory nor the nonstatutory labor exemption is available as a defense. Brief for Respondents-Appellants at 77-82. Respondents also appeal from the ALJ's finding that an order is necessary as to the monetary conditions that were contained in respondents' Basic Texts, arguing that the rules governing monetary conditions never applied to the U.S., were not enforced in the U.S., and were abandoned altogether in 1992. *Id.* at 1, 23-27. Finally, the respondents argue on appeal that the rules governing working conditions must be analyzed under the rule of reason and cannot be found unlawful because complaint counsel have not proven that respondents had power in the market for conference interpretation in the U.S. or that the rules had any anticompetitive effect in the U.S. *Id.* at 18-22, 36-61.

2. RESPONDENTS

Respondent AIIC is an association of professional conference interpreters organized under French laws, with its Secretariat located in Geneva, Switzerland. Stips. 6-7. AIIC's rules are in its "Basic Texts," which include AIIC's Statutes, Code of Professional Ethics, and Professional Standards (also referred to as Standards of Professional Practice). Stip. 9; CX-1; CX-2; Brief for Respondents-Appellants at 9.

AIIC's supreme body, the Assembly, consists of all Association members and meets once every three years. IDF 2; Stip. 10. AIIC's Assembly is responsible for setting policy, including voting on Basic Texts and expelling members for rule violations. IDF 37-38. AIIC has a "Council," consisting of the president, three vice presidents, a treasurer, and representatives from each of the Association

3. JURISDICTION

1. The Commission Has Specific Personal Jurisdiction over Respondent AIIC

Respondent AIIC contends that the Commission lacks in personam jurisdiction over it.² As explained below, we conclude otherwise. At the outset it should be noted that counsel for AIIC stated at oral argument and in a subsequent written submission that it would not appeal any order that the Commission might issue, provided that such order would not constrain respondent's ability to retain four of the challenged restraints (*viz.*, the length of day, team size, professional address, and portable equipment rules). Oral Argument Tr. 7; *see also id.* at 8-10; Supplemental Brief for Respondents-Appellants at 6 (Oct. 26, 1996). Further, during argument and in its supplemental brief, respondent's counsel acknowledged its earlier proffer of a consent order encompassing all but four challenged restraints. *Id.* Such conduct may constitute a waiver of respondent's in personam jurisdiction objections in light of the Commission's decision to issue an order that does not enjoin those four rules (albeit for reasons other than respondent's offer). *Cf. Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinée*, 456 U.S. 694, 703-05 (1982) (party can waive its personal jurisdiction defense and "actions of the defendant may amount to a legal submission to . . . jurisdiction . . . whether voluntary or not").³ Nevertheless, in an abundance of caution, we address the issue of in personam jurisdiction.

1. Legal Standard for Exercise of In Personam Jurisdiction over Foreign Respondent

The Supreme Court in *International Shoe* presented a two-pronged test that establishes the minimum contacts prong for in personam jurisdiction. First, "minimal contacts" must be shown to find that "fair play and substantial justice" are served. *International Shoe*, 326 U.S. at 316, 320. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985).

"minimum contacts" prong of the test. The defendant must have purposefully directed its activities into court there." *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 284 (1980). See also *Burger King*, 471 U.S. 462. Individuals have "fair warning" that a party may subject them to the jurisdiction of a foreign sovereign, quoting *Shaffer v. Heitner*, 439 U.S. 333 (1979) (Stevens concurring). That requirement is met if, for example, the defendant "purposefully avails itself of the privilege of conducting activities within the jurisdiction, thus invoking the protections of its laws." *Hanson v. Denckla*, 431 U.S. 180 (1977). *Volkswagen*, 444 U.S. at 297 (a defendant that purposefully avails itself of the privilege of conducting activities within the forum[,]" quote "subject to suit there").

If the defendant's conduct satisfies the minimum contacts prong, the court must consider whether the assertion of personal jurisdiction is consistent with fair play and substantial justice. *See, e.g., Burger King*, 471 U.S. 462. Under the *International Shoe* analysis, the courts evaluate the defendant's contacts with the forum, but also "the burden on the defendant, the interests of the forum, judicial efficiency, and the comity of the nations." *World-Wide Volkswagen*, 444 U.S. at 294. *See also* *Shaffer v. Heitner*, 439 U.S. 333 (1979) (Stevens concurring).

Washington, 326 U.S. 310 (1945), which requires that the defendant's conduct be shown to underlie the due process requisites. *See also* *World-Wide Volkswagen*, 444 U.S. 284. Second, the court must find that the exercise of jurisdiction is justified by the assertion of jurisdiction. This test must be satisfied.

On whether the contacts are sufficient, the court in *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 284 (1980), held that the Due Process Clause does not require a defendant to subject them to the jurisdiction of a foreign sovereign, quoting *Shaffer v. Heitner*, 439 U.S. 333 (1979) (Stevens concurring). That requirement is met if, for example, the defendant "purposefully avails itself of the privilege of conducting activities within the jurisdiction, thus invoking the protections of its laws." *Hanson v. Denckla*, 431 U.S. 180 (1977). *Volkswagen*, 444 U.S. at 297 (a defendant that purposefully avails itself of the privilege of conducting activities within the forum[,]" quote "subject to suit there").

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2. Specific Jurisdiction

As the case law implementing these basic principles of jurisdiction has developed, two species of in personam jurisdiction over foreign respondents have emerged: "specific" jurisdiction and "general" jurisdiction. Specific jurisdiction attaches if there is a sufficiently close relationship between the cause of action and the nonresident's activities within the forum.⁵ General jurisdiction requires a higher degree of involvement with the forum than does specific jurisdiction, and allows a plaintiff to sue a defendant on virtually any cause of action, including those that do not arise from the defendant's contacts with the forum. Thus, normally, there would be no reason to determine whether general jurisdiction exists if the cause of action at issue and the forum are sufficiently related to trigger specific jurisdiction.

In determining whether specific jurisdiction exists in this instance, we must ask:

(a) whether the conduct was "purposefully directed" to the forum, *Burger King*, 471 U.S. at 471 (quoting *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 774 (1984)); (b) whether the cause of action

First, respondent published rates of remuneration for interpretation services performed in the United States and prepared schedules of per diem charges with entries unique to this country. *See generally* CX-71, 75, 76, 79, 81 to 84; CX-2446-C; CX-301-Z-42 (Bishopp); CX-305-Z-49 to 51 (Sy); CX-55 to -65; CX-247-Z-2, Z-5; CX-124-E; CX-125-E; CX-130; CX-301-Z-152.41 to Z-152.42 (Bishopp); CX-268-E; CX-300-Z-72 to Z-76, Z-128 to Z-129 (Motton). Similarly, AIIC tailored its work and monetary rules, and waivers for such rules, for application in the United States. *See generally* CX-71 to -73, 75 to 77, 79, 81 to 84 (rates); CX 55 to 65 (rates); CX-124-E (per diem); CX-125-E (per diem); CX-130 (per diem); CX-247-Z-2, Z-5 (per diem); CX-301-Z-152.41 to Z-152.42 (Bishopp) (per diem); CX-268-E (per diem); CX-300-Z-72 to Z-76, Z-128 to Z-129 (Motton) (per diem); CX-245-I, F (indivisible day waiver); CX-405-C (team size); CX-407-F to G (team size); CX-50 (team size); CX-56 (team size); CX-1384-A (solo interpreter waiver applicable to U.S.); CX-268-F (solo waiver); CX-301-Z-152.43 (Bishopp) (solo waiver); CX-300-Z-33 to Z-36, Z-128 to Z-129 (Motton) (solo waiver); CX-432-G to H (solo waiver). AIIC also adopted its workload and other rules with the expectation that those rules would be followed in the United States. *See generally* Stips. 9, 83-87; Silberman, Tr. 3132-33.

Second, respondent AIIC sought, in conjunction with efforts of the U.S. Region, to ensure the uniform application of the AIIC Code and its Annexes in the United States. For example, the U.S. Region discussed and sent to AIIC in Geneva a document called "AIIC Working Conditions for Interpreters in USA (Provisional Paper)." *See* CX-439-A, D to F; CX-1408-A, C to E. In addition, AIIC investigated complaints against U.S. Region members for violations of its rules. *See generally* CX-1693-A to C; CXT-1693-A to C; CX-1300-A; CXT-1320-A to C; CXT-239-I; CX-304-Z-128 to Z-131 (Motton); CX-1066-A to E; CX-1086; CX-1090; CX-1100; CX-1138-A to B; CX-1256-B; CX-236-C. AIIC also solicited complaints from the U.S. Region concerning members who violated AIIC's moonlighting rules, including the names of such members and copies of contracts demonstrating such violations. *See* CX-432-G to H, M. The U.S. Region representative to the AIIC Council also advised U.S. members how to comply with AIIC rules and issued warnings to members regarding noncompliance with association rules. *See* CX-1471; CX-1470-A. U.S. Region members also serve as agents of AIIC when serving on the bodies responsible for creating and enforcing AIIC rules. *See* CX-300-O to Q (Motton); CX-2490-A to G; CX-1-G to H (1994 AIIC Statutes Article 24(6)); CX-2-G to H (1991 AIIC Statutes Article 24(6)).⁶

⁶ We find unpersuasive respondent's reliance on cases in which an association failed to exercise substantial influence over the members

to remain at a professional address for a minimum of six months. In addition, AIIC's conduct described above in the text had a substantial influence over its members' conduct in providing interpretation services in this country.

Third, AIIC cooperated with The American Association of Language Specialists ("TAALS") with respect to conduct in the United States challenged in the complaint. *See generally* CX-409-A; CX-218-J; CX-266-Z-6 (coordination of AIIC and TAALS activities); CX-405-C (in 1975 AIIC agreed to work with TAALS to examine issue of U.S. antitrust laws); CX-1728-B (appointment of official liaison from TAALS to AIIC, with eight-year term). In particular, AIIC and TAALS worked together to enforce their overlapping rules in the U.S. *See generally* CX-1066-A; CX-1090; CX-1138-A to B; CX-237-H; CX-239-B; CXT-1731-B. Further, TAALS and AIIC shared information on enforcement and on their mutual efforts to effect changes in the terms of the contracts for interpretation services at the 1984 Olympic Games. *See* CX-1248; CX-1266-B; CX-1310; CX-1696; CX-1708; CX-1714-A; CX-1728-B; CX-1733; CX-1735.

Fourth, respondent AIIC held its General Assembly in New York City in 1979 and voted there to adopt several of the provisions challenged in the complaint, including rules prescribing equal remuneration for all members of an interpretation team and limiting the length of the working day. *See* CX-6-A to M; CXT-6-E to M; CX-219-P to R; CXT-221-A-Z-20, pp. 18-19; CX-221-D. In addition, AIIC mailed draft proposals of its Codes of Ethics and Standards of Practice to the United States for review and comment before other General Assembly meetings. *See* CX-1406-B to C; CX-266-Z-5; CX-260-A to B.

2. *Claims Against Respondent AIIC Arising from U.S. Activities*

With respect to the second aspect of specific jurisdiction analysis, it is settled that "[a]n action will be deemed not to have arisen from the defendant's contacts with the forum state only when they are unrelated to the operative facts of the controversy." *Creech v. Roberts*, 908 F.2d 75, 80 (6th Cir. 1990), *cert. denied*, 499 U.S. 975 (1991). In this case, the cause of action arose from the very same conduct conferring jurisdiction. The Commission's complaint alleges that respondent AIIC and its United States affiliate members conspired to fix the fees that they could charge for interpretation services performed in the United States, and that they imposed a variety of restrictions that illegally restrained competition among U.S. interpreters. Specifically, AIIC and its U.S. Region allegedly enforced fee schedules, work rules and other restrictions on members operating in the United States.

The alleged price-fixing herein includes minimum rates that members must charge within the United States: for performance of interpretation services; for cancellations; for recording of interpretations; as compensation for travel time, rest, and conference recesses; for performing whispered interpretation or working alone; and as reimbursement for travel, lodging and other expenses. The complaint also challenges the respondents' work rules in the U.S. requiring that all interpreters on the same job obtain the same pay regardless of skill level or experience; that interpretation fees be paid on a full-day basis; and that member interpreters must pay their own subsistence and travel when they do volunteer work. The following additional restrictions imposed on U.S. interpreters by AIIC and its U.S. Region were also challenged in the complaint

members may work per day; limits on member use of portable equipment; a requirement that interpreters declare a single professional address that they can change only once every six months with three months' notice; a prohibition against accepting non-interpreter duties at a conference where members are performing interpretation services; a prohibition on comparative advertising; restrictions against certain exclusive employment arrangements; a prohibition on offering package deals of interpretation and other services; a ban on commissions; a requirement that members selecting an interpretation team give preference to freelance interpreters over interpreters with permanent positions; limits on accepting multiple assignments within a period of time; and prohibitions on the use of trade names by members who coordinate interpreters.

We therefore find that the claims in the Commission's complaint arise from, or are related to, the foregoing AIIC contacts with the United States.

3. Reasonableness

The third aspect of specific jurisdiction analysis is to determine whether, under the particular circumstances of the case, the exercise of jurisdiction is reasonable as a matter of constitutional due process. We conclude that the Commission's exercise of personal jurisdiction here would satisfy that standard.

Asahi Metal Industry Co. is the Supreme Court's most recent pronouncement on in personam jurisdiction over foreign defendants. The Court explained that determining "reasonableness" of the exercise of jurisdiction in a given case depends on an evaluation of several factors, which the Court had previously articulated in *World-Wide Volkswagen* (a case involving personal jurisdiction over domestic defendants):

A court must consider the burden on the defendant, the interests of the forum State, and the plaintiff's interest in obtaining relief. It must also weigh in its determination "the interstate judicial system's interest in obtaining the most efficient resolution of controversies; and the shared interest of the several States in furthering fundamental substantive social policies."

Asahi, 480 U.S. at 113 (quoting *World-Wide Volkswagen*, 444 U.S. at 292).

As to "the burden on the defendant," we recognize that AIIC is a foreign association, organized under French law and having its only office in Geneva, Switzerland. Nonetheless, the Commission does not believe that requiring AIIC to appear through counsel in the present action imposes on AIIC an unusually severe or unreasonable burden.⁷ In any event, "when minimum

⁷ In *Asahi*, the Court found that litigation in California would severely burden the Japanese defendant (and that there was no showing that litigation in California, rather than Japan or Taiwan, would be more convenient for the Taiwanese plaintiff). In the present case, by contrast, litigation in the United States offers some convenience due to AIIC's relationship with the U.S.

contacts have been established,"

Commission is exercising jurisdiction over AIIC's United States Region, and, in any event, the challenged conduct by AIIC is closely related to that region.⁹

On balance, in this case, we conclude that the Commission's interest in protecting competition within the United States, and considerations of efficiency, are sufficient to outweigh the burdens that may be placed on AIIC to defend itself in this forum. Thus, we conclude that the assertion of personal jurisdiction over AIIC here is reasonable under the Due Process Clause.

Accordingly, because AIIC's unlawful conduct was purposefully directed towards the United States, because the claims alleged in this case arose from such activities, and because the assertion of jurisdiction here would be reasonable under the Due Process Clause, we hold that the Commission may lawfully exercise in personam jurisdiction over AIIC in this case.

2. The Not-for-Profit Exemption Is Inapplicable

We disagree with respondents' claim that they are entitled to the not-for-profit exemption. Respondents claim that "[n]either AIIC nor the U.S. Region is 'organized to carry on business for its own profit or that of its members' under Section 4" of the FTC Act, 15 U.S.C. § 44 (1994), as interpreted by the Commission in its opinion in *College Football Ass'n*, D. 9242 (July 8, 1994), 5 Trade Reg. Rep. (CCH) ¶ 23,631 ("*CFA*"). Respondents' Post Trial Brief at 126-27. In *Community Blood Bank of Kansas City Area, Inc. v. FTC*, 405 F.2d 1011 (8th Cir. 1969), the Eighth Circuit rejected the notion that a corporation's nonprofit organizational form alone places it beyond the Commission's jurisdiction. The Eighth Circuit explained that the FTC Act's Section 4 nonprofit exemption extends only to corporations that are "in law and in fact charitable." *Id.* at 1019. We applied this standard in *American Medical Ass'n*, 94 F.T.C. 701 (1979), *aff'*

Respondents' Post-Trial Brief at 126-27. Our decision in *CFA* does not afford immunity to respondents in this case. *CFA* addressed whether a nonprofit organization, all of whose members are not-for-profit entities, is subject to the Commission's jurisdiction when it engages in commercial activity and distributes the income earned from that activity to its members. Our jurisdictional analysis in *CFA* did not call the holding in *AMA* into question. *See CFA*, slip op. at 20-26, 5 Trade Reg. Rep. (CCH) at 23,361-64; *CDA*, slip op. at 6, 5 Trade Reg. Rep. (CCH) at 23,782.

AIIC falls within our jurisdiction for many of the same reasons the *AMA* and *CDA* did. *See generally CDA*, slip op. at 6-7, 5 Trade Reg. Rep. (CCH) at 23,782-83; *AMA*, 94 F.T.C. at 986-88. AIIC and the U.S. Region exist and engage in activities to improve members' incomes and working conditions. AIIC and the U.S. Region adopted minimum daily rates for use in the U.S. and adopted other rules governing the working conditions for interpreters. AIIC publishes a directory of AIIC members, which AIIC sends to AIIC members and purchasers of interpretation services to facilitate the hiring of AIIC members. IDF 467, 468; Stips. 61-62. AIIC also negotiates member discounts for such items as airfare, hotels, and publications. IDF 483. AIIC also provides its members with insurance plans for health, loss of earnings, and retirement, and manages two retirement plans for members. IDF 484, 485. AIIC has contacted various governmental entities, including a U.S. Senator, to improve the financial situation of its members. IDF 487, 488. The ALJ found numerous other examples of how AIIC serves the pecuniary benefits of its members, and we agree with his findings in this regard. *See generally* IDF 453-97. Finally, because AIIC and U.S. Region members are themselves profit seekers, this case is more akin to *CDA* and *AMA* and unlike *CFA*, where the members were not-for-profit educational institutions.

3. AIIC Does Not Qualify for the Labor Exemption

Respondents argue that "the statutory labor exemption immunizes all challenged Basic Texts provisions from antitrust liability [and] the nonstatutory labor exemption so immunizes AIIC's agreements." Brief for Respondents-Appellants at 82 n.84. The statutory labor exemption is designed to protect union conduct, and the Supreme Court has said that "a party seeking refuge in the statutory exemption must be a bona fide labor organization, and not an independent contractor or entrepreneur." *H.A. Artists & Assocs. v. Actors' Equity Ass'n*, 451 U.S. 704, 717 n.20 (1981) (citing *Meat Drivers v. United States*, 371 U.S. 94 (1962), and *Columbia River Packers Ass'n v. Hinton*, 315 U.S. 143 (1942)). The nonstatutory labor exemption protects from antitrust liability certain labor agreements that are part of, or result from, the collective bargaining process. *Brown v. Pro Football, Inc.*, 116 S. Ct. 2116, 2121 (1996).

AIIC is an association of professional interpreters who have, through the association, promulgated a series of rules and regulations governing competition among themselves concerning the provision of conference interpretation services. As the ALJ found, the association members have expressly declined to organize AIIC as a labor organization (IDF 504-05), and we find that the weight of the evidence shows that the freelance AIIC members, for whom the pay

and working conditions have the most relevance, are self-employed entrepreneurs and not employees. For example, AIIC members individually arrange their jobs and have complete discretion as to which jobs they will take and which they will decline. IDF 503. Moreover, the respondents, who carry the burden of proof with respect to establishing the applicability of this exemption, have offered no evidence to support the position that freelance AIIC members are employees. In fact, respondents have stipulated that 68 percent of "AIIC members in the United States are self-employed (*i.e.*, freelance) interpreters." Stips. 57, 60. Moreover, Mr. Luccarelli, one of respondents' key witnesses, testified that outside of the permanent employees of various international organizations, interpreters are generally not considered employees. Luccarelli, Tr. 1694; see also IDF 504.

We therefore find that AIIC is an organization of competing self-employed professionals and not a bona fide labor organization. Accordingly, we reject AIIC's argument that its Basic Texts are shielded by the statutory labor exemption. See *H.A. Artists & Assocs.*, 451 U.S. at 717 n.20. See generally 1 Phillip E. Areeda & Donald F. Turner, *Antitrust Law* ¶ 229c (1978); Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 229'c (Supp. 1996).

Respondents also argue that they have negotiated several collective bargaining agreements on behalf of AIIC members with institutions that employ freelance AIIC members alongside their regular employees. Stips. 75, 78, 81. AIIC asserts that its agreements are immunized from antitrust challenge by the nonstatutory labor exemption. Because we are not challenging the agreements that AIIC relies upon for the nonstatutory exemption, we do not have to reach the question whether those agreements are in fact the product of a collective bargaining process or are something else, such as employment contracts or contracts for the provision of services.¹⁰

¹⁰ While the ALJ incorrectly said that the nonstatutory labor exemption "is available only for union-employer agreements" (ID at 131), *cf.*, *e.g.*, *Brown v. Pro Football, Inc.*, 116 S. Ct. at 2123-24, we think it clear that the only agreements that the nonstatutory labor exemption reaches are those that grew out of the collective bargaining process, *see id.*

4. LEGALITY OF RESTRAINTS OF TRADE

Restraints of trade are unlawful under Section 5 of the Federal Trade Commission Act, as well as Section 1 of the Sherman Act, 15 U.S.C. § 1 (1994), when they are *per se* illegal or when they are unreasonable under the rule of reason. The law does not condemn some practices that restrain trade in a literal sense -- as, for instance, all contracts do to varying degrees -- when those practices have no significant anticompetitive effect or even promote competition. In each case "the ultimate question is whether the challenged restraint hinders, enhances, or has no significant effect on competition." *CDA*, slip op. at 14, 5 Trade Reg. Rep. (CCH) at 23,786; *see also National Collegiate Athletic Ass'n v. Board of Regents of the Univ. of Okla.*, 468 U.S. 85, 104 (1984) ("NCAA"); *National Soc'y of Prof'l Engineers v. United States*, 435 U.S. 679, 691 (1978). Recent Supreme Court decisions continue the distinction between *per se* and rule of reason analyses. *See, e.g., Palmer v. BRG of Georgia, Inc.*, 498 U.S. 46 (1990) (per curiam); *FTC v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411 (1990) ("SCTLA").¹¹

Although respondents do not specifically appeal from the ALJ's finding that their rules resulted from a conspiracy, before examining respondents' restraints and the analysis to be accorded each, we address this element of a Section 5 case. As we noted recently in *CDA*, it is well-established that "professional associations are 'routinely treated as continuing conspiracies of their members.'" *CDA*, slip op. at 9, 5 Trade Reg. Rep. (CCH) at 23,783 (quoting 7 Areeda, *Antitrust Law*, *supra* note 11, ¶ 1477, at 343, and citing *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 500 (1988)). *See also National Soc'y of Prof'l Engineers*, 435 U.S. at

Respondents herein, as in *CDA*, clearly promulgated their Basic Texts, which "implies agreement among the members of [the] organization to adhere to the norms of conduct set forth in the code." *CDA*, slip op. at 10, 5 Trade Reg. Rep. (CCH) at 23,784 (citing *AMA*, 94 F.T.C. at 998 n.33). Moreover, as in *CDA*, respondents herein require both members and candidates for membership to expressly pledge to abide by AIIC's Basic Texts. IDF 43-45; CX-1-Z-30; CX-2-Z-30; CX-300-Z-8 to Z-10 (Motton). AIIC's Council also interprets and enforces AIIC's Basic Texts. *See* IDF 39-41.

We therefore affirm the ALJ's finding that the restraints at issue in this case are the result of an agreement among competitors -- namely, the members of AIIC, acting through their Assembly and other representative entities. *See* ID at 101-04. We turn to the specific restraints imposed by respondents and analyze each under the appropriate antitrust standard to determine whether it is an unreasonable restraint of trade.¹²

1. Restraints on Price Competition -- *Per Se* Unlawful

Per se categories of unlawful conduct consist of agreements or practices that are almost always harmful to competition and rarely, if ever, accompanied by substantial procompetitive justifications. The law accords *per se* treatment to certain kinds of behavior that longstanding

It is well established that a horizontal agreement to eliminate price competition is a *per se* violation of the antitrust laws. *See, e.g., Maricopa*, 457 U.S. at 344-48; *United States v. Trenton Potteries Co.*, 273 U.S. 392, 397 (1927).¹³ Thus, any alleged "reasonableness" of an agreement to fix prices will not justify the resulting interference with competition. *See Trenton Potteries Co.*, 273 U.S. at 397-98; *United States v. Addyston Pipe & Steel*, 85 F. 271, 291 (6th Cir. 1898) (dictum), *aff'd as modified*, 175 U.S. 211 (1899). Lack of market power to effect the agreement is not a defense to the *per se* illegality of the agreement. *SCTLA*, 493 U.S. at 430-31; *Socony-Vacuum*, 310 U.S. at 224-25 & n.59.

1. Facts

AIIC and the U.S. Region adopted a wide variety of rules that affected and eliminated price competition among AIIC members in the United States. Since AIIC was founded in 1953, it has established binding rules governing its conference interpreter members, including rules concerning the remuneration charged. AIIC rules are found in its Basic Texts, which include Governing Statutes (CX-2-A (1991); CX-1-A to M(1994)), a Code of Professional Ethics (CX-2-Z-37 to 39(1991); CX-1-Z-37 to 39(1994)), Standards of Professional Practice (CX-2-Z-40 to 49 (1991); CX-1-Z-40 to 46 (1994)), a Staff Interpreters' Charter (CX-2-Z-54) (1991)), and various Annexes to the Basic Texts, including the Guidelines for Recruiting Interpreters. CX-2-Z-50 to 53 (1991); CX-1-Z-47 to 52 (1994). For the reasons discussed *infra* at 25-29, we find that the following rules are individually and collectively part of an overall price-fixing scheme and we declare each of them *per se* unlawful under Section 5.

1. *Minimum Daily Rates*

From 1953 until 1973, AIIC published universal minimum daily rates applicable world-wide, with certain exceptions for particular countries where the mandatory minimum rate was higher. In 1973, when the U.S. dollar and other currencies were no longer traded at fixed exchange rates, AIIC began a program to establish individual rates for each country on the basis of recommendations from AIIC members in those countries. IDF 99; Weber, Tr. 1142-44, 1147. However, in 1983 AIIC became aware that certain countries were applying their antitrust laws to rules adopted by professional associations and began to send out lists of minimum daily rates under the title "Market Survey," which was widely understood to reflect a "gentleman's agreement" on the minimum rate to be charged.¹⁴ IDF 516. In 1982 the U.S. Region became particularly concerned about the application of U.S. antitrust laws and asked AIIC to stop publishing a minimum daily rate for the United States. *See* CX-1226-A ("gentleman's agreement not to ask for less than" \$250 per day; antitrust lawyers advised U.S. Region not to have fixed rate appear on the rate sheet). From approximately 1982 until 1988, there was a tacit

AIIC became aware of the FTC investigation of interpreter associations in June 1991, when two U.S. Region members responded to a Commission document request sent to TAALS. IDF 538; CX-608-Z-77; CX-935-B. At its General Assembly meeting in 1991, AIIC's membership voted on whether to remove the monetary conditions from its Basic Texts, but the vote failed to achieve the required two-thirds majority. IDF 520-21; CX-270-K. AIIC then decided to hold an Extraordinary Assembly in 1992 to reconsider eliminating the monetary rules. One day before its 1992 Extraordinary Assembly, the Non-Agreement Sector held an off-the-record meeting to examine how, in light of the antitrust laws, it was possible to "operate in another way."¹⁶ IDF 510; CX-271-C, F; CX-273-U. The next day the Assembly voted on the following resolution:

DEEPLY ATTACHED to the principles of universality and solidarity upon which AIIC, since its inception, has based its action in organizing the profession, for the benefit of both the interpreters and the users of interpretation,

FULLY AWARE of the gradual implementation of anti-trust legislation in the various parts of the world,

DECIDES on the following principles:

1. to remove all mention of monetary conditions (e.g. rates, subsistence and travel allowances, payment of non-working days) from our basic texts. . . .

CX-273-G; IDF 509. The Council subsequently decided that "[a]ll provisions of the Basic Texts that refer to financial conditions are immediately withdrawn. . . . The Basic Texts shall be amended consequently at the next ordinary Assembly." CX-279-I (March 1994 Bulletin); *see also* CX-273-O; CXT-273-O, p.1. Subsequently, at the 1994 Assembly, necessary changes to remove the monetary conditions were incorporated into the Basic Texts. IDF 97; CX-970-A.

¹⁶ The June 1992 AIIC Bulletin set forth the agenda for the Extraordinary Assembly. It contained this message from AIIC's president:

We urge as many members as possible to attend this meeting on cartels which has been proposed by the NAS and will be attended in the morning by a lawyer. Colleagues from Canada and Germany will explain how, in practice, it is possible to "operate in another way". Since there will be neither minutes nor recording of the proceedings, your presence is essential if you wish to be fully informed. . . . On the basis of this information, you will be able to take the relevant decisions which will enable the Assembly to achieve its aims.

CX-271-F.

2. *Indivisible Daily Rates*

Article 6(a) of the 1991 AIIC Standards provided that "[r]emuneration shall be on an indivisible daily basis." CX-2-Z-42.¹⁷ AIIC's rules meant that "you charge per day no matter how long you work." CX-303-Z-109 (Moggio-Ortiz); *see also* CX-886-D; Saxon-Forti, Tr. 2696; CX-305-Z-89, Z-97, Z-110 (Sy).

Even where interpreters received a waiver from AIIC allowing them to work alone for meetings lasting 40 minutes or less in the U.S., they were nonetheless required to charge the full daily rate. CX-301-Z-152.1 (Bishopp); CX-432-G. The June 1993 Bulletin presented sales arguments interpreters could use in light of the deregulation of AIIC's Basic Texts, noting that they should argue that with respect to "conferences of short duration . . . one cannot take other assignments in the course of a free half-day." CXT-276-E-G, pp.1-2.

U.S. Region interpreters charge indivisible daily fees, regardless of the number of hours worked. IDF 126; Swetye, Tr. 2826-28, 2830-31; CX-300-Z-143 (Motton); Weber, Tr. 1264. Intermediaries understood the AIIC rate to mean an indivisible daily rate, which they paid. IDF 127, 126; Neubacher, Tr. 763, 765-66; Citrano, Tr. 552-53.

3. *Fees for Non-working Days*

Article 12 of the 1991 Standards of Professional Practice stated:

- a) When an interpreter is recruited to work in a place other than that of her or his professional address she or he shall receive a remuneration for each day required for travel and rest as well as for Sundays, public holidays and non-working days in the course of a conference or between conferences. This remuneration shall be at least equal to the base rate.
- b) When an interpreter is recruited to work in the place of her or his professional address she or he shall receive a remuneration for each non-working day in the course of the conference (up to a maximum of two). This remuneration shall be at least equal to the base rate.

¹⁷ There is no provision specifying that remuneration shall be for an indivisible day in the 1994 Basic Texts.

CX-2-Z-46. As noted above, the "base rate" was defined in Article 8 of the 1991 Basic Texts as being at least two-thirds of the standard minimum daily rate. CX-2-Z-43 (Article 8). Article 14 specified, *inter alia*, that for journeys of more than nine hours, the interpreter was "entitled to" rest days, which "equated to non-working days and remunerated at the same rate." In lieu of rest days, the interpreter could accept first class airfare. CX-2-Z-47.¹⁸

4. *Same Team, Same Rate*

Article 6(c) of the 1991 AIIC Standards of Professional Practice provided that "[a]ny member of the Association asked to work in a team of interpreters shall only accept the assignment if all the freelance members of that team are contracted to receive the same rate of remuneration." CX-2-Z-42.¹⁹ The rule further stated that "[a]ny interpreters recruited separately for a language which is not one of the normal working languages of the organisation concerned may be regarded as not being members of the teams." *Id.* Thus, the rule did not apply when interpreters were recruited for an "exotic" language, such as Russian, Japanese, or German, or another language for which "there is difficulty finding interpreters." IDF 151; CX-301-Z-33, Z-35 to Z-36 (Bishopp); CX-300-Z-82 (Motton).

5. *Travel Arrangements*

Article 15(a) of the 1991 Standards provided:

Every contract signed with a member of the Association for a conference, or a number of immediately consecutive conferences, away from the place of her or his professional address must include payment for travel by the shortest possible return (or circular) route between the place of her or his professional address and the conference venue (or venues).

¹⁸ Article 8 of the 1994 Standards provides: "The remuneration for non-working days occurring during a conference as well as travel days, days permitted for adaptation following a long journey and briefing days that may be compared to normal working days shall be negotiated by the parties." Article 10 of the 1994 Standards further provides: "Travel conditions should be such that they do not impair either the interpreter's health or the quality of her/his work following a journey. This means that journeys lasting a long time or involving a major shift in time zone call for the scheduling of rest days (generally one rest day for journeys of between nine and sixteen hours, and two rest days for journeys of 16-21 hours and three for journey[s] in excess of 21 hours)." CX-1-Z-45. Although the rule as revised in 1994 is not *per se* illegal, in light of the previous agreements to set remuneration for non-working days and to specify the forms of travel, we are requiring that for a period of five years AIIC eliminate from its Basic Texts all references to payments and travel arrangements, even if expressed in non-mandatory language. *See* discussion in Section VI, *infra* at 48-49.

¹⁹ There is no provision specifying that remuneration shall be the same for all members of a team in the 1994 Basic Texts.

CX- 2-Z-48. The rule further specified that payment for travel by air shall be for first class, business class, or club class and that tickets are not to be restricted to a particular carrier nor can an interpreter be forced to travel by charter flight. *Id.* Article 15(b) further required that for successive conferences away from the interpreter's professional address, unless there is "full and separate payment of the return travel from each [conference], the interpreter shall receive a fee and a subsistence allowance for every day" between conferences. *Id.*

AIIC's rules governing travel arrangements were binding in the U.S. IDF 239. In fact, the 1991 paper, "Working conditions for interpreters in USA," the purpose of which was to ensure the uniform application in the U.S. of the AIIC rules, states that "[i]n addition to professional fees, each interpreter shall be entitled to: . . . return economy air fare for trips under 8 hrs. Restricted tickets are not acceptable. For trips longer than 8 hrs. interpreters are entitled to business class or first class tickets. When train service is more convenient, first class tickets." CX-439-E, ¶ 6; IDF 239.²⁰

6. *Per Diem*

Article 13 of the 1991 Standards of Practice provided:

- a) For the whole of the period spent away from the place of her or his professional address the interpreter shall receive a subsistence allowance, calculated per night of absence.
- b) The Association shall regularly publish a list of subsistence allowances for the various countries. They shall reflect the prices charged by first-class hotels.
- c) The interpreter may agree to the conference organisers paying up to half the subsistence allowance in kind by providing a hotel room, including breakfast, or up to eighty percent by providing full-board.
- d) One half of the subsistence allowance shall be due when the interpreter's absence from the place of her or his professional address is less than twelve hours between 8:00 and 20:00 hours (which may vary slightly as a function of local custom) and when it is not

²⁰ In the 1994 Standards, Article 10 states: "Travel conditions should be such that they do not impair either the interpreter's health or the quality of her/his work following a journey." Article 9 further provides: "Except where the parties agree otherwise, members of the Association shall be reimbursed their travel expenses." CX-1-Z-45; IDF 238. Although the rule as revised in 1994 is not *per se* illegal, in light of the previous agreements to specify forms of travel, we are requiring that for a period of five years AIIC eliminate from its Basic Texts all references to payments and travel arrangements, even if expressed in non-mandatory language. *See* discussion in Section VI, *infra* at 48-49.

necessary for the interpreter to spend the night away from the place of her or his professional address.²¹

CX-2-Z-46. The record establishes that: AIC rules required members to charge a per diem when they worked away from their professional address (IDF 110; CX-300-Z-71 to Z-72 (Motton); CX-301-Z-67 (Bishopp));²² AIC's Council approved the rates (IDF 113; CX-301-Z-152.41 to Z-152.42 (Bishopp); CX-268-E; CX-300-Z-72/3 to Z-74/22 (Motton)); and AIC published a per

8. *Recording*

Article 2(b) of both the 1991 and 1994 Standards of Professional Practice provides:

Any contract for the employment of a member of the Association must stipulate that the interpretation is intended solely for immediate audition in the conference room. No one, including conference participants, shall make any tape recording without the prior consent of the interpreters involved, who may request appropriate remuneration for it, depending on the purpose for which it is made and in accordance with the provisions of international copyright agreements.

CX-2-Z-41 and CX-1-Z-40. The ALJ found that "AIIC's rule on recordings is binding in the United States." IDF 244; Weber, Tr. 1251. Moreover, members at a NAS meeting held in Dublin in January 1989 voted that recordings not for resale should be charged at 25% of the daily rate, and recordings for resale at 100% the daily rate. The results of the vote were published in AIIC's Bulletin. CX-253-D (Apr. 5, 1989 AIIC Bulletin); CXT-251-W at 2-3; IDF 245.²⁴

9. *Pro Bono Work*

Article 7 of the 1991 Basic Texts, Standards of Professional Practice, titled "Non-Remunerated Work," stated:

clause whereby, in the event of all or part of the contract being canceled by the conference organiser, the remuneration envisaged would remain payable to the interpreter and she or he would, if applicable, be refunded any out-of-pocket expenses. A specimen cancellation clause that may be used for this purpose shall be included in the general conditions appearing on the back of the standard contract for individual interpreters.

CX-1-Z-41. Although the rule as revised in 1994 is not *per se* illegal, in light of the previous agreements to specify a standard cancellation clause that provides for the payment in full of all remuneration contemplated to be paid under the contract, we are requiring that for a period of five years AIIC eliminate from its Basic Texts all references to such payments in the event of cancellation, even if expressed in non-mandatory language. *See* discussion in Section VI, *infra* at 48-49.

²⁴ The only testimonial evidence regarding the actions taken at the Dublin meeting was provided by Claudia Bishopp in her investigational hearing testimony. CX-301-Z-152.7 - 152.11. Ms. Bishopp stated with respect to the rates for recordings: "I don't think this was ever agreed. It has certainly never been put into practice. There is no agreement among members of what would be acceptable to each one." *Id.* at 152.8. Thus, there is no additional evidence as to whether this agreement was ever adhered to, or whether it is still in place or was disavowed as a result of the 1992 Assembly vote to eliminate all monetary conditions from AIIC's rules.

Members of the Association may provide their services free of charge, especially for conferences of a charitable or humanitarian nature, provided they pay their own travel expenses and subsistence (subject to the granting of a waiver by the Council beforehand). All the other conditions laid down in the Code of Professional Ethics and in these Standards of Professional Practice must be observed.

CX-2-Z-42. *See also* CX-9-F; CXT-6-E to M, p. 4 (1979 Code); Weber, Tr. 1232.²⁵

10. *Commissions*

Paragraph (c)4 of the AIIC Guidelines for Recruiting Interpreters (appended to the 1991 and 1994 Basic Texts),²⁶ under "Duties Towards the Profession," provides that "Members of the Association shall not accept or give commissions or any other rewards in connection with team recruitment or the provision of equipment." Article 6(d) of the 1991 Standards of Professional Practice further stated: "Remuneration shall be net of any commission." CX-2-Z-42 (1991).²⁷

AIIC members discussed the issue of commissions at a meeting in the early 1980s. An AIIC Bulletin subsequently reported: "There is no reason why an intermediary, AIIC member or otherwise, should not request a fee from the organisers for expenses incurred in recruiting a team, but this must be charged to the organiser and clearly shown as distinct from the interpreters fees and never deducted from the interpreters fees." CX-227-J (March 1981 Bulletin); IDF 253.

2. Legal Analysis

²⁵ Article 5 of the 1994 Professional Standards states that "[w]hen members of the Association provide their services free-of-charge for conferences of a charitable or humanitarian nature, they shall respect the conditions laid down in the Code of Professional Ethics and in these

Based on the extensive history and publication of minimum daily rates, the record evidence of the price-fixing agreement, and the expert testimony, we conclude that there was an unlawful agreement among AICC members as to the minimum price to be charged for conference interpretation in the U.S. We further find that respondents engaged in restraints that prevented

purchase of goods is “tantamount to an agreement to eliminate discounts, and thus falls squarely within the traditional *per se* rule against price-fixing.” *Id.* at 648. Even if the price of the underlying product is not fixed (as it was not in *Catalano*, but is here), an agreement substantially impacting the price to be charged is unlawful. *Id.* at 647; *Sugar Institute v. United States*, 297 U.S. 553, 600-02 (1936) (agreement to adhere to announced prices and terms of sale unlawful, even though the specific prices and terms were not agreed upon). Similarly, the courts have held *per se* unlawful other methods of affecting price competition that fall short of fixing the actual price of the product. *See, e.g., Plymouth Dealers’ Ass’n of N. Cal. v. United States*, 279 F.2d

of where the shipment originated, was *per se* illegal), *cert. dismissed*, 462 U.S. 1125 (1983).²⁸ The price-fixing formula used here also prevented interpreters from competing with one another by discounting their rates for non-working days. *See Catalano*, 446 U.S. at 644-45 (discussing role of discounts in competition among wholesalers).

The travel rules prevent conference organizers from realizing considerable economies by planning ahead and taking advantage of special offers.²⁹ More significant, absent the travel rules, competing interpreters or intermediaries could use savings on travel expenses as a term of price competition. By agreeing to forego competition on this element of price, AICC and its members have fixed prices in violation of the antitrust laws. *See Catalano*, 446 U.S. at 645; *cf. In re Plywood Antitrust Litigation*, 655 F.2d at 634. We also agree with the ALJ's finding that "AICC

agreement to place on the purchaser a cost of the transaction and is analogous to the agreements on credit terms in *Catalano* and on freight costs in *FTC v. Cement Institute*. Cf. *American Radiator*, 433 F.2d at 185-88 (evidence of conspiracies to limit maximum discounts and to eliminate a low-priced product line sufficient for jury to find illegal price fixing).

AIIC's rules, in combination with agreements reached at the NAS meeting in 1989, set the amount to charge for recordings and constitute another form of *per se* unlawful price fixing. See, e.g., *Catalano*, 446 U.S. at 647-48; *Northwestern Fruit Co.*, 665 F. Supp. at 871-72.

Complaint counsel's economic expert testified that the ban on commissions helped AIIC members reach and maintain their cartel agreement by preventing discounts on the minimum fee

profession.” CXT-1320-A to C, p.1.; IDF 249; *see generally* Weber, Tr. 1232-33, 1271-72. Thus, we find that AIIC’s 1991 rule on *pro bono* work operated as a prohibition on discounts and is *per se* illegal under *Catalano*. Alternatively, AIIC’s restraints on *pro bono* work can be viewed as setting a minimum price because AIIC members would have to charge some amount for their services in order to receive reimbursement for travel and other expenses associated with charitable work. Minimum price setting in the sale of services, as well as goods, is *per se* illegal price fixing. *See Goldfarb v. Virginia State Bar*, 421 U.S. 773, 782-83 (1975) (state bar association

2. Legal Analysis

We concur in the ALJ's findings that AIC's moonlighting rules constitute an agreement that staff interpreters will not compete with freelance interpreters. *See* IDF 280-291; CX-300-Z-114 to Z-115, Z-121 (Motton); CX-301-Z-95 to Z-97 (Bishopp); *see generally* Hamann-Orci, Tr. 14-15; Van Reigersberg, Tr. 363-64; *but see* Lateiner, Tr. 905. This agreement is in effect a market allocation because it promotes and protects the economic interests of local, freelance interpreters from competition from permanently employed "staff" interpreters. Thus, the agreement effectuates a market division and is a *per se* violation of the antitrust laws.

Judge Posner'

particular type of restraint challenged." *Maricopa*, 457 U.S. at 349 n.19. In fact, we recognized and applied this approach in our recent decision in *CDA*. See slip op. at 24-25, 5 Trade Reg. Rep. (CCH) at 23,790-91. AIIIC's restrictions on the non-price terms and conditions of employment, business arrangements, and advertising are not in the categories of restraints traditionally considered *per se* illegal. Moreover, we cannot say that they appear "to be one[s] that would always or almost always tend to restrict competition and decrease output." *Broadcast Music, Inc. v. CBS, Inc.*, 441 U.S. 1, 19-20 (1979) ("*BMI*"). We believe it would be imprudent to expand the *per se* rule to these restrictions and, therefore, we apply the rule-of-reason analysis instead.

Under the rule of reason, a court will examine the restraint in the totality of the material circumstances in which it is presented in order to assess whether it impairs competition unreasonably. Although many courts have elaborated on the details of this test, Justice Brandeis' classic formulation remains the touchstone for rule-of-reason analysis:

The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts. This is not because a good intention will save an otherwise objectionable regulation or the reverse; but because knowledge of intent may help the court to interpret facts and to predict consequences.

Board of Trade of the City of Chicago v. United States, 246 U.S. 231, 238 (1918).

The Supreme Court has made clear that the rule of reason contemplates a flexible inquiry, examining a challenged restraint in the detail necessary to understand its competitive effect. See, e.g., *NCAA*, 468 U.S. at 103-10. Thus, the inquiry need not be conducted in great depth and elaborate detail in every case, for sometimes a court may be able to determine the anticompetitive character of a restraint easily and quickly by what has come to be known as a "quick look" review. See *IFD*, 476 U.S. at 459-61; *NCAA*, 468 U.S. at 106-10 & 109 n.39. As the cases make clear, however, a variety of factors go into conducting an appropriate rule-of-reason analysis, depending upon the particular facts of the case. Generally, a court will look to the following: product and geographic market definition; market power; anticompetitive effects; barriers or impediments to entry; and any plausible efficiency justifications. Because the rules at issue here are not plainly anticompetitive and complaint counsel has not established anticompetitive effects or respondents' market power, we dismiss the complaint as to the rules governing length of day, team size, professional address, portable equipment, advertising, package deals, exclusivity, trade names, double-dipping and other services.

1. Market Definition

The Department of Justice and the FTC have set forth their approach to defining the relevant geographic market in the 1992 Merger Guidelines as that area within which a hypothetical monopolist could impose a "small but significant and nontransitory" increase in price that would not be offset by a loss in sales. *Horizontal Merger Guidelines* § 1.21. Thus, for example, we would look to whether conference interpreters from outside the United States would offer their services in the United States and whether customers in the United States would seek the services of foreign interpreters if faced with a price increase of five to ten percent.

The ALJ found that the "relevant geographic market is the United States." IDF 366; *see also* Wu, Tr. 2193-94. Respondents initially argued that the geographic market should include interpreters who reside in Mexico and Canada, as well as foreign interpreters who reside in the United States part of the year. Respondents' Proposed Findings of Fact, ¶¶ 142-45. Respondents, however, have not challenged the ALJ's conclusion on appeal. Although there is some evidence that employers and intermediaries may include foreign interpreters on the lists from which they attempt to hire, the rules related to travel and per diem leave us unpersuaded that foreign interpreters function as a constraint on price increases by interpreters domiciled in the United States. Thus, our review of the record provides no reason to overrule the ALJ's finding in this regard.

2. Competitive Effects and Market Power

As we recently stated in CDA:

Market power is part of a rule of reason analysis, but it is important to remember why market power is examined. We consider market power to help inform our understanding of the competitive effect of a restraint. Where the consequences of a restraint are ambiguous, or where substantial efficiencies flow from a restraint, a more detailed examination of market power may be needed.

CDA, slip op. at 28, 5 Trade Reg. Rep. (CCH) at 23,792 (footnote omitted). Similarly, the Supreme Court has indicated that when a court finds actual anticompetitive effects, no detailed examination of market power is necessary to judge the practice unlawful. *See IFD*, 476 U.S. at 460-61; *NCAA*, 468 U.S. at 109-10.

Complaint counsel and the ALJ place substantial reliance on evidence that AIIC's members adhered to the price-fixing agreement to prove that AIIC had market power. More specifically, the ALJ found that the Wu Data Set established that the AIIC members "charged at least the 'suggested minimum

fact "[t]hat AIIC members charged the agreed rates over four years indicates that AIIC had market power in U.S. conference interpretation in the years 1988 through 1991. (Wu, Tr. 2052-53, 2055.) The anticompetitive effects in the United States show that AIIC has market power, since market power is the ability to raise price or restrict output." IDF 327.

We disagree with the ALJ's finding that AIIC had market power because AIIC members charged the agreed-upon price. The fact that AIIC members charge and receive a set price does not necessarily mean that they have market power. It could simply mean that they have made an ill-advised decision to set a price that some market participants accept but that in reality lowers overall demand for their services, or it could mean that the price fixed was set exactly equal to the competitive price. There is no evidence in this record to show, for example, what non-AIIC members charged or received or the percentage of overall private sector conference interpretation work that AIIC versus non-AIIC members perform. Thus, in this case, we do not believe that it is appropriate to attribute market power to AIIC by the mere fact that its members found it in their interest to adhere to a price-fixing agreement. Moreover, if there were evidence of the amount being charged by interpreters who were not members of AIIC, that would not necessarily be dispositive proof of whether AIIC had market power. It is precisely the danger that business persons will find it in their economic interest to go along with a price-fixing agreement that makes price fixing so pernicious and a *per se* offense requiring no showing of market power.

Thus, to determine whether AIIC has market power, we look first to market share evidence. While the parties, as well as the ALJ, agree that the market is properly defined by language combination, there is no evidence in the record from which to determine market shares by language combination. *See, e.g.*, Reply Brief for Respondents-Appellants at 20; Complaint Counsel's Reply to Respondents' Proposed Findings of Fact and Conclusions of Law, Vol. I, at 43 n.35; Wu, Tr. 2391. The briefs, findings of fact, Initial Decision, and oral argument discuss at length the market shares held by AIIC members, but the shares discussed are all defined by singular languages or the overall number of interpreters working in the United States. For example, the ALJ found that AIIC (in combination with TAALS) has 24 percent of the estimated number of Portuguese conference interpreters and 44 percent of the French conference interpreters (with percentages for other languages between these extremes). IDF 379. Respondents, on the other hand, argue that their market shares for the five Western European languages focused on by the ALJ are "at most from the low to mid-teens to the low twenties." Reply Brief for Respondents-Appellants at 24 (emphasis in original). Without delving into the particulars of the different versions of market shares, we conclude, assuming that the product market is defined as language pairs, that neither the ALJ's, complaint counsel's, nor respondents' calculations can serve as the basis for a finding of market shares. Thus, complaint counsel has failed to carry the burden of proof concerning respondents' market shares by language combination, making it impossible to determine market power.

Even without a showing of market power, if the anticompetitive effects of the rules were clear, we still would be able to make a finding of liability under a rule-of-reason analysis. The competitive effects of the rules at issue here, however, are not obvious from the rules alone, and

the record in this case is virtually devoid of evidence of anticompetitive effects flowing from the non-price restraints. *See generally* IDF 317-65. With the exception of three findings (IDF 341-43), all of the effects discussed by the ALJ stem from the price-related restraints. Two findings address "Team Size" and demonstrate that AIIC members generally abide by AIIC's rules with respect to team size, and that to the extent they deviate from the recommended team strength, they receive additional compensation. IDF 341-42. However, it is not clear that this is an anticompetitive result. Almost all of the witnesses testified that AIIC's team size rules reflected the way conference interpretation works best and that they therefore generally utilize the same team sizes AIIC advocates in its rules. The third finding addresses the length-of-day rule and suggests that interpreters sometimes insist on receiving extra compensation if the conference "exceeds a normal workday." IDF 343. As discussed *infra* at 37-39, the evidence suggests that not all interpreters insist on overtime pay and, for the ones that do charge, the amount they charge varies. Moreover, many of the witnesses at trial testified that the length of day specified in AIIC's rules generally coincides with the reality of the time period after which interpreters begin to experience mental fatigue, which can affect the quality of the interpretation services being provided. *See* discussion *infra* at 37-38. Thus, in our view, the ALJ's findings in this regard are not sufficient to make a finding of anticompetitive effects flowing from the non-price restraints.

3. Efficiencies

Over the past few decades both the Commission and the courts have increasingly recognized the role of efficiencies in assessing the competitive impact of restraints of trade under the rule of reason. *See CDA*, slip op. at 32-37, 5 Trade Reg. Rep. (CCH) at 23,794-96. *See generally* 1 Federal Trade Comm'n Staff, *Anticipating the 21st Century: Competition Policy in the New High-Tech, Global Marketplace*, ch. 2 (May 1996). The Supreme Court relied extensively on an analysis of the efficiencies of certain vertical contractual restraints in upholding such restrictions in *Continental T.V., Inc. v. GTE Sylvania Inc.*,

standard under the rule of reason, efficiencies are part of the analysis. *See CDA*, slip op. at 32-37, 5 Trade Reg. Rep. (CCH) at 23,794-96.

Respondents argue that the restraints at issue in this case are justified by various efficiencies, *to wit*, that they ensure the quality of the interpretation services provided; maintain the health and safety of interpreters; and provide needed information to consumers about the appropriate way to staff conferences requiring interpretation services. Although our decision with respect to the issues of market power and anticompetitive effects negates the need to assess the adequacy of these justifications, at least some are not facially without merit.

4. Conclusion

For the reasons discussed, we cannot condemn under the rule of reason any of the non-price rules disputed below.³³ Those rules include length of day, team size, professional address, portable equipment, advertising, package deals, exclusivity, trade names, double-dipping and other services.³⁴

5. Rules Being Dismissed

1. *Length of Day*

The 1991 (Article 4) and 1994 (Article 7) Standards of Professional Practice state that "the normal duration of an interpreter's working day shall not exceed two sessions of between two-and-a-half and three hours each." CX-2-Z-42; CX-1-Z-45. The ALJ found that AIIC's rules allow members to work beyond the hours specified by AIIC as long as they are paid for overtime, and that many AIIC members charge overtime when working beyond six hours. IDF 166-68. The ALJ further found that one intermediary paid interpreters "about 20% more than the standard rate when interpreters worked more than six hours a day (Neubacher, Tr. 804-05)," while another paid interpreters an additional \$100-200 for anything over a seven-hour day. IDF 343; Citrano, Tr. 543-45. Some complaint counsel witnesses testified that AIIC members occasionally work longer days without charging overtime. Davis, Tr. 881 (interpreters do not always request

National Soc'y of Prof'l Engineers, 435 U.S. at 693-96.

³³ Our decision in this regard obviates the need to discuss issues related to entry or enforcement of the rules.

³⁴ Because the ALJ dismissed the complaint allegations challenging the rules on double-dipping and other services, we do not discuss these rules. However, we note that while we are upholding the dismissal, we disagree with the ALJ's analysis. He found the rules *per se* illegal but dismissed them for lack of enforcement; on the other hand, we believe the rules should be analyzed under the rule of reason and dismiss them because complaint counsel has not met its burden of proof.

additional compensation for working beyond the standard day -- it depends on how much additional time is being required); Lateiner, Tr. 973 (half-hour grace period). Other intermediaries testified that interpreters have refused work for hours that exceed the normal working day. IDF 178. Finally, complaint counsel's expert testified that "[s]ometimes, the overtime charge would be another half day of remuneration, sometimes there would be hourly charges." Wu, Tr. 2120.

The only arguable enforcement of this rule dates back to the 1984 Olympic Games, when AIIC wrote Wilhelm Weber a letter warning him to conform his contracts to AIIC's Code. An AIIC member had objected to a contract offered by Weber that provided for a seven-hour work day. IDF 181; CX-1300-A; Weber, Tr. 1252-53; *see generally* CXT-1693-A to C.

The rules themselves contain no mention of overtime or the appropriate level of remuneration for sessions that exceed AIIC's recommended length of day. Moreover, the evidence suggests that individual interpreters applied this rule in a wide variety of ways. Finally, many of the interpreter and intermediary witnesses (called by both respondents and complaint counsel) testified that this rule helped to maintain the quality of interpretation and the health of the interpreters because working beyond the "normal" working day often results in mental fatigue and interpreting mistakes. Hamann-Orci, Tr. 84-85; Davis, Tr. 871-73; Weber, Tr. 1187, 1292, 1297; Luccarelli, Tr. 1661. Since the evidence does not show that AIIC specified that overtime must be paid, that interpreters uniformly charged for overtime, or that uniform rates were charged for overtime, this does not constitute independent price fixing.³⁵ Moreover, this rule differs from the *per se* unlawful price-fixing rules, such as those on commissions and pro bono work, because, unlike the latter two, the length of day rule has no price aspect on its face and there are some plausible justifications for setting forth what a "normal" day is. For example, even Wilhelm Weber, one of complaint counsel's key witnesses, testified that the rules with respect to length of day and team strength ensure the health of the interpreters and the quality of the interpretation services. Weber, Tr. 1278-79, 1296-97.

Complaint counsel argue and the ALJ found that the length of day rule was an output restraint and therefore *per se* unlawful. We agree that if this rule were a strict limitation on output, it would likely be condemned as *per se* unlawful because output restrictions have the same basic economic effect as an agreement to increase prices. *See SCTLA*, 493 U.S. at 423; *NCAA*,

³⁵ We note, however, that as recently as 1989 AIIC issued a document entitled "Conditions Governing Recruitment and Work at Intergovernmental Meetings Outside the Agreement Sector," which could be used under certain specified circumstances "[i]n lieu of the corresponding rates and conditions laid down in Annex I to the AIIC Code of Professional Conduct and Practice." This document specified the compensation to be paid to interpreters who were required to work in excess of the daily or weekly workload levels set forth in the document. CX-2064-A to D. Because there is no testimony or other evidence in the record explaining this document, how it was developed, whether it was adopted by agreement among AIIC's membership, and in what countries it was applicable, a decision as to its legality is not before us.

468 U.S. at 100. However, because the rule itself merely sets forth the "normal" length of day, does not prohibit interpreters from working overtime, and does not set any overtime pay, and because the evidence shows that interpreters work overtime (with and without additional compensation), the rule is not a strict limitation on output and we cannot say with confidence that it is a restraint that will always or almost always have anticompetitive effects.³⁶

We believe AIIC's rule specifying the "normal" work day is somewhat similar to the standardization of products. As Areeda observed:

Product standardization might impair competition in several ways. For example, producers of automobile tires might agree to produce only five tire varieties for which they adopt common specifications. Such standardization might deprive some consumers of a desired product, eliminate quality competition, exclude rival producers, or facilitate oligopolistic pricing by easing rivals' ability to monitor each other's prices.

⁷ Areeda, *Antitrust Law*, *supra* note 11, ¶ 1503a, at 373. In examining the sufficiency of the evidence from which to infer the existence of a conspiracy, courts have recognized that "standardization of a product that is not naturally standardized facilitates the maintenance of price uniformity." *C-O-Two Fire Equip. Co. v. United States*, 197 F.2d 489, 493 (9th Cir. 1952) (citing *Milk and Ice Cream Can Inst. v. FTC*, 152 F.2d 478, 492 (7th Cir. 1946)). The courts there said that some standardization is understandable, but too much leads to evidence that can be drawn upon to reach a conclusion of the existence of a conspiracy.

Standardization does not, in our view, fall under the *per se* rule, but should be examined under the rule of reason. For example, it hardly is *per se* illegal to sell gasoline by the gallon, although that unquestionably aids horizontal price fixing among gas stations. Here, the length of work-day rule by itself does not enable members to fix price or output; the problem is primarily with the fixing of the price itself. We believe that this rule must therefore be examined under the rule of reason. Therefore, for the reasons set forth *supra* at 33-36, we reverse the ALJ and find that complaint counsel failed to carry the burden of proof under the rule of reason.

³⁶ This flexibility, combined with evidence supporting AIIC's proffered justifications, distinguishes this rule from the absolute ban on operating automobile salesrooms during certain periods that we condemned in *Detroit Automobile Dealers Ass'n*, 111 F.T.C. 417 (1989), *aff'd in relevant part*, 935 F.2d 457 (6th Cir.), *cert. denied*, 506 U.S. 703 (1992).

2. *Team Size*

Articles 9, 10, and 11 of the 1991 Basic Texts, Standards of Professional Practice, set forth team size tables for consecutive, whispered, and simultaneous interpretation. CX-2-Z-43 to 46.³⁷ In the case of simultaneous interpretation, the rule is absolute, providing that "[t]he team strength indicated . . . must be respected." CX-2-Z-46 (Art. 11). Although AIIC at one point maintained two different team size tables with corresponding prices for simultaneous interpretation, that dual system was not used in the United States. Thus, the U.S. Region always had only the absolute written prohibition. *See* IDF 171.³⁸

There is some evidence of adherence to the team strength rules. Some interpreters have refused work with intermediaries under working conditions that do not conform to staffing requirements (Davis, Tr. 869-70; Clark, Tr. 614-15 (Berlitz was expected to meet AIIC's working conditions)); intermediaries who have deviated from staffing requirements have paid interpreters extra compensation (Citrano, Tr. 539; Neubacher, Tr. 767-69); and individual interpreters have

standard with respect to setting forth optimal staffing to maintain the quality of conference interpretation services, and this similarity to standard setting leads us to conclude that the team size rule should be examined under the rule of reason. Moreover, since we are condemning as *per se* unlawful all of the price-related agreements and prohibiting the implementation of price-related agreements in the future, we believe that once AIIC members begin to compete on price, it is unlikely that there will be anticompetitive effects from this rule. Therefore, we reverse the ALJ and find that complaint counsel failed to carry the burden of proof under the rule of reason.

3. *Professional Address Rule*

Article 1 of AIIC's 1991 Standards of Professional Practice required that members declare a single professional address that they must maintain for at least six months and can change only upon three months' notice. CX-2-Z-40. The 1991 rules also explicitly required that all contracts be based only upon the official professional address of the AII -2 -2

One AIIC member traveled round-trip between Washington and New York to work for the New York Stock Exchange, but charged the client for round trip travel between Vienna and New York because Vienna was her professional domicile. Bowen, Tr. 1011-12; IDF 223. Another member was offered a job in Washington on November 15, 1991, but her professional address did not change from Paris to Washington until December 20. The U.S. Region Representative suggested that she either seek permission from AIIC in Geneva, or "telephone all other colleagues with [her] language combination in the Washington area, to verify that they were all indeed working on that date." CX-1471; IDF 225.

The ALJ found that AIIC members follow the professional address rule, unless they obtain a waiver, and that the AIIC Council enforces this rule. IDF 227; *see also* CX-300-Z-38 (Motton); CX-284-L; Bowen, Tr. 1029-30; CX-237-H to I; CXT-237-H to I. On November 30, 1991, the U.S. Region Representative admonished one member that he was in violation of the AIIC rules because he had been working in the New York area although he had a Washington, D.C. professional address "without officially notifying AIIC of his change of address.

The ALJ, citing to *IFD*, found that the rule on portable equipment was a restriction "on the package of services offered" (ID at 117) and should be analyzed under the rule of reason. We agree that this rule must be analyzed under the rule of reason. This rule is akin to a typical professional standard, declaring the use of certain equipment to be inferior and recommending against its use except in certain limited circumstances. In fact, numerous witnesses testified that although the use of portable equipment is acceptable under certain limited circumstances, which AIIC's rules recognize, its use would not be appropriate for large or long conferences because the lack of a soundproof booth subjects the interpreter to environmental noise, compromises the quality of the interpretation services, and increases the interpreter's mental fatigue. *See, e.g.*, Respondents' Proposed Findings of Fact, ¶¶ 351-355, citing to Hamann-Orci, Tr. 49-50; Neubacher, Tr. 707; Luccarelli, Tr. 1701-02; Clark, Tr. 632, 643-44; Obst, Tr. 304 (State Department tries to avoid use of portable equipment). We also note that there are in fact international standards for built-in (permanent) booths (ISO 2603 (1983)), portable booths (ISO 4043 (1981)), and other equipment (IEC 914 (1988)). *See* CX-2064-D; CX-2062-G. We therefore reverse the ALJ and find that complaint counsel failed to carry the burden of proof under the rule of reason.

5. *Advertising*

Both the 1991 and 1994 versions of AIIC's Code of Professional Ethics contain the following provisions:

Article 4 (b): They [Members] shall refrain from any act which might bring the profession into disrepute.

Article 5: For any professional purpose, members may publicise the fact that they are conference interpreters and members of the Association, either as individuals or as part of any grouping or region to which they belong.

CX-1-Z-38, CX-2-Z-38. The "Recruitment Guidelines" further state that "Article 5 of the Association's Code allows members to provide factual information to users about the nature and availability of interpreters'

prohibited price advertising and therefore committed a *per se* violation. Moreover, the two instances of enforcement the ALJ cites do not support a finding that the rules were interpreted or enforced to prohibit price advertising.⁴⁰ Any restrictions on nonprice advertising and promotion must be analyzed under the rule of reason. *See CDA*, slip op. at 24-25, 5 Trade Reg. Rep. (CCH) at 23,790-91. Therefore, we reverse the ALJ and find that complaint counsel failed to carry the burden of proof under the rule of reason.

6. *Package Deals*

The AIIC Guidelines for Recruiting Interpreters, attached as an annex to the 1991 Basic Texts, in paragraph (b)7, "Duties Towards Colleagues," provide that "Members of the Association acting as coordinators shall not make 'package deals' grouping interpretation services with other cost items of the conference and shall in particular avoid lump-sum arrangements concealing the real fees and expenses due to individual interpreters." CX-1-Z-49; IDF 255. Paragraph (c)1 states: "The provision of professional interpretation services is always kept clearly separate from the supply of any other facilities or services for the conference, such as equipment." *Id.* Paragraph (b)5 states that "[i]nterpreter's fees shall be paid directly to each individual interpreter by the conference organiser." *Id.*

In 1990 and 1991, the U.S. Region prepared and discussed a provisional paper on AIIC working conditions for interpreters in the United States. The paper stated: "All contracts shall be concluded directly between the conference and the interpreter; the conference shall make payment directly to the interpreter." CX-439-D; *see also* CX-435-A; IDF 256.

The ALJ found that "clients prefer contracting through intermediaries because intermediaries can more readily be held financially liable if the conference is unsuccessful and provide quicker response time to requests for services than individual interpreters." IDF 260; CX-227-J; CX-1633-B. Nonetheless, the ALJ concluded that the competitive effect of this rule is less obvious than some of the others and that it therefore should be analyzed under the rule of reason. We agree and note that there is some evidence that some intermediaries who are AIIC members do occasionally offer lump sum payment arrangements and package deals, with no repercussions from AIIC. *See Lateiner*, Tr. 976. We therefore reverse the ALJ and find that complaint counsel failed to carry the burden of proof under the rule of reason.

7. *Exclusivity*

⁴⁰ One of the instances had no relationship to the United States -- it involved an incident in Canada. *See* CX-305-Z-332 (Sy); CXT-501-W. Moreover, there was testimony that the disciplinary action taken in that case resulted from the member's failure to use the internal AIIC grievance procedures, rather than because of the alleged advertising rule violation. *See* Luccarelli, Tr. 1683-86; *see also* CXT-501-W, p.2. The second incident involved a member who had written a letter to an international organization offering to reduce the cost of language services through her own full-time employment. CXT-502-Z-53 to 54; RX-815.

The AIIC Guidelines for Recruiting Interpreters state: "The conference interpreter makes it clear that she or he does not 'provide' interpreters . . . [and] avoids creating the impression that certain interpreters are available only through her or him, or that she or he controls teams of fixed composition." CX-2-Z-52. The ALJ found that, in compliance with AIIC's rules, coordinating interpreters in the United States do not exclusively represent interpreters and no AIIC member has established a commercial interpretation firm with interpreters as employees. IDF 263; Luccarelli, Tr. 1693-94; CX-2-Z-52 (1991); CX-301-Z-105 (Bishopp). The ALJ concluded that the competitive effect of this rule is less obvious than some of the others and that it therefore should be analyzed under the rule of reason. *See* ID at 117-18. We agree that this rule is of the type adopted by professional associations that is traditionally analyzed under the rule of reason. In fact, there is evidence that some intermediaries have lobbied against laws in states that were considering whether subcontractors (such as freelance interpreters) should be considered employees of the companies with which they contract because the intermediaries apparently believed that it would be economically detrimental to them if the interpreters were considered employees. Luccarelli, Tr. 1693-96. Therefore, we reverse the ALJ and find that complaint counsel failed to carry the burden of proof under the rule of reason.

8. *Trade Names*

The AIIC Guidelines for Recruiting Interpreters state that a coordinating interpreter "acts under her or his own name and does not seek anonymity behind the name of a firm or organisation, although co-operative services may be offered by a group of interpreters who carry on business under a group name." CX-2-Z-52. The ALJ found that "there are no such

the monetary conditions worldwide in 1992. The Commission has identified the following factors as relevant to the question whether to issue an order when a respondent professes to have ceased the complained-of activities: the *bona fides* of the respondent's expressed intent to comply with the law in the future; the effectiveness of the claimed discontinuance; and the character of the past violations. *Massachusetts Bd. of Registration in Optometry*, 110 F.T.C. 549, 616 (1988) (citing *United States v. W. T. Grant Co.*, 345 U.S. 629, 633 (1953)). Cf. *Borg-Warner Corp. v. FTC*, 746 F.2d 108, 110 (2d Cir. 1984) (citing *W.T. Grant* in discussion of proof necessary for relief against allegedly discontinued conduct). These factors all argue strongly in favor of placing respondents under order.

The facts do not support respondents' assertions that AIIC's rules did not apply in the United States and that, even if they did, AIIC has abandoned all monetary rules. The record shows that AIIC's rules were adhered to and enforced in the United States and that AIIC's members agreed to follow, and did follow, AIIC's price-fixing and market allocation rules in the United States. See discussion *supra* at 15-31.⁴¹ Despite AIIC's adoption of a "resolution" in 1992 to remove all monetary conditions and a commitment to change its Basic Texts in 1994, there continued to be widespread adherence to a standard rate. Dr. Lawrence Wu, complaint counsel's economic expert, found that many AIIC members continued to set their fees with reference to the AIIC rate even after AIIC stopped publishing a rate for the U.S. Region in 1992. Wu, Tr. 2205-06; IDF 533. For 1992 to 1994 the rates continued to be clustered near the AIIC rate, and through 1993 the most frequently charged rate continued to increase yearly by \$25. Although in 1994 and 1995 there was no increase in the most frequently charged rate and there was a greater distribution of prices, most prices for a day's work were still in the \$500-550 range, and the clustering found suggests that AIIC's "discontinuance" of the price-fixing agreement was not particularly effective, at least through 1995. Wu, Tr. 2204-05, 2207; see also Clark, Tr. 614.

Moreover, many of AIIC's other "repealed" rules are still contained in AIIC's Basic Texts (phrased in less mandatory language) and in the standard form contracts AIIC provides for its members' use. Although the evidence in the record is insufficient to determine whether AIIC and its members actually agreed to the terms in its standard form contracts, the standard form contract nevertheless contains many of the same (or similar) provisions we are declaring unlawful. Thus, the continued use of these provisions in the standard form contract seems inconsistent with AIIC's expressed intent to comply with the law in the future.⁴²

⁴¹ Dr. Lawrence Wu, complaint counsel's economic expert, examined conference interpreting contracts of freelance interpreters in New York and Washington, D.C., and found that from 1988 to 1991 two-thirds of the contracts examined were at or \$50 above the published AIIC rate. Wu, Tr. 2016-17; IDF 104.

⁴² The Recruiting Guidelines appended to the Basic Texts and Statutes state that AIIC's model contract "should normally be used" and any other contract used "must at least embody the standard conditions specified by the Council." CX-1-Z-49; IDF 139.

For example, AIIC's standard form contract provides for fees for non-working days. CX-2059-A; CX-2060-A; IDF 139; Weber, Tr. 1221. In addition, although the 1994 rules eliminate any ties between the professional address and payments for travel, subsistence, and non-working days, the standard form contract continues to tie travel reimbursement to the professional address. The "General Conditions of Work," which are part of the form contract, state:

Unless both parties have agreed otherwise, the interpreter shall have the free choice of route and dates of travel. He/she is not bound to use chartered flights. He/she shall however only be refunded the costs for the mode(s) of transport laid down in clause VII.1 for direct return travel between his/her professional address and the conference venue . . .

As a general rule and unless the parties have agreed otherwise, the interpreter shall travel first class on air journeys of long duration and in business class for a journey of less than 9 hours.⁴³

The standard contract also provides for the appropriate remuneration in the event of cancellation in two separate clauses. CX-2059-B. The relevant portions of the contract state that the conference organizer shall be obliged to pay an interpreter the amount provided for in the contract regardless of the reasons for cancellation and whether they were beyond the control of the organizer. CX-2059-B, ¶ ¶ 6&9. Paragraph 6 of the General Conditions of Work further provides in relevant part that "[t]he remuneration shall be paid net of commission."

With respect to the "character of respondents' past violations," respondents engaged in *per se* unlawful price fixing and attempted to hide their price-fixing agreements in the past: during the 1980s in the United States, rates were unpublished but no less binding.⁴⁴ As one AIIC Council member wrote in a 1995 AIIC Bulletin: "At Brussels [in 1992] we deregulated our monetary conditions and trusted our members to keep the faith. Now why on earth can we not trust our members today to maintain the other working practices even though they may not be mandatory . . . ?" CX-285-S. *See also* IDF 509-12.

A claim of abandonment is rarely sustainable as a defense to a Commission complaint where, as here, the alleged discontinuance occurred "only after the Commission's hand was on the respondent's shoulder." *Zale Corp.*, 78 F.T.C. 1195, 1240 (1971); *see also Fedders Corp. v.*

⁴³ CX-2059-B, ¶ 7. Clause VII.1 of the contract provides for the "cost of a first-class return ticket by rail/air/sea from . . . at the current tariff." CX-2059-A.

⁴⁴ *See, e.g.*, CX-1238 (letter from AIIC's Secretary General to Wilhelm Weber in connection with the Los Angeles Olympics, stating how it was inconceivable that anyone could read the standard form contract to mean that rates could be negotiated downward: "[M]embers all know that [sic] the local rate is and any bargaining with the client can only be upwards and not downwards. It was inserted in this way because of the 'cartel' pricefixing laws in some countries, but members know very well that they must not undercut.").

FTC, 529 F.2d 1398, 1403 (2d Cir.), *cert. denied*, 429 U.S. 818 (1976). In light of all of the circumstances of this case, an order prohibiting respondents from continuing to engage in price fixing is necessary and in the public interest. The remedy we impose has a "reasonable relation to the unlawful practices found to exist" and therefore is within our authority. See *Jacob Siegel Co. v. FTC*, 327 U.S. 608, 613 (1946).

6. FINAL ORDER

Paragraph I of the order sets forth the applicable definitions. Paragraphs II and III of the order prohibit respondents from agreeing, *inter alia*, to provisions governing: fees, including minimum daily rates; indivisible daily rates; rates for nonworking days, including travel, briefing, and rest days; per diem rates or formulas; reimbursement for travel expenses; standard cancellation clauses; recording fees; commissions; and the recruitment of interpreters based on whether or not they are permanently employed. The order applies only to conduct that would affect activities in the United States.

Paragraph IV of the order requires respondents to discipline individuals who at their meetings engage in discussions about fees applicable in the United States. The required discipline includes warning a participant or participants to refrain from engaging in the prohibited discussions and, if the warning is not effective, removing the person or persons from the meeting. If such disciplinary actions prove unsuccessful, the meeting must be adjourned.

Paragraph V of the order clarifies that nothing in our order prohibits respondents from performing under or entering into any negotiated agreement, as that term is defined in Paragraph I (L). Paragraph VI requires respondents to amend, *inter alia*, AIIC's Basic Texts to conform to the requirements of the order. Because of the longstanding nature of many of respondents' price-related restraints, Paragraph VIII requires respondents to distribute to their members, officers, directors, and affiliates an announcement about the Commission's action, a copy of the complaint and order, and any of respondents' documents that are amended pursuant to the order.

Paragraph VII of the order is a "fencing-in" provision and requires respondents for a period of five years to eliminate from their Basic Texts and standard form contracts provisions related to certain payments and travel arrangements. In light of the longstanding and comprehensive nature of respondents' price-fixing agreements, fencing-in relief is particularly warranted. As the Supreme Court has observed, "[t]he purpose of relief in an antitrust case is 'so far as practicable, [to] cure the ill effects of the illegal conduct, and assure the public freedom from its continuance.'" *United States v. Glaxo Group Ltd.*, 410 U.S. 52, 64 (1973) (quoting *United States v. United States Gypsum Co.*, 340 U.S. 76, 88 (1950)). The Court further found in *National Society of Professional Engineers* that a district court is "empowered to fashion appropriate restraints on . . . future activities both to avoid a recurrence of the violation and to eliminate its consequences," even if that entails "curtail[ing] the exercise of liberties that [respondent] might otherwise enjoy." 435 U.S. at 697. The same is true when the Commission,

as opposed to a federal court, fashions the remedial order. *See FTC v. National Lead Co.*, 352 U.S. 419 (1957).

Thus, the Commission can proscribe unlawful activity that the respondent has not yet undertaken, as well as activity that would itself be considered lawful but for the fact that it threatens to perpetuate or revive a violation of law. For example, in *National Lead Co.*, the Commission prohibited the individual adoption of zoned pricing plans because it had found *per se* unlawful horizontal collusion on zoned pricing plans. The Court upheld a temporary and conditional prohibition of individually adopted zoned pricing plans aimed at "creating a breathing spell during which independent pricing might be established without the hang-over of the long-existing pattern of collusion." 352 U.S. at 425. Since the plan could easily be subject to unlawful manipulation and had been used for nearly 25 years, and since the respondents had been found to have violated the antitrust laws, the provision bore a reasonable relation to the underlying unlawful practice. *Id.* at 421, 429. In light of the temporary nature of this provision, the order was upheld.

Similarly, respondents here have engaged in a longstanding, comprehensive scheme to eliminate price competition on virtually all aspects of conference interpreting. The Commission finds that it is necessary to prohibit respondents, for a period of five years, from maintaining any provisions in their Basic Texts or form contracts, even if phrased in non-mandatory language, that relate to: payment in the event of cancellation of a contract; payment of commissions or a requirement that remuneration shall be paid net of any commissions; payment for travel, specification of specific modes of travel, connecting payment or tickets for travel to an interpreter's professional address, or specification of rest days for travel; payment for non-working days, travel days, or rest days; payment for a subsistence allowance while on travel; and payment for recordings of conference interpretation.

Finally, the order contains standard reporting and recordkeeping requirements that will allow the Commission to monitor respondents' compliance with the order, as well as a 20-year sunset provision.

7. CONCLUSION

The International Association of Conference Interpreters and its U.S. Region adopted a comprehensive price-fixing scheme that restrained competition among conference interpreters in the U.S. in violation of Section 5 of the FTC Act. We find that AIIC's contacts with the U.S. are related to this cause of action and are sufficient to allow the Commission to exercise specific personal jurisdiction over AIIC. Moreover, we find that respondents provide their members with

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