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Collusion Versus Collaboration: Getting It Right

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I. INTRODUCTION

Collaboration between firms in an industry can be beneficial to both firms and consumers in a market, insofar as firms are indeed only co-operating rather than colluding on anticompetitive outcomes. There is a fine line between the two but firms in industries where there are real benefits to be reaped from co-operation stand to make significant gains from knowing where that line is drawn. They could lose out disproportionately by not erring on the side of caution, whether knowingly or unknowingly.

There exists an array of collaborative practices that firms might engage in. Some of these are illegal *per se* whereas others can be employed legally, should firms choose to. What are the other forms of co-operation and when are they permissible? When might an industry, or a set of firms, be punishable by law for their collaborative actions? The answers to these questions may vary by sector and jurisdiction, but there are some general principles to be considered by firms, associations of firms, and competition authorities in order to make collaboration more of a success.

II. COLLABORATION VERSUS COLLUSION

Collaboration can be based on qualitative features of the market like industry expertise or quantitative ones such as prices or quantities of inputs or outputs. The former can lead to better outcomes for firms, and ultimately consumers. They can serve to enable firms to use their collective know-how to improve the quality of their products or services or make production processes more efficient. If these cost savings are passed on to consumers, consumers ultimately benefit; competition authorities are likely to support such ventures as a result. Agreements such as joint ventures, trade or professional associations, licensing agreements, and strategic alliances are examples of competitor collaborations that can lead to such efficiencies.[2]

Collaboration on quantitative features like prices or quantities (inputs or outputs) is more likely to lead to anticompetitive outcomes. This form of collaboration is much likely to be collusion, often serving to allow producers to increase profit shares by intervening with market forces, either setting prices or quantities artificially. The agreements that are considered illegal *per se* include price-fixing, market allocation, bid-rigging, and group boycotts.[3] Collaboration

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[2] "Antitrust guidelines for collaborations among competitors." *Available at: http://www.ftc.gov/system/files/documents/public_statements/300481/000407ftcdojguidelines.pdf*

[3] "Antitrust Issues for Associations". *Available at: http://www.venable.com/files/Event/b7b86e69-f9f8-45da-a89a-2cb0b93b71ac/Presentation/EventAttachment/2a498acf-33ab-4ebb-9131-2d8772aaa5c4/Antitrust_Issues_for_Associations.pdf*

does not even have to be led by firms themselves; associations that exist in the market might also provide an avenue for it. Trade associations are a case in point here.

The problematic issue here is that all types of collaboration occur in the same types of forums. Trade associations, for instance, provide platforms for discussions—whether on qualitative or quantitative market features. For a competition authority to ban the existence of any type of collaborative structure, therefore, lowers the probability of anticompetitive outcomes; but, in some cases, also strips consumers of any benefits that they might have seen otherwise.

In considering how collaboration differs from collusion, it is useful to think of form-based versus effects-based approaches. Form-based approaches give little attention to the effects of the relevant agreement on competition or consumers whereas effects-based approaches do.[4] Competition authorities are increasingly moving towards the use of the effects-based approaches. In considering the effects then, collaboration should be expected to lead to higher consumer welfare; collusion is unlikely to do so. Even if collusion leads to a better outcome for consumers, the point is that, *ex ante*, it was not intended that this outcome be achieved. In such a case, competition authorities may utilize form-based approaches to prevent collusive structures from causing detriment to the market, as they have the potential to do.

The law on such points varies by competition regime. Further, herein lies the dichotomy of interests—firms are interested in protecting and increasing their margins, whereas competition authorities are interested in ensuring that consumers are offered sufficient choices at competitive prices. In an effective competition regime, these two outcomes are achieved simultaneously. The right level and type of collaboration enables firms to flourish, but not at the expense of consumers.

III. DIFFERENCES IN GEOGRAPHIC MARKETS

Competition laws are drawn up differently across the world. In some regions of the world, even countries that share borders have very different approaches to competition law—if indeed they do have competition laws—making the issues far more complicated. A company might be investigated by different jurisdictions at the same time, each with differing timings for the conclusion of their cases and dissimilar laws enacted against the company. Such issues are particularly problematic for multinational firms which work across jurisdictions, as recent investigations into large firms like Google have illustrated.

In the U.S. guidelines, factors considered in analyzing competitive effects include:

- market power;
- limits on collaborators' independent decisions on price, output, or other competitively sensitive variables;
- the exclusionary nature of agreements;
- the extent of integration of assets and financial interests;

[4] "The Counterfactual Method in EU Competition Law: The Cornerstone of the Effects-Based Approach." *Available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1970917*

- whether the collaboration is reasonably necessary to achieve the claimed efficiencies and whether there are less restrictive ways of doing so;
- the extent to which competitively sensitive information is shared; and
- the duration of the collaboration.[5]

In the EU guidelines, Article 101 sets out how such agreements are to be analyzed, considering whether the agreement has the object or effect of restricting competition. Factors considered include:

- the probability of parties being able to raise prices or reduce output, quality, variety, or innovation; and
- whether the agreement makes coordination easier.

Further, such analysis is set in the contexts of how close competition is and relative market shares.[6]

Some countries have no competition laws in place, or have competition regimes in a stage of infancy. Here, developing countries have to trade off objectives of enhancing business-friendly frameworks to attract new businesses against constructing a competitive environment for consumers. Such objectives may not necessarily be compatible with that of their largest trading partners.

In such cases, the most reasonable platforms for discussion might be multilateral organisations. ASEAN (Association of Southeast Asian Nations), an organization that comprises ten countries in Southeast Asia, for instance, has committed to getting all their member countries to have competition laws in place by 2015. The organization has also been developing regional guidelines, establishing a network of authorities to discuss competition issues and encouraging capacity building.[7] Such a commitment helps in getting regions on the same page with regards to competition law, making enforcement easier.

IV. WHAT INVOLVED PARTIES COULD DO

Firms will gain the most by endeavoring to comprehend the tailored laws for their industry in the jurisdiction(s) they operate in. By including competition authorities in their industry-level discussions, they can obtain guidance at an early stage regarding their coordinated outcomes. Transparency will be central to ensuring that they stay on the right side of the law.

For instance, ABB—an automation company—sets out antitrust guidance notes. One of these is specifically tailored to "trade associations, professional associations and other gatherings."[8] It sets out a code of conduct for employees, a set of rules to follow, and a list of

[5] "Competitor collaborations: new EU guidelines and US law compared". *Available at: http://www.pepperlaw.com/pdfs/Sicalides_CompetitorCollaborations_02_2011.pdf*

[6] *Id.*

[7] "About the ASEAN Experts Group on Competition (AEGC)." *Available at: http://www.aseancompetition.org/aegc/about-asean-experts-group-competition-aegc*

[8] "Antitrust guidance note: Trade associations, professional associations and other industry gatherings". *Available at:*

recommended behaviors at trade association meetings. It is particularly useful to note the framework used by the company. Employees are required to get approval to attend trade association meetings, ensuring that there is an individual held responsible for dissemination of antitrust guidance beforehand. The individuals designated with this responsibility are known as Country Integrity Officers and are also charged with providing advice to employees who have been privy to commercially sensitive information.

Trade associations, on their part, can ensure that there is a list of topics that are off the table.[9] Joint negotiations regarding prices, payments, costs, and salaries sit in the first category that should be avoided; these are some of the quantitative features aforementioned. Business strategies, tactics, and reactions to public policies are some qualitative topics that should be steered clear of. Finally, information-sharing to avoid includes discussions of how a market should be shared—be that by customer, geography, or product type.

Competition authorities have a part to play in ensuring that the laws set out are transparent and easily accessible. When the laws change, they also have a role in making sure that firms, as well as industry associations, are kept abreast of the alterations. It is ultimately beneficial for both firms and authorities, in terms of costs avoided, to be on the same page. If, however, there is a high frequency of changes in the law which cause confusion, or if the means by which firms can learn of the changes is complicated, it is less likely that this will happen successfully.

The U.K.'s Competition and Markets Authority, for instance, has set out a helpful list of behaviors that trade associations should avoid in a "60-second" summary. These include: (i) rules that prevent members from taking independent commercial decisions, (ii) allowing members to discuss sensitive information, and (iii) issuing formal or informal pricing or output recommendations to members, among others.[10] The simplicity of such guidance makes it accessible to a wide range of firms considering such associations.

V. CONCLUSION

Given improvements in the quantity and quality of data collected, as well as the electronic methods by which they are increasingly collected, collaboration is likely to become easier and more accessible to a wider range of firms and industries. Big data is an integral part of the future and there is certainly a market in data itself. This movement presents a real opportunity for firms to collaborate in a way that is beneficial to them, consumers, and competition authorities.

However, it will not only remain important in a static setting that the lines of the law be drawn clearly for firms to understand them; but a large challenge also lies in conforming to the laws even as they change or become even more complex in nature. Here, continued collaboration between firms and competition authorities will be crucial.

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http://www02.abb.com/global/abbzh/abbzh252.nsf/0/b750f9a433cca8b4c12579eb004cae2b/$file/antitrust+guidance+note_trade+associations.pdf

[9] Antitrust for Trade Associations. *Available at: http://apps.americanbar.org/antitrust/at-committees/at-yld/ppt/AntitrustforTradeAssociations.ppt*

[10] "Do's and Don'ts for trade associations, CMA." *Available at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/358304/Trade_Association_dos_and_don_ts.pdf*