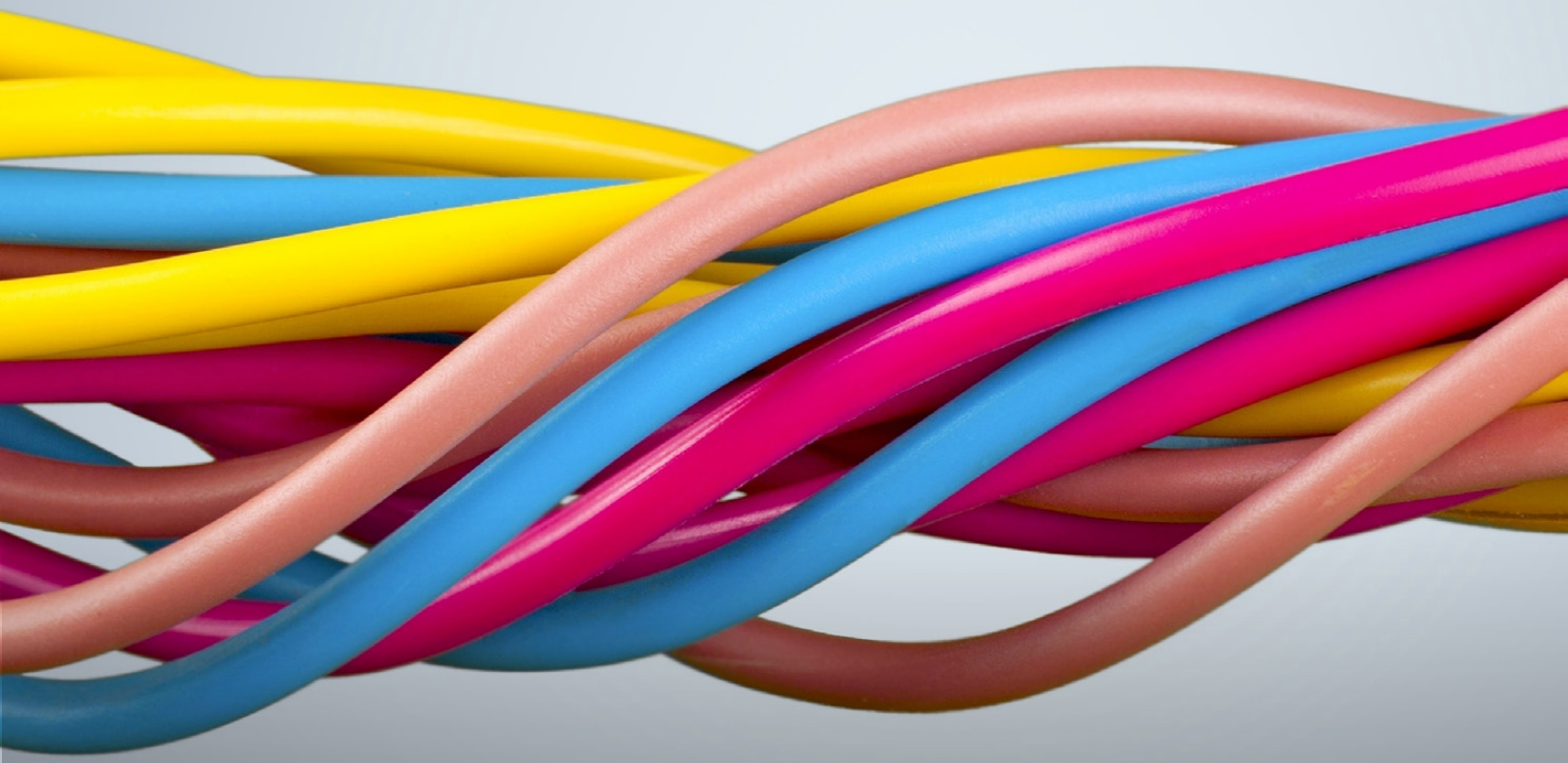
PROFESSIONAL AND TRADE ASSOCIATIONS BACK ON THE ANTITRUST FRONT



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I. INTRODUCTION

CPI's Antitrust Chronicle on "Collaboration between Competitors" brought to mind several instances through which rivals may collaborate, often licitly. The classical joint-ventures, IP joint agreements and patent pools, standard-setting organizations, sharing of essential infrastructures, consortia to participate in public procurements, export agreements and the recently extensively discussed crisis cooperation agreements, due to the COVID-19 pandemic.

This article focuses on another type of collaboration between competitors. Curiously, many classical antitrust handbooks devote little space to discussing them. But the fact is that they are everywhere and have widespread competition implications in a variety of markets. They are important for a series of non-competition related reasons. They can foster competition but can also generate several types of antitrust concerns. In fact, in several jurisdictions, if one picks a convicted cartel at random, there is a very good chance that one of its kind will be somehow involved.

They are the humble but omnipresent trade and professional associations, that are now being brought back to the antitrust front of debates, due to rising competition concerns in the labor market and to the European Commission's recent announcement in favor of more bargaining power to liberal professionals and self-employed individuals (especially the ones connected to digital markets).

Trade and professional associations can be extremely useful and sometimes essential to ensure competitive markets. When playing this role, some incredibly interesting configurations of collaborative agreements and resulting competition policy discussions arise. Self-regulation by non-public agents, pro-competitive standard setting organizations, elimination of hazardous information asymmetries, private fostering of market development and joint lobbying for better legislation and regulation that, in many cases, are highly beneficial.

Nonetheless, theory and experience show that, if not properly managed, trade and professional associations can be one of the most prolific sources of antitrust violations (or debates), directly or indirectly. They often play a role, sometimes auxiliary and sometimes central, in cartel behavior. At the very least, they can encourage and facilitate the exchange of sensitive information between competitors, a difficult and increasingly important antitrust theme. Boycotts are a common (and classical) antitrust debate arising from such associations. Also, in recent times, the development of technologies that can generate tacit coordination between rivals, possibly employed within associations, has also been taking a central stage in competition policy debates.

Finally, discussions get even more complex when one realizes that professional associations are one of the few (if not only) cases in which antitrust law – always so rigid against rivals coordinating output, prices and market allocation – is willing to sometimes open an exception in favor of countervailing power represented by these joint unions of smaller players against companies' market power.

The topic of countervailing and bargaining power by professional associations gets greater importance as discussions of monopsony and oligopsony effects over the labor market become one of the central debates in current antitrust.[2]

Moreover, the theme of bargaining power has recently regained attention after the European Commission launched a public consultation on the Digital Services Act Package, that contains a section on "self-employed individuals and platforms." According to Executive Vice-President Margrethe Vestager, "we are launching a process to ensure that those who need to can participate in collective bargaining without the fear of breaking EU competition rules."[3]

Almost all of the above-mentioned discussions are grounds for controversy or gray areas within antitrust law and practice. In this sense, although trade and professional associations are one of the most ancient institutions of capitalism, dating as far back as the medieval guilds that started shaping commerce and commercial law as is,[4] competition law often still seems not to be quite sure what to make of them.

II. THE APPLICATION OF COMPETITION LAW TOWARDS TRADE AND PROFESSIONAL ASSOCIATIONS

In several countries, freedom of association is protected as a fundamental right, for a myriad of reasons that go beyond competition, although it is also true that its existence as a means of protecting workers and individuals in general against concentrated market power is at the very core of trade and professional associations. Antitrust enforcement should not, and usually does not, forget that.

Divergences regarding the theme of competition law applied to trade and professional associations, however, start at their very meaning and scope. This often goes unnoticed in most discussions.[5]

In some jurisdictions, certain types of workers associations and, more specifically, certain types of behaviors carried by such associations are to a certain extent exempt from antitrust law. It is the case, for example, of agreements between workers with the objective of ensuring adequate employment conditions. Also, when unions of workers decide to go on strike, even if the purpose is to obtain better wages (meaning the price of their work, which is usually a sensitive variable for antitrust economics), such actions are usually governed by labor law, and not competition law.[6]

Having said that, law and experience show that this tolerance demonstrated by antitrust law is narrow and does not seem to apply equally when it comes to associations of liberal or self-employed professionals. On the contrary. There is therefore an explicit or implicit differentiation between classic unions and associations of liberal professionals. Also, conducts such as naked price fixing and market allocation, always so very dear to antitrust, also seem to be too much for several competition authorities to ignore, in any instance.

Therefore, the very notion of what exactly are the differences between unions, cooperatives, professional and trade associations for antitrust purposes is often unclear, as is the conclusion over which of them competition laws should or should not apply, and under which circumstances. This may change from jurisdiction to jurisdiction, but it is fair to say that the answers to these questions are many times unclear even within many countries' internal law and jurisprudence.

2 OECD, *Competition in labour markets*. 2020, available at http://www.oecd.org/daf/competition/competition-in-labour-markets-2020.pdf.

3 EC Addresses The Issue Of Collective Bargaining For The Self-Employed, *Competition Policy International*, July 3 2020, available at https://www.competitionpolicyinternational.com/ec-address-the-issue-og-collective-bargaining-for-the-self-employed/.

4 ANTUNES, José A. Engrácia. *Os grupos de sociedades: estrutura e organização jurídica da empresa plurissocietária*. 2. ed. ver. atual. Coimbra: Livraria Almeida, 2002.

5 The OECD attempts an honorable effort to try and homogenize these discussions, but several questions remain open. See OECD, *Trade associations*, 2007, available at http://www.oecd.org/regreform/sectors/41646059.pdf; and OECD *Competition in labour markets*, 2020, available at http://www.oecd.org/daf/competition/competition-in-labour-markets-2020.pdf.

6 OECD, *Competition in labour markets*, 2020, available at http://www.oecd.org/daf/competition/competition-in-labour-markets-2020.pdf.

In general, however, one can say that there seems to be greater tolerance by antitrust when in face of workers' unions than associations of trade, self-employed or liberal professionals. Also, there is evidently greater tolerance to allow conducts and agreements that are not so close to antitrust greater evils (price fixing, market division and the likes). Nonetheless, although in many cases the rule of reason usually applies, trade and professional associations are often target of antitrust prosecution for less hard-core behaviors such as exchange of sensitive information and market foreclosure.

III. PRO-COMPETITIVE ASPECTS OF TRADE AND PROFESSIONAL ASSOCIATIONS

Trade and professional associations encompass many features that have positive effects over competition, directly or indirectly.

Education and training of its members and collaborators. Education and training increase the quality of products and services and foster innovation.

Diminishing information asymmetries. Although the unproper exchange of sensitive information within associations can lead to antitrust issues, economics and competition literature recognize that the wide dissemination of information throughout the market is an important booster of competition and entry.[7]

Information to consumers. The dissemination of market information is particularly pro-competitive when it reaches consumers and helps them chose. Many trade and professional associations play an important role in spreading useful information to consumers.

Self-regulation and standardization. This can be an anticompetitive feature if not well managed, but if properly directed it provides a more levelled playing field that may increase competition, reduce costs and provide safety and better services to consumers.

Pro-competitive lobbying. Although lobbying can also be an anti-competitive tool, it is true that in many instances it represents a legitimate and positive way for trade and professional associations to call for better legislation and regulation that applies to the market in general, as a means to pro-competitively level trade practices and standards, prevent asymmetric regulation, diminish general industry costs and foster public policies that benefit players, workers and consumers.

Market development. Either by education and training, lobbying, funding, self-regulation, spreading information and other means, trade and professional associations can be a powerful fosterer of development within its target market and also upstream and downstream production chains.

Countervailing power. From a competition law perspective, this is perhaps the central role of trade and professional associations, and the reason why antitrust is willing to ponder in face of behaviors that would possibly not be allowed if arising from regular companies. Rendering bargaining power to individual professionals and small businesses of self-employed players against companies that hold much larger market power is a key feature and objective of laws that protect trade and professional associations. The right countervailing balance should, in theory, lead to pro-competitive results by diminishing companies' ability to abuse their market power. We will discuss the issue of such balance later in this article.

7 OECD, *Information exchanges between competitors under competition law*, 2010; MOTTA. Massimo. *Competition policy: theory and practice*. New York: Cambridge University Press, 2004.

IV. POSSIBLE ANTICOMPETITIVE ASPECTS OF TRADE ASSOCIATIONS

A. Cartels

There is no doubt that trade and professional associations can offer a fertile ground for hard-core cartel behavior. They can simply play a passive scenario where competitors sometimes meet, which by itself is not illegal. But experience shows that in some cases these encounters end up leading to illicit coordination of prices, output, market allocation and so on. In certain situations, however, the associations themselves can play a much more active role in encouraging, designing and sustaining a cartel between its associated members, who are competitors. Practice shows that these cartels may include the whole spectrum of naked coordinated behaviors: price fixing, agreements to restrain or control output, allocation of costumers, division of geographical areas of trade and bid-rigging.

Take for example a jurisdiction such as Brazil. Over the past several years, the competition authority has trialed (and continues to trial) several cases in which cartel behavior is directly or indirectly associated with trade and professional associations.

In earlier years, prosecuted cases included examples of a profound use of associations in hard-core cartels, such as the *Sand Cartel*[8] and the *Gravel Cartel*,[9] in which involved trade associations served as a place for meeting, the designer of cartel rules and handbooks, training for the cartelists employees (on the cartel rules), holder of records of client division portfolios, hiring of consultants to establish the cartel prices and output, inspector against deviations from the agreement and so on. Cases such as these led to per se convictions in which the trade associations were also condemned for influencing and aiding the cartel. Although cartels with such hard features are appearing less and less, still a large part of cartels discovered in Brazil over the past years often had some type of involvement of trade associations.

Another prolific set of conducts are related to the establishment of price tables by professional associations, such as medical doctors,[10] accountants,[11] photographers,[12] lawyers,[13] real estate brokers,[14] and others. Unlike a usual hard-core cartel price fixing, these price tables were not hidden nor discussed in secrecy. On the contrary, in most of these cases the tables were advertised and professionals claimed that they had the right to establish minimum prices, in order to avoid the "deterioration" of their profession. Nonetheless, in the majority of cases the Brazilian antitrust authority, as in most similar cases in other jurisdictions, condemned the conduct considering it to be an infringement on competition law. The trial of some of these cases, however, did involve lively debates on whether these should be considered per se violations, or if the rule of reason should apply and call for verification of factors such as market power and whether the associated professionals were actually compelled to follow the price tables or not. Jurisprudence against such behaviors has in general been rigorous, and in most countries the per se rule applies[15], although the application of the rule or reason (or a softened version of the per se rule) in some jurisdictions shows that the competition law applied over professional associations is indeed far from a clear and uniform approach, even in face of such a sensitive variable as pricing.

Regardless of the approach, however, years of relatively heavy enforcement against cartels, price tables and the participation of trade and professional associations in these illicit agreements seem to have had some compliance effect. As stated by the OECD, "naked price fixing or customer allocation conspiracies orchestrated by a trade association are becoming rarer."[16] In its stead, the focus of concerns has shifted to conducts such as exchange of sensitive information that may lead to coordinate behavior and to restrictions that may affect entry or the ability of market players to compete freely.

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8 PA n. 08012.000283/2006-66, CADE.

9 PA n. 08012.002127/2002-14, CADE.

10 PA nº 08012.003893/2009-64, CADE.

11 IA nº 08700.006673/2015-82/PA nº 08012.000643/2010-14, CADE.

12 IA nº 08700.002566/2017-47/PA nº 08700.006965/2013-53, CADE.

13 PA nº 08012.006641/2005-63, CADE.

14 PA nº 08700.004974/2015-71, CADE.

15 OECD, *Trade associations*, 2007.

16 OECD. *Trade associations*. 2007.

B. Exchange of Sensitive Information

Exchange of sensitive information between competitors has been a hot topic in antitrust,[17] and trade and professional associations can offer real opportunities for it to happen.

Once again, the association can merely play a passive and non-illicit role of rendering competitors an opportunity to legitimately meet, and these meetings can then turn into a channel for the exchange of communications. Nonetheless, trade and professional associations can also take part in actively influencing and structuring these communications, by gathering sensitive market data from competitors and other agents, and by sharing this information among them.

Evidently, not every dissemination of information is problematic. On the contrary, as previously mentioned, lowering information asymmetries can be a powerful pro-competitive tool.

However, certain types of information obtained from competitors can in theory both encourage and allow for anticompetitive conducts, either by permitting that a rival unilaterally positions its strategies against or in coordination with its competitor's practices, or by facilitating collusive strategies by to two or more competitors, sometimes even tacitly.

The effectiveness of such anticompetitive results depends on the type of information available (for instance, confidential data on output and prices can be especially detrimental, according to applicable literature[18]), how recent or outdated it is, and whether it is detailed data or too aggregated to be made useful for anticompetitive purposes.[19]

The recipients of the information are particularly important. Data that is widespread to all rivals, but also potential entrants and consumers, can generate several pro-competitive results. On the other hand, sensitive data that is privately exchanged between selected competitors may result in several of the negative outcomes described, without its potential benefits to competition. If misused, a trade or professional association may precisely become a vessel for this type of information exchange.

C. Market Foreclosure and Restrictions to Competition

Although tools such as self-regulation and standardization by trade and professional associations can be pro-competitive, in many cases they may be used in an opposite direction, serving as a means to restrict competition in the market and often to deter the entry of new rivals. As stated by the OECD, the rule of reason usually applies:

> Both the US and the European approaches are founded on the acknowledgment that self-regulation by professional associations can be pro-competitive as long as there is a plausible efficiency-enhancing explanation for the restraint. (…) The restraint can be found unlawful if it is likely to raise price and restrict output in a manner that would be harmful to consumer welfare."[20]

Membership rules and access restrictions can sometimes be a powerful deterrent of competition, when becoming a member or receiving some kind of certification is a necessary or relevant variable for a player to practice in that particular market. This happens to be the case in many professions and trade practices, and therefore is a common anticompetitive use of these associations when such powers are used to impair new entries or avoid free competition. In 2015, for example, the U.S. Supreme Court, in FTC v. North Carolina Dental Assn, decided against a rule promulgated by a dentists' professional association which declared the service of teeth whitening to be a part of the practice of dentistry, with the result that only licensed dentists could practice it.

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17 FRADE, Eduardo; CARVALHO & Vinicius Marques de. New Approaches to Cartel Enforcement and Spillover Effects in Brazil: Exchange of Information, Hub and Spoke Agreements, Algorithms, and Anti-Poaching Agreements, *Competition Policy International*, November 2019, available at https://www.competitionpolicyinternational.com/new-approaches-to-cartel-enforcement-and-spillover-effects-in-brazil-exchange-of-information-hub-and-spoke-agreements-algorithms-and-anti-poaching-agreements/.

18 MOTTA. Massimo. *Competition policy: theory and practice*. New York: Cambridge University Press, 2004.

19 FRADE, Eduardo. *O direito societário e a estruturação do poder econômico*. São Paulo: Singular, 2016, p. 124.

20 OECD. *Trade associations*. 2007.

Self-regulation of technical aspects of the involved products or services can also be used as a competitive deterrent. For example, the design of industry technical requirements by the trade or professional association in a way that excludes potential competitors. In Brazil, for instance, the competition authority investigated claims that the standardization of certain technical requirements of steel rebars by a domestic association prevented Chinese products to enter the country.[21] Alleged unjustified technical requirements were also discussed as antitrust violations imposed by an association of gas heaters manufacturers in Radiant Burners, Inc v. People Gas Light & Coke Co, in the U.S.[22]

Restrictions on marketing and advertisement are also a common debate, that can be justified but also sometimes anticompetitive.[23]

D. Boycotts

Trade and professional associations are often the maestro when it comes to orchestrating boycotts against buyers (or sellers) that fail to comply with the demands of the associated professionals.

Once more, this is a hard subject in antitrust law and practice. The divergence exposed by Robert Bork over 40 years ago still seems to remain somewhat alive:

> According to conventional wisdom, boycotts (or agreements among competitors to refuse to deal) are illegal per se. But that proposition is easily shown to be false. Many agreements not to deal with others are perfectly lawful, and will certainly remain so, because they are indispensable to the conduct of the businesses involved.[24]

Concerted refusals to deal may be very rigorously assessed by antitrust authorities, especially if used as a means to impose coordinated prices, but in several cases there is also relatively large room to discuss efficiencies and justifications.[25] Such tolerance might be particularly applicable to trade and professional associations when enforcing efficient self-regulation[26] and eventually even in the context of collective bargaining against larger market power, although limitations apply.

The Brazilian case is an interesting one in this regard as well. CADE has trialed several cases of medical professional associations over the past years, in which doctors collectively negotiated with service acquirers, most of them with larger market power, such as health insurance companies.[27] In most of these cases the medical associations were convicted for antitrust violations, because they held a large percentage of local doctors, aimed at imposing minimum prices and, as a tool to enforce its will, would apply concerted boycotts against companies that refused to accept it.

On the one hand, this goes to show that antitrust authorities are usually rigorous when it comes to the imposition of coordinated prices by professional associations. On the other hand, most of these cases were not framed as per se violations, and the antitrust discussions usually involved heavy debate on the associations actual market power and potential positive effects of bargaining power against larger companies. The cases were only convicted because the authority found that the professional associations had crossed the line. What initially constituted numerous independent competing doctors fighting its way alone against companies' significant buyer power became, through the articulation of a professional association, a unity that often accounted for all professionals of a certain medical specialty, completely inversing the game and enforcing monopoly power over companies. In the end of the day, the central debate focuses on the optimum balance of countervailing power.

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21 PA nº 08012.001594/2011-18, CADE.

22 364 U.S. 656, 81 S.Ct. 365 (1961).

23 For example: California Dental Association v. FTC, 119 S.Ct. 1604 (1999).

24 BORK, Robert H. *The antitrust paradox: a policy at war with itself*. New Yorl: The Free Press, 1978.

25 HOVENKAMP, Herbert. *Federal antitrust policy: the law of competition and its practice*. Third Edition: Thomson West, 2005, pp. 226-233.

26 HOVENKAMP. *Ibid*, p. 234.

27 The latest trialed case when this article was wrote, in September 2020, was PA nº 08012.003893/2009-64, CADE.

V. FINAL CONSIDERATIONS: THE DIFFICULT ISSUE OF BALANCE IN COUNTERVAILING POWER

The never-stopping pendulum of antitrust has recently pointed to concerns with the labor market and how monopolies and monopsonies have affected and perhaps may have deteriorated labor conditions and wages. The concern evidently assumes that individual workers and professionals might be hurt by market power concentrated in large corporations. One of the possible considered solutions is to allow and foster countervailing power.[28]

This seems to be exactly the European Commission's plan, for example, in the launching of "a process to ensure that those who need to can participate in collective bargaining without the fear of breaking EU competition rules," as stated by Margrethe Vestager in the context of the public consultation on the Digital Services Act Package, that contains a section on "self-employed individuals and platforms."[29]

When it comes to bargaining power, trade and professional associations are usually a central player, and therefore antitrust discussions surrounding them become once more increasingly important.

As this article shows, there are several difficult discussions involving antitrust enforcement, competition policy and the use of trade and professional associations. In the end, several of these discussions directly or indirectly have to do with finding the right balance between large market power on the one side and countervailing power on the other side – an equation that is very hard to solve –, and at the same time trying to take the positive outcomes provided by these associations, leaving its anticompetitive implications out.

28 HOVENKAMP, Herbert. *Note on Competition Policy and Labour Markets.* OECD, June 2019, available at https://one.oecd.org/document/DAF/COMP/WD(2019)67/en/pdf; OECD. *Competition in labour markets.* 2020, available at http://www.oecd.org/daf/competition/competition-in-labour-markets-2020.pdf.

29 EC Addresses The Issue Of Collective Bargaining For The Self-Employed, *Competition Policy International*, July 3 2020, available at https://www.competitionpolicyinternational.com/ec-address-the-issue-og-collective-bargaining-for-the-self-employed/.

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