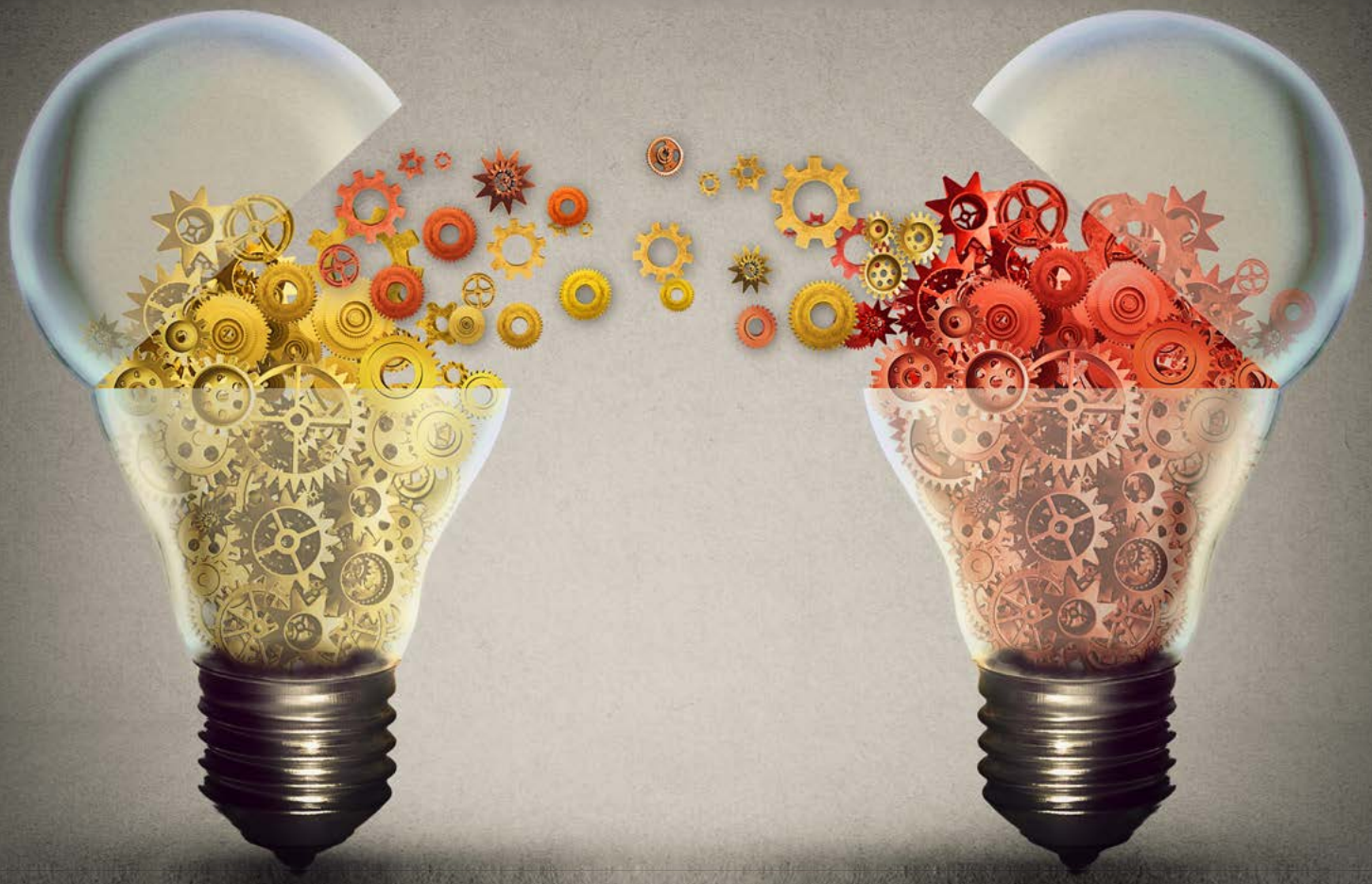
Antitrust Chronicle

FALL 2015, VOLUME 1, NUMBER 1



INFORMATION SHARING & ANTITRUST

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CPI Antitrust Chronicle
Nov 2014 (1)

"But the Bridge Will Fall" is Not a Valid Defense to an Antitrust Lawsuit

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"But the Bridge Will Fall" is Not a Valid Defense to an Antitrust Lawsuit

Jarod Bona[1]

I. INTRODUCTION

People see the world through their own lens. Spending eight or more hours a day engrossed in a profession will, inevitably, alter your perspective.

To illustrate, someone seeking a solution to, let's say, "general fatigue," will receive different answers depending upon whether they visit (1) a medical doctor, (2) a mental-health professional, (3) a fitness trainer, or (4) a nutritionist. Each of these professionals, separately, when they encounter this same symptom sees a problem to be solved through their practice's particular methods. They see the solution of the problem of general fatigue through their own lens, engrained from perhaps years of daily practice.

At the same time, it is reassuring for people to believe that they participate in a noble profession that really helps people. And they get to know others within the profession socially and probably develop favorable views of them as well.

So when these professionals get together for trade association conferences, meetings, or other events, they likely pat each other on the back and glow in their own importance. This isn't necessarily bad; it is human. It certainly happens with lawyers, which perhaps shows that we are human too.

But like many all-too-human characteristics that are usually harmless, this bias toward one's profession has a dark side when sprinkled with power.

When members of a profession obtain power—either through government privilege or massive horizontal collaboration—they will likely abuse it. They can't help themselves. They see the world a certain way and will exercise their power in that direction.

These professionals will typically exercise their power to the detriment of customers, clients, or patients and to the other professions that compete with them to serve those individuals.

In fact, this term the U.S. Supreme Court will decide a case that implicates these concerns: *North Carolina State Board of Dental Examiners v. Federal Trade Commission*.[2] In that case, the U.S. Federal Trade Commission ("FTC") accused a state-sponsored board made up of practicing dentists of violating the antitrust laws by trying to stop dentist competitors from engaging in teeth-whitening. For any number of safety and consumer-protection rationales—or their own

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[2] *North Carolina State Board of Dental Examiners v. Federal Trade Commission*, No. 13-534.

self-interest—the powerful group of dentists decided that only dentists in North Carolina should be able to whiten people's teeth. It may or may not have been a coincidence that dentists were the highest-price providers of this service and that expunging competition would likely help to keep these high prices.

The issue in this case is not whether the horizontal group conduct is anticompetitive, but whether a state-action exemption applies because the dental board has state characteristics.

This, of course, isn't the first time that a group of professionals have banded together and exercised power premised upon the superiority of their profession. The great Adam Smith, in his famous book, *An Inquiry Into the Nature and Causes of the Wealth of Nations*, remarked in 1776 that "People of the same trade seldom meet together, even for merriment and diversion, but the conversation ends in a conspiracy against the public, or in some contrivance to raise prices."[3]

The Supreme Court addressed such a group in 1978 in the great case of *National Society of Professional Engineers v. United States*.[4] That case involved an association of engineers that believed that its members were above competing on price. Indeed, the group forbids its engineers from doing so.

Here's why:

> it would be cheaper and easier for an engineer "to design and specify inefficient and unnecessarily expensive structures and methods of construction." Accordingly, competitive pressure to offer engineering services at the lowest possible price would adversely affect the quality of engineering. Moreover, the practice of awarding engineering contracts to the lowest bidder, regardless of quality, would be dangerous to the public health, safety, and welfare.[5]

Thus, these engineers seemed to believe that price competition would cause bridges to collapse. The Supreme Court, however, easily disposed of this defense.

The *Professional Engineers* Court explained that the federal antitrust laws require a system of competition: "The Sherman Act reflects a legislative judgment that ultimately competition will produce not only lower prices, but also better goods and services."[6] Justice John Paul Stevens, for the majority, continued: "In this case, we are presented with an agreement among competitors to refuse to discuss prices with potential customers until after negotiations have resulted in the initial selection of an engineer."[7] Here, "no elaborate industry analysis is required to demonstrate the anticompetitive character of such an agreement."[8]

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[3] ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS, Book 1, Chapter X, Part II, p. 152 (R. H. Campbell & A. S. Skinner, eds. 2 vols. Glasgow Edition of the Works and Correspondence of Adam Smith 2, 1976).

[4] *National Society of Professional Engineers v. United States*, 435 U.S. 679 (1978).

[5] *Id.* at 684-85.

[6] *Id.* at 695.

[7] *Id.* at 692.

[8] *Id.*

The group's restriction on competitive bidding "prevents all customers from making price comparisons in the initial selection of an engineer, and imposes the Society's views of the costs and benefits of competition on the entire marketplace."[9]

Justice Stevens explained that the engineers' attempt to justify their restraint "on the basis of the potential threat that competition poses to the public safety and the ethics of its profession is nothing less than a frontal assault on the basic policy of the Sherman Act."[10]

An antitrust case is not the place to debate the merits of competition. Through the Sherman Act, Clayton Act, and other federal legislation, Congress has already determined that we are ordering our economy through a system of competition: "The assumption that competition is the best method of allocating resources in a free market recognizes that all elements of a bargain—quality, service, safety, and durability—and not just the immediate cost, are favorably affected by the free opportunity to select among alternative offers."[11] Notably, the Court explained, "the statutory policy precludes inquiry into the question whether competition is good or bad."[12]

Although decided almost 41 years ago, the case is just as relevant today. Lawyers, medical doctors, dentists, and a whole host of professions have a similar perspective. Everyone sees the world through their own lens and has an exaggerated idea of their profession's importance in the world.

In support of this perspective, these professionals form groups and try to get away with clearly anticompetitive restraints. The industry seeks to decide when to suspend competition. These groups will argue that they are above the federal antitrust laws because "they," in particular, are very important and without these restraints, the world, or at least a bridge, will collapse. But that, as the Supreme Court in *Professional Society of Engineers* explained, is not a defense to an antitrust lawsuit.

[9] *Id.* at 695.
[10] *Id.*
[11] Id.
[12] Id. at 696.

CPI COMPETITION POLICY INTERNATIONAL

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Information Exchanges and Competition Law:
A Few Comparative Law Thoughts

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Information Exchanges and Competition Law: A Few Comparative Law Thoughts

Pedro Callol[1]

I. INTRODUCTION

Information exchanges between competitors have been an object of interest for competition authorities on both sides of the Atlantic for decades now; in the European Union since the 1970s with cases such as the *IFTRA Glass Containers* and later the *UK Tractor* information exchanges, and in the United States as far back as the 1920s with cases such as *Maple Flooring* or *American Column & Lumber*. Information exchanges between competitors have not only given rise to a considerable amount of cases, but also to interpretative notices by the respective competition authorities. The U.S. Federal Trade Commission ("FTC") and the Department of Justice ("DOJ") jointly issued in 2000 the *Antitrust Guidelines for Collaboration Among Competitors*,[2] and the European Commission issued in 2011 the *Guidelines on the Applicability of Article 101 of the Treaty on the Functioning of the European Union to Horizontal Cooperation Agreements*.[3]

In spite of this attention, the matter continues to generate considerable confusion in many instances, which may be due, among other things, to the fact that most information exchanges present mixed features and can rarely be regarded as clear-cut. Information exchanges that increase transparency, for instance, are in some circumstances pro-competitive, because they may enable purchasers to compare offers more easily, or may enable the formation of *ad hoc* offers suitable for individual clients—both of which should be viewed positively. In other circumstances, however, arrangements that enable transparency may also be a device for collusion, enabling monitoring and eventual punishment of deviating offers. A single information exchange that under some circumstances is pro-competitive may look anticompetitive in other circumstances and, what is often the case, the same information exchange under the same circumstances may present both pro-competitive and anticompetitive features.

Grey is most often the color of information exchanges.

II. THE COMPETITIVE ASSESSMENT OF INFORMATION EXCHANGES.

The competitive assessment of information exchanges requires sound business and legal judgment based on precedent, along with a careful consideration of the business purpose of the information exchange. Economics is undoubtedly a key tool in the analysis of many of these agreements. Very often, a proposed information exchange scheme will not look exactly the same as anything on record. Consequently, the assessment of information exchanges is generally a

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[2] *Available at* http://www.ftc.gov/sites/default/files/documents/public_events/joint-venture-hearings-antitrust-guidelines-collaboration-among-competitors/ftcdojguidelines-2.pdf.

[3] OJ 2011/C 11/01, *available at* http://europa.eu/legislation_summaries/competition/firms/l26062_en.htm.

case-by-case exercise, with the difficulty that there are few "hard" rules that provide the "absolute" certainty that jurists so often long for.

Notwithstanding the foregoing, there are of course a few rules of thumb that may be extracted from the interpretative notices of the European Commission, the DOJ and the FTC's joint Guidelines, as well as from the considerable body of case law from the various competition authorities. In summary:

1. Information exchanges are generally not *per se* forbidden and will be considered under the rule of reason under U.S. law,[4] even though sometimes the line between information exchange (for instance on future prices) and price-fixing itself may be very thin. In some instances information exchanges between competitors will be looked at harshly and be condemned under Sec. 1 of the Sherman Act; in particular, where "the sharing of information related to a market in which the collaboration operates or in which the participants are actual or potential competitors may increase the likelihood of collusion on matters such as price, output or other competitively sensitive variables."[5] Ultimately, information exchanges related to prices that are intimately associated with price-fixing may be dealt with as *per se* illegal (conceptually it may be difficult in those instances to delineate one from the other).
2. Under EU competition law, an information exchange "can only be addressed under Article 101 if it establishes or is part of an agreement, a concerted practice, or a decision by an association of undertakings."[6] This approach echoes the principle that the information exchange will be dealt with as part of price-fixing (or as a restriction by object[7]) if its purpose and effect make it difficult to separate the information exchange itself from a price-fixing scheme. The view that this type of information sharing is anticompetitive *per se* or "by object" is confirmed by the more recent Commission Guidance on restrictions of competition "by object" for the purposes of defining which agreements may benefit from the *De Minimis* Notice.[8]
3. Effects of information sharing agreements must be assessed on a case-by-case basis with the test here being one of likelihood. It is more likely that an information exchange will be anticompetitive if conditions are in place for easy coordination; in particular, if:
    a) the market where the arrangement takes place is more transparent than not;
    b) the market is more concentrated than not;
    c) the market is non-complex, more stable, and symmetric (*e.g.*, commodity markets).
    d) the market is oligopolistic; and

[4] *Maple Flooring Mfrs. Association v. US* (1925).
[5] U.S. FTC & DOJ Collaboration Guidelines, *supra* note 2, at point 3.31.
[6] Commission Horizontal Guidelines, *supra* note 3, at point 60.
[7] *See* point 72 of the Guidelines, *Id.*
[8] C (214) 4136 final.

e) the companies are homogeneous in terms of costs, demand, market shares, product range, capacities, etc.

4. Regarding the nature of the data, the following categorizations drawn from the case law, and as codified in the Commission Horizontal Guidelines,[9] are helpful in the assessment of which information exchanges are more likely to fall foul of Article 101:

   a) Sharing of strategic data is more likely to give rise to concerns. Strategic data include prices and price increases, discounts, rebates, customer lists, production costs, quantities, turnovers, sales, capacities, qualities, marketing plans, etc.

   b) Market coverage of the information exchange should be sufficiently narrow, enabling other competitors not participating in the information exchange to constrain any anticompetitive effects of the information exchange. The theory here works very much like with cartels, so that a cartel covering only a small portion of the market could arguably have no effects because that cartel would be easily disciplined by competitors that are not members of the cartel. In Europe at least, however, the risk is that regardless of the effects this is to be treated as a *per se* or by object infringement anyway (without prejudice to the recent ECJ Judgment in *Cartes Bancaires*, commented on below).

   c) Aggregated information, provided the aggregation does not enable the inference of individualized companies' data, is not likely to be anticompetitive.

   d) The age of the data is relevant; exchange of historic information is not problematic. What data is to be considered as being historic is a matter for consideration on a case-by-case basis as it depends on the relevant market at hand.

   e) Exchange of genuinely public information (i.e., information that is equally accessible, in terms of access costs, to all competitors and customers alike) does not pose an issue.

5. Even when information exchanges take place in markets and regard matters likely to be problematic in view of the above, justifications may be available for those exchanges where there are, for instance, important efficiency gains in the form of cost savings. For example, information exchanges on past conduct of consumers in the insurance or financial markets make it possible for companies to provide more individualized and tailored offers, which may be beneficial to consumers in parameters such as prices and other factors. Transaction cost economics may also sometimes justify information exchanges between competitors in markets characterized, for instance, by a great number of transactions and limited resources on the supply side. In all of these instances, of course, the business justification must be legitimate, any restrictions on competition must be proportionate to the ends sought, and consumers must ultimately share in the benefits of the information exchange.

[9] *Supra* note 3.

The above is a summary of principles generally applicable both under EU and U.S. law, which are hopefully useful to assess the legality of information exchanges between competitors. A general issue—at least in Europe—which has to an extent already been delineated, is that competition authorities sometimes tend to consider some kinds of information arrangements as forbidden by object. This possibility of prohibition by object may sometimes be used as a sort of excuse by competition authorities to arrive at rather quick conclusions, which may in turn feed concerns that not enough economic analysis is used when considering some of these arrangements.[10]

In this regard, the need for a careful weighing of the economics of the particular arrangement may also seem to be supported by the recent judgment of the European Court of Justice of September 11, 2014, *Groupement des Cartes Bancaires*,[11] which introduces a compelling case for taking account of the structure of the relevant market, the goods concerned, the goals sought by the horizontal arrangement, etc. When finding that a given conduct is restrictive "by object," competition authorities should go beyond the actual wording of the measure at hand in order to inquire to what extent that wording reveals a sufficient degree of harm that would enable them to characterize such a conduct as being anticompetitive by object. One must remain hopeful that the *Cartes Bancaires* case will be an enzyme for improvement in the review of grey conduct, such as some information exchanges, by competition authorities.

III. THE ROLE OF TRADE ASSOCIATIONS IN INFORMATION EXCHANGES AND THE SUBSIDIARY LIABILITY OF TRADE ASSOCIATION MEMBERS FOR ILLEGAL INFORMATION EXCHANGES FACILITATED BY THE ASSOCIATION

The role of trade associations in information exchanges has been extraordinarily important in recent years, with many trade associations playing a crucial part in collecting information and relaying it back to its members. The problem here arises when trade associations go beyond their role of facilitators of genuinely aggregated information and act as a means to share detailed information in a way that may actually or potentially affect competition. When this happens, information exchanges facilitated by associations are perceived as linked to the existence and functioning of cartels. In Spain, for instance, there have been quite a few cases involving illegal information exchanges facilitated by associations in the last few years (*e.g.*, paper envelopes, pallets, hair care products, movie distribution, and a currently ongoing investigation in the car sector where an illegal arrangement is allegedly said to have taken place).

The above-mentioned activity by trade associations as information exchange facilitators should be considered with caution. For practical purposes, most—if not all—significant companies doing business in Europe are members of one or many trade associations. Any disregard by association members of the collection and management of information by the associations to which they belong may cost those companies money in the form of subsidiary liability, which is foreseen both by EU and Spanish competition laws.

[10] *See*, for instance, P. Posada de la Concha, & S. Garcia de Frutos, S. *Intercambios de información entre competidores: actuaciones de la CNMC en un caso reciente*, ANUARIO DE LA COMPETENCIA 2014, Fundación ICO, Spain.

[11] Case C-67/13.

Indeed, the Spanish Competition Act foresees, with almost identical drafting to that of Article 23.4 of EC Regulation 1/2003,[12] that when a trade association is required to pay a fine: *(i)* it must first be requested from the association concerned; *(ii)* if the association is not solvent, it is obliged to call for contributions from its members to cover the amount of the fine; *(iii)* if the individual members do not contribute within the time limit set by the Competition Authority, the latter may claim the fine directly from any of the association members who held positions in the governing body of the association at the time the anticompetitive conduct took place; and *(iv)* if all else fails, the Competition Authority may claim the fine from any member of the association who is active in the market where the infringement occurred. However, members of the association need not pay when they show that they have not implemented the infringing decision of the association and either were not aware of its existence or had actively distanced themselves from it before the investigation on the matter started.

It is striking how few publicly available precedents there are on the application of the rules mentioned above relating to subsidiary liability of trade association members for conduct of an association; and how little insight those counted precedents provide, both at the European Union and national levels. Only in recent months has the Spanish NCA issued a decision applying this provision in connection with an anticompetitive conduct case (including information exchanges) by an association in a market related to a particular type of wine grape. There is also a decision related to a poliuretan foam cartel (including participation of a trade association), which only marginally touches on the point. In view of the applicable statute and the limited case law on the topic, our initial conclusions on this matter are as follows:

1. It is not necessary that the association be declared insolvent by a commercial court for the system of subsidiary liability to kick in. It is enough if the association unilaterally declares itself insolvent.
2. The wording of the relevant provisions indicates that the subsidiary liability by association members is a form of joint and several liability, so that in principle the National Competition Authority ("NCA") or the European Commission could choose to claim from a single member the entire amount of the fine (and leave it to that infringer to later make a claim against the other members of the association). But the provision also uses the word "may," indicating that the authorities may also choose to claim the amount of the fine from all or some of the association members and may do so equally or using a weighted system of some kind.
3. In the only precedent that deals with this matter specifically, the NCA seems quite ready to accept the non-participation/distancing defense from the association members. Successful defenses have included the following:
    a. Proof that an individual member ceased to be a member of the relevant association prior to the admitted facts.
    b. If the cessation as a member of the association took place subsequent to the petition by the member to leave the association, the latter is taken as the relevant

[12] Article 23.4 of EC Regulation 1/2003, of 16 December 2002, on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (OJ L1/1, 2003).

date; again, a relevant point when associations take some time to process members' requests, or in those cases where the association makes it necessary to pay any outstanding membership fees prior to removing the requesting member from the association.

c. Active distancing from the illegal information exchange or conduct and evidence of not having implemented the association's recommendation. This includes, for instance, evidence that the recommended pricing was not implemented, or that it was implemented only prior to the illegal conduct. Evidence of active distancing seems difficult to find in practice.

4. Even if a member of a trade association was a successful leniency applicant, it does not shield that member from subsidiary liability in cases when the association is insolvent. This may present the paradox that a company that is granted immunity ends up paying anyway if the relevant trade association is fined, but the association is insolvent. Policy considerations regarding incentive reductions for leniency aside, the NCA considers that the source of liability is not directly the conduct of the association member/leniency applicant (in connection with which the latter may have been granted immunity), but the conduct of the association (which in turn is insolvent) and the *ex lege* subsidiary liability of association members.

In conclusion, trade associations have been and are likely to be in focus as information exchanges facilitators. Association members should not turn a blind eye on conduct by trade associations; on the contrary, they should actively seek adequate compliance, since individual association members may be deemed liable on a subsidiary basis for information exchanges implemented by the association, even if such members have in practice had little responsibility for such information exchange.

CPI COMPETITION POLICY INTERNATIONAL

CPI Antitrust Chronicle
Nov 2014 (1)

Collusion Versus Collaboration: Getting It Right

Neha Georgie

Collusion Versus Collaboration: Getting It Right

Neha Georgie[1]

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*

CPI COMPETITION POLICY INTERNATIONAL

CPI Antitrust Chronicle
Nov 2014 (1)

Trade Associations in Asia: A Predictable Focus of the Authorities

Mark Jephcott & Tom Kemp
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Trade Associations in Asia: A Predictable Focus of the Authorities

Mark Jephcott & Tom Kemp[1]

I. INTRODUCTION

Trade and industry associations[2] may be formed by businesses for legitimate reasons that enhance competition: Small businesses may find increased bargaining power when negotiating as part of a trade association, and an association may develop and enforce trade standards and best practices. However, such associations may also provide a forum for industry players to conduct themselves in potentially anticompetitive ways. For example, businesses in an industry association may collectively decide to set prices or exchange commercially sensitive information.

It is perhaps because of the proliferation of trade associations in Asia, and their propensity to be used as a vehicle for anticompetitive behavior, that trade associations have been an enforcement focus of antitrust authorities in Asia, particularly in China, in recent years. While price-setting has been the main condemned activity of anticompetitive behavior in trade associations, other—more subtle and controversial—practices have been in the spotlight in jurisdictions with more mature competition law regimes.

II. PRICE-SETTING—ANTICOMPETITIVE BEHAVIOR THAT IS EASIER TO DETECT

In many jurisdictions, particularly those with newer competition law regimes, price-fixing behavior in trade associations features more heavily in investigations and actions by antitrust authorities. As price-setting activities tend to be relatively easy to detect and enforce against, they are frequently the first port of call for enforcement by the antitrust agencies.

A. China—Anticompetitive Behavior In Prevalence Of Trade Associations

Many of China's trade associations were formed with regulatory or administrative duties in addition to the advancement of interests of the relevant industry, the commonly understood purpose of a trade association. Given their quasi-governmental genesis, Chinese trade associations appear to be able to exert a greater influence over the market competition than their counterparts in mature market economies, and therefore they can detect and punish deviations

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[2] This article will use the term "trade association" and "industry association" interchangeably to mean any association or body formed by businesses in the same sector or industry: the term also includes professional associations.

from potential anticompetitive behavior more easily.[3] Anticompetitive practices are also sometimes expressed in regulatory language, such as "self-regulatory" or "self-discipline."

It is perhaps unsurprising, therefore, that trade associations have been featured in a number of investigations by antitrust authorities in China. Out of 17 investigations for non-price related anticompetitive behavior published by the State Administration for Industry and Commerce as at November 2012, 16 were reportedly related to trade association activities, while 22 of the 29 investigations opened by the State Administration for Industry and Commerce ("SAIC") in 2013 are reported to have been organized or assisted by industry associations. Although there are no similar figures for investigations into price-related violations of China's Anti-Monopoly Law ("AML") by the National Development and Reform Council ("NDRC"), 2013-2014 saw enforcement actions by the NDRC and its local arms against a gold and jewelry trade association in Shanghai, several tourist associations in Yunnan province, driving school associations in southern China's Guangdong province, and insurance associations in Henan and Zhejiang provinces, all involving price-fixing practices.

Trade associations have also been in the spotlight for private antitrust litigation. In November 2013, a local seafood industry association in Beijing had anticompetitive provisions in its association manual struck down after a local seafood merchant took the association to court. In this case two provisions in the manual stated explicitly that members were prohibited from competing with each other on prices for scallops or from selling them to non-members of the association, with penalties for deviation and rewards for informing on non-compliance. The Beijing Second Intermediate People's Court held that the provisions violated the AML and declared them invalid, a decision which has recently been upheld in the Beijing Higher People's Court. The lawsuit was the first reported private litigation case against a trade association in China, and the first case after the Supreme People's Court published guidelines on civil disputes relating to monopolistic conduct in May 2012 in which "articles of association in violation of the AML" had been listed as a possible cause of civil action against trade associations.[4]

B Outside China—Some Price-Setting Through Trade Associations, Some Other Types Of Cartels

Unlike China, most jurisdictions in Asia do not have many trade associations that can trace their roots back into government or regulatory functions. As such, the trade associations in these jurisdictions do not seem to be as prevalent or powerful as their Chinese counterparts. While some trade associations may be formed by legislation or government regulations, some of the trade associations are formed by businesses' initiatives. However, such trade associations seem just as susceptible to being used by some businesses as a means to promulgate anticompetitive conduct.

Some Asian jurisdictions have seen price-fixing activities by trade associations. In Singapore, for example, a group called the Association of Modeling Industry Professionals collectively raised prices for hiring models; although an appeal in April 2013 saw the fines of

[3] Please see more details on trade associations in China in Hao Qian, *Trade Associations and Private Antitrust Litigation in China*, 4(1) CPI ANTITRUST CHRON. (April 2013), *available at* https://www.competitionpolicyinternational.com/trade-associations-and-private-antitrust-litigation-in-china/

[4] http://www.chinacourt.org/law/detail/2012/05/id/145752.shtml

some modeling agencies reduced, the Competition Commission of Singapore asserted that the association was merely a "front" for its members, and was engaged in price-fixing more than in fighting for better terms for local models.

In Malaysia, professional associations have come under scrutiny. In August 2013 the Malaysian Competition Commission ("MyCC") published a report on price-setting behavior by professional bodies in 34 sectors. It found that, although many professional associations were authorized by law to set price scales for their members, some professional bodies in five sectors (namely company secretaries, arbitrators, mediators, landscape architects, and dental practitioners) had set fee scales when in fact they had no authorization to do so. The MyCC noted that the prohibition of horizontal agreements under Malaysia's Competition Act applied to all commercial activities, including professional services, and that any price-setting by professional bodies without the requisite legal power or an exemption is prohibited under the Competition Act.

In South Korea, trade associations have been implicated in both price-setting and other categories of infringement. In July 2014, the Korea Fair Trade Commission ("KFTC") fined ready-mixed concrete associations in connection with the imposition of fixed-price increases for sales to particular classes of customer. Industry associations were also among the parties fined in connection with bid-rigging in contracts for the supply of electricity meters in September 2014.

In other jurisdictions with comparatively newer competition law regimes, businesses have engaged in price-setting activities without forming a trade association; in these jurisdictions collusion and price-fixing between businesses seems more common than those carried out under the umbrella of a trade associations. Indonesia, for example, has seen alleged "cartelization" of many agricultural products in 2013, including garlic, beef, chicken, soybeans, rice, and eggs, according to Indonesian antitrust authorities; investigations are planned or underway in several of those products.

III. MORE CONTROVERSIAL BEHAVIOR—INFORMATION EXCHANGES

In jurisdictions with more mature competition law regimes, trade associations have appeared to engage in potentially anticompetitive conduct that is more controversial than price-fixing—probably because there is a greater awareness among businesses that price-setting is a blatant infringement of the relevant antitrust law, or because the relevant regulator has already prosecuted price-fixing cases, which are "easy-kills" for regulators overseeing incumbent regimes.

Trade associations in these jurisdictions may then need to be aware of other activities that may also be regarded as anticompetitive, such as sharing business information. For the regulators, these practices may be more difficult to detect and take action against, as clear evidence is often lacking in such cases or their effects on competition may be harder to prove.

South Korea—Exchange of Information Within Trade Associations

In October 2013, BMW Korea, Mercedes-Benz Korea, and the Korean Automobile Importers and Distributors Association faced allegations at a parliamentary inquiry that, through events they called "workshops," they exchanged sales information. The parties denied that they exchanged information on sales strategies or know-how, instead claiming that only information on "events schedules" was shared to avoid clashes between events.

Similarly, when some doctors of the Association of Korean Medicine were accused of exchanging information about prices and services on an online, doctors-only social club in August 2013, the KFTC was of the opinion that the doctors shared the information as individuals, rather as a group, and that the information exchanges on the club did not appear to be collaborative action by the association.

Information exchanges within trade associations appear to be difficult to identify as they often take place in informal settings and orally, and harder still to take action against. What may look like an exchange of commercially sensitive information between businesses in a trade association might be claimed to be an innocuous exchange of technical schedules or best practices. There is also a debate (at least in Asia) as to where the line is between a perfectly legitimate conversation between industry players and an anticompetitive information exchange, and whether information exchange can be an object infringement without the burden on the regulator to prove effects. Consequently, antitrust actions against these practices appear to be more rare in Asia (as compared to, for instance, the European Union).

IV. CONCLUSION

Trade associations are currently, and are likely to remain, a key focus of the antitrust enforcement agencies in Asia. As competition law regimes mature and develop in jurisdictions across Asia, cartels and other "classic" anticompetitive behavior, such as bid-rigging by trade associations, are expected to be exposed by antitrust regulators, and trade associations may come under increased scrutiny by regulators. However, after the "easy targets" like price-fixing have been pursued by antitrust authorities, other anticompetitive activities conducted via trade associations will become harder to detect and prosecute.

CPI COMPETITION POLICY INTERNATIONAL

CPI Antitrust Chronicle
Nov 2014 (1)

Trade and Professional Associations in Canada: An Update

Mark Katz
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Trade and Professional Associations in Canada: An Update

Mark Katz[1]

I. INTRODUCTION

Canada's Competition Bureau (the "Bureau") has maintained its focus on trade and professional associations in 2014. This has involved not only various forms of prosecutions and proceedings but also initiatives in a growing part of the Bureau's enforcement agenda: advocacy and compliance.

A summary of 2014's key developments is set out below.

II. THE TREB CASE

TREB, Canada's largest real estate board, represents more than 35,000 real estate brokers and agents principally in the Greater Toronto Area ("GTA"). TREB owns and operates an electronic database known as the TREB Multiple Listing Service™ system ("TREB MLS®"), which contains current and historical information about the purchase and sale of residential real estate in the GTA. Only TREB's members have direct access to the TREB MLS®,[2] and these members must agree to abide by certain rules and policies enacted by TREB in order to maintain their membership in good standing.

In May 2011, the Bureau filed an application against TREB, arguing that it had abused its dominant position in the market for residential real estate brokerage services. Specifically, the Commissioner alleged that restrictions imposed by TREB on the information that its members could provide to consumers over the internet through password protected websites known as "VOWs" perpetuated the traditional "bricks and mortar" business model used by most brokers and agents and prevented the creation of innovative business models that, the Bureau claimed, would improve productivity and lower costs to consumers.

In order for an abuse of dominance case to be made out, the Tribunal must find that:

a) one or more persons substantially or completely control, throughout Canada or any area thereof, a class or species of business;

b) that person or persons have engaged in or are engaging in a practice of anticompetitive acts; and

c) the practice has had, is having, or is likely to have the effect of preventing or lessening competition substantially in a market.

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[2] Some brokers and agents outside of the GTA may also have access to TREB MLS® data as a result of reciprocal agreements between their real estate boards and TREB.

In a decision released in April 2013, the Tribunal held that, because TREB is an association that does not itself compete in the market for residential real estate brokerage services, the Bureau's case did not satisfy any of the above criteria.

First, the Bureau could not show that TREB controlled a relevant market as required by (a) above. Second, the Tribunal stated that it was bound by the Federal Court of Appeal's 2006 *Canada Pipe* decision, where the Court held that in order for the requirements of (b), above, to be met, the anticompetitive acts in question must be directed towards a competitor of the dominant firm. Since TREB does not compete with its members, its restrictions on the data permitted to be provided to consumers on a VOW could not have the negative effect on a competitor required by the *Canada Pipe* decision. Finally, since there was no anticompetitive act, the Tribunal held that the requirements of (c), above, also could not be met on the facts of the case.

On February 3, 2014, the Federal Court of Appeal overturned the Tribunal's decision. The Court held that the Tribunal had misinterpreted the Court's earlier decision in *Canada Pipe* and that the *Competition Act*'s abuse of dominance provisions could potentially apply to a person that controls a market even if that person does not compete in that market. The Court remanded the case back to the Tribunal to be reconsidered on the basis of proper legal principles.

On July 24, 2014, the Supreme Court of Canada refused to grant TREB leave to appeal the Federal Court of Appeal's decision.

While the merits of the TREB case will now be decided by the Tribunal after a re-hearing, the Supreme Court of Canada's decision to deny leave means that the Federal Court of Appeal's decision in TREB is, for now, the most current guidance on the type of conduct that may be pursued under the Competition Act's abuse of dominance provisions.

In practical terms, the Federal Court of Appeal's decision in the TREB case has the potential to expand the scope of conduct that may be pursued under the abuse of dominance provisions. While it is difficult to anticipate all the circumstances or markets in which such effects might arise, an illustrative example of this broader approach to abuse of dominance may be found in a recent decision in the United Kingdom where an airport authority was found to have abused its dominant position by restricting the number of bus routes serving the airport, thereby lessening competition for local bus transportation—a market in which the airport authority did not compete.[3]

The Federal Court of Appeal's decision also confirms that trade associations may be pursued for abuse of dominance in appropriate circumstances. While other provisions of the *Competition Act* also remain relevant, the Bureau in the past 20 years has tended to base its applications against trade associations on allegations of abuse of dominance. The Federal Court of Appeal's decision confirms the viability of this approach.

[3] *Arriva The Shires Ltd.* v *London Luton Airport Operations Ltd.*, [2014] EWHC 64 (Ch), *available at* http://www.bailii.org/ew/cases/EWHC/Ch/2014/64.html.

III. CARTEL CASES

It is trite to say that trade associations often feature prominently in cartel investigations and prosecutions. But that is because it so often happens to be true.

The latest Canadian entry in this category became public in April 2014, when several parties pleaded guilty to participating in an agreement to collectively set various surcharges relating to the supply of "non-vessel operating common carrier" ("NVOCC") export consolidation services from Canada to foreign destinations.

Of interest, according to the "Statement of Admissions and Agreed Facts" filed with the Court, the parties' communications (for at least a portion of the time) were conducted under the auspices of the Canadian Freight Forwarder Association ("CIFFA"), and specifically a CIFFA committee working group called the "NVOCC Export Working Group of the Ocean Freight Committee." Moreover, according to the court-filed documents, CIFFA published the surcharge formulas set by this working group through electronic bulletins that it distributed to its members. In most cases, the surcharges were apparently published in the "members only" portion of CIFFA's website.

An industry trade association was also said by the Bureau to have played a critical role in an alleged conspiracy involving providers of concrete forming services for residential developments in the City of Toronto. The Bureau alleged that the parties had used meetings of their industry association to set pricing and monitor non-compliance. The Bureau executed search warrants in January 2013 but dropped the case a year later, having decided not to refer the matter for prosecution.

IV. ADVERTISING RESTRICTIONS

The Bureau announced earlier this year that it had undertaken a review of advertising restrictions imposed by certain professional associations (pharmacists, dentists, and veterinarians) on their members. More details are expected to be released before the end of 2014.

Restrictions on advertising were also among the issues canvassed by the Bureau in a study it published on professional associations in 2007, the last time that the Bureau conducted an extended review of competition among self-regulated professions. In that study, which looked at five professions (accounting, legal, optometrists, pharmacists, and real estate agents), the Bureau identified numerous restrictions that, in its view, appeared "to go beyond what is necessary to protect consumers from false or misleading advertising and, as a result, limit consumers' access to legitimate information that greatly benefits competition."

The Bureau expressed particular concerns about restrictions on comparative advertising. Associations often impose such restrictions on members, ostensibly as a way of promoting collegiality and respect among members. From the Bureau's perspective, however, limits on comparative advertising "obstruct competition between service providers and make it difficult for new entrants to advertise any distinctive features of the services they offer, protecting incumbents from the full forces of competition."

It is not clear if the Bureau's current examination of advertising restrictions for dentists and veterinarians was motivated by specific complaints or if it was simply a matter of being their "turn." It is also not clear why the practices of pharmacists are once again under Bureau scrutiny.

Answers to these questions will have to await the conclusion and publication of the Bureau's report.

V. COMPLIANCE

To underscore the importance of competition law compliance for trade associations, the Bureau released in March 2014 a pamphlet entitled "Trade Associations and the *Competition Act*" (ominously the pamphlet was published to coincide with the Bureau's first "Anti-Cartel Day").

Although quite brief (two pages), the pamphlet sets out some helpful basic "Dos and Don'ts" for trade associations. But associations should not be misled into believing that this pamphlet represents the alpha and omega as far as their compliance obligations are concerned. Indeed, the first "do" emphasized by the Bureau is that associations should establish an "effective" compliance program and "where practicable," appoint a "compliance officer" to implement and oversee this program.

Further details are set out in the Bureau's proposed draft revisions to its bulletin on "Corporate Compliance Programs," which was released for comment on September 18, 2014. The draft revised bulletin offers the Bureau's most current blueprint for competition compliance, including for trade associations. Intriguingly, and in contrast to the United States, the Bureau also expressly states in the draft that it intends to establish an "incentive program," which could result in reductions in fines for leniency applicants who can demonstrate that they had established a "credible and effective" competition compliance program, notwithstanding their involvement in illegal conduct.

Trade associations, of course, can differ widely in the resources available to them to implement competition compliance programs. It would be a mistake, however, to conclude that any such program must be of the "Cadillac" variety to qualify as "credible and effective." It is possible to craft suitable programs to suit any association's budget and level of resources. What is needed, above all, is the commitment to make competition compliance a priority. The Bureau's continuing focus on trade association conduct should provide all of the incentive that is required in that regard.

CPI COMPETITION POLICY INTERNATIONAL

CPI Antitrust Chronicle

Nov 2014 (1)

Increasing Fines vs. Incentivizing Corporate Compliance: A Case for Compliance

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Increasing Fines vs. Incentivizing Corporate Compliance: A Case for Compliance

Kathryn Hellings & Daniel E. Shulak[1]

I. INTRODUCTION

This past summer the United States Sentencing Commission ("USSC") prompted a public debate about the adequacy of fines imposed in criminal antitrust cases by including the issue in its list of priorities for the then upcoming fiscal year. For the reasons outlined below, rather than increasing criminal antitrust fines to increase deterrence, the U.S. Department of Justice's Antitrust Division (the "Division") could instead promote and foster corporate compliance—thereby preventing or reducing anticompetitive conduct—by incentivizing companies to adopt effective internal compliance programs.

II. THE ROLE OF THE U.S. SENTENCING GUIDELINES AND STATUTORY MAXIMUM FINES

Over the last ten years, the Division has resolved all but two of its corporate cases by plea agreement. Since at least 2005, there has not been a single criminal plea agreement filed by the Division in which the Division's prosecutors deviated from the United States Sentencing Guidelines (the "Guidelines"). The Division has explained this practice by noting that the Guidelines promote "consistency, fairness, and transparency in sentencing."[2]

The Guidelines are established by the USSC, an independent agency in the judicial branch of the U.S. government that aims to make criminal penalties more standardized and consistent. The non-binding Guidelines provide advisory standards for criminal penalties imposed on defendants convicted in federal district court. In practice, the Guidelines provide a formula for determining penalties in federal cases—points are assigned to various factors, and the resulting point calculation leads to a Guidelines range for sentencing.

Under the Guidelines, until 2004, the maximum fine for a criminal antitrust violation was $10 million for corporations and $350,000 for individuals. In 2004, however, Congress enacted the Antitrust Criminal Penalty Enhancement and Reform Act ("ACPERA"), which enhanced

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[2] Scott D. Hammond, "Antitrust Sentencing in the Post-*Booker* Era: Risks Remain High for Non-Cooperating Defendants," Remarks Before the ABA Section of Antitrust Law, Spring Meeting (March 30, 2005), *available at* http://www.usdoj.gov/atr/public/speeches/208354.htm.

criminal antitrust penalties to $100 million for corporations and $1 million for individuals. Moreover, despite the existence of an enhanced maximum fine under the Guidelines, ACPERA provides for an alternative fine calculation tied to twice the gain or loss associated with the illegal conduct, which allows prosecutors to seek fines well above $100 million. Nevertheless, the statutory maximum is a significant guidepost to the stakeholders in criminal antitrust cases.

III. THE CASE FOR HIGHER FINES

Since ACPERA's enactment in 2004, corporate criminal antitrust fines have increased substantially. From 2004-2013, the total amount of corporate fines levied in criminal antitrust cases was $6.6 billion.[3] In contrast, from 1994-2003, the 10-year period preceding ACPERA, total corporate antitrust fines totaled only $2.24 billion.[4] The annual average for total fines obtained by the Division in the ten years preceding the enactment of ACPERA was $240M, while, in the ten years following ACPERA's passing, the average was $660 million.[5] In just the last five years, the Division obtained, on average, $820M in fines per year; and, notably, the Division has obtained more than $1B in fines in each of the past three years. [6]

Despite drastically increasing criminal antitrust fines, however, the American Antitrust Institute ("AAI"), citing a 2012 study by Professors Connor and Lande, has advocated that criminal antitrust fines should be doubled. In their 2012 study, Professors Connor and Lande analyzed criminal antitrust fine data and concluded that the current antitrust fine levels are insufficient to optimally deter anticompetitive conduct and protect potential victims of cartelization. Connor and Lande concluded, "the combined level of U.S. cartel sanctions has been only 9% to 21% as large as it should be to protect potential victims." Thus, they opined, the "average level of U.S. anti-cartel sanctions should be quintupled."[7] The AAI, although citing this study, only calls for doubling the fines.

IV. UNFORESEEN IMPACT OF INCREASED FINES

While it is possible that substantially higher corporate fines would deter at least *some* quantity of cartel behavior, higher fines would likely lead to more trials and increase the need for costly "inability to pay" analyses. These increased litigation burdens could be so significant that they would constrain the Division's ability to investigate cartels and win convictions, ultimately decreasing the number of antitrust conspirators that are caught and prosecuted.

In an environment where fines are routinely in the hundreds of millions dollars, doubling recommended fines would likely result in fines in the billions of dollars, drastically changing the

[3] *See* DEP'T OF JUSTICE, ANTITRUST DIV. WORKLOAD STATISTICS FY 2004-2013 *available at* http://www.justice.gov/atr/public/workload-statistics.html

[4] *See* DEP'T OF JUSTICE, ANTITRUST DIV. WORKLOAD STATISTICS FY 1990-1999 *available at* http://www.justice.gov/atr/public/246419.pdf; and DEP'T OF JUSTICE, ANTITRUST DIV. WORKLOAD STATISTICS FY 2000-2009 *available at* http://www.justice.gov/atr/public/281484.pdf.

[5] *See* DEP'T OF JUSTICE, ANTITRUST DIV. WORKLOAD STATISTICS FY 1990-1999 *available at* http://www.justice.gov/atr/public/246419.pdf; and DEP'T OF JUSTICE, ANTITRUST DIV. WORKLOAD STATISTICS FY 2000-2009 *available at* http://www.justice.gov/atr/public/281484.pdf.

[6] *See* DEP'T OF JUSTICE, ANTITRUST DIV. WORKLOAD STATISTICS FY 2004-2013 *available at* http://www.justice.gov/atr/public/workload-statistics.html

[7] C&L at 428.

calculus for companies accused of violations. Substantially higher corporate fines would likely cause many more corporate defendants to forgo plea agreements and incentivize them to go to trial. Criminal antitrust cases are complex, and in the face of a billion dollar plea offer, a corporate defendant might be more willing to take its chances with a skilled defense litigator rather than accept a plea bargain.

Further, an increase in trials would be a significant drain on already limited DOJ resources, an agency that relies heavily on corporate pleas. More trials would likely mean fewer wins for the Division. A review of Division's criminal antitrust cases reveals that Division has resolved all but two of its corporate cases by plea agreement over the past 10 years. Of the two corporate cases that went to trial, *United States v. Stora Enso North America Corporation*, in 2007, resulted in an acquittal, and *United States v. AU Optronics Corporation*, in 2012, resulted in a guilty verdict and the largest antitrust fine in history ($500 million).[8] While the Division undoubtedly employs skilled litigators prepared to try cases successfully, one must question how many cases the Division can successfully prepare for and try concurrently if significantly more corporate defendants refuse to plead guilty.

Compounding the problem, a decrease in corporate plea agreements also means fewer cooperating witnesses providing information and evidence for use by Division prosecutors against defendants opting for trial. The absence of some of this evidence, which would have otherwise been provided pursuant to the cooperation obligations of the plea agreements, would further drain DOJ's investigative resources and could ultimately lower the Division's overall effectiveness at trial.

A lesser-known cost likely to be associated with higher fines would be an increase in the number of "inability-to-pay" cases, in which a corporate defendant makes a showing that it cannot pay the fine and continue to survive as a viable enterprise in the market. These cases can be a significant burden on the Division, as they require an extensive investigation into the corporate defendant's overall financial status. Often, inability-to-pay cases require the Division to retain an outside expert to conduct detailed analyses of and opine on a company's financial health. These analyses are time consuming and resource draining, further increasing the strain on DOJ resources and slowing down progress of an investigation.

For example, in *U.S. v. Florida West International Airways Inc.*, the defendant's ability to pay was hotly contested, and the case included a protracted fight over the credibility of Division's "inability to pay" expert.[9] Florida West argued it could only pay a fine of $50,000, while Division argued, after opening Florida West's books, for a $1 million fine.[10] While ultimately, the court sentenced Florida West to pay the full $1 million fine recommended by the Division, the time and expense of the litigation associated with the defendant's claim of inability to pay was significant[11] Notably, the $1 million fine recommended by Division was a fraction of the Guidelines fine range of $20.7 million and $41.4 million.

[8] The $500 million fine was actually a tie for the highest ever with F. Hoffmann-La Roche, Ltd. in 1999.

[9] *See* http://www.law360.com/articles/389965/doj-wants-at-least-1m-fine-in-airline-price-fixing-case.

[10] *Id.*

[11] *See* http://www.law360.com/articles/364195/florida-west-fined-1m-for-price-fixing-after-rare-plea.

A survey of publically available data suggests that higher corporate fines will lead to an increase in inability to pay cases. In the ten years preceding the 2004 ACPERA enhancements, only 16 fines of 269, or 5.9 percent, were reduced because of a defendant's inability to pay. Since 2004, however, 21 of 168, or 12.5 percent, of fines have been reduced based upon a corporate defendant's inability to pay. One can only imagine how many inability cases would result if criminal fines again were increased as proposed by Professors Connor and Lande. These cases would only further drain DOJ resources.

V. INCENTIVIZING EFFECTIVE CORPORATE COMPLIANCE PROGRAMS AS AN ALTERNATIVE

Rather than increasing the penalties for compliance failures, the Division could instead improve overall deterrence for antitrust offenses by incentivizing corporate compliance. A shift in focus—from the stick (the penalty) to the carrot (compliance incentives)—would ultimately reduce crime and protect U.S. consumers.

In contrast to other enforcement agencies and other DOJ components, including DOJ's Criminal Division, the Division has never provided credit to a cooperating corporate defendant for an "existing compliance program"—a compliance program in effect at the time that the criminal conduct occurred. While the U.S. Attorneys' Manual states that "no compliance program can ever prevent all criminal activity by a corporation's employees," and the Guidelines provide for compliance credit, the Division has never filed a case in which the penalty was reduced in recognition of a company's existing compliance program. Similarly, according to publicly available information, the Division has never provided credit to a cooperating defendant for compliance program improvements made after the Division uncovered the defendant's collusive conduct. By failing to provide compliance program credit to all cooperating corporate defendants, the Division is effectively disincentivizing companies from putting into place effective, but oftentimes costly, programs that could deter cartel conduct more effectively than any increase in penalty.

By comparison, the DOJ's Criminal Division takes into account a corporation's compliance program in fashioning an appropriate resolution. In the 2012 Resource Guide, for example, the Criminal Division outlines the potential benefits corporate defendants can obtain because of compliance efforts:

> DOJ and SEC…consider the adequacy of a company's compliance program when deciding what, if any, action to take. The program may influence whether or not charges should be resolved through a deferred prosecution agreement (DPA) or non-prosecution agreement (NPA), as well as the appropriate length of any DPA or NPA, or the term of corporate probation. It will often affect the penalty amount and the need for a monitor or self-reporting.

Moreover, the Criminal Division doesn't simply address the compliance program in existence at the time of the criminal conduct, but also regularly requires companies address compliance program lapses in order to prevent future violations. In short, the Criminal Division is engaged with the corporate community on the issue of corporate compliance, recognizing defendants' compliance efforts, fostering efforts to implement sufficient compliance programs, and, where necessary, ensuring, as part of the corporate resolution, that adequate compliance programs are implemented.

VI. CONCLUSION

The mission of the Division is to "promote economic competition through enforcing and providing guidance on antitrust laws and principles." By encouraging and fostering effective corporate compliance, and adopting policies in line with other agencies and DOJ components, the Division will be meeting this stated objective and ultimately protecting American consumers. Moving the focus from the penalty for criminal conduct to the prevention of the conduct would lead to stronger corporate compliance, and stronger corporate compliance should lead to fewer breaches of the law.