

Trade Associations and Competition Law Enforcement

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Workshop on "Competition Advocacy and Exchange of
Information among Competitors," Pontificia Universidad
Javeriana, Bogotá, Colombia, 4 May 2012

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Introduction

- There is no doubt that trade associations engage in activities to promote the interests of its members and that many of these activities are in compliance with competition laws.
- However, the experience of virtually every competition law enforcement system is that trade associations engage in activities contrary to competition laws or have encouraged or assisted others to do so.
- The competition laws of the European Union, which is enforced by the European Commission and the national competition authorities of the 27 Member States of the EU, address explicitly the conduct of trade associations.

Introduction cont'd

- Article 101 TFEU (Treaty on the Functioning of the European Union) prohibits not only agreements and concerted practices of undertakings (businesses) which has the object or effect of prevention, restricting or distorting competition.
- Decisions of associations of undertakings which have such object or effect are also prohibited by Article 101 TFEU.
- This is recognition that anti-competitive conduct may be engaged by undertakings *indirectly* through associations representing their interests.

Introduction cont'd

- Trade associations may be implicated in anti-competitive conduct in different ways:
 - engaging in or promoting illegal conduct which violates competition laws against anti-competitive agreements (Type I);
 - engaging in (legitimate) activities to promote the interests of its members of a voluntary association (Type II);
 - regulating the activities of its members under a legislative mandate (Type III).

Type I: Role in “Hard Core” Anti-competitive Conduct

- A trade association may play a central role in an agreement among its members to engage in anti-competitive conduct, especially, an agreement to engage in so-called ‘hard core’ conduct such as price-fixing, bid-rigging, output reduction, market sharing, customer allocation.
- “Hard core” activities are considered to be inherently anti-competitive (by object under EU law) without the need to prove the anti-competitive effects of such conduct.
- In furtherance of such anti-competitive conduct, a trade association may do one or more of the following which are usually done in secret:
 - organise and conduct meetings at which actions in furtherance of the agreement are taken;
 - monitor the activities of the members to ensure compliance;
 - sanction conduct which breaches the agreement;
 - generally serves as the ‘referee’ of disputes among members.

Type I cont'd

- Enforcement authorities around the world has taken action against trade associations for its role in such anti-competitive activities. Most cartels, especially those which last for some time, make use of trade associations to further their anti-competitive actions.
- “Hard Core” anti-competitive conduct is prevalent among industries where the goods are standardized and competition is generally about price terms.
- In this environment, there is a strong incentive for market participants to avoid price competition since it may lead to a price-war which is only to the benefit of buyers of the product

Type II: Voluntary Association

- A trade association (including a professional association) may regulate the activities of its members and may be do so as part of the activities of a voluntary association but without any legislative mandate.
- In carrying out its regulatory role (absent any legislative mandate), the trade association may engage in conduct which infringes competition laws.
- Typically, the conduct in question is not inherently anti-competitive. It therefore becomes necessary to examine whether the conduct is anti-competitive because of its effects.

Type II cont'd

- Among the types of conduct that may infringe competition laws are:
 - requirements for admission and for remaining as a member of the association;
 - representing members in their individual negotiations with buyers, typically, governments
 - recommended practices such as hours of operations;
 - gathering and dissemination of statistical information supplied by individual members;
 - codes of conduct.

Type III: Legislative Mandate

- Some trade associations regulate the activities of its members under a legislative mandate.
- This statutory regulatory role may be exercised along with the role to promote the interests of its members.
- Exercising a legislative mandate along with promoting the interests of its members can be challenging.
- This type of trade association is often found among the liberal professions. See Case C-49/07 *Motoe* [2008] ECR I-4863

Type III cont'd

- Where a trade association has some regulatory role with legislative mandate, an important issue arises in many jurisdictions as to whether the alleged offending conduct is not illegal because it has been authorized by law.
- This is known as the “regulated conduct” defence. The full contours of this defence is subject of much controversy in many jurisdictions. Controversy centers on conduct which is not expressly authorised or permitted.
- The notable exception is under EU competition law. (Some Member States recognize the regulated conduct defence in its national competition laws.)

Type III cont'd

- Generally, there is no recognition in EU law of the regulated conduct defence with the result that an association with a regulatory role under legislation must comply with the laws against anti-competitive agreements, etc under Article 101 TFEU.
- Under EU law, the fact that an action may be taken under legislative mandate is not sufficient to exempt that action from European competition laws. See Case C-309/09 *Wouters*, [2002] ECR I-1677
- It is necessary to examine whether the action is taken pursuant to a "public interest" criterion.

Information Exchanges

- Information exchanges may include information about individual businesses:
 - prices, current and historical
 - sales, current and historical
 - names and locations of customers, current and historical
 - output, current and historical
 - plant operations
 - marketing plans
 - business plans
- Any exchange of information involving potentially competitively-sensitive matters directly between competitors, whether current or historical, should be avoided since it raise suspicions that the exchange is in furtherance of an existing anti-competitive agreement.

Information Exchanges cont'd

- Trade associations are often used for the collection and distribution of industry (consolidated) information.
- The collection and distribution of industry information, typically through a trade association or a third party such as an accounting firm, may raise concerns if one or more of the following exists:
 - information is more current than historical;
 - there are few market participants.

Information exchanges cont'd

- Article 101 TFEU also deals with a “concerted practice” as coordination among competitors which does not take the form of an agreement.
- The Court of Justice of the EU has characterized the exchange of information between competitors as a concerted practice:

“the exchange of information between competitors is liable to be incompatible with the competition rules if it reduces or removes the degree of uncertainty as to the operation of the market in question, with the result that competition between undertakings is restricted” (Case C-8/08 *T-Mobile Netherlands BV*, Court of Justice, para. 35)

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