TRADE ASSOCIATIONS, INFORMATION EXCHANGE, AND CARTELS

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Trade associations can play a procompetitive role in an economy but, as an association of actual and potential competitors, can also raise important competition law issues that must be addressed carefully by legal counsel. This Issue Paper presents a hypothetical problem that illustrates many of the issues that counsel can confront in representing a trade association, its members, or company executives. The Issue Paper raises many of the issues from a United States' perspective with occasional comparative examples from other jurisdictions. Carefully consider how your jurisdiction would, and should, address these all too real issues. In thinking about the competition law and best practices in your jurisdiction, also consider how the best legal advice possible will be subverted unless there is a true culture of compliance in the industry, enterprises, and employees in question.

I. TRADE ASSOCIATION HYPOTHETICAL

The Widget Manufacturers Association ("WMA") is a trade association with five principal members. D and E are the two largest members who each sell approximately 25% of the widgets in the country where WMA is located. The three smaller members A, B, and C each sell approximately 10% of widgets in this country. There are also a handful of high-end specialty widget manufacturers, component manufacturers, and industry consultants who are

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associate members of the WMA.

The five principal members of the WMA all tend to sell mass market widgets although the smaller firms tend to sell mostly through widget dealers. The two largest firms (D and E) sell a higher percentage of their output through large retailers like Walmart and Target. The remaining widget sales in this jurisdiction consist of imports, primarily from Japan and Taiwan, and a number of very small domestic manufacturers specializing in very expensive titanium widgets and other niche sales.

The WMA holds quarterly meetings in the nation's capital where the members meet for dinner, discuss current events related to the industry, and usually have a prominent after-dinner speaker from the world of business or politics. Once a year, the WMA also holds an annual meeting at a fancy resort. At the annual meeting, the WMA elects officers for the following year, holds its annual business meeting, and has a golf tournament for the higher-level employees of the members. Brief written agendas are circulated before the meetings.

To the extent it is relevant, the WMA and its members have been investigated by the national competition agency from time to time in the past, but no actions have ever been taken by the agency. The most serious investigation occurred approximately ten years ago, when officials from D and E were found to have met on two occasions at their corporate headquarters supposedly to discuss WMA business, but without the presence of A, B, or C, any regularly scheduled WMA meeting, or any written agenda.

Part of that investigation involved allegations that WMA members sought to fix prices with their foreign competitors. While there appeared to be evidence of communications between domestic and foreign widget firms about prices, there was never any evidence that an agreement was reached. The investigation eventually was dropped without any formal complaint or statement of objections being filed, but the matter involved substantial legal fees and negative publicity for the industry. The current leadership of the WMA consists of mostly newer and younger managers, but also includes at least one of the "old guard" whose actions were part of the investigation referred to above.

The WMA has retained you to provide antitrust counsel on the following issues:

> (1) The WMA would like to institute an information exchange program to gather and share on a private password protected website whatever types of industry information would be helpful to its members without raising significant competition law risks;
> (2) The WMA would like to gather publicly available information about imports to investigate whether foreign widgets are being imported at unfairly low prices in order to decide whether the domestic widget manufacturers should file an antidumping petition with the government international trade ministry seeking increased antidumping duties or legislative action limiting widget imports or raising import duties;
> (3) Whether seeking an advisory opinion on items 1 and 2 from the national competition agency would be valuable or advisable.

Finally, the WMA seeks your advice on compliance procedures for the quarterly and annual meetings to ensure that the WMA members comply with all competition law requirements. Specifically, the WMA seeks your advice on whether legal counsel should be present for the meetings and what role legal counsel should play at the meetings and the related social events.

II. THE UNITED STATES PLAYBOOK

In the United States, there is a body of case law dealing with trade associations and information exchange dating back to the early days of the antitrust laws.[1] There are no trade association specific statutes and little modern case law dealing with these issues. However, this is an area where most legitimate trade associations

[1] United States v. United States Gypsum Co., 438 U.S. 422 (1978); United States v. Container Corp. of America, 393 U.S. 333 (1969); Sugar Inst. v. United States, 297 U.S. 553 (1936); Maple Flooring Mfrs.' Ass'n v. United States, 268 U.S. 563 (1925); United States v. Am. Linseed Oil Co., 262 U.S. 371 (1923); Am. Column & Lumber Co. v. United States, 257 U.S. 377 (1921); Eastern States Retail Lumber Dealers Ass'n v. United States, 234 U.S. 600 (1914).

and enterprises rely on sophisticated antitrust counsel to provide the rules of the road for their clients to follow so they avoid antitrust violations and even the threat of serious investigations. Less scrupulous operators may ignore legal advice or shield their behavior from legal counsel.

A. Information Exchange

The first question most antitrust counsel will ask an association or a competitor regarding an information exchange program will be: "Why do you want to do this?" Assuming the answer (or the likely reason why) isn't to implement or facilitate price fixing or related cartel behavior, experienced U.S. antitrust counsel is likely to provide the following rules of thumb for a client to consider in structuring an information exchange.

RULES OF THUMB FOR LEGITIMATE
INFORMATION EXCHANGE IN THE U.S.

DO'S
- Use past transactions sufficiently old so not considered competitively sensitive, at least 3-6 months old;
- Aggregate data;
- Have a third party collect and process data;
- Make data publicly available;
- Better if heterogeneous product;
- Clean record for competition law;
- Written information exchange policy per above, monitored by counsel and adhered to by firms and association.

DON'TS
- Avoid current or future transactions and info as to current or future prices, quantities, territories, or consumers;
- Avoid use of, or easily identifiable, individual transactions;
- Avoid direct exchanges between competitors;
- Limit access to data to competitors;
- More problematic if homogeneous or commodity-type product or service;
- Lots of past problems;

- Ad hoc unmonitored exchanges between association members.

Based on the facts given, would you advise your clients to proceed under U.S. antitrust law with the proposed information exchange program, and if so how? Would your advice be any different under the law of your jurisdiction?

B. Information Exchange to Lobby the Government

The legitimate lobbying of any branch of the United States government normally is immune from the application of the antitrust laws. Under the *Noerr-Pennington* doctrine, individual or joint lobbying of the government is immune because the antitrust laws were designed to police economic market activity, rather than political activity. Any application of the antitrust laws to such activity would also raise serious constitutional issues as interfering with the right to petition and the free speech rights of the enterprises and individuals involved.

As a result, intense and often deceptive lobbying activity by the railroad industry to harm the trucking industry was held to be beyond the scope of the antitrust laws under the *Noerr-Pennington* doctrine.[2] The Supreme Court in *Noerr* and subsequent cases in essence held that conduct was not unlawful if it sought to injure competition through the results of governmental action (legislative, executive, administrative or judicial).[3] Conduct which violated other laws, such as bribery, could be brought under those separate provisions, but the antitrust laws were not the proper vehicle to regulate political conduct.[4]

Noerr-Pennington would not apply if the petition was a mere sham to directly interfere with the competitor or competitors. In general, sham petitioning seeks to harm competition through the process of the petitioning activity, rather than the outcome of the

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[2] Eastern R.R. Presidents Conference v. Noerr Motor Freight, 365 U.S. 127 (1961); United Mine Workers v. Pennington, 381 U.S. 657 (1965). *See generally* ABA SECTION OF ANTITRUST LAW, MONOGRAPH 25, THE NOERR-PENNINGTON DOCTRINE (2009).

[3] *Pennington*, 381 U.S. at 670.

[4] City of Columbia v. Omni Outdoor Advert., 499 U.S. 365 (1991).

proceeding. For example, the United States Supreme Court found no immunity for a trucking company which delayed the entry of a competitor by filing a pattern of baseless oppositions to requests for licenses to serve new routes.[5] The Court focused on the fact that the defendant sought to impose heavy costs and delays on its competitors through the mere filings of the proceedings without regard to the outcome of the disputes.[6] However, the Supreme Court has cautioned that the petitioning activity must be "objectively baseless" before it can be held to be a sham.[7]

The Supreme Court considered the misuse of trade association procedures to harm a competing technology in *Allied Tube*.[8] In *Allied Tube*, manufacturers of steel conduit used in construction engaged in a concerted plan to block the approval by the association of newer plastic conduit. The incumbent firms packed the trade association meeting and manipulated the vote, effectively barring the new technology from being implemented into legally binding state and local building codes. The Supreme Court held that such a plan was not immune from the antitrust laws.

Based on the facts of the hypothetical, the joint collection of information to file antidumping or other judicial or administrative claims against their foreign competition should not raise significant U.S. antitrust issues with three caveats. First, in the absence of additional information, one may assume that the firms are not using the import relief claim as a pretense to collude with each other or their foreign competition. For example, the filing or threatening of an antidumping claim, or other legal proceeding, cannot be a sham to reach a price fixing or other cartel agreement among or between the national and foreign competitors.[9] Second, the claims may not be knowingly false or asserted with the predominant purpose of

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[5] California Motor Transp. Co. v. Trucking Unlimited, 404 U.S. 508 (1972).

[6] *Id.* at 513; *see also* Otter Tail Power Co. v. United States, 410 U.S. 366, 380 (1973).

[7] Prof'l Real Estate Investors v. Columbia Pictures Indus. (PRE), 508 U.S. 49 (1993).

[8] Allied Tube & Conduit Corp. v. Indian Head, Inc., 486 U.S. 492 (1988).

[9] Spencer Weber Waller, *Abusing the Trade Laws: An Antitrust Perspective*, 17 LAW POL'Y INT'L BUS. 487 (1985).

injuring competition through the filing and conduct of the proceeding, rather than the result of the proceeding. Finally, counsel should insist on the precautions from the rules of the road set forth above, with competitively sensitive information shared with counsel or a similar third party for sole use in the preparation of the antidumping proceeding, rather than shared directly between the competitors themselves. Counsel or experts working on their behalf should then verify the truthfulness and completeness of the information before proceeding with the claim. But win or lose, the results of a good-faith non-frivolous judicial or administrative proceeding should not result in antitrust liability, even if the competitors suffer competitively from the results of the proceeding.

C. Seeking an Advisory Opinion

There is another option for those associations who want an additional level of assurance beyond the advice of counsel. Both the Federal Trade Commission and the Antitrust Division have procedures where they will provide "advisory opinions" (FTC)[10] or "business review letters" (DOJ)[11] for any type of proposed business conduct other than mergers.

In both cases, the procedures are very similar. The agencies will only opine on proposed future conduct.[12] The applicant provides a letter requesting the advance review and must provide the full facts necessary for the agencies to review in order for them to state what their enforcement position would be if the proposed conduct were initiated.[13] The agencies reserve the right to request further information which can include document production, interviews, depositions, and contact with third parties as needed.

The agencies will respond in one of three ways at the conclusion of their investigation into the matter. In the best-case scenario, the agencies will indicate that they have no present intention

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[10] *Advisory Opinions*, FEDERAL TRADE COMMISSION, https://www.ftc.gov/policy/advisory-opinions (last visited Sept. 14, 2017).

[11] Antitrust Division Business Review Procedure 28 CFR § 50.6 (2015).

[12] *Id.* at ¶2.

[13] *Id.* at ¶5.

of challenging the conduct if it were implemented. Conversely, the agencies may indicate they would challenge the conduct if the parties went forward with their plan. On occasion, the agencies may indicate that they are not in a position to state their present enforcement intentions, which may indicate that the agencies are continuing to investigate the conduct in question or other aspects of the undertaking's behavior. In addition, the agencies will not provide advance guidance for mergers.[14] The agencies then publish the request and the response on their websites redacting any confidential business information or trade secrets.

These responses are not a form of immunity, but as a practical matter the agencies do not challenge the proposed conduct unless they believe the parties have provided false or incomplete information, or the market conditions have significantly changed from the time of the request. Similarly, a favorable response would not prevent a private party from challenging the conduct in court, but would presumably weigh heavily with a judge or jury considering whether the law was actually violated or whether the defendants had the requisite intent to violate the law.

As a practical matter, there are two main situations when firms or associations seek such an advisory opinion or business review letter. First is the situation when the client is risk averse and wants the extra layer of assurance before proceeding with their plans. This can include legitimate information exchange plans where counsel have carefully followed the road map set forth above and are highly confident that: (1) the agencies will issue the favorable "no present intention to challenge" letter and (2) that the client is squeaky clean and it is unlikely that the agency will stumble upon any related or other antitrust violations. A number of information exchange plans have been approved through this procedure where there was very little risk that the agencies would challenge the plan with or without the request for a business review letter.[15]

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[14] *Id.* at ¶¶8–9.

[15] *See e.g.*, Letter from Joel I. Klien, Assistant Attorney Gen., Dep't of Justice Antitrust Div., to Barbara Greenspan, Assoc. Gen. Counsel, Electric Power Research Inst., (Oct. 2, 2000) (published on the Department of Justice webpage) (stating no intention to challenge exchange of cyber security best practices to protect electrical utilities).

Firms and associations have also used these types of requests prior to embarking on highly public and expensive programs of joint ventures or other forms of collaboration between competitors. If the government would inevitably learn of the conduct anyway, and if there is any serious risk of antitrust challenge, the co-venturers need to know sooner rather later before investing large amounts of money or time in a doomed venture.[16]

If such a procedure was available in your jurisdiction, how would you counsel your clients about the value and risks of seeking an advisory opinion on your carefully prepared information exchange plan?

D. Compliance at the Actual Association Meetings or Golf + Beer = Price Fixing[17]

All of the above issues pale in comparison to the overall issue of how best to prevent trade association meetings from becoming a forum or sham for outright price fixing or other hardcore cartel violations. The U.S. playbook has only partial solutions for this issue if there is not already a culture of compliance.

The annual meeting is the perfect example of this double-edged sword. Dressing up a cartel in the guise of a trade association meeting is not a defense. As the international lysine cartel illustrated, calling something a trade association does not change the nature of a cartel if the competitors are using the meeting itself, or the events before or after the meeting, to fix prices, set production levels, allocate territories, or allocate customers.[18] While counsel

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[16] *See, e.g.*, Letter from Renata B. Hesse, Acting Assistant Attorney Gen., Dep't of Justice Antitrust Div., to Nicholas W. Burlingham, Esq., Columbia Fuel Services, Inc. (Jan. 2, 2013), https://www.justice.gov/atr/response-columbia-fuel-services-and-lanmar-aviation-incs-request-business-review-letter; Letter from Molly S. Boast, Acting Assistant Attorney Gen., Dep't of Justice Antitrust Div., to James R. Weiss, Esq., K&L Gates LLP (Sept. 8, 2009), https://www.justice.gov/atr/response-reliance-networks-request-business-review-letter.

[17] Thanks to James Mutchnik of Kirkland & Ellis for this witty aphorism of the ultimate fear of serious antitrust and compliance specialists.

[18] This dynamic is illustrated in Kurt Eichenwald's excellent book on the lysine cartel, The Informant, and the feature film of the same name.

cannot be omniscient or omnipresent at an annual meeting, particularly of a larger association, certain best practices have evolved to minimize the risks of a legitimate trade association straying off the straight and narrow path into dangerous territory.

Each trade association meeting should have a written agenda that the parties actually follow. Written minutes also should be prepared that accurately reflect what was discussed and decided upon at the meeting.

The association, and any member large enough to be able to afford the expense, should have counsel in attendance, or at a minimum available to advise the members if the conversation strays from acceptable topics to the hallmarks of cartel behavior – such as discussions of present or future pricing, production, territories, customers, efforts to boycott competitors, or other forbidden topics.

It is common for mid-level lawyers to attend the meeting on behalf of the association or a member and interject if the conversation is veering into dangerous territory and steer the conversation back to safe ground. Sometimes, the lawyer even brings a whistle, or a literal red flag, to get the attention of the attendees before a poorly phrased comment leads to a dangerous discussion or the inference (rightfully or not) of an unlawful agreement.

Counsel also must carefully prepare their clients before any meetings as to the rules-of-the-road. A well-trained client can remind the rest of the group of what are proper subjects for discussion or agreement between competitors and what is tantamount to an illegal conspiracy. If other members seem intent on breaking the law, a member can make the proverbial "noisy exit" to make clear that they are not part of any resulting conspiracy and everyone remembers that they did so. Loud exclamations, knocking over the water glass or coffee cup, or anything else sufficiently memorable is often advised in these situations, so that if the law has been broken, it is clear that the company or individual has refused to be part of the agreement.

The enforcement agencies can play an equally important role in ensuring that a trade association can meet and lawfully transact their business without fear of antitrust concerns. A well-

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KURT EICHENWALD, THE INFORMANT (2000); THE INFORMANT! (Participant Media 2009).

drafted competition law that the business community understands and can observe is beneficial. More problematic, is an ambiguous or contradictory law that allows trade associations to "recommend" prices or outright exemptions that allow price fixing to flourish.[19] The government can provide guidance in the form of advisory opinions on a case-by-case basis in the United States or publish rules of the road for trade associations, as is the case in Australia.[20]

Bar Associations and law firms can supplement the agencies with short plain-English guides for clients and trade associations. More recently, the Antitrust Section of American Bar Associations published a short plain language ten-page inexpensive pocket guide for executives involved in trade associations that can be easily digested beforehand or brought into a trade association meeting or other event.[21]

However, all the precautions in the world cannot prevent firms and individuals from breaking the law and hiding their conduct from legal counsel. A large trade association meeting provides numerous opportunities for unmonitored conversations outside meetings, in exhibition halls, in the bars and restaurants, on the golf course, in the bathrooms, or behind closed doors of hotel rooms. Even the best legal advice can be ignored and the most sensible precautions circumvented. In the end, a firm or individual must want to comply with the law or the sagest advice will be for naught.

The consequences can be dire, particularly in the United States with its robust criminal enforcement program. An agreement to exchange information is a "contract, combination, or conspiracy" within the meaning of Section 1 of the Sherman Act, but

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[19] *See* New Zealand Commerce Act Section 32 (which exempts from the rule against price fixing price recommendations if there are 50 or more parties to the agreement for a recommended price, and it is a genuine "recommendation." The "recommendation" may still be challenged if it can be shown that the price recommendation has the purpose, or effect, or likely effect, of substantially lessening competition.).

[20] *Industry Associations, Competition and Consumers*, AUSTRALIAN COMPETITION AND CONSUMER COMMISSION, https://www.accc.gov.au/system/files/Industry%20associations%20and%20the%20CCA.pdf. (last visited Sept. 14, 2017).

[21] AMERICAN BAR ASSOCIATION, SECTION OF ANTITRUST LAW, CARTEL LAW BASICS FOR EXECUTIVES (2017).

such an agreement without some additional agreement on prices, production, territories, etc., would normally be judged under the rule of reason. If it were challenged, the government would normally bring only a civil violation seeking an injunction to stop the practice. If the information exchange or other communications are part of a broader plan to fix prices or engage in other cartel behavior then the likely result is a criminal prosecution for per se unlawful hardcore cartel violations.

Consider this cautionary tale from the United States Court of Appeals for the Fourth Circuit affirming the conviction of real estate brokers for price fixing executed through an industry association:

> At the dinner, Foley [one of the realtors] rose, made some prefatory remarks and then stated that his firm was in dire financial condition. Saying that he did not care what the others did, he then announced that his firm was changing its commission rate from six percent to seven percent. Testimony as to what was said by various persons in the ensuing discussion is greatly in conflict, but there was evidence from which the jury could find that each of the individual defendants and a representative of each corporate defendant…expressed an intention or gave the impression that their firm would adopt a similar change. The discussion also included reference to the earlier unsuccessful effort by [a realtor] to adopt a seven percent policy, from which the jury could find that defendant knew that their cooperation was essential.[22]

Carefully consider the best way to avoid this type of result in your jurisdiction.

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[22] United States v. Foley, 598 F.2d 1323, 1332 (4th Cir. 1979). *See generally* William H. Page, *Tacit Agreement Under Section 1 of the Sherman Act*, 81 ANTITRUST L.J. 593 (2017).

III. CONCLUSION

This Issue Paper provides a U.S. perspective on the principal antitrust issues raised by the hypothetical and the common perils of the collaboration of competitors through a trade association. We now turn to the roundtable discussion of how each jurisdiction's own history, law, culture, and compliance norms would address these types of issues.