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LATIN AMERICAN COMPETITION FORUM

Session I: Competition Issues in Trade Associations

Contribution from US Federal Trade Commission and the US Department of Justice

13-14 Septembre 2011, Bogotá (Colombia)

The attached document from the US Federal Trade Commission and the US Department of Justice is circulated FOR DISCUSSION under Session I of the Latin American Competition Forum at its forthcoming meeting to be held on 13-14 September 2011 (Colombia).

Contact: Ms. Hélène Chadzyska, Administrator, LACF Programme Manager
Tel.: +33 (01) 45 24 91 05; Fax: +33 (0)1 45 24 96 95; Email: helene.chadzyska@oecd.org

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LATIN AMERICAN COMPETITION FORUM

13-14 September 2011, Bogota (Colombia)

Session I: Competition Issues in Trade Associations

-- CONTRIBUTION FROM THE US FEDERAL TRADE COMMISSION AND THE US DEPARTMENT OF JUSTICE ¹ --

1. The large majority of trade association activity is pro-competitive or competitively neutral. A trade association may, for example, perform an important information-gathering function that would be difficult for its members to perform individually, or it may have as a principal function the establishment of standards that protect the public or allow the interoperability of components made by different manufacturers. The association may represent its members before legislative bodies and governmental agencies, a competitively-neutral activity that may serve the socially desirable function of improving the information upon which governmental decisions are made. If done carefully and with adequate antitrust advice, these legitimate goals can be accomplished without undue antitrust risk.

2. Trade associations and their members sometimes fail to take account of antitrust issues, however, which can result in their engaging in illegal conduct. The most obvious example is outright price-fixing, bid-rigging, or market division by members at trade association meetings or, more likely, separate sessions on the margins of a meeting.

3. In the first sections of the paper we discuss the antitrust implications of various trade association activities, such as collecting and exchanging economic information, facilitating and/or organizing restraints on competition, and membership issues. In the last section, we discuss antitrust issues relating to standard setting.

¹ Much of this submission is based on a longer 2007 submission to the OECD Competition Committee's Working Party 3 on Cooperation and Enforcement, which can be found at <http://www.ftc.gov/bc/international/docs/ustradeass.pdf>. Due to space limitations, this version omits a discussion of trade association standard setting activities.

1. Collection and Exchange of Economic Information by Trade Associations

4. U.S. courts have long recognized the utility of statistical information collection by trade associations.² Exchanges of price information can pose significant anticompetitive risks, however, particularly in concentrated industries. Because conduct of this sort does not always injure competition it is analyzed under the rule of reason. “An exchange of price information that is not part of a price-fixing scheme still may be upheld if it is unlikely to have an anticompetitive effect on prices or if the exchange has a legitimate business purpose that offsets any likely anticompetitive effect in a rule of reason analysis.”³ As a general rule, information exchanges involving non-price data, and historical data rather than current or future data, are less likely to raise antitrust concerns; aggregated data managed by an independent third party, in which particular suppliers or customers are not revealed, also raise fewer concerns.⁴

2. Examples of Trade Associations Facilitating Collusion and/or Organizing Naked Restrictions of Competition

5. In recent decades, the antitrust agencies have generally not encountered trade associations that have organized naked restrictions of competition, such as price-fixing, bid rigging and market allocation. This is partially due to the level of sophistication of U.S.-based trade associations about the antitrust laws. Even more likely, however, it is attributable to the fact that individuals and companies that engage in such conduct realize that, to avoid detection, collusion must be conducted covertly. The open involvement of a trade association could only increase the chances that the conspiracy would come to the attention of the authorities.

6. On occasion, however, the U.S. agencies have encountered trade associations that have facilitated or organized collusion. In *Federal Trade Commission (FTC) v. Superior Court Trial Association*,⁵ for example, the FTC filed a complaint against an association of private criminal defense lawyers who routinely accepted appointments to defend indigent criminal defendants at public expense, along with four of its officers, alleging that they had entered into an agreement to restrain trade by refusing to accept new appointments under a program that provided court-appointed lawyers for such defendants until the government increased the lawyers’ fees. The FTC characterized the conduct of the association and its members as a conspiracy to fix prices and to conduct a boycott and concluded that they were engaged in unfair methods of competition. The case ultimately reached the U.S. Supreme Court, which held that “[t]he agreement among the association and its members was designed to obtain higher prices for their services and was implemented by a concerted refusal to serve an important customer in the market for legal services and, indeed, the only customer in the market for the particular services that [the association members] offered”. The Supreme Court ruled that “[t]he horizontal arrangement among these competitors was unquestionably a naked restraint on price and output” and did not consider the “expressive component” of the boycott as an excuse “meriting an exemption from the per se rules of antitrust law.”

7. Another example involved a trade association of wirebound box manufacturers, two of which the Department of Justice prosecuted for a 20 year conspiracy to allocate customers. In that case, the trade association kept records of its members’ customers. When one of the association’s members made a sales call on a potential customer, that member contacted the association to determine if the potential customer

² *Maple Flooring Mfrs. Ass’n v. United States*, 268 U.S. 563, 582-83 (1925).

³ ABA Section of Antitrust Law, *Antitrust Law Developments* (6th ed. 2007), at 95.

⁴ For example, see the 1996 FTC/DOJ Statements of Antitrust Enforcement Policy in Health Care, <http://www.ftc.gov/bc/healthcare/industryguide/policy/hlth3s.pdf>.

⁵ *Federal Trade Commission v. Superior Court Trial Association et. al.*, 493 U.S. 411 (1990).

was already being serviced by one of the association's members. If the customer was already being serviced by another one of its members, the trade association would provide a code letter. The code letter identified a certain section of the United States on a secret map kept by the association and its members. Through the use of the code letter and the secret map, the first member knew that second member serviced the customer. The first member then called the second member to see what the first member should bid or quote to ensure that the second member kept the customer.

3. Examples of Members Using Trade Association Activities to Cover Unlawful Collusion, without the Knowledge of the Trade Association

8. More frequently, the U.S. agencies have encountered examples of trade associations that have provided cover for collusion. One of these examples involved a conspiracy among five major citric acid manufacturers to fix prices and allocate sales volumes for citric acid worldwide from March 1991 through June 1995. The industry's trade association, the European Citric Acid Manufacturers' Association (ECAMA), was a legitimate trade association but was used to provide cover for the cartel. One of the witnesses in the related lysine trial testified in court that ECAMA gave the citric acid conspirators "good cause" to be together at the particular location for the official ECAMA meetings. Since the conspirators were all attending the official meetings in any case, it was convenient to meet the day before the official meetings to fix the prices of citric acid and set market shares. Consistent with the purpose of being a cover for illegal activity, ECAMA took steps to prevent its formal activities from crossing the antitrust line.

9. Another example was the trade association subcommittee formed for the sole purpose of providing cover for the lysine conspiracy. The lysine conspiracy involved price-fixing and volume allocation agreements in the world market for lysine from June 1992 through June 1995, affecting over \$1 billion in sales. Early in the lysine conspiracy, the conspirators formed an amino acid working group or subcommittee of the European Feed Additives Association for the purpose of providing cover in the same way that they observed that ECAMA was providing cover for the citric acid conspiracy. The subcommittee provided a false, but facially legitimate, explanation as to why the conspirators were meeting. One witness in the lysine trial described the lysine trade association as a "good reason to get together." Another witness described the trade association as "camouflage" for the "unofficial meeting" where the conspirators would meet to "agree on the price [of lysine]." To maximize the cover the subcommittee provided, the conspirators created sham documents under the association's imprimatur to conceal the conspirators' true activities. For instance, one witness prepared, in his words, a "phony" agenda for a subcommittee meeting in Paris in October 1992 in order to attach a legitimate purpose to a conspiratorial meeting. In fact, none of the issues on the agenda were discussed at the meeting.

4. Trade Association Organization of Anticompetitive Activity

10. A trade association may openly exceed its legitimate functions and organize anticompetitive activity. In *FTC v. Indiana Federation of Dentists*,⁶ for example, the FTC ruled that the policy of an organization of dentists in Indiana, which required its members to withhold x-rays from dental insurers who were evaluating patients' claims for benefits, constituted an unfair method of competition. The case also reached the Supreme Court, which found a violation under a rule of reason analysis. The court characterized the Federation's policy as a horizontal agreement among its members to withhold from their customers a particular service that they desire. Absent proof of countervailing procompetitive benefits, the Court held that such an agreement was illegal.

⁶ *Federal Trade Commission v. Indiana Federation of Dentists*, 476 U.S. 447 (1986).

11. Another example may be found In *United States v. Association of Retail Travel Agents (ARTA)*,⁷ where the Department of Justice charged ARTA in connection with its efforts to orchestrate a boycott of travel providers that did not conform to ARTA's vision of an appropriate travel agent compensation system. ARTA's Board of Directors had adopted a written policy calling for a minimum ten percent commission on hotel and car rental sales by travel agents, the elimination of all distribution outlets for airline tickets other than travel agents, and the payment of commissions based on full fares rather than the actual discounted prices. A few days later, ARTA hosted a press conference where it announced the content of this policy, and shortly thereafter, one of ARTA's board members announced that his travel agency would cease doing business with certain travel providers whose commission and sales practices did not comport with the policy, and invited other travel agents to do likewise. Thereafter, at least one other board member made a similar announcement.

12. The Division's complaint alleged that ARTA and its members had violated Section 1 of the Sherman Act by agreeing on commission levels and other terms of trade on which ARTA members and other travel agents should transact business with travel providers, and by inviting, encouraging and participating in a group boycott designed to induce travel providers to agree to those commission levels and terms of trade. The case was settled by a consent decree in which ARTA was prohibited from "inviting or encouraging concerted action by travel agents or travel agencies to refuse to do business with specified suppliers of travel services or to do business with specified suppliers only on specified terms; and directly or indirectly adopting, disseminating, publishing, or seeking adherence to any rule, bylaw, resolution, policy, guideline, standard, objective, or statement made or ratified by an officer, director or other official of defendant that has the purpose or effect of advocating or encouraging any of the[se] practices."

13. A more recent example can be found in the FTC's Realcomp II decision.⁸ The FTC found that Realcomp, an association of local real-estate associations, unreasonably restrained competition among real estate brokers in southeastern Michigan. In particular, the FTC "alleged that Realcomp's website policy and search-function policy injured consumers by limiting the marketing of limited service listings, which tend to cost less than the full-service listings offered by Realcomp's members, thereby eliminating competition without cognizable and plausible efficiency justifications." The Court of Appeals upheld the FTC's findings that Realcomp's website policy gave rise to potential genuine adverse effects on competition due to its substantial market power and the website policy's anticompetitive nature, the website policy caused actual anticompetitive effects, and Realcomp's proffered procompetitive justifications were insufficient to overcome a prima facie case of adverse impact.

5. Trade Association Rules that Inhibit Competition

14. Industry codes of conduct that restrain competition may be anticompetitive. The DOJ challenged a professional society's prohibition in its canon of ethics of competitive bidding by its members (*National Soc. of Professional Engineers v. U.S.*⁹). In that case the Supreme Court held that the trial court was justified in refusing to consider the defense that the canon was justified "because it was adopted by members of a learned profession for the purpose of minimizing the risk that competition would produce inferior engineering work endangering the public safety." The Court held that "no elaborate industry analysis is required to demonstrate the anticompetitive character of such an agreement," and that "the Rule of Reason does not support a defense based on the assumption that competition itself is unreasonable."

⁷ *United States v. Ass'n of Retail Travel Agents*, 1995-1 Trade Cas. (CCH) ¶70,957 (D.D.C. 1995).

⁸ *Realcomp II, Ltd. v. Federal Trade Commission*, 635 F.3d 815 (6th Cir. 2011). Realcomp is appealing the Court of Appeals decision to the Supreme Court.

⁹ *National Society of Professional Engineers v. United States*, 435 U.S. 679 (1978).

15. In another case, the FTC brought a complaint against the California Dental Association (CDA), a non-profit association of local dental societies.¹⁰ The FTC challenged the agreement of CDA's members to abide by its Code of Ethics, which, *inter alia*, prohibited false or misleading advertising. The CDA interpreted the Code to restrict both truthful and deceptive advertising of prices, particularly discounted fees, and the quality of dental services. The FTC sought to apply a "quick look" analysis that treated facially anticompetitive non-price agreements among competitors as presumptively unlawful unless a plausible efficiency justification can be produced. While the Supreme Court unanimously agreed that the activities of a trade association comprised of competing firms could violate the antitrust laws, a narrow majority of the court did not find it intuitively obvious that advertising restrictions were likely to be anticompetitive, and rejected the view that a "quick look" could be applied in such a case and instead required a more complete rule of reason inquiry.

16. At the same time, there may be cases where the procompetitive benefits of trade association rules outweigh potential risk to competition. FTC staff recently issued an advisory opinion letter stating that it has no present intention to challenge the Council of Better Business Bureaus' proposed "accountability program," which would hold companies engaged in online behavioral advertising accountable for compliance with the "Self-Regulatory Principles for Online Behavioral Advertising."¹¹ These principles were released in July 2009 by a coalition of industry associations, and are administered by the Digital Advertising Alliance. According to the letter, unless it is designed or misused by competitors to limit competition, industry self-regulation to provide consumers with more useful information and increased choice generally benefits consumers with little or no risk of diminishing competition among complying businesses.

6. Issues Associated with Trade Association Membership

17. In *Northwest Wholesale Stationers v. Pacific Stationery & Printing Co.*, 472 U.S. 284 (1985), the Supreme Court addressed the exclusion of companies seeking membership in a wholesale buying cooperative of office supply retailers. The Court noted that the cooperative "permit[ted] the participating retailers to achieve economies of scale in both the purchase and warehousing of wholesale supplies, and also ensure[d] ready access to a stock of goods that might otherwise be unavailable on short notice." The asserted reason for expelling the plaintiff – failure to comply with a cooperative rule on disclosure of a change in stock ownership – was described as a "reasonable" rule which "may well provide the cooperative with a needed means for monitoring the creditworthiness of its members." The Court held that a rule of reason analysis was appropriate: "[w]hen the plaintiff challenges expulsion from a joint buying cooperative, some showing must be made that the cooperative possesses market power or unique access to a business element necessary for effective competition."

18. The DOJ and FTC have also applied a rule of reason analysis to membership in health care joint ventures, such as physician and multiprovider networks. The agencies' Health Care Statements "focus not on whether a particular provider has been harmed by the exclusion but on whether the exclusion reduces competition among providers in the market and thereby harms consumers. That analysis requires an assessment and balancing of potential procompetitive and anticompetitive effects, which in turn requires an evaluation of the market structure, the basis for the exclusion, and the resulting competitive incentives, all of which are integral to a rule of reason analysis."¹²

¹⁰ *California Dental Association v. Federal Trade Commission*, 526 U.S. 756 (1999).

¹¹ FTC Staff: No Present Intention of Challenging Council of Better Business Bureaus' Accountability Program for Online Behavioral Advertising as Anticompetitive, available at <http://www.ftc.gov/opa/2011/08/cbbb.shtm> (August 15, 2011).

¹² 1996 FTC/DOJ Statements of Antitrust Enforcement Policy in Health Care, *supra* footnote 4. *See also*, ABA Section of Antitrust Law, *Antitrust Law Developments* (6th ed. 2007), at 480.

7. Standard Setting: Exclusionary Conduct through Product Certifications

19. The other major class of restraints are those designed to restrict competition, not within the group, but between favored firms and disfavored firms. The theme here is exclusion rather than collusion. An example is a seal of approval or other standard-setting activity. The first point to make about standard setting is that it will almost invariably be analyzed under the rule of reason, unless it is merely a device to enforce a price-fixing agreement by excluding new entrants or by punishing members who deviate from the cartel. Standards provide many pro-competitive benefits to consumers by providing them with information, by ensuring that products of different manufacturers are compatible with each other, and by keeping unsafe products out of the marketplace. Rule of reason treatment is therefore generally appropriate when analyzing standards issues.

20. The second point is that market power is an important factor in determining whether a standard can have an anticompetitive effect and therefore can be unlawful. If certification by a particular group is only one among many ways to be recognized by consumers as acceptable, deprivation of that certification is unlikely to have a significant competitive effect. If, on the other hand, failure to adhere to the particular standard would result in effective exclusion from the market, then there is much greater reason to be concerned about the appropriateness of such exclusions as do take place.

21. The third point is that exclusion by an entity in the standard setting body is not necessarily unlawful, depending on the legitimacy of the reasons for exclusion. One important proxy for the legitimacy of the exclusion is the fairness of the process by which it was reached. The two most significant Supreme Court cases in this area arose from processes that were fundamentally flawed. In *American Society of Mechanical Engineers v. Hydrolevel Corp.*,¹³ a manufacturer of safety devices for water boilers made competitive use of the position of one of its employees as a vice-chair of the relevant standards-setting subcommittee of ASME. To meet a competitive threat from another company, the employee worked with the chair of the subcommittee to request an opinion from ASME concerning the competitor's product. The chair then responded to the letter that he had helped draft, erroneously suggesting, on ASME stationery, that the competitor's product was unsafe and in violation of ASME's code. The employee was later commended in his personnel file for "efforts and skill in influencing the various code making bodies to 'legislate' in favor of [the manufacturer's] products." The Supreme Court upheld a finding of liability against ASME.

22. Similarly, in *Allied Tube & Conduit Corp. v. Indian Head, Inc.*,¹⁴ a manufacturer of steel conduit for electrical wiring defeated an attempt by a competitor to get plastic conduit approved as safe for use in electrical wiring. It did so by "packing" a meeting of the National Fire Protection Association at which the relevant provisions of the National Electrical Code were to be discussed and voted upon. The Supreme Court held that the *Noerr-Pennington* doctrine¹⁵ did not protect the manufacturer from liability for this abuse of the standards-setting process.

¹³ *American Society of Mechanical Engineers v. Hydrolevel Corp.*, 456 U.S. 556 (1982).

¹⁴ *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492 (1988).

¹⁵ The *Noerr-Pennington* doctrine protects a defendant from liability for anticompetitive government actions and incidental anticompetitive effects resulting from the defendant's petitioning the government for such actions. *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961); *United Mine Workers v. Pennington*, 381 U.S. 657 (1965).