

**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE****Working Party No. 2 on Competition and Regulation****Publicly funded education markets – Note by the United States****3 June 2019**

This document reproduces a written contribution from the United States submitted for Item 3 of the 67th OECD Working Party 2 meeting on 3 June 2019.

More documents related to this discussion can be found at

<http://www.oecd.org/daf/competition/publicly-funded-education-markets.htm>

Please contact Mr Chris PIKE if you have any questions about this document
[Email: Chris.Pike@oecd.org]

JT03448697

United States

1. Introduction

1. Providing educational services to students is a business endeavor that operates much like any other. Education providers and consumers respond to incentives that economists and antitrust enforcers are well accustomed to analyzing. Indeed, higher education is one of the United States' oldest and largest industries. One 2014 Government Accountability Office report estimates that public colleges and universities receive in excess of \$300 billion in revenue annually.¹ Private institutions likely add hundreds of billions of dollars more, as do ancillary industries that exist only to serve higher education, like financial lenders, textbook manufacturers, tutors, and test preparation services.

2. There are some common features of higher education businesses that may be significant to antitrust analysis. For instance, colleges are typically non-profit entities, they often have the ability to engage in significant price discrimination, and they frequently provide diverse services ranging from housing to in-house publishing to consumers who already have a relationship with the institution. This paper first sets forth selected guiding principles on how the U.S. enforcement agencies apply existing antitrust principles to conduct in higher education and then summarizes the major U.S. antitrust cases in higher education in order to highlight some of these common issues.

2. Competition Principles Applied to Education

3. As in any other market, competition between educational institutions is a driver of consumer welfare. When schools have to compete for students, they must respond to consumer demand, including by offering services that better meet the educational needs of students.

4. Even when the government subsidizes education using public funds, legislatures can design systems that capture the benefits of competition by ensuring that consumers play a role in choosing their preferred educational institutions. The charter school and voucher movements in primary and secondary education in the United States are two examples of policies that can increase competition through school choice.

5. Additionally, legislatures often play an important role in determining the barriers to entry for educators and educational institutions. Like in other specialized industries, incumbents in the education industry have an incentive to restrict supply by erecting quality or other requirements before new entrants can offer educational services. If the certification requirements are unnecessary or overly burdensome, they reduce consumer welfare by raising the cost to supply education, or by restricting the number of new entrants in the market. For this reason, legislatures should carefully evaluate whether certification requirements are necessary to accomplish a policy goal. For the same reason, antitrust enforcers should closely evaluate the tactics of private accreditation organizations or other associations of educators comprised of horizontal competitors who act together to raise barriers to entry.

¹ *Higher Education: State Funding Trends and Policies on Affordability*, at Table 3, available at <https://www.gao.gov/assets/670/667557.pdf>.

6. Many higher education transactions reflect traditional economic arrangements that are familiar to antitrust enforcers—there is a fee (e.g., tuition, room and board, activity fees) exchanged for a service (e.g., education, housing, meals). Some aspects of a transaction might at first blush appear contrary to economic decision-making, but further inquiry can uncover the incentives that drive economic analysis. For instance, colleges do not necessarily charge the maximum price to all of their customers, but this phenomenon can be explained as a type of network effect: colleges that can attract excellent students can optimize the quality of their product for other customers. It is therefore important for antitrust analysis to understand the facts that explain an educational institution’s incentives. For instance in *United States v. Brown University*,² the Third Circuit remanded the case for the district court to take a closer look at conduct that was tantamount to price fixing and would typically be condemned as per se unlawful. The unfamiliar motivations surrounding financial aid decisions made the outcomes less predictable than in a typical price-fixing case and required additional factual inquiry to understand the economic effects.

7. The U.S. enforcement agencies thus apply the familiar tool of effects analysis to the conduct of educational institutions. Before doing so, however, the agencies must decide whether the conduct is commercial in nature and whether any exceptions should apply in the education context to conduct that would otherwise be condemned as per se unlawful.

2.1. Commercial vs. non-commercial conduct

8. The Sherman Act applies only to restraints “of trade or commerce,”³ meaning that some actions, even if acted on jointly, would fall outside of the ambit of the antitrust laws if they were non-commercial.⁴ The Supreme Court has interpreted this “non-commercial exception quite narrowly, however, explaining that Congress intended the Sherman Act to apply “as broadly as it could.”⁵ As such, colleges and universities do not enjoy a blanket exemption from the Sherman Act even when they are structured as non-profit entities.⁶ Instead of asking whether the entity is a commercial actor, the test is whether the conduct, agreement, or decision at issue is commercial in nature. As highlighted by *Brown University*, the inquiry is a fact-specific one, based “on the nature of the conduct in light of the totality of the surrounding circumstances.”⁷ There, the court held that agreements to affect tuition prices are indeed commercial.⁸ This result is in line with the trend in recent cases to draw the contours of “commerce” quite broadly.⁹

9. When considering agreements among higher education institutions, the U.S. enforcement agencies evaluate not the actor, but rather the commercial nature of the act and its expected effect. The three principal levers of competition in a traditional commercial market are price, output, and quality. If an agreement between academic

² 5 F.3d 658 (3d Cir. 1993).

³ 15 U.S.C. § 1.

⁴ See *Klor’s, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207, 213 n.7 (1959).

⁵ *Goldfarb v. Va. State Bar*, 421 U.S. 773 (1975).

⁶ *Id.* at 786-87.

⁷ *Brown University*, 5 F.3d at 666.

⁸ *Id.*

⁹ See, e.g., *Agnew v. Nat’l Collegiate Athletic Ass’n*, 683 F.3d 328, 338 (7th Cir. 2012); *O’Bannon v. Nat’l Collegiate Athletic Ass’n*, 802 F.3d 1049, 1065 (9th Cir. 2015).

institutions materially restrains competition on dimensions of price, output, or educational quality, it is likely commercial in nature and covered by the Sherman Act.

10. Those named dimensions are far broader than their labels imply. “Price” includes more than just the tuition sticker price; it extends at least to scholarships, discounts, room and board, and other fees levied by a university. “Output” is broader than just the total number of students admitted; it could also include the number of students admitted at any particular point in the application process, the application process itself, admissions standards, the admission of transfer students, or efforts to recruit applicants or transfer students. Finally, the notion of “quality” encompasses a range of agreements, such as those that restrict majors or courses offered, the qualifications of professors hired, the number of professors hired, or the perceived or actual difficulty of curricula.

2.2. Standard of review in educational markets

11. Under the Sherman Act, an agreement in restraint of trade is judged by its reasonableness unless the effect of the agreement is so well understood that it falls into a special category of *per se* offenses, such as price fixing, market allocations, and output restrictions.

12. After the *Brown University* case, some have incorrectly argued that there are no *per se* illegal agreements among educational institutions, because those institutions necessarily have educational quality as a goal.¹⁰ The court in *Brown University*, however, specifically noted that educational institutions are not “immune from *per se* treatment” for “commercially motivated conduct.”¹¹

13. The U.S. enforcement agencies consider whether an agreement among educational institutions deserves *per se* treatment much like they would in any other market.

14. First, assuming an agreement and restraint exist, the agencies consider whether the restraint is reasonably related to, and reasonably necessary to achieve procompetitive benefits from an efficiency-enhancing integration of economic activity (also known as “ancillary”).¹² If the restraint is ancillary to a collaboration, then the harm of the restraint on competition will be considered together with the benefits of the restraint, and evaluated for reasonableness overall. If the restraint is naked, however, then the question is whether its effects are so well understood as to obviate the need for detailed analysis. If the effects of the agreement enhance educational or other aspects of quality then a reasonableness analysis may be required to understand the ultimate effect on consumer welfare.

3. Cases Applying Antitrust Law to Higher Education

15. In *Goldfarb v. Virginia State Bar*, the U.S. Supreme Court expressly rejected a blanket exception to the antitrust laws for entities engaged in public service, emphasizing

¹⁰ See, e.g., Brief for American Council on Education as Amicus Curiae in Support of the Petition for a Writ of Certiorari at 9-10, *Nat’l Collegiate Athletic Ass’n v. Law*, 1998 WL 34103010 (*Brown University* stands for the “principle that antitrust challenges to nonprofit entities pursuing noncommercial goals warrant careful consideration under a plenary rule-of-reason review[.]”).

¹¹ 5 F.3d at 672 (italics added).

¹² See, e.g., *Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*, 792 F.2d 210 (D.C. Cir. 1986).

that “Congress intended to strike as broadly as it could in § 1 of the Sherman Act.”¹³ Since *Goldfarb*, educational entities often have been subjected to the antitrust laws if the activity at issue is determined to be commercial.

16. One of the leading private actions applying antitrust law to the business of higher education is *National Collegiate Athletic Association v. Board of Regents of the University of Oklahoma et al.*, in which the University of Oklahoma alleged that the NCAA’s control over the televising of college football games violated Section 1 of the Sherman Act.¹⁴ The district court concluded that the NCAA controls over college football “are those of a classic cartel with an almost absolute control over the supply of college football” and that the procompetitive justifications offered were insufficient.¹⁵ The U.S. Court of Appeals for the Tenth Circuit found the plan constituted *per se* illegal price fixing and, even assuming it was not a *per se* violation, rejected the procompetitive arguments the NCAA made in support of its plan.¹⁶ The Supreme Court held that applying a *per se* standard would be inappropriate because the case involved “an industry in which horizontal restraints on competition are essential if the product is to be available at all.”¹⁷ Applying a truncated rule of reason analysis, the Court found the NCAA’s plan violated the Sherman Act.

17. About a decade later, in 1991, the U.S. Department of Justice (DOJ) filed a civil suit alleging a violation of the Sherman Act in the higher education industry, *United States v. Brown University*.¹⁸ The DOJ alleged that nine elite universities had illegally conspired to restrain price competition on financial aid to prospective undergraduate students beginning as early as 1980.¹⁹ The universities involved, including Ivy League schools and MIT, had formed a specific group (called the “Overlap” schools) whose purpose was to “eliminate price competition among those schools for talented students among member institutions.”²⁰ This restraint on price competition resulted in less financial aid—and thus higher family contributions—for some financial aid applicants.

18. The Ivy League schools settled with the DOJ and a consent decree pertaining to these defendants was filed concurrently with the Complaint.²¹ MIT did not join in the

¹³ 421 U.S. 773, 787 (1975).

¹⁴ 468 U.S. 85 (1984).

¹⁵ *Id.* at 95-96 (internal quotation omitted).

¹⁶ *Id.* at 96-97.

¹⁷ *Id.* at 101.

¹⁸ 5 F.3d 658 (3d Cir. 1993).

¹⁹ The named defendants included Ivy League members Brown University, Columbia University, Cornell University, Dartmouth College, Harvard University, Princeton University, University of Pennsylvania, and Yale University (collectively, “the Ivies”), and the Massachusetts Institute of Technology (MIT). The DOJ’s complaint alleged that the Overlap universities (1) agreed not to award merit (i.e., non-need-based) scholarships based on academic achievement or other attributes, (2) agreed on a formula for determining the family contribution, (3) compared and eliminated significant differences between schools in the family contribution for individual students at annual spring meetings, and (4) exchanged self-help levels for students and, in an annual spring meeting, often matched self-help awards for individual students.

²⁰ 5 F.3d at 673.

²¹ The consent decree restrained the Ivy League members from, among other things, agreeing with any other college or university (1) on all or part of financial aid awarded to any student or any

settlement and the matter proceeded to trial. The district court²² held that MIT's conduct was an illegal horizontal price fixing arrangement and issued an injunction prohibiting MIT from participating in any agreements with other colleges and universities that may have the tendency to affect the price to be paid by a prospective student. MIT appealed the district court decision.

19. In September 1993, the U.S. Court of Appeals for the Third Circuit reversed the district court opinion and remanded the case, requiring the district court to conduct additional analysis.²³ As a threshold matter, the Third Circuit agreed with the district court that the Overlap agreement was subject to scrutiny under Section 1 of the Sherman Act. The Third Circuit noted the Sherman Act applied because "the payment of tuition in return for education services constituted commerce."²⁴ The Third Circuit held, however, that the conduct was not *per se* unlawful price fixing, noting the uncertainty regarding the impact of the conduct on competition, given that MIT had argued the colleges' motives were not to profit-maximize but rather to accomplish a social good.²⁵

20. There have been several cases addressing whether the decision to accredit a school is commercial in nature, and therefore subject to the antitrust laws. In *Marjorie Webster Junior College v. Middle States Association of Colleges and Secondary Schools, Inc.*,²⁶ the U.S. Court of Appeals for the D.C. Circuit held that an accreditation decision could be "distinct from the sphere of commerce" if it was for educational purposes rather than to achieve a commercial goal. The Sixth Circuit addressed the question in *Foundation for Interior Design Education Research v. Savannah College of Art & Design*, where the plaintiff, an accreditation organization for interior design education programs, denied the defendant's application for accreditation and sought declaratory judgment that it did not violate the antitrust laws by excluding the defendant school.²⁷ The defendant made multiple counterclaims, including alleging a group boycott by the foundation and its members. Although the court decided on other grounds, the Sixth Circuit noted that an accreditation decision might be made for non-commercial reasons, and under those circumstances would escape antitrust scrutiny.

21. In *Jung v. Ass'n of American Medical Colleges et al.*, medical school graduates in their training residencies alleged that the National Resident Matching Program violated

student's family contribution, (2) to apply a similar or common formula for contributions, and (3) whether or not to offer merit-based awards. The consent decree also prohibited the Ivy League members from exchanging a number of different types of information with other colleges and universities, including the school's plans regarding the amount of self-help and proposed financial aid awards. The Ivy League members also were required to refrain from exchanging budgetary information, including future tuition projections and general faculty salary levels, and from agreeing to fix tuition levels or faculty salary levels.

²² *United States v. Brown Univ., et al.*, 805 F.Supp. 288 (E.D. Pa. 1992).

²³ 5 F.3d at 673.

²⁴ *Id.* at 666.

²⁵ For instance, MIT argued that the Overlap allowed for an increase in socio-economic diversity and allowed more students to receive financial aid.

²⁶ 432 F.2d 650, 654 (D.C. Cir. 1970).

²⁷ 244 F.3d 521 (6th Cir. 2001).

Section 1 of the Sherman Act.²⁸ The residents alleged that the “matching” process imposed anticompetitive restraints on medical residency hiring and that the accrediting organization for medical schools helped implement the process through its accreditation criteria. In denying defendants’ motions to dismiss, the district court found that the Sherman Act applied to the accreditation decision as alleged and that the plaintiffs stated an antitrust claim by alleging that the defendants used the accreditation standards to require institutions to enforce caps on compensation and to participate in other matching program rules.²⁹

22. The question of what constitutes “commercial” conduct has also been raised in cases involving schools’ rules for eligibility to participate in sports programs. In *O’Bannon v. National Collegiate Athletic Association*, a former collegiate basketball player brought a class action challenging the NCAA’s use of images of former student athletes for commercial purposes.³⁰ The suit alleged that, upon graduation, the former student athletes should be entitled to financial compensation for the NCAA’s use of their images. The district court held the NCAA’s position to the contrary violated Section 1 of the Sherman Act. On appeal, the U.S. Court of Appeals for the Ninth Circuit held that the NCAA’s rules were not exempt from antitrust scrutiny.³¹ The Ninth Circuit determined that the rules had the effect of fixing an aspect of price that recruits pay to attend college.³²

23. Finally, educational institutions compete in the hiring and retention of the highly skilled faculty necessary to accomplish their educational mission. Consequently, some institutions have been subject to allegations that they entered into no-poach or no-hire agreements. Recently, in *Seaman v. Duke University and Duke University Health System*, an assistant professor brought a class action alleging that Duke and the University of North Carolina agreed not to permit lateral hiring of faculty between the universities and that the agreement violated Section 1 of the Sherman Act by eliminating competition for faculty, restricting their mobility, and suppressing their compensation. In March 2019, the DOJ filed a Statement of Interest in that lawsuit addressing the proper application of the antitrust laws. In the view of the DOJ, the *per se* prohibition against naked no-poach agreements applies the same in the context of an educational institution hiring professors as it does in any other commercial industry. In May 2019, the DOJ filed an unopposed motion to intervene for the limited purpose of joining the proposed settlement and obtaining the right to enforce an injunction designed to prevent the maintenance or recurrence of any unlawful agreements relating to employee retention or recruitment.³³

²⁸ 300 F. Supp. 2d 119 (D.D.C. 2004).

²⁹ *Id.* at 162, 169-72.

³⁰ 7 F. Supp. 3d 955 (N.D. Cal. 2014).

³¹ *O’Bannon v. Nat’l Collegiate Athletic Ass’n*, 802 F. 3d 1049 (9th Cir. 2015).

³² *Id.* at 1052.

³³ *Seaman v. Duke University and Duke University Health System*, Case No. 15-cv-00462 (M.D.N.C.); see also Press Release, Justice Department Seeks to Intervene in Private Class Action to Enforce Prohibition on Unlawful “No-Poach” Agreements, available at <https://www.justice.gov/opa/pr/justice-department-seeks-intervene-private-class-action-enforce-prohibition-unlawful-no-poach>.