

# Trade associations and other information exchange programmes in the US: what enforcers prohibit, what they require

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Although antitrust enforcers in the United States agree that trade associations serve a number of pro-competitive purposes, one area of particular concern has traditionally been association ‘information exchange programmes’. During the past year, associations and similar groups have tested the boundaries of permissible information exchanges in the US, and antitrust enforcers have challenged some of these activities. The resulting enforcement actions and court rulings set forth new guidance for permissible information exchange activity. In particular, they may signal a willingness of the US Department of Justice not only to prohibit or limit information exchanges, but also to require such exchanges in certain circumstances.

To assist practitioners and participants in planning and implementing information exchanges among competitors, this article sets forth the antitrust framework in the US, highlights the key issues in recent enforcement actions on this topic, and elicits the principles underlying these decisions, even as they are rapidly developing.

## US antitrust framework for association information exchanges

As a general matter, all trade associations and similar competitor collaborations risk significant issues under US antitrust laws, primarily due to the ease with which anti-competitive ‘agreements’ can be inferred under section 1 of the Sherman Antitrust Act in that context.<sup>1</sup> The standard jury instructions provide that it is not necessary to show that the members of an alleged unlawful conspiracy entered into any express, formal or written agreement; directly stated their purpose or the details of the plan; or agreed to the means by which they would accomplish their purpose. In fact, an agreement may have been entirely unspoken. Plaintiffs will argue that an agreement should be inferred based on evidence that the participants met together – frequently at an association – and then acted in a similar fashion. As a result, trade associations and their members need to take extra care that any joint activity serves legitimate, pro-competitive purposes, and that the activity avoids even the appearance of impropriety.

The risk to companies arising from participation in an association, coupled with the spectre of stiff penalties for violations of US antitrust laws, can be particularly problematic when associations wish to launch information exchange programmes. More than any other association activity, these programmes lend themselves to charges of an anti-competitive agreement among the participants. Merely participating in an information exchange programme may be viewed as satisfying this key element of an antitrust violation, so participants must tread carefully.<sup>2</sup>

As an initial matter, it is settled law that the US antitrust statutes do not prohibit, or even disfavour, information exchanges. Courts and the enforcement agencies recognise the potential pro-competitive benefits of certain information exchange programmes, if they are conducted properly. Nevertheless, the exchange of information, especially relating to price and output, can facilitate collusion in certain circumstances.<sup>3</sup>

## Specific sources of underlying legal principles in the US

In the US, there are four main sources for guidance on information exchanges. The key elements of each are summarised below.

## US case law

A number of early decisions from US courts established the line between permissible and impermissible exchanges of price information. The first Supreme Court case to address this issue was *American Column and Lumber Co v United States*, 257 US 377 394-95 (1921), concerning trade association members’ exchange of information on sales, production and inventories. In condemning these exchanges, the court was most concerned with the exchange of price and output information; particularly, “suggestions as to both future prices and production.”<sup>4</sup> In *United States v American Linseed Oil Co*, 262 US 371 (1923), the court struck down another information exchange programme concerning price lists, price variations and the names and addresses of buyers who received special prices. It noted that the association kept the information confidential within the membership, preventing the members’ customers from accessing information that might permit them to negotiate on a more favourable basis with association members.

Soon after these first two decisions, the Supreme Court upheld an information exchange programme in *Maple Flooring Mfrs Ass’n v United States*, 268 US 563 (1925). The data dissemination programme in *Maple Flooring* called for detailed information on individual sales and monthly information on production and new orders. The court distinguished previous cases because this association ‘aggregated’ the price and volume information, and required only historic (not present or future) information, which decreased the competitive sensitivity. Moreover, the aggregated information was available not only to association members, but to their customers as well, to maintain a level playing field.

More recent cases have highlighted the importance of making price information available to customers of the members of an association, and of ensuring that it is at least as valuable to customers as it is to members. In *In re Petroleum Prods Antitrust Litig*, 906 F 2d 432, (9th Cir 1990), competing oil companies had a practice of publicly announcing, sometimes in advance, discounts (or decisions to withdraw discounts) to their franchisee gasoline stations. Notwithstanding *Maple Flooring*’s reliance on the importance of public disclosure, the Ninth Circuit held that the form of the exchange, “whether through a trade association, through private exchange as in *Container*, or through public announcements of price changes, should not be determinative of its legality.”<sup>5</sup> Where public dissemination of wholesale prices is of no value to (i) consumers, who are only concerned with retail prices, nor to (ii) the branded franchisees, who were not free to shop around for their oil, see id at 448, it does nothing to mitigate the anti-competitive effects.<sup>6</sup>

## DoJ and FTC guidelines

In 1996, the US Department of Justice and the Federal Trade Commission issued guidance on information exchange programmes in the context of the health care industry.<sup>7</sup> The Health Care Statements identify three safety zones for information exchanges.<sup>8</sup> The most important of these states that the enforcement agencies will not challenge the collection and dissemination of prices, discounts or methods of payment if (i) an outside party collects the information, (ii) price information is more than three months old, and (iii)

specific price information is not able to be identified with specific competitors. To ensure that information cannot be matched to an individual competitor, each statistic must be based on at least five participants, where no participant represents more than 25 per cent of the weighted basis of a statistic and the information must be aggregated so recipients cannot connect prices charged with individual competitors. These conditions are meant to balance the participant's interest in obtaining information to respond to changing market conditions, against the antitrust risk that the exchange could allow competing participants to collectively agree on prices.

In 2000, the enforcement agencies jointly issued the Antitrust Guidelines for Collaboration Among Competitors,<sup>9</sup> setting forth a more general framework for analysis for any collaboration among competitors, including associations. The Collaboration Guidelines recognise the pro-competitive benefits of information exchanges and provide that the level of concern depends on the type of the information shared, and the way in which it is disseminated.

The Collaboration Guidelines state that “[o]ther things being equal, the sharing of information relating to price, output, costs, or strategic planning is more likely to raise competitive concern than the sharing of information relating to less competitively sensitive variables.”<sup>10</sup> Similar to the Health Care Statements, the recency of the information is listed as an important factor; the sharing of information on present operating and future business plans is more likely to raise concerns than the sharing of historical information. Likewise, the Collaboration Guidelines echo the notion that sharing individual company data is more likely to raise concern than sharing aggregated data that does not permit recipients to identify individual firm data.

In several instances, the Justice Department has issued Business Review Letters<sup>11</sup> concerning information exchange programmes, and these provide further insight as the developing enforcement policies at the DoJ. For example, in a letter to the Internationally Board-Certified Lactation Consultants (IBCLCs), the DoJ permitted a price survey for fees charged by self-employed members. The justification was that knowledge of average fees in a specific region would assist in setting competitive rates. The proposed programme was structured using the principles outlined in the Health Care Statements, described above.<sup>12</sup>

In another Business Review Letter, the DoJ approved an information exchange, including exchange of price information, but required certain limiting modifications. In *BroChem Marketing Inc* (13 May 2003), BroChem proposed the creation of a Chemical Information System that would be made available to chemical distributors seeking information about the product lines of competing chemical producers. The database was to include, among other information: product names, producer names, chemical names, other producers of the same products and prices. The DoJ requested that BroChem modify its proposed programme to ensure that price-sensitive information would not be accessible to competitors or others who should not have access to it. Specifically, the DoJ required computer safeguards for the electronic platform used to operate the exchange, to ensure that each chemical producer could only access data it had provided to BroChem, and that each distributor had access only to information regarding products that the chemical producers authorised the distributor to market. By these restrictions, the DoJ signalled its willingness to mandate the use of limited and preferred access levels, that are made possible only by the use of electronic-platform technologies.

### Recent information exchange cases

In the past year, three DoJ cases illustrate the enforcement policies that are maturing in the US. In one case, the DoJ filed suit to terminate an information exchange programme involving contract

liability provisions – largely because it had no benefit to consumers. In a second matter, the DoJ approved an information exchange programme regarding labour standards and conditions in ‘sweatshop’ factories, but imposed limiting conditions to restrain the exchange of wage or compensation information and to ensure that the programme provided no new price transparency. In a third matter, the DoJ evolved a new level of policy enforcement, requiring instead of prohibiting the continuance of an information exchange.

In the first matter, *United States v Professional Consultants Insurance Co (PCIC)*, the competing insurance consultants, proposed a programme whereby they would share information about their use of contractual limitations of liability (called LOLs).<sup>13</sup> PCIC members and non-members engaged in numerous discussions disclosing to each other ongoing and prospective LOL implementation policies, plans and practices. The DoJ alleged that the programme members intended to use the programme to agree on implementing LOLs, instead of continuing to compete unilaterally against each other on this key term. The DoJ alleged that the information exchange was “not motivated by any purpose of improving marketplace efficiency in the provision of actuarial consulting services, and in fact provided actuarial clients with no pro-competitive benefits in their purchases of actuarial consulting services.”

From an antitrust compliance viewpoint, this case demonstrates first that contractual terms, apart from price and cost, are competitively sensitive. Additionally, three principal shortcomings of the PCIC exchange programme contravened developing government enforcement policy: (i) the information was individualised, instead of aggregated; (ii) the information was current and forward-looking, instead of historical; and (iii) the exchange would benefit competing members, without any corresponding (or greater) advantage to their customers. Thus, the DoJ concluded that the exchange of LOL information “facilitated at least tacit collusion of competitors’ decisions to implement LOL”.

In the second recent matter, the DoJ issued a Business Review Letter in June 2006 to the Fair Factories Clearinghouse (FFC), approving a programme to collect and share information related to factory workplace standards, but with conditions. The exchange would create a database to be available to all participants in the retail industry, including retailers. Proposed additional future users covered a wide spectrum, including universities, factories, standard-setting organisations and buying agents. The database would include information relating to terms and conditions of employment, such as wage levels, use of underage labour and workplace safety.

The DoJ determined that the FFC database would be unlikely to have anti-competitive effects because of several safeguards. First, participation in the initiative would be voluntary and all member decisions regarding the use of a particular factory would be unilateral. Second, the DoJ emphasised the need for all wage and hour information to be aggregated. Finally, all members agreed to comply with an Antitrust Policy Statement, requiring outside counsel to be present at all FFC board meetings. The DoJ also accepted FFC’s stated position that the initiative would be unlikely to have a negative effect on prices because labour accounts for a very small percentage of the cost of goods (less than 3 per cent for clothing made domestically and half of 1 per cent for clothing produced abroad). Thus, the DoJ continued its recent policy to focus on benefits to customers from an association exchange.

In the third matter, the DoJ filed suit on 8 September 2005 against the National Association of Realtors (NAR) to ‘require’ the continued operation of an information exchange programme concerning the Multiple Listing Service (MLS). The MLS is a joint venture among competing real estate brokers that allows them to provide customers with listings for ‘virtually all’ residential properties for sale. Some non-traditional brokers, using the internet,

recently began offering password-protected websites that permit customers to access and search the MLS database on their own – on the same footing as brokers. According to the DoJ, internet brokers provide fewer services generally, spend less time per customer, and as a result, are able to lower their commissions in comparison to traditional brokers. In response to this competitive threat, NAR adopted a Virtual Office Website Policy allowing brokers to withhold property listings on the MLS from the internet brokers' websites. The DoJ filed suit, alleging that the new NAR policy “denies brokers using new technologies and business models the same benefits of MLS membership available to their competitor brokers, suppresses technological innovation, discourages competition on price and quality, and raises barriers to entry.”<sup>14</sup>

In response, NAR modified its policy the day the complaint was filed, but the DoJ amended its complaint and alleged that the revised policy was similarly anti-competitive. The modified policy still contains a version of the ‘blanket opt-out’ provision allowing traditional brokers to hold back listings from other brokers who provide MLS information online. The DoJ also pointed out that NAR changed its membership rules to deny access to MLS listings to brokers operating referral services.

The DoJ's action against NAR is ongoing. The parties have filed briefs, and the DoJ has emphasised the need for customer access to the MLS data, formerly available only to brokers. The DoJ action demonstrates that enforcement agencies recognise the pro-competitive benefits of certain information exchanges and will do more than simply permit information exchange programmes. In some cases, the government will act affirmatively to require them, by mandating their continued operation.

### Conclusions

The present state of US antitrust law on information exchanges rests on several principles. Generally speaking, information exchanges that provide useful information to members enabling them to increase efficiency, reduce cost and improve safety, without unduly threatening competition, will survive scrutiny. Conversely, information exchanges, particularly those concerning competitively sensitive information, are at greater risk of being challenged. Given the extensive guidance available from government policy statements and recent enforcement actions, associations and their counsel are empowered to structure and manage their information exchange programmes to deliver value to members without risk of antitrust exposure.

### Notes

- 1 15 USC section 1 (2006).
- 2 See eg, *Todd v Exxon Corp* 275 F3d 191, 198 (2d Cir 2001) (“Information exchange is an example of a facilitating practice that can help support an inference of a price-fixing agreement.”); *United States v Airline Tariff Publishing Co*, 836 F Supp 9 (DDC 1993) (approving consent decree barring airlines from exchanging information where exchange allegedly used to facilitate collusion); and *In re Petroleum Prods Antitrust Litig*, 906 F2d 432, 445-50 (9th Cir 1990) (noting that exchanging price information is treated as a plus factor from which a jury could infer an agreement among rivals to fix prices).
- 3 See eg, *United States v Container Corp of America*, 393 US 333 (1969); *American Column & Lumber Co v United States*, 257 US 377 (1932); and *Maple Flooring Mfrs Ass'n v United States*, 268 US 563 (1925).
- 4 *Id* at 398-99.
- 5 *Id* at 447 (quoting Richard Posner, *Antitrust Law: An Economic Perspective* 47 (Univ Chi Press 1976)).
- 6 See also *Jung v Ass'n of American Med Colleges*, 300 F Supp 2d 119, 167-68 (DDC 2004) (holding that information publicly disseminated does not immunise it, given prospective residents' inability to use information).
- 7 Statements of Antitrust Enforcement Policy in Health Care (Health Care Statements) (1996).
- 8 In cases falling outside the zones, the enforcement agencies will review, on a case-by-case basis, the nature of the information exchanged, the reasons for the exchange, the nature and extent of communications between the competing participants and customers, and the market in which the information is exchanged.
- 9 [www.ftc.gov/os/2000/04/ftdojguidelines.pdf](http://www.ftc.gov/os/2000/04/ftdojguidelines.pdf)
- 10 See section 3.31(b).
- 11 28 CFR section 50.6 (2006).
- 12 US Department of Justice Business Review Letter, issued to ILCA (25 May 2004).
- 13 See *United States v Professional Consultants Insurance Co*, Amended Final Judgment, available at [www.usdoj.gov/atr/cases/f213500/213528.pdf](http://www.usdoj.gov/atr/cases/f213500/213528.pdf).
- 14 Complaint ¶ 7, *United States v National Assoc of Realtors*, Civ No. 05C-5140 (DC Ill 8 Sept 2005).

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