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Antitrust Enforcement Against Trade Groups Shows Need for Diligence

By Justin Hedge and Francesca Pisano

Trade association activities continue to draw antitrust scrutiny. Through the first three quarters of 2017, the Federal Trade Commission (FTC) brought three cases against trade associations, making a total of eight such cases since 2014. (*See FTC, National Association of Animal Breeders*, Inc., Sept. 28, 2017; *FTC, American Guild of Organists*, May 26, 2017; *FTC, Cooperativa de Médicos Oftalmólogos de Puerto Rico*, March 3, 2017.)

Over the years, the Department of Justice (DOJ) similarly has taken enforcement action and also has been active in issuing guidance on specific association conduct through its ''business review letter'' process. (*See US v. Chiropractic Associates, LTD.* 4:13-cv-04030 (D.S.D. 2013).) And in a Nov. 10 speech, the newly confirmed head of the DOJ antitrust division, Makan Delrahim, suggested that standard-setting organizations (SSOs) soon may be a focus of enforcement investigations to the extent their members are imposing licensing terms in a collusive and anticompetitive manner.

The most recent enforcement cases demonstrate that even well-established trade associations need to exercise continued diligence regarding the antitrust laws. While trade associations and professional groups serve important pro-competitive functions, they also bring together competitors, which creates heightened risks under the antitrust laws — reputational and legal risks for both associations and their members. In addition to government enforcement, trade association activities also continue to be ripe ground for antitrust claims by private plaintiffs. (*See, e.g.*, Complaint, *Esquire Deposition Solutions LLC, v. Louisiana Court Reporters Association, et al.*, No. 2:17-cv-09877 (E.D. La. Sept. 29, 2017).)

So what are the key antitrust ''watch-outs'' that trade associations (and their members) should be aware of? The recent cases highlight that:

1) The antitrust authorities may attempt to look past activities done in a trade association's own name — such as the licensing of association-owned technology rights — and consider them as joint conduct to analyze whether members have entered into an unlawful anticompetitive agreement.

2) Trade associations need to consider carefully whether their activities have an impact on competition between members, as competitive harm can arise even with activities relating to the functioning of the association, such as the adoption of codes of conduct or ethical rules for members.

3) Strong compliance programs may ensure that a trade association and its members comply with the antitrust laws. Further, compliance programs that go beyond mere policy statements and create a ''culture of compliance'' may help minimize the inferences courts are willing to draw in private antitrust litigation. It is important for trade associations to regularly refresh and reinvigorate their antitrust compliance programs.

Typical Antitrust Concerns The FTC and DOJ recognize that trade associations often drive important procompetitive activities. However, such benefits do not afford trade association activities blanket immunity from the antitrust laws. (*See, e.g.* FTC and DOJ, Antitrust Guidelines for Collaborations Among Competitors, (2000).)

Typically, the FTC and DOJ will consider whether trade association activities are agreements among competitors that limit competition. Naked restraints on trade outside the context of a pro-competitive integration of assets, such as agreements by members not to compete on price or in certain territories, may be challenged as *per se* unlawful — i.e., automatically unlawful without respect to any proffered justifications. Where the activity is not a naked restraint, the authorities will evaluate

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the activity using the *rule of reason*, which balances the pro-competitive benefits against potential anticompetitive effects.

Typical areas of antitrust concern for trade associations include:

Price Fixing. Agreements by trade association members that compete with each other outside the association to set or fix the prices that the members charge (or will pay) for a particular good or service are likely to present significant antitrust risks and could be challenged as *per se* unlawful, whether the agreement is entered directly or through association rules. Rules on a price ''range'' or ''floor'' that members must observe would raise similar issues.

Customer or Geographic Allocations. Agreements among members to divide or allocate certain customers or geographic areas similarly are likely to present significant antitrust risks and could be challenged as *per se* unlawful.

Information Exchanges/Benchmarking. Many trade associations coordinate information exchanges or benchmarking studies to improve competition in their industries. However, such activities can pose antitrust risks to the extent that they facilitate price-fixing behavior or otherwise have an anticompetitive effect.

Group Boycott. Trade association rules can give rise to antitrust risks if they could be viewed as an agreement among members to refuse to deal with a nonmember competitor. Similarly, if participants in a trade association jointly agree not to buy from or sell to a company, this also could present risks under the antitrust laws. (*See Northwest Wholesale Stationers v. Pacific Stationery & Printing Co.*, 472 U.S. 284, 294 (1985).)

Trade associations and their members should keep these areas in mind when evaluating the antitrust risks presented by new association activities. Additionally, recent enforcement cases suggest other issues that warrant further consideration for an association's antitrust compliance efforts.

Lessons From Recent Cases

1) Antitrust authorities may look through a trade association and treat its activities as joint conduct of members.

Trade associations often will engage in outward-facing activities in their own name. Although one might think of such activity as unilateral because it is conducted by a single trade association, it is important to remember that a trade association is a collection of competitors. Accordingly, in assessing trade association activities, the antitrust authorities will evaluate whether there is an unlawful agreement among members to restrain competition. The FTC followed this approach in a recent enforcement action against the National Association of Animal Breeders (NAAB), which involved access to research and development activities conducted by a trade association.

On August 18, 2017, the Federal Trade Commission and NAAB settled claims that NAAB violated the antitrust laws by adopting restrictions relating to the use of certain technology rights held by NAAB. NAAB is a non-profit trade association of firms that provide cattle artificial insemination. (*See*, *In the Matter of National Association of Animal Breeders, Inc.*, FTC 151-0135 (Aug. 18, 2017).) According to the FTC, NAAB membership covered about 90 percent of the cattle artificial insemination market.

NAAB had exclusive rights to a technology used to predict the transmission of commercially valuable traits by dairy bulls. The technology, called genomic predicted transmitting ability (GPTA), was developed by the USDA with NAAB funding assistance. The FTC alleged that NAAB acted ''as a combination of its members'' when requiring members to have an interest in a dairy bull before being allowed access to that bull's GPTA data through NAAB. The member could either (1) own the bull, (2) have an agreement to purchase at least 30 percent of the bull, (3) have a lease on the bull, or (4) have an exclusive marketing agreement for the bull.

The FTC alleged that this restriction (1) stifled competition in the sale of bulls by allowing some NAAB members to acquire GPTA of a particular bull only *after* purchasing an interest in the bull and (2) ''impeded'' development of a market for NAAB members selling GPTA access to non-members. According to the FTC, this ''dampened competition among NAAB members when buying dairy bulls'' as ''[a]ccess to GPTA information would tend to drive the price of the bull toward its true value.''

NAAB entered into a consent decree to settle the FTC's allegations and agreed that for 20 years, the organization would not enact any restrictions on its members' ability to sell technology or information from research projects conducted with a government agency or by NAAB independently unless those restrictions were ''reasonably necessary'' to achieve ''procompetitive benefits or efficiencies.''

The FTC enforcement action against NAAB illustrates the need for trade associations and individual market participants alike to consider carefully the antitrust risks of association activities, even when the association is arguably acting as an independent market participant. NAAB held the GPTA technology rights, but its decision about the terms on which to grant access was deemed joint conduct for purposes of the FTC's antitrust analysis.

2) Association activities need to be considered carefully for any impact on competition.

Activities that impact competition can come in many forms. The terms on which access is granted to association information or technology (as seen in the NAAB case), membership requirements, or even obligations contained in an ethical guideline or code of conduct have all been found to impact competition in recent cases.

For example, NAAB previously settled a separate case brought by the FTC concerning its code of ethics. In 2015, the FTC alleged that NAAB's code unlawfully restricted competition among members by prohibiting certain advertising practices. (*See* Analysis to Aid Public Comment, *In the Matter of National Association of Animal Breeders*, FTC 141-0215 (Sept. 24, 2015).)

In particular, the FTC took issue with two provisions that prohibited members from:

1) Promulgating advertising that named ''member competitors . . . in printed material comparing averages between members,'' and

2) Sharing certain price information of bulls in printed materials.

NAAB did not specifically prohibit its members from competing against each other or from running com-

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parative advertising. However, the FTC had concerns about the restriction against naming competitors in printed materials because of its impact on competition. The FTC alleged that these rules ''injure[d] consumers by restricting the disclosure of truthful and nondeceptive information.'' NAAB settled the case by entering into a consent decree that required it to remove its advertising restrictions and maintain an antitrust compliance program. (See, *In the Matter of National Association of Animal Breeders*, FTC 141-0215 (Nov. 6, 2015).)

Similarly, the FTC brought two actions against different music professional associations in recent years due to the impact of their ethics rules. (*See*, Complaint, *In the Matter of American Guild of Organists*, FTC No. 151-0159 (May 26, 2017); Complaint, *In the Matter of Music Teachers National Association, Inc.*, FTC No. 131-0118 (Dec. 16, 2013).)

The rules at issue placed restrictions on the members' ability to actively recruit students, seek jobs held by another member, or accept employment without the approval of an incumbent musician. In these cases, the FTC alleged that the trade associations' rules had the effect of limiting or restricting competition among musicians and musical teachers.

However, these cases also demonstrate that not all trade association restrictions violate the antitrust laws. In its action against the National Association of Music Teachers (NAMT), the FTC explicitly permitted the association to enforce ethical restrictions prohibiting music competition judges from soliciting students. In other trade association actions, the FTC has accepted restrictions designed to protect students when the agency determines that the potential competitive harm of the restriction is outweighed by the legitimate justification for the restriction. For example, in an enforcement action against the Professional Skaters Association, the FTC specifically permitted certain ethical restrictions designed to prevent the sexual or physical abuse of children or limiting ongoing interruptions of lessons or performances.

The FTC appeared to have found the NAMT limitation acceptable because it was narrowly tailored (e.g., applicable only to competition judges and only during competitions) and associated with a legitimate justification (presumably enabling a fair competition). Similarly, the FTC permitted the NAMT to set guidelines that restricted ''false or deceptive'' advertisements — a restriction also allowed by the 2015 NAAB settlement.

Other trade association activities that have come under scrutiny in recent years include alleged group boycotts, territorial restraints, joint contract negotiation, limits on a members' ability to offer incentives or rebates, the setting of ''reimbursement floors'' for members, and restrictions binding former association members. (*See* Complaint, *In the Matter of Cooperativa de Médicos Oftalmólogos de Puerto Rico*, FTC No. 141-0194 (Mar. 3, 2017); *In the Matter of Professional Lighting and Sign Management Companies of America, Inc.*, FTC No. 141-0088 (Mar. 15, 2015); *US v. Chiropractic Associates, LTD*. 4:13-cv-04030 (D.S.D. 2013) (challenging a chiropractic association's practice of jointly negotiating contracts on behalf of its members); *US v. Oklahoma State Chiropractic Independent Physicians Association*, 4:13-cv-00021 (N.D. Ok 2013) (same).)

Ultimately, trade associations need to keep in mind that their activities can impact competition among members in a number of ways. Trade associations and their members should broadly consider any competitive impact when evaluating the antitrust risks of the group's activities.

3. Trade associations and members should have regularly updated compliance programs to create a ''culture of compliance.''

Having a robust antitrust compliance program is a key to preventing antitrust scrutiny. To be most effective, a program will consist of more than just a written policy. It will include various ongoing efforts to ensure all trade association staff and members are sensitive to antitrust issues. For example, a program can include:

1) Regular training for association staff and member representatives;

2) Training for new member representatives prior to participating in association activities;

3) Review of agendas by counsel in advance of association meetings;

4) Providing a reminder of antitrust rules at the start of association meetings;

5) Monitoring of association meetings by counsel;

6) Checkpoints for antitrust risk assessments before new resolutions or policies are adopted;

7) Review of new programs or activities by counsel prior to launch; and

8) Audits of existing programs, including information sharing programs or benchmarking studies.

Not only can good compliance programs help identify and prevent antitrust issues, but they also can lead to benefits in the event of litigation. For example, in a recent civil class action brought against two competing airlines, the plaintiffs alleged that one company invited its competitor to collude — a situation that could be alleged just as easily in the context of trade association meetings where competitors are regularly in contact. On defendants' motion for summary judgment, the court found there was insufficient evidence that an unlawful agreement ultimately had been reached based on how employees reacted. (*See In re Delta/Airtran Baggage Fee Antitrust Litigation*, No. 1:09-md-2089 (N.D. Ga. Mar. 28, 2017).)

The court specifically noted that Delta employees characterized AirTran's public statements as ''inappropriate,'' ″[un]wise,'' ''odd,'' and ''otherwise problematic specifically because of defendants' antitrust obligations.'' Consequently, the court concluded that these responses made ''the inference that Delta would have accepted any such invitation less plausible.'' Training employees how to respond to potentially anticompetitive conduct can not only prevent violations, but also can create a record that is useful in the defense of potential allegations.

Regularly taking a fresh look at a trade association's antitrust compliance program will help to identify process improvements, address new areas of potential concern, and generally keep antitrust compliance at the forefront of association activities. This is in the best interests of the association and its members and will help to foster the type of compliance culture that can pay dividends if there are ever allegations of wrongdoing.

Additionally, it is worth noting that both the DOJ and the FTC offer the opportunity for advisory opinions. (*See, e.g.*, Competition Advisory Opinions, FTC; Business Reviews, DOJ.) The DOJ will issue ''business review letters'' and the FTC will issue ''advisory opinions'' in response to inquiries about whether particular conduct would give rise to concerns and a potential en-

forcement action. These programs can be a useful tool that trade associations might consider as part of a larger antitrust compliance program.

Conclusion The steady, if not increasing, number of antitrust enforcement cases involving trade associations in recent years demonstrates that trade associations must remain vigilant with respect to managing antitrust risks. Moreover, recent cases have underscored that trade association activity can be challenged as joint conduct among competitors and that trade association rules can be alleged to harm competition. As such, it is important that trade associations carefully consider the antitrust implications of their activities and regularly revisit and update antitrust compliance policies and procedures to minimize the risks for both the association and its members.

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