Organisation de Coopération et de Développement Économiques
Organisation for Economic Co-operation and Development

21-Oct-2010

English - Or. English

DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE

DAF/COMP/WD(2010)117
For Official Use

ROUNDTABLE ON INFORMATION EXCHANGES BETWEEN COMPETITORS UNDER COMPETITION LAW

-- Note by the Delegation of the United States --

This note is submitted by the delegation of the United States to the Competition Committee FOR DISCUSSION at its forthcoming meeting to be held on 27-28 October 2010.

English - Or. English

JT03290816

5. U.S. courts and antitrust agencies have long recognized that information sharing schemes can be competitively neutral or even procompetitive. Thus, for example, in *Maple Flooring Mfrs.' Ass'n v. United States* the court noted that the public interest is served by certain information exchanges that may "avoid the waste which inevitably attends the unintelligent conduct of economic enterprise" and that "[c]ompetition does not become less free merely because the conduct of commercial operations becomes more intelligent through the free distribution of knowledge of all the essential factors entering into the commercial transaction."[5]

6. Similarly, the antitrust agencies' *Antitrust Guidelines for Collaborations Among Competitors*,[6] discussed in greater detail in section IV.B.i below, expressly recognize that the sharing of information among competitors may be procompetitive and is often reasonably necessary to achieve the procompetitive be (i)-2.5 (i)n

concerning the "most recent price charged or quoted" among sellers of corrugated shipping containers,[15] albeit on an irregular basis, unlawfully stabilized prices. Consequently, the Court concluded that the exchange of price information, involving a highly concentrated industry and a fungible product with inelastic demand, "had an anticompetitive effect in the industry, chilling the vigor of price competition."[16] It therefore found the exchange to amount to concerted action and thus sufficient to establish a combination or conspiracy in violation of Sherman Act §1.

4. Criteria considered in assessing the legitimacy of information exchanges

10. Information exchanges may facilitate anticompetitive harm by advancing competitors' ability to collude. The exchange may carry out an overt agreement, support tacit meetings of the mind, or be unilateral in nature, but all result in anticompetitive effects. Therefore, actual evidence of anticompetitive

factors, the FTC and DOJ consider the nature and purpose of the collaboration, how it is structured and controlled, and whether it has adopted safeguards to prevent or limit the participants' access to each others' competitively sensitive information.[36]

Safety Zones

Under the DOJ/FTC Guidelines for Collaborations among Competitors

Because some competitor collaborations may be procompetitive, the antitrust agencies believe that "safety zones" are useful in order to encourage such activity.[37] Information sharing and various trade association activities also may take place through competitor collaborations, and are therefore a specific type of collaboration. In the aforementioned collaboration Guidelines[38] the antitrust agencies designated safety zones to provide participants in a competitor collaboration with a degree of certainty in situations in which anticompetitive effects are so unlikely that the antitrust agencies presume the arrangements to be lawful without inquiring into particular circumstances. These safety zones are not intended to discourage competitor collaborations that fall outside the safety zones.[39]

General Competitor Collaborations. Absent extraordinary circumstances, the antitrust agencies do not challenge a competitor collaboration when the market shares of the collaboration and its participants collectively account for no more than twenty percent of each relevant market in which competition may be affected. This safety zone, however, does not apply to agreements that are per se illegal, or that would be challenged without a detailed market analysis,

enforcement policy with respect to collective dissemination of health care providers' fee information to purchasers, and Statement No. 6 outlines their policy with respect to exchanges of price and cost information among competing health care service providers.[44]

With respect to collective provision of fee-related information, Statement No. 5 sets forth an antitrust safety zone in which such provision will generally not be challenged by the antitrust agencies.[45] In order to qualify for this safety zone, the collection of information must: (1) be managed by a third party; (2) contain information based on data that is more than three months old; and (3) contain shared data aggregated from at least five providers, of which no individual provider represents more than 25 percent, and be sufficiently aggregated to prevent identification of prices charged by any individual provider. The sharing of prospective fee-related information falls outside the antitrust safety zone, and will be assessed on a case-by-case basis, including scrutiny of the nature and extent of communications, the rationale for providing the information, and the nature of the market in which it is provided.[46]

Health Care Statement No. 6 provides general guidance on the antitrust agencies' enforcement policy in circumstances where competing service providers (hospitals, physician groups, etc.) participate in written surveys of prices for health care services or compensation costs (salaries, wages, or benefits).[47] Specifically, Statement No. 6 acknowledges that such surveys can have significant benefits for health care consumers, providers, and purchasers when conducted with appropriate safeguards against collusion or other reduction of competition.[48] The Statement, therefore, sets forth an antitrust safety zone similar to the one set in Statement No. 5, with the same three conditions mentioned above in ¶ 23 that, when met, lead the antitrust agencies not to challenge the proposed exchange, absent extraordinary circumstances.[49]

With respect to exchanges of price and cost information among competing providers that do not satisfy the safety zone conditions, the antitrust agencies will generally apply a rule of reason analysis. The *Statements* explain that this involves balancing the parties' asserted justifications for the exchange against the enforcement agency's assessment of its likely anticompetitive effects, such as facilitating collusion on salary levels or reducing access to certain specialty services.[50] However, exchanges of future price or employee compensation data are very likely to be considered anticompetitive, and to the extent such exchanges constitute an agreement among competitors on prices for health care services or wages paid to health care employees, will be considered unlawful *per se*.[51]

---

44 *Id.*, at pp. 49-52.

45 Importantly, the protection of the antitrust safety zone applies "absent extraordinary circumstances," which leaves the agencies some enforcement flexibility when confronted with atypical facts or business arrangements, see *Id.*, at p. 43.

46 *Id.*, at pp. 46-47

47 *Id.*, at pp. 49-52. As noted above, the Statements also discuss collective activity by providers to furnish pricing data (fees, discounts, reimbursement methods, etc.) to health care purchasers. For most purposes, the same antitrust principles apply to both types of information exchanges. "The principles expressed in the Agencies' statement on provider participation in exchanges of price and cost information are applicable in this context." *Id.* at p. 44.

48 *Id.*, at p. 49.

49 *Id.*, at p. 50.

50 *Id.*, at p. 51.

51 *Id.*

5. Examples of information exchanges viewed as permissible

5.1 FTC advisory opinions

20. Potential participants in an information exchange may request an advisory opinion from the Commission or FTC staff that analyzes antitrust ramifications of the proposed exchange, provided that they are subject to the agency's jurisdiction.[52] Most FTC advisory opinions issued in this area to date have

6.2 Exchanges in trade association contexts

31. Trade associations provide their members and consumers with valuable benefits, such as

75

7. Information exchanges in premerger negotiations

35. Certain information exchanges between competitors are necessary and legitimate in the context of negotiating a potential merger or acquisition. The antitrust agencies recognize that merging firms have a legitimate interest in engaging in certain forms of coordination such as due diligence and appropriate transition planning, both of which necessarily involve information exchanges at levels of detail that would not normally occur among independent firms. These forms of coordination and information sharing are assessed to see if they are reasonable and necessary to implement the legitimate objectives of the imminent merger agreement. Where the merging firms are competitors or are in a relationship that affects competitive interactions in the marketplace, however, premerger information exchanges can present issues under Section 1 of the Sherman Act. The exchange can be especially harmful to competition where the merger negotiation falls through and planned merger never materializes.

36. The antitrust agencies' general approach to information exchanges in premerger negotiations has been that where premerger coordination is reasonably necessary to protect the core transaction, the conduct is assessed under the rule of reason.[89]

8. Conclusion

37. Information exchanges among competitors are not necessarily anticompetitive, and in fact are often procompetitive. In applying Section 1 of the Sherman Act to exchanges of price and other information among competitors, U.S. courts and antitrust agencies follow a rule of reason approach that balances the information exchanges' anticompetitive effects with their potential procompetitive benefits (e.g. efficiency and product quality improvements).

38. Actual anticompetitive harm resulting from the exchange, such as higher prices or price uniformity, is the strongest reason for challenging an information exchange. In addition, criteria considered in assessing the exchange's potential anticompetitive effects include: the nature and quantity of the information; how recent the shared data is; parties' intent in sharing the information; industry structure; public availability of information; how the exchange is structured and controlled; the frequency of exchanges; and whether the parties involved in the exchange adopted safeguards to prevent or limit the participants' access to each others' competitively sensitive information.

39. In addition to applying a general rule of reason analysis, antitrust agencies have delineated safety zones in which, absent extraordinary circumstances, they would consider information exchanges competitively benign. In the context of integrative collaborations, the agencies generally do not challenge information exchanges when the market shares of the collaboration and its participants collectively account for no more than twenty percent of each relevant market in which competition may be affected. Furthermore, in h2.348cte