Price-Fixing Other Horizontal Agreements, Part 1

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 Antitrust laws are the traffic lights for business. The focus of this column is the most important antitrust “red light” — horizontal price fixing — and several business practices that, while common, are actually “yellow lights” that can lead to significant antitrust risk if not undertaken with care.

What is Horizontal Price-Fixing?

Horizontal price-fixing occurs when two or more competitors conspire to set prices, price levels, or price-related terms for their goods or services. With very limited exceptions, price-fixing is per se illegal, regardless of its reasonableness or actual effect on competition. As a result, price-fixing is serious business. The fines and criminal sentences all arise from Department of Justice investigations into price-fixing.

Beware. Agreements among competitors may constitute price-fixing even where they do not involve the ultimate price of a product. Examples of unlawful price-fixing arrangements include agreements between competitors on:

1. A method of quoting prices.
2. Uniform or standard trade-in allowances.
3. Price differentials between grades of production.
4. Percentage of functional discounts.
5. Price or feature advertising.

6. Excluding a low-price competitor from a trade show.
7. Shipping or credit terms.

Other types of agreements, such as those that interfere with competitive bidding or seek to control production, also have an effect on price and can raise serious antitrust concerns.

Price-fixing has been per se illegal as long as there have been antitrust laws. Thus, most price-fixing is not accomplished by express agreement, and direct evidence of collusion is rare (although there are some astonishing exceptions). Generally, collusion is accomplished subtly and is, therefore, proven by inference from otherwise common business practices involving communications and cooperation between competitors. That makes it important to be aware of what common practices create that risk, and how to lawfully engage in them to minimize risk.

Exchanging Information with Competitors

As a general rule, while not illegal per se, it is best never to discuss prices, costs, production, purchase terms, territories or customers with competitors. While courts recognize that the exchange of price information can, in some cases, increase economic efficiency and make markets more, rather than less, competitive, direct price exchanges are routinely deemed evidence of a scheme that violates the antitrust laws.

Price data is best shared by competitors, if at all, only indirectly, and in ways that make the information disseminated to competitors cumulative and generic. Even where the information exchange is done carefully and with the best of intentions, the most important factor in determining whether the law has been violated is whether there is a demonstrable anti-competitive price effect.

Although the exchange of cost information is less problematic from an antitrust perspective, the same cautions apply. Care should also be taken in exchanging credit, production and other confidential business information because each can, and does, affect the ultimate price of a product.

The greatest danger that arises from the exchange of sensitive information among competitors is that it creates one more fact from which a jury may be allowed to infer a per se illegal price-fixing conspiracy. It is not difficult to imagine a jury finding that a conspiracy exists where competitors exchange price lists and their respective prices subsequently rise to the same level, even if the pricing was purely coincidental and innocent.

Gathering of Competitor Information

Companies certainly may and do seek information about their competitors, but they should do so from a source other than the competitor. For example, a company could legitimately obtain a competitor’s price list from a distributor or from a public bid document.

Because of the inferences that can be drawn from the use of that information, however, any employee receiving a competitive price list should contemporaneously document in writing when, where, how and from whom the price list was received.

That will help ensure that, if the company faces an antitrust suit years later, the company can prove it received the list from someone other than a competitor. As information becomes increasingly available on the web pages of competitors, a company may also find useful information there, subject to appropriate documentation of the public source.

It is also common for trade associations to collect information in the form of sales and production data from individual members, aggregate that data and disseminate it to the association's membership. This, too, is generally permissible, provided that the trade association takes care to assure that the information is sufficiently aggregated so that the association is not merely acting as a conduit between competitors to exchange sensitive information.

Where, however, the relevant market is concentrated, even an exchange of public information may create the inference of an agreement among members of the association to curtail production and raise prices by signaling planned behavior. Thus, where a concentrated market exists, it is prudent not only to avoid price information exchanges with competitors, but to also consult legal counsel before participating in, or responding to, any trade association activities or industry analyst's survey or request for price information, including discounts, rebates, shipping and credit terms.

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