Price-Fixing Other Horizontal Agreements, Part 2

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This is part two of a two-part piece. Part one can be found here *[1].* [2]

Joint Purchasing & Other Competitor Collaboration Arrangements

Joint purchasing agreements can be lawful because their effects can be pro-competitive. Because of the prevalence of such arrangements, as well as other competitor collaborations for joint research and development, production, marketing, distribution and sales, the Federal Trade Commission and the U.S. Department of Justice adopted formal Antitrust Guidelines for Collaborations Among Competitors in April 2000.

These guidelines and subsequent interpretations by both agencies provide an analytical framework and specific “safe harbors” based on factors like market share, market concentration, and the scope and length of the collaboration, all of which help assess whether the proposed joint activity is more or less likely to achieve efficiencies that will benefit consumers.

In general, the higher the market share of the competitors individually or as a proposed group, the stricter the scrutiny that will be applied, but any business contemplating a collaborative effort with one or more of its competitors should review the guidelines carefully.

Other Non-Price-Related Agreements

Some common horizontal agreements do not involve price, but are nonetheless often deemed anti-competitive and therefore illegal. Perhaps the most familiar are concerted refusals to deal or group boycotts — arrangements in which those at the same horizontal level of the market agree not to deal with competitors, customers or suppliers.

The intent of the boycott is to disadvantage competitors, and it is often accomplished by cutting off a competitor's access to a necessary supply, facility or market, either by direct denial or through other coercion. These concerted refusals to deal are often the subject of private antitrust suits (and treble damages claims) and complaints to antitrust regulatory authorities.

They also present the highest risk that a manufacturer will join a horizontal conspiracy among its distributors and find its otherwise legitimate business plans deemed per se illegal. Even a series of purportedly vertical relationships between a dealer and its various suppliers that results in the suppliers boycotting the dealer's competitors may violate the antitrust laws.

To avoid this potential risk, suppliers and dealers need to follow some simple rules:

1. Suppliers should never agree with competitors to refuse to sell products to common dealers or customers.
2. A supplier should never agree with a group of its customers or dealers not to deal with some other dealer or customer.
3. Competing dealers must remember that the antitrust laws view them as competitors and view any horizontal agreement between them harshly.
4. Aggrieved dealers should complain directly to the supplier without involving other dealers, and the supplier should do no more than listen politely, taking action, if any, unilaterally without involving the complaining dealer further, much less agreeing on a course of action.

Horizontal agreements to divide markets or allocate customers are also per se unlawful, and run a close second to price-fixing schemes in number of agreements condemned. Bid rigging, for example, is considered an agreement to allocate customers and has resulted in jail terms for participants. Market divisions among potential, as well as actual competitors, are also unlawful.

Customer allocations and territory divisions by and among competitors are generally condemned because they are indirect forms of production or output restrictions. For example, exclusive distributorship agreements between competitors that restrict one party from competing in the market of another party may constitute a horizontal allocation that denies consumers in both markets the benefits of competition on price and quality.

In contrast, courts have recognized that some products could not be offered without limited cooperation between competitors. For example, professional sports leagues could not produce games without agreements on schedules, rules and certain splits of gate receipts.

In these situations, where horizontal market and customer allocations are ancillary to an integration of economic activities by the parties and where those integrated economic activities are actually pro-competitive, courts have judged the actions under the rule of reason.

Covenants not to compete are analyzed under the rule of reason. Covenants not to compete have many business and legal implications, but in the antitrust context are usually examined for reasonableness with regard to time, territory and type of product. Plaintiffs bear a heavy burden to prove that a covenant not to compete violates the Sherman Act when the covenants arise as part of a legitimate business transaction.

To be lawful, restrictive covenants need only be:

1. Ancillary to the main purpose of the lawful contract.
2. Neither imposed by a party with monopolistic power, nor in furtherance of a monopoly.
3. Partial in nature, and reasonably limited in time and scope.
4. No greater than necessary to afford fair protection to the parties, and not so extensive as to interfere with the interest of the public.

To succeed on a claim for a violation based on a covenant not to compete, a defendant must have knowingly enforced an invalid non-competition agreement, and the plaintiff must show an adverse impact on competition in the relevant market stemming from enforcement of the provision, either through direct evidence (for instance, showing a decrease in supply) or a more elaborate showing of adverse effects on competition without pro-competitive justification. Thus, as a general rule, unless a covenant not to compete amounts to an allocation of customers or markets, they survive antitrust challenge.

In short, while competitor collaborations can occur on a number of levels, and often have significant, beneficial effects on the market, they can also have precisely the opposite effect. As a rule of thumb, it is always prudent to start with the assumption that any collaboration among competitors is a yellow light, and potentially a red light in practice if not policy, more than justifying advance consultation with the legal department before moving forward.

Read: Pricing Issues and Federal Antitrust Law *[3]*

To read part one of this two-part series, please click here. *[1] What's your take? Please feel free to comment below! For more information, please visit* www.foley.com *[4].*

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