

Trade Associations and Information Exchanges: A Word of Caution

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In remarks delivered on October 30, 2012, John Pecman, Canada's new Interim Commissioner of Competition, highlighted the enforcement risks that trade associations face under the *Competition Act* (the "Act"). The Commissioner's speech was intended to emphasize the importance of competition compliance generally for Canadian businesses. But he also took the opportunity to single out trade associations for special attention, commenting that while the Competition Bureau does not believe that trade associations are inherently bad, they "are naturally exposed to greater risks of anti-competitive behaviour because they provide a forum that may encourage competitors to collaborate".

The Commissioner identified several types of association conduct that could attract scrutiny, including one activity that goes to the core of what many associations do, namely collecting and distributing information and analyses for members. Although information exchange exercises conducted by associations will usually be legitimate and competitively benign, the Commissioner cautioned that they can also be exploited for anti-competitive ends. For example, exchanges of sensitive information between competing trade association members can create transparency about each other's businesses and thus indirectly diminish the incentives to compete vigorously. In some cases, information exchanges can be used by competitors to facilitate out-and-out criminal cartel behaviour, such as price fixing or market allocation.

A recent case in the United States illustrates how competition authorities can base allegations of anti-competitive conduct on information exchanges between trade association members.

In January 2012, the U.S. Federal Trade Commission (the "FTC") filed an administrative action alleging that the three largest suppliers of ductile iron pipe fittings in the United States had colluded to set and maintain prices for their products. As part of its case, the FTC pointed to the fact that the three firms had exchanged information on the volume of their monthly shipments through a trade association called the Ductile Iron Fittings Research Association ("DIFRA"). According to the FTC, the companies used this information to monitor each other's compliance with their collusive arrangement.

In particular, the FTC alleged the following:

- the DIFRA data was sufficiently detailed that, with only some additional calculations, the parties could figure out each other's market shares and thus whether they were losing sales;
- the type of sales data exchanged also allowed the participants to determine whether they were losing sales due to competitive discounting which was contrary to their alleged agreement; and

- although the data exchanged was "historical" in the sense that it related to past sales volumes, the information was sometimes less than two weeks old when collected and typically less than two months old by the time it was disseminated to the parties.

Interestingly, the association retained the services of a third party accounting firm to aggregate the information received before it was distributed to the members. Use of a third party for these purposes is often recommended as a device to avoid potential liability. However, the FTC obviously concluded that employing an outside accounting firm was not determinative in this case.

The FTC also seems to have been influenced by the fact that DIFRA only had four members, three of whom are alleged to have participated in the price fixing conspiracy (and accounted for 95% of industry sales). From the FTC's perspective, the small number of members in DIFRA made it possible for the alleged cartel participants to identify the data submitted by each of the individual members, even if the data was ostensibly distributed in aggregate form in order to preserve anonymity.

Two of the suppliers have now settled their cases with the FTC, with one party still contesting the FTC's allegations. On the issue of information exchanges, the party contesting the case argues that the aggregated sales volume data circulated by DIFRA provided no insight into pricing and was not used to support any conspiracy.

Although the matter has not yet been adjudicated on the merits, the FTC's allegations point to several considerations that trade associations and their members should bear in mind when organizing information exchange exercises:

- **Currency of information:** Information collected from members should be based on historical data, i.e., with no indication of future prices or trading terms. As the ductile pipe case illustrates, however, competition authorities will look closely to see if the information is sufficiently "historical" for these purposes.
- **Type of information:** Associations should be careful about the type of information to be collected. In general, issues are more likely to be raised if the information exchanged among members includes information on pricing, costs, volumes of sales, terms of sales, capacity and production levels, customer/supplier-specific information and information relating to strategic plans. Information that is less likely to raise issues would relate to matters such as general (not proprietary) technology, quality control issues, and environmental or safety matters.
- **Level of detail and aggregation:** Exchanging information that is aggregated or that only discloses broad trends is safer than exchanging detailed company-specific information. As the ductile pipe case illustrates, however, one issue that will have to be considered is whether the number of participants is sufficiently large to effectively permit the anonymity of individual member's information to be preserved.
- **Use of a third party:** Competition authorities, including in Canada, often encourage associations to use the services of third parties (such as accounting firms) to collect, aggregate and then disseminate information to members. However, this is not always an

economically feasible option. Moreover, as the ductile pipe case demonstrates, the use of a third party service will not shield associations in all cases.

Other helpful measures that associations can take to reduce risk when designing information exchanges include:

- Limit the number and frequency of information exchange exercises.
- Make sure that there is a legitimate reason for an information exchange exercise and properly document that objective.
- Don't coerce association members to participate in information exchange exercises, e.g., by disciplining members who decline to share their information.
- Don't share raw data between the members.
- Don't discuss the information exchange process or results except at formal meetings of the association pursuant to a written agenda that has been reviewed by counsel. Consider also whether counsel should be in attendance for any such discussions.
- Keep data only for as long as necessary to complete the legitimate objective of the exercise.

Information exchange exercises by trade associations can serve beneficial purposes such as facilitating research and benchmarking initiatives, promoting improved industry practices and standards, and supporting lobbying and advocacy efforts. However, as Canada's Interim Commissioner of Competition has noted, and recent U.S. case law demonstrates, information exchanges can also represent a significant liability risk for trade associations and their members.