

Guidelines for Antitrust Compliance (As Adopted February 9, 2000)

Overview

The Open Mobile Alliance recognizes the importance of the antitrust laws. It is the Open Mobile Alliance's policy to comply strictly with these laws. These guidelines address: (1) the areas of antitrust which may relate to the Open Mobile Alliance and its members, (2) the dangers that must be avoided to minimize the risk of antitrust liability, and (3) policies and procedures to follow in the area of competition. Members should be aware, however, that these guidelines cannot address every potential area of antitrust concern for the Open Mobile Alliance and its members. Whenever there is doubt, it is the policy of the Open Mobile Alliance to seek the assistance of legal counsel experienced in antitrust matters.

Trade Associations and Antitrust Actions

Associations, their officers, and their members often face greater antitrust risk than individuals because membership in an association constitutes a form of concerted action, which is a necessary element of a large number of U.S. federal and state antitrust violations. Antitrust actions against trade associations may be criminal or civil and may be filed by the Department of Justice, the Federal Trade Commission, the Attorney General of one or more states, or private parties. The basic federal antitrust statutes, known as the Sherman Act, the Clayton Act, the Federal Trade Commission Act, and the Robinson-Patman Act, are discussed below.

Penalties

The penalties for antitrust violation are potentially severe. Individuals may be sentenced to up to three years in prison and fined up to \$350,000 under the Sherman Act. Corporations may be fined up to \$10,000,000 under the Sherman Act. The Federal Trade Commission is authorized to enforce its orders both by injunctions and by civil penalties of up to \$10,000 for each day of a continuing offense. Many states have laws patterned after both the Sherman Act and the Federal Trade Commission Act that can be the basis of additional enforcement actions. Finally, private parties are authorized to sue to recover three times actual damages (treble damages), plus attorneys' fees incurred as a consequence of an antitrust violation.

It is important to note that each party found liable, no matter how small a role that party played, can be held liable for all damages caused by all participants in the antitrust conspiracy. The legal costs incurred in defending an antitrust challenge, beyond the penalties that might ultimately be imposed, frequently run into the hundreds of thousands of dollars. Some associations have paid millions of dollars to defend themselves in especially long or complex antitrust suits.

Participation Required for Trade Association Liability

A trade association can be held liable for the unauthorized acts of its staff if the individuals are acting within their ostensible authority. The Supreme Court held an association liable even though it was unaware of the misrepresentation in a letter where the staff acted within its apparent authority to issue the letter.

Participation Required for Member Liability

Unlike an association, a member will not be found liable for acts of which he or she is unaware. Nor will a member of a trade association be found liable in an antitrust case solely on the basis of membership. However, one's mere presence at a meeting in which an illegal conversation has taken place, even if the person disagrees with it, can be sufficient to include that individual as part of an alleged conspiracy. Also, even if the evidence against the member is not sufficient to establish antitrust liability, the member may still be caught in an investigative net, named as defendant, or named as an unindicted coconspirator.

Antitrust Laws in General

The basic federal antitrust statutes are the Sherman Act, the Clayton Act, the Federal Trade Commission Act, and the Robinson-Patman Act.

The Sherman Act prohibits contracts, combinations, and conspiracies in restraint of trade in interstate commerce. Under Section 1 of the Sherman Act, two principal findings are required to establish an unlawful activity. First, there must be a combination, and second, there must be an unreasonable restraint of trade. If there is a finding of an unreasonable restraint of trade, the courts and enforcement agencies will not accept as a defense a worthy motive.

Since associations are by definition combinations, their very existence frequently supplies a prosecutor with sufficient evidence to establish the first element of unlawful antitrust activity, namely concerted action. Therefore, associations must plan their activities with caution so that their conduct does not establish the second element, that is, an unreasonable restraint of trade. Concerted activity will be found to constitute an unreasonable restraint of trade if the effect of such activity is to allocate territories or customers, restrict production, limit channels of distribution, or fix or maintain prices.

Section 2 of the Sherman Act condemns monopolization, attempts to monopolize and conspiracies to monopolize. Section 2 of the Sherman Act is less likely to be of concern to trade organizations, such as the Open Mobile Alliance.

The Clayton Act prohibits specific acts such as exclusive dealing, price discrimination, and certain mergers. Except for the Robinson-Patman Act, which in 1936 amended Section 2 of the Clayton Act, its substantive provisions have little application to a trade association. The Robinson-Patman Act's prohibition against buyers knowingly inducing or receiving a discriminatory price would be relevant if the Open Mobile Alliance engaged in group buying.

The Federal Trade Commission Act, in addition to prohibiting the anticompetitive activities made illegal by the Sherman and Clayton Acts, bans unfair methods of competition and unfair

or deceptive acts and practices. Unlike the Sherman and Clayton Acts, where most of what is prohibited requires the action of two or more parties, individuals or firms can be liable under the Federal Trade Commission Act even though they did not act in concert with others.

In addition to the federal antitrust laws, most states have enacted statutes similar to the Sherman Act, the Clayton Act, and the Federal Trade Commission Act. Courts interpreting state antitrust laws generally rely on federal decisions as precedent, since most of the state statutes parallel the federal statutes.

Antitrust Laws Applicable to the Open Mobile Alliance

Focusing on the federal antitrust laws, of principal concern to the Open Mobile Alliance and its members is Section 1 of the Sherman Act, which renders illegal all “contracts, combinations, and conspiracies” in restraint of trade in interstate commerce. Although Section 1 of the Sherman Act, interpreted literally, would prohibit all contracts and conspiracies to restrain trade, courts have interpreted it as prohibiting only unreasonable restraints. This limitation is known as the rule of reason.

A court evaluating the legality of a practice under the rule of reason considers a variety of market factors such as the nature of the restraint and its effect, market conditions, and the history of the restraint. Courts attempt to weigh the anticompetitive effects of a particular restraint against the procompetitive benefits. Other rule of reason factors include whether the restraint serves a legitimate business purpose and whether the restriction on competition may be classified as de minimis.

Certain activities are regarded by courts as so lacking in procompetitive benefits that they are presumed to be unreasonable by their very nature and are considered illegal per se. When an activity is designated a per se antitrust violation, a conclusive presumption is created that the activity is an unreasonable restraint.

Practices within the per se category include agreements among competitors to fix or set prices, fees, rates, or commissions, as well as certain kinds of agreements to boycott competitors, suppliers, or customers. Note that the concept of “price fixing” encompasses agreements not only to raise prices but also to lower or stabilize prices. Virtually any agreement, arrangement, or understanding among competitors that involves tampering with free market prices, fees, rates, or premiums is a per se antitrust violation law violation.

The term “group boycott” encompasses a broad range of conduct, but generally refers to collusive efforts by competitors to enforce their will against an unwilling competitor, customer or supplier. Group boycotts are per se illegal when they are used by competitors to enforce price fixing arrangements or to exclude another competitor from a market.

The Sherman Act prohibition extends to any such agreement, whether written or oral, formal or informal, express or implicit. Only rarely is an anticompetitive agreement set out clearly in a written document. Antitrust liability is more often found by examining a course of business conduct from which a jury can infer the existence of an illegal conspiracy. The circumstances

may be entirely innocent and lawful when viewed separately. But the same circumstances, when viewed in the aggregate, may be held to constitute an antitrust conspiracy.

Even perfectly innocent and legal conduct may have the appearance of a conspiracy. Once a lawsuit alleging conspiracy is filed, it may be difficult to dispose of it in summary proceedings, thereby leading to costly discovery and trial costs. With such a very high cost of even a victorious defense against a conspiracy allegation, it is important to look at both the appearance, as well as the substance, of arrangements among competitors.

Potential Areas of Concern for Trade Associations

The legality of activities of associations and their members under the antitrust laws is determined according to standards no different from those used to determine the legality of the activities of other persons or firms. Special problems do arise, however, from the basic nature of an association. Many of an association's most fundamental policies and valuable programs directly impinge upon areas of particular antitrust concern.

Potential areas of concern for trade associations include membership guidelines, lobbying efforts, research and development, standardization and certification activities, and information exchanges.

(1) Membership Guidelines

Exclusionary membership standards that affect a competitor's ability to compete may invite litigation under the antitrust laws. Membership limitations may be anticompetitive since a denial of membership may place the applicant at a competitive disadvantage with association members.

(2) Lobbying Efforts

Efforts by associations to influence legislation or other governmental regulation and to petition departments of government, including administrative agencies and courts, for actions that may restrain trade receive a qualified immunity under two legal doctrines: one is the Noerr-Pennington doctrine, the other is the state action exemption.

The Noerr-Pennington doctrine recognizes associations' rights under the First Amendment to the U.S. Constitution and offers associations an exemption from antitrust liability for concerted activity seeking to modify laws or regulations. However, not all activities intended to influence governmental behavior are protected by the Noerr-Pennington doctrine. In particular, some courts have held that communications to influence the government in its commercial capacity (for example, as a buyer), as distinguished from its regulatory role, can violate the antitrust laws.

Also, where the rules, standards, and specifications advocated are simply attempts to interfere directly with the business relationship of a competitor, the association may be liable for activities of the lobbyists under the Noerr-Pennington sham lobbying exception. The Supreme

Court has held that the selfish, anticompetitive-intended efforts to influence legislation are fully protected, so long as the intended goal is the ultimate anticompetitive legislation, and not the interim abuse of the legislative process.

State action is concerned with conduct taken at the direction of the government. For state action immunity to apply, the conduct must flow from a “clearly articulated and affirmatively expressed state policy” to displace competition with regulation and be subject to “active state supervision”. Where the state acts in its sovereign capacity, it is exempt from antitrust prosecution.

(3) Research and Development

A trade association’s efforts to discover new markets and promote product innovation are generally permissible. Since research and development is a basis upon which firms compete in a given industry, joint programs which tend to eliminate competition may raise antitrust concerns. In recognition of the fact that joint research may result in significant public benefits without unreasonable anticompetitive effect, the Department of Justice has generally advocated a rule of reason approach for analyzing the antitrust risks of research joint ventures. Also, the National Cooperative Research and Production Act offers certain protection to trade associations that notify the Attorney General and the Federal Trade Commission.

(4) Standardization and Certification Activities

Trade associations may engage in product standardization or product certification. Standards safeguard against product failure, provide product uniformity and enhance safety. At the same time, the formulation and application of industry standards to industry competitors can raise significant anticompetitive problems where they are used to restrict entry into the industry, to inhibit innovation, or to limit the ability of competitors to compete. Antitrust problems arise where there is no rational basis for the exclusion or the exclusion goes beyond what is necessary to achieve the purpose of the standard.

(5) Information Exchanges

Courts evaluate information exchanges under the rule of reason analysis. In general, information exchanges that have plausible efficiency justifications are upheld (such as airline computer reservation systems), while information exchanges that stabilize prices or suppress competition are struck down (such as agreements by competitors to charge a uniform price).

Court cases provide the following guidelines for statistical information gathering activities:

- (a) only collect and report on past information, and do not attempt to analyze or comment in any way on the information collected;
- (b) disclose only aggregate data, and not information that specifically identifies individual companies or transactions;
- (c) make clear that participation in the program is voluntary, and does not require audits of the information submitted;
- (d) utilize a third party to collect and distribute the data;

- (e) maintain the confidentiality of the individual information provided; and
- (f) make clear that the information provided by individual respondents is not to be discussed among competitors.

How data is put to use and the business decisions that may flow from the data should always be left to the individual companies.

Conclusion

The essential principle which should guide the policies and programs of the Open Mobile Alliance and its members in order to avoid antitrust violations is that no illegal agreements, arrangements, or understandings should be reached or carried out through the Open Mobile Alliance. Conduct which might even give the appearance of an illegal agreement should also be avoided. Officers, directors, members and staff of the Open Mobile Alliance should be alert to conduct that might fall into areas of particular antitrust concern.

Any questions about the issues should be addressed to legal counsel.

Checklist of Actions to Limit Liability

The following checklist is a tool for the Open Mobile Alliance members and staff, but is not an exhaustive list. It is not a substitute for the Open Mobile Alliance's Guidelines for Antitrust Compliance, or the advice of the Open Mobile Alliance's legal counsel, or other legal counsel.

- (1) Obtain advice from your own legal counsel concerning the possible risks involved in your association activities.
- (2) Meetings should be held only when there are pertinent items of substance to be discussed which justify a meeting and the meeting has been announced in advance with a specific agenda.
- (3) Participants at any Open Mobile Alliance meeting should adhere strictly to the agenda.
- (4) Minutes of all meetings should be kept, which accurately report what actions, if any, were taken.
- (5) Review the agenda in advance of the Open Mobile Alliance meetings and the minutes following the meetings; and compare your own notes or recollection with the reported minutes.
- (6) Do not discuss with other members sensitive antitrust subjects, such as those that relate to price (for example, individual market prices or roamer rates, price changes, discounts, allowances, credit terms), production, markets and the selection of customers or suppliers.
- (7) Avoid discussions of sensitive antitrust subjects in any social gatherings.
- (8) Do not attend meetings where procedural rules are not followed.

(9) Ask that the Open Mobile Alliance obtain a periodic independent review of its corporate documents and its association procedures for potential antitrust problems.

(10) Never allow yourself to be coerced into taking part in questionable association activities. There should be no policing of the industry to see how individual members are conducting their business.

(11) If there is any doubt about an association program or subject of discussion, consult immediately with your legal counsel before participating.