Discussion Points

Presented by the Business and Industry Advisory Committee (BIAC) to the
OECD Competition Committee
Working Party No. 3 on Co-operation and Enforcement

“Potential Pro-Competitive and Anti-Competitive Aspects of Trade/Business Associations”*

16 October, 2007

I. Introduction

1. The Business and Advisory Committee (BIAC) to the OECD appreciates the opportunity to submit these comments to the OECD Competition Committee’s Working Party No. 3 (WP3) for its roundtable on “Potential Pro-Competitive and Anti-Competitive Aspects of Trade/Business Associations,” on 16 October, 2007.

2. In responding to the questions raised our focus has been on trade associations defined as organisations which are established to promote the common good of a given industry or economic sector and comprising undertakings which may not necessarily be operating at the same level of the relevant market. This paper does not take account of the activities of various other bodies which describe themselves as trade associations such as ad hoc representative groups sometimes established for a specific lobbying purpose.

3. BIAC is aware that the reported cases over the years are littered with examples of cartels utilising such trade associations whether directly or indirectly as shelter for their alleged activities. Equally regulators often seem to have an innate suspicion of the activities of trade associations perhaps influenced by the frequently quoted dictum of Adam Smith from 1776 in "The Wealth of Nations":

"People of the same trade seldom meet together, even for merriment and diversion, but the conversation ends in a conspiracy against the public, or in some contrivance to raise prices. It is impossible indeed to prevent such meetings, by any law which either could be executed, or would be consistent with liberty and justice. But though the law cannot hinder people of the same trade from sometimes assembling together, it ought to do nothing to facilitate such assemblies; much less to render them necessary."

4. However, the world has moved on since 1776, particularly with the widespread growth globally of comprehensive competition laws, and whilst BIAC vigorously supports efficient and effective prosecution of hard core cartels¹ we believe that a balanced view should be taken

* Paper prepared by Rufus Ogilvie Smals, General Counsel, GKN plc, with substantial contribution from BIAC Competition Committee members.

¹ See, most recently, “Prosecuting Cartels Without Direct Evidence of Agreement” presented by BIAC to the OECD at the OECD Global Forum on Competition (8 February, 2006).
of trade associations - taking into account the numerous useful and necessary functions which they perform, their awareness of the importance of compliance with competition laws and their often extensive activities in fostering such compliance. The direct engagement of a small minority of trade associations in unlawful activities over the years should not outweigh the benefits brought to the economy (in many cases both industry and consumers) by the vast majority of trade associations which taken together have become an integral feature of most market economies.

5. This paper will briefly review some of the key functions of Trade Associations and will then consider their role in relation to competition law in various jurisdictions, their value as a compliance tool in advocating the importance of competition law and will then deal with some of the more specific issues raised in the request for contributions.

II. Functions of Trade Associations

6. Information dissemination and exchange

One of the most useful activities of a trade association is the distribution to its members of information relating to its segment of the industry. This includes, among other things, information regarding legislation and regulations that may impact industry members. In addition, it can include technological trends, economic forecasts, projections regarding complementary or downstream industries, and other important information that can enable firms to make rational investment decisions that optimize the distribution of capital.

A particular type of information that sometimes attracts regulatory scrutiny is the collection and dissemination of statistical data from trade association members. Properly conducted, the collection of statistical information can stimulate competition by enabling firms, for example, to recognize demand trends and expand their investment in the industry. Thus, there should be a presumption that properly conducted statistical programmes are pro-competitive and can produce significant economic benefits.

In a typical statistical programme, individual company data is gathered and then compiled into industry-wide totals and disseminated to members and often to others in the industry. The value of access to reliable data concerning a particular industry is widely recognized. Information about total industry sales can be one of a number of factors taken into account by businesses as a means of ensuring maximum allocation of resources. In addition, decisions about the purchase of raw materials, advertising, plant or store location, and capacity can be made on a more efficient basis by relying on accurate statistical data.

One of the benefits of having a trade association collect and exchange information is that the trade association functions as an independent third party. Direct exchanges between competitors are riskier because they provide more opportunities for express or tacit price

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2 Portions of Section II are from draft versions of the AMERICAN BAR ASSOCIATION, SECTION OF ANTITRUST, ANTITRUST AND TRADE ASSOCIATIONS, 3D ED. (forthcoming Spring 2008).
fixing agreements. Exchanges through an independent third party, however, are less likely to be open to challenge.

The U.S. competition agencies have provided a particularly useful model for the exchange of industry information in a presumptively procompetitive manner. The Health Care Statements, jointly issued by the Antitrust Division of the Department of Justice and the Federal Trade Commission in 1996, set forth an antitrust safety zone that describes exchanges of price and cost information among providers that will not be challenged by the Agencies under the antitrust laws (absent extraordinary circumstances). The safe harbour exists if the following conditions are satisfied: (1) the survey is managed by a third party (e.g., a purchaser, government agency, health care consultant, academic institution, or trade association); (2) the information provided by survey participants is based on data more than three months old; and (3) there are at least five providers reporting data upon which each disseminated statistic is based, no individual provider’s data represents more than 25 percent on a weighted basis of that statistic, and any information disseminated is sufficiently aggregated such that it would not allow recipients to identify the prices charged or compensation paid by any particular provider. Notably, the U.S. agencies have endorsed the Health Care Statements model for general application across industries.

Participants in an information exchange will be less exposed to antitrust risk where they can show a legitimate business reason for the exchange. For example, in Cement Manufacturers, the U.S. Supreme Court upheld an exchange by a trade association of information regarding specific job contracts, relying heavily on the fact that the purpose for the exchange was to prevent the perpetration of fraud on the association’s members.

At the same time, improperly conducted statistical programmes may not enhance competition and, in some circumstances, may diminish competition. Often, such statistical programmes are not sufficiently robust in terms of the number of participants or the age of the data collected, but these shortcomings frequently can be cured through counseling and the imposition of precautionary measures. BIAC believes that improper statistical programs conducted in good faith by a trade association should be subject to prohibition orders or other remedial measures but should not be subject to prosecution as criminal enterprises or cartels subject to fines. Such prosecution should be reserved for naked restraints of trade. Of course, a naked price fixing agreement conducted under the guise of a trade association (i.e., not in good faith) is properly subject to cartel enforcement.

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3 Mary L. Azcuénaga, Commissioner, FEDERAL TRADE COMM’N, Price Surveys, Benchmarking and Information Exchanges, Washington, DC (Nov. 8, 1994) at 13 (“The principal concern in conducting a price survey should be insulating the members from direct price exchanges and an inference of an agreement on price”).

4 See, e.g., id. at 13-14; U.S. DEP’T OF JUSTICE & FEDERAL TRADE COMM’N, STATEMENTS OF ANTITRUST ENFORCEMENT POLICY IN HEALTH CARE (1996) [hereinafter HEALTH CARE STATEMENTS], reprinted in 4 Trade Reg. Rep. (CCH) ¶ 13,153, available at http://www.ftc.gov/reports/hlc3s.pdf, Statement 6, (one of the three requirements for an information exchange to fall within the antitrust “safety zone” is if “the collection is managed by a third party (e.g., a … trade association”)); ABA SECTION OF ANTITRUST LAW, A PRIMER ON THE LAW OF INFORMATION EXCHANGE, 18-19 (2d ed. 2002).

5 HEALTH CARE STATEMENTS, Statement 6.

7. Industry promotion, for example, through joint marketing

Trade associations engage in a variety of activities to promote, sell, or distribute goods or services that are produced either jointly or individually by their members. Such activities include trade shows, advertising programs, the establishment of auctions and other marketplaces, sports leagues, joint marketing of health services, and joint selling of other services or products. The U.S. Competitor Collaborations Guidelines, issued jointly by the DOJ and FTC, state that “[s]uch agreements may be procompetitive, for example, where a combination of complementary assets enables products more quickly and efficiently to reach the marketplace.”

8. Joint purchasing

Some trade associations offer group purchasing programs to their members and other industry participants. In some joint buying programs the association acts as a purchasing agent, while in others the association has a more limited role and may simply sponsor the program on an opt-in basis. Group purchasing is not limited to product inputs but also may involve services; for example, trade associations may act as joint purchasing agents for health care services or insurance. The potential procompetitive benefits of joint buying are apparent; “[p]urchasing collaborations, for example, may enable participants to centralize ordering, to combine warehousing or distribution functions more efficiently, or to achieve other efficiencies.”

The U.S. Health Care Statements again provide useful safe harbours, stating that, absent extraordinary circumstances, the agencies will not challenge joint purchasing arrangements if: (1) the buying group’s purchases account for less than 35 percent of the total sales of the product or service by all suppliers in the relevant geographic market; and (2) the cost of the product or service being jointly purchased accounts for less than 20 percent of the total

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8 See, e.g., Gregory v. Fort Bridger Rendezvous Ass’n, 448 F.3d 1195 (10th Cir. 2006).
9 See, e.g., Phil Tolkon Datsun v. Greater Milwaukee Datsun Dealers’ Advertising Ass’n, 672 F.2d 1280 (7th Cir. 1982).
12 See, e.g., U.S. DEP’T OF JUSTICE, Business Review Letter to Santa Fe, New Mexico Managed Care Organization 1997 DOJBLR LEXIS 3 (Feb. 12, 1997) (no intention to challenge plan to challenge plan to “offer hospital and physician services to health insurance plans and other third-party payers using capitation and global fee contracts as well as other types of contract arrangements”).
13 See, e.g., U.S. DEP’T OF JUSTICE, Business Review Letter to Association of Independent Corrugated Converters, 1998 DOJBLR LEXIS 16 (Dec. 23, 1998) (no intention to challenge proposal by independent corrugated converters with small or limited number of plants “to form joint selling entities . . . that could efficiently sell to national and regional accounts”).
14 COMPETITOR COLLABORATIONS GUIDELINES, supra note 6, § 3.31(a).
16 COMPETITOR COLLABORATIONS GUIDELINES, supra note 6, § 3.31(a). See also Northwest Wholesale Stationers v. Pacific Stationery, 472 U.S. 284, 295 (1985) (“The [joint buying] arrangement permits the participating retailers to achieve economies of scale in both the purchase and warehousing of wholesale supplies, and also ensures ready access to a stock of goods that might otherwise be unavailable on short notice”).
revenues from all products or services sold in the downstream market by each competing participant in the joint purchasing arrangement.\textsuperscript{17}

The \textit{Health Care Statements} also propose safeguards to mitigate concerns that might arise in joint purchasing agreements. The \textit{Statements} counsel that “antitrust concern is lessened if members are not required to use the arrangement for all their purchases of a particular product or service.”\textsuperscript{18} In addition, “where negotiations are conducted on behalf of the joint purchasing arrangement by an independent employee or agent who is not also an employee of a participant, antitrust risk is lowered.”\textsuperscript{19} Finally, “the likelihood of anticompetitive communications is lessened where communications between the purchasing group and each individual participant are kept confidential, and not discussed with, or disseminated to, other participants.”\textsuperscript{20}

\section{9. Standards development}

Trade associations often promulgate industry standards which may be adopted by the government such that the standards become law. The Department of Justice and Federal Trade Commission recently commented on the procompetitive nature of standards development:

"Industry standards are widely acknowledged to be one of the engines driving the modern economy. Standards can make products less costly for firms to produce and more valuable to consumers. They can increase innovation, efficiency, and consumer choice; foster public health and safety; and serve as a “fundamental building block for international trade.” Standards make networks, such as the Internet and wireless telecommunications, more valuable by allowing products to interoperate. The most successful standards are often those that provide timely, widely adopted, and effective solutions to technical problems.”\textsuperscript{21}

A prominent example of such activity is in Germany with widespread participation of trade associations in the development of DIN standards which cover all areas of economic life.

Standards development activities by their very nature require the exchange of substantial amounts of information sometimes very recently developed. These activities very often may achieve significant procompetitive results however. These may include lower information costs, expanded use of technologies to the advantage of consumers, increased compatibility and interoperability of complementary technologies, and enhanced entry by new participants in relevant markets.\textsuperscript{22} It is therefore very important that these activities are not deterred by an

\begin{footnotes}
\item[17] \textit{HEALTH CARE STATEMENTS}, supra note 3, Statement 7.
\item[18] \textit{Id.}
\item[19] \textit{Id.}
\item[20] \textit{Id.}
\end{footnotes}
overly strict approach to enforcement of competition rules, whilst recognising that information flows need to be carefully controlled within the governance and compliance policies of the standards development bodies.

10. Lobbying

Another key activity of many trade associations is representing to Governments, Regulators and other public bodies the interests of members on legislation, regulations, taxation and policy matters likely to affect them. This is often of considerable value to governmental bodies as they can deal largely with "one voice" when seeking consultation with an industry on any proposed changes or developments. For many members (particularly smaller firms) this is a principal benefit from membership in that their interests and concerns can be represented more effectively and with greater weight than they would command individually.

There are many cases also where this type of activity has proven to be a two-way street for regulators; there are many examples where detailed new regulations or voluntary codes benefiting consumers could not easily have been developed without the close and detailed cooperation of trade associations, e.g. the REACH legislation on chemicals and the development of codes of practice under the Consumer Codes Approval Scheme (CCAS) in the UK.

III. Trade Associations and Competition Law

11. The rules of competition law apply equally, of course, to trade associations; EU Article 81(1) refers specifically not just to agreements between undertakings but also to decisions by associations of undertakings. This approach has filtered through into the domestic laws of most EU Member States in addition. Acting through a trade association as an intermediary does not work as a method of escaping Article 81(1).

Furthermore, the term "decision" has been widely interpreted. The case law position is that any action by an association which is designed to coordinate the conduct of its member undertakings constitutes a "decision" within the meaning of Article 81(1). It is not necessary for a "decision" to be binding on the members. Being a member of an association is deemed sufficient to empower the association to undertake obligations on its behalf.

Consequently, even where a member has not expressly approved an anti-competitive agreement concluded by the association but has not expressly opposed it, the member may be held to have acquiesced in the agreement. This approach has been taken further in a recent decision of the Court of Justice requiring positive disassociation to prove that you were not part of a cartel:

"142 It is settled case-law that it is sufficient for the Commission to show that the undertaking concerned participated in meetings at which anti-competitive agreements were concluded, without manifestly opposing them, to prove to the requisite standard that the undertaking participated in the cartel. Where


participation in such meetings has been established, it is for that undertaking to put forward evidence to establish that its participation in those meetings was without any anti-competitive intention by demonstrating that it had indicated to its competitors that it was participating in those meetings in a spirit that was different from theirs (see, in particular, Joined Cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P Aalborg Portland and Others v Commission [2004] ECR I-123, paragraph 81 and the case-law cited).

143 In that regard, a party which tacitly approves of an unlawful initiative, without publicly distancing itself from its content or reporting it to the administrative authorities, effectively encourages the continuation of the infringement and compromises its discovery. That complicity constitutes a passive mode of participation in the infringement which is therefore capable of rendering the undertaking liable in the context of a single agreement (see Aalborg Portland and Others v Commission, cited above, paragraph 84)."

12. Whilst in many other jurisdictions passive participation may not be regarded as sufficient to ground liability it is at least apparent that both within the EU and other jurisdictions there is no question of trade associations enjoying any special exempt status when it comes to compliance with competition laws. To the contrary, they are particularly vulnerable to investigation and prosecution with sufficient deterrence in place to make both the trade association and its members particularly anxious to avoid any conduct under the auspices of the association which could be considered questionable under applicable competition laws.

BIAC believes that the greater concern is that the many benefits of trade associations as described earlier in this paper could be unnecessarily limited or lost altogether should regulators adopt an unduly restrictive approach to their activities or if they view trade associations as a particular target for deterrence by, for example, imposing fines which threaten the continuation of the trade association (and possibly an element of double jeopardy on its members) even where its involvement in unlawful activity has been at best indirect.

IV. Compliance Activities of Trade Associations

13. Fully appreciating the need to avoid becoming a refuge for cartels and in the interests of their members generally many trade associations have embarked upon comprehensive compliance and training programmes. A selection of such (publicly available) programmes as run by trade associations in various jurisdictions are listed in the attachment to this paper. Many also publish rigorous guidance relating to the conduct of meetings of the trade association. More generally, trade associations are often very active in providing training in competition laws to its members sometimes in close cooperation with national regulators.

14. Rules

The right to become a member of a trade association can be critical to operating in a particular market which is why membership rules should be based on reasonable objective standards with appropriate appeal procedures in case of refusal of admission. In Metropole Television the CFI classified the standard of legality of membership rules to the effect that
they should be "objective and sufficiently determinative so as to enable them to be applied uniformly and in a non-discriminatory manner vis-a-vis all potential members."

BIAC supports the need for rules of admission to a trade association to be transparent, proportionate, non-discriminatory and based on objective standards particularly where exclusion from membership is likely to put the undertaking concerned at a competitive disadvantage. For similar reasons procedures for expelling members should also be based on reasonable and objective standards.

V. Conclusions

15. Given the complexities of the economic and regulatory environment in which businesses have to operate the membership of a trade association can offer a range of benefits to members - particularly smaller companies - which help to maximise the efficiency of the market system as a whole. The conduct of such bodies, as well as that of the members, are subject to compliance with competition laws and most such bodies are acutely aware of this.

BIAC is not advocating any special leniency programme for trade associations but equally it does not believe that there would be any justification for trade associations to be any more targeted or more rigorously treated than their members.

16. Just as well organised companies with first class competition compliance programmes can sometimes run foul of competition laws, often as a result of the unauthorised conduct of misguided managers, so is it that trade associations can also unwittingly or otherwise infringe. It is an issue which is well appreciated by corporate compliance officers with best practice now developing towards extending special training to corporate representatives who attend trade association meetings.

Many trade associations themselves issue guidelines for conduct at such meetings and it may be that best practice guidelines for the conduct of trade associations generally should be developed by the regulatory community where such action is not already in progress.

17. However, any such approach should be risk based and proportionate so as not to unduly constrict the entirely legitimate objectives of trade associations in a manner which could limit their effectiveness. BIAC stands ready and willing to work with OECD and/or other regulators to develop such guidelines.

Attachment

1. Web Services – Interoperability Organization *Antitrust Compliance Policy*  
   [http://www.ws-i.org/docs/Membership/20020828.WS-IAntitrust.pdf](http://www.ws-i.org/docs/Membership/20020828.WS-IAntitrust.pdf)

2. Retail Packaging Association *Antitrust Compliance Policy and Guidelines*  

3. The International Titanium Association *Antitrust Guidelines*  

4. Southwestern Fertilizer Conference, Inc. *Guide to Antitrust Compliance*  
   [http://www.swfertilizer.org/AntiTrust.htm](http://www.swfertilizer.org/AntiTrust.htm)

5. Institute of Electrical and Electronics Engineers, Inc. *Antitrust and Competition Policy*  