ANTITRUST LAW
AMERICAN BAR ASSOCIATION YOUNG LAWYERS DIVISION

AMERICAN BAR ASSOCIATION
Young Lawyers Division

Committee Newsletter | Winter 2017

TABLE OF CONTENTS

ARTICLES >>

Safeguards to Minimize the Antitrust Risks Associated with Trade Associations…………2
By Catie Ventura
This article discusses safeguards that should be implemented by a trade association to reduce antitrust risks.

Antitrust Risks for Companies in Dual Distribution Networks Following *Fortiline*……..….3
By Daniel S. Graulich
This article summarizes a recent FTC challenge to an invitation to collude by a dual distributor and provides guidance for companies that operate in dual distribution networks.

***Meyer v. Kalanick*: Uber at the Intersection of Electronic Bargaining Law and Price Fixing** ………………………………………………………………………….……………..….6
By Danielle Moriber
This article discusses the recent Southern District of New York decision addressing the enforceability of electronic contracts.

NEWS AND ANNOUNCEMENTS >>

Young Lawyers Division Spring Conference May 4-6, 2017 in Montreal…………………...……..7

ARTICLES

Safeguards to Minimize the Antitrust Risks Associated with Trade Associations

By Catie Ventura

Trade associations are often a hunting ground for government entities and civil litigants searching for signs of anticompetitive conduct. While trade associations can provide clients with many benefits, they can also pose antitrust risks.

So what should you say to a client asking for your advice about forming or joining a trade association? Before jumping to the litany of risks presented by participation in a trade association, evaluate whether the following safeguards have been put in place. While nothing can prevent an inquisitive government agency or plaintiffs' attorney from looking into the association or its membership, these safeguards should reduce the risk that any improper conduct is found.

- **Retain antitrust counsel and develop antitrust guidelines.** Involving antitrust counsel in all trade association activities will help avoid potential missteps in the formation and operation of the association. Developing antitrust guidelines will ensure each member understands what conduct is permissible and what is prohibited.

- **Keep written records of each meeting.** For each trade association meeting, draft an agenda, limit discussions to agenda topics, and keep meeting minutes that accurately reflect the discussions that took place. In the event of an inquiry, these documents can be used to show the absence of anticompetitive conduct and the efforts made by the association to comply with antitrust laws.

- **Membership rules matter.** Rules about membership in a trade association should be objective and not act as barriers to competition. If membership in a trade association is limited to certain competitors, and not others, the association may be considered anticompetitive.

- **Only exchange historical data.** Any sensitive data exchanged among members of a trade association should be at least three months old.[1] Exchanging historical data reduces the risk that members of the trade association can use this information to collude in the future.

- **Aggregate data through a third party.** Any sensitive data collected from members of the trade association should be collected by a third party that is not active in the relevant market. If data is distributed to members, the data should be aggregated to ensure individual data points cannot be attributed to an individual member.

---

[1] Statement of Antitrust Enforcement Policy in Healthcare, Department of Justice and Federal Trade Commission, August 1996, at 45.

© 2017 by the American Bar Association. Reproduced with permission. All rights reserved. This information or any portion thereof may not be copied or disseminated in any form or by any means or stored in an electronic database or retrieval system without the express written consent of the American Bar Association.

- **The more members, the better.** When sensitive data is exchanged between members of a trade association, the Department of Justice and Federal Trade Commission recommend that data be provided by at least five members.[2] The more members in a trade association, the more likely this five-member threshold will be met each time members seek to share data.

Catie Ventura is a member of the Litigation practice group at Kirkland & Ellis. Her practice focuses on antitrust and competition matters and complex commercial litigation.

Antitrust Risks for Companies in Dual Distribution Networks Following *Fortiline*

By Daniel S. Graulich

Antitrust Risks for Companies in Dual Distribution Networks Following *Fortiline*

In August 2016, the FTC brought the first administrative complaint of its kind against a company involved in a dual distribution channel. In the Matter of Fortiline, LLC, Docket No. C-4592. Dual distribution refers to a manufacturer that sells directly to end-use customers and sells to independent distributors who in turn sell the manufacturer's product to end-use customers. Antitrust issues can arise in this context since the manufacturer competes directly with its channel partner at the distribution level. At the same time, companies involved in these types of distribution networks must be able to openly communicate throughout the supply-chain in order to coordinate distribution efforts. This issue is likely to become increasingly important given the emergence of e-commerce, since companies often sell products and services through both their own websites and those of third parties. It is therefore essential that companies working across multiple channels implement practices that are designed to manage channel conflict without running afoul of the antitrust laws. This article first summarizes the FTC's complaint against Fortiline, and its proposed and final consent orders. It then lays out some guidance for companies involved in dual distribution networks.

Factual Background

Until 2009, Fortiline primarily distributed ductile iron pipes for Manufacturer A on an exclusive basis. At that time, Fortiline terminated its relationship with Manufacturer A in North Carolina and most of Virginia and began to distribute for Manufacturer B. Following termination, Manufacturer A began to sell directly to customers in these states and competed by offering lower prices. During this time, Fortiline continued to distribute Manufacturer A's piping in other regions and would provide Manufacturer A's piping to contractors as needed for the completion of ongoing projects started before 2009.

---

[2] *Id.*

© 2017 by the American Bar Association. Reproduced with permission. All rights reserved. This information or any portion thereof may not be copied or disseminated in any form or by any means or stored in an electronic database or retrieval system without the express written consent of the American Bar Association.

The FTC in its administrative complaint alleged two sets of communications constituted an "invitation to collude"[3][4] in violation of Section 5 of the FTC Act.[5] (In the Matter of Fortiline, LLC, Docket No. C-4592, Complaint.) First, Fortiline sent Manufacturer A an email that criticized Manufacturer A for setting its prices too low. The email also stated that other pipe manufacturers had tried to "keep up their numbers" and advised Manufacturer A to follow this approach. Second, Fortiline complained to Manufacturer A at a trade association meeting for selling piping "20% below market" to a Virginia customer.

The Commission's Competitive Concerns

In its proposed order, the Commission recognized market and price-related communications between a manufacturer and its distributors in a vertical relationship are often necessary. (Fortiline, LLC, Analysis to Aid Public Comment, 81 Fed. Reg. 157 (August 15, 2016).) The Commission was therefore careful to point out that Fortiline's invitation was an attempt to collude on pricing "across the board", indicating the Commission's concern that the communications had an impact on horizontal competition and went beyond the potentially procompetitive impact of vertical communications between a manufacturer and supplier to promote inter-brand competition. In other words, the Commission viewed Fortiline's solicitation as an attempt to coordinate prices across both Manufacturer A's and Manufacturer B's product lines. Particularly relevant was the fact that Fortiline terminated its agreement with Manufacturer A in 2009, which created a more limited distribution arrangement between the two companies and increased the number of instances in which the companies competed through head-to-head sales with contractors. As a result, the Commission concluded that Fortiline's communications were primarily motivated by a desire to limit pricing pressure on its future sales of rival products (as opposed to a desire to prevent Manufacturer A from free-riding on investments Fortiline had made in distributing Manufacturer A's own product).

FTC's Final Consent Order

The FTC approved a final consent in September 2016. This order prohibits Fortiline from entering into or soliciting an agreement with other competing distributors to fix prices or allocate markets. (In the Matter of Fortiline, LLC, Docket No. C-4592, Decision & Order.) It also contains exceptions that allow Fortiline to act pursuant to a lawful manufacturer-distributor

[3] The FTC defines an "invitation to collude" as an "an improper communication from a firm to an actual or potential competitor that the firm is ready and willing to coordinate on price or output." Fortiline, LLC, Analysis to Aid Public Comment, 81 Fed. Reg. 157 (August 15, 2016). Such invitations are viewed as being "presumptively anti-competitive." Absent a pro-competitive justification, the FTC treats such invitations as being in violation of Section 5 violation even without a showing of market power or actual competitive effect.

[4] Under Section 1 of the Sherman Act, an agreement is required to establish collusive behavior whereas invitations to collude are unilateral in nature. While the scope of Section 5 of the FTC is not fully defined, the FTC has long taken the position that its jurisdiction under this section covers such solicitations due to its actual and potential anticompetitive effects.

[5] "Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful." 15 U.S. Code § 45.

© 2017 by the American Bar Association. Reproduced with permission. All rights reserved. This information or any portion thereof may not be copied or disseminated in any form or by any means or stored in an electronic database or retrieval system without the express written consent of the American Bar Association.

relationship and enter into sales agreements for piping from competitors. The order further specifies that the following communications are not violations of Section 5: (i) requests by a distributor to receive prices, rates, rebates or discounts comparable to those that a manufacturer gives to other distributors and contractors/end users; (ii) negotiations for becoming an exclusive or quasi-exclusive distributor; and (iii) negotiations with a manufacturer to distribute products to contractors/end users previously or potentially served by that manufacturer. *Id.* at 3.

Practical Considerations

Following the FTC's *Fortiline* decision, companies and practitioners should keep in mind the following:

- In tailoring compliance efforts, companies should consider risk factors such as the degree to which a given company competes with a channel partner. This observation is especially relevant to the extent a high percentage of a manufacturer's retail sales are through company-owned outlets, independent dealers have operations at the supplier level, or companies seek to negotiate competitive clauses that limit the terms on which the parties to the contract may deal with third-party suppliers, distributors, and customers.

- Companies should be mindful of the nature and manner of their communications with channel partners in dual distribution networks. In particular, where communications are required between a manufacturer and its distributor in areas in which they compete, communications should indicate the company's desire to minimize channel conflict and optimize distribution of the manufacturer's own product lines. In addition, precautions should be taken whenever companies engage in discussions that involve competitively sensitive information[6] (such as end-user pricing and resale terms).

- Companies should provide guidelines to employees and implement safeguards where possible. Appropriate guidelines could include advising the distribution team not to discuss competitively sensitive information with independent distributors. Policies may include putting in place firewalls between distribution and supply teams, which can in turn allow an intermediary to assess the degree to which information may be considered competitively sensitive.

- Companies that operate globally should take into account that competition agencies may differ in their approach towards dual distribution analysis.

Going Forward

[6] "Competitively sensitive information" typically includes information that is proprietary, confidential and/or not publicly available relating to pricing or pricing strategies, costs, revenues, profits, margins, output, business or strategic plans, marketing, advertising, promotion, or research and development. *See, e.g.*, *In the Matter of Bosley, Inc., Aderans America Holdings, Inc., and Aderans Co., Ltd.*, Docket No. C-4404, Complaint.

© 2017 by the American Bar Association. Reproduced with permission. All rights reserved. This information or any portion thereof may not be copied or disseminated in any form or by any means or stored in an electronic database or retrieval system without the express written consent of the American Bar Association.

As noted by several practitioners, it is often difficult in practice to distinguish whether communications between companies in the dual distribution context are vertical or horizontal in nature. Commissioner Ohlhausen highlighted this issue in her dissenting statement, noting that the "equivocal factual circumstances may chill procompetitive vertical conduct in markets with dual distribution." (Dissenting Statement of Maureen K. Ohlhausen In the Matter of Fortiline, LLC File No. 151-0000.) In light of the recent election results and likely changes that will be made to Commission's leadership in the near future, it is likely that the FTC will be more sensitive in analyzing these types of communications.

Dan Graulich is an associate in Hogan Lovells US LLP's Washington DC Office.

***Meyer v. Kalanick*: Uber at the Intersection of Electronic Bargaining Law and Price Fixing**
By Danielle Moriber

In December 2015, Plaintiff Spencer Meyer filed a civil antitrust action against Uber and Kalanick, the company's founder and CEO, on behalf of himself and a putative nationwide class of Uber users for what the Complaint terms "classic anticompetitive behavior." (*Meyer v. Kalanick*, Civ. No. 15-9796, Dkt. No. 1 at 3 (S.D.N.Y. Dec. 16, 2016); *see also* Dkt. No. 26 (S.D.N.Y. Jan. 29, 2016).) Specifically, the Complaint seeks relief for Defendants' alleged unlawful horizontal and vertical price-fixing conspiracies in violation of Section 1 of the Sherman Act and New York State law. Compl. at 1. United States Southern District Judge Jed Rakoff denied a motion to dismiss and subsequent motion for reconsideration by Kalanick, holding that Plaintiff adequately stated a claim. (*Id*. at Dkt. Nos. 37 and 44.) In July 2016, Judge Rakoff denied Defendants' subsequent motions to compel arbitration because Plaintiff Meyer never actually formed an agreement to arbitrate. Defendants appealed to the Second Circuit. Oral argument is scheduled for the end of February, 2017.

In its Opinion denying Defendants' motions to compel, the District Court detailed differences between common types of electronic bargaining agreements, which range from those which contain no requirement that a user visit or view a page with terms, to requiring a user to view a page with terms and click "I agree" in order to proceed, to those where the user "is allegedly notified of the existence and applicability of the site's 'terms of use' when proceeding through the website's sign-in or login process." (*Id*. at Dkt. No. 126 at 18 (internal quotations omitted).) However, the Court explained that while these distinctions serve as a useful guidepost, established contract principles continue to apply.

The District Court analyzed the extent to which the arbitration clause was conspicuous and its terms express by reviewing the steps involved for user registration on the Uber app and the display at each step. The Court's Opinion even attaches an image of the relevant sign-in screen scaled to size for reference.

The defining factors in *Meyer* were that a user need not click "I agree" to proceed to use the app, that the terms did not appear on the user's screen during the registration process, and that the registration screen did not adequately call attention to the existence of the terms. With regard to the latter, the Court emphasized that the "Register" button and credit card information

© 2017 by the American Bar Association. Reproduced with permission. All rights reserved. This information or any portion thereof may not be copied or disseminated in any form or by any means or stored in an electronic database or retrieval system without the express written consent of the American Bar Association.

fields were prominent as compared to the link to the terms of service. In addition, the placement of the dispute resolution clause within the lengthy terms and conditions posed a further barrier. Ultimately, the Court determined that the parties never formed an agreement because the notice was not "reasonably conspicuous" and plaintiff did not "evince unambiguous manifestation of assent to those terms." (*Id*. at 25.)

It is difficult to determine the full impact of Judge Rakoff's decision before the Second Circuit issues an Opinion in the appellate proceedings. However, the holding in *Meyer* is confined to the specific facts presented. Indeed, the Court made clear that the enforceability of an electronic contract requires in-depth, case specific analysis and there is no bright line rule that determines enforceability.

NEWS AND ANNOUNCEMENTS

Save the Date! Young Lawyers Division Spring Conference May 4-6, 2017 in Montreal

Check the YLD Antitrust Committee Website for more news and announcements

© 2017 by the American Bar Association. Reproduced with permission. All rights reserved. This information or any portion thereof may not be copied or disseminated in any form or by any means or stored in an electronic database or retrieval system without the express written consent of the American Bar Association.