Select 2016
Working within trade associations: A practical workshop on how to avoid competition law pitfalls
13 October 2016
Overview

10 minutes
- **Setting the scene**
  Mark Jones

10 minutes
- **Mini-theatre**
  A trade association meeting gone wrong

25 minutes
- **De-brief from mini-theatre and Q&A**
  All Hogan Lovells team
Setting the scene
Setting the scene

- Trade associations have a crucial role to play, eg:
  - Co-ordinating industry views for political decision-makers
  - Promoting best practice
- Particular importance for Brexit: UK government actively encouraging trade associations to communicate industry views in order to inform negotiations
- Role of competition law to help ensure fair, competitive and open markets in Europe and worldwide
Trade associations and competition law

Lobbying and Trade Association work is protected by the EU Treaty (Article 11(1) TEU)

Risk: What starts as legitimate trade association and lobbying work develops into competition law infringements

Competition law prohibits:
- restrictions of competition
- agreed boycotts
- discrimination

Permitted

NOT permitted
Consequences of infringement

Bad things happen

- Large fines
- Unenforceable contracts
- Disciplinary action, including disqualification of directors in some countries
- In some countries, criminal sanctions
- Damages actions in the courts brought by competitors or customers
- Reputational harm
Fines

• Fines levied against companies, trade associations and individuals
• Amount of the fine:
  – Companies: up to 10% of group worldwide turnover
  – Trade associations: up to 10% of the sum of the group worldwide turnovers of the members active on the market affected by the infringement (EU penalty)
  – For the person responsible in companies and trade associations: up to EUR 1m in certain jurisdictions, eg Germany
Fines – recent examples

EU

• Consumer detergents: EUR 315 million (2011)
• Trucks: EUR 2.93 billion (2016 and on-going)

UK

• Three Counties, Association of estate and lettings agents: GBP 735,000 (2015)

Spain

• ATAP, Association of Autonomous Transporters of the Port of Bilbao: EUR 1.5 million (2016)
• STANPA, National Association for Perfumes and Cosmetics: EUR 51 million (2011)
Fines – recent examples

France
• Parcel delivery companies: EUR 672.3 million (2015)
• Modelling agencies: EUR 2 million (2016)

Germany
• Beer: EUR 338 million
• Wallpapers: EUR 17 million
• Drugstore products: EUR 63 million
• Lenses: EUR 115 million
• Mills industry: EUR 65 million
Trade associations can face consequences themselves

AC Treuhand II (2015 ECJ)

- AC-Treuhand, a consultancy offering data collection and analysis services, was responsible for organising cartel meetings
- It also participated in the meetings and facilitated exchanges of information between the members
- The European Commission imposed a fine of EUR 348,000 on AC-Treuhand
- Competition law exposure even if party is not active on the market affected by the cartel
- So intermediaries may be liable for infringements of competition law – even without market activities!
  - eg consultancies, market research agencies, brokers, online platforms, trade associations
Mini-theatre
Mini-theatre

**Peter** – a long standing employee of WHU. Dedicated to the association but with an alarmingly poor knowledge of competition law

**Aniko** – a member of WHU with a lot of common sense

**Mark** – a colleague of Peter at the WHU. A good friend and someone off whom Peter likes to bounce ideas
Mini-theatre: De-brief
Information exchange – De-brief

In his enthusiasm to assist in the post-Brexit world, Peter had some curious ideas about information exchange
The type of information matters

• Some information exchanges are always prohibited as a restriction of competition by object, including:
  – Exchanging *intentions of future conduct* relating to prices or quantities
  – *Current conduct* that reveals intentions for future behaviour
  – Cases where the combination of different types of data enables the *direct deduction* of intended future behaviour

• For other information exchanges, necessary to assess potential *effect* based on:
  – Characteristics of the *market*
  – Characteristics of the *information*
Note that it is not only pricing information which is competitively sensitive.
Managing a trade association meeting – De-brief

Peter let the meeting get out of control
## Dos

- Prepare, check and circulate agenda
- Ensure the meeting follows the agenda
- Additional points not included in the agenda should be agreed explicitly by the members
- Interrupt and object to any potentially anticompetitive discussion – ensure public distancing
- Take minutes of all the meetings
- Check the minutes and consult legal counsel if in doubt

## Don'ts

- Agree, discuss, recommend a course of action or exchange of information on commercially sensitive matters including:
  - Prices, discounts or other terms offered to customers
  - Current planned stock levels, production capacities, output or agreeing volumes to be sold
  - Recent/planned sales figures
  - Allocating territories, markets or customers
  - Proposed responses to invitations to tender
Avoiding spill-over

Legitimate activities

• Trade associations promote the interests of the industries they represent and raise awareness about them
• These activities are entirely legitimate and may include:
  – Lobbying on policy decisions (eg response to BREXIT)
  – Discussing best practices
  – Agreeing how to implement new legislative requirements (eg discussion on EU environmental requirements)
• All of which are unlikely to give rise to competition concerns
• However they may spill over into illegitimate activities
Avoiding spill-over (II)

Examples

- **Lobbying / BREXIT**
- **EU environmental requirements**
- **Anticompetitive information exchange (profit margins, costs, pricing, etc)**
- **Price-fixing**
Avoiding spill-over (III)

Case study: Consumer detergents (April 2011)

- From 1997 the European washing powder Trade Association, AISE, campaigned for environmentally-friendly washing powder
- **Legitimate aim?** Improve the environmental performance of detergent products by reducing the amount of packaging material used
- **What happened?** Certain manufacturers implemented this initiative but also commercially coordinated their environmental response:
  - Agreed not to decrease prices despite smaller packet sizes
  - Agreed to exclude specific types of promotions during the implementation of the environmental initiative
  - Agreed a price increase at a particular time
  - Exchanged sensitive information on prices and trading conditions
- **Outcome:** The European Commission imposed fines totalling EUR 315 million
Informal meetings and off-agenda items – De-brief

Peter loves talking about off-agenda items
Danger of informal meetings and off-agenda items

- Antitrust infringements may take place outside the formal meeting
- You are never off the record when you speak with a competitor
- Same standards of conduct for meetings also apply to social events
No-one listened to Peter's compliance statement
Compliance statements

- Just reading out a compliance statement is not enough
- It should be understood and followed by all of those present in the room – not just a piece of paper
- Record the fact that a compliance statement has been made in the meeting minutes
- Existence of a compliance programme may not be a mitigating circumstance
Drafting minutes – De-brief

Peter was unaware of best practice for minute-taking
Meeting minutes

• If you are drafting minutes, ensure that they contain a complete and accurate record of the meeting

• If you are concerned about matters discussed at the meeting
  – Ask that any minutes taken of the meeting reflect your concerns,
  – And draft your own record of the meeting (with your objections noted)

• Remember that others may be taking minutes with a different record of events
Public distancing – De-brief

Did Aniko successfully distance herself?
Discussion on minimum prices

Members' perspective

• Aniko thought she could distance herself by
  – Leaving the meeting
  – Publicly stating "I completely disassociate myself from this meeting"

Trade association perspective

• Peter and Mark thought they were safe from a competition law infringement by
  – Reading out an antitrust statement
  – Aniko walking out of the meeting
  – And that it was enough to save all members and trade association
What needs to be done?

Members – ensure public distancing

• Interrupt and object to the discussion of this subject
• Insist that your objection is noted in the minutes
• Leave the meeting if the conversation does not end and ensure your departure is noted in the minutes
• Inform the legal department / the compliance representative of the trade association and of your own company about the incident

Trade association

• Terminate the meeting
• Record termination in minutes
Extra-territorial application – De-brief

Peter thought that the European Commission could not get involved in matters that occurred outside the EU.
The extra-territorial application of EU competition law

- The Commission will have jurisdiction as soon as a cartel has an effect on trade between EU Member States
- So cartels entered into outside the EU and between non-EU companies can still be caught by EU rules
- And many other countries have anti-cartel laws, eg Brazil
- With similar long-reach effects-based jurisdiction
Membership applications

- Peter took a "fast and loose" approach to membership applications
- Peter rejected Company A's membership on the basis that it is not fully active in the industry
Membership

• Depending on the jurisdiction, trade associations are in principle free to decide about membership
• But certain membership decisions can lead to exclusion claims
• Refusals/expulsions need to be objectively justified
  – Non-fulfilment of membership conditions laid out in the trade association's rules (non-discriminatory terms based on reasonable, objective standards)
  – For an objective and justifiable reason

Examples

– Industry restrictions:
  – member must be participant in relevant industry
  – at the relevant level in the supply chain
– Adherence to legal/regulatory standards or legitimate code of ethics
Membership

- **Recommended safeguards**
  - Objective rules which are clearly set out in the trade association's statutes
  - Uniform and consistent enforcement (e.g., don't play favourites or discriminate against an unusually aggressive competitor)
  - Procedurally fair
Recommending suppliers – de-brief

Peter wanted to blacklist certain suppliers
Recommendations

• Particular care must be taken in recommending / not recommending specific suppliers
• Risk that negative comments could be construed as a collective boycott
• Non-targeted and general recommendations are generally fine
• Negative recommendations to be avoided
Remember that competition authorities can conduct dawn raids

- Includes IT search
- May include search of personal devices
- Penalties for obstruction
Aniko has significant experience in advising clients operating in a broad range of industry sectors in relation to EU and UK competition laws. She has represented clients in both international and domestic cartel investigations; advised on UK, EU and multijurisdictional M&A transactions; and assisted with day-to-day commercial arrangements and compliance programs. Aniko’s practice also includes advising on private litigation arising out of anti-competitive conduct.

With over twenty years of experience as a competition lawyer, Peter works with businesses, in particular trade associations, to develop and implement effective compliance programmes, including training, audits, and day-to-day compliance advice. Based in Brussels, Peter is an active speaker and writer on key developments and trends in EU competition law. Peter has previously worked as an in-house competition lawyer.

Mark advises on complex and high profile competition/antitrust issues. He focuses on obtaining competition clearances for M&A transactions and joint ventures; representing clients in cartel, monopoly and market investigations; and providing advice and support on antitrust compliance matters. He is equally at home advising on UK, EU and multijurisdictional matters. Mark has advised trade associations and other clients participating in them on antitrust issues.

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