

THE BLURRING OF LINES BETWEEN COOPERATION AND COLLUSION

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INFERRING COLLUSION THROUGH PARALLEL ACTION

- **By itself, evidence of parallel conduct is insufficient to demonstrate the existence of an illegal agreement. Theater Enterprises, Inc. v. Paramount Film Distrib. Corp., 346 U.S. 537, 541 (1954).**

- **An inference of concerted action arises only when parallel conduct is accompanied by other facts and circumstances—so-called “plus factors.” See Petruzzi’s IGA Supermarkets, Inc. v. Darling-Delaware Co., 998 F.2d 1224, 1232 (3rd Cir. 1993).**

- **Plus factors are facts that tend to show that the conduct would be in the parties' self-interest if all firms acted in the same way, but would be contrary to their self-interest if they acted alone. Interstate Circuit, Inc. v. United States, 306 U.S. 208, 222 (1939).**

- **An agreement should not be inferred from the challenged conduct if legitimate business reasons would rationally lead the firm to engage in that conduct independently. Wilcox v. First Interstate Bank, 815 F.2d 522, 525 (9th Cir. 1987).**

EXAMPLES OF “PLUS FACTORS”

- **Artificial standardization of products. See C-O-Two Fire Equip. Co. v. United States, 197 F.2d 489, 497 (9th Cir. 1952).**

- **Raising prices in time of surplus. See American Tobacco Co. v. United States, 328 U.S. 781, 805 (1946).**

- **Giving pretextual reasons for action. See Dimidowich v. Bell & Howell, 803 F.2d 1473, 1479-80 (9th Cir. 1986).**

- **Correspondence, meetings, or other communications, when followed by simultaneous, identical actions. See Pittsburgh Plate Glass Co. v. United States, 260 F.2d 397, 400-01 (4th Cir. 1958), aff'd, 360 U.S. 395 (1959).**

PRACTICES FACILITATING COLLUSION: THE ETHYL CASE

- **Unilateral adoption of “price signaling” practices, including selling at delivered prices, giving advance notice of price increases, and use of “most favored nation” clauses, does not violate § 5 of the FTC Act.**

- **The Second Circuit held that “before business conduct in an oligopolistic industry may be labeled ‘unfair’ within the meaning of § 5 a minimum standard demands that, absent a tacit agreement, at least some indicia of oppressiveness must exist such as (1) evidence of anticompetitive intent or purpose on the part of the producer charged, or (2) the absence of an independent legitimate business reasons for its conduct.” E.I Du Pont De Nemours & Co. v. FTC, 729 F.2d 128, 139 (2d Cir. 1984).**

OTHER RECENT GOVERNMENT § 1 ACTIONS

- **United States v. American Bar Ass'n, 1996-2 Trade Cases (CCH) ¶ 71,453 (D.D.C. 1995)**
 - **DOJ alleged that the ABA restrained competition among professional law school personnel by fixing compensation levels and working conditions, and through the ABA's law school accreditation process.**
 - **The consent decree required the ABA to restructure its accreditation procedures to permit governance by those who lacked an alleged direct economic interest in enforcing the accreditation process.**

- **United States v. Alex. Brown & Sons, Inc. (NASDAQ Market Makers), 1998-2 Trade Cases (CCH) ¶ 72,337 (S.D.N.Y. 1998)**
 - **DOJ challenged industry-wide “quoting conventions,” in which dealer spreads (the difference between the dealer’s buying and selling price) of $\frac{3}{4}$ point or greater were quoted in quarters, while spreads under $\frac{3}{4}$ point were quoted in odd-eighth fractions.**
 - **The complaint alleged that the informal understanding effectively stabilized the spread on a number of NASDAQ stocks and that it restrained price competition among the defendants in the purchase and sale of NASDAQ stocks.**
 - **The consent decree prohibits the defendants from agreeing with other market makers to adhere to the quoting convention and required each defendant to adopt a detailed antitrust compliance program that randomly monitors trader telephone conversations.**

GUIDELINES FOR COLLABORATIONS AMONG COMPETITORS

- **If efficiency-enhancing integration is “reasonably necessary” to achieve procompetitive benefits, agreement will be analyzed under rule of reason.**

Agreements are not considered reasonably necessary if an equivalent efficiency-enhancing integration can be achieved through practical, significantly less restrictive means. Guidelines § 3.2.

- **Is this a dangerously open standard? Can’t agencies always find a less restrictive way of achieving an integration?**

- **The Guidelines recognize that ease of entry may be likely to deter or counteract a collaboration that lessens the quality, diversity, or pace of research and development. The Guidelines recommend following the entry analysis found in the Horizontal Merger Guidelines.**

Guidelines § 3.35.

- **Does it make sense to apply principles adopted for horizontal merger analysis to contractual agreements to develop products jointly? Can these two areas be reconciled so easily?**

- **Cognizable efficiencies: “[T]he participants must substantiate efficiency claims so that the Agencies can verify by reasonable means the likelihood and magnitude of each asserted efficiency. . . . Efficiency claims are not considered if they are vague or speculative or otherwise cannot be verified by reasonable means.” Guidelines § 3.36(a).**
- **How will agencies verify efficiency claims? Very difficult to do.**

- **The Guidelines establish “safety zones” of presumptively lawful agreements. The Guidelines state that the agencies will not challenge a competitor collaboration when the market shares of the collaboration and its participants collectively account for no more than twenty percent of each relevant market in which competition may be affected. Guidelines § 4.2.**
- **What is “magic” about 20%? Bright-line rules remove analytical reasoning from process. Couldn’t a “range” be equally as effective?**