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WHEN DOES "COOPERATION" BECOME "COLLUSION?"

I. The recent DOJ and FTC Draft Antitrust Guidelines for Collaborations Among Competitors, available in <www.usdoj.gov/atr/public/guidelines/redir2.htm>, establish a detailed analytical framework for evaluating the possible anticompetitive effects of a competitor collaboration. Although directed largely at joint ventures, the Guidelines are written broad enough to provide important insight into how the DOJ and FTC will treat other forms of competitor collaborations.

A. First, the authorities assess the nature of the agreement at issue to determine the agreement's business purpose and to ascertain if the agreement will cause anticompetitive harm.

1. Competitive concerns can arise if the agreement limits independent decision making or combines control or financial interests of competitors.

2. Competitive concerns can also arise if the collaboration creates significant opportunity for the participants to collude, such as certain kinds of information sharing.

B. Market concentration can affect the likelihood that an agreement can facilitate anticompetitive practices, by affecting the difficulties and costs of achieving and enforcing collusion in a relevant market.

C. If the nature of the agreement and the relevant market shares and market concentration indicate a likelihood of anticompetitive harm, the next analytical step is to determine whether the participants and the collaboration have the ability and incentive to compete independent of each other. Several factors are relevant here, including:

1. The extent to which the relevant agreement is non-exclusive, in that the agreement permits participants to continue to compete against each other;

2. Whether the agreement requires participants to contribute significant assets to the collaboration that would otherwise enable participants to be effective independent competitors;

3. The extent of each participant's financial interest in the collaboration and its impact on the participant's incentive to compete independently;

4. The extent to which the collaboration's organization and governance affects the participants' ability and incentive to compete independently;

5. The extent to which the collaboration permits or encourages the disclosure of competitively sensitive market information; and

6. The duration of the collaboration.

D. If entry can be timely, likely, and sufficient in magnitude and character, the Guidelines recognize that entry can deter or counteract the anticompetitive consequences of the collaboration.

E. Some collaborations that may result in anticompetitive harm should not be discouraged if the agreement is reasonably necessary to achieve "cognizable efficiencies," meaning efficiencies that do not arise from anticompetitive restrictions on output or service and cannot be achieved through practical, significantly less restrictive means.

II. "Cutting edge" cases and consent decrees

A. E.I. Du Pont De Nemours & Co. v. FTC, 729 F.2d 128 (2d Cir. 1984)

1. The FTC had held that the four largest domestic producers manufacturers of lead antiknock gasoline additives violated § 5 of the FTC Act by unilaterally adopting "price-signaling" practices, including:

a. Selling at delivered prices;

b. Giving notice of price increases well in advance of what was required by contracts with customers;

c. Providing advance notice of price increases in the press; and

d. Using "most favored nation" clauses in which the seller promised not to charge the beneficiary of the clause a price higher than other customers.

2. Vacating the FTC's order, 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 reason for its conduct." Id. at 139.

3. In subsequent cases, the FTC has narrowed this standard and has read DuPont as applying to "independent conduct rather than agreements between competitors . . . or other agreements." In re Coca-Cola Co., 5 Trade Reg. Rep. (CCH) ¶ 23, 625 at 23,326 n.25 (FTC June 13, 1994).

B. United States v. Airline Tariff Publ'g Co., 1993-2 Trade Cases (CCH) ¶ 70,410 (D.D.C. 1993)

1. Suing under § 1 of the Sherman Act, the DOJ alleged that the defendant airlines used a computerized fare exchange system to coordinate changes in their fares and to signal future pricing intentions.

2. The alleged facilitating practices included the announcement of "first ticket dates" (the first date that a fare is available for sale) and "last ticket dates" (the last date that a fare is available for sale) and the manipulation of footnote designators and fare codes to communicate fare changes.

3. The consent decree severely restricted these practices, permitting the release of last ticket dates only in conjunction with bona fide mass media promotions.

C. United States v. American Bar Association, 1996-2 Trade Cases (CCH) ¶ 71,453 (D.D.C. 1995)

1. Suing under § 1 of the Sherman Act, the DOJ alleged that the ABA restrained competition among professional law school personnel through the ABA's law school accreditation process and by fixing compensation levels and working conditions.

2. The procompetitive aspects of the ABA policies (including setting minimum standards for law school quality, providing valuable information to consumers) were weighed against alleged anticompetitive harm of a lack of competition in the market for the services of professional law school personnel.

3. The consent decree prohibited the ABA from adopting any policy that had the purpose or effect of imposing salary or benefit requirements on law school personnel. The consent decree further required that the ABA restructure its accreditation procedures to permit governance by people other than those with an alleged direct economic interest in the accreditation outcome.

D. United States v. Alex. Brown & Sons, Inc. (NASDAQ Market Makers), 1998-2 Trade Cases (CCH) ¶ 72,337 (S.D.N.Y. 1998)

1. DOJ challenged industry-wide "quoting conventions," under which dealer spreads (the difference between the dealer's buying price and selling price) of ¾ point or greater were quoted in quarters, while dealer spreads under ¾ point could quoted in odd-eighth fractions. The complaint alleged that the market makers enforced the quoting conventions through peer pressure by making it known that violating the conventions was

"unethical" or "unprofessional," and that the market makers allegedly threatened to refuse to deal with traders who violated the conventions.

2. 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.

3. 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.

E. United States v. Visa USA Inc., Civil Action No. 98-Civ 7076 (S.D.N.Y.) (complaint filed Oct. 7, 1998) (available in <http://www.usdoj.gov/atr/cases/f1900/1973.htm>)

1. Visa and MasterCard are non-profit associations created and operated by fee-paying members (primarily banks). Members can issue credit cards bearing the association's trademark and can provide card acceptance services that enable merchants to accept the association's card for the purchase of goods. Most members also become "owners" of the association and participate in its governance.

2. Both Visa and MasterCard have rules that prohibit members from joining rival associations, but those rules do not apply to each other. Visa member banks can and do become members and participate in the governance of MasterCard, and vice versa. Many of the largest member banks have governance positions in both Visa and MasterCard. This system of overlapping ownership and control is referred to as "duality."

3. The DOJ filed suit against Visa and MasterCard under § 1 of the Sherman Act, alleging that the system of duality restrains competition between Visa and MasterCard networks by lessening incentives to compete, diminishing brand differentiation between the two networks, and impairing the development of new products.

4. However, duality has significant procompetitive effects. In the absence of duality, it is likely that only one of the credit card associations (probably Visa) would have emerged as dominant. Duality prevents a single firm from exercising exclusive control over the credit card network and exploiting the "network effect" that creates a high barrier to entry in this market.