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Associations Can Run Afoul Of Anti-Trust Rules

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Antitrust: Even the name is ominous. And the closer you look at it, the more vaguely menacing it seems. For example, if you violate the antitrust laws, you might rack up millions of dollars in fines, and you might even go to jail.

Maybe worst of all, it seems as if you might actually need to understand economics to avoid violating the antitrust laws.

But, it isn't that bad. Antitrust law – or competition law as it is known elsewhere in the world – is really just about ensuring that our largely free-market economy works for consumers. The goal is not to turn you into an antitrust lawyer, or even a lawyer (and certainly not an economist). The goal is to help you keep your eyes peeled for potential antitrust issues so that if a competition issue arises you can call someone who can help.

A little background

The main idea in antitrust is to prevent firms or groups of firms from obtaining the power to control a market through means other than competition on the merits. A big part of the focus of the antitrust laws is on what the firm or firms have done to get control over the market.

It isn't a violation of the antitrust laws to have monopoly power, which basically means the power to control a market. After all, the firm that designs a better product and patents it might end up in control of its market. Also, it isn't a violation if a firm with monopoly power charges what the market will bear. Instead, the focus is on how the firm obtained its monopoly power.

There are a number of antitrust laws that are more or less specific to the types of conduct to which they apply. For nonprofit purposes, the only law you really need to think about is the Sherman Antitrust Act, sections One and Two.

You can largely even cut that in half: In the association world, the principal antitrust law to worry about is Section One of the Sherman Act, which applies to illegal agreements. Section Two of the Sherman Act, relating to monopolization, pops up only occasionally in the context of standard-setting and patents.

Section One of the Sherman Antitrust Act is surprisingly brief. Putting aside a sentence relating to penalties (described more in a bit), the entire provision is: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is declared to be illegal." The provision has three parts: (1) "Every contract, combination in the form of trust or otherwise, or conspiracy…"; (2) "in restraint of trade or commerce" and (3) "among the several states, or with foreign nations." The first part really just means agreements. The last bit relates to the power of the federal government to regulate interstate commerce.

The first question you should always ask when thinking about Section One is whether there is an agreement. If there is an agreement, the next question is whether that agreement is likely to make consumers better off, say by lowering prices, or whether instead the agreement is likely to make them worse off.

Agreements. Probably the main reason that antitrust law focuses on associations is that associations are groups of firms or professionals who are often competitors. Very often that means that the things that associations do are seen as being a result of agreements among competitors, and therefore subject to Section One of the Sherman Act.

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Also, association meetings, online listserves and chat rooms, and other association-facilitated gatherings provide a range of useful forums for rivals to meet and talk about matters that they perhaps should not discuss. For the rest of this article, assume that everything an association does is a result of an agreement among its members. The courts are a little more forgiving than that, but it gets complicated.

Restraints of Trade. The more difficult question is whether the association or its members are doing something that is in restraint of trade. Generally, antitrust law looks at agreements in one of two ways. The first way is for those agreements that, on their face, are so likely to be anti-competitive that more evidence is not likely to change that conclusion; there is per se illegality. This means that a plaintiff only needs to show that the parties made this sort of an agreement.

The second way antitrust law looks at agreements relates to agreements that are, on their face, more ambiguous. In that case, even after an agreement is proven, the plaintiff will need to prove that the effect of the agreement is to reduce output or raise prices under the “rule of reason.”

The range of agreements that are considered illegal per se has declined over the years, as the courts have determined that it is important to understand the effects of the agreements on competition before condemning them. There are still a number of agreements that are per se illegal, however, and these violations can be so serious that it is possible that someone who engages in this sort of conduct can end up in prison. Per se illegal agreements include price fixing agreements, agreements to allocate markets (where firms agree to stay out of each other’s markets so they don’t compete), bid rigging and some group boycotts. Even without time in jail, the stakes can be high. Penalties for these violations include fines of up to $1 million for individuals and $100 million for organizations.

The rule of reason is different. It is a relatively detailed look at the restraint to see if it promotes competition or suppresses competition. In trying to figure out the answer to that question, courts will look at the agreement itself; the market power of the agreeing firms, where market power is usually derived from their market shares; and any potential efficiency justifications for the agreement.

In the context of an association, efficiency justifications improve the operation of the association or help its members better serve their customers or clients.

Specifics. There are a number of ways that associations and their members can get on the wrong side of the antitrust laws, but most of the violations fit into one of two categories: (1) programs or facilities by associations that are set up in a way that allows members to violate the antitrust laws, and (2) rules or decisions by associations that unfairly hinder the ability of certain firms or types of firms to compete against members of the association.

Facilities or procedures that allow members to violate the antitrust laws. Holding meetings and other activities that bring members together are key functions of virtually all associations. Of course, those members are usually in competition with one another and, as such, there is frequently a concern about what the members say to each other when they meet. To avoid association meetings being used as part of a price-fixing conspiracy, a few rules need to be followed: (1) agendas and presentations should be prepared and distributed in advance of meetings; (2) care should be taken to keep to these materials at the meeting unless there is a good reason to depart; and (3) minutes of the meetings should be prepared that concisely reflect the discussions.

Association meetings should not be used to talk about prices or organizational plans regarding output decisions. Other topics to avoid include whether members should do business with certain other firms and complaints about the business practices of other firms. And it can be very helpful to have antitrust counsel present at association meetings. All of these rules apply to both discussions in person and via the Internet using discussion board facilities run or facilitated by the association.

Very often associations will collect data from members and use that data to create reports that are sent to the membership. These programs are often useful in advancing the best practices of the members of the association. But, done incorrectly, they can also make it easier for members to fix prices. Generally speaking, association statistical reporting programs should not allow members to derive information (especially pricing or output information) about specific competitors from the reports.

The best way to avoid that is to ensure that the reports are based on data that is relatively old rather than current or forward-looking. The reports should be aggregated rather than identifying the data of individual firms, with a large enough group of responders that individual firm data cannot be easily discovered. Finally, the reports should be justifiable as a program that can help members better serve their customers.

Rules that unfairly limit the ability of some firms to compete. One of the benefits of associations is that they often provide services to members that are so useful that they might be necessary for the firms in the industry or profession to compete. When that is true, it can be an antitrust violation to restrict the availability of those services to members if it is difficult for some companies or professionals to become members.

This is a complicated area. Any decision by an association to limit membership, expel a member or limit the availability of an important service will be closely looked at by the courts. These situations work better for associations when those decisions are objective and consistently applied, and are backed by a legitimate reason for the decision based on the pro-competitive needs of the association.

Finally, expulsion decisions that harm competitors to members of an association are more likely to be given a pass under the antitrust laws if decisions are made after due process is given to the expelled party. Another area where associations sometimes stumble is when they have codes of ethics, enforceable standards, or other rules that limit the ability of members to compete. The most common ways in which these rules might lead to antitrust problems are when they limit the pricing or output decisions that members can take. One relatively common example of that sort of a rule is a rule that limits the ability of members to use truthful advertising regarding prices or discounts.

One final point to mention is the importance of an antitrust compliance program. Not only are these programs helpful to keep associations out of trouble, the absence of a policy can be used as evidence of wrongdoing when there are problems and might increase penalties for any violations that occur.

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