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UNILATERAL DISCLOSURE OF INFORMATION WITH ANTICOMPETITIVE EFFECTS (E.G. THROUGH PRESS ANNOUNCEMENTS)

-- United States --

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The attached document is submitted to Working Party No.3 of the Competition Committee FOR DISCUSSION under item III of the agenda at its forthcoming meeting on 14 February 2012.

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1. Introduction

1. This submission provides an overview of how the unilateral disclosure of information to competitors is evaluated under U.S. antitrust laws.

2. Both antitrust law and other aspects of U.S. law favor the disclosure of accurate information to consumers, customers, investors, and other members of the public. Markets generally operate more efficiently when participants convey relevant information, such as prices, quality, and other product attributes, to others in the market. For example, companies often provide information about future price increases to allow customers to adjust their production plans or the timing of their purchases.[1] Similarly, securities markets perform more efficiently when companies disclose relevant information about financial performance, company operations, and business plans to investors.

3. The antitrust concern regarding unilateral disclosures of information is that they may, in some circumstances, facilitate anticompetitive harm. For example, disclosure may be accompanied by a direct invitation by a competitor to collude—a company may unilaterally offer to raise its prices if a competitor will follow suit. Or disclosure may provide competitors with information that allows them to coordinate tacitly in a manner that lessens competition. A unilateral disclosure of information also may raise anticompetitive concern by providing competitors with other price or non-price information about future plans, which would allow those competitors to alter their business plans in a way that reduces competition.

4. The possibility that unilateral information disclosures could result in anticompetitive harm is broadly recognized. An FTC study published in 1985 found that price signaling by companies can increase prices in the affected market. The study looked at price books for generators that the two main market participants published, which made the pricing of products with numerous options more easily understood. The study concluded that prices had in fact been maintained at an artificially high level through this price signaling.[2]

5. Economists and others have also recognized the possibility that disclosures of certain types of information may drive competitors in a market towards an equilibrium outcome that is anticompetitive.[3] One such type of disclosure has been described as "cheap talk"—communication that does not commit firms to a course of action—such as announcing a future price increase but leaving open the option to

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1 *See, e.g.*, *E.I. DuPont de Nemours & Co. v. Federal Trade Commission*, 729 F.2d 128, 134 (2d Cir. 1984).

2 David F. Lean, Jonathan D. Ogur & Robert P. Rogers, *Does Collusion Pay . . . Does Antitrust Work?*, 51 SOUTHERN ECON. J. 828, 838-39 (1985).

3 *See, e.g.*, Jonathan B. Baker, *Two Sherman Act Section 1 Dilemmas: Parallel Pricing, the Oligopoly Problem, and Contemporary Economic Theory*, 38 Antitrust Bulletin 143, 163 (1993) (statements may allow industry members to identify a non-competitive outcome as optimal and select it in parallel); Gregory J. Werden, *Economic Evidence on the Existence of Collusion: Reconciling Antitrust Law with Oligopoly Theory*, 71 ANTITRUST L.J. 719, 732 n.53 (2004) (companies may make statements, even without a commitment to action, that affect the expectations of other competitors); PHILLIP E. AREEDA AND HERBERT HOVENKAMP, ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION ¶ 1419d (2d and 3d eds. Aspen Publishers 1998-2010) (Aug. 2011 Update) ("[A] solicitation to raise prices in concert may reduce the uncertainty, either by setting a target price or by raising confidence that rivals will follow."). In addition, in some cases, an invitation to collude may in fact have been accepted, but there is not sufficient evidence to prove an agreement was struck. *See* Susan S. DeSanti and Ernest A. Nagata, *Competitor Communications: Facilitating Practices or Invitations to Collude? An Application of Theories to Proposed Horizontal Agreements Submitted for Antitrust Review*, 63 ANTITRUST L.J. 93, 106 (1994).

rescind or revise it before it takes effect.[4] If the terms of agreement are complex (*e.g.*, specifying prices in numerous markets) but there is a common desire to reach agreement, cheap talk can help firms reach a collusive equilibrium.[5]

6. Under U.S. antitrust law, unilateral conduct, such as a unilateral disclosure of information, does not violate Section 1 of the Sherman Act, which prohibits a "contract, combination . . . or conspiracy" that unreasonably restrains trade.[6] This is because a unilateral act does not constitute the agreement required to create a violation of Section 1.[7] A unilateral disclosure of information may, in certain circumstances, violate Section 5 of the Federal Trade Commission Act ("FTC Act"), which prohibits "unfair methods of competition,"[8] or Section 2 of the Sherman Act, which prohibits efforts to "monopolize, or attempts to monopolize," including acts to "combine or conspire" with another person to monopolize.[9]

7. The remainder of this submission reviews how U.S. courts, and the U.S. Federal Trade Commission ("FTC") and the U.S. Department of Justice's Antitrust Division ("DOJ") (collectively, "the U.S. antitrust agencies"), have applied Section 5 of the FTC Act and Section 2 of the Sherman Act to the unilateral disclosure of information. In applying these laws, the U.S. antitrust agencies evaluate the legality of unilateral disclosures of information by considering such factors as the nature and quantity of information disclosed, the specificity and context of the information disclosure, the nature of the industry and the market involved, and whether there are procompetitive business justifications for the disclosure of information.

4 Joseph Farrell & Matthew Rabin, *Cheap Talk*, 10 J. ECON. PERSP. 103 (Summer 1996).

5 Studies have shown such mechanisms have been effective in the airline industry. *See* William Gillespie, "Cheap Talk, Price Announcement, and Collusive Coordination," EAG 95-3, Discussion Paper, Economic Analysis Group, Antitrust Division, U.S. Department of Justice (Sept. 25, 1995); *see also* Severin Borenstein, *Rapid Price Communication and Coordination: The Airline Tariff Publishing Case*, *in* THE ANTITRUST REVOLUTION: ECONOMICS, COMPETITION, AND POLICY (John E. Kwoka, Jr. & Lawrence J. White eds., 3d ed. 1999).

6 15 U.S.C. § 1. The Supreme Court has held that "the dissemination of price information is not itself a per se violation of the Sherman Act." *United States v. Citizens & S. Nat'l Bank*, 422 U.S. 86, 113 (1975).

7 *See Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 767-68 (1984).

8 Although violations of the Sherman Act are also deemed to be violations of Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, the Supreme Court has held that Section 5 of the FTC Act also applies to some conduct that does not violate the Sherman Act. *See, e.g.*, *FTC v. Sperry & Hutchison Co.*, 405 U.S. 233, 239 (1972) (Section 5 gives FTC authority "to define and proscribe an unfair competitive practice, even though the practice does not infringe either the letter or the spirit of the antitrust laws"); *see also Atlantic Refining Co. v. FTC*, 381 U.S. 357, 369-70 (1965) (FTC has power to challenge practices "that do not assume the proportions of antitrust violations"); *FTC v. Brown Shoe Co.*, 384 U.S. 316, 321 (1966) (Section 5 power is "particularly well established with regard to trade practices which conflict with the basic policies of the Sherman and Clayton Acts even though such practices may not actually violate these laws."); *FTC v. Indiana Federation of Dentists*, 476 U.S. 447, 454 (1986) (Section 5 includes Sherman Act violations as well as "practices that the Commission determines are against public policy for other reasons") (dictum); *DuPont*, 729 F.2d at 136-37 ("Although the Commission may under § 5 enforce the antitrust laws, including the Sherman and Clayton Acts, it is not confined to their letter. It may bar . . . conduct which, although not a violation of the letter of the antitrust laws, is close to a violation or is contrary to their spirit.") (citations omitted).

9 15 U.S.C. § 2.

2. Antitrust Enforcement Actions Involving Unilateral Disclosures of Information

8. The U.S. antitrust agencies have pursued only a small number of antitrust cases involving unilateral information disclosures. This section summarizes the significant cases the agencies have brought. These cases have generally involved disclosure of information and other statements that, in light of the context and other facts, appeared to be invitations to collude. With the exception of the *American Airlines* case, none of these actions was litigated before a court. All of these cases resulted in settlement agreements without a judicial finding that the conduct violated the antitrust laws.

9. The *U-Haul International* case involved U-Haul, a company that rents trucks to individuals for moving household goods.[10] The company's profits were limited by aggressive competition in the market. The FTC alleged in its complaint that U-Haul had developed a strategy by which it would raise its rental rates and then call its competitors to disclose that it had made rate increases, encourage them to increase rates as well, and threaten to reduce its rates again if the competitors did not raise their rates. In addition, the FTC alleged that U-Haul had announced on an investor conference call that it recently had increased its rates and had encouraged its main competitor to do the same, while warning that it would drop its rates if its competitor did not match them within a specific period of time. The FTC alleged that these private and public disclosures created a significant risk of anticompetitive harm—because the proposals could have been accepted and, even if not formally accepted, they could have led to less aggressive competition—and thus violated Section 5 of the FTC Act. Accordingly, the FTC reached a consent decree with U-Haul that prohibited future efforts to use communications of this type to raise or stabilize prices or otherwise to coordinate with other companies on pricing.

10. The *Valassis Communications* matter involved an alleged invitation to collude from one publisher of newspaper advertising inserts to its only rival in that market.[11] The FTC alleged in a complaint that, during a public earnings conference call, the CEO of Valassis announced a new strategy for raising prices of inserts. The company knew that its rival, News America, would be monitoring the call. The FTC alleged that Valassis intended to facilitate collusion through its announcement. Moreover, it alleged that there was no legitimate business reason for Valassis to disclose its new pricing strategy. The FTC determined that if News America had accepted the invitation from Valassis, higher prices and reduced output of newspaper advertising inserts were likely to result, and that the conduct accordingly violated Section 5. Valassis entered into a consent order with the FTC that prohibits unilateral communications, both public and private, concerning the company's willingness to refrain from competing with rivals or to coordinate pricing with them, as well as prohibiting actual coordination on pricing.

11. In the *Stone Container* case, the FTC challenged a unilateral initiative to increase linerboard prices through a scheme that included unilateral disclosures of information.[12] The FTC alleged in a complaint that Stone Container, the largest U.S. manufacturer of linerboard, had failed in a recent effort to lead an industry-wide increase in prices because industry inventory was relatively high. Renewing its effort to increase prices, Stone Container sought to purchase inventory from its competitors and draw down

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10 Complaint, U-Haul Int'l., Inc., FTC File No. 081-0157 (July 14, 2010), *available at* http://www.ftc.gov/os/caselist/0810157/100720uhaulcmpt.pdf; Decision & Order, U-Haul Int'l., Inc., FTC File No. 081-0157 (July 14, 2010), *available at* http://www.ftc.gov/os/caselist/0810157/100720uhauldo.pdf; Analysis of Agreement Containing Consent Order to Aid Public Comment, U-Haul Int'l., Inc., 75 Fed. Reg. 35,033 (June 21, 2010), *available at* http://www.ftc.gov/os/caselist/0810157/100609uhaulanal.pdf.

11 *In re Valassis Communications, Inc.*, F.T.C. No. C-4160 (April 19, 2006) (consent order), *available at* http://www.ftc.gov/os/caselist/0510008/0510008c4160ValassisDecisionandOrder.pdf.

12 *In re Stone Container Corp.*, 125 F.T.C. 853 (1998), all relevant information *available at* http://www.ftc.gov/os/caselist/c3806.shtm.

its own inventory, while reducing production at its factories by a similar amount. In arranging for the purchases of linerboard, Stone Container executives communicated to their counterparts at the other companies that Stone Container would reduce its output and replace that production with its purchases from the competitors, and that it believed these actions would support price increases in the industry. In addition to these private statements, Stone Container used public statements and press releases to communicate its objectives. The FTC alleged that these acts and statements constituted an invitation by Stone Container to its competitors to join in a coordinated price increase, violating Section 5 of the FTC Act. Stone Container entered into a consent decree with the FTC that barred the company from future communications requesting or suggesting raising, fixing, or stabilizing prices.

12. In the *Precision Moulding* matter, the manager of the dominant manufacturer of certain art framing products asserted during a meeting with its competitor that the competitor's pricing was "ridiculously low" and suggested that the company should not "give the product away."[13] The manager also threatened a price war that the competitor would not survive. Based on this conduct, the FTC alleged that the company had violated Section 5 of the FTC Act. The FTC entered into a consent decree with the company barring it from requesting or urging price increases or price stabilization, as well as from entering into agreements regarding price.

13. In the *AE Clevite*, case, the FTC alleged that a company had complained at a meeting to a competitor about its low pricing of locomotive engine bearings.[14] The two companies together held about 95 percent of the market in this product. The FTC alleged that a company official had stated that its competitor was "ruining the market" and then sent by facsimile a list comparing the two companies' pricing. The FTC viewed this disclosure of pricing information as an implied invitation not to compete on price and a violation of Section 5. The FTC reached a consent agreement with the defendant, barring the defendant from requesting, suggesting, or proposing to competitors that they jointly raise or fix prices.

14. The FTC alleged in the *YKK (U.S.A.)* matter that YKK, a manufacturer of zippers and zipper installation equipment, had told its competitor to stop offering free equipment to customers as part of their zipper purchases because the conduct was "unfair and predatory."[15] The FTC alleged that the request proposed to eliminate a form of discounts in violation of Section 5, and, if accepted, would have reduced competition between the companies, which together had over 80 percent of the zipper market. The FTC entered into a consent decree with YKK prohibiting suggestions or requests to competitors to fix or raise prices or to cease providing discounts or free equipment.

15. In *Quality Trailer Products Corp.*, the FTC alleged in a complaint that the company's employees told its competitor at a meeting that the competitor's prices for a group of certain axle products were too low.[16] In addition, the employees explained that, because of the state of the industry, the two companies did not need to compete on price, and they stated that they would not price their axle products below a specified amount. The FTC alleged that, had the invitation been accepted, the agreement would have been an unlawful restraint of trade, violating Section 5 of the FTC Act. Accordingly, the FTC reached a consent decree with the defendant that prohibited future communications that requested or suggested raising, fixing, or stabilizing prices.

16. Finally, in *United States v. American Airlines, Inc.*, the United States brought monopolization charges under Section 2 of the Sherman Act against an airline company whose president proposed to a

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13 *In re Precision Moulding Co.*, 122 F.T.C. 104 (1996).

14 *In re AE Clevite, Inc.*, 116 F.T.C. 389 (1993).

15 *In re YKK (U.S.A.) Inc.*, 116 F.T.C. 628 (1993).

16 *In re Quality Trailer Products Corp.*, 115 F.T.C. 944 (1992).

competitor that they raise prices in sequence.[17] This case did not involve a unilateral price disclosure. The president of American Airlines contacted the president of its competitor, Braniff, to discuss the aggressive competition between the two airlines on a number of routes. The two airlines' combined market shares were between 60 and 90 percent on a number of non-stop routes from Dallas-Fort Worth, but they had been engaged in an aggressive price war. American's president proposed that Braniff raise fares by 20 percent, and promised that American would then raise its fares the next day by the same amount. Braniff's president demurred, and did not raise prices as proposed. American sought to dismiss the DOJ's complaint for failure to state a claim under the Sherman Act; the district court agreed and dismissed the complaint. On appeal, the court of appeals concluded that the elements of an attempted monopolization case under Section 2 had been met, because if Braniff had accepted American's offer, the two airlines together would have had monopoly power.[18] American subsequently entered into a consent decree that prevented the conduct from reoccurring, resolving the DOJ's competitive concerns.

17. Although unilateral conduct cannot violate section 1, as mentioned in paragraph 6 above, unilateral price disclosures can facilitate collusion among competitors, which may, in certain circumstances, violate section 1. In 1992, the DOJ sued eight of the largest U.S. airlines and the Airline Tariff Publishing Company ("ATP") for price fixing and for operating ATP, their jointly owned fare-exchange system, in a way that facilitated collusion in violation of Section 1 of the Sherman Act.[19] ATP was a complex system for the exchange of information among major airlines, which was widely and openly operated to disseminate fare information through computer reservation systems and travel agents. ATP provided a means for the airlines not only to disseminate fare information to the public but also for them to engage in essentially a private dialogue on fares. The airlines designed and operated ATP's computerized fare-exchange system so that they could (1) communicate more effectively with one another about future fare increases, restrictions, and elimination of discounted fares, (2) establish links between proposed fare changes in one or more city-pair markets and proposed changes in other city-pair markets, (3) monitor each other's changes, including changes in fares not available for sale, and (4) reduce uncertainty about each other's pricing intentions. ATP thus operated in "a manner that unnecessarily and unreasonably allowed [the airlines] to coordinate fares." The case was resolved with a judicial consent decree crafted to ensure that the airline defendants did not continue to use any fare dissemination system in a manner that unnecessarily facilitated price coordination or that enabled them to reach specific price-fixing agreements.

3. Criteria Considered in Assessing the Legality of Unilateral Information Disclosures

18. Although unilateral disclosure of information is generally not likely to harm competition, and can have procompetitive benefits, there are instances when it has the potential to create anticompetitive effects. The following are among the criteria that are relevant to determining whether a unilateral disclosure of information is likely to harm competition:

- *The nature and quantity of the information disclosed.* Disclosing extensive information regarding pricing, output, major costs, marketing strategies and new product development is more likely to have anticompetitive implications. In particular, disclosure of information about

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17 743 F.2d 1114 (5th Cir. 1984).

18 *Id.* at 1118. Microsoft was also found to have engaged in an unlawful attempt to monopolize the Internet browser market by proposing to Netscape that Microsoft develop browsers only for Windows computers and Netscape develop only for other operating systems. *See United States v. Microsoft Corp.*, 87 F. Supp. 2d 30, 46 (D.D.C. 2000), *aff'd in part and rev'd in part*, 253 F.3d 34 (D.C. Cir. 2001).

19 United States v. Airline Tariff Publishing Co., 1994-2 Trade Cas. (CCH) ¶70,687 (D.D.C. Aug. 10, 1994); see http://www.usdoj.gov/atr/cases/dir23.htm.

future pricing generally has the greatest potential for anticompetitive harm because, if agreed to, a price-fixing agreement would result. Even in the absence of an agreement, disclosure of information about future pricing has a greater likelihood of promoting tacit collusion than disclosure of other information.

- *The specificity and context of the information disclosed*. A disclosure expressing a willingness to raise prices by a specific amount (or similar information, such as a specific output reduction) creates a greater likelihood of anticompetitive harm than disclosure of less specific information. Thus, for example, a recipient of specific information can easily conform to a particular figure—such as the 20 percent price increase proposed by American Airlines or the price floor proposed in Quality Trailers. Similarly, Stone Container's statements regarding its output and inventory reductions provided competitors with specific information regarding the company's plans in the context of its attempt to raise industry prices. More generally, a disclosure containing terms of coordination has a greater likelihood of creating anticompetitive harm than one without such terms.

- *Whether the disclosure is public or private*. Disclosure of information in a public setting may inform the market in ways that promote competition. In comparison, disclosure of information in private does not provide these potential benefits or does so to a lesser degree. Private communications may also, in certain circumstances, more readily allow for non-verbal implicit confirmation that the disclosed information has been accepted by the competitor as a proposal for common action. Several of the examples set out above involved private communications between upper-level employees with the authority to adjust pricing and output. In some instances, in addition to their private communications, companies used public communications, such as press releases, in ways that furthered the companies' objectives.

- *The nature of industry and market*. In concentrated industries, a unilateral disclosure of information is more likely to create the possibility of anticompetitive effects because tacit or express collusion is more likely. This is particularly true if the disclosure is made by a company with a dominant position in the market in an attempt to influence a competitor with a significant position. Similarly, other structural market characteristics, such as homogeneous products or barriers to entry, may make successful collusion more likely, thus raising the risk that a disclosure of information could be anticompetitive. By comparison, a disclosure of information in an unconcentrated industry with robust competition is less likely to lead to industry-wide coordination that will have anticompetitive effects. In several of the examples described above, such as the *American Airlines*, *Valassis*, and *Stone Container* cases, the market involved a low number of participants. However, other cases did not necessarily involve high market shares, including the *Quality Trailer Products* case.

- *Procompetitive business justifications for the disclosure of information*. As noted above, information disclosures, particularly when made publicly, can benefit the operation of the market by providing participants with better information on which to make decisions.[20] For example, public statements likely to be of general interest to customers and others in the market, such as planned price increases or factory downtime during which the company may not be able to supply customers, may be more likely to have a procompetitive purpose. Information disclosures made in private, by comparison, are less likely to provide information to market participants.

[20] *See du Pont*, 729 F.2d at 134.

4. Conclusion

19. Unilateral disclosure of information is often procompetitive and helps improve the functioning of markets. However, in certain circumstances such disclosures have the potential to be anticompetitive. U.S. courts and antitrust agencies evaluate whether such disclosures violate Section 5 of the FTC Act or Section 2 of the Sherman Act. Unilateral disclosures of information, however, do not, standing alone, violate Section 1 of the Sherman Act.

20. There have been relatively few fully litigated cases involving unilateral information disclosures, so that the precise contours of what is permissible and what may violate the antitrust laws in the United States are not completely clear. Some of the considerations the U.S. antitrust agencies may take into account are the nature of the information disclosed, including how specific it is, whether the information is disclosed broadly to the public or privately communicated only to competitors, whether the industry at issue is concentrated, and whether there are legitimate procompetitive reasons for the disclosures.