Department of Justice

COOPERATION AMONG COMPETITORS

by

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The recent debates concerning auto safety legislation have again focussed attention on a problem of perennial importance to antitrust law. The question is when and in what respects competitors may carry on cooperative endeavors that are likely to have some effect on their business decisions.

I am not speaking, of course, about those forms of cooperation which are beyond the pale. Everyone knows that cooperation in the form of price fixing, market sharing, and the like, is unlawful - although I must say, based on my brief experience with the Antitrust Division, that this knowledge all too often is not enough to keep blatant violations from taking place. The problem area we are concerned with involves activities which, though likely to have some effects on price or to affect competition in some respect, are said to have overriding economic and public interest justifications meriting antitrust recognition. It is in this area where fears have again been expressed that antitrust prevents desirable cooperation leading to improved competition and to economic performance more in the public interest.

It is my firm conviction that this is not so. Judicial decisions have certainly given wide latitude to cooperation among competitors. If anything, the decisions, particularly those of more ancient

vintage, would probably permit too much. I shall attempt to give you some idea of the reasons for my conclusions by reviewing - necessarily somewhat sketchily - what I believe the antitrust approach to various kinds of cooperation is or ought to be, and why this approach makes sense. I shall start by considering cooperative dissemination of information on prices, costs, and other market data. I shall then consider some examples of cooperation in the form of regulation or limitation of the means of competition.

I.

In the landmark Socony Vacuum case, the Supreme Court stated that "a combination formed for the purpose and with the effect of raising, depressing, fixing, pegging or stabilizing the price of a commodity . . . is illegal per se." Despite this broad formulation, however, it has always been and remains clear that competitors are free to collect and disseminate considerable amounts of data pertinent to informed business decisions, even though it is likely that informed judgments by various individual competitors may produce somewhat different price and other decisions than would otherwise take place.

It is not too difficult to explain this. The antitrust laws are concerned with the protection and promotion of effective competition.

If buyers and sellers are ignorant of many of their alternatives, this clearly impairs the functioning of the market. A buyer may pay a price to one seller higher than he would pay if he knew that competing sellers would sell for less. And a particular seller, ignorant of market conditions and of prices being obtained by others, may sell at a lower price than a more perfectly functioning market would enable him to get. Thus, in appropriate circumstances, the consequence of the dissemination of certain market information is to bring the functioning of the market closer to the competitive ideal rather than away from it. This is the vital difference between a lawful information scheme and invidious price fixing.

As you are all aware, not all information schemes fall into the lawful catagory. In oligopoly situations, too quick and too detailed a dissemination of information may make the market perform worse rather than better. It is generally recognized that elements of informational schemes which some might think innocuous may be used not for the purpose of promoting rational independent judgment but for the purpose of discouraging price competition. One immediately suspects an illicit purpose, for example, in any informational scheme which involves the identification of individual

sellers and buyers in each reported transaction. Normally, this is completely unnecessary to any market information scheme looking only to rational competitive pricing decisions. Even if the data needs to be broken down geographically because there are different submarkets, there still is normally no need for identifying particular sellers. Consequently, it is reasonable to assume that the purpose of identification is to detect and thus to discourage the would be price-cutter. Nevertheless, having made this obvious point, I should repeat again the justification for legitimate efforts of competitors to cooperate in the dissemination of useful market information. It is simply that such efforts bring the functioning of the market closer to, rather than away, from the competitive ideal.

II.

I should now like to turn to agreements among competitors that pose more difficult problems, namely, agreements limiting or regulating their competition in some significant respects. In the old Board of Trade case - a popular favorite of antitrust defendants - Mr. Justice Brandeis said:

> "The true test of legality [in these cases] is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition."

At stake in that case was the Chicago Board of Trade's "call" rule, whereby members were prohibited from purchasing or offering to purchase grain during off hours at prices other than the last bids before the Exchange closed. A rule of this kind clearly raises more serious problems than the cooperative dissemination of market information. An agreement to gather and disseminate market information, absent the problems I discussed, imposes no limit on the business decisions of the parties concerned. The Board of Trade rule did. The plain implication of the rule was that some traders preferred to compete freely after hours and would have but for the rule. In this particular instance, if one accepts the fact findings made by the Court, the purpose of the limitation - just as in the information cases - was to create a more unified, a more "perfect" market for grain. The logic of Board of Trade would lead us to be quite unconcerned with an agreement among competitors not to utilize advertising which everyone agreed was false and misleading. The kind of competition we are all interested in is clearly interfered with when consumers are diverted away from their best buy by patent misinformation.

Nevertheless, overly ready reliance on Board of Trade would be a mistake. An agreement among competitors which limits their competition in some significant respect is always deserving of

close scrutiny, and there is no doubt at all that such agreements cannot be defended solely on the basis of a general claim that competition is "improved." Let me start with a kind of agreement which I believe would clearly be held unlawful. Suppose that all American luggage manufacturers agreed to discontinue the production of luggage that did not meet certain minimum standards of durability, and that the defense of the agreement was simply that the American consumers would thereby be provided with better products than some of them had been purchasing in the past. A similar agreement was held unlawful over 50 years ago in the Standard Sanitary case. Such agreements should be struck down because there is no apparent reason why consumers should be deprived of the opportunity to purchase inferior, but cheaper, products if they prefer to do so. For many consumers, the extra quality is not worth the extra price; others may not be able to afford the more expensive product at all. If there are sellers willing to supply them with cheaper merchandise, which they wish to buy, this is simply what competitive allocation of resources is designed to permit. An agreement to remove from the market alternatives which some buyers want and which some sellers are prepared to supply is not "improving" competition but interfering with it.

Taking another example, it seems to me that the same conclusion must be reached with regard to an agreement among all grocery stores in a particular market not to use trading stamps, again on the assumption that the defense rests simply on the proposition that consumers will be benefitted thereby. While it may be hard for some of us to understand the attractions of trading stamps, attractions they clearly have. Perhaps it is often a coldly rational calculation on the part of a housewife who is given grocery money freely but money for other items only grudgingly that this is the best way of getting the gadgets she wants. But even if the popularity of trading stamps is attributable to more subtle satisfactions than that, on what basis could we conclude that a clear consumer preference should be thwarted by a group of competitors who, but for their agreement, would endeavor to see that that preference was met?

I have been treating these past two examples on an assumption that consumers are making an informed choice, that is, they were purchasing inferior luggage knowing that it was inferior and they were patronizing the store that gave trading stamps knowing that they will end up paying a higher amount for groceries than the trading stamps are worth. It is conceivable that there could be

situations where consumers were not making an informed choice, and where an agreement among competitors to remove a particular alternative was intended to lead to the elimination of an option that consumers would have rejected any way if only they had known the facts. But I doubt that this is worth much attention. Usually it would be extremely difficult to prove convincingly that such a state of affairs exists. Indeed, even where some consumer misinformation exists which causes some buyers to make the wrong purchase, there will usually be some others who are not mislead at all. Trading stamps are almost certainly an example.

But wholly apart from these problems, it seems to me that most instances of consumer misinformation or lack of information can be resolved by agreements - or even by individual actions - that are much less restrictive than removing an alternative from the market all together. Thus, there would be nothing to prevent the luggage manufacturers in my hypothetical example from agreeing to attach accurate descriptive labels to their various grades of merchandise. There would be nothing to prevent them from agreeing to inform consumers accurately of the results of durability tests on their various grades of merchandise. Similarly,

in the trading stamp instance, there is nothing to prevent grocery stores from giving consumers the true facts about the cost of trading stamps; and no agreement would be necessary for one or more groceries to offer the consumer a choice between taking stamps or, say, twice the face value of the stamps in a direct money discount. While I would stop short of saying that there are no circumstances in which an agreement to limit product options could be defended as necessary to overcome consumer misinformation or inability to make a rational choice, the possibilities seem quite remote to me.

Are there any other possible justifications for such agreements? I think there may be, but here too they are quite limited and need to be very carefully defined. Let me again use a hypothetical example. Suppose that the manufacturers of a particular product discover that one of the raw materials which they have customarily used in production is unquestionably dangerous to the health of their employees. Suppose further that all known substitutes for this raw material are considerably more expensive so that their use would detectably increase the price of the end product. In such a situation, an agreement among the competing manufacturers to abandon the offending raw material might well be necessary. If any

one manufacturer started using the substitute without assurance of cooperation by his competitors, his accelerated costs might drive him out of business, since consumers - unless charitably motivated in large numbers - would probably not spend more for a product which to them is no better. Would such an agreement be attacked under the antitrust laws? I hardly think so. While the problem is one which is normally and most appropriately dealt with by legislation, I cannot imagine any enforcement authority interfering with an agreement which as a stop-gap pending appropriate legislative action, clearly contributes to health and safety. Yet it is important to specify the characteristics of the situation which lead us to this result. They are three - that there is no other less restrictive method of achieving the goal, that the agreement makes a material contribution to health and safety, and that there is no dispute about this.

Should we insist on the latter condition, namely that the health and safety issue be crystal clear? Again, I hesitate to be catagorical. Should not there be room for an agreement among competitors to abandon a process or product simply where there is good reason to believe that a significant issue of health or safety is involved. One is tempted to think so, particularly where there is good reason

to believe that health and safety is indeed the reason for the action, or, putting it the other way around, where there is little reason to suspect an anticompetitive purpose of some sort. A considerable amount of assurance on this score is provided whenever the group as a whole does not appear to gain any economic advantage at the expense of those with whom they deal, as would seem to be the case with the agreement to abandon use of the dangerous raw material in favor of more expensive substitutes.

Nevertheless, the less clear it is that health and safety is being served, we must at the least be the more careful before tolerating restrictive agreements of this kind, even where the agreement, by increasing costs, would appear to operate to the disadvantage of the group. For we have known cases in the past, and there will undoubtedly be cases in the future, where agreements to limit product variety in fact serve the not so estimable purpose of enabling manufacturers in a highly concentrated industry to gain the benefits of reduced competition.

Moreover, I am not entirely convinced that private agreement is a suitable substitute for legislation as an appropriate means of meeting less than clear health and safety needs that require imposing higher charges on the consumers of particular products, where the

justi fi cation is not the immediate interests of the consumers themselves but rather the general welfare. Particularly where the consumers involved may derive no benefits, either now or in the future, what we have is a conflict of interests; and generally speaking resolution of conflicting interests is peculiarly the province of the legislature.

III.

Before concluding there is one point that should be made completely clear. In discussing collaboration among competitors which regulates or limits their competition in particular ways, I have been considering only voluntary adherence by the competitors themselves to agreements of one sort or another. I have not been discussing the question of sanctions that might be imposed within the group for failure to comply with the agreement; the more so, I have not been discussing sanctions effected through pressure on outside parties with whom the group deals. For good reasons, the law has always been suspicious of the potential abuse in private government of economic activity enforced by sanctions. Therefore, the use of sanctions within and without the group raises quite separate questions, and to me it is clear that whatever we might conclude with regard to voluntary adherence to an agreement is by no

means necessarily applicable to the sanctions which might be applied to make the agreement binding and effective. Let me give just one specific example. That an issue of health and welfare - or more specifically good medical care - was allegedly involved did not prevent the Department of Justice from bringing suit against the District of Columbia Medical Society many years ago for boycotting group health programs. In that case we did not find the health and welfare claim particularly persuasive. But even if it were much more persuasive than it appeared to us to be, I believe the courts' long established distaste of a boycot is eminently well-founded. It is one thing for competitors to voluntarily impose upon themselves some limitations on competition, in circumstances such as I have described. It is quite another to use collective economic pressure to drive third parties out of businesses which are perfectly lawful and lawfully conducted, or to coerce third parties into abandoning economic decisions which no law forbids them from making. In short, the imposition of sanctions is indeed an assumption of legislative power by a private group which is likely to be intolerable under all but the most extreme circumstances.

IV.

Leaving out the refinements, I would suggest the following

general conclusions on the extent to which antitrust law permits cooperative agreements among competitors:

1. Agreements concerned with the dissemination of relevant market information are lawful, indeed encouraged, so long as there is no indication of a purpose to inhibit individual competitive decision making.

2. So long as there has been informed consumer choice, a voluntary agreement to take away certain product alternatives is unlawful unless essential to achievement of a strong, clear, overriding interest in the public health or safety, and then probably only until there has been an opportunity for appropriate legislative action.

3. There may be situations in which voluntary agreements to limit product alternatives are necessary to meet the incapacity of consumers to make a rational choice, but these are likely to be extremely rare and the burden of proof on proponents should be a heavy one.