HORIZONTAL COLLABORATION IN THE SUPPLY CHAIN SUMMIT

Legal Framework & Antitrust Compliance

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Litigated a number of antitrust cases involving the transportation industry and has advised various companies on joint ventures and other competition law related issues pertaining to the supply chain field. He has also worked on competition law issues related to the laws of the EU and several Asian countries. He is the Chair Elect of the Antitrust Committee of the Federal Bar Association

How is supply chain collaboration treated under the antitrust laws?

Price fixing, bid rigging, customer allocation, geographic restraints and boycotts are all violations of Section 1 of the Sherman Act – called "Agreements in Restraint of Trade".

Prison and private suits for treble damages.

Agreements in Restraint of Trade

Either:

1. Per se. Unlawful on their fare. Unlawful even without market power. So agreements to fix prices even if no market power can be a violation.

2. Rule of Reason. Not a violation on its face. Court may examine the nature of the activity to determine if it is really an anticompetitive restraint.

May have pro-competition aspects that can help reduce prices or provide other benefits.

Most issues related to horizontal collaboration in the supply chain will be judged under the rule of reason.

Joint Ventures

Collaboration in the supply chain is viewed under the antitrust laws as a form of Joint Venture (JV).

JVs have a variety of structures. Often formed for a limited purpose such as distributing a product or service, developing new markets (e.g. exports) or developing technical standards.

Avoid Per Se JVs - Price

The collaborative endeavor must be structured so that agreements on product or service price are not entered into. Competitors cannot use a JV devise as a means to fix prices or limit the scope of pricing. Price fixing can mean not only agreeing upon a certain price but also such things as:

1. *establishing maximum or minimum prices (price ranges)*
2. *limiting discounts*
3. *limiting rebates*
4. *restricting times of price changes*
5. *restricting volume pricing*

Avoid Per Se JVs – Non-Price

JV should be structured so that customers are not divided up ("allocated") among the JV members.

Should not allocate territories ("we will serve the NE region, company B the SW region, company C the mid-West, etc.")

Avoiding Antitrust Problems

1. *Put the collaborative efforts in writing.*
2. *Express its limited scope (e.g. confined to the distribution of certain supplies or products).*
3. *No limits on or even discussions relating to product pricing and other per se issues.*
4. *State how will achieve efficiencies (pro customer).*
5. *No discussions (even "Wink Wink" discussions) that involve per se issues such as price fixing.*
6. *Let customer know it is a collaborative effort.*

Section 1 Conspiracies

To violate Section 1 there must be a conspiracy among two or more actual or potential competitors. If a corporation, such as a holding company, has two or more subsidiaries they may fix prices, divide customers, etc. without violating Section 1. Copperweld Corp. v. Independence Tube Corp., 467 U.S. 75 2 (1984).

So supply chain arrangements within the same commonly owned commercial group will not be an antitrust violation.

Among separately owned competitors parallel action in itself is not a violation of Section 1. In Bell Atlantic Corp. v. Twombly, 127 St. Ct. 1955 (2007), the Supreme Court essentially held that a violation may not be found if the only evidence is that the parties had similar prices or other business practices (termed "conscience parallelism"); to establish a violation there must also be evidence of actual conspiratorial activity.

Joint Purchasing Arrangements

In general competitors may join together to purchase goods and services.

"The cooperative arrangement [group purchasing of office supplies] thus permits the participating retailers to achieve economies of scale in purchasing and warehousing that would otherwise be unavailable to them" Northwest Wholesale Stationers v. Pacific Stationary & Printing Co., 472 U.S. 284, 295 (1985).

Group negotiations with a supplier, which could be a supplier of services such as transportation related services, is generally not going to be considered a Section 1 violation. Such activity may result in lower prices for the purchasers in the group. *White & White, Inc. v. American Hosp. Supply Corp.*, *723 F.2d 495 (6th Cir. 1983).*

Specifically as to transportation it was held in Instant Delivery Corp. v. City Stores Co., 284 F.Supp. 941 (E.D. Pa. 1968) that group purchases by product competitors of package delivery transportation services was not a violation of the antitrust laws.

Combing Too Much Market Power Could Raise Questions

Market power may be considered as part of the totality of a JV under a rule of reason approach. The two federal antitrust enforcement agencies (the Department of Justice and the Federal Trade Commission) have stated that for non-per se type activity if the collective market shares of the collaboration and its participants account for

no more than 20% of a relevant market, the agencies are unlikely to challenge the arrangements. Antitrust Guidelines for Collaborations Among Competitors (Federal Trade Commission & Department of Justice), April 2000, Sec. 4.2. However, the 20% figure should not be taken as a bright line.

This raises issues as to what is the relevant market to which the collaborative agreement applies.

It also raises issues as to what alternatives would a customer have to the JV, how comprehensive is the scope of the JV and is it easy for others to enter the market?

Specifically in a transportation context the Department of Justice has stated that for ocean carriage a group of shippers could have a projected volume in a shipper association arrangement of 35% of the available transportation capacity before the Department may have an interest. *Remarks of Deputy Assistant Attorney General, Antitrust Division before the Chemical Manufacturers Association, October 21, 1985, p. 5.*

Carrier JVs

Carriers, logistics companies, brokers, etc. may combine to offer particular distribution services. One entity, such as a logistics company, may have agreements with a variety of transportation providers (motor carriers, rail carriers, air carriers, ocean carriers, drayage companies, port agents, warehouse operators, etc.). These agreements may place certain limits on the participating carriers such as not servicing members

of a supply chain consortium outside of the transportation service providers agreed to operation. *Rothery Storage & Van Co. v. Atlas Van Lines*, *792 F.2d 210 (D.C. Cir. 1986), cert. den., 479 U.S. 1033 (1987). The reasoning is that each carrier in the chain obtains benefits from being part of the arrangement and if they could operate outside the chain the chain would be broken.*

In Richards v. Neilsen Freight Lines, 810 F.2d 898 (9th Cir. 1987) it was held that a motor carrier could agree with a regional delivery motor carrier to prohibit backhauls by the regional carrier without violating Section 1.

Summary

Horizontal collaboration in the supply chain context can provide efficiencies and cost savings for all participants and present market advantages to customers.

If such arrangements are structured to avoid price fixing and other per se antitrust offenses and present customers with beneficial alternatives then the agreements that are inherent in a collaborative arrangement should not violate the antitrust laws.

Loosely organized collaborative arrangements with ill-defined scopes of activity need to be avoided because if antitrust challenges are raised they can be difficult to defend with expensive consequences.