

Invitations to Collude and Unilateral Information Disclosure

Roundtable on Information Exchange and Market Transparency, 4 June 2015, Pembroke College

Oxford Centre for Competition Law and Policy in conjunction with The Oxford/Stockholm Soderberg Venture and The Journal of Antitrust Enforcement,

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Why address unsuccessful invitations to collude?

FTC in *Valassis Communications*:

- “First, it may be **difficult to determine whether a particular solicitation has or has not been accepted.**
- Second, **even an unaccepted solicitation may facilitate coordinated interaction** by disclosing the solicitor’s intentions or preferences.
- Third, the anti-solicitation doctrine serves as a useful **deterrent against conduct that is potentially harmful and that serves no legitimate business purpose.**”
- Plus: stink operations?

Why one needs to be careful

- Some unilateral disclosures (other than naked invitations to collude) may have **procompetitive benefits**, e.g.
 - Increasing vertical transparency for customers
 - Information disclosure for corporate governance purposes
 - Information disclosure in the context of a joint venture
- So, intervention may result in **type I errors** and/or a **chilling effect**

‘Concerted Practice’ is a red herring

- Even ‘agreement’ is a term of art and could be interpreted purposively
- Calling some prohibited forms of coordination ‘concerted practices’ instead of ‘agreement’ does not solve **the actual question when a given conduct constitutes a prohibited form of coordination**
- See *Wood Pulp II*
- also cf. the fate of Count 1 in *McWane*: Chairwoman Ramirez and Commissioner Brill would have found concerted action on the evidence, Commissioners Ohlhausen and Wright not



Invitations to collude

“Hello Phil, Our company name is InstantUPCCodes.com, as you may be aware, **we are one of your competitors** within the same direct industry that you are in.

.... Here's the deal Phil, **I'm your friend, not your enemy Here's what I'd like to do: All 3 of us- US, YOU and [Company A] need to match the price that [Company B] has I'd say that 48 hours would be an acceptable amount of time ...** The thing is though we all need to agree to do this or it won't work . . .Reply and let me know if you are willing to do this or not.”

“Crandall: Yes. I have a suggestion for you. **Raise your goddamn fares twenty percent. I'll raise mine the next morning.**

Putnam: Robert, we-

Crandall: You'll make more money and I will too.

Putnam: We can't talk about pricing.

Crandall: Oh bull * * * *, Howard. We can talk about any goddamn thing we want to talk about.” (*American Airlines*)

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Netiquette:
Do not shout

Avoid prepositions at the end of a clause

Avoid clichés; watched The Informant too often

Comma splice

Do not swear

Numbers below ten should be spelled out

Concerted Practices – or not?

‘[c]ircumstantial evidence of consciously parallel behavior may have made heavy inroads into the traditional judicial attitude toward conspiracy, but "conscious parallelism" has not yet read conspiracy out of the Sherman Act entirely’

- A: ‘Stay out of our area’; B stays out
- A: ‘If you raise prices, we will not undercut you’; a few days later, B raises prices

Guidelines on horizontal co-operation

Para. 63: Where a company makes a **unilateral announcement that is also genuinely public** [...] this **generally does not constitute a concerted practice** within the meaning of Article 101(1) ⁽⁵²⁾. However [...] the possibility of finding a concerted practice cannot be excluded, for example in a situation where such an announcement was followed by public announcements by other competitors [...]

⁵² This would not cover situations where such announcements involve invitations to collude.

Public versus private disclosure

- True: public disclosure will *often* be less problematic
 - Many legitimate business purposes require public disclosure (eg, price announcements that increase vertical transparency)
 - Higher probability of detection makes anticompetitive intent less likely
- However:
 - Public disclosure does not guarantee any legitimate purpose, much less a net beneficial effect; not a good proxy
 - Where unilateral actions are not prohibited, detection is irrelevant

Approaches

- Section 2 Sherman Act (American Airlines)
- Wire fraud (Ames Sintering)
- Section 5 FTC Act (eg, *Quality Trailer Products*, *YKK*, *AE Clevite*, *Precision Moulding*, *Stone Corporation*, *Valassis Communications*, *U-Haul*, and *InstantUPCCodes.com/Nationwide Barcodes*)
- Possibly Criminal Attempt Act 1981 with s 188 EA 2002 (as amended by the 2013 ERRRA)
- Until 2005, in Germany possibly administrative offence
- Australia: price signalling provisions in banking

Sliding scales...

1. ... as to the anti/procompetitive effects balance
 - a. Explicit, naked private invitations to collude (eg *Quality Trailer Products*, *Barcode* cases)
 - b. More ambiguous conduct (*Stone Container*)
 - c. Public announcements (*Valassis*, partly *U-Haul*)
2. ... as to the severity of the remedies
 - a. Criminal liability
 - b. Administrative offence
 - c. Forward-looking injunction
3. Severity of the remedies is not always proportional to the anti/procompetitive effects balance

Differentiated approach

- Prohibit explicit naked invitations to collude; use sufficiently deterrent sanctions (criminal sanctions/admin. fines)
- Unilateral information disclosures other than naked invitations to collude with possible procompetitive effects
 - Are there any less restrictive means that allow the procompetitive aspects to be realised?
 - If not, and procompetitive effects are genuine: no intervention.
 - If there are obvious less restrictive means, may be tantamount to naked invitation (sham justification)
 - If (1) there are anti- and procompetitive effects of sufficient magnitude, and (2) (non-obvious) less restrictive means, competition authority should have the **power to order less restrictive means to be used in the future**