

ATTACHMENT 1

Excerpts from: Draft Information Bulletin on Trade Associations

Issued by the Government of Canada Competition Bureau

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PART 3: Association Activities that may raise concerns

Certain association activities have the potential to raise competition concerns. It is not possible to outline every possible activity where a concern may arise. There are, however, a number of activities which pose a greater risk of raising competition concerns. These activities are discussed below.

3.1 Information Sharing

An important task of associations is to provide their members with information relevant to their industry. The exchange of information will not necessarily give rise to competition issues under the *Act*. Indeed, competitive markets function more efficiently when information is relatively free and openly available to industry participants. At the same, it is recognized that information exchanged among competitors who collectively possess market power may have serious adverse effects on competition, depending upon the nature and timing of the information exchange. Where markets are characterized by high levels of concentration, barriers to entry and relative stability, information exchanges in respect of commercial information may reduce uncertainty about rivals' competitive responses and so act to further temper rivalry. When the products involved are relatively homogeneous and firms compete across a limited number of competitive variables, the risk that such exchanges will have significant adverse effects on competition is further heightened.

The exchange of competitively sensitive, such as information regarding current or future prices, information is more likely to raise competition issues under the *Act*. Associations should also exercise caution in the collection and dissemination of information regarding market shares, costs, levels of output, strategic or marketing plans and other similar types of information. Where an association intends to collect and disseminate information that may be commercially sensitive, associations should consider the following steps to reduce competition risks:

- Collect only historical information - For example, the collection of historical pricing information is less likely to raise concerns than the collection of current and future prices;
- Only disseminate information in an aggregated form - The more generalized the information, the less likely the potential for an anti-competitive effect. The information exchanged should not reveal individual firm data or specific transaction data. The dissemination of aggregated industry data reduces the likelihood that the disclosure of such information will have an adverse effect on competition.

- Use an independent data collection agency - Data collected from industry participants should be collected by an independent firm and the anonymity of individual members and their data should be preserved.
- Do not coerce members to provide data - Association members should not be required to supply data or comply with any proposals regarding the sharing of information.

3.2 Agendas and Meetings

Association meetings should have clear agendas and comprehensive minutes. The agendas should be specific. Meeting should not become a forum for the discussion of competitively sensitive information, such as pricing, costs, market allocation, production and market shares. The discussion of discounts, payment terms, business strategy and bidding tactics are also topics that should be avoided. It is recommended that the association have legal counsel review agendas and minutes and attend all association meetings where there is potential for discussion of sensitive subjects. Associations should also have a document retention program which clearly sets out which records are to be kept and for what period of time in order to protect itself by keeping a history of previous meetings that have been held.

Informal conversations and discussions that take place outside the regularly scheduled association meetings and activities may also raise concerns. Unscheduled or informal meetings between competitors, whether held in conjunction with regular association meetings or not, should be treated with great caution.

3.3 Association Membership

The majority of firms that choose to become members of an association do so because of the benefits provided by the association. Association membership should be voluntary and based on clear and transparent criteria. In some instances, association membership could raise issues under the *Act* if, for example, membership requirements, exclusions and expulsions could impair a firm's or person's ability to compete.²³ For example, excluding a potential member because of that member's refusal to adhere to certain pricing policies may raise concerns under the price maintenance provision of the *Act*.

3.4 Association Discipline

Associations should avoid sanctions aimed at forcing members to obey various association recommendations which may have an anti-competitive effect. For example, associations should avoid any actions or use of language in their communications to members which explicitly or implicitly require or suggest membership adherence to particular price or trade terms. Likewise, there should be no sanctions imposed on members who choose not to follow association fee guidelines.²⁴ Actions that take the form of direct persuasion or implied coercion are not consistent with preserving the independence of association members. However, sanctions that are implemented for legitimate purposes, such as for the failure to meet safety standards, would not raise a concern under the *Act*.

3.5 Fee Guidelines

The Bureau recognizes that professional associations often disseminate fee guidelines as a source of information on prevailing prices in professional services' markets.²⁵ However, such fee guidelines raise concerns under the *Act* as they may facilitate agreements on the fees to be charged by competing members. The issuance of a fee guideline which is genuinely intended to be a source of information as to the prevailing fees in a particular market would not likely, in and of itself, raise an issue under the *Act*. This would be so if such a guideline was issued without raising any intention or expectation that the association's members should alter their prices to conform to the fees presented in the guideline. However, a fee guideline could raise concerns under the *Act* if it is used to establish or facilitate an agreement on prices or promote adherence to a specified level of fees.

Given the negative effect of collusion on consumer welfare, it is recommended that associations look to less intrusive means to provide consumers or professionals with the information they need on prices. As well, if adopting such a guideline, a genuine suggested fee guideline is one which is issued merely for consumer or professional information purposes, without raising any intention or expectation that the membership will adopt the guideline in their practices. Members must feel free to deviate from the guideline without fear of recrimination or sanction. Fee guidelines which have the following characteristics are less likely to raise concerns under the *Act*:

- prepared in a systematic and scientific fashion;
- comprised of statistics gathered and compiled by an independent third party;
- based on questionnaires which ask respondents what fees they have charged, on average, over a given period, as opposed to what fees they consider desirable or acceptable;
- based on a predetermined response rate from the relevant association membership; and
- based on independent verification of a sub-sample of responses.

3.6 Advertising

The competitive benefits of advertising are numerous. For example, advertising facilitates entry by enabling new firms to make their presence and unique features widely known. It also increases consumer awareness of prevailing prices which may lead to price competition. Association activities relating to advertising typically fall into two categories: advertising conducted by the association itself and guidelines or rules adopted by an association for its members in relation to advertising.

With regard to the former, associations often promote the industry they are representing through advertising and other public statements. Whereas advertising is typically for a specific product or service, advertising conducted by an association will generally be used to promote the product, services or views of an industry. In promoting the service, product or views of an industry, an association should ensure that it does not engage in materially false or misleading

representations. In addition to those provisions found in the *Act*, the *Consumer Packaging and Labelling Act*, the *Textile Labelling Act* and the *Precious Metals Marking Act*, all contain provisions which prohibit false or misleading representations.

Associations must also exercise caution in imposing restrictions or prohibitions on advertising conducted by its members. For example, an association sometimes, in its guidelines or rules, restricts the type, amount or manner in which members may or may not conduct their advertising. Such restrictions should be examined to determine if they would restrict a member's ability to compete in a market.