



ANTITRUST GUIDE

For Members and Staff of the Foodservice Packaging Institute, Inc.

FOREWORD

In modern trade associations like the Foodservice Packaging Institute, Inc. (FPI), both members and staff are affected by numerous federal and state laws and regulations. Tax considerations, safety, health and environmental laws, affirmative action plans—to mention just a few—are matters that frequently affect judgment and decision and the day-to-day operation of the organization.

The federal antitrust laws are, in some respects, similar to other laws and regulations in that they are laws which can and should affect business judgments, decisions and operations. Some antitrust laws are criminal and their violation may involve substantial fines and prison sentences. In addition, civil suits for treble damages against alleged violators are with enormous verdicts being awarded to successful plaintiffs are not uncommon. Therefore, the antitrust laws should be a subject of which every member is acutely aware.

The primary purpose of this guide is to foster that awareness. It is not, and is not intended to be, either a detailed analysis of the antitrust laws or a substitute for competent legal counsel, nor does it attempt to deal with the antitrust laws which have been enacted by most states and are generally similar to federal law. Rather, by explaining those federal antitrust laws having application to associations in general terms, it is intended to assist FPI members and staff in becoming sensitive to potential antitrust problems and to aid in avoided them.

PURPOSE OF ANTITRUST LAWS

The chief purpose of the antitrust laws is to protect and foster the efficient operation of our free enterprise system by assuring the preservation of competition among business firms at all levels of trade. These laws are primarily based on the theory that the consumer benefits by getting the best product at the lowest price through competition and that society's productive resources are best allocated and utilized by subjecting business firms to the rigors of a competitive market.

If one company through improper means dominates a market with resultant power to control prices and exclude competition, consumers and society generally suffer. The same is true if competitors agree among themselves to fix prices, rig bids, limit production, divide markets, allocate customers or boycott other industry participants. In both cases consumers and society lose the benefits of competition in the affected markets. The antitrust laws are aimed at conduct that threatens to deprive consumers of the benefits of competition.

FPI POLICY ON ANTITRUST

It is, and has always been, the uncompromising policy of FPI to exercise the greatest care to comply, not only with the antitrust laws, but with all laws applicable to the activities of organizations such as ours. To aid in effecting this policy, FPI's activities are closely monitored by counsel.

Because of acutely increased awareness and concern resulting from the expanding volume of antitrust litigation involving many industries, it is important to restate the commitment of FPI, its members and staff, to full compliance with both the letter and spirit of the antitrust laws.

This restatement is designed to serve as a reminder of FPI's long-standing commitment to compliance and as an aid to members and staff in understanding those portions of the antitrust laws which have applications to our activities.

FPI ORGANIZATION AND PURPOSE

FPI was founded in 1933 and since then has merged with other associations to form the organization we know today. It is the material-neutral trade association for converters of single-use foodservice packaging products and their raw material and machinery suppliers. These products consist of cups, plates, platters, bowls, trays, beverage carriers, bags, containers, lids and domes, wraps, straws, cutlery and utensils for the service and/or packaging of prepared foods and beverages in foodservice establishments. Other related products such as placemats, doilies and tray covers; trays used in packaging raw meat, poultry, seafood, produce, and other food products; and egg packaging are also included.

Broadly speaking, the purpose of the association is to promote the legitimate interests of the industry in areas in which individual companies cannot adequately perform or do so well on their own. Such areas include: presenting the industry's views to legislators at all levels of government; interfacing with government regulatory agencies; collecting statistical data; promoting the use of the industry's products; providing a lawful forum for the discussion of subjects of interest to the industry; improving the industry's public image and host of similar programs and activities.

With the application of intelligence, common sense and care, the likelihood of involvement with antitrust problems because of participation in FPI activities should be minimal.

BRIEF DESCRIPTION OF ANTITRUST LAWS

Sherman Antitrust Act

The Sherman Antitrust Act (1890) is the principal antitrust law. It outlaws all contracts, combinations and conspiracies that unreasonably restrain interstate and foreign trade. This includes agreements among competitors to fix prices, rig bids, allocate customers and control production.

The Sherman Act also makes it a crime to monopolize any part of interstate commerce. An unlawful monopoly exists when only one firm controls the market for a product or service, and it has obtained that market power, not because its product or service is superior to others, but by suppressing competition with anticompetitive conduct. The Act is not violated simply when one firm's vigorous competition and lower prices take sales from its less efficient competitors--that is competition working properly.

Sherman Act violations involving agreements between competitors usually are punished as criminal felonies.

The U.S. Department of Justice is empowered to bring criminal prosecutions under the Sherman Act. For criminal offenses, individual violators can now be fined up to \$1 million and sentenced to up to 10 years in federal prison for each offense, and corporations can be fined up to \$100 million for each offense. Under some circumstances, the maximum fines can go even higher than the Sherman Act maximums to twice the gain or loss involved.

Clayton Act

The Clayton Act (1914) is a civil statute that carries no criminal penalties. It prohibits mergers or acquisitions that are likely to lessen competition. Under the Act, the government challenges those mergers that a careful economic analysis shows are likely to increase prices to consumers. The Act also prohibits other business practices that under certain circumstances may harm competition. The following arrangements normally receive close scrutiny under the Clayton Act:

- **Exclusive Dealing.** These normally are agreements between a supplier and a distributor in which the distributor agrees to handle only the product line of the supplier. If such an agreement “may be to substantially lessen competition or tend to create a monopoly in any line of commerce,” the agreement is illegal.
- **Tying Arrangement.** Most frequently, tying arrangements are unilateral actions in which a supplier refuses to sell a customer product “A” unless the customer also agrees to buy product “B”. Tying arrangements are frequently held to be illegal; however, on occasion, courts have accepted justifications. Before embarking upon any plan that may involve a typing arrangement, always consult your attorney.

The Clayton Act is also important to private parties harmed by antitrust violations because it allows them to bring civil actions and seek treble damages and recovery of their attorneys' fees and costs.

Consequently, the expense of anti-competitive conduct in violation of the antitrust laws carries both the risk of exposure to criminal fines and imprisonment and also the possibility of significant civil damages.

Federal Trade Commission Act

The Federal Trade Commission (FTC) Act prohibits unfair methods of competition in interstate commerce, but carries no criminal penalties. It also created the Federal Trade Commission to police violations of the Act. The Act neither defines unfair competition nor unfair or deceptive acts and practices, leaving it to the Commission to decide what they are. Violations of cease and desist orders can result in fines of up to \$16,000 for each day of non-compliance. For the purpose of this guide, it is assumed that the requirements of the Sherman and FTC Acts are similar, while recognizing the broader scope of activity potentially encompassed by the FTC Act.

The Robinson-Patman Act

The Robinson-Patman Amendment is an amendment to the Clayton Act and was intended to promote competition by preventing discriminatory pricing practices. Courts have interpreted the term “discriminate in price” to mean “differentiate in price.” The Robinson-Patman Act is complex and often confusing. Solutions to problems require an extensive examination of all the facts and an experienced attorney’s advice is usually indispensable.

MAIN ANTITRUST STATUTES

Section 1 of the Sherman Act prohibits contracts, combinations, and conspiracies in restraint of trade. The Supreme Court has said that not every contract or combination in restraint of trade constitutes a violation; only those which unreasonably restrain trade are unlawful. Problematic conduct under the antitrust laws generally falls into two categories: activities that are presumed to be unreasonable in and of themselves and are therefore considered illegal (“per se” violations) and those activities that are judged by a “rule of reason” analysis of all facts and circumstances surrounding the conduct in question in order to determine whether it unreasonably restrains trade and therefore violates the law.

Conduct which is considered to be unlawful per se consists of certain practices which clearly restrain competition and have no other redeeming benefits. Examples of such practices include:

- agreements to establish price (price fixing), which may include understandings regarding elements of price, such as margins, costs or formulas to establish price;
- bid-rigging;
- agreements to refuse to deal with third parties (boycotts);
- agreements to allocate customers or markets or limit production; and
- tie-in sales which require the customer to buy an unwanted item in order to buy the product desired.

Trade associations like FPI, by their very nature, present potential antitrust problems. One reason is that in bringing competitors together into an organization, there exists the means by which collusive action can be taken in violation of the antitrust laws. Since the antitrust laws prohibit combinations in restraint of trade and since a membership organization by its very nature is a combination of competitors, one element of a possible violation is already present. Only the further action to restrain trade is necessary for a violation to occur.

Members of FPI must therefore refrain from any discussion that could provide the basis for an inference that the members agreed to take any action that might restrain trade. An “agreement” among members in antitrust terms is a very broad concept: it may be oral or written, formal or informal, expressed or implied, and an agreement can be inferred from circumstances. A “gentleman’s agreement” to “hold the line” on prices is more than sufficient to evidence an unlawful conspiracy to fix prices.

The basic principle to be followed in avoiding antitrust violations in connection with organization activity is to assure that no illegal agreements, expressed or implied, are reached or carried out through the organization. To this end, members should refrain from any conduct, even in jest, which may give the appearance of impropriety or unlawful agreement, including conduct at social gatherings attendant to association meetings.

GENERAL GUIDELINES

Following are some general guidelines which can minimize the possibility that inferences of antitrust guilt can be drawn from organization activities:

- Meetings should be held only when there are proper items of substance to be discussed which justify a meeting.
- In advance of every meeting, a notice of meeting along with an agenda should be sent to each member of the group and reviewed by association counsel; the agenda should be specific and such broad topics as “marketing practices,” which might look suspicious from an antitrust standpoint, should be avoided.
- Participants at the meeting should adhere strictly to the agenda. In general, subjects not included on the agenda should not be considered at the meeting.
- If a member brings up for discussion at a meeting a subject of doubtful legality, he or she should be told immediately the subject is not a proper one for discussion. While the association’s counsel will ordinarily assure that inappropriate subjects are not discussed, adherence to the antitrust laws is the responsibility of every meeting attendee, and any attendee or association staff representative, particularly if counsel is absent, should attempt to halt any discussion which he or she feels discussion is creating the possibility of an anticompetitive situation, or the appearance of one. Should the discussion continue, despite protest, it is advisable that members leave the meeting.
- Secret or private meetings involving competitors held at the time of the regular association event should be strictly avoided. Such meetings may enhance the opportunity for the discussion of

illegal activities, and, accordingly, they seriously jeopardize legitimate organization activities and create a very substantial risk that those activities will be investigated.

- During meetings there should be no recommendations with respect to “sensitive” antitrust subjects – those that relate to price, costs, and the selection of customers or suppliers. Prices should not be discussed at all.
- Members should not be coerced in any way into taking part in organization activities. There should be no policing of the industry to see how individual members are conducting their business.
- If there is any doubt about an organization program or subject of discussion, members should check with organization staff and counsel. Members may also wish to consult with their company’s counsel, and this is encouraged.
- Members should cooperate with FPI’s counsel in all matters, particularly when counsel has ruled adversely about a particular activity.

The following topics of discussion that must be avoided at FPI meetings:

- Current or future prices and price trends, including components of prices
- What constitutes a fair profit or margin level
- Possible increases or decreases in prices
- Standardization or stabilization of prices
- Industry pricing policies or practices
- Pricing procedures
- Cash discounts
- Credit terms
- Control of sales
- Inventory levels, production capacity and costs
- Plans regarding production, distribution or marketing of particular products
- Allocation of markets or customers
- Refusal to deal with a firm because of its pricing, distribution or other business practices
- Whether or not the pricing practices of any industry member are unethical or constitute an unfair trade practice.

Some of the basic areas of activity which should be carefully scrutinized from an antitrust standpoint, including review by counsel, are the following:

- Denial of membership to an applicant
- Expulsion of a member
- Conduct of a statistical reporting program, including industry benchmarking
- Conduct of a standardization and certification program
- Conduct of a joint research program

- Establishment and enforcement of codes of ethics
- Denial of services to non-members

ANTITRUST PENALTIES

There are both civil and criminal penalties for violating the antitrust laws. The penalties for violating the antitrust laws are severe. An individual and a corporation found to have violated the antitrust laws may be fined up to \$1 million and \$100 million, respectively. Individuals and corporate officers may be imprisoned for up to ten years. Additionally, there are civil penalties available to government antitrust enforcement agencies such as a cease and desist order and dissolution of the organization. In addition to government enforcement of the antitrust laws, an individual or company that suffers injury as a result of an antitrust violation may file a private suit against the violator and recover treble damages as well as attorneys' fees and costs. Civil class actions can be enormously costly.

CONCLUSION

Trade association membership and particularly membership in an organization such as FPI need not represent a material antitrust risk if members and staff follow the policy and guidance in this document. Most antitrust problem avoidance can be accomplished by application of intelligence, honesty, care and common sense. The remaining problem avoidance can be accomplished with competent legal counsel.

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