ASSOCIATIONS AND INTERNATIONAL ANTITRUST ENFORCEMENT

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Introduction

Today, more and more trade associations and professional societies compete in a global environment. In that context, they must comply not only with the United States antitrust laws, but also with the antitrust and competition laws of almost 100 countries throughout the world. Obviously, each trade association or professional society cannot be expected to have an in house staff antitrust specialist familiar with the entire gamut of international antitrust laws. However, trade associations and professional society senior staff members should have a clear understanding of basic antitrust and competition law requirements in the countries in which they have a presence and should have access to experienced antitrust counsel who can provide needed advice whenever antitrust sensitive issues arise.

Antitrust in an International Setting

In 1890, The United States Congress enacted the Sherman Antitrust Act. The purpose of this statute was to prevent large U.S. corporations from restraining competition by entering into agreements to fix prices and limit production. Congress wanted to protect free and open competition in the U.S. by prohibiting agreements to monopolize commerce between major companies. Initially, the Sherman Act was considered as the protector of both consumers and small business. Consumers were protected against agreements by sellers to artificially inflate the price of consumer goods. Small business was protected against attempts by big business to conspire to eliminate small businesses from the marketplace.

Section 1 of the Sherman Act declared illegal "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations..." In the years after its enactment, this language did not change but the interpretation by the Courts of the meaning of that language, created a new body of law that certainly could not have been anticipated by legislators in 1890.

As an example, the statute specifically prohibits "[e]very contract...in restraint of trade." Early on, the Courts decided that Congress did not intend the phrase "[e]very contract" to mean "every contract." According to the Supreme Court, that phrase really meant: "every unreasonable contract." Thousands of pages have been written trying to differentiate between "reasonable" and "unreasonable" restraints on trade and how to measure the difference. This body of jurisprudence has created the antitrust concept called "the rule of reason." When a Court examines anti-competitive practices, one of the first issues is to determine whether the "rule of reason" applies and if so, what evidence is required to find that there is an antitrust violation.

The Courts have recognized that some types of joint activities such as bid rigging, price fixing, customer allocation, market allocation and group boycotts are, on their face, so offensive as to be in antitrust terms, "per se" illegal. These activities are not subject to analysis under the rule of reason. Generally, all activities that are not in the "per se" category are subject to some type of rule of reason analysis. To make this analysis, each party to the litigation hires a team of economists to evaluate the practices and determine whether the economic effects are pro-competitive or anti-competitive.

As time progressed, economists and the Courts began to decide cases in favor of practices that theoretically would promote economic efficiency and result in lower consumer prices. There was a general recognition that "big" was not necessarily "bad." Indeed, economists conclude that small competitors such as the neighborhood drug store, the small grocery store or the independent appliance store, were not economically efficient. Consumers could get better prices from large national sellers. As a result, the Courts started to permit industry consolidations and large national companies began to dominate every major marketplace. What started out as laws designed in part to protect small businesses from large competitors turned out to be laws that may have led to the demise of small businesses.

As this body of antitrust law evolved, large U.S. companies actively competing in the U.S. faced another challenge. They began to complain that, in the world outside the U.S., there were no antitrust laws and competition was often defined by a series of national or international cartels which fixed prices, controlled production and allocated markets. As U.S. companies recognized the need to compete internationally, they also recognized that they could not compete in markets controlled by cartels. The U.S. government began to push its economic partners to develop their own antitrust compliance requirements. In response, the EU and independent countries worldwide began adopting statutes that mirrored U.S. antitrust statutes. Antitrust agencies in various countries started working together and it is now common place for an antitrust investigation to be coordinated among multiple national antitrust enforcement agencies.

The development of an international antitrust environment to some extent paralleled the rise of the information age. As information became more readily available, industries consolidated and the ability of sophisticated, large businesses to compete internationally became widespread. U.S. and non-U.S. companies were no longer just large national companies. They became truly multi-national.

The development of the internet and e-commerce has heightened the capacity to compete globally. As a result, trade associations and professional societies needed to think and act globally as well. In order to fully represent their members, more and more trade associations and professional societies have concluded that they must expand beyond national boundaries and lead their industry and professions on an international basis.

Trade Associations and Professional Societies Operating Internationally

As your organization begins to expand internationally you will need to expand your definition of traditional antitrust to include broader aspects of competition law. Your goal will be to increase the worldwide markets for the members of your trade association and to permit the professionals that you represent to practice globally rather than nationally.

In the international arena you will find that you need to deal with customs and tariff barriers, Foreign Corrupt Practices Act issues, traditional antitrust issues regarding bidding, pricing, production quotas and the availability of raw materials." You will need to be familiar with international intellectual property issues to protect your members' patents, trademarks and copyrights. You will also need to watch international regulation of e-commerce. Finally, you may become involved with multi-national agencies that are addressing supply and demand issues and international standard setting bodies.

In these efforts, you must always be aware of the fact that, by definition, a trade association or professional society is a group of competitors working together to promote a trade or profession. Activities that promote the interests of most of the members may cause adverse economic effects on some of the members or on competitors in other industries or professions. To that extent, your organization may be viewed by antitrust enforcement agencies as a group of competitors acting in unison (or in antitrust terms "conspiring ') to restrain trade. If it is determined that your actions are not a "per se" violation of international antitrust laws and such actions are found to be reasonable under the antitrust "rule of reason," then you have no problems. However, if the conduct is viewed as "unreasonable," the association and its members may be subject to significant fines and penalties and if the conduct is deemed to be a "per se" antitrust violation, individuals, including association executives, may be subject to criminal penalties including incarceration.

Conclusion

For many trade associations and professional societies, the globalization of our economy will require that the organization promote the interests of its members on an international basis. Expansion into the international arena will become a necessity, not merely an option. As part of that expansion, the organization will be faced with the need to address international competition law requirements in most instances modeled after U.S. antitrust laws. You can best address this need by discussing your plans with

counsel prior to acting and becoming sensitive to not only the national but also the international competition laws affecting your trade association or professional society.

If you are interested in learning more about "Associations and International Antitrust Enforcement," contact Rich Bar, GKG Law, P.C. at 202.342.6787 or rbar@gkglaw.com.