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Message from the Chairs

We’re pleased to write this column as we wrap up another very busy year for the Joint Conduct Committee.

During this past year we have sponsored nine brown bags. Of particular note is our series, co-sponsored with the International Committee, comparing the evaluation of joint conduct (other than criminal) under the competition laws in a number of major jurisdictions. We’ve already covered Canada, Europe, Brazil and Mexico—with other programs to follow in the fall. While many have contributed to the success of this series, special kudos go to John Delacourt for generally overseeing our programs, and to Mark Botti for conceiving and implementing the international JV series.

On the publication front, two major books are nearing the finish line. One will be a new edition of Joint Ventures: Antitrust Analysis of Collaborations Among Competitors. Ryan Marth has taken the lead in editing this new edition. The other publication is an entirely new handbook on the rule of reason, which will be a definitive work on the topic. Mark Botti has been coordinating a large team of authors and reviewers.

Hats off to Jacqueline Shipchandler for organizing our efforts to send out timely alerts about key joint conduct developments. This project complements the more indepth coverage of developments that we provide in our newsletter. Jacqueline is rotating off as a Committee Vice-Chair, and she deserves special appreciation for her work not only on our “tracking” project, but also for her service as editor of this newsletter over the last three years.

All of these projects require active participation by a large number of Committee members, and we thank them for their work and encourage others to let the Committee leadership know if you wish to get involved.

This is the last Co-Chair column from us as our terms as co-chairs come to an end and we hand off our “gavel” to John Delacourt and Mike Fanelli, the new co-chairs of the committee.

Best wishes for the rest of the summer!

Brian Grube and Bob Leibenluft
Co-Chairs
Reliance on Circumstantial Evidence to Identify Collusion
Mark Glueck and Eileen Reed
Finance Scholars Group

Introduction

Despite the long history associated with circumstantial evidence serving as the basis for establishing collusion in Section 1 cases, we note a persistent lack of judicial clarity regarding the type and amount of economic evidence required to support or defend against such claims. While the threshold requirements for establishing agreement in the absence of direct evidence are well recognized, beyond categories of relevant evidence, there seems to be no acknowledged and consistent application of so-called 'plus factors.' Given the amount of research and commentary devoted to the incentives and conditions under which competitors chose to collude and the number of successful prosecutions of such activity able to serve as yardsticks for predicting conditions where markets are susceptible to cartelization, one would expect a greater degree of judicial clarity.

The lack of such consistency in the application of plus factors may signal the fact that varying market conditions, in terms of market dynamics, the nature of how firms compete and how sales are made (e.g., contracting vs. auction), make uniform, judicially-enforceable criteria unrealistic. This suggests that it is best to be guided by the characteristics (both behavioral and structural) of the specific markets at issue, with relatively less concern for a mechanical application of all recognized plus factors, as some will necessarily be less relevant under certain market conditions. In this article, we review the criteria associated with the use of circumstantial evidence required to establish agreement, highlighting areas where greater clarity could be expected.

Role of Circumstantial Evidence

“First, successful price coordination requires accurate predictions about what other competitors will do; it is easier to predict what people mean to do if they tell you.” Blomkest Fertilizer, Inc. v. Potash Corporation of Saskatchewan, 203 F.3d 1028 (8th Cir. 2000). Where conspirators have overtly memorialized their intentions and actions to collectively raise price, antitrust precedent accepts there is a low probability of making a Type II under-enforcement antitrust error (false negatives are likely self-correcting), and the per se rule is applied. However, the absence of ‘smoking gun’ evidence does not defeat a claim that competitors have colluded to affect economic outcomes in a similar and potentially equivalent fashion as under an explicit agreement. In such cases, circumstantial evidence, providing the context for parallel conduct, may suffice. However, explanations for parallel conduct must distinguish instances where conduct represents collusion from those instances where such conduct reflects outcomes of interdependent firms, acting unilaterally in making their own independent pricing and output decisions. In other words, circumstantial evidence must rule out competitive parallel behavior, with pure oligopoly being the most recognizable basis for such outcomes.

Descriptions of the types of relevant undocumented conduct among competitors are familiar—“a meeting of the minds,” American Tobacco v. U.S., 328 U.S. 781, 810 (1946), and “a conscious commitment to a common scheme designed to achieve and unlawful objective.” Monsanto v. Spray-Rite Corp., 465 U.S. 752, 768 (1984). Circumstantial evidence must meet two thresholds. When
taken as a whole, the evidence must “reasonably tend to prove” the existence of conspiracy, while “excluding the possibility that the alleged competitors acted independently.” *Matsushita Elec. Indus. v. Zenith Radio Corp.*, 475 U.S. 574 (1986). Judge Posner articulated a standard in *In re High Fructose Corn Syrup*, noting that plaintiffs “must present evidence that would enable a reasonable jury to reject the hypothesis that the defendants foreswore price competition without actually agreeing to do so.” 293 F.3d 651 (7th Cir. 2002).

**Assessing Circumstantial Evidence**

While commentators group these types of relevant circumstantial evidence somewhat differently, there seems to be recognition of three fundamental considerations in relying on circumstantial evidence to establish collusion:

1. The presence of parallel conduct during the alleged collusive period,
2. The presence of structural and behavioral characteristics considered to be conducive to collusion, and,
3. Whether firms undertook actions that can only be justified in the context of a cartel (acts against independent self-interest).

Without direct evidence of communication resulting in agreement, the observation of parallel pricing practices among competitors must stem from some collective departure from historical norms in order to be meaningfully reflective of coordination. Such relevant parallel conduct may take the form of: (i) increased uniformity in price levels and a corresponding decline in the variance in prices among suppliers; (ii) increased uniformity in the rates of price change; (iii) failure of prices to adjust to change in demand; or (iv) a reduction in bidding activity or more selective bidding among suppliers. In addition, parallel conduct may include similar behavior where outcomes are consistent with coordination. Many of these comparisons are able to be re-cast as formal statistical tests that can detect these shifts from historical norms as regime shifts between competition and collusion. Nevertheless, we note that decisions related to cases with these fact patterns do not ascribe greater probative value to any particular outcome or the presence of multiple outcomes, except perhaps in the case of localized gasoline retailing, where the presence of parallel pricing in the face of declining demand was found insufficient to raise an inference of agreement. Similarly, there is no particular guidance related to pricing or bidding metrics that indicates a sufficiently significant departure from historical norms as a trigger for evidence of likely collusion. The lack of guidance on this point may stem from the potential that while coordination may have occurred, observable or quantified damages may be limited, and, therefore, the suspect pricing patterns may not display sizeable variation from historical norms.

While these outcomes may be the most visible signs of parallel conduct as the product of collusion, and account for the most relevant elements of the potential effects of collusion, evidence that suppliers adjusted selling terms in ways that make it more difficult for consumers to avoid coordination among competitors merits equal, if not greater, consideration. Uniform imposition of terms (such as most favored nation or customer status, resale price maintenance, elimination of legacy discount terms, eliminating or shortening buy-in periods in advance of price increases, changes to sales force incentives and similar policies) all heighten the likelihood that efforts to coordinate pricing will be effective. When found in the presence of parallel pricing conduct, they may increase the likelihood that collusion has been identified. Conversely, evidence of parallel conduct in markets where consumers have available low cost means of avoiding the effects of intended price increases suggests collusion is less likely to have been the cause.
Assuming a sufficiently parallel departure from historical competitive norms is found, in terms of prices, margins or other transactional measures, the next step in identifying the presence of collusion based on circumstantial evidence involves the use ‘plus factors’ for purposes of establishing that the observed parallel behavior is the product of conspiracy and not conscious parallelism. The discussion of the role of plus factors begins with the well-accepted starting point: that the more complex the market, the greater the likelihood that communication and explicit agreement is required for successful collusion and, therefore, the lower the probability that circumstantial evidence can reliably identify collusion. Figure 1 represents a sample of market considerations, or ‘select’ plus factors, both structural and behavioral, that have been found to be relevant in considering the probability of collusion.

**Figure 1**

**Select Plus Factors**

<table>
<thead>
<tr>
<th>Structural or Behavioral</th>
<th>Probability of Agreement</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>High</td>
</tr>
<tr>
<td>Product Attributes</td>
<td>Commoditized</td>
</tr>
<tr>
<td>(structural)</td>
<td></td>
</tr>
<tr>
<td>Transaction Prices</td>
<td>Observable</td>
</tr>
<tr>
<td>(behavioral)</td>
<td></td>
</tr>
<tr>
<td>Demand (structural)</td>
<td>Predictable</td>
</tr>
<tr>
<td>Sales – frequency</td>
<td>Continual</td>
</tr>
<tr>
<td>(structural)</td>
<td></td>
</tr>
<tr>
<td>Sales – terms (behavioral)</td>
<td>Limited</td>
</tr>
<tr>
<td>Means of Communication</td>
<td>Frequent</td>
</tr>
<tr>
<td>– (direct/indirect)</td>
<td></td>
</tr>
</tbody>
</table>

The cartel must provide for the collective benefits of the participants, the basis for members to expect their share of benefits exceeds what would be earned by competing and the means to resolve disputes. Reverse engineering the formation and operation of the cartel can serve to isolate the presence of relevant plus factors that unambiguously facilitate these cartel requirements. Despite broad agreement as to how the cartel must operate and perform in terms of these requirements, we note limited agreement, in terms of case holdings and related commentary, on whether and which structural and behavioral plus factors should be present to most reliably substantiate claims of collusion as opposed to interdependent and unilateral conduct. In short, given their relative importance in substantiating allegations of collusion, the treatment of plus factors appears under-developed.

Since any violation stems from the basis by which coordination was achieved, we would expect that plus factor analysis would concentrate on the presence of conditions that best facilitate collusion. This does not appear to be the case. The often-cited fourteen-factor list developed by Judge Posner largely focuses on behavioral considerations as being factors present in markets where parallel conduct is likely the product of collusion. Even a broad interpretation of the ‘Posner factors’ concerning the exchange of price information seems to undervalue the conditions that must be present for both the formation and execution of most cartels.

A plus factor analysis limited to traditional market structure characteristics when applied in the aggregate adds little more in terms of emphasis on communication among competitors than Judge Posner’s factors. A structural orientation to plus factors may focus on characteristics including the number of firms in the market, entry barriers, capacity considerations, the nature of demand,
including closeness of substitutes, the frequency of price adjustments, cost asymmetries and quality difference, buyer power and access to information (firm specific and market-wide). Without sufficient guidance as to the relative importance of any specific factor or subset of factors, a structurally-oriented plus factor analysis with limited consideration for inter-firm communication may prove no more reliable in identifying collusion than a behavior-dominated set of factors.

Conclusion

Forecasting the potential presence of cartel behavior before cases are filed, where actual cartel behavior is subsequently verified may provide a positive refinement to plus factor analysis. It remains to be seen whether cartel screening, focusing on the use of statistical analysis of varying behavioral characteristics designed to identify periods of departure from competition, provides guidance on the relative importance of select factors. While ex ante analysis like screening may provide a beneficial refinement, the conclusions of ex post analysis have been mixed, including the finding of limited or no support that concentration and product homogeneity are associated with cartel behavior. Given the number and breadth of cases subject to plus factor analysis, and the resulting absence of clear guidance as to their application, we are left with the recognition that market specific characteristics may well prove too high a barrier to the application of more generally accepted rules.

1. Authors are Managing Director and Principal at Finance Scholars Group
2. We note that in Anderson News and SENA, the Supreme Court has recently declined to clarify the evidence standards in Section 1 cases, suggesting the continued absence of judicial clarity or an accepted framework for evaluating the relative importance of circumstantial evidence. See, e.g., W. Kovacic, R. Marshall, L. Marx, and H. White, Plus Factors and Agreement in Antitrust Law, 110 Michigan Law Review 393 (2011) (providing an expansive treatment of the application of circumstantial evidence and plus factors). 
3. This does not reflect a judgment that interdependent behavior generally yields competitive prices to consumers, but rather the impracticality of prosecuting oligopoly. Interdependence need not be limited to pure oligopoly. Where dominant firms act as monopolists with respect to residual demand, smaller firms set output where marginal cost equals the dominant firm’s price. In such cases, firms set output and prices by taking account of each other’s actions.
4. In addition to well-recognized statistical tests, analysis may take the form employed in merger analysis where coordinated effects models establish the closeness of pre-merger competition and behavioral assumptions are adjusted to model collusive as opposed to competitive interactions.
5. White v. R.M. Packer Co., 635 F.3d 571 (1st Cir. 2011)

Analyzing Joint Ventures Under Canadian Competition Law

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Introduction

The framework for review of international joint ventures under Canadian competition law has undergone a significant change since the most recent amendments to the Competition Act (the “Act”) came into force in 2010. The most significant recent development related to joint ventures in Canada has been the adoption of a more appropriate framework for review through
the introduction of a civil provision dealing with competitor collaborations in section 90.1 of the Act. International joint ventures will now typically be reviewed under either the merger provisions of the Act or the civil agreements provision in section 90.1. Although parties to a joint venture agreement may still be subject to the criminal conspiracy provisions of the Act, it appears as though that risk has been significantly diminished. This article will provide a brief overview of the current legal framework, including the Canadian Competition Bureau’s (the “Bureau”) framework of analysis, for the review of international joint venture agreements and other strategic alliances in Canada.

Overview of the Legal Framework for the Review of Joint Venture Agreements in Canada

Prior to the 2009 amendments, joint venture agreements or other forms of strategic alliances between competitors were dealt with, for competition enforcement purposes, either as a merger or under the criminal conspiracy provisions, which at that time applied to any agreement that unduly lessened competition. Even the theoretical risk of substantial fines, imprisonment for individuals, and civil (class) actions associated with the criminal conspiracy provisions arguably had a significant chilling effect on legitimate pro-competitive cooperation between competitors. Recognizing that strategic alliances can allow Canadian businesses to capture the benefits of rapid technological changes and dynamic competitive conditions, the Canadian legislature introduced a middle-ground analysis for such agreements between competitors.

The 2009 amendments removed the threat of criminal sanctions for legitimate competitor collaborations and introduced a civil review mechanism whereby such agreements are now subject to civil remedies if they are likely to substantially lessen or prevent competition. The Bureau also issued Competitor Collaboration Guidelines (the “Guidelines”) at the end of 2009 to assist businesses and their counsel in assessing whether a particular form of competitor collaboration is likely to raise concerns under the criminal or civil provisions of the Act. Although not binding on the Bureau, prosecutors, or the courts, the Guidelines outline how the Bureau intends to treat different types of agreements between competitors or potential competitors.

The Guidelines are very helpful and recognize that pro-competitive collaborations (including many joint ventures) can benefit Canadians by allowing firms to make more efficient use of resources and accelerating the pace of innovation. Even though there has been little judicial treatment of the new framework, where a joint venture does not constitute a merger, the Bureau will now generally assess the agreement or arrangement under the new civil provision, reserving the criminal offence for “naked restraints” on competition (“hard-core” cartel conduct), specifically, price-fixing, market allocation or output restriction agreements.

Merger Review Provisions

A joint venture that falls within the broad definition of a “merger” will be assessed under the merger provisions in section 92 and following of the Act. The Guidelines explicitly state that a proposed or completed acquisition that fits the definition of merger under section 91 of the Act will be assessed under the merger provisions and not the civil agreements provision in section 90.1 or the conspiracy provision in section 45 of the Act. A merger is defined as an acquisition or establishment of control over, or significant interest in, the whole or a part of a business through the purchase or lease of shares or assets, by amalgamation or combination or otherwise.
The substantive test under section 92 is whether a merger or proposed merger “prevents or lessens, or is likely to prevent or less, competition substantially.” The merger review framework is very similar to that contained in the U.S. Horizontal Merger Guidelines.

A specific exemption from merger review is provided for under section 95 of the Act if the definition of “joint venture” contained in that provision is met. Practically speaking, the significance of section 95 in merger reviews may be limited given its numerous requirements. The exemption only applies to joint ventures formed, other than through a corporation, to undertake a specific research and development project, which would not have taken place or be likely to take place in the absence of the venture. An agreement must govern the continuing relationship between all parties and provide for the termination of the venture once the project has been completed. There can be no change in control over any party. Finally, section 95 can only exempt merger review; therefore, a joint venture could still be subject to review under other provisions of the Act.

Criminal Conspiracy Provisions

As mentioned above, the criminal conspiracy provisions of the Act are now reserved for the most egregious forms of cartel agreements, agreements to fix prices, allocate markets or restrict output that constitute “naked restraints” on competition. Naked restraints on competition are described in the Guidelines as being restraints that are not implemented in furtherance of a legitimate collaboration, strategic alliance or joint venture. These forms of conduct described in section 45(1) are treated on a per se basis and are subject to significant criminal sanctions.

The Guidelines state that once the Bureau has determined that an agreement does not constitute a merger and as a result, should be assessed under either section 45 or 90.1, the Bureau will then determine whether the criminal provision in section 45 or the civil agreements provision in section 90.1 is applicable to the agreement.

If a joint venture is used as a vehicle for price fixing, market allocation or output restriction, it will violate section 45 and the parties will be subject to criminal prosecution and penalties and civil actions for damages. However, if a legitimate joint venture contains that type of restriction, the parties may be able to avail themselves of the ancillary restraints defense contained in section 45(4) of the Act. For the purpose of subsection 45(4), an ancillary restraint is an agreement or term of an agreement that contravenes the prohibitions in subsection 45(1), but which is directly related to, and reasonably necessary for giving effect to, a broader and lawful agreement. The Bureau explicitly states in the Guidelines that it will typically analyze anticompetitive provisions in joint venture agreements under section 90.1 of the Act rather than treating them as criminal per se under section 45. Thus, even though section 45(1) prima facie criminalizes all of these types of agreements, the Bureau will not typically prosecute them as criminal offences. The Bureau recognizes that some desirable business transactions and collaborations require explicit restraints to make them efficient or even possible. For example, parties may be unwilling to participate in the joint development of a product where one party is able to independently compete with the joint venture.

The Ontario Superior Court recently considered the new framework and section 45 in the context of a civil class action by franchisees against the Tim Hortons franchise. The plaintiff franchisees claimed that a joint venture agreement between the franchisor and a third-party to supply baked goods to the franchisees at certain prices violated section 45. They claimed damages pursuant to section 36 of the Act, which permits private actions to recover damages caused by violations of Part V of the Act, including section 45. The Court summarily dismissed the plaintiffs’ claims. As an aside, in analyzing the issue the Court
had regard to the Guidelines, demonstrating their influence with courts. The Court held that the ancillary defense provision in section 45(4) exempted the joint venture agreement from the criminal prohibition in section 45(1). The Court’s reasons were categorical and should provide additional comfort to those concerned that section 45 applies to many joint venture agreements: “section 45(4) confirms that the agreement of two parties to form a joint venture to produce a product and to sell that product at a particular price is not a prohibited price-fixing agreement. If that was the case, any price fixed by the agreement, no matter what the amount, would contravene the section—a manifest absurdity.”

Nevertheless, some types of joint ventures carry a higher degree of competition risk and there is no guarantee that competitor collaborations will be free from scrutiny under section 45. For example, certain joint selling arrangements that are, in substance, essentially agreements between competitors to fix prices will be assessed by the Bureau under section 45. The Commissioner ultimately reserves the right to pursue a case under section 45 and refer evidence to the Director of Public Prosecutions with a recommendation that criminal charges be brought.

Agreements or Arrangements that Prevent or Lessen Competition Substantially

The real benefit of section 90.1 is that it provides an alternative to section 45 and its severe criminal penalties and exposure to civil actions for damages, in cases where the joint venture cannot be properly characterized as a merger but is nevertheless a legitimate competitor collaboration. As a result, the introduction of section 90.1 has allowed a more appropriate framework for joint venture review and should go a long way to reduce the “chilling effect” that the risk of criminal collusion had on businesses engaging in potentially beneficial alliances.

The civil review mechanism for joint venture agreements or other forms of strategic alliances is effectively akin to a merger review. Section 90.1 applies to any agreement between competitors and much like a merger, the Competition Tribunal may only order a remedy if it finds that the agreement prevents or lessens, or is likely to prevent or lessen, competition in a market substantially. A contravention of section 90.1 does not give rise to civil actions for damages. The Commissioner will generally not challenge an agreement under section 90.1 on the basis of a concern related to the exercise of market power by the parties to the agreement where the market share held by the parties is less than the safe harbour thresholds applied in a merger analysis. Section 90.1(2) also contains a non-exhaustive list of factors that the Tribunal may have regard to in its analysis, as in the merger review context. Moreover, section 90.1(4) requires the Tribunal to consider efficiencies resulting from the agreement.

Although it has yet to be tested, on its face, section 90.1 appears to provide a more flexible and contextual framework for analysis of non-hard core agreements than did the old section 45 and implicitly recognizes that many agreements between competitors are economically beneficial.

The Guidelines are also instructive in that they identify a number of different types of competitor collaboration agreements, their respective benefits, and potential for anticompetitive effects. Through the Guidelines, the Bureau has identified a number of factors that it will consider when assessing various types of collaboration agreements, which include: research and development agreements, production agreements, and commercialization and joint selling agreements. The Guidelines are very useful in that they provide examples of the Bureau’s approach to each type of joint venture agreement and identify the competition law risks associated with each.
Given that section 90.1 is relatively new, there is a dearth of case law dealing with the provision. In June of 2011, however, the Bureau filed an application with the Competition Tribunal to block a proposed joint venture between Air Canada and United Continental Holdings Inc. The two airlines proposed to create a joint venture whereby they would coordinate their respective operations, including jointly set prices, capacity and schedules on certain transborder routes. The Bureau challenged the proposed joint venture under section 92 of the Act, on the basis that it was effectively a merger between the parties’ Canadian and U.S. operations. In addition, the Bureau sought to undo certain provisions within three existing “coordination agreements” between the airlines to coordinate key aspects of competition, including joint prices, scheduling and revenue, under section 90.1. The Tribunal did not get the opportunity to assess the transaction under section 90.1, as the parties eventually reached a consent agreement with the Bureau, agreeing not to implement their joint venture or to coordinate via existing “coordination agreements” on 14 air passenger routes between Canada and the U.S. Either way, this case is encouraging in that it shows the Bureau’s willingness to use the new civil provision for legitimate competitor collaborations that nevertheless raise competition issues.

Investment Canada Act

International joint ventures may also be subject to review under the Investment Canada Act (the “ICA”). The ICA is Canada’s statute of general application governing the acquisition of control of Canadian businesses by non-Canadians. The Canadian government adopted a new policy at the end of 2012 relating to acquisitions by state-owned enterprise (“SOE”) investors, and has since passed amendments to the ICA implementing the new policy. The new policy and subsequent amendments confirm that SOE acquisitions will be subject to additional scrutiny by the government (particularly acquisitions in the oil sands) and set out various factors that the government will consider in the review of SOE investments, including an analysis of “the degree of control or influence an SOE would likely exert on the Canadian business that is being acquired; the degree of control or influence an SOE would likely exert on the industry in which the Canadian business operates; and, the extent to which a foreign state is likely to exercise control or influence over the SOE acquiring the Canadian business.”

It is unclear whether the new policy and amendments will affect the number of joint ventures in Canada going forward, particularly in the oil and gas sector. Prior to the amendments, certain joint venture structures allowed foreign investors, including SOEs, to invest in Canada without triggering a review under the ICA. Indeed, prior to the new policy, joint ventures had become popular vehicles for new investment in the Canadian oil and gas sector. Significantly, the amendments introduce new deeming powers for the Minister of Industry, which could have a chilling effect on joint ventures involving SOEs. The Minister will be given the ability to impose ICA reviews on acquisitions of control of Canadian businesses by entities that would otherwise qualify as “Canadian” under the ICA if the Minister is satisfied that the entity is controlled in fact by a SOE. Similarly, the Minister will now be able to deem direct acquisitions of certain minority interests in Canadian businesses by SOEs to be acquisitions of control. These types of transactions would not previously have been subject to a review under the ICA.

It should be remembered that joint ventures in sensitive sectors, and potentially even those in strategic sectors like the oil and gas sector, may give rise to national security reviews even in cases where the joint venture would not otherwise be reviewable under the ICA.
Conclusion

Canada has historically had difficulty fitting joint venture agreements and other strategic alliances neatly into an appropriate framework for antitrust review. Critics of the previous legal framework for the review of joint ventures under the Act would argue that the rigid approach discouraged businesses from entering into potentially pro-competitive alliances because of the risk of exposure to criminal enforcement and civil actions for damages. The introduction of section 90.1 has allowed for a more appropriate and flexible framework for joint venture review. This framework provides the Bureau with more flexibility in how it approaches joint venture agreements and it will be interesting to see the effect it has on joint venture agreements in Canada going forward, especially once market participants have had a chance to become familiar with the Bureau’s approach to enforcement.

1. R.S.C. 1985, c. C-34 [Competition Act].
3. Competition Act, supra note 1, at s. 91.
4. Relevant factors in assessing the competitive effects of a merger include the degree of concentration in the market, the extent to which effective competition would remain in the market after the merger, the likelihood that the merger will remove a vigorous and effective competitor, barriers to entry, the availability of substitute products, the extent of foreign competition, the nature and extent of change and innovation in the market and whether the business of a party to the merger is likely to fail. The Bureau will also determine whether efficiency gains that are likely to be brought about by the merger will be greater than and will offset any anticompetitive effects arising from the merger.
5. Guidelines, supra note 2, at § 1.1.
6. Guidelines, supra note 2, at § 1.3.
7. Guidelines, supra note 2, at § 2.5.
9. Fairview, supra note 8 at para 631
10. Fairview, supra note 8 at para 632-3.
11. Fairview, supra note 8 at para 633.
12. Guidelines, supra note 2, at § 2.4.1.
13. For example, where the parties’ share represents less than 35 percent of the relevant market or, on the basis of a coordinated exercise of market power by firms in the relevant market, where the share of the four largest firms in the relevant market is less than 65 percent or the share of the parties to the agreement is less than 10 percent.
14. See section 93 for the factors considered in the merger review context. Section 93 and 90.1(2) are nearly identical except that section 93 also includes the “failing firm” defense which permits the Tribunal to consider “whether the business, or a part of the business, of a party to the merger or proposed merger has failed or is likely to fail”.
15. See Guidelines, supra note 2, at § 3.6-3.11.
16. R.S.C. 1985 [1st Supp.], c. 28 [ICA]. The term “joint venture” is actually defined in the ICA at section 3, it means: “an association of two or more persons or entities, where the relationship among those associated persons or entities does not, under the laws in force in Canada, constitute a corporation, a partnership or a trust and where, in the case of an investment to which this Act applies, all the undivided ownership interests in the assets of the Canadian business or in the voting interests of the entity that is the subject of the investment are or will be owned by all the persons or entities that are so associated.”
18. SOE Statement, supra note 17.
19. So long as the investment is over the new SOE review threshold of $344 million (for 2013).
20. The Canadian legislature amended the ICA in 2009 and introduced a new national security review mechanism that allows the Canadian government to review, prohibit, or impose conditions on direct or indirect investments by non-Canadians that would not otherwise be reviewable under the ICA on the basis of national security concerns.
Is Failure to Meet the “Safety Zone” for Information Exchanges Among Competitors a Harbinger of Danger?

Lee Istrail
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For much of the past two decades, companies in both the health and non-health sectors alike have relied on policy guidance issued by the federal antitrust enforcement agencies establishing a safety zone from FTC or DOJ challenge for certain information exchanges. A recent decision by a federal court in Michigan\(^1\) and recent FTC enforcement proceedings\(^2\) have suggested that failure to satisfy the elements of the requisite safety zone may increase the risk of an antitrust challenge. Do these developments signal a shift in enforcement policy, such that structuring information exchanges to strictly fall within the applicable safety zone is the only way to secure peace of mind regarding the exchange of data? Or are there still other ways to structure information exchanges so as to minimize antitrust liability? This article will provide a brief overview of the agencies’ guidance regarding antitrust safety zones for information exchange, followed by a discussion of the application of the safety zone criteria in business reviews, enforcement proceedings and litigation, before addressing the potential implications of two recent developments in this area.

Background on Antitrust Safety Zone for Information Exchanges

In August 1996, the FTC and DOJ jointly issued their Statements of Antitrust Enforcement Policy in Health Care (the “1996 Health Care Statements”) to provide contemporaneous guidance concerning their enforcement policies regarding various types of arrangements between health care providers. One of the Statements pertains to “Provider Participation In Exchanges Of Price And Cost Information” and includes a section entitled, “Antitrust Safety Zone: Exchanges Of Price And Cost Information Among Providers That Will Not Be Challenged, Absent Extraordinary Circumstances, By The Agencies” (hereinafter “Safety Zone”).\(^3\) In it, the agencies announced that ordinarily, the FTC and DOJ will refrain from challenging an information exchange that meets the following criteria:

1. the exchange is managed by a third party;
2. the information provided by participants is based on data that is more than three months old;
3. there are at least five contributors of data for each disseminated statistic;
4. no individual participant’s data represents more than 25 percent of any particular statistic; and
5. disseminated information is sufficiently aggregated such that participants are unable to identify the data of any other participants.\(^4\)

The 1996 Health Care Statements also noted, “Exchanges of price and cost information that fall outside the antitrust safety zone generally will be evaluated to determine whether the information exchange may have an anticompetitive effect that outweighs any procompetitive justification for the exchange.”\(^5\) Shortly after the 1996 Health Care Statements were issued, the Assistant
Director of the FTC’s Bureau of Competition further explained the purpose of the Safety Zone criteria, noting that “we have tried to make even clearer what we have said all along—that the safety zones do not define the full range of legal conduct—and to encourage providers to focus on developing innovative ways to serve consumers better, rather than on fitting into a safety zone.” Thus, the agencies took the view that transactions that did not meet the Safety Zone criteria nevertheless could be lawful and would be subject to a rule of reason evaluation.

Application of the Safety Zone Criteria

While the Safety Zone is explicitly applicable to transactions between health care providers, “[the 1996 Health Care Statements’] analytical principles have wider relevance” and accordingly, the Safety Zone has been applied to other industries besides health care. Moreover, the guidance that the agencies have furnished reflected the observation in the 1996 Health Care Statements that conduct could pass antitrust scrutiny even though it failed to meet all of the Safety Zone elements. For example, in 2012 the FTC blessed an information exchange proposed by the Independent Connecticut Petroleum Association even though the data being collected was not more than three months old. The FTC noted, “the proposed plan does not meet the guidelines’ safe-harbor test of using information more than three months old. However, the guidelines recognize that conduct falling outside the safety zone nevertheless may be unlikely to harm competition, and should be assessed on a case by case basis. The quantity-sold data to be exchanged under the ICPA program is, in the context of this industry, unlikely to be competitively sensitive. Accordingly, its exchange among competitors is unlikely to facilitate anticompetitive outcomes.” Thus, divergence from one of the criteria was not dispositive. Rather, the FTC conducted a rule of reason analysis, concluding that on balance the data in question was unlikely to be a tool that would be used to harm competition.

On the other hand, in at least one instance, the FTC has issued a consent order opining that the party being investigated had failed to meet at least two elements of a functionally identical safety zone spelled out in the 1996 Healthcare Statements, and that this (along with other alleged conduct) was anticompetitive. In its enforcement action against the Wisconsin Chiropractors Association (“WCA”), the FTC alleged that the WCA provided fee surveys to members that included current charge data for particular chiropractic treatments, and that some of this data was less than one month old. In addition, the FTC claimed, “at times, these fee surveys reflected insufficiently aggregated data, thus effectively identifying current prices by individual chiropractic offices.” The FTC noted that the requirements of its cease and desist order concerning the collection and distribution of fee surveys “are identical to the requirements found in the safe harbor provisions of the Statements of Antitrust Enforcement Policy in Health Care, Statement 5 on Providers’ Collective Provision of Fee-Related Information to Purchasers of Health Care Services...” Thus, the FTC ordered WCA to adhere to Statement 5’s safety zone requirements going forward. Of course, this provision can be seen as a “fencing in” requirement that is part of a remedial order against an entity that has allegedly violated the antitrust laws, and not a minimum requirement that is generally applicable.

The DOJ also has brought enforcement actions against competitors engaging in information exchanges, at least some of which were resolved by consent orders allowing for activities that fell within the Safety Zone.

Information exchanges have also served as the basis for Sherman 1 antitrust claims in federal courts. In the absence of price fixing evidence, agreements to share information are evaluated pursuant to the rule of reason. Courts have held that market concentration tends to amplify the anticompetitive effects of exchanges and courts have found that exchanges can cause an
actual adverse effect on competition. By contrast, where customers in an industry need to know future prices in advance in order to bid on contracts, exchanges of price information have been upheld.

Recent Developments

More recently, conduct falling outside the Safety Zone has become the predicate for a major, ongoing FTC enforcement action and for a significant federal district court opinion. These cases suggest that the conduct falling outside the safety zone will be subject to antitrust scrutiny and serve as a reminder of the importance of carefully vetting proposed information exchanges with counsel.

In January 2012, the FTC brought an enforcement action against three sellers of ductile iron pipe fittings ("DIPF") pursuant to FTC Act Section 5, claiming that the sellers provided data to an aggregator, the data was generally no older than 45 days, and when the data was re-distributed to the competitors, it was generally not more than two months old. Therefore, the FTC alleged that the parties’ conduct did not fall within the parameters of the Safety Zone for numerous reasons: the data collected was not more than three months old, the exchange had fewer than five participants, and the structure of the market made it probable that an individual participant’s data accounted for more than 25 percent of an individual statistic. The FTC reached consent orders with two of the defendants, Sigma Corp and Star Pipe Products, in early 2012. The Sigma and Star Pipe orders were broader than the Safety Zone in several respects:

- The orders required that data collected must be at least six months old, not merely three months old as required by the Safety Zone.
- The orders required that no individual participant’s data represents more than 25 percent of total reported sales, as required by the Safety Zone, but also that the sum of any three participants’ data represented no more than 60 percent of total reported sales.
- The orders required that information be exchanged no more than once every six months.
- The orders required that at the same time statistics are distributed to any participant, those statistics would have to be made available to the public.

Even though the information exchange was managed by a third party, the FTC opined that this was insufficient in this case, and provided the following guidance regarding the lesson of the consent orders: “While failing to qualify for the safety zone of the Health Care Guidelines is not in itself a violation of Section 5, firms that wish to minimize the risk of antitrust scrutiny should consider structuring their collaborations in accordance with the criteria of the safety zone.”

While Sigma Corp. and Star Pipe settled, the third defendant, McWane Inc., litigated the FTC’s action. On May 9, 2013, an FTC Administrative Law Judge ("ALJ") issued an Initial Decision holding that FTC had failed to present evidence to support the allegation that McWane had engaged in an anticompetitive information exchange with its competitors. The ALJ held that the transaction in question is to be evaluated under the rule of reason. The ALJ held that the FTC established that the market in question was concentrated, but failed to prove that this concentration, in conjunction with the information exchange, had created an environment likely to facilitate collusive pricing. The ALJ emphasized that the FTC merely alleged the exchange of
data concerning past sales transactions; there was no claim that data was exchanged regarding current or future transactions.\(^{28}\)

Concerning the specificity of the data, the ALJ held that the data did not include or reveal sales prices, and was insufficient to allow any defendant to determine any other defendant’s market share in the industry.\(^{29}\)

Overall, the ALJ held that the evidence showed that the information exchanged was far less specific than the information at issue in cases such as Todd v. Exxon and Cason-Merenda, discussed below, and hence it was unlikely to facilitate anticompetitive conduct.\(^{30}\)

Finally, the ALJ noted that the evidence demonstrated that the exchanges had cognizable procompetitive effects: “[T]here is logical and credible evidence of procompetitive effects. As noted above, McWane used the...data to implement lower published prices in relation to its competitors...The evidence also shows that the...data identifies the extent to which various segments of the market are moving, including over time, which thereby helps each...member to assess overall market trends, and better manage production schedules and inventory.”\(^{31}\)

The ALJ’s decision is subject to appeal to the full Commission, and it remains to be seen whether the decision will stand. The ALJ’s conclusion in McWane, however, can be contrasted with the district court’s 2012 denial of summary judgment in Cason-Merenda v. Detroit Medical Center,\(^{32}\) in which a class of registered nurses (“RNs”) alleged that eight Detroit-area hospitals conspired to suppress the wages of RNs employed by the hospitals, and exchanged compensation-related information among themselves and thereby reduced the wages of RNs by reducing competition for their services. Among the alleged mechanisms of coordination, the plaintiffs claimed that the Defendant hospitals sponsored third-party surveys of RN compensation.\(^{33}\)

The defendants contended that the conduct at issue conformed to the Safety Zone and was therefore immune from antitrust liability.\(^{34}\)

The plaintiffs introduced evidence that for a three-year period, statistics were disseminated regarding the RN wages paid by specific participating hospitals on specific dates,\(^{35}\) and that, in other instances, the results were reported in a disaggregated fashion such that the defendant hospitals could deduce which hospital had reported which data.\(^{36}\)

The court noted that “In addition, the results reported... sometimes ran counter to the recommendation in the DOJ/FTC Guidelines that participant data should be more than three months old.”\(^{37}\)

The court further observed that “even to the extent that the [defendants] utilized third-party surveys rather than direct contacts to obtain market wage data—thereby employing a practice that was at least potentially more compliant with the DOJ/FTC Guidelines and less suggestive of collusive action—Plaintiffs properly point to the ‘pretextual’ nature of at least some of these surveys,”\(^{38}\) such as having a former employee of one of the defendants purport to be an independent third party.

In holding that the plaintiffs survived summary judgment on their Sherman Act Section 1 claim on a rule of reason theory, the court accorded substantial weight to the Safety Zone. For instance, the court held that it was:

…satisfied that the record here gives rise to issues of fact as to causation that a trier of fact should be permitted to resolve. In particular, Plaintiffs have produced evidence suggesting that wage-related data exchanged among the Defendant hospitals—data which, as discussed, was sometimes shared through direct contacts or through surveys that did not satisfy the DOJ/FTC ‘safety zone’ criteria—was actually relied upon and brought to bear in Defendants’ decisions to reduce elements of their RN compensation packages below the levels that were contemplated before this data became available.\(^{39}\)
The court also noted that generally, “the courts view certain types of information exchanges as triggering concerns of anticompetitive effects, and the DOJ/FTC Guidelines likewise speak to these concerns. The record in this case features ample evidence of exchanges of wage data that implicate these concerns and exceed the Guidelines’ ‘safety zone.’”40 The court concluded that any “pro-competitive objectives identified by the Defendant hospitals...could just as well have been achieved through exchanges that fell comfortably within the ‘safety zone’ identified in the DOJ/FTC Guidelines... . Defendants are notably silent as to how it was necessary to their independent competitive interests to proceed in this fashion, rather than confining their exchanges to the ‘safety zone.’”41 Of course, Cason-Merenda only denied summary judgment for the defendants, and did not decide whether the information exchange was unlawful; nevertheless, it is a powerful example of how a court may rely on the Safety Zone in assessing whether or not conduct requires a closer examination to determine legality.

Conclusion

The Cason-Merenda decision and the FTC’s enforcement action against DIPF sellers illustrate the perils of diverging from the Safety Zone. Competitors conducting an information exchange should consider adhering to the Safety Zone, and should prepare and document any applicable justifications establishing why divergence from the Safety Zone elements is critical to achieving the beneficial pro-competitive ends of the information exchange.

3. 1996 Health Care Statements at Statement 6A.
4. 1996 Health Care Statements at Statement 6A.
5. 1996 Health Care Statements at Statement 6B.
13. Id. Statement 5 pertains to “Providers’ Collective Provision Of Fee-Related Information To Purchasers Of Health Care Services” and contains a section entitled, “Antitrust Safety Zone: Providers’ Collective Provision Of Fee-Related Information That Will Not Be Challenged, Absent Extraordinary Circumstances, By The Agencies.” Statement 5A states that this safety zone employs the same criteria as Statement 6A’s Safety Zone on information exchanges.
16. See, e.g., United States v. United States Gypsum Co., 438 U.S. 422, 443 n16 (“The exchange of price data and other information among competitors does not invariably have anticompetitive effects; indeed such practices can in certain circumstances increase economic efficiency and render markets more, rather than less, competitive”) (1978); United States v. Citizens & S. Nat’l Bank, 422 U.S. 86, 113 (1975).
21. Id.
25. Initial Decision In the Matter of McWane, Inc. and Star Pipe Products, Ltd., Docket No. 9351, May 9, 2013 (D. Michael Chappell, Chief Administrative Law Judge), available at http://www.ftc.gov/os/adjpro/d9351/130509mcwanechappelldoc.pdf. McWane, Inc., was found liable on four of the counts that are not pertinent to this article. The Initial Decision holds that Complaint Counsel succeeded in proving “that respondent engaged in monopolistic practices, attempted to monopolize, engaged in a conspiracy to monopolize, and engaged in an unreasonable restraint of trade with Sigma in the Domestic Fittings market.” Initial Decision at p. 447.
26. Id. at 354, citing Todd v. Exxon Corp., 275 F.3d 191 (2d Cir. 2001)
27. Id. at 355-62.
28. Id. at 357.
29. Id. at 358-59.
30. Id. at 360-61.
31. Id. at 362 n34.
33. Id. at 606.
34. Id. at 612.
35. Id. at 612-13.
36. Id. at 613.
37. Id. at 614.
38. Id. at 613.
39. Id. at 645.
40. Id. at 647.
41. Id. at 630.
42.

In Case You Missed It... MFNs and RPMs: The Antitrust Spotlight is on Price Relationship Agreements
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On March 19, 2013, the Joint Conduct and International Committees of the American Bar Association Section of Antitrust Law co-sponsored a program entitled “MFNs and RPMs: The Antitrust Spotlight is on Price Relationship Agreements.” The program was moderated by Ingrid Vandenborre (Skadden, Arps, Slate, Meagher & Flom LLP), and featured panelists David Parker (Frontier Economics), Fiona Scott-Morton (CRA), Nelson Jung (Office of Fair Trading) and Thomas McGrath (Linklaters). Highlights from the panel discussion are summarized below.
Background

Several high profile investigations and cases recently in the United States and Europe have focused on antitrust issues in connection with most-favored nation ("MFN") and other types of price parity clauses. Government enforcers and private civil plaintiffs have challenged MFNs in the eBooks, health insurance and hotel booking industries, alleging that they result in anticompetitive effects.

Highlights

Mr. McGrath provided background on some of the major enforcement actions involving MFNs in the United States. In the 1980s, the FTC unsuccessfully challenged MFNs contained in fuel additive producers’ contracts, arguing that they tended to dampen competition and facilitated conscious parallelism.1 Since then, most of the successful challenges to MFNs have focused on their alleged exclusionary effects.

In 1996, the DOJ challenged MFNs in agreements between Delta Dental of Rhode Island ("Delta Dental") and dental service providers in Rhode Island, in what was one of the most significant MFN cases.2 The DOJ argued that Delta Dental’s MFNs raised rivals’ costs and created a disincentive for dentists to participate in lower cost dental plans offered by Delta Dental’s competitors, in violation of Sherman Act Section 1. Notably, the district court observed that there was no evidence that Delta Dental used the MFN to reduce costs.3

A few years later, the DOJ investigated Orbitz, a joint venture between several major airlines. An Orbitz MFN required airlines to make any fare available on the internet also available to Orbitz. The DOJ was concerned that the MFN would facilitate price coordination. The DOJ ultimately closed its investigation after several years of observing declining prices and successful competition from major airlines and low cost airlines that were not members of Orbitz.4

Mr. McGrath also noted that in a couple of older cases, courts had come close to holding that MFNs were presumptively procompetitive.5

Mr. McGrath then discussed the DOJ’s recent enforcement actions against Blue Cross and Apple. Blue Cross is the leading health insurer in Michigan, covering approximately 60 percent of insureds there. It has contracts with 70 out of 130 hospital providers in Michigan, which encompasses approximately 40 percent of the available hospital beds in the state. Blue Cross’s contracts with hospital providers included two types of MFN provisions: (1) 40 community hospitals were required to charge other insurance providers at least as much as they were charging Blue Cross; (2) 22 other hospitals, covering 45 percent of the acute care hospitals in Michigan, were required to charge some or all insurance providers more than what they were charging Blue Cross (up to 40 percent more in some cases) under “MFN-plus” provisions. The contracts also contained a limited carve out for insurers with 1 percent market share in Michigan. The DOJ challenged the MFNs, arguing that the MFNs raised rivals’ costs, raised barriers to entry, disincentivized growth and expansion, and resulted in higher prices for consumers. The district court denied Blue Cross’s motion to dismiss, holding that the DOJ’s allegations plausibly established potential anticompetitive effects in a relevant market in violation of the Sherman Act.6 The court also noted that the MFN-plus contracts increased premiums charged to residents and deterred new entrants to the market.

Mr. McGrath identified a couple of interesting facts about the Blue Cross MFNs that may become significant as the private civil cases proceed.7 Blue Cross obtained the MFN provisions in exchange for increases in the prices it paid to hospitals, so the
agreements and price increases may have resulted from competitive negotiations. In addition, the carve-out for new entrants with 1 percent market share may have been sufficient to permit new entry into the market. On the other hand, the 1 percent carve-out could also be viewed as a mechanism to prevent new entrants from gaining scale. These and other factors will be addressed as the cases proceed.

Mr. McGrath also discussed the DOJ’s eBooks case. DOJ has alleged that Apple and the five largest publishers of eBooks conspired to fix prices for newly released, best-selling eBooks. Amazon, maker of the Kindle e-reader and tablet, had been purchasing eBooks from publishers at wholesale prices set by the publishers and then reselling those books at retail prices set by Amazon. Amazon typically resold eBooks at $9.99, a significant discount to hard copy book prices. Apple allegedly entered into separate vertical agreements with each of the major publishers to sell eBooks using an “agency” model instead of the “wholesale” model. Under the agency model, publishers could sell their eBooks directly to consumers through Apple’s iBooks, and Apple would earn a commission of 30 percent on each sale. This allowed publishers to set the retail price for eBooks and allegedly solve the “$9.99” problem they faced under the wholesale model with Amazon. Each agreement included a MFN clause providing that the price of an eBook sold through iBooks could not be higher than the retail price of that eBook sold anywhere else. The DOJ alleged that the MFN was designed to incentivize the publishers to negotiate an agency model with all eBook sellers, including Amazon, and thereby remove all price competition at the retail level, permitting publishers to charge higher retail prices, and protecting Apple’s 30 percent commission. Mr. McGrath noted that one of the key issues going forward in the case will be whether the MFN was a legitimate way to assist Apple, a new entrant to the market. On the one hand, the MFN protected Apple, the new entrant, from the incumbent, Amazon, but on the other hand, it significantly reduced retail competition from Amazon.

Ms. Scott-Morton discussed some of the different forms that MFNs can take. She noted that MFNs are not always expressly labeled as MFNs even though they act like MFNs. A pending DOJ action against American Express challenges non-discrimination provisions in American Express’s contracts with merchants that bar merchants from offering different prices or terms to customers who make purchases using non-American Express credit or charge cards. This restricts competition at the retail level in the credit card market. In private civil cases involving airline distribution, plaintiffs have alleged that Sabre’s agreements with airlines require the airlines to charge the same prices for tickets regardless of what distribution channel the airlines use. These provisions also create market symmetry just like other MFNs.

Mr. Jung emphasized the distinction between wholesale and retail MFNs. Retail MFNs, such as the alleged MFNs in Apple’s agreements with publishers, reduce retail price competition, but wholesale MFNs can preserve retail price competition. Mr. Jung also discussed some recent developments in Europe. He noted that in the EU eBooks investigation, Apple committed not to impose any retail price MFNs for five years, and to stay the implementation of any existing retail price MFNs for two years. According to Mr. Jung, German competition authorities may be investigating a price parity obligation imposed by Amazon that allegedly prevents new online platforms from entering the market and competing with Amazon through lower prices. German competition authorities are also investigating “best price” clauses in the online hotel booking market, and the president of Germany’s competition authority recently described those clauses as vertical price-fixing. In the UK, Mr. Jung stated that the UK Competition Commission was taking a look at the effect of MFNs on websites that compare private motor insurance prices, although a competition investigation had not been opened. Those MFN clauses provide that an insurer’s price listed on one website must be the same as the prices listed on all websites.
Ms. Scott-Morton identified three potential anticompetitive effects associated with MFNs:

1. **Reduced price competition.** On their face, MFNs may look like they deliver low prices by expressly guaranteeing that a covered buyer will receive the best price. But when there are many covered buyers, MFNs actually create a strong incentive to eliminate discounts, because a discount offered to one customer must be offered to all covered buyers, significantly increasing the cost of discounts. The result is that everyone receives the lowest price, but the lowest price is higher than it otherwise would have been without the MFN. This can lead to reduced output and eliminate output increasing price discrimination.

2. **Foreclosure.** MFNs can make it more difficult for new firms to enter a market and provide a new product. If a new entrant’s discount must be provided to incumbents, this creates a significant financial penalty to doing business with the new entrant. The *Delta Dental* and *Blue Cross* cases provide examples of this alleged harm.

3. **Collusion.** MFNs can facilitate collusion by making it easier to monitor price changes in the market. MFNs lead to more uniform and more public prices and make it harder for conspirators to cheat or offer secret discounts.

Mr. Parker identified some of the potential procompetitive effects of MFNs:

1. **Reduced incentive problems.** MFNs can reduce free-riding and encourage investment. For instance, a buyer could safely invest in a factory for a supplier if a MFN prevents the buyer’s competitors from free-riding on lower priced products made at the new factory.

2. **Reduced information problems.** MFNs can encourage market participants to do business with new entrants or to buy or sell new products. Market participants may lack information about new entrants or new products and be unable to reliably assess risk or quality. This can cause market participants to wait and see how new entrants or new products fare in the marketplace before making any investments of their own. MFNs can alleviate problems associated with lack of information by promising to make adjustments for parties if circumstances change or do not turn out as predicted. For instance, a MFN could guarantee that if the price of a good falls below the purchase price, the seller will refund the difference. Such a provision is only expensive for a low-quality provider, and is therefore a signal of high quality.

3. **Protects quality or usefulness of the product.** MFNs can protect the quality or usefulness of the product itself. For instance, a producer may want to list its product on a particular website in order to obtain an endorsement that comes with selling on that website. But the producer may then sell its product elsewhere at a lower commission once it has received the endorsement of the first website. Such behavior reduces the usefulness of certain websites, such as price comparison websites that aim to provide the lowest prices. A MFN can prevent such conduct and prevent damage to quality of the product itself.

Mr. McGrath then discussed some of the ways clients may be able to reduce the risk that a MFN clause will run afoul of US antitrust laws. According to Mr. McGrath, the most important risk factor is the market power or market share of the parties involved. A smaller player in the market can legitimately use MFNs to grow and increase market share, but a larger player in the market faces more antitrust risk when it comes to MFNs. It also makes a difference whether the MFN guarantees equal treatment vis-à-vis competitors, or whether it is a MFN-plus that guarantees better treatment. The latter comes with increased risk. Efficiencies
and objectively measurable cost savings associated with MFNs can also help establish that the MFNs are reasonable. While it is important to understand the client’s motivation for wanting a MFN, it isn’t clear from the cases whether intent is a relevant factor in assessing antitrust liability.

The panelists also discussed differences between US and EU approaches to MFNs, and responded to some questions relating to MFNs in internet markets and pharmaceutical markets. Overall, the panel’s discussion illustrated just how fact-intensive antitrust analysis of MFNs can be. Companies need to carefully consider the characteristics of the markets in which they operate and the incentives and effects created by MFNs in those markets, particularly in the current environment.

A recording of the program is available to Section members at: http://www.americanbar.org/content/dam/aba/uncategorized/international_law/mfns_and_rpms_3_19.mp3

7. At the time of the panel discussion, the DOJ case had been stayed pending a Michigan State legislative initiative to ban MFNs in health insurance. Michigan passed this new law in March 2013 shortly after the panel discussion, and the law goes into effect in January 2014. In light of the new law, DOJ dropped its case against Blue Cross, but private civil cases are still pending.