



Trade and Professional Associations and the Potential Problem of “Overt” Cartels

by

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A central focus of this First BRIC International Competition Conference is the fight against hard-core cartels, which remains the central focus of competition law enforcement authorities worldwide. My remarks will deal with another, related topic. This is what I call “overt” cartels. An overt cartel is a professional or trade association with rules that fix prices, recommend prices, or set minimum or maximum price levels. Whereas hard-core cartels are often “covert” as they almost always involve competitors communicating in secret with an intent to fix prices or otherwise restrict competition, the evidence of an overt cartel is often available in the form of published or easily obtainable trade association rules. Overt cartels may also arise from ignorance of competition law rules, rather than from an intent to break them, and may also be the product of outdated economic regulation. Despite these differences, both overt and hard-core cartels harm consumer welfare. Thus, the elimination of overt cartels, in addition to the continuing fight against hard-core cartels, is of vital importance, perhaps especially so for BRIC countries.

I. The Application of Competition Law to Overt Cartels

Before proceeding further, it would be useful for me to explain the context in which I speak. As introduced I am the Executive Director of the Jersey Competition Regulatory Authority – or JCRA – which is the competition-law enforcement authority for the Island of Jersey in the Channel Islands located in between Great Britain and France. Unlike the BRIC countries my jurisdiction is very small, with a total population of only 91,000 and an annual GDP of approximately \$6.5 billion. You may therefore wonder what can the BRIC countries learn from such a small place? Well, despite its small size, Jersey has two features in common with the BRIC countries that are relevant to today’s discussion: (1) a traditionally highly regulated economy, and (2) a new competition law, which was first introduced at the end of 2005.

A. Conveyancing Fees

As Jersey’s competition law was coming into effect, one of the features of Jersey’s economy that we noticed was the presence of many long-standing restraints contained in the rules of trade associations. The JCRA therefore made the elimination of these rules one of its early enforcement priorities. One restraint affected the provision of conveyancing services – the title search and associated legal services involved in the

sale of real property. Specifically, the Law Society of Jersey had an ethical rule – first established in 1954 – that required all lawyers to charge a fee of no less than 1% of a transaction’s value for the provision of conveyancing services. This scale fee was incompatible with Jersey’s new competition law. We therefore urged the Law Society to voluntarily eliminate it, or face potential enforcement action. The Law Society agreed, and eliminated the fee at the end of 2005.¹

In 2008, the JCRA studied the effects arising from this action.² We found that as a result of the elimination of the scale fee, conveyancing fees in Jersey now vary substantially among different suppliers, and that consumers shop around. This has resulted in substantially reduced prices. Whereas under the old rule fees were set at 1% of the transaction’s value, today fees generally range from 0.75% to as low as 0.2%. Taking a conservative estimate of price reductions, the study calculates that, overall, consumers in Jersey have saved approximately £2 million per year (or roughly \$3.3 million).

The JCRA’s findings are consistent with a study produced for the European Commission on conveyancing services within the EC Member States.³ This study found that consumers have greater choice and are on average paying less for conveyancing services under deregulated systems, with no loss in service quality. It also concluded that arguments usually used to support the existence of fixed or recommended fees for conveyancing services either are not supported by the available evidence, or can be achieved through less restrictive means on competition. The study cited reforms to the notary profession in the Netherlands, which included the elimination of a fixed fee for conveyancing services. These reforms led to a drop of over 37% in the total fees paid by consumers in the Netherlands, which equates to an annual welfare gain of almost €348 million (or almost \$500 million).

B. Other Professions

The results of both the JCRA and EC’s studies are thus consistent -- the elimination of fixed fees for conveyancing services resulted in lower prices and an increase in consumer choice.

¹ See JCRA Media Release, *JCRA Welcomes Lawyers’ Steps to Eliminate Scale Conveyancing Fee* (8 Dec. 2005).

² See JCRA, *Impacts of Competition Policy in the Bailiwick of Jersey* (22 Sept. 2008).

³ See Centre of European Law and Politics (ZERP), University of Bremen, *Study COMP/2006/D3/003 Conveyancing Services Market* (Dec. 2007).

Conveyancing, however, is only one example of competition law forcing the elimination of a trade association fixed or recommended fee in Jersey. In addition, our actions have directly led to the removal of such fees among dentists, driving instructors, taxi-cabs, building contractors, plumbers and electricians.⁴ The JCRA's achievements in Jersey reflect broader efforts elsewhere. The liberalisation of professional services has been a major focus of the European Commission, and this has led to the elimination of fixed or recommended fees in many different professions in countries across Europe.⁵ This has been a recent focus of the EFTA Surveillance Authority and the OECD Competition Committee.⁶

II. Enforcement Considerations

Despite the demonstrated importance of targeting overt cartels, I would suggest that an “all guns blazing” enforcement approach may not necessarily be appropriate. The JCRA's substantial successes in this area were not the result of formal decisions and fines, but through encouraging the professional associations themselves to take voluntary action. The European Commission also has encouraged voluntary compliance in this area, as have various national competition authorities.

Facilitating voluntary compliance can take several forms, depending on the circumstances. It can be through direct, bilateral communications with the associations, participation in trade seminars and conferences, or undertaking sector studies and reviews. For restrictive trade association rules that may be facilitated or mandated by Government regulations, efforts should be directed at competition law advocacy with relevant decision-makers on a national, regional, or even local level. Finally, a simple stock-taking exercise – collecting and assessing the rules from various trade associations in a country – can itself be informative.

I stress that encouraging voluntary compliance does not mean taking a “soft” approach to overt cartels. This is because, to be credible, efforts to encourage voluntary compliance must be backed-up by an expressed willingness to pursue more

⁴ Additional information about each of these matters may be found on www.jcra.je.

⁵ See Communication from the Commission, Report on Competition in Professional Services, COM(2004) 83 (9 Feb. 2004); and Commission Staff Working Document, Progress by Member States in reviewing and eliminating restrictions to Competition in the area of Professional Services, COM(2005) 405 (5 Sept. 2005).

⁶ See EFTA Surveillance Authority, *Report on Regulation of Professional Services in the EFTA States*, Case No. 47716, Event No. 307279 (15 July 2005); OECD Competition Law & Policy Division, *Policy Roundtable Trade Associations* (2007).

formal enforcement action. So, in the United Kingdom, for example, the Office of Fair Trading identified restrictions to competition in the legal, accountancy, and architectural professions, and gave the relevant associations a twelve-month window to voluntarily remove or justify the rules in question, or face enforcement action under the competition law.⁷

III. Other Potential Restrictions from Overt Cartels

Now, I need to offer an admission. By focussing on trade association rules that fix or recommend prices, admittedly I have taken the easy task. Trade association rules on pricing can almost never be justified. Beyond direct pricing measures, however, there are a wide variety of other trade association rules that may or may not affect competition. Through my remarks today, I am not saying that trade associations are inherently anticompetitive, nor am I advocating for the complete deregulation of professional services. To analyse trade association rules the European Commission suggests a proportionality test that examines if the rule in question truly serves a clearly defined public interest and is no more restrictive than necessary to achieve its desired objective.

IV. Considerations with Overt Cartels in BRIC Countries

I conclude my remarks today by suggesting that the application of competition law to overt cartels may be particularly important to BRIC countries. The BRIC countries are some of the world's most dynamic and fastest growing economies. They also share strong legacies of Government economic intervention and regulation.

As the economies of the BRIC countries continue to expand, international experience suggests that the service sector will grow in importance and represent an ever-larger share in total value added.⁸ I would suggest that as this happens, it would not be in your countries interests to have growth in professional services shackled by outdated and restrictive trade association rules. As the delegates to this conference would agree, competition is the best engine for increases in efficiency, innovation and productivity and, ultimately, for overall consumer welfare and economic growth. Artificial and unjustified restraints to this process in professional services thus should be identified and eliminated.

⁷ See Office of Fair Trading, *Competition in professions*, OFT328 (March 2001).

⁸ See OECD, Directorate for Science, Technology and Industry, *The Service Economy in OECD Countries*, DSTI/DOC(2005)3 (11 Feb. 2005).

Finally, I suggest that targeting overt cartels could be a particularly fruitful area for newer competition enforcement agencies. The JCRA victories I have described today came about without the need for formal decisions or judicial action. They arose from our vigorous advocacy efforts, back up by a real threat of enforcement action. In addition to eliminating anticompetitive restraints, these actions materially contributed to the building of a competition culture in Jersey, and to the JCRA's creditability.

Thank you.