

# Kluwer Competition Law Blog

## The Ethics of Trade Association Codes of Ethics

Mark Katz (Davies Ward Phillips & Vineberg LLP, Canada) · Friday, December 19th, 2014

One of the functions that trade and professional associations often perform is to help “regulate” the business conduct of their members, often through the vehicle of “codes of ethics”. When properly applied, “self-regulation” of this type can protect consumers, reduce regulatory burdens for industry members, and enhance an industry’s reputation with government bodies and the public at large.

That said, it is clear that self-regulation by associations can create competition law issues if rules and regulations are adopted and enforced in such a way as to restrict competition. In particular, concerns can arise when associations seek to dictate the terms on which members are able to compete against each other.

Four recent enforcement proceedings brought by the U.S. Federal Trade Commission (“FTC”) illustrate the types of concerns that competition authorities can have with trade association codes of ethics. In these cases, the codes of ethics in question prohibited members from:

- offering discounts on their services or otherwise charging lower fees than other members;
- soliciting clients from other members;
- engaging in comparative advertising or disparaging other members; and
- recruiting employees of other members.

The restrictions in question were justified as being necessary to promote ethical conduct among members and to protect the integrity of the industry/profession. To the FTC, however, they amounted to nothing more than unlawful limits on free competition.

Similar scenarios have presented themselves recently in other jurisdictions. In Italy, for example, the Italian Competition Authority (AGCM) has fined the country’s National Bar Council for, among other things, establishing a rule that lawyers who charged below a minimum tariff would be guilty of breaching the Council’s code of ethics. In the U.K., the Competition and Markets Authority (CMA) issued a statement of objections on December 10, 2014, against an association of real estate agents alleging that the association’s rules breached the Competition Act 1998 by prohibiting members from advertising their fees or discounts in a local newspaper.

The Canadian Competition Bureau’s approach would be similar to that of the authorities in these other jurisdictions. In several speeches over the past two years, for example, the Commissioner of Competition has expressed concerns about the impact that various trade association practices can have on competition between members, including restrictions on members’ advertising, mandatory fee schedules, and limits on professional service practice offerings.

In light of the foregoing, if your association has a code of ethics, ask yourself if it does any of the following:

- enforces pricing schedules or otherwise limits price competition;
- prevents members from soliciting business from each other;
- prevents members from soliciting employees from each other;
- restricts members' advertising beyond simply prohibiting false or misleading advertisements; and/or
- otherwise creates barriers to expansion/entry or the adoption of innovative business practices.

An affirmative answer to any of these questions should serve as a warning that further action on your part may be necessary to ensure that your association's code of ethics is truly "ethical", not just from the members' perspective, but also when viewed through a "competition law prism" with the interests of other market participants and the consuming public in mind.

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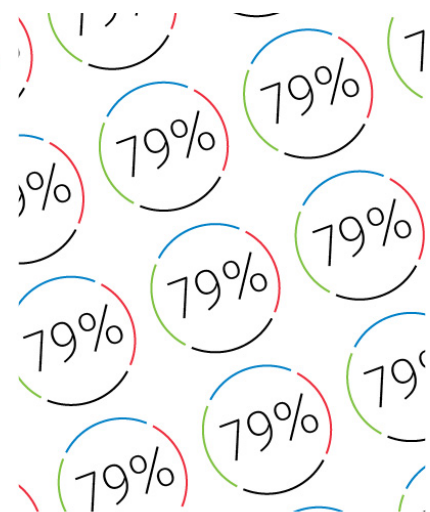
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*Source: OECD* ">Consumer welfare

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