



Antitrust: Pricing Dos and Don'ts

iFA INTERNATIONAL
FRANCHISE
ASSOCIATION

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SYMPOSIUM**

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Agenda

- The Legal Framework
- Franchise Business Model
- Assessing Potential Antitrust Exposure
- Franchisor Pricing Strategies
- A New Frontier - Technology and Business Intelligence
- National Pricing Promotions
- Horizontal Competitors

Antitrust Law

Core federal antitrust laws

- Sherman Act (1890)
 - Purpose was to preserve “free and unfettered competition as the rule of trade.”
- In 1914, two additional acts were passed:
 - Federal Trade Commission Act resulted in the creation of the FTC
 - Clayton Act
- With some revisions, these are still in effect today.

The Basics – Horizontal and Vertical Restraints

- Horizontal Competitors
 - Stricter level of scrutiny applied to certain agreements between competitors at the same level (e.g., competing retail stores or competing wholesalers)
 - Viewed as anti-competitive
 - Per se illegal
 - Examples, price fixing, bid rigging, market or customer allocation
- Vertically Related Parties
 - Rule of reason analysis is very fact specific
 - Requires proof of certain legal elements in a prescribed step-by-step analysis
 - Requires proof of likely anticompetitive effects (within a defined market, geography)
 - Defenses include showing efficiencies and pro-competitive effects

Legal Framework – Franchise Business Model

- Setting the Stage
 - Post *Leegin*, due to the rigorous proof required, vertical price restraints are relatively rarely challenged under federal law
 - Significant Cases
 - *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984)
 - *American Needle, Inc. v. National Football League*, 560 U.S. 183 (2010)
 - *Arrington v. Burger King Worldwide, Inc.*, 47 F.4th 1247 (11th Cir. 2022)
 - State Laws
 - Maryland
 - California
 - New York

Franchise Model

- Franchisor and Franchisees - Vertical Related Parties
 - Move away from *Copperweld* and the single business enterprise analysis
 - Importance of *American Needle* and *Arrington*
- Franchisee Relationships - Understanding Horizontal Competitors
 - FTC Guidance
 - Industry and Trade Group Analysis

Assessing Potential Antitrust Exposure

- Pricing Policies
 - Franchisor may seek to mandate some or all pricing of products
 - Franchisor may require its franchisees to follow its advertising policy, including compliance with specific promotions, discounts, reward programs, and price point advertising

FDD and Franchise Agreement

- Item 16 - Restrictions on what the franchisee may sell
- Disclose any franchisor-imposed restrictions or conditions on the goods or services that the franchisee may sell or that limit access to customers, including:
 - Any obligation on the franchisee to sell only goods or services approved by the franchisor
 - Any obligation on the franchisee to sell all goods or services authorized by the franchisor
- Franchise Agreement
 - Operational Standards
 - Often refers to external policies
 - Advertising Policy
 - Operations Manual
 - Compliance section
 - Often results in a default notice with an opportunity to cure

Hypothetical - Health and Wellness Franchise

- Item 16
- **We may also periodically set maximum or minimum prices for services and products that your business offers.** We may periodically change the required and/or authorized products and services, and there are no limits on our right to do so. You must promptly implement these changes and must discontinue selling any products or services that we at any time decide to disapprove in writing. Items 8, 9 and 12, as well as the Manual, provide additional information regarding your specific obligations and limitations.
- Franchise Agreement
- Services. You will conform to all quality and customer service standards prescribed by us in writing, provided that the standards are not specifically set for you, but are set for our entire system, or a specific region or market in which other System businesses are operating. **We may also periodically set maximum or minimum prices for services and products that your business offers.**

Assess the Antitrust Risk

- Marketing wants to specify an actual price point
 - Not minimum or maximum, but a specific price point for a new service
 - Franchisees will not be allowed to vary the price; the price will be “locked” in the POS system
 - Consumer advertising will specify the price, but Marketing will include a disclaimer that says “price and participation may vary”
- Considerations
 - Does FDD and Franchise Agreement support this?
 - What additional information might be helpful?
 - Ops Manual/Advertising Policies
 - Variance Policies
 - State Law Considerations
 - Maryland, New York, California

A New Frontier - Technology and Business Intelligence

- Dynamic Pricing
- Franchisor may implement dynamic pricing strategies due to:
 - Market conditions (e.g., cost of goods, higher labor costs); and/or
 - Demographic factors (e.g., captive locations, household income levels)
- Surveillance Pricing
- Franchisor may adjust pricing for individual consumers or groups based on online data which allows them to:
 - target specific consumers based on browser history;
 - online interactions with that brand; and/or
 - in combination with other data that it collects and seek to adjust prices for individual consumers or groups

Hypothetical – Burger Chain

- Franchise Agreement states:
- Franchisor may exercise rights with respect to pricing programs and products to the fullest extent permitted by then-applicable law, which may include:
 - Establishing the maximum retail prices or recommending retail prices;
 - Advertising specific retail prices for some or all programs, products or items sold by the Restaurant (“price point advertising campaigns”); and
 - Engaging in advertising, promotional and related programs which franchisee must participate in and which may directly or indirectly impact retail prices (such as “buy one, get one free”)
- Franchisor may engage in these activities only in certain geographic areas (towns, cities, states, regions) and not others, or with regard to certain subsets of franchisees and not others.

Antitrust Assessment

Burger Chain insists on a pricing strategy that adds \$3.00 extra in California and a few “expensive” metropolitan areas

- Franchise Agreement supports franchisor’s marketing strategy
- Are there FTC considerations
 - Consumer Protection
- State law considerations
 - Antitrust
 - Franchise relationship laws

Horizontal Competitors

- Certain horizontal agreements may be presumed anticompetitive
- Variations can raise tricky issues
 - “Hub and spoke” conspiracies (e.g., vertically related party acts as a facilitator or coordinator of a conspiracy among horizontal competitors)
 - Trade associations and industry groups
 - Entities that aggregate and disseminate industry statistical information

Hypothetical - Franchisee Association and Industry Trade Associations

- Franchisor owns multiple service-oriented brands, which each have a franchisee association established and run by franchisees
- Those independent associations feed into a larger associations that meets quarterly to discuss topics that all the brands have in common
- Franchisor became aware that an upcoming meeting has a line item entitled “Pricing – How to Win”
- A franchisee association may wish to discuss pricing strategies among its members, but caution is necessary
 - Franchisees may be viewed as horizontal competitors
 - Franchisee communications among their peers may give rise to heightened scrutiny
 - Franchisees should be aware of the rules around communications relating to pricing

Franchisee Association and Industry Trade Associations – Best Practices

- Set an agenda ahead of each meeting to limit the possibility that such discussions could arise
- Maintain meeting notes
- Halt any improper discussions around pricing strategy
- Seek advice of counsel

A Word of Caution

- Assessment of antitrust risk cannot be fully captured by “dos and don’ts”
 - Requires a more nuanced analysis
- Cases may provide guidance
 - When and to what extent certain pricing practices may implicate significant legal risk
 - But antitrust law around pricing continues to evolve
- Pricing policies and strategies within franchising require careful consideration as they may
 - Implicate antitrust doctrines dealing with both vertical and horizontal competitive effects
 - Generate legal disputes about the proper standard for assessing antitrust risk

Any Questions?

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