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Violating the FTC Act, Even Absent Harm to Competition

From the Experts

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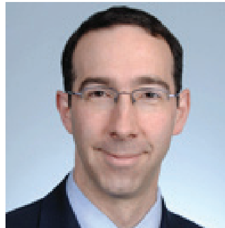
Just talking to a rival about prices can violate federal antitrust law, even if those discussions cause no harm to competition. That is the message of *FTC v. Bosley*, a recent enforcement action brought by the Federal Trade Commission under its Section 5 authority to prevent "unfair methods of competition."

Bosley is the latest in a string of FTC efforts to articulate a standalone Section 5 theory, and this one goes even further into uncharted territory. In light of Chairwoman Edith Ramirez's recent suggestion that the FTC will provide "case-by-case" guidance on its Section 5 authority by bringing additional enforcement actions, *Bosley* is a good reminder of the perils and costs of information sharing and the broad reach of Section 5.

In early April, the FTC announced a proposed consent decree with Bosley Inc. and related entities prohibiting future information sharing with competitors. Bosley manages medical and surgical hair transplant practices throughout the United States and is the largest such manager in the nation. According to the FTC, the CEO of Bosley shared nonpublic information about future product offerings, price floors, discounts, expansion and contraction plans, and business performance with the CEO of HC (USA) Inc., a major competitor, which in turn reciprocated. The exchanges were ongoing for at least four years. Bosley



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also exchanged information with other, unnamed competitors.

The FTC brought a complaint against Bosley for "facilitating coordination and endangering competition" and thereby violating Section 5 of the Federal Trade Commission Act. The remedy is a proposed consent order enjoining the company from sharing competitive sensitive, nonpublic information directly with a competitor. The order also requires Bosley to institute an antitrust compliance program, and to submit to ongoing monitoring reports and audits.

In a public analysis of the proposed consent decree, the FTC noted three risks of sharing competitively sensitive information with rivals: "First, a discussion of competitively sensitive prices, output, or strategy may mutate into a conspiracy to restrict competition. Second, an information exchange may facilitate coordination among rivals that harms competition, even in the absence of any explicit agreement regarding future conduct. Third, knowledge of a competitor's plans reduces uncertainty and enables rivals to restrict their own competitive efforts, even in the absence of actual coordination."

Because of these *potentially* anticompetitive effects, the FTC concluded that Bosley "engaged in unfair methods of competition in violation of Section 5." The FTC explained in its analysis that the exchange of information—which it characterized as a "tacit understanding" between Bosley and its competitor—"*could* facilitate coordination or endanger competition." The FTC offered some examples of how this could happen, but it did not suggest that any such coordination actually occurred.

Instead, all of the FTC's discussion of harm to competition is purely hypothetical. Information sharing with competitors "*could* lead a competitor to determine not to open facilities or market services in a particular location" or "a competitor *might* avoid granting additional discounts to maintain existing price levels for surgical hair transplantation services." These actions "*could* result in consumer harm in the form of reduced choice or artificially inflated transaction prices." Indeed, they could, but the FTC does not allege that they ever actually did result in consumer harm. In short, the FTC found that the information sharing created no competitive benefits, and apparently concluded that

any potential anticompetitive effect was sufficient to condemn the conduct under Section 5.

In past information exchange cases, the FTC has alleged more than the mere exchange of information and potential harm to competition. In 2010, for example, the FTC brought a case against U-Haul International Inc. for inviting its main competitors, Budget Truck Rentals LLC and Penske Truck Leasing Co. LP, to collude. U-Haul decided that prevailing rental truck rates were unsustainable, and its CEO sent memoranda to its regional managers instructing them to raises prices and to reach out to their Budget counterparts and invite them to raise prices, too. One memo even included a script: "Are you tired of renting 500 miles for $149 and $28 commission? Then, tell your Budget/Penske rep that U-Haul is up and they should be too." The CEO also discussed pricing in a quarterly earnings call, announcing that U-Haul was raising prices and urging its competitors to follow suit. Competitors in at least one regional market accepted this suggestion, and the FTC brought a case under Section 5 alleging an invitation to collude.

Likewise, in 2006, the FTC brought a case against Valassis Communications, Inc., one of the two main companies that published advertising inserts for newspapers. After initially raising prices and losing market share, Valassis cut prices in an effort to regain its former 50 percent market share. Its competitor did the same, and prices dropped dramatically. Then, in a quarterly earnings call, Valassis CEO announced a new strategy: Valassis would cut prices necessary to defend its current market share, but for new business it would not bid below a specific price floor that was higher than the prevailing market rate. In turn Valassis would monitor its competitor's response looking for "concrete evidence" of reciprocity. The FTC alleged that Valassis had made an invitation to collude and, in so doing, had committed "attempted monopolization" in violation of Section 2 of the Sherman Act and Section 5 of the FTC Act.

Similarly, in 1998, the FTC brought a case against Stone Container Corporation regarding information exchanges. Stone Container, which manufactured linerboard, had sought to raise prices, but after announcing its price increase, none of its competitors followed suit and Stone Container was forced to withdraw its price increase. Stone Container determined that the price increase failed because of excess inventory. According to the FTC, "Stone Container developed and implemented a strategy to invite its competitors to increase the price of linerboard." Stone Container surveyed its competitors to determine how much excess capacity there was, and then announced—both publicly and privately to competitors—that it was suspending production at over half of its facilities and arranging to purchase excess inventory from several of its competitors. The FTC alleged that Stone Container was inviting competitors to collude and, thus, violating Section 2 and Section 5.

The FTC's case against Bosley stands out from the U-Haul, Valassis and Stone Container precedents. Bosley's information sharing—though certainly not advisable—was not an open invitation to collude equivalent to U-Haul, Valassis, or Stone Container, and the FTC did not so allege. Indeed, the FTC invoked only Section 5 against Bosley—not Section 2's attempted monopolization, tacitly admitting that it could not prove the elements of any violation of the traditional Sherman Act antitrust laws. In other words, *Bosley* appears to reflect the view that information sharing among competitors may violate Section 5, even absent an invitation to collude or any evidence of harm to competition or consumers.

The effect of the FTC's enforcement against Bosley should not be overlooked: There are real consequences to a Section 5 enforcement action. Although seemingly more benign that treble damages and joint-and-several liability, the consent decree and other remedies imposed on Bosley are far from cost-free. In particular, the company likely incurred significant investigation and defense costs, and it now faces adverse publicity and ongoing FTC scrutiny.

There is reason, moreover, to expect more *Bosley*-type enforcement actions by the FTC. The agency continues to explore its authority under Section 5 to reach conduct that is not unlawful under the Sherman Act and other antitrust statutes, and Chairwoman Ramirez announced in early April that the FTC would develop Section 5 guidance "on an incremental, case-by-case basis," i.e., by bringing enforcement actions. *Bosley* appears to be an early example of that incremental approach.

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