EMTA

TRADE ASSOCIATION FOR
THE EMERGING MARKETS

EMTA Antitrust and Competition Guidelines

Updated October 2020

EMTA's mission is to promote the orderly development of fair, efficient and transparent trading markets in Emerging Markets instruments, to help integrate the Emerging Markets more fully into the global capital markets and to help build greater confidence in the Emerging Markets asset class. Since its formation in 1990, EMTA and its working groups have developed and recommended, on a non-binding basis, a code of conduct, market infrastructure such as netting facilities and a clearing corporation, many market practices and a variety of trading documentation in the EM fixed income, loan and FX derivatives product areas. Within EMTA, decisions are normally made by consensus, rather than by majority vote, and all recommendations are expressly made subject to the caveat that individual market participants may always agree otherwise.

As a trade association for a global marketplace, EMTA and its members must be especially cognizant of the laws of various jurisdictions which, in general, prohibit anti-competitive conduct without always clearly defining it. It is sometimes easy to assume that, by promoting high professional standards of conduct, antitrust and similar problems can always be avoided. Unfortunately, this is not always the case, particularly in an industry that has come under very close public and regulatory scrutiny. The antitrust and comparable laws are often stated in general terms, and the analysis of their application is complex, and inadvertent violations can therefore occur far too easily.

In general, the US antitrust laws prohibit anti-competitive behavior without defining the specific conduct that would be illegal. Judicial decisions have identified common types of violations, but because applying the antitrust laws so often involves questions of interpretation to specific facts and contexts to which answers are neither certain, nor necessarily predictable, the topic of compliance with these laws cannot be treated adequately by merely listing do's and don'ts or by attempting to develop precise standards of acceptable business conduct.

The starting point for understanding the fundamental nature of the US antitrust laws is the Sherman Act of 1890, Section 1 of which prohibits "contracts, combinations and conspiracies in restraint of trade". In general, to constitute a violation of this broad prohibition, conduct must be found to be action that is both concerted, and which restrains trade. Determination of what concerted conduct constitutes an impermissible restraint of trade involves two distinct but related methods of analysis, depending on the general character of the conduct under consideration. Under the first method, certain conduct, such as horizontal price-fixing or group boycotts, is considered to be so inherently anti-competitive as to be "per se" unlawful, without further inquiry into its purpose, effect or context. Conduct that is not "per se" unlawful is subject to a "rule of reason" analysis (or balancing test) designed to ascertain whether or not the conduct in question merely regulates, and thereby perhaps promotes, competition, by means of examining the nature and structure of the industry in which such conduct occurs and the circumstances, purpose and effect of such conduct on the relevant marketplace; that is to say, in the case of trade associations, certain activities intended to promote greater market efficiency, and thereby promote competition,

may be permissible under the antitrust laws even if they arguably involve some "restraint" on market behavior. It is correct to suspect that applying this "rule of reason" to determine what is reasonable and therefore permitted, and what is not, may be more art than science.

Trade association activities, by their very nature, often involve concerted action that arguably exerts some restraint on trade, and for that reason, they are subject to close scrutiny under the antitrust laws. The courts have found, however, that many forms of industry self-regulation, particularly those that have set standards for products, procedures or market participant conduct, may promote industry competition by causing the marketplace to function more efficiently. Though this provides no assurance that all trade association activities intended in the interest of greater market efficiency will be permitted under the antitrust laws, it has always been EMTA's goal that its activities be conducted in such a way, and with such purpose and effect, that they would survive any possible challenge under the antitrust laws.

Just as EMTA always endeavors to ensure that its activities do not violate the US antitrust or similar laws of other jurisdictions, EMTA members and other market participants are encouraged to familiarize themselves with all such laws to which they are subject, as well as their own internal policies, so that their activities are in compliance with all such laws.

EMTA's work in furtherance of its mission cuts across a number of financial product areas, such as fixed income, loans and FX derivatives, that may fall under the jurisdiction of other trade associations or groups, which have developed their own policies and guidelines relating to compliance with the US antitrust and comparable laws of other jurisdictions. While not having the force of law, these policies and guidelines may be generally applicable to the personnel of EMTA member firms active in these product areas and in any event provide very useful guidance to those active in connection with EMTA's activities within these product areas as well. Accordingly, EMTA strongly recommends that its members and their personnel be familiar with such guidance relevant to their areas. It is EMTA's intent that its own procedures, generally as described below, be as consistent as possible with such guidance.

In accordance with the foregoing, and for the sake of good order, each EMTA working group is expected to follow these procedures:

(1) A recording secretary (normally the EMTA staff lawyer who customarily works with such working group) should archive its records, either electronically, physically or both;

(2) Before each meeting, a written agenda for the meeting should be sent to the working group members, and the meeting should follow such agenda to the extent reasonably practicable;

(3) A copy of these Guidelines should be sent to the working group not less than annually, and at the outset of each meeting, attendees should be reminded of these Guidelines; and

(4) A record of each meeting in reasonable detail should be kept.

Working Group activities conducted by email are generally subject to the principles contained in these Guidelines, and Working Group members are reminded of the considerations set forth in these Guidelines in connection with any related communications.