

Information Surveys & Competition Law – Key Points & Best Practices for Associations

By Mark Katz & Steve Szentesi

Information surveys are one of the most important functions that an association can perform for members. Surveys can be used to facilitate research initiatives and benchmarking exercises, increase market transparency and customer knowledge, promote improved products and services, and support industry lobbying and advocacy efforts.

Competition issues can arise, however, when associations collect information about members' business practices and activities, such as revenues, costs, margins, market shares, customers, marketing or business plans, and so on.

While the collection and sharing of this type of competitively-sensitive information is not in and of itself an offence in Canada, information exchanges may be regarded by Canada's Competition Bureau as a "red flag" evidencing illegal cartel conduct (such as price fixing or market allocation). Indeed, evidence of information exchanges between members has often figured prominently in cases where trade associations have been convicted for involvement in criminal anti-competitive behaviour.

In addition, since 2010, the Competition Bureau is now authorized to bring civil proceedings to prohibit agreements between competitors that substantially prevent or lessen competition. In its *Competitor Collaboration Guidelines*, the Bureau specifically points to "information sharing" agreements as the type of arrangement that could invite enforcement action. According to the Bureau, it may seek to prohibit an "information sharing" exercise where the exchange of information creates transparency between competitors and diminishes or even eliminates their incentive to compete vigorously.

The interim head of the Competition Bureau, John Pecman, recently reiterated the potential concerns inherent in trade association-sponsored information surveys. As he said in a speech:

"[w]e are concerned with conduct that reduces incentives to compete vigorously. Information sharing agreements are an example of this. Competitively sensitive information exchanged among competitors can have serious negative effects on competition, especially if they are in highly concentrated markets with relatively homogenous product offerings."

None of this means that associations should immediately scrap their information gathering exercises. However, associations must approach these activities with caution, and should take into account a few important factors before proceeding.

The first question that always must be asked is: what is the purpose of the survey or information exchange? It is critical that the association be able to identify and support a legitimate pro-competitive purpose for the exercise – e.g., an effort to improve products, increase efficiencies, promote the industry, etc. If a legitimate reason cannot be articulated, the survey should not proceed. Moreover, it is equally important that all

documents and other communications relating to the planned survey (including emails) reflect the legitimate reasons for collecting and disseminating the information so as not to undercut the association's position if challenged at a later stage. Practical steps in this regard may include briefly describing the pro-competitive purposes in member communications and reflecting those purposes in internal memoranda, minutes, notes, etc.

Assuming that this initial threshold is crossed, here are some best practices to consider when designing an association survey:

- Information collected should be limited to historical data, with no indication, for example, of future pricing, production or marketing intentions.
- Member-specific raw data/information should be kept confidential and must not be distributed. The only information that ultimately goes out to the members should be distributed in a generalized and aggregated nature (i.e., it should not be company specific). In addition, the raw data should be deleted after a reasonable period of time.
- The number of participants in the survey should not be so small as to make it unlikely or impossible to ensure that results will be anonymous.
- Participation by members should be voluntary, i.e., members should not be coerced into participating in surveys or information gathering exercises.
- Similarly, information circulated should not be accompanied by any requirement or recommendation for future conduct by members – for example, you should not require or suggest that members adhere to particular pricing, distribute products in a particular market, limit/restrict production or deal with specific customers, suppliers or competitors.
- Depending upon the complexity or sensitivity of the project, it may be prudent to use an independent third party to collect, analyze and disseminate the information.
- Information that is made publicly available is less likely to raise concerns, although making information public is not necessarily determinative.

Information surveys are an excellent way for associations to provide an important service for their members. However, it is also incumbent upon associations – and their members – to ensure that these exercises do not later result in an unwanted call or knock on the door from the Competition Bureau.

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