



Standards for Finding Vertical and Horizontal Agreements

Antitrust
Eric E. Johnson
ericejohnson.com



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Sherman Act § 1

Re-run

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this can be
shortened to
“agreement”

or “concerted
action”

they’re interchangeable ...

Finding a horizontal agreement

- Often there is direct evidence that is pretty much out in the open. In that case, it's easy. For example:
 - Association rules (*NCAA v. OU, California Dental, Fashion Originators*)
 - Cooperative's bylaws (*Northwest Stationers*)
 - A regular out-in-the-open joint venture (*Texaco*)
- But often there is no direct evidence of an agreement. We can predict this to be the case in straight-out price fixing and other clearly per-se violations - because the participants don't want to be sued or sent to jail.
 - What we see, instead, is parallel conduct.

Parallel conduct

- It's theoretically true that without an agreement, there's no liability.
- But the law can infer an agreement without direct evidence.
- So, in practice, it's not about whether or not there's an agreement in reality, it's about whether or not there is conduct that allows an agreement to be inferred.

The economic sense test

- Parallel conduct that is equally consistent with what firms would do independently, regardless of what other firms would be doing, will not permit an inference of agreement.
- Parallel conduct that would be irrational and unprofitable unless other firms were engaging in the same conduct might allow an inference of an agreement. But mere parallelism isn't a § 1 agreement. The court looks for plus factors.

Plus factors

For conduct that's irrational/unprofitable unless others engage in it also, plus factors suggest an actual agreement:

- The parallel conduct is unlikely absent a hidden agreement, because it's against individuals' economic self interest: An agreement can be inferred.
- The parallel conduct follows secret meetings or common invitations: An agreement can be inferred.
- There's a pattern of exchanges of price information: An agreement can be inferred.
- There's what looks like cartel enforcement behavior, e.g., evidence of refusals to deal or predatory pricing directed at one actor followed by a return to parallel pricing: An agreement can be inferred.
- **But** "mere" parallelism - *even with awareness and strategic calculation* - is not a § 1 agreement.

Finding vertical agreements

Courts are even more skeptical of finding vertical agreements than horizontal agreements. For example, exchanges of information between companies on different rungs of a vertical structure is to be expected. So that's not much of a plus factor. Bottom line: Courts are very skeptical of finding vertical agreements.