

CATEGORY MANAGEMENT: THE ANTITRUST IMPLICATIONS IN THE UNITED STATES AND EUROPE

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Introduction

When walking through your local grocer, have you ever wondered why products are placed where they are on the shelves? For example, why are certain products placed at eye-level, while others are below on the bottom shelf? Why are some products placed next to others while some are placed on the end-caps of the aisles? Have you ever wondered how your grocer decides to carry the specific brands they do or how they decide to run a certain promotion when they do?

These are all questions that are answered through the retail management practice of category management. Category management analyzes consumer purchase information to make decisions about which brands and products a retailer should carry, where on the shelves these products should be placed, at what prices they should be offered, and when the products should be part of a promotion.¹ This practice evolved in the early 1990s as an improvement on the traditional approach, brand management.² As opposed to brand management, a retailer using category management makes its decisions based on the category

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¹ See FED. TRADE COMM'N, REPORT ON THE FEDERAL TRADE COMMISSION WORKSHOP ON SLOTTING ALLOWANCES AND OTHER MARKETING PRACTICES IN THE GROCERY INDUSTRY (2001) [hereinafter FTC REPORT], available at <http://ftc.gov/os/2001/02/slottingallowancesreportfinal.pdf>.

² ABA Section of Antitrust Law, Category Management Antitrust Handbook 3 (2010) [hereinafter ABA Handbook]; see also Robert L. Steiner, *Category Management – A Pervasive, New Vertical/Horizontal Format*, 15 ANTITRUST 77, 77 (2001).

as a whole, rather than by task or by brand.³ Since it is more efficient for suppliers to handle category management duties, most retailers now turn this responsibility over to a “category captain,” a leading supplier in the particular category.⁴ This practice of a supplier making decisions or giving advice to a retailer about not only its own prices and products but also those of a competitor leads to inherent antitrust concerns.⁵

This note begins by discussing the background of category management, providing the historical and practical reasons for why the practice emerged, and noting category management practices that could potentially lead to antitrust concerns in Part I. Next, Part II provides antitrust analysis from both the U.S. and European perspectives. Part III then provides suggested changes to U.S. antitrust law as applied to category management. Finally, Part IV discusses why favorable reform is necessary because category management ultimately benefits the consumer.

I. Background

Category management is a retail management practice that involves in-depth consumer analysis which enables retailers to tailor their pricing and product selection to best meet consumer preferences.⁶ This consumer analysis is concentrated at the product-category level,⁷ such as deodorant, cereal, or, more generally, breakfast foods. These product categories are then managed like their own small business (or profit center), and decisions are made based on the category as a whole, rather than on single brands.⁸ This practice differs from brand management — the traditional form of retail marketing — because decisions are made across multiple competing brands, taking into account the interactions among them.⁹

Category management enables retailers to use their limited

³ FTC REPORT, *supra* note 1, at 47.

⁴ ABA Handbook, *supra* note 2, at 3.

⁵ *Id.* at 49-50.

⁶ Leo S. Carameli, Jr., *The Anti-Competitive Effects and Antitrust Implications of Category Management and Category Captains of Consumer Products*, 79 CHI.-KENT L. REV. 1313, 1314 (2004); *see also* ABA Handbook, *supra* note 2, at 3.

⁷ FTC REPORT, *supra* note 1, at 47; ABA Handbook, *supra* note 2, at 13-14.

⁸ ABA Handbook, *supra* note 2, at 13-14; *see also* Thomas W. Gruen, *The Evolution of Category Management*, 2 ECR J. 17 (2002).

⁹ ABA Handbook, *supra* note 2, at 13-14.

shelf space in the most efficient and profitable manner.¹⁰ With this category-focused technique, retailers are able to offer the best product assortment, organized in the most effective way on the shelves, and at the prices consumers are most willing to pay.¹¹ In the end, consumers win because they get the prices and products they are most interested in purchasing, and retailers increase customer satisfaction and loyalty.¹²

Category management emerged as a retail management practice in the supermarket industry in the mid-1990s.¹³ Since then, it has swept across the grocery industry in the United States, Europe, and across the globe.¹⁴ The practice has also expanded to convenience stores, pharmacies, and other mass outlet chains.¹⁵ This trend is partially due to the vertical integration sparked by Wal-Mart and its suppliers in the mid-1980s.¹⁶ Wal-Mart's vertical partnerships mainly focused on logistical efficiencies; however, the same idea engendered the growth of the category management practice.¹⁷

At a time when the supermarket industry was losing market share to supercenters and discount stores, there was the incentive for retailers to use their upstream suppliers in a more efficient manner.¹⁸ This led supermarkets to turn over their category management duties to their suppliers and designate a supplier or two to act as a "category captain."¹⁹ A category captain is generally a leading manufacturer in the industry that takes responsibility for managing a product category at a designated retailer.²⁰ The category captain's duties can vary based on the extent of the relationship, but, typically, a captain provides information and advice based on its in-depth knowledge

¹⁰ See Benjamin Klein & Joshua D. Wright, *The Economics of Slotting Contracts*, 50 J.L. & ECON. 421 (2007); see also *Antitrust and Category Captains*, ROUNDTABLE DISCUSSION (Nat'l Press Club, Washington, D.C.), June 23, 2003, available at <http://www.antitrustinstitute.org/files/270.pdf> [hereinafter ROUNDTABLE DISCUSSION].

¹¹ Carameli, *supra* note 6, at 1314; see also ABA Handbook, *supra* note 2, at 13.

¹² Carameli, *supra* note 6, at 1314.

¹³ Steiner, *supra* note 2, at 77-78; see also ABA Handbook, *supra* note 2, at 3.

¹⁴ Steiner, *supra* note 2, at 77.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.* at 77-78.

¹⁹ *Id.* at 77.

²⁰ *Id.*; see also ABA Handbook, *supra* note 2, at 3.

about consumer preferences in a particular product category.²¹ However, sometimes the captain may be given much more responsibility and could even make ultimate decisions about which brands and products its retailer should sell.²²

Regardless of the form of the relationship, the partnership makes practical and economical sense for several reasons. First, the retailer lacks both the incentive and the necessary resources to conduct this research.²³ A retailer's main goal is to attract customers away from its competitors and to increase the number of purchases its customers will make.²⁴ A retailer is generally not concerned whether its customers purchase one product over another.²⁵ Suppliers, on the other hand, are very interested in researching why a customer purchases its competitors' products over its own, so the supplier, rather than the retailer, is more likely to conduct this analysis.²⁶ In the end, all parties win; the consumer gets the products and prices it is looking for, the retailer gets more business due to more effective product offerings, and the supplier strengthens the relationship with its retailers.

Furthermore, the supplier has the expertise and the knowledge to most effectively manage a product category. With the increased use of scanner data, a supplier can use its multitude of consumer information to determine which factors specifically drive a consumer's purchase (e.g., prices, promotions, and product placement).²⁷ Suppliers also have the necessary personnel to implement category management suggestions, such as preparing in-store displays, shelf reorganization, and pricing changes.²⁸

Supermarkets and grocery chains typically spend very minimal amounts on marketing at the store level, so it is beneficial to rely on suppliers for this service.²⁹ In an industry

²¹ Carameli, *supra* note 6, at 1314.

²² FTC REPORT, *supra* note 1, at 48.

²³ ABA Handbook, *supra* note 2, at 10.

²⁴ *Id.*

²⁵ *Id.* at 19.

²⁶ *Id.*

²⁷ Mary W. Sullivan, *Slotting Allowances and the Market for New Products*, 40 J. LAW & ECON. 461, 475 (1997).

²⁸ ABA Handbook, *supra* note 2, at 10.

²⁹ Brandon Copple, *Shelf Determination: Under Betsy Holden, Kraft Foods is Winning the War of the Aisles*, FORBES, Apr. 15, 2002, available at <http://www.forbes.com/forbes/2002/0415/130.html>.

2011]

Category Management

545

where net profit after taxes is only about 1-2%,³⁰ a supermarket will do whatever it takes to save money. Because successful category management is essentially unattainable without a category captain, securing these services has become a regular practice among retailers.³¹

II. Antitrust Analysis

Antitrust laws are intended to promote competition, so obvious antitrust concerns arise when a single supplier is given the power to influence retailer decisions regarding not only the supplier's own products, but its competitors' products, too. This section analyzes possible anti-competitive situations and provides suggested approaches for compliance with United States antitrust law and foreign competition law.

A. United States Antitrust Analysis

In 2001, the Federal Trade Commission ("FTC") issued a report on marketing practices in the grocery industry ("FTC Report") that specifically addressed the category captain relationship.³² In the FTC Report, the FTC set forth four specific situations that may create anti-competitive issues.³³ For example, "[t]he category captain might: (1) learn confidential information about rivals' plans; (2) hinder the expansion of rivals; (3) promote collusion among retailers; or (4) facilitate collusion among manufacturers."³⁴ The ABA Section on Antitrust Law has also recognized a fifth category, (5) tortious conduct.³⁵ These five situations can be grouped into two major themes: the exclusion of rival suppliers from the market, and the collusion among suppliers or retailers by means of the category captain relationship.³⁶ The first two situations above, along with tortious conduct, deal with the "exclusion" theme, and the third and fourth situations fall within the "collusion" theme.

³⁰ See FOOD MKTG. INST., *Supermarket Facts: Grocery Store Chains Net Profit – Percent of Sales* (Dec. 2008), available at http://fmi.org/docs/facts_figs/Net%20profit%20percent%20of%20sales2008.pdf.

³¹ ABA Handbook, *supra* note 2, at 3.

³² See FTC REPORT, *supra* note 1.

³³ *Id.* at 50.

³⁴ *Id.*

³⁵ ABA Handbook, *supra* note 2, at 42-46.

³⁶ See generally ABA Handbook, *supra* note 2.

1. Access to Competitors' Information

The first instance of potential exclusionary behavior occurs when category captains are given access to competitors' information.³⁷ As the FTC points out, this information can be used to "thwart the growth of [competitors] or lessen their incentive to produce innovative plans, to the ultimate detriment of consumers."³⁸ A supplier could use this information to beat its competitors to the market with new products or to run a concurrent and competing promotion with its competitors.³⁹

The FTC recommends the use of internal firewalls to ensure that sensitive competitor information is not inappropriately distributed.⁴⁰ A supplier should separate employees that make category suggestions from those that receive information about competitors' plans.⁴¹ This helps ensure that unbiased decisions are being made and may help a supplier disprove allegations regarding the misuse of competitor information. Also, as a general rule, any decision made by a category captain should always have a legitimate business reason based on objective evidence of what is best for the category as a whole.⁴² While this alone will not protect against antitrust violations, it will help a defendant's case.

Although there is not a specific case on point, the Supreme Court seems to support the free flow of information between suppliers and retailers. For example, in *Monsanto Co. v. Spray-Rite Services Corp.*, the Court stated, "distributors are an important source of information for manufacturers."⁴³ In *United States v. U.S. Gypsum Co.*,⁴⁴ the Court noted in another context that sharing prices between a retailer and supplier encourages competition among suppliers, ultimately leading to reduced prices

³⁷ FTC REPORT, *supra* note 1, at 50-51.

³⁸ FTC REPORT, *supra* note 1, at 50.

³⁹ ABA Handbook, *supra* note 2, at 46-47; *see also* FTC REPORT, *supra* note 1, at 50.

⁴⁰ ABA Handbook, *supra* note 2, at 36; *see also* FTC REPORT, *supra* note 1, at 51.

⁴¹ FTC REPORT, *supra* note 1, at 51.

⁴² *See* *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 605 (1985) (stating "[i]f a firm has been 'attempting to exclude rivals on some basis other than efficiency,' it is fair to characterize its behavior as predatory.").

⁴³ 465 U.S. 752, 763 (1984).

⁴⁴ 438 U.S. 422 (1978).

for the consumer.⁴⁵

2. The Restriction of Rivals' Expansion

The second area of exclusionary concern is the category captain's power to control a retailer's marketing decisions that might ultimately hinder rivals' expansion.⁴⁶ A captain can exclude its rivals through one of two ways: (a) by making recommendations "about product placement and promotions [that] could hinder the entry or expansion of other manufacturers, leading to less variety and possibly higher prices,"⁴⁷ or (b) through exclusive dealing agreements between a retailer and supplier.⁴⁸

a. Recommendations Made by Category Captains

A category captain may facilitate exclusion if the captain's recommendations result in the placement of the captain's products and the removal of competitors' products.⁴⁹ A recommendation, alone, is not sufficient to reach an exclusive dealing claim,⁵⁰ and courts are less likely to find so when the ultimate decision rests with the retailer.⁵¹ A court's decision will mainly focus on whether the recommendation resulted in actual exclusivity.⁵² The issuance of elimination recommendations is a purpose of category captains when the recommendations are supported with "accurate, localized data, and where they do not confer exclusivity on the retailer's shelves..."⁵³

According to former FTC Commissioner Thomas B. Leary, "[t]he best strategy for a captain may be to recommend a plan that will preserve its already strong market position rather than blatantly enhance it."⁵⁴ The former Commissioner sees a

⁴⁵ *Id.* at 456-57.

⁴⁶ FTC REPORT, *supra* note 1, at 51-52.

⁴⁷ *Id.* at 51.

⁴⁸ ABA Handbook, *supra* note 2, at 37-42.

⁴⁹ *Id.* at 48.

⁵⁰ *See Stearns v. Genrad, Inc.*, 564 F. Supp. 1309, 1313-314 (M.D.N.C. 1983), *aff'd*, 752 F.2d 942 (4th Cir. 1984).

⁵¹ *NicSand, Inc v. 3M Co.*, 507 F.3d 442, 451-53 (6th Cir. 2007).

⁵² ABA Handbook, *supra* note 2, at 50.

⁵³ *Id.*

⁵⁴ Thomas B. Leary, *A Second Look at Category Management* at 6 (June 23, 2003). This paper is based on oral remarks delivered on June 23, 2003 at the American Antitrust Institute's Roundtable Discussion on Antitrust and Category Captains, in Washington, D.C. [hereinafter Leary] *available at* <http://www.ftc.gov/speeches/leary/040519categorymgmt.pdf>.

distinct difference between a category captain advising on its own brands versus advising on pricing and promotions for a competitor's brand.⁵⁵ Leary points out that while there is no case specifically stating that a captain advising on a competitor's prices is per se illegal, the practice is "inherently suspect."⁵⁶

b. Exclusive Dealing

Exclusive dealing occurs when a retailer promises to deal exclusively with a supplier and thus agrees not to purchase from other suppliers.⁵⁷ Exclusive dealing can also arise if a supplier's actions have the effect of creating an "exclusive" arrangement between the retailer and supplier.⁵⁸ For example, exclusive dealing can occur when a captain "rais[es its] rivals' distribution costs by eliminating their access to downstream markets."⁵⁹

Retailers typically choose a captain that has the greatest or second-greatest sales in the category.⁶⁰ A captain with this amount of market power can achieve an exclusionary effect if it is given the power to decide the product offering, pricing, and placement at its retailers' stores.⁶¹ However, as an FTC panelist points out, the "exclusion of rivals by a category captain is unlikely as a practical matter: such tactics are not in the best interest of the retailer, and if a category captain behaves in that manner, it will have progressively less influence as an advisor."⁶²

In analyzing whether there is an illegal exclusive dealing arrangement, a court considers several factors: the actual agreement between the parties,⁶³ the impact the arrangement has on the market,⁶⁴ the market power of the category captain,⁶⁵ and

⁵⁵ Paul B. Hewitt & Mary Anne Mason, *Category Management: An Interview with FTC Commissioner Thomas B. Leary* at 3, NEWSLETTER, (Sherman Act Section 2 Comm.), Spring 2005, at 6-7 [hereinafter *FTC Interview*], available at http://www.ftc.gov/speeches/leary/050328aba_interview.pdf.

⁵⁶ *Id.* at 4.

⁵⁷ A. Douglas Melamed, *Exclusive Dealing Agreements And Other Exclusionary Conduct — Are There Unifying Principles?*, 73 ANTITRUST L.J. 375, 375 (2006).

⁵⁸ ABA Handbook, *supra* note 2, at 37.

⁵⁹ *Id.*

⁶⁰ FTC REPORT, *supra* note 1, at 51.

⁶¹ ABA Handbook, *supra* note 2, at 37.

⁶² FTC REPORT, *supra* note 1, at 52.

⁶³ ABA Handbook, *supra* note 2, at 38.

⁶⁴ *Id.*

⁶⁵ In *R.J. Reynolds Tobacco Co. v. Philip Morris Inc.* 199 F. Supp. 2d 362,

foreclosure of competitors or injury to competition.⁶⁶ As a defense, the defendant may offer evidence of the efficiencies gained by its conduct.⁶⁷ The court will most likely balance these factors and determine whether there is a less restrictive alternative.⁶⁸

In general, retailers should retain ultimate discretion in making category decisions;⁶⁹ placing that amount of power in a supplier's hands is illogical for both business and antitrust reasons.⁷⁰ Instead of granting decision-making powers to a captain, a retailer should only take recommendations and should not solely rely on a captain's category proposal. Another approach used by some retailers is to arrange for second opinions from another supplier or engage a "third-party advisor" with no vested interest in the category.⁷¹ These conservative approaches can help a retailer ensure it does not inadvertently implement anti-competitive category decisions.

3. Collusion Among Retailers

A situation that can cause collusion problems is when a single supplier acts as a captain for multiple competing retailers.⁷² This arrangement can be conducive to collusion for two reasons: (a) the category captain can facilitate information sharing and agreement between competing retailers, known as the "hub-and-spoke" theory,⁷³ or (b) the category captain may use its central, authoritative role to "set" prices at competing retailers.⁷⁴

394 (M.D.N.C. 2002), *aff'd*, 67 F. App'x 810, 812 (4th Cir. 2003), the district court held that 51.3% market share was insufficient to support an exclusive dealing claim. The court of appeals affirmed and based its decision on the lack of foreclosed competition, not on Philip Morris' lack of market power.

⁶⁶ ABA Handbook, *supra* note 2, at 38; *see also*, *El Aguila* 131 F. App'x 450 at *3. *El Aguila* provides a good example of a court considering these factors. For example, the court took notice of the many other competitors present in the stores, the number of new competitors to the market, and the fact that the plaintiff's products were in the stores where the defendant had paid a slotting fee.

⁶⁷ ABA Handbook, *supra* note 2, at 38.

⁶⁸ *Id.*

⁶⁹ FTC REPORT, *supra* note 1, at 54; ABA Handbook, *supra* note 2, at 36.

⁷⁰ Leary, *supra* note 54, at 2.

⁷¹ Steiner, *supra* note 2, at 77-78.

⁷² ABA Handbook, *supra* note 2, at 33.

⁷³ *Id.* at 33-34; FTC REPORT, *supra* note 1, at 52-53; *FTC Interview*, *supra* note 55, at 6-7.

⁷⁴ ABA Handbook, *supra* note 2, at 33.

a. The “Hub-and-Spoke” Theory

In this first scenario, competing retailers can use information from the category captain to coordinate pricing, promotional events, or product offerings.⁷⁵ To establish a claim under this theory, all of the participants must know of the project’s unlawful nature and knowingly participate in it.⁷⁶ As the FTC Report points out, category management inherently requires the sharing of sensitive information between retailers and suppliers;⁷⁷ however, there are certain safeguards that both retailers and suppliers can use to ensure that confidential information is used properly.

Retailers can best protect themselves by only appointing category captains that are not currently serving as a captain for direct competitors of the retailer.⁷⁸ Also, according to the FTC Report, abuse of the category captain position can result from the inexperience of firms in using category management, or from poor training of category managers.⁷⁹ Before implementation, retailers should be knowledgeable about the practice of category management and should properly train employees to ensure information is properly used.

Suppliers can best protect themselves by designating separate teams of employees to the different retailers.⁸⁰ This approach, coupled with strict confidentiality rules governing information exchange among employees, would help a supplier mitigate its potential antitrust liability.⁸¹ The FTC suggests that employees who receive information about competitors should not be involved in the management of the firm’s own brands and that these employees not communicate the information to those in charge of the brands.⁸²

⁷⁵ *Id.*

⁷⁶ *See* Toys “R” Us, Inc. v. FTC, 221 F.3d 928, 934-35 (7th Cir. 2000); *see also* Elder-Beerman Stores Corp. v. Federated Dep’t Stores, 459 F.2d 138, 146-47 (6th Cir. 1972).

⁷⁷ FTC REPORT, *supra* note 1, at 50.

⁷⁸ ABA Handbook, *supra* note 2, at 34.

⁷⁹ FTC REPORT, *supra* note 2, at 54, n. 178 (“You can’t just say, One day you’re a buyer, next day you’re a category manager, because that’s what happens.”).

⁸⁰ *Id.* at 51.

⁸¹ *Id.* at 54.

⁸² *Id.* at 51.

b. The “Common Price Setter” Theory

The other situation involving a single supplier acting as captain for multiple retailers is what is known as the “common price setter” theory.⁸³ This is similar to the hub-and-spoke theory but involves “setting” prices at competing retailers.⁸⁴ This can unknowingly happen to a retailer if a captain makes identical price recommendations to several retailers, and each retailer adheres strictly to the captain’s recommendation.⁸⁵ Regardless of whether it was intentional or not, courts have held that this practice is a violation of Section 1 of the Sherman Act.⁸⁶

To repudiate any “price setter” allegations, retailers should retain ultimate price setting authority and should refrain from adopting a captain’s recommendations in their entirety.⁸⁷ More importantly, a retailer should refrain from using a captain that is already serving in that capacity for competitors.⁸⁸ This will protect retailers against unknowingly “setting prices.” Again, suppliers should use different teams of employees combined with internal safeguards so that competitor pricing information is not shared internally.⁸⁹

All of the recommended measures identified above should be memorialized in a written agreement between a retailer and its category captain. Throughout implementation, these measures should also be well documented in order to prove that appropriate steps were taken to prevent collusive practices.

4. Collusion Among Manufacturers

Another potentially problematic scenario is when multiple suppliers act as co-captains for a single retailer. In this situation, the co-captains can collude and decide that only their products will be sold at the designated retail chain.⁹⁰ The sharing of information between competitors is another concern in this situation.⁹¹ Such practice could indirectly lead to collusion

⁸³ See ABA Handbook, *supra* note 2.

⁸⁴ *Id.* at 52.

⁸⁵ *Id.* at 53.

⁸⁶ *Citizen Publ’g Co. v. United States*, 394 U.S. 131, 134-36 (1969); *Va. Excelsior Mills, Inc. v. FTC*, 256 F.2d 538, 540 (4th Cir. 1958).

⁸⁷ ABA Handbook, *supra* note 2, at 34-35.

⁸⁸ FTC REPORT, *supra* note 1, at 53.

⁸⁹ *Id.* at 51; ABA Handbook, *supra* note 2, at 34-35.

⁹⁰ ABA Handbook, *supra* note 2, at 33.

⁹¹ *Id.*

because the competitor could tailor their pricing and product offerings based on the information obtained from the rival supplier.⁹²

From a supplier standpoint, both of these antitrust issues can be avoided by simply being ethical and using common sense. Knowingly colluding would obviously be an issue, but a supplier should also be cognizant of the use of competitors' information. Also, as discussed above, the FTC suggests creating internal firewalls and having a legitimate business reason for a captain's action.⁹³

From a retailer's perspective, establishing boundaries with category captains through use of a written agreement is an effective method of ensuring compliance.⁹⁴ For example, the retailer should always retain ultimate authority in the decision-making process.⁹⁵ The agreement should also contain a confidentiality provision to ensure that information is not illegally shared between rival suppliers.⁹⁶

5. Tortious Conduct

Conwood, a Sixth Circuit case, involved the United States Tobacco Co. ("USTC") and its role as category captain in the nearly \$1.7 billion moist snuff market.⁹⁷ USTC was the leading manufacturer in this industry and held about a 77% market share while the plaintiff in the case, Conwood, held about a 13% share of the market.⁹⁸ Conwood alleged – and provided evidence and witness testimony – that USTC used its category captain position to exclude competition by:

- (1) remov[ing] racks from stores without the permission of store management and discarded and/or destroyed these racks . . . ;
- (2) trained their "operatives to take advantage of inattentive store clerks . . . ;
- (3) misused its position as category manager by providing misleading information to retailers in an effort to dupe retailers into believing . . . that USTC products were better selling so

⁹² *Id.*

⁹³ FTC REPORT, *supra* note 1, at 51.

⁹⁴ ABA Handbook, *supra* note 2, at 36.

⁹⁵ *See Id.*; *see also* FTC REPORT, *supra* note 1, at 54.

⁹⁶ ABA Handbook, *supra* note 2, at 36.

⁹⁷ *Conwood Co. v. United States Tobacco Co.*, 290 F.3d 768, 774 (6th Cir. 2002).

⁹⁸ *Id.*

that retailers would carry USTC products and discontinue carrying Conwood products; and (4) entered into exclusive agreements with retailers in an effort to exclude rivals' products.⁹⁹

Even though the record also included evidence that there were no anti-competitive effects,¹⁰⁰ the district court upheld the jury verdict in favor of Conwood, and awarded \$350 million in damages, which USTC appealed.¹⁰¹

The Sixth Circuit rejected USTC's three arguments: (1) that the rack removal/destruction were only instances of "isolated sporadic torts" rather than widespread antitrust violation; (2) that Conwood did not establish a causal link between USTC's practices and antitrust injury; and (3) that Conwood failed to show sufficient foreclosure from the market as was required under recent exclusive dealing cases under Sections 1 and 2 of the Sherman Act.¹⁰² The Sixth Circuit rejected this last argument because Conwood's claims involved product destruction and the abuse of the category captain relationship rather than simple exclusive dealing.¹⁰³

Although *Conwood* is a seminal case in the area of category management, applying it has proven difficult. This is because of the hybrid nature of USTC's conduct, which involved both tortious conduct and legitimate competitive activity.¹⁰⁴ Also, despite the evidence that there were no anti-competitive effects, the court nonetheless found that USTC's conduct was anti-competitive.¹⁰⁵ The unique elements of this case make applying the decision difficult in other category management situations and leave questions unanswered for practitioners in this field. For example, when does business defamation and tortious

⁹⁹ *Id.* at 783.

¹⁰⁰ See Joshua D. Wright, *Antitrust Law and Competition for Distribution*, 23 YALE J. ON REG. 169, 193-94 (2006) ("(1) Conwood's market share, and the market shares of several competitors, increased during the relevant time period; (2) the market experienced a 45% increase in output; (3) successful entry by new brands; and (4) United States Tobacco enjoyed a modest 10% success rate at obtaining exclusive product display racks.") [hereinafter Wright, *Antitrust Law*].

¹⁰¹ *Conwood*, 290 F.3d at 773.

¹⁰² Joshua D. Wright, *Antitrust Analysis of Category Management: Conwood v. United States Tobacco Co.*, 17 SUP. CT. ECON. REV. 311, 327 (2009) [hereinafter Wright, *Antitrust Analysis*].

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ See Wright, *Antitrust Law*, *supra* note 100, at 169.

conduct rise to the level of antitrust liability rather than simply tort liability?¹⁰⁶ How widespread does the tortious conduct need to be?¹⁰⁷ Can a single act be enough, or does there need to be a pattern of conduct?¹⁰⁸ These questions appear to be unresolved, and the *Conwood* court did not provide guidance on many of these issues.

B. Foreign Competition Law Considerations

This section focuses on international standards for determining whether category captain practices are considered anti-competitive. Outside of the United States, the practice is most prevalent in Europe; therefore, the majority of this analysis is based on European law. The analysis is broken down into three sections: (1) guidelines promulgated by the European Commission and the French Competition Authority; (2) the draft settlement agreement of 2004 between Coca-Cola and the European Commission; and (3) foreign conduct that affects U.S. commerce.

1. Guidelines

The main source of European law on category management stems from the European Commission's Verticals Block Exemption Regulation ("VBER") and from the accompanying Guidelines on Vertical Restraints ("the Guidelines").¹⁰⁹ The European Commission ("EC") enacted the Guidelines on July 28, 2009, and they will likely remain in force until 2020.¹¹⁰ The Guidelines acknowledge that, if practiced legally, category management leads to higher customer satisfaction and greater economic benefits.¹¹¹ The Guidelines set forth specific recommendations for how firms operating in the European Union can practice category management in

¹⁰⁶ ABA Handbook, *supra* note 2, at 46.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ See generally, *Commission Notice for Guidelines on Vertical Restraint*, SEC (2010) 411 [hereinafter *EC Guidelines*], available at http://ec.europa.eu/competition/antitrust/legislation/guidelines_vertical_en.pdf.

¹¹⁰ Andr s Font Galarza et al., *European Union: EC Publishes Draft Antitrust Rules Governing Distribution Agreements*, MONDAQ BUS. BRIEFING (July 30, 2009).

¹¹¹ *EC Guidelines*, *supra* note 109, at ¶ 213.

accordance with the VBER.¹¹²

First, the VBER exempts from its rules category management relationships involving retailers and suppliers that both have market shares less than 30%.¹¹³ For firms with market shares above this threshold, the EC provides a list of factors it considers in its anti-competitive analysis.¹¹⁴ The main factor in considering the possible anti-competitive effect is the “market position of the supplier” and the foreclosure effect the supplier’s market share has on competing firms.¹¹⁵

The duration of the category captain relationship is another factor considered.¹¹⁶ The Guidelines state that, in general, agreements shorter than one year entered into by non-dominant companies are in general not considered to be anti-competitive.¹¹⁷ Agreements between one and five years entered into by non-dominant companies are usually analyzed with a balancing test involving the pro- and anti-competitive effects.¹¹⁸ Agreements lasting longer than five years are analyzed under the assumption that the purported efficiencies outweigh their foreclosure effect.¹¹⁹ The Guidelines note that category management agreements entered into by dominant companies, regardless of their length, are more likely to result in anti-competitive foreclosure.¹²⁰

The analysis also involves the market position of a supplier’s competitors.¹²¹ The Guidelines state that, as long as the competitors are sufficiently numerous, no strong, appreciable, anti-competitive effects can be expected.¹²² In analyzing the strength of competitors, the Guidelines set specific standards regarding market share.¹²³ For example, where the market share of the largest supplier is below 30% and the market share of the five largest suppliers is below 50%, the Guidelines say there is

¹¹² *Id.* ¶¶ 132-40, 210-12.

¹¹³ *Id.* ¶209.

¹¹⁴ See *EC Guidelines*, *supra* note 109, at ¶¶132-40.

¹¹⁵ *Id.* ¶132 (citation omitted).

¹¹⁶ *Id.* ¶133.

¹¹⁷ *EC Guidelines*, *supra* note 109, ¶133; See Comm’n Recommendation (EC) No. 361/2003 of 6 May 2003, 2003 O.J. L 124/36, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2003:124:0036:0041:en:PDF>.

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *Id.* ¶134.

¹²² *Id.*

¹²³ *Id.* ¶135.

unlikely to be a single or cumulative anti-competitive effect.¹²⁴ In these situations, “[i]f a potential entrant cannot penetrate the market profitably, this is likely to be due to factors other than [the category captain relationship].”¹²⁵

The Guidelines also consider the barriers to entry. When there are minimal barriers, market foreclosure is unlikely to be a problem.¹²⁶ The Guidelines further note that the relationship is unlikely to produce anti-competitive results when there is significant “countervailing power” present, i.e., the buyer’s power is significant.¹²⁷

In making its determination, the EC considers each of the factors listed above. It also sets forth a general rule in retail settings: if a non-dominant supplier ties up 30% or more of the relevant market, it is likely to be considered anti-competitive.¹²⁸ For a dominant supplier, even a modest amount tied up in an exclusive dealing agreement is likely to be considered anti-competitive.¹²⁹

Apart from the Guidelines, the first European entity to specifically address category management is the French Competition Authority (“FCA”).¹³⁰ In its opinion issued on December 7, 2010, the FCA recognized that category management could lead to exclusion of competing suppliers as well as collusion between retailers.¹³¹ However, the FCA’s opinion was not as specific as the EC guidelines at addressing what specifically constitutes anti-competitive behavior.

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Id.* ¶136.

¹²⁷ *Id.* ¶137.

¹²⁸ *Id.* ¶140.

¹²⁹ *Id.*

¹³⁰ See République Française Autorité de la Concurrence [French Competition Authority], Avis n° 10-A-25 du 7 décembre 2010 [Opinion No. 10-A-25 of December 7, 2010] [hereinafter *FCA Opinion*], available at <http://www.autoritedelaconcurrence.fr/pdf/avis/10a25.pdf>.

¹³¹ See *id.*; see also *The French Competition Authority Issues Two Opinions on the Mass Retail Food Distribution Section*, CMTY. WEEK (SJ Berwin LLP, London, Eng.), Dec. 10, 2010, available at http://www.sjberwin.com/ebf/eu_competition/community_week/2010_December_10/download.pdf [hereinafter SJ Berwin LLP]; see also *Category Management Agreements: A New Field Means of Concerted Practices?*, PARIS COMPETITION NEWSLETTER (Norton Rose LLP, Paris, Fr.), Jan., 2011, available at http://www.nortonrose.com/knowledge/publications/2011/pub33439.aspx?lang=en-gb&page=all#publication_page_110104105321 [hereinafter Norton Rose LLP].

First, the FCA focused primarily on the “tripartite concerted practice,” also known as the “hub-and-spoke” theory discussed above.¹³² Also, the FCA only makes two general recommendations: first, that the appointment of a category captain be made public, such as through a tender for applications; and second, the FCA recommends that category management agreements clearly set forth each party’s specific responsibilities.¹³³ The FCA’s somewhat vague recommendations are partially due to the nature of the category-captain relationships existing in France.¹³⁴ In its opinion, the FCA notes that French retailers typically reserve ultimate authority on marketing policies, while the captains only provide non-binding recommendations.¹³⁵ Since this already creates a lower risk of anti-competitive behavior, the FCA most likely believed that strict guidelines were not as necessary as in other countries.

2. Case Law

One of the largest European cases in recent history involving the abuse of a supplier’s dominant market position is the draft settlement agreement entered on October 19, 2004 between Coca-Cola (“Coke”) and the European Commission.¹³⁶ While this settlement agreement was regarding Coke’s abuse of its dominant market position, its general principles can be used to analyze a category management relationship as well.¹³⁷ The agreement applies to all EU states where Coke’s market share is over 40% or where Coke’s sales are more than twice that of its nearest competitor.¹³⁸

The draft settlement agreement sets some specific requirements by which Coke must abide by in EU member states and these factors are instructive as to what practices the EC may

¹³² Norton Rose LLP, *supra* note 131.

¹³³ SJ Berwin LLP, *supra* note 131.

¹³⁴ *FCA Opinion*, *supra* note 130, at 5.

¹³⁵ *Id.*

¹³⁶ See generally Undertaking Case Comp/39.116/B-2 - Coca-Cola [hereinafter Undertaking], available at http://ec.europa.eu/competition/antitrust/cases/dec_docs/39116/39116_5_6.pdf; see also Heba M. Hamouda, *Agreement With Coca-Cola Ends The European Union’s Five Year Inquiry Into A Potential Abuse Of A Dominant Position* (2004), available at http://www.luc.edu/law/academics/special/center/antitrust/pdfs/hamouda_coca_cola.pdf.

¹³⁷ Hamouda *supra* note 136, at 1.

¹³⁸ Undertaking, *supra* note 136 at 2.

consider anti-competitive. The main requirement the EC set forth was that Coke had to put an end to all exclusivity arrangements.¹³⁹ This empowered all Coke retail customers to freely buy and sell carbonated soft drinks from the suppliers of their choice.¹⁴⁰ Coke was also banned from offering “target rebates” to customers that purchased the same amount or an increased amount as their previous purchase quantity.¹⁴¹ Coke could no longer use “tying provisions” that required a buyer to purchase a less popular Coke product with Coke’s best-selling products.¹⁴² In addition, Coke could no longer give rebates for customers that agreed to reserve shelf space for Coke’s entire group of products.¹⁴³ Lastly, Coke could no longer restrict the use of rent-free beverage coolers; retailers are now free to use at least 20% of coolers’ capacity for any product of their choosing.¹⁴⁴

3. Foreign Conduct That Affects U.S. Commerce

Since the Second Circuit’s ruling in *United States v. Aluminum Co. of America*,¹⁴⁵ courts and Congress have recognized that foreign conduct that affects U.S. commerce can be a violation of U.S. antitrust law.¹⁴⁶ A recent decision, *Federal Trade Commission v. Church & Dwight Co., Inc.*,¹⁴⁷ confirms this proposition. The FTC is investigating Church & Dwight (“C&D”), maker of Trojan brand condoms, for possible antitrust violations associated with C&D’s category management activities.¹⁴⁸

The court held that evidence from C&D’s Canadian subsidiary was relevant in the FTC’s investigation into C&D’s American operations.¹⁴⁹ The FTC contended that the Canadian documents were relevant because they could help explain the difference in C&D’s market share in the United States and

¹³⁹ *Id.* at 6.

¹⁴⁰ *Id.*

¹⁴¹ *Id.* at 5.

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *Id.* at 8.

¹⁴⁵ 148 F.2d 416 (2d Cir. 1945).

¹⁴⁶ *Recent Case Highlights Issues In Public Antitrust Investigations*, ANTITRUST TODAY (Nov. 22, 2010), <http://www.antitrusttoday.com/2010/11/22/recent-case-highlights-issues-in-public-antitrust-investigations/>.

¹⁴⁷ Misc. No. 10-149, 2010 WL 4283998 (D. D.C. Oct. 29, 2010).

¹⁴⁸ *Id.* at *1.

¹⁴⁹ *Id.* at *2.

Canada.¹⁵⁰ C&D has a much lower market share in Canada, and the FTC argued that this may be due to C&D's potentially illegal sales tactics in the United States.¹⁵¹ Siding with the FTC, the court applied a very liberal relevance standard that was satisfied because the information was reasonably relevant and because the FTC's relevance arguments were not "obviously wrong."¹⁵²

The court also held that C&D was required to show that compliance would "threaten[] to unduly disrupt or seriously hinder" C&D's business operations.¹⁵³ C&D failed to establish any affidavits or other supporting proof that this would be unduly burdensome, and the court granted the FTC's discovery requests for the Canadian subsidiary.¹⁵⁴

This decision indicates that in today's globalized economy, a federal agency may investigate a foreign subsidiary of an American company "merely because the agency's original grant of authority is the investigation of economic activity that has had an impact on interstate commerce within the United States."¹⁵⁵ For companies with U.S. and foreign offices, the court's adoption of the "not obviously wrong" standard in *Church and Dwight* may indicate that it will be very difficult for a company to object to an investigation based on relevancy grounds.¹⁵⁶ Assuming it has the appropriate evidence, a company may be more successful shielding foreign documents with legitimate burden objections than relevance arguments.

III. Proposed Changes to U.S. Antitrust Law on Category Management

The area of antitrust law as applied to category management is still a relatively undefined area of law that leaves practitioners with little guidance on what is permissible. Although the FTC provided some general recommendations in its 2001 report, clearer guidelines would lead to a more efficient practice of category management. In 2002, the FTC announced it would not issue guidelines on the payment of slotting allowances and that it would research the matter further;¹⁵⁷ however, nearly

¹⁵⁰ *Id.* at *4.

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ *Id.* (quoting *FTC v. Texaco*, 555 F.2d 862, 882 (D.C. Cir.1977)).

¹⁵⁴ *Id.*

¹⁵⁵ *Id.* at *2.

¹⁵⁶ ANTITRUST TODAY, *supra* note 146.

¹⁵⁷ ABA Handbook, *supra* note 2, at 30, n. 6.

nine years later, the FTC has yet to fully address this issue.

Practitioners are left with vague FTC recommendations such as, “the category captain [should] not bias its advice to the retailer in such a way that it effectively excludes or significantly disadvantages its competitors.”¹⁵⁸ As the court stated in *National Petroleum*, “rules, as contrasted with the holdings reached by case-by-case adjudication, are more specific as to their scope, and industry compliance is more likely simply because each company is on clearer notice whether or not specific rules apply to it.”¹⁵⁹

As the practice of category management continually grows and evolves, the law must do the same. A starting point would be for the FTC to take notice of changes in European law and follow suit. For example, the EC’s Guidelines set forth concrete standards with suggested lengths of category management contracts¹⁶⁰ and specific market share thresholds.¹⁶¹ These definitive standards, along with a list of five or six other specific factors,¹⁶² provide firms in the EU with concrete guidance on what will be considered anti-competitive.

U.S. antitrust law should also promulgate guidelines with specific factors on which category management practices constitute anti-competitive conduct. Category captain agreements are more likely to be anti-competitive when large suppliers can control distribution for a significant period of time.¹⁶³ This being the case, the FTC and the Department of Justice (“DOJ”) should set specific market share limitations and term limits on category management contracts. Several courts have established safe harbors for short-term agreements that are terminable on short notice,¹⁶⁴ however, a definitive rule should be established to provide sufficient notice for category captains. Also, one commentator notes that courts generally attach liability when

¹⁵⁸ FTC REPORT, *supra* note 1, at 54.

¹⁵⁹ Nat’l Petroleum Refiners Assn. v. FTC, 482 F.2d 672, 690-91 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 951 (1974).

¹⁶⁰ *EC Guidelines*, *supra* note 109, at ¶133.

¹⁶¹ *Id.* at ¶135.

¹⁶² *See id.* at ¶¶132-40.

¹⁶³ Wright, *Antitrust Law*, *supra* note 100, at 191.

¹⁶⁴ *See, e.g.,* Roland Mach. Co. v. Dresser Industries, 49 F.2d 380, 395 (7th Cir. 1984) (holding that a presumption of lawfulness exists for exclusive dealing contracts terminable in less than 1 year); *see also* Omega Env’tl., Inc. v. Gilbarco, Inc., 127 F.3d 1157, 1162 (9th Cir. 1997) (stating that the “short duration and easy terminability of these agreements negates substantially their potential to foreclose competition”).

market foreclosure reaches 40%.¹⁶⁵ This number, or a similar amount, should be formalized in a specific guideline that establishes how much market foreclosure constitutes an antitrust violation.

Furthermore, the FTC and DOJ should take measures aimed at mitigating the risk of collusive or exclusive category captain practices. First, instead of merely suggesting that a captain establish internal firewalls, the FTC and DOJ should mandate that a company take specific measures to prevent the inappropriate sharing of confidential information. Next, the FTC and DOJ should require captains and retailers to document their arrangement so that it sets forth specific limitations on the extent of the relationship. Category captains should then be required to file these agreements with the FTC so it can monitor category management relationships more effectively. As former FTC Commissioner Leary pointed out in a 2005 interview, the FTC really does not know which firms are acting as category captains, which retailers they are working with, what functions these captains are performing, and how much coordination is actually involved.¹⁶⁶ The FTC and DOJ need to collect this information to answer these questions and get a better understanding of how to address reform in this area. The FTC and DOJ could also use this information to determine whether a captain is serving for multiple retailers in a given geography. If so, the FTC or DOJ could monitor whether this results in a “hub-and-spoke” arrangement or whether it has the “common price setter” effect, as discussed above.

IV. Why Category Management Is Beneficial to the Consumer

When performed in accordance with antitrust law, category management is an effective retail marketing practice that provides numerous benefits to consumers.¹⁶⁷ The practice leads to the product selection and prices most favorable to consumers and can be used to enhance a consumer’s shopping experience.¹⁶⁸

Through category management, retailers are more likely to carry the brands and products that consumers are most interested

¹⁶⁵ Jonathan M. Jacobson, *Exclusive Dealing, “Foreclosure,” and Consumer Harm*, 70 ANTITRUST L.J. 311, 318 (2002).

¹⁶⁶ *FTC Interview*, *supra* note 55, at 7.

¹⁶⁷ Steiner, *supra* note 2, at 78.

¹⁶⁸ *See id.*; *see also* Carameli, *supra* note 6, at 1314.

in purchasing.¹⁶⁹ With information from their category captains, retailers can enhance a consumer's shopping experience by placing products in the most convenient location, using displays in the most effective manner, and shelving complementary products next to each other.¹⁷⁰

Category management is evolving even further by focusing not only on one category, but on multiple complementary categories.¹⁷¹ For example, Procter and Gamble teamed up with Carrefour, Europe's leading retailer, to create the "baby solution center," an example of a complementary category management approach.¹⁷² This "store within a store" brought together complementary expertise from Nestlé, Johnson & Johnson, Fisher-Price, and Procter & Gamble.¹⁷³ The "baby solution center" incorporates all baby categories (diapers, wipes, baby food/milk/formula, toys, baby cosmetics and baby clothes) into one location to give the consumer an enhanced shopping experience.¹⁷⁴ Not only did this category management approach provide consumers convenience, it also significantly increased sales for the categories as a whole.¹⁷⁵ This is evidence that collaboration among retailers and competing suppliers is beneficial for all parties involved. It is also evidence that, given the power to make category decisions, it is in a captain's best interest to do what is best for the category as a whole, rather than simply what is best for itself.

Category management not only enhances the consumer shopping experience, it also increases retailer profits,¹⁷⁶ ultimately leading to lower prices.¹⁷⁷ The more efficient retailer-supplier relationships created by category management yields higher profits, thereby providing the most effective and profitable product decisions.¹⁷⁸ For example, in a study comparing category management to brand-by-brand management, retailers that used the category management approach obtained a 10% profit

¹⁶⁹ Carameli, *supra* note 6, at 1314.

¹⁷⁰ *See id.*; *see also* Gruen, *supra* note 8, at 4.

¹⁷¹ *See, e.g.*, Gruen, *supra* note 8, at 4.

¹⁷² *Id.*

¹⁷³ *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ *Id.* ("The results were impressive, with sales in the major categories (diapers and food) increasing 34 to 51 per cent and sales in the impulse categories (toys and clothing) doubling and tripling.").

¹⁷⁶ *See* ROUNDTABLE DISCUSSION *supra* note 10.

¹⁷⁷ Klein & Wright, *supra* note 10, at 437.

¹⁷⁸ *Id.*

improvement over retailers using brand-by-brand management.¹⁷⁹ In the same study, a simple cost-plus markup approach, another popular marketing practice, led to a 60% reduction in profit compared to a category management approach.¹⁸⁰ The difference in performance was due to sub-optimal pricing, more frequent ordering, and larger inventory resulting from the cost-plus practice.¹⁸¹ In another study, European retailers using category management reported impressive cost savings in multiple product categories.¹⁸² These results were achieved by reducing out-of-stocks, cutting SKUs, and improving the efficiency of product delivery systems.¹⁸³

Although there is some debate about whether increased profits actually lead to consumer savings,¹⁸⁴ in such an intensely competitive industry,¹⁸⁵ it would be highly unlikely that a retailer would not try to gain a competitive advantage through lower prices. This is evidenced by the prevalence and success of the discount-shopping strategy used by Wal-Mart and online retailers. Also, studies indicate that retailer profits have not increased during the period that category management strategies have been in place, further suggesting that savings are actually being passed on to consumers.¹⁸⁶

Category captains are necessary tools in the use of category management because retailers would be unable to create these efficiencies on their own. “[T]he manufacturer may know things like the times of year when a product will sell best, the kinds of promotions that are most effective in moving the product, or the kinds of complementary goods that might be advantageously displayed in adjacent space.”¹⁸⁷ Retailers have information about the category as a whole, but they need access to suppliers’ wealth of in-depth information to truly understand consumer behavior.

¹⁷⁹ Joseph M. Hall et al., *Retailer Dynamic Pricing and Ordering Decisions: Category Management Versus Brand-by-Brand Approaches*, J. RETAILING 172, 178 (2010).

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

¹⁸² Steiner, *supra* note 2, at 78, n. 13 (citation omitted).

¹⁸³ *Id.* (citation omitted).

¹⁸⁴ See, e.g., Wright, *Antitrust Analysis*, *supra* note 102, at 311, n. 25; see also Steiner, *supra* note 2, at 80.

¹⁸⁵ See FOOD MKTG. INST., *supra* note 30 (showing that industry net profit after taxes is only 1-2%).

¹⁸⁶ Wright, *Antitrust Analysis*, *supra* note 102, at 311, n. 25.

¹⁸⁷ FTC REPORT, *supra* note 1, at 48.

V. Conclusion

A fundamental concern of antitrust policy is whether a potential anti-competitive activity actually benefits consumers¹⁸⁸ and, since category management does, courts should generally be deferential to the practice. When performed in accordance with proper antitrust law, category management is an effective retail marketing practice that provides numerous benefits to the consumer. For this reason, reform in this area should not be aimed at prohibiting the practice, but rather at ensuring that the practice is performed in the most legal and ethical manner. Reform needs to establish clear guidance so that retailers and suppliers know how to properly practice category management. This will increase the use of category management and ultimately benefit consumers through lower prices, better product offerings, and enhanced shopping experiences. Consumers have a grave interest in prohibiting anti-competitive conduct and preserving this practice, so retailers, suppliers, and lawmakers should do everything possible to ensure this is accomplished.

¹⁸⁸ Wright, *Antitrust Law*, *supra* note 100, at 177.