



Information Exchange and Hub & Spoke Cartels

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25 March 2010

A fashionable infringement

- **Finland**
 - *Grocery retailers* (2008)
- **France**
 - *Palais Parisiens* (2006)
- **Germany**
 - *Drugstore products* (2008)
 - *Luxury cosmetics* (2008)
- **Italy**
 - *Asnef-Equifax* (2006)
- **Netherlands**
 - *T-Mobile* (2009)
- **UK**
 - *Private schools* (2006)
 - *Dairy products*
 - *Tobacco*
 - *Brands*
- **EU**
 - *Bananas* (2008)

Commission Decisions

	Cartel	Other
2005	5	1
2006	7	0
2007	8	3
2008	7	1
2009	6	0
Total	33	5

Commission Decisions

	Cartel	Other	
		object	effect
2005	5	1*	-
2006	7	-	-
2007	8	2	1
2008	7	1	-
2009	6	-	-
Total	33	4	1

“A cartel usually requires the exchange of information on prices and markets ...

At the other end of the spectrum, dissemination by a trade association of anonymized, historical statistical data may be unobjectionable.

Between those two extremes, difficult issues arise”

Bellamy & Child (6th Ed)

- ***UK Tractor Exchange (1998)***
 - effect restriction
- ***Bananas (2008) / T-Mobile (2009)***
 - cartel/object restriction

“It is common practice in many industries for aggregate statistics and general market information to be gathered, exchanged and published. [This] is a good means to increase market transparency and customer knowledge, and thus may produce efficiencies ...

However, the exchange of commercially sensitive and individualized market data can, under certain circumstances, breach Article 81”

Maritime Transport Guidelines (2008)

- **Explicit collusion**
 - cartels et al
 - based on explicit agreement
 - no market structure requirement
- **Tacit collusion**
 - oligopolistic interdependence
 - no need for an explicit agreement
 - only a threat in oligopolies

Information exchange is

- part of the evidence for a cartel (C1)
- an infringement in and of itself (C2)
- the only evidence for a cartel (C3)

- ***British Sugar (1999)***
 - meeting to ‘end price war’
 - ‘pricing matrix’ handed over
- **Maritime Transport Guidelines**
 - “an information exchange system may constitute a breach of the competition rules even when the market is not highly concentrated but there is a reduction of the undertakings’ decision-making autonomy resulting from pressure during subsequent discussions with competitors”
 - cites *Tyssen Stahl (1999)*

- ***UK Tractor Exchange***
 - individualized non-price sales data
 - exchanged “frequently”
 - concentrated market
 - effects analysis
- **Rationale**
 - “on a truly competitive market transparency between traders is in principle likely to lead to the intensification of competition”
 - “exchanges of precise information at short intervals ... on a highly concentrated oligopolistic market ... likely to impair considerably the competition which exists between traders”

- ***IFTRA Glass Containers (1974)***
 - “It is contrary to [Art 101] ... for a producer to communicate to his competitors the essential elements of his price policy”
- ***Private Schools (2006)***
 - 50 schools mutually exchanged proposed fees
 - 250+ private schools in UK
- ***Palais Parisiens (2006)***
 - exchange of information including business plans between 6 ‘Palace’ hotels in Paris

- **Object cases**
 - exchange with other evidence of cartel activity (C1), or
 - exchange of
 - price information (future/non-public), or
 - information re future competitive strategy (C3)
- **Effect cases**
 - exchange of
 - commercially sensitive and individualized market data
 - in a highly concentrated market (C2)

- ***T-Mobile***

“an exchange of information which is capable of removing uncertainties between participants as regard the timing, extent and details of the modification to be adopted by the undertakings concerned must be regarded as pursuing an anti-competitive object”

“An exchange of information between competitors is tainted with an anti-competitive object if the exchange is capable of removing uncertainties concerning the intended conduct of the participating undertakings”

- ***T-Mobile***
 - potentially broad language “capable of removing uncertainties”
 - exchange concerned purchase prices
- ***Asnef-Equifax***
 - exchange of credit risk information between lenders
 - must not disclose “market position or the commercial strategy of competitors”
- ***Bananas***
 - exchange of future pricing information occurred
 - exchange of “price setting factors” also illegal
 - one way disclosure sufficient

- **Law on information exchange still “difficult”**
- **(Over)cautious advice likely to persist**
- **Thoughtful guidance from the Commission would be helpful**

- **EU**
 - *Bananas*

- **UK**
 - *Toys and Kit (2006)*
 - *Dairy products*
 - *Tobacco*
 - *Brands*

- **Cartels in which not all the parties are in direct contact**
- **One (or more) of the parties acts as an intermediary (hub) for the conspiracy between the other parties**
- **UK cases concern allegations of suppliers coordinating collusion between retailers (and visa-versa)**

- **UK regulator (OFT) and specialist court (CAT) in *Toys and Kit***
 - **Scenario 1** (A, B and C infringe)
 - A discloses information to B
 - it is reasonably foreseeable that B might “make use of that information to influence market conditions”, and
 - B discloses that information to A’s competitor C
 - **Scenario 2** (A and B infringe)
 - B discloses information to A
 - A knows that information to be based on conversations with A’s competitor C
 - A in return discloses its future intentions to B

- **UK Court of Appeal in *Toys and Kit***
 - **Scenario 1** may not be an infringement if
 - A did not actually foresee B's use of the information, and/or
 - C did not know A had consented to the disclosure
 - **Scenario 1** will be an infringement if
 - A “may be taken to intend” that its information be passed to competitors
 - C knows “the circumstances” of A's disclosure, and
 - C uses the information in setting prices
 - The case is stronger where there is reciprocal disclosure by A and C via B

- **Disclose your own confidential data only under confidentiality requirements**
- **If you receive confidential third party data**
 - do not pass it on to third parties
 - do not offer your own confidential data in return