



Information Exchange: Interactive Session

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Your sales director informs you that he has been in regular private meetings with the sales directors of your three largest competitors.

Issues discussed include demands from customers for rebates as well as actual and intended reactions to those demands

**Confectionery Manufactures, BKA, Aug 2012
(see also Dishwasher Detergents, and Consumer Goods)**

You are shown a monthly bulletin from a commercial trade publication which states that, in response to a US\$ 100/t drop in raw material prices, competitor A (named) would be dropping its selling price by only US\$ 20/t.

A second (unnamed) competitor is also reported to have indicated that it would not be passing on the full price reduction.

EU Horizontal Guidance (2011)

- **Two categories of information exchange**
 - as part of a wider horizontal agreement
 - free-standing information exchange
- **First to be assessed in context of wider agreement (§ 56)**
- **Second addressed in Guidelines**

- **Potential benefits recognized (§ 57)**
- **Primary concern: collusion (§§ 65-68)**
 - specifically tacit collusion
- **Secondary concern: foreclosure (§§ 69-71)**
 - exclusive exchange of very strategic data
 - exclusion a significant competitive disadvantage

- **Exchange presumed anticompetitive if it discloses (§§ 72-74)**
 - future intentions
 - of individual competitors
 - relating to (i) prices or (ii) quantities
- **Indirect disclosure is sufficient**
- **But *cf* firm public commitments (§ 74, fn 4)**

- **Will the exchange enable tacit coordination**
- **Is there an innocent commercial rationale (pro-competitive justification)**
- **Issues to explore**
 - nature of the information
 - nature of the market
 - nature of the exchange
 - rationale for the exchange

- **Nature of information** (§§ 86-90 + 92-93)
 - non-public, strategic, individualized, non-historic, sufficient market coverage
- **Nature of market** (§§ 77- 85)
 - concentrated, transparent, stable, “non-complex”, symmetric
- **Nature of exchange** (§§ 91 and 94)
 - frequency, in public or in private, direct competitor contact
- **Rationale** (§§ 95 - 104)
 - benchmarking, credit checks, demand projection, provision of information to customers

Safe Harbours

- *Tractor Exchange* (European Commission, 1999)
 - no individual data less than 12mths old
 - newer data aggregated over at least 3 undertakings
- *Whatif? Private Motor* (OFT, 2011)
 - no data as to future prices
 - data less than 6mths old must be (i) aggregated over at least 5 undertakings and (ii) anonymized
- *Raw Milk* (BKA, 2012)
 - aggregated data over at least 5 undertakings ok – if market share of largest player <33% and top 2 < 60%
 - individual data more than 6mths old may be ok – if price fluctuation is high
 - data allowing inferences on current/future prices may be illegal, eg rolling 12mth price averages
 - individual price factors (eg discounts) not broken out

Questions To Ask

- **Pricing or quantity data**
 - includes discounts, surcharges, direction of travel
 - detailed cost data, pricing models (possibly)
 - market shares, customers, territories (possibly)
- **Other commercially sensitive data**
 - data companies keep confidential for commercial purposes
- **Something else**

- **Concerns future intentions**
 - particularly re price or quantity
- **Current data**
 - may sometimes disclose future intentions –
Whatif? Private Motor, Raw Milk
- **Historical data**
 - to be determined in market context
 - how fast do, eg prices, change

- **Individual undertakings identified**
- **Aggregated**
- **Anonymized**
- **Risk of disaggregation**
 - aggregated over less than 5 undertakings
 - one or two players have disproportionate weight
 - other factors allow identification of individual data

- **Publicly available**
 - freely accessible, to customers and competitors
- **From a competitor**
 - directly/indirectly
 - with/without their consent
- **Via a third party – where did they get it?**
 - commercial data aggregator
 - customer/supplier
 - trade association

- **Oligopoly (bad)**
 - small number of significant players – *Finnish supermarkets*
- **Atomized and dynamic (good)**
- **Other risk factors**
 - history of collusion
 - commodity type products
 - stable conditions (demand, innovation, etc)

- **Legitimate commercial rationale**
 - benchmarking
 - credit checks
 - provision of customer information, eg price comparison
 - demand forecasts
- **Absence of clear rationale a concern**

- **Regular and frequent**
 - regularity and frequency increased risk of collusion
 - assess against market background
- **Public/private**
 - public exchanges less risky, particularly if accessible to customers
- **Market coverage**
 - data with limited coverage may have limited value

Outline Analysis

- **Object infringement risk**
 - direct or indirect exchange of individualized data on prices or quantities
- **Within safe harbour**
 - no object risk
 - other data aggregated, anonymised and/or historic
- **Effects analysis**
 - balance of coordination risk vs legitimate business objective

Back to the Questions

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A trade association wishes to provide its members with demand data – backward and forward looking. To be collected from its members (who are competitors).

You find that one of your sales team has a copy of a competitors price list in his drawer.

Thank you

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