Information Exchange and Hub & Spoke Cartels

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This time last year
A fashionable infringement

- Finland
  - Grocery retailers (2008)

- France
  - Palais Parisiens (2006)

- Germany
  - Drugstore products (2008)
  - Luxury cosmetics (2008)

- Netherlands
  - T-Mobile (2009)

- Spain
  - Asnef-Equifax (2007)

- UK
  - Private schools (2006)
  - Dairy products*
  - Tobacco*
  - Brands*

- EU
  - Bananas (2008)*
“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)
A lot has changed

- EU Horizontal Guidelines published
- Hub & spoke aspects in cases have narrowed or collapsed
  - *Tobacco*
  - *Dairy*
  - *Brands*
- New cases have emerged
  - *UK Banks*
  - *UK Motor Insurance*
  - *German FMCG*
Horizontal Guidelines
New Horizontal Guidance

• Real progress

• Clarifies
  • practical and theoretical basis of Commission’s approach
  • when information exchange will constitute a per se infringement
  • factors relevant to an effects analysis

• Number of open questions remain
Practical approach

- 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

- Second addressed in Guidelines
Theoretical basis

- Main concern is that information exchange leads to collusion
  - specifically tacit collusion

- Secondary concern in relation to foreclosure
  - exclusive exchange of very strategic data
  - exclusion a significant competitive disadvantage

- Clear recognition of potential pro-competitive benefits
Object infringements

- Narrow ‘object box’ for pure information exchange
  - Covers only exchanges of
    - individualized data
    - re future intentions
    - relating to
      - prices, or
      - quantities
Effects analysis

• **Nature of market**
  • concentrated, transparent, stable, “non-complex” and symmetric

• **Nature of information**
  • strategic, individualized, recent, publicly available, market coverage

• **Nature of exchange**
  • frequency, in public or in private

• **Similar to merger analysis of coordinated effects**
Some outstanding questions
How narrow is the object box?

• “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)

• Quantity data may include data on market share, territories or sales to customer groups (fn 56)

• Price data may include
  • prices paid for inputs – ie cost data (T-Mobile)
  • “price setting factors” (Bananas)

• Can current data disclose future intentions?
When does collusion arise?

• **Guidelines take a broad view**
  • “information exchange can constitute a concerted practice if it reduces strategic uncertainty … Consequently, sharing of strategic data between competitors amounts to concertation”

• **Case law**
  • tacit agreement requires “an invitation” to fulfill an anticompetitive goal jointly leading to a “concurrence of wills” (*Bayer Adalat*)
  • a concerted practice requires action on the market – but this may be presumed (*Anic*)
Unilateral exchanges

• **Sufficient if**
  • one competitor makes a unilateral disclosure of strategic information, and
  • that disclosure is “accepted”

• **Presumed acceptance absent “clear statement” that information unwelcome**

• **Impact of *Anic* presumption?**
Public information exchanges

• **Woodpulp**
  • public announcements of price increases not collusive

• **Guidelines**
  • “a concerted practice cannot be excluded for example in a situation where [a public announcement] was followed by public announcements by other competitors”

• **NB firmness of public commitments**
How will this be applied in practice?

- **Scope for broad interpretation**
  - particularly if effects analysis applied in ‘check list’ manner

- **Analysis of pro-competitive effects likely to be important**
  - source of reassurance in case of uncertainty
  - “on a truly competitive market transparency between traders is in principle likely to lead to the intensification of competition” (Tractor Exchange)
• **On-line tool created by 7 insurers and 2 IT companies (WhatIf? Private Motor)**
  - individualized data
  - including future prices
  - private exchange
  - updated monthly

• **Case to be settled without fines**
  - data to be aggregated (over at least 5 insurers) and to cover only current prices
Hub-and-Spoke Exchanges

ABC Trilateral Concerted Practices

“IIIC” Indirect Illegal Contacts
The Basic Picture - May be reciprocal
The Basic Picture - May be reciprocal

Supplier A

Supplier C

Retailer B
Features

• Not all parties are in direct contact

• The ‘hub’ acts as an intermediary and often a legitimate business contact

• The ‘spokes’ are typically competitors e.g. suppliers on one side and buyers on the other in the UK cases (cf Bananas)
• Suppliers and retailers exchange information for legitimate, pro-competitive reasons
  • while seeking advantage in price negotiations
  • as part of gathering market intelligence (to compete rather than coordinate)

• Information may flow between competitors absent agreement/knowledge/coordination
  • the hub (B) may act without the knowledge or consent of the spokes (A) or (C)
  • confidentiality is routinely ignored
• An infringement will occur if
  • A “may be taken to intend” OR “does in fact foresee” that its information will be passed from B to competitors such as C
  • C “may be taken to know the circumstances” of A’s disclosure, and
  • C uses the information in setting prices
[No legal requirement that disclosure it is reciprocal]

• An infringement may not occur if
  • A did not in fact foresee B’s use of the information, and/or
  • C did not appreciate the basis on which A had provided the information
• Will objective intention/foresight suffice rather than subjective intention/foresight (e.g. A should have known even if A actually did not..)

• In hub and spoke exchanges, is remaining active on the market sufficient to establish presumption that [C] took account of information received? (Presumption only established in direct competitor contacts case)
Dairy

- Government initiative to improve returns to farmers from retailers/dairy processors
- Retailers/processors deemed “colluding on prices for butter, milk and cheese during 2002 and 2003”
- In 2007 most parties settle with OFT and fines over £116m agreed
- Two retailers fought on but in 2008 another processor settles bringing total agreed fines to over £120m
- In 2010 Morrisons dropped and 3 of 4 allegations against market leader Tesco dropped with “no contest” on final one which it then also later challenged
- Total agreed fines down by at least around £50m: watch this space…
**Tobacco and Brands**

**Tobacco**
- Hub and spoke allegations made in 2008 SO but dropped in final decision
- Novel form of “price and parity RPM” equivalent in effect to horizontal manufacturer exchanges
- Decision imposing fines up to £225m under appeal: watch this space…

**Brands**
- Hub and spoke allegations concerning supermarkets and suppliers of over 100 brands
- Over 2 years of investigation, dawn raids involving 100+ officials and millions of emails reviewed
- Case closed on “prioritization” grounds
Future for hub-and-spoke cases?

- UK appetite for further hub and spoke cases may now be lower given experience meeting high burden of proof and uncertainty over legal test.

- Key issue in UK cases is role of subjective knowledge/intention.

- Clear risks where evidence of:
  - price information exchanges leading to commitments to price at particular level
  - repetitive reciprocal exchanges (A to B to C and C to B to A)
Practical suggestions

- Remind staff to emphasise confidentiality appropriately
- Proactive distancing in writing and retain record
- Focussed training for relevant staff