



Information Exchange and Hub and Spoke Cartels

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2011 Horizontal Guidance: A Step Forward

“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)

- **Stand-alone information exchange is a separate issue**
- **Tacit collusion is the key concern**
- **Object infringements defined**
- **Structure of effects analysis outlined**

- **Two categories of information exchange**
 - as part of a wider horizontal agreement
 - free-standing (pure) information exchange
- **First category must be assessed in context of the wider agreement (§ 56)**
 - is the wider agreement pro-competitive
 - is the info exchange reasonably necessary
- **Guidelines address pure info exchange separately**

- **Primary concern: collusion (§§ 65-68)**
 - must be tacit collusion (usually a high standard)
 - info exchange related to an express agreement analyzed separately (see above)
- **Secondary concern: foreclosure (§§ 69-71)**
 - very narrow scope of application
- **Potential benefits clearly recognized (§ 57)**

- **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

Open Issues

1. Public Announcements

- “[A] concerted practice cannot be excluded in a situation where such an announcement was followed by public announcements by other competitors, not least because strategic responses of competitors to each other’s public announcements (which, to take one instance, might involve readjustments of their own earlier announcements to announcements made by competitors) could prove to be a strategy for reaching a common understanding about the terms of coordination”

- **Horizontal Guidelines**
 - unilateral announcements lawful (§63)
 - reduced likelihood of coordination if public announcement equally accessible to all (§94)
 - no object risk if “fully committed” (§73,fn4)
 - retain right to “adapt intelligently” (§63)
- ***Woodpulp (C-89/85 etc)***
 - public price announcements not collusive
- ***Bayer-Adalat(C-2/01 etc)***
 - need to show “concurrence of wills”

- ***USA v Airline Tariff Publishing (1994)***
 - rare example of allegations of tacit collusion via information exchange
 - case based on multiple examples of fare increases being proposed and withdrawn depending on competitor responses – often without being implemented
 - clear evidence that parties interpreted public announcements as communications
 - case still settled by consent decree without fines

2. Hub and Spoke Collusion

- **Hub-and-Spoke Agreements**
 - *Hasbro/Argos/Littlewoods ('Toys')* (OFT, 2003)
 - *Replica Football Kit ('Kit')* (OFT, 2003)
- **Hub-and-Spoke Information Exchanges**
 - *Bananas* (EC, 2008)
 - *Private Schools* (OFT, 2006)
 - *Dairy Retail Price Initiatives* (OFT, 2011)

- **Information Exchange via a Competitor**
 - *Bananas* (EC, 2008)
 - *Private Schools* (OFT, 2006)
- **Information Exchange via a Supplier/Customer**
 - *Dairy Retail Price Initiatives* (OFT, 2011)
 - *Groceries Sector ('Brands')* (OFT, 2010)
 - *Tobacco* (OFT, 2010)

- ***Dairy Retail Price Initiatives (OFT, 2011)***
 - pricing intentions disclosed to suppliers
 - to enable prices to be printed on packets

- ***Scottish Dairies (OFT, 2008)***
 - cross supply arrangements create price transparency

- **General rule (direct competitor contact)**
 - unilateral disclosure sufficient (*British Sugar*)
 - collusion assumed absent clear protest (§ 62)
- **Indirect contacts (hub-and-spoke)**
 - *Bananas* (§ 254) – reasonably foreseeable
 - *Toys and Kit* (CoA, 2006) – either
 - actually foreseen (§ 91), or
 - may be taken to intended/know (§ 141)
 - reciprocal disclosures strengthen case (§ 141)

- **General rule (direct competitor contact)**
 - anticompetitive use assumed (§ 62)
 - based on *Anic*(C-49/92) case law
- **Indirect contacts (hub-and-spoke)**
 - *Toys and Kit* (CoA, 2006) – may need to show that information actually relied on by recipient (§ 141)
 - *Bananas* (§ 315) – no need to show effects

Thank you

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