THE CHALLENGE IS TO DISTINGUISH BETWEEN SITUATIONS IN WHICH INFORMATION DISCLOSURE (PRIVATE OR PUBLIC) INCREASES COMPETITION AS OPPOSED TO LEADING TO COORDINATED OUTCOMES.

Justin Coombs
Compass Lexecon

Justin Coombs opened the seminar with a presentation outlining the basic economic theory underlying the antitrust analysis of information exchange and providing an economist’s perspective on the recent UK cement case. For markets to operate optimally, maximising consumer welfare, firms and consumers must, inter alia, be well-informed so that they may make well-considered choices; competition does not require "uncertainty". In general, more information is good for competition and consumers. However, in some circumstances, too much information can instead facilitate coordination (for example, by allowing a coordinated outcome to be reached or by allowing firms to monitor compliance with such an outcome once established). The challenge is to distinguish between situations in which information disclosure (private or public) increases competition as opposed to leading to coordinated outcomes.

The recent UK cement case, arising from a market investigation reference under the UK Enterprise Act by the then Office of Fair Trading to the then Competition Commission (now merged in the Competition and Markets Authority), raises the question of in what circumstances disclosure of information to customers may have an anticompetitive effect by facilitating coordination. The UK cement market comprises four domestic producers, with only limited imports (representing approximately 20% of the market). Previously, prices were individually negotiated with customers and letters were sent by suppliers to their customers each year announcing any proposed price increase, but prices were then individually negotiated with customers so that any proposed price increases were very rarely implemented in full. Whilst the case did not involve any direct communication between competitors, information about competitors’ future pricing intentions was leaking back to other suppliers by virtue of the high degree of vertical integration in the market (meaning that most suppliers are each other’s customers) and the reporting of such information by customers in the context of price negotiations with their suppliers. Interestingly, there was no allegation that the relevant practice infringed Article 101 of the Treaty on the Functioning of the European Union. Rather, the Competition Commission concluded that the relevant market structure was susceptible to coordination and that market players took steps to exploit this susceptibility, using shares of sales as a focal point. This tacit coordination also involved the use of price announcement letters as a means to signal price increases to competitors, thus facilitating price parallelism, and softening customer resistance to price increases. The Competition Commission settled on an interventionist remedy comprising three elements: certain divestments by the largest player (Lafarge Tarmac); the prohibition of generic price announcements (to be replaced by individualised communications with customers only); and restrictions on the publication of industry output data (by both trade associations and government) to make the monitoring of output and market shares more difficult.

In commenting on the UK cement case, Mr Coombs remarked that the causal nexus between the price announcement practices and the alleged coordination remained unclear: how do price announcements help firms coordinate on market shares? How do price announcements help firms coordinate on prices if prices are ultimately individually negotiated? Further, it was not explained how one-shot communications could facilitate coordination.

The presentation concluded by examining how the risk of coordination or collusion in the context of information exchange may be reduced. Firms could be prevented from communicating proposed prices to customers, but customers cannot make informed choices without information on prices. It was therefore considered whether firms could communicate prices in alternative ways to reduce the risk of coordination. A number of factors may have an impact in this regard, including whether communications with purchasers are specific or general (or repeated or single), the length of advance notice of any proposed price changes, and the extent of vertical integration in the market. These are complex issues, which are likely dealt with best on a case-by-case basis.
EXCHANGE OF INFORMATION: CURRENT ISSUES
30 April 2014 / Allen & Overy, Brussels

EXCHANGE OF INFORMATION – A LEGAL PERSPECTIVE

Kris Dekeyser*
DG Competition

The second presentation considered EU competition law’s treatment of information exchanges, traditionally a grey area on which some recent cases have served to shed some light. It is important to consider the context in which the information exchange takes place: where an exchange is ancillary to a horizontal cooperation agreement or serves to support a cartel, it falls to be assessed together with the related agreement or the cartel respectively.

In cases where there is an autonomous information exchange, then it may, depending on the circumstances, constitute a restriction by object, a restriction by effect or be deemed pro-competitive in nature. It was clarified that, exchanges between competitors of their individualised future intentions could, depending on the circumstances of the case, be considered as cartels, and, as such, may be the subject of a leniency application.

Guidance on the assessment of information exchanges can be found in the Horizontal Guidelines (Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements Text with EEA relevance, OJ C 11, 14/01/2011, p. 1–72). Case law has further yielded useful clarifications: it is established that one-way communication is sufficient for there to be an infringement by object and that the Commission does not have to show that the recipient of the information will actually take it into account when setting its own commercial policy, as this will be presumed, where the recipient of the information remained active in the market. Whilst this presumption may be rebutted, so far there has been no successful rebuttal. Further, there is no need for the Commission to show any “actual plan” regarding future behaviour as the mere disclosure of commercially sensitive information will suffice.

Mr Dekeyser discussed two notable EU cases involving exchanges of information in order to illustrate how these are assessed under EU law. In the Court of Justice’s judgment in the T-Mobile case of June 2009 (Case C-8/08, T-Mobile Netherlands B.V and others v NMa [2009] ECR I-4529), the anti-competitive conduct under review arose from one single meeting between representatives of mobile telecommunications operators during which future intentions affecting dealers (not directly end-customers) were disclosed between competitors. The Court confirmed that an information exchange constitutes a restriction by object if it is capable of removing uncertainties concerning the intended conduct of the participants. A causal connection between the information exchange and future market conduct will be presumed, unless the contrary is proved by the recipient firm. Passive receipt of strategic information at just one meeting is a concerted practice and amounts to a restriction by object so that there is no need for the effects of such a practice to be analysed. It is not the number of exchanges involved or whether the exchange is reciprocal that matter: the key question is whether the information exchanged is capable of influencing parties’ market conduct.

In its decision in the Bananas cartel of October 2008 (Case COMP/39.188 - Bananas, OJ 2009 C189/12, Confirmed by the General Court in its judgment of 14 March 2013 - Case T-587/08 - Fresh Del Monte Produce v Commission and Case T-588/08 - Dole Food and Dole Germany v Commission), the Commission considered that bilateral discussions twice a week between bananas suppliers on price setting factors “served at least as market signals, trends or indications as to the intended development of banana prices” and, therefore, amounted to a concerted practice having an anticompetitive object. On appeal, the parties argued that they disclosed public information only. However, the Court agreed with the Commission’s assessment that, even if certain of the information could be obtained from other sources, the parties’ point of view on certain information, which was significant for the conditions of supply and demand, and its impact on the development of the market did not by definition constitute publicly available information. The Court held that, through their timing (shortly before the quotation prices were set) and their frequency, the relevant communications formed a pattern and had the same anticompetitive object, as the parties “thereby disclosed their course of action”.

Mr Dekeyser then briefly referred to the factors discussed in the Horizontal Guidelines as being relevant to the assessment of whether an information exchange may have restrictive effects, notably the characteristics of the relevant market(s) involved, the market coverage represented by the information exchange and the characteristics of the information at issue.

In conclusion, Mr Dekeyser touched upon two types of atypical cases involving information exchange, namely hub-and-spoke cases and signalling cases. Concerning hub-and-spoke exchanges, it was noted that the Commission has not yet dealt with such a case, but that the key question would seem to be whether the recipient was aware or should have been aware of the other party’s intentions in communicating the information. With regard to signalling, it was clarified that public announcements which are not committal and are adjusted in response to competitors’ public announcements might amount to a concerted practice, depending on the facts underlying the case at hand. Mr Dekeyser referred to the fact that the Commission is currently investigating a signalling case which, once it is concluded, will hopefully shed further light on the Commission’s approach to signalling.

* Kris Dekeyser is Head of Unit Antitrust – Case support and policy, at the European Commission, DG COMP, Brussels. This synthesis has been prepared by Concurrences Journal. Views expressed cannot be regarded as stating an official position of the European Commission.
The third and final presentation discussed the recent investigation by the Dutch Consumers and Markets Authority (ACM) involving three Dutch mobile network operators (MNOs). Whilst no evidence of an infringement was identified, the ACM considered that two public statements could potentially lead to anti-competitive collusion and required commitments by the MNOs in question in order to avoid the risk of collusive behaviour in the future.

Mr Schillemans explained that the first statement was made by KPN during a panel discussion at a Dutch Telecom conference and signalled that KPN planned to recommence charging connection fees, to which Vodafone responded that it hoped that KPN would follow through with this plan. Later internal Vodafone documents indicated that it also planned to resume charging connection fees if KPN did so. Some time later, several other MNOs also followed suit. The second incriminating statement was again made by KPN and revealed, in generic and non-specific terms, the company’s potential intention to increase its prices. Internal documents of T-Mobile reveal that it picked up on these statements and concluded that it would implement a price increase. The ACM considered these statements to be problematic in light of the specific characteristics of the telecoms market (high degree of concentration, limited competition from non-MNOs and relatively transparent market and homogeneous products), which facilitate tacit collusion. Whilst the statements in question were not binding and only expressed possible future market behaviour, such “cheap talk” nonetheless lessened strategic uncertainty between competitors, thus leading to tacit collusion.

In order to address the potential competition concerns identified by the ACM, the MNOs committed not to issue any public statements about future prices or other commercial conditions before internal decision-making processes had been finalised, with a carve-out for statements made during analyst calls (despite the fact that these calls are also attended by competitors). Mr Schillemans commented that this case clarifies the difference between a purely legal analysis of information exchange and an approach informed by economic principles: whilst from a purely legal standpoint, the context in which the information exchange occurs (private or public) remains determinative, context is irrelevant for the purposes of assessing the economic effects of the exchange. In conclusion, Mr Schillemans noted that, in cases involving public announcements, it remains unclear how the recipient of the information may distance itself from the exchange and, thus, rebut the presumption (on which its liability depends) that it relied upon the information.
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Intervenants
Joaquin Almunia, Scott Hemphill, Bill Kovacic, Kai-Uwe Kuhn, Frederic Jenny, Cecilio Madero, John Fingleton, Bruno Lasere, John Fingleton, etc.