



KING'S
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Analysing Information
Exchanges under Article 101

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Overview

A standalone information exchange may be procompetitive but may infringe Article 101

- Where results from joint (not unilateral) conduct
- Where relates to individual confidential information about future decisions (especially pricing/output)
- Where otherwise facilitates collusion between players or excludes new entrants

Conclusions and compliance lessons

Standalone information exchanges

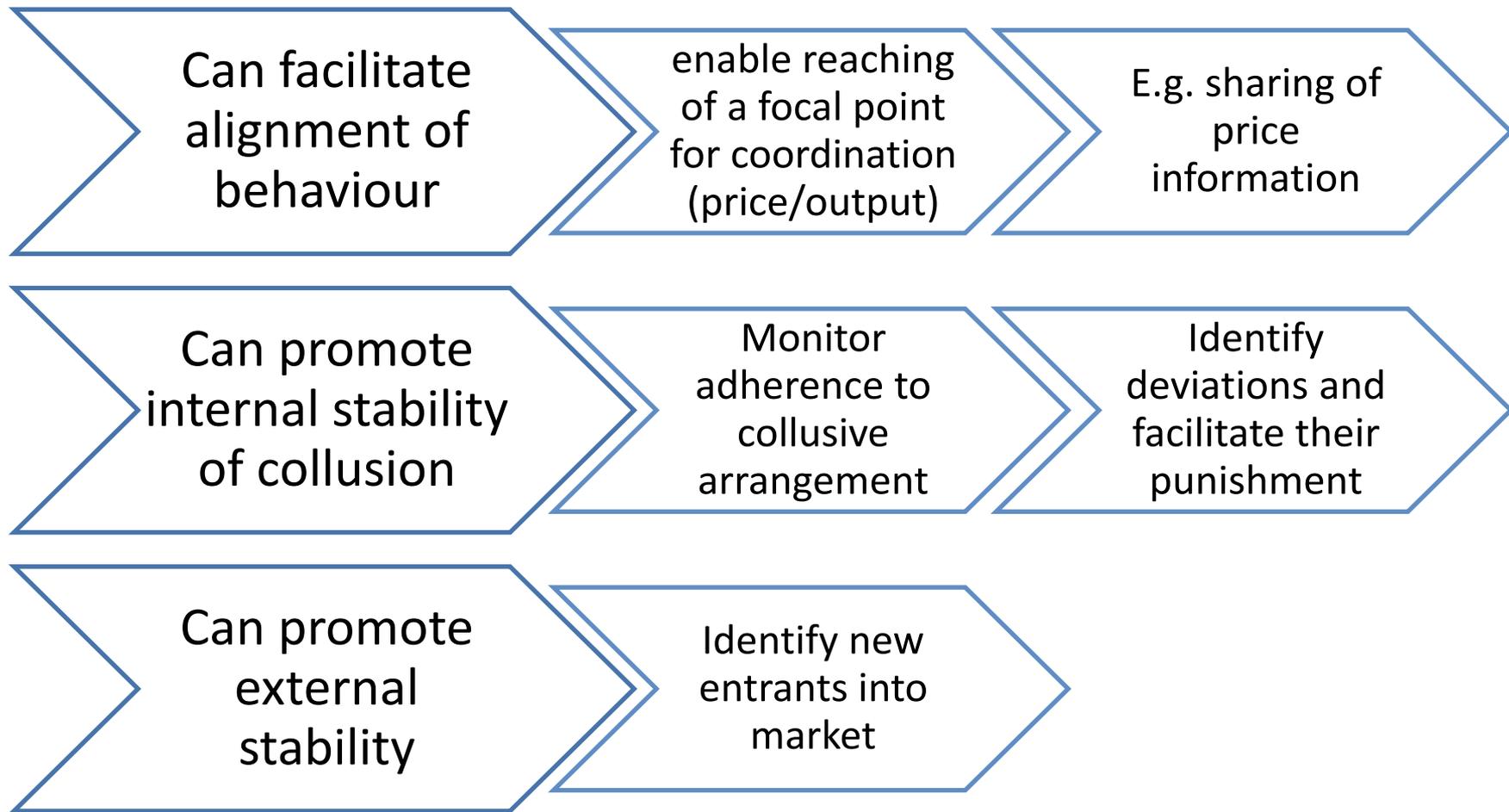
Pros

- Where disclosed to consumers (help well-informed-reasoned decisions)
 - Reduce search costs
 - Help choose most suitable product/service
- Private exchanges may improve commercial strategies and internal efficiencies
 - Help adapt business processes/perform better
 - Effective allocation of resources
 - Help understand market trends/demand
 - Improve functioning of market
 - Disseminate technical information on new products to facilitate use of standard components and interconnections

Cons

- May purely be a mechanism for coordinating behaviour – facilitate alignment of conduct identification of deviations from competitive strategy
 - As fight against cartels identifies business may find more amorphous ways of coordinating conduct
 - Only caught if 'joint' conduct can be established
- Even if not designed to coordinate conduct may have the effect of facilitating collusion

Mechanism for coordination, facilitates collusion (explicit or tacit) or reduces strategic uncertainty?



May also present opportunities to foreclose competitors from a market, eg where provides the recipients with a significant competitive advantage over rivals

Information exchanges – the spectrum



Some information exchanges - purely mechanisms for coordinating the joint fixing of prices/output ?

Informing competitors of intentions re *future conduct regarding prices or quantities* (individualised data) (not public)

Restrictive of competition by object and run risk of being investigated and fined as cartels

No need for direct link between concerted practice and prices charged to final consumers (*T-Mobile* and *Dole*)

Challenge may be to establish that results from joint conduct (agreement – decision – concerted practice)

Concurrence of wills – form unimportant

No actual plan required for concerted practice

- “knowingly substitutes practical co-operation ... for the risk of competition”
Dyestuffs
- “any direct or indirect contact ... to influence the conduct on the market of ... [a] competitor or to disclose to such a competitor the course of conduct which they themselves have decided to adopt or contemplate ...” *Suiker Unie*
- Conduct designed to remove uncertainty as to each other’s future conduct eg
 - reciprocal exchange of strategic information (even if only on a single occasion) (*T-Mobile*)
 - Unilateral disclosure of strategic information by one undertaking to a competitor where the recipient requests or accepts it (*Cimenteries*), unless it publicly distances itself from it (*Tate and Lyle*)
 - Indirect exchanges through an intermediary (eg hub and spoke or A-B-C)

But not *invitations to collude* if not accepted

For example

Bananas – €60 million fines* (exchange of information about price setting factors constituted a concerted practice having an anticompetitive object)

T-Mobile – €88 million fines* - concerted practice can be established from single meeting

RBS/ Barclays – RBS agreed to pay £28.5 million for unilateral disclosure of information accepted by competitor

Replica Football Kits – fines of £18 million* for price fixing operated through contact between dealers and supplier

* Reduced on appeal

But what about public exchanges of information/ price announcements?

‘[A]lthough Article [101] ... prohibits any form of collusion which distorts competition, it does not deprive economic operators of the right to adapt intelligently to the existing and anticipated conduct of their competitors’.

Genuinely unilateral announcements do not constitute a concerted practice – public disclosures to consumers/ investors may be beneficial (*Woodpulp*)

But what about public announcements which followed by public announcements by competitor(s) - a strategy for reaching a common understanding about the terms of coordination?

Container Line Shipping - ongoing investigation – including into whether public announcements/ price-signalling may be sufficient to establish concerted practices
Dutch mobile operators case

Flows of information can harm market outcomes even if *object* not to restrict competition

If facilitates coordination (easier to reach/ sustain internally or externally)

Need to consider *information exchanged* and *market context* – not in abstract

- Compare likely effects with situation that would prevail in its absence

Agricultural Tractors



8 businesses in UK tractor market, together holding 88% of UK market, 4 largest holding 80%; exchanged, over an extended period of time, detailed historic sales data

Commission concluded that the information exchange had a “*likely anticompetitive effect*” on the market:

- structure of the market (high concentration, high barriers to entry, absence of significant imports from outside the Community);
- kind of information exchanged (disaggregated commercially sensitive information);
- frequency of the exchanges (monthly, quarterly, weekly and even daily basis).

Asnef-Equifax

- The object of the register was to increase the amount of information available to credit institutions about potential borrowers and to reduce the risk of lending.
- Compatibility of the exchange system with competition depended on:
 - Whether the market is highly concentrated so that undertakings could become aware of competitors' market position and commercial strategy;
 - Not revealing lender identity; and
 - Non-discriminatory accessibility of the register to all operators in that market.
- ECJ took the view that a system for the exchange of information between credit institutions about the insolvency and default record of their clients does not, in principle, have a restrictive effect on competition.

Horizontal Cooperation Guidelines

Market characteristics

- ‘Companies are more likely to achieve a collusive outcome in markets which are sufficiently **transparent, concentrated, non-complex, stable** and **symmetric**’
(Guidance paragraph 77)

Characteristics of information exchanged (Guidance paragraphs 86-94)

- **Strategic information** – reduces strategic uncertainty as to prices, discounts, rebates, customer lists, production costs, capacity
- **Market coverage** – covers a sufficiently large part of the relevant market
- **Aggregated/individualised data** – individualised company level information more likely to be restrictive.
- **Age of data** – historic data is unlikely to lead to a collusive outcome
- **Frequency of the information exchange** – high frequency facilitates a common understanding and monitoring of deviations
- **Public/non-public information** – Public information equally accessible to competitors and customers

Conclusions

Certain horizontal information exchange increasingly treated as quasi-cartel activity

Exchange on future intentions, particularly pricing and volumes, and industry specific indicators of future intentions, most at risk

Repudiate unsolicited material otherwise tacit acquiescence and presumption of usage

Close scrutiny of unilateral public price and 'market direction' announcements – firms should consider why statement made and if necessary?

Conclusions

Avoid sharing information which is:

- ✗ **private:** not yet published / confidential
- ✗ **sensitive:** relating to commercial strategy e.g., price data
- ✗ **individualised:** non-aggregated specific information
- ✗ **forward looking / recent:** including within the last 12 months

• Consider carefully the need for communication:

- **necessity:** is it essential that the information be shared
- **interpretation:** how could this be interpreted by a competition authority
- **recipient:** who are you sharing the information with



- ✓ Exchange information which is publicly available, historic, anonymised, aggregated or redacted to reduce the competitive sensitivity associated with private, recent, individualised information
- ✓ When attending meetings or trade association gatherings,
 - insist on a written agenda,
 - object to any deviations,
 - keep minutes and excuse yourself immediately should the conversation stray
 - report incidents which could have competition law consequences to Legal Department
 - exercise the same caution in conversation with attendees as would in formal written communications
- ✓ Limit disclosure to information deemed necessary to disclose
e.g., if the communication is for the purpose of entering into a transaction



THANK YOU!

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