

BANANAS AND PUBLIC ANNOUNCEMENTS: DEFINING THE BOUNDARIES OF ANTI-COMPETITIVE INFORMATION EXCHANGES

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ABSTRACT

Information exchange between competitors remains a murky area of competition law, as it is not always clear when pro-competitive information sharing ends and collusive conduct begins. In addition, there are many shades of grey in between. It is also an area where there has been much development, in recent years.

A question reflecting the difficulty in identifying anti-competitive conduct relates to discussions around weather conditions. When does shooting the breeze with a competitor about climatic events and the demand for bananas, become price fixing? The European General Court recently answered that the line is crossed when the market for that particular commodity is a concentrated one and such discussions affect the weekly quotation price for bananas.² Clearly advising clients not to talk about prices is not sufficient and the effects of seemingly benign conversations must always be considered.

Closer to home the Competition Commission recently imposed strict conditions in a number of merger cases before the Competition Tribunal, to prevent anti-competitive information sharing from taking place where the Commission was concerned that sensitive information discussed at board meetings may lead to anti-competitive outcomes.³

This paper considers recent developments in respect of the law around the exchange of sensitive information between competitors and how best to mitigate against anti-competitive

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² See *Del Monte v. Commission* (Case T-587/08) and *Dole v. Commission* (Case T-588/08).

³ For instance the settlement agreement entered into between in the large merger between Business Venture Investments no. 1658 (Pty) Ltd and Afgri Operation Ltd and Senwes Capital (Pty) Ltd Case No. 87/LM/Dec12 - 015644

information exchange. We also make suggestions for practitioners as to how to best advise their clients in this regard.

1. INTRODUCTION

The exchange of information between competitors is an area of competition law where the law is still developing world wide. It is an area which will continue to develop as firms that wish to influence the competitive dynamics of the markets in which they operate, look for more creative ways to influence those market dynamics without entering into overt collusive agreements. Competition authorities must therefore necessarily adopt a more proactive approach to dissuading such behaviour. This can be, and in many countries is, being done by providing clear guidelines on what is acceptable and unacceptable information exchange, clamping down on various forms of anti-competitive information exchange which may lead to anti-competitive outcomes and imposing conditions on merging parties who operate in oligopolistic markets, sensitive to the effects of an exchange of sensitive information.

The fundamental difficulty with the regulation of information exchange is that greater transparency in a market is generally efficiency enhancing, as it can benefit consumers directly and can produce efficiencies for the firms involved, which boosts consumer welfare and should therefore be welcomed and encouraged.⁴ However it can also produce anti-competitive effects by facilitating collusion or by providing firms with focal points around which to align their behaviour.⁵ Therefore a careful balance must always be struck to ensure that pro-competitive information exchange is encouraged and the benefits thereof are recognised, while anti-competitive exchanges are dealt with appropriately.

This paper looks at the nature of information exchange between competitors and how competition authorities in the United States of America (“US”), European Union (“EU”) and the United Kingdom (“UK”) deal with it. We discuss recent cases in these jurisdictions which reflect how closer attention is being paid to unilateral disclosures of information with anti-

⁴ Organisation for Economic Co-Operation and Development (“OECD”), ‘*Policy Roundtables Information Exchange Between Competitors under Competition Law 2010*’ (11 July 2011) DAF/COMP(2010)37 (“OECD 2010 Report”), Overview.

⁵ OECD, ‘*Policy Roundtables Unilateral Disclosure of Information with Anti-competitive Effects 2012*’ (11 October 2012) DAF/COMP(2012)17 (“OECD 2012 Report”), Overview.

competitive effects and information exchanges between competitors which take place through a third party (such as an agent or retailer) - so called vertical exchanges of information. We then turn to consider the South African Competition Authorities' approach to information exchanges and the steps taken to prevent anti-competitive information exchange from occurring in some of the oligopolistic markets that characterise many sectors of our economy. We conclude by offering practical considerations which can be used to determine whether or not the exchange of information (be it directly between competitors, through unilateral disclosure or vertical) may be considered to be anti-competitive.

This paper is not intended as a comprehensive review of the approach to information exchange in the jurisdictions discussed, but rather a general overview of how information exchange is approached, considering the applicable law in those jurisdictions and discussion of recent cases which in our view are notable developments in the field.

2. WHAT IS INFORMATION EXCHANGE?

Information exchange refers to interactions among competitors that, from a competition law perspective, fall between universally condemned "hard core" or so called "naked" cartel conduct (involving an explicit agreement to set prices, restrict output, divide markets or rig bids) and tacit collusion⁶ arising from interdependent oligopolistic markets, which is generally seen not to be in violation of competition law.^{7 8}

In the course of normal business practice, many companies exchange different types of information through different channels which can increase transparency, which leads to better allocative and productive efficiencies but may also facilitate collusive outcomes between competitors.⁹

⁶ Tacit collusion arises in oligopolistic markets where the very nature of the market means that firms tend to be interdependent in their pricing and output decisions so that the impact of each firm impacts on the others that operate in that market and therefore elicits a counter response.

⁷ OECD 2010 Report at 9.

⁸ OECD 2012 Report at 19.

⁹ OECD 2010 Report at 9.

Information can be exchanged between competitors directly (either privately¹⁰ or publically¹¹) - by groups of firms in the context of trade associations or industry forums, as well as through third parties, so called vertical exchanges of information¹².

The OECD 2010 Report¹³ on information exchange notes that “*generally information exchanges between competitors may fall into three different scenarios under competition rules (i) as part of a wider price fixing market sharing agreement whereby the exchange of information functions as a facilitating factor (ii) in the context of broader efficiency enhancing co-operation agreements such as joint ventures, standardisation of R&D agreements or (iii) as a stand-alone practice whereby the exchange of information is the only co-operation between competitors.*”¹⁴

3. WHAT IS THE MISCHIEF COMPETITION AUTHORITIES ARE SEEKING TO PREVENT BY REGULATING INFORMATION EXCHANGE?

As Adam Smith observed almost 240 years ago “*People of the same trade seldom meet together, even for merriment and diversion but the conversations ends in a conspiracy against the public, or in some contrivance to raise prices.*”¹⁵ It is precisely this type of mischief - collusion between competing firms - which competition authorities seek to prevent by monitoring and acting against information exchange between competitors.

Collusion refers to any form of co-ordination or agreement among competitors in a market with the object or effect of raising prices (directly or indirectly) to a level where the price is higher than it would be in a competitive market (i.e. higher than the competitive equilibrium).¹⁶

¹⁰ I.e. between competitors only.

¹¹ I.e. to customers as well as competitors.

¹² E.g. customers, agents, benchmarking studies as well as “hub-and-spoke” arrangements.

¹³ At footnote 4 *supra.*

¹⁴ OECD 2010 Report at 9.

¹⁵ See A. Smith, *The Wealth of Nations*, Vol 1, Bk 1, Ch 10 (1776).

¹⁶ OECD 2012 Report at 28.

The biggest difficulty with information exchange is that perfect information is a requirement for perfect competition, yet the exchange of competitively sensitive information between competing firms can either in itself be a form of collusion, or it is a method by which a collusive agreement can be monitored or reached.

Information exchange is a practice which can facilitate collusion, be it through direct or indirect communication between competitors or price signalling through public speeches or announcements.¹⁷

The potential for anti-competitive effects (or pro-competitive benefits) which may result from information exchange, depends on a number of factors which relate to the type of information exchanged and the structural characteristics of the market involved, as well as the modalities in which the information exchange takes place.¹⁸ Exchanges of core competitive information (e.g. information on price, quantity, market share and strategy) may result in an artificial increase of supply-side market transparency.¹⁹ This artificial increased transparency eliminates the uncertainty that provide the essential motivating force in competitive markets.²⁰

An analysis of the structure of the market and the levels of concentration is important when determining whether an exchange of information is likely to lead to anti-competitive effects. This is because achieving sustained collusive outcomes are easier in concentrated markets. When determining whether the nature of the information itself may result in or lead to anti-competitive outcomes (or to the fixing of a price or restriction of output), factors which are taken into account are the age of the information and the level of aggregation. It is recognised that the exchange of disaggregated information or information that can easily be disaggregated in respect of future pricing intentions, carries the greatest risk in a concentrated market.²¹ The older the information is and the higher the level of aggregation is (or the

¹⁷ OECD 2012 Report at 30.

¹⁸ OECD 2010 Report at 11.

¹⁹ Antonio Capobianco '*Information Exchange Under EC Competition Law*' (2004) *Common Market Law Review* 41:1247 – 1276 at 1256.

²⁰ *Supra*.

²¹ OECD 2010 Report at 11.

difficulty of disaggregation), the less likely it is that the information may lead to anti-competitive outcomes.²²

The method by which information is exchanged or disseminated also plays a role in considering the nature of an information exchange. As mentioned above, firms can exchange information either publically, privately, directly, through third parties or through public information sharing schemes. Competition agencies generally view private disclosures of information as more concerning than public disclosure.²³

4. **HOW INFORMATION EXCHANGE IS REGULATED ELSEWHERE IN THE WORLD**

We now turn to consider, by way of a general overview, how information exchange is dealt with in the EU, UK and US. We further consider some interesting cases which reflect developments in the approach taken to information exchange in those countries. We also briefly consider new legislation introduced in Australia to specifically address price signalling and other forms of unilateral disclosure which have an anti-competitive effect, but which may not fall within the ambit of an ‘agreement’.

The competition laws of most jurisdictions²⁴ do not contain specific provisions which deal with information exchange. Information exchange is analysed through the prism of competition law provisions which deal with agreements and concerted practices between firms in a horizontal relationship.

²² Supra.

²³ Supra.

²⁴ See the discussion in respect of the Australian approach below for a discussion on a jurisdiction which introduced specific legislation to deal with anti-competitive price signalling and other forms of information exchange which may fall short of an agreement.

5. THE EU

Legal Framework

In the EU information exchange is dealt with under the provisions of Article 101 of the Treaty of the Functioning of the European Union (“**TFEU**”) which prohibits agreements and concerted practices²⁵ between competitors the object or effect of which is to restrict competition within the common market.

In December 2010 the European Commission adopted a revised and extended guidance paper on the EU competition rules applicable to horizontal co-operation agreements²⁶ (“**Horizontal Guidelines**”), which contain specific provisions dealing with information exchange.²⁷

The Horizontal Guideline sets out the basis on which information exchange agreements are analysed and also identifies to which extent and what type of information exchanges may fall within the ambit of ‘agreements’ or ‘concerted practices’ in terms of Article 101 of TFEU. It further sets out guidelines on how information exchanges should be analysed, considering the nature of the information exchanged, the market characteristics of the market in which the firms who are exchanging the information operate as well as the method of exchange.

The Horizontal Guideline makes it clear that information exchanges may amount to restrictions of competition by object and state specifically that:

72. *“Any information exchange with the objective of restricting competition on the market will be considered as a restriction of competition by object. In assessing whether an information exchange constitutes a restriction of*

²⁵ The concept of a concerted practice as it has been developed through the jurisprudence of the Court of Justice of the European Union, refers to a form of coordination between undertakings by which, without it having reached the stage of an agreement, practical cooperation between competitors is knowingly substituted for the risks of competition. Case 48/69 ICI v. Commission (Dyestuffs) [1972] ECR 619, par. 64. See also Case C-8/08, T-Mobile Netherlands, par. 26; Joined Cases C-89/85 and others, Wood Pulp, [1993] ECR 1307, par. 63 (see pg. 180 of OECD 2012 Report).

²⁶ See Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements, O.J. C 11 of 14.1.2011.

²⁷ See part 2 thereof, from paragraph 55 of the Horizontal Guidelines.

competition by object, the Commission will pay particular attention to the legal and economic context in which the information exchange takes place²⁸. To this end, the Commission will take into account whether the information exchange, by its very nature, may possibly lead to a restriction of competition²⁹.

73. *Exchanging information on companies' individualised intentions concerning future conduct regarding prices or quantities³⁰ is particularly likely to lead to a collusive outcome. Informing each other about such intentions may allow competitors to arrive at a common higher price level without incurring the risk of losing market share or triggering a price war during the period of adjustment to new prices (see Example 1, [at paragraph 105]). Moreover, it is less likely that information exchanges concerning future intentions are made for pro-competitive reasons than exchanges of actual data."*

Factors which are considered to determine whether or not information is likely to have adverse effects on the competition in a market must be analysed on a case-by-case basis, as the results of the assessment depend on a combination of various case specific factors. An assessment of the restrictive effects information exchange may have on competition compares the likely effects of the information exchange with the competitive situation that would prevail in the absence of that specific information exchange.³¹ For an information exchange to have restrictive effects on competition within the meaning of Article 101(1) of TFEU, it must be likely that the exchange will have an appreciable adverse impact on the parameters of competition such as price, costs, output, product quality, product variety, the degree of rivalry or innovation. Whether or not an exchange of information will have restrictive effects on competition depends on both the economic conditions in the relevant markets and the nature and characteristics of the information exchanged.^{32 33}

²⁸ "See, for example, *Joined Cases C-501/06 P and others, GlaxoSmithKline*, paragraph 58; *Case C-209/07, BIDS*, paragraphs 15 et seq."

²⁹ "See also *General Guidelines*, paragraph 22."

³⁰ "Information regarding intended future quantities could for instance include intended future sales, market shares, territories, and sales to particular groups of consumers."

³¹ *Case C-7/95 P, John Deere v Commission*, at paragraph 76. Usually referred to as the "Tractor Case".

³² Horizontal Guideline at par. 75.

Recent EU Case Law on Information Exchange

Two interesting recent judgements by the European General Court (“**the General Court**”), as contained in the cases between *Del Monte v. Commission*³⁴ and *Dole v. Commission*³⁵ (“**Dole case**”) (together “**the Banana Cases**”)³⁶, dealt with information exchange relating to pre-pricing information which was exchanged by importers and distributors of bananas in the EU.

In its ruling in the Banana Cases the General Court upheld the European Commission's ruling that Del Monte and Dole participated in a concerted practice to coordinate quotation prices for bananas and that the firms had contrived Article 81 (now 101) of TFEU through the exchange of pre-pricing information. In their defence before the General Court the firms insisted that their discussions amounted to nothing more than generic conversations with no organised or pre-defined agenda – discussions which could even be characterised as market gossip.³⁷

In the Banana Cases, firms involved in the import and sale of bananas into the EU regularly discussed their own private assessments on demand, future quotation prices, and climatic events, before preparing their own quotation prices for bananas which they would present to and negotiate with retailers.

The European Commission and General Court found that in the context of the relatively concentrated market for bananas, the pattern of communication between the importers on critical pre-pricing facts amounted to an infringement by object. The General Court found that the pre-pricing communications decreased uncertainty surrounding future decisions on the importers’ quotation prices. It therefore found that the practice was regarded as an

³³ A full discussion of the Horizontal Guideline does not fall within the ambit of this paper, for more information in respect thereof please refer to paragraphs 60 – 110 thereof.

³⁴ Case T-587/08.

³⁵ Case T-588/08.

³⁶ Handed down by the General Court on 14 March 2013.

³⁷ See par 188 in Case T-587/08.

infringement by object, as it amounted to a concerted practice between the firms involved, which had the effect of directly or indirectly fixing the prices or other trading conditions related to the sale of bananas. The General Court stated that it was not necessarily finding a direct link between those practices and consumer prices.³⁸

Specifically the General Court rejected the argument raised in the Dole case that "*an exchange of information can constitute a restriction of competition by object only if it forms part of broader cartel arrangements*" as unfounded in the law.³⁹ The General Court also found that if the undertakings remain in the market, they could not fail to take into account the information exchanged.

Observation

What makes these cases so interesting is that even though the firms did not exchange actual pricing information, the fact that the information exchanged related to pre-pricing factors, within the banana market, influenced the prices they quoted to retailers and which removed uncertainty in the market, which was viewed as equivalent to a price fixing cartel.

The Banana Cases can be seen as an indication that the exchange of pre-pricing information amongst competitors, which relates to future quotation prices, may fall within the ambit of commercially sensitive information, given the market context. It is interesting to note that the exchange of such pre-pricing information can amount to an infringement by object, even in the absence of a direct link between those practices and consumer prices or evidence of a wider cartel arrangement.

³⁸ See par. 64 of the Dole case.

³⁹ See par. 59 of the Dole case.

6. THE UK

Legal Framework

The UK has adopted the Horizontal Guidelines as developed by the European Commission. The Office of Fair Trading (“OFT”) applies the Horizontal Guideline when it applies Article 101 of TFEU, and it has regard to them when it applies the Chapter 1 prohibition of the Competition Act 1998.⁴⁰

Recent UK Case Law on Information Exchange

In the UK there have been interesting developments in recent years relating to the exchange of information which does not occur directly between competitors. There have been a number of successful prosecutions of so-called “hub-and-spoke” arrangements regarding the exchange of commercially sensitive information by competitors through third parties, for example, from one retailer to another through their supplier.⁴¹

Hub-and-spoke arrangements work as follows: a retailer (“A”) discloses to a supplier (“B”) its future pricing intentions in circumstances where A intends that B will make use of that information to influence market conditions by passing that information to other retailers (of whom “C” is one).⁴² B does, in fact, pass that information to C in circumstances where C knows the circumstances in which the information was disclosed by A to B and C does, in fact, use the information in determining its own future pricing intentions. In such circumstances A, B and C will all be regarded as parties to a concerted practice having as its object the restriction or distortion of competition.⁴³

These types of cases do not require that reciprocity be proved, but they are much stronger if there is proof of reciprocity, in the sense that C discloses to supplier B its future pricing intentions in circumstances where C may be taken to intend that B will make use of that

⁴⁰ OECD 2012 Report at 159.

⁴¹ OECD 2012 Report at 168.

⁴² OECD 2012 Report at 169.

⁴³ OECD 2012 Report at 169.

information to influence market conditions by passing that information to (amongst others) A, and B in fact does so.⁴⁴

In the UK the OFT and the English Court of Appeal has found that the provision of, receipt of or passing on of information between competitors through an intermediary in such circumstances is anti-competitive and an infringement of competition law.⁴⁵

The English Court of Appeal's judgment in *Argos Ltd and Littlewoods v Office of Fair Trading*⁴⁶⁴⁷ and *Umbro Holdings Ltd v Office of Fair Trading and JJB Sports v Office of Fair Trading*⁴⁸⁴⁹ confirmed that these types of arrangements fall within the ambit of a concerted practice and that they should therefore be assessed as such. In both of these cases, the English Court of Appeal found that the exchange of information through an intermediary amounted to an infringement by object.

Observation

The recognition of hub-and-spoke arrangements and the acceptance that vertical information exchanges can be as harmful as direct horizontal exchanges is a noteworthy development in UK law and we anticipate seeing more of these types of cases investigated in other jurisdictions.

⁴⁴ Supra.

⁴⁵ OECD 2012 Report at 169.

⁴⁶ *Argos Ltd/Littlewoods v Office of Fair Trading* [2006] EWCA CIV 1318, Case Nos 2005/1071 and 1074.

⁴⁷ Generally referred to as the "Hasbro case".

⁴⁸ *Umbro Holdings Ltd v Office of Fair Trading (Judgment on penalty) and JJB Sports v Office of Fair Trading* [2006] EWCA Civ 1318, Case No 2005/1623.

⁴⁹ Generally referred to as the "Replica Kit case".

7. THE US APPROACH

Legal Framework

In the US, the question whether information exchange between competitors violate the US anti-trust laws is analysed in terms of section 1 of the Sherman Act, which prohibits a “*contract, combination...or conspiracy*” that unreasonably restrains trade.^{50 51 52}

As explained in the US submission which forms part of the OECD 2010 Report:

*“The antitrust concern is that information exchanges may facilitate anticompetitive harm by advancing competing sellers’ ability either to collude or to tacitly coordinate in a manner that lessens competition. Thus, for example, exchanges on price may lead to illegal price coordination. In addition, information exchanges may raise anticompetitive concern by facilitating group behaviour of downstream entities against upstream ones.”*⁵³

In the US, information exchanges between competitors are examined either under the “rule of reason” or condemned as *per se* violations.⁵⁴ Information exchanges are generally examined by way of a “rule of reason,” analysis that distinguishes legitimate information exchanges from illegal ones by balancing the anti-competitive effects of the information exchange with their potential pro-competitive benefits which arise as a result thereof.⁵⁵

⁵⁰ 15 U.S.C. § 1.

⁵¹ OECD 2010 Report at 294.

⁵² Violations of the Sherman Act are also deemed to be violations of section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45.

⁵³ OECD 2010 Report at 294.

⁵⁴ Although an agreement to exchange price information is not itself illegal *per se*, proof that competitors have shared information sometimes has served as evidence of a *per se* illegal conspiracy to fix prices.” ABA Section of Antitrust Law, 1 Antitrust Law Developments 93 (6th ed. 2007) citing, *inter alia*, In Re Flat Glass Antitrust Litig., 385 F.3d 350, 368—69 (3rd Cir. 2004) cert. denied, 544 U.S. 948 (2005); Petroleum Products Antitrust Litigation, 906 F.2d 432, 445-50 (9th Cir. 1990).

⁵⁵ OECD 2012 Report at 294.

Under U.S. antitrust law, a unilateral disclosure of information, does not violate section 1 of the Sherman Act, which (as mentioned above) prohibits a “*contract, combination . . . or conspiracy that unreasonably restrains trade*”.⁵⁶ For conduct to fall within the ambit of section 1 of the Sherman Act, an agreement must be proved. Due to the fact that a unilateral act does not constitute the agreement required to create a violation of section 1 of the Sherman Act, unilateral disclosures are reviewed under the Federal Trade Commission Act (“**FTC Act**”) or section 2 of the Sherman Act. Section 5 of the FTC Act, prohibits “unfair methods of competition”, while section 2 of the Sherman Act prohibits efforts to “monopolize, or attempts to monopolize” including acts to “combine or conspire” with another person to monopolize.⁵⁷

Like the European Commission, the Federal Trade Commission (“**FTC**”) and the US Department of Justice (“**DOJ**”) (collectively, “**the US competition authorities**”) have issued guidelines titled the ‘*Antitrust Guidelines for Collaborations among Competitors*’ (“**Competitor Collaboration Guidelines**”)⁵⁸ which sets out how the US competition authorities analyse information exchanges between competitors.

The Competitor Collaboration Guidelines are aimed at assisting businesses in assessing the likelihood of an antitrust challenge to collaboration with one or more competitors. The Competitor Collaboration Guidelines sets out a useful summary of US law in respect of information exchange and provides an analytical framework for the evaluation of information exchange between competitors.⁵⁹

Recent US developments in the field of Information Exchange

It is particularly in the field of unilateral disclosures of information where there have been a number of interesting developments in US anti-trust law. Of particular interest is the

⁵⁶ Section 1 of the Sherman Act, unlike Article 101 of TFEU does not makes provision for ‘concerted practices’.

⁵⁷ OECD 2012 Report at 172.

⁵⁸ FTC and DOJ, Collaboration Guidelines, dated April 2000 are available at <http://www.ftc.gov/os/2000/04/ftcdojguidelines.pdf>.

⁵⁹ For more information in respect of the Competitor Collaboration Guidelines, please refer thereto.

introduction of the concept that a unilateral disclosure made in public, but which a firm knows its competitors will hear / is hoping that they may respond to, may amount to an “invitation to collude”. We discuss two recent cases in the US below, which cases clearly illustrate the meaning of “an invitation to collude”. Both cases relate to settlement agreements entered into with the FTC and were brought under section 5 of the FTC Act.

Valassis Case

The first case is that of *Valassis Communications Inc.*,⁶⁰ (“**Valassis**”) in which the FTC challenged an announcement made by Valassis’ president and CEO, in a public call with analysts, in which he detailed Valassis’ strategy to increase prices and further made a public offer to News America Marketing and The News Corporation Limited (“**News America**”), one of Valassis’ most important competitors (which he knew would be monitoring the call).⁶¹ The offer entailed that Valassis would cease competing for News America customers, provided that, News America ceased competing for Valassis’ customers.⁶² It was made clear that if accepted, both firms could raise prices within their respective protected customer bases and end their price war (which had been raging for a number of years).⁶³ In the call Valassis proposed that prices be restored by both firms to the pre-price war levels and described how business with shared customers and outstanding bids to News America’s customers would be handled.⁶⁴

Valassis further made it clear that it would monitor News America’s response, by looking for concrete evidence of reciprocity in their behaviour. The CEO is quoted as saying that:

“In the recent past News America has been quick to make their intentions known. We don’t expect to read the tea leaves. We expect that concrete evidence of News America’s intentions will be available in the marketplace in short order. If News

⁶⁰ Valassis Communications, 2006, FTC File No 051 0008.

⁶¹ OECD 2012 Report at 173.

⁶² Supra.

⁶³ Supra.

⁶⁴ Supra.

*America continues to pursue our customers and market share then we will go back to our previous strategy.”*⁶⁵

To resolve these allegations, Valassis entered into a consent order with the FTC agreeing not to engage in unilateral communications, both public and private, concerning the company’s willingness to refrain from competing with rivals or to co-ordinate pricing with them.⁶⁶

U-Haul case

Another case relating to an invitation to collude is the FTC’s case against *U-Haul International Inc. (“U-Haul”)*⁶⁷ which involved both private and public communications.

According to the complaint, U-Haul’s CEO instructed U-Haul’s regional managers and dealers to reach out privately to their counterparts at U-Haul’s closest competitor in the market for consumer truck rental, Avis Budget Group (“**Budget**”) to exhort them to match U-Haul’s higher rates.⁶⁸ A year later, U-Haul’s CEO allegedly instructed managers to raise their rates, anticipating that Budget would raise their price to meet U-Haul’s new price. However Budget did not follow U-Haul’s price increase.

Then, during an earnings conference call with analysts in response to a question about U-Haul’s pricing strategies, U-Haul’s CEO explained that U-Haul was trying to “show price leadership” for the good of the entire industry.⁶⁹

He went on to say that U-Haul was attempting to indicate to competitors that they should not “*throw the money away, and that they should price at cost at least.*”⁷⁰ The CEO then indicated that he had instructed U-Haul managers to wait a while longer for Budget to

⁶⁵ At page 3, of the FTC’s compliant in the Valassis case.

⁶⁶ OECD 2012 Report at 173.

⁶⁷ Matter of U-Haul International, Inc. and AMERCO, 2010, FTC File No 081-0157.

⁶⁸ OECD 2012 Report at 43.

⁶⁹ At par 24 of the U-Haul compliant.

⁷⁰ Supra.

respond and that he was optimistic that Budget would respond by raising prices.⁷¹ He also added that Budget need not match the U-Haul prices exactly, but could lag behind by 3–5 per cent.^{72 73}

The FTC found that U-Haul had contravened section 5 of the FTC Act and that U-Haul’s conduct amounted to an invitation to collude, which (if the invitation had been accepted by Budget) would likely have resulted in higher one-way truck rental rates and reduced output.⁷⁴ U-Haul subsequently entered into a settlement agreement with the FTC.

Observation

These cases are of particular interest as although the information was put forward with the hope that it would influence a competitor’s behaviour (in both cases a significant competitor in a concentrated market), the disclosures were purely unilateral, and no evidence was put forward that the competitor in question – or other market participants behaviour was influenced. It will be interesting to see whether other jurisdictions follow the FTC’s approach to these types of unilateral public disclosures.

8. AUSTRALIA – PRICE SIGNALLING AMENDMENTS

Legal Framework

Australia has taken a novel approach to addressing the concerns raised by information exchange and price signalling, by amending their competition legislation and introducing specific provisions to address price signalling and information exchange which falls short of an “agreement”.

This amendment was introduced in November 2011 when the Australian Parliament passed amendments to the Competition and Consumer Act 2010 (“CCA”) (previously known as the

⁷¹ Supra.

⁷² Supra.

⁷³ OECD 2012 Report at 43.

⁷⁴ At par 26-27 of the U-Haul complaint.

Trade Practices Act 1974) targeting what has been called “price signalling”.⁷⁵ The new legislation took effect in June 2012 (“**the amendments**”).⁷⁶

The amendments were designed to address, at least in part, the fact that potentially anti-competitive information exchanges were not always caught by the cartel provisions in the CCA.⁷⁷ Due to the strict interpretation given to the definitions of a “contract, arrangement or understanding” by Australian courts, which required proof of a “meeting of the minds, a commitment or obligation of some kind”, before a practice which included an exchange of information amounted to collusive behaviour.⁷⁸

The new provisions target public and private disclosures of pricing and related information.⁷⁹

As explained in the OECD 2012 Report:

*“the amendments include a per se prohibition of private disclosure of pricing information to one or more competitors; and a prohibition on other disclosures of pricing information (including public disclosures) which depends on whether it can be established that such practices have substantially lessened competition in a market. The new provisions also include a number of exceptions for certain legitimate disclosures, for example the disclosure of pricing information to a related corporate body or a disclosure required under the continuous disclosure obligations in the Corporations Act 2001.”*⁸⁰

Unlike the cartel provisions of the ACC, which carry both civil and criminal sanctions, the new prohibitions carry only civil sanctions.⁸¹ The remedies available include financial penalties which can be up to the greater of AUD10 million, 10 per cent of a business’ annual

⁷⁵ See the OECD 2012 Report at 34 and 101.

⁷⁶ Supra.

⁷⁷ Supra.

⁷⁸ Supra.

⁷⁹ Supra.

⁸⁰ Supra at 34.

⁸¹ Supra.

turnover or three times the benefit gained. However, the new provisions will not apply to all goods, and services and the application thereof will be restricted to classes of goods and services prescribed by regulation.⁸² Under regulations currently proposed by the Australian government, the provisions will initially only apply to the banking sector.⁸³

Observation

The Australian introduction of specific provisions dealing with prohibited information exchange appears to be the first of its kind, and it will be interesting to see how it is applied over time and whether other countries follow suit if it proves successful.

9. EXCHANGE OF COMPETITIVELY SENSITIVE INFORMATION IN SOUTH AFRICA

Legal Framework

In South Africa the exchange of information between competitors is analysed in terms of section 4(1) of the Competition Act, 89 of 1998 (“**the Act**”). The exchange of commercially sensitive business information between competitors may, as in the EU, UK and US amount to either a *per se* contravention of the Act or fall within the ambit of a rule of reason analysis, depending on the nature of the information exchanged.

Section 4(1) of the Act provides that -

"An agreement between, or concerted practice by, firms or a decision by an association of firms, is prohibited if it is between parties in a horizontal relationship and if-

- (a) *it has the effect of substantially preventing or lessening competition in a market, unless a party to the agreement, concerted practice, or*

⁸² Supra.

⁸³ Supra.

decision can prove that any technological, efficiency or other pro-competitive, gain resulting from it outweighs that effect; or

- (b) it involves any of the following restrictive horizontal practices:*
 - (i) directly or indirectly fixing a purchase or selling price or any other trading condition;*
 - (ii) dividing markets, by allocating customers, suppliers, territories, or specific types of goods or services; or*
 - (iii) collusive tendering."*

The distinction between section 4(1)(a) and 4(1)(b) of the Act is important. Section 4(1)(b) of the Act is a *per se* prohibition which means that conduct in the form of price-fixing, market division or bid rigging between competitors is absolutely illegal and incapable of justification. Contraventions of section 4(1)(a) however, are dealt with by means of a "rule of reason" or balancing approach and an efficiency defence is available to the parties (in other words, any anti-competitive effects must be outweighed by pro-competitive benefits).

Similarly to the jurisdictions discussed above, whether information exchanges infringe the Act is determined on a case-by-case basis. The question which arises is whether the information exchanged could adversely affect competition in the market by providing a platform for firms to co-ordinate their behaviour and act in a parallel manner without explicitly entering into an agreement to do so. The Act, similarly to the EU and UK, prohibits a 'concerted practice', which means that the scope for the prosecution of information exchange practices is wide enough to cover for example, hub-and-spoke arrangements and unilateral disclosures, as discussed in the case examples above.

Section 4(1)(b) contraventions allow the Competition Tribunal ("**the Tribunal**") to impose strict penalties and a firm found to have engaged in price-fixing, market division or collusive tendering where arrangements can be fined up to 10 per cent of its annual turnover. Section 4(1)(a) on the other hand carries no fine for a first time offender.

Unlike in the EU, UK and US, the South African Competition Commission (“**Commission**”) has not yet issued guidelines on how it analyses information exchange, nor surprisingly, (given the concentrated nature of many sectors of the South African economy and prevalence of oligopolistic markets), have there been any decisions handed down by the Tribunal in cases relating to pure information exchange (i.e. information exchange as a distinct practice as distinguished from information exchange which forms part of a larger collusive arrangement).

In order to discern the South African competition authorities’ (“**the competition authorities**”) current approach to information exchange we have discussed herein the Commission’s submissions in the OECD 2010 Report, a referral made to the Tribunal and the approach the Commission has taken in imposing conditions in mergers on shareholders to prevent opportunities for shareholders to share commercially sensitive information.

Submission to the OECD 2010 Report

In the OECD 2010 Report the Commission made the following comments about its approach to information sharing in the South African context -

“At the core of the Commission’s approach are the components of coordinated outcomes, namely competitors reaching agreement or understanding, being able to monitor conduct, and to be able to respond to (‘punish’) deviations by other firms.

In this regard, while much of the attention internationally regarding information exchange appears to be focused on information regarding pricing, our experience is more to do with information exchange regarding quantities supplied, at a high level of disaggregation in terms of geography and product specifications (such as pack size). Such information may be more competitively sensitive where the competitive process itself means pricing transparency and/or there are well understood pricing points in any case, as there are in many commodity type industries in South Africa. These pricing points may be the ones that were used historically under a cartel and/or government regulation, they may still be posted by industry associations or public entities as benchmarks, there could be a well-established price leader, or they may be the well-understood ceiling monopoly price, and hence the ideal cartel price. In the

latter case, the alternative for local buyers to buying from local suppliers is often to import, the 'import parity price' based on an international benchmark price plus freight costs is thus the ceiling cartel price and can be readily monitored by local suppliers. Note, if local firms were relatively uncompetitive this would be the expected price in the absence of coordination, but it still does not mean that local firms should coordinate around such a price benchmark.

Under the circumstances of well understood pricing points, the issue for coordination is to prevent competitive discounting off these prices. Critical to this is being able to monitor market shares, albeit at a disaggregated level where there are non-trivial local transport costs.”⁸⁴

The Commission’s approach as outlined above is evidenced by its referral of a complaint of price fixing and market division in respect of the marketing and sale of diesel products against six oil companies⁸⁵ (“**the oil companies**”), and the industry association⁸⁶ to which they belonged under CC Case Number 2009/Jan/4223 (“**Petroleum referral**”). The type of information exchanged by the oil companies which the Commission considers amounts to a contravention of sections 4(1)(b)(i) and (ii) of the Act, related to the monthly sales volumes of each company broken down per product category in each magisterial district sold to defined groups of customers.⁸⁷ The various product categories in respect of which the information was exchanged, included petrol, diesel illuminating kerosene, heavy furnace oil, bitumen, liquid petroleum gas and lubricants.⁸⁸

The Commission’s conclusion on the practise was that the exchange of the aforementioned information at the level of detail at which the information was exchanged, allowed the oil companies to track each other’s sales and to align their strategies in the market thereby eliminating competition between them. Further, the Commission is of the view that it allowed

⁸⁴ OECD 2010 Report at 370.

⁸⁵ Being Chevron SA (Pty) Ltd, Engen Limited, Shell SA (Pty) Ltd, Total SA (Pty) Ltd, Sasol Limited and BP SA Limited.

⁸⁶ Being South African Petroleum Industry Association (“**SAPIA**”)

⁸⁷ Competition Commission Press Release 24 October 2012 “Competition Commission Refers case of collusion against oil companies” at 1.

⁸⁸ Supra.

them to divide markets by deciding (based on the information exchanged), to enter or not to enter, compete for or not compete for certain geographic markets or customer groupings.⁸⁹ The exchange of this commercially sensitive information therefore removed the element of surprise in strategic decision making, and allowed the firms involved to coordinate their behaviour.⁹⁰

The Commission has over the years investigated numerous incidence of information exchange and has settled a number of these complaints with the firms involved.⁹¹ However (as mentioned above) none of the cases have been prosecuted and tried before the Tribunal as yet. We therefore wait with interest to see how the Tribunal analyses the information exchanged between the oil companies and look forward to receiving the guidance which a decision by the Tribunal can provide in this area of competition law.

Recent Merger Decisions

There have been a number of recent merger decisions in which the Commission imposed conditions on the shareholders of the merged firm to ensure that sensitive information is not passed on to competing firms in which such shareholders may also hold interests. These cases include the Commission and Tribunal's recent decisions in respect of the mergers between *Industrial Development Corporation of SA Limited and Scaw South Africa (Pty) Ltd and Consolidated Wire Industries* ("the IDC Merger")⁹², *Capitau Investments Management Limited and New Foodcorp Holdings*⁹³, *Business Venture Investments no. 1658 (Pty) Ltd and Afgri Operation Ltd and Senwes Capital (Pty) Ltd*⁹⁴ and most recently the acquisition of

⁸⁹ Supra at 1.

⁹⁰ Supra at 3.

⁹¹ Sectors which have been investigated include the markets for the production and sale of: Bitumen and bituminous products, flat steel, cement, wheat milling, animal feed, dairy feed, dairy feed and poultry feed. A comprehensive discussion of the Commission's investigations into the information exchange practices prevalent in these sectors is set out in Reena Das Nair, Siphon Mtombeni and Tapera G. Muzata's paper entitled "A review of lessons from Information exchange investigations and the approach of the South African Competition Commission" presented at the Sixth Annual-Competition Law Economics And Policy Conference (September 2012). See also the Commission's submission to the OECD 2010 Report at 371 - 372.

⁹² Case No. 60/LM/Jun12.

⁹³ Case No. 112/LM/Dec12.

⁹⁴ Case No. 87/LM/Dec12.

Independent News & Media South Africa (Pty) Ltd by Sekunjalo Independent Media (Pty) Ltd, which was an intermediate merger.⁹⁵ The conditions imposed in these merges include restrictions on cross-directorships and the requirements that companies with interests in two or more competing firms have policies and procedures in place to ensure that sensitive commercial information is not shared between these firms.⁹⁶

It appears from the above that the Commission is taking a proactive stance to preventing the exchange of commercially sensitive information which may have an anti-competitive impact in already concentrated markets or markets prone to collusion. What can be gleaned from these cases is the fact that the Commission is conscious of the risks that cross-directorships and minority shareholdings may bring in concentrated markets and that parties to mergers in these types of markets, where a shareholder has interests in one or more competitors must be aware of the fact that the Commission is likely to impose conditions to restrict the possible exchange of commercially sensitive information.

10. PRACTICAL GUIDELINE

In the absence of a South African guideline on information exchange, we have considered the approach taken and factors used to analyse information exchange in the EU, UK and US, and have compiled the guideline below as a summary of factors which should be considered when assessing whether information exchanged (or unilaterally communicated) would result in anti-competitive information exchange.

In assessing whether an information exchange is likely to be harmful to competition, the factors set out below must be taken into account.

⁹⁵ Commission Media Release ‘*Commission approves Sekunjalo and INMSA merger subject to conditions*’ 29 July 2013 available at <http://www.compcom.co.za/assets/Uploads/AttachedFiles/MyDocuments/Commission-approves-Sekunjalo-and-INMSA-merger-subject-to-conditions2.pdf>

⁹⁶ See in particular the IDC merger at par 78 and 79. In the IDC merger “competitively sensitive information was defined as information including but not limited to the following “(i) Pricing – including, but not limited to, pricing of specific products, prices / discounts / rebates offered to specific clients and planned reductions or increases; (ii) Margin information by product or client; (iii) Cost information for particular products; (iv) Information on specific clients and client strategy, including information with respect to the sales volumes of clients; (v) Marketing strategies; (vi) Budgets and business plans; and (vii) Agreements and other (non-standard) terms and conditions relating to the supply and distribution of steel products” at par 78.2.

Market Characteristics

It is accepted that firms are more likely to achieve collusive outcomes in markets which are transparent, concentrated, non-complex, stable and symmetric.⁹⁷ Therefore to determine whether a particular market may be adversely affected by an exchange of information, the structure of the relevant market must be analysed. The level of concentration of the relevant market and the structure of supply and demand are key factors in considering whether the information exchange poses a risk to the competitive process.

Where the market is truly competitive, information exchanges between competitors is less likely to be a threat to competition as transparency is likely to lead to improved competition. However, where the relevant market is a highly concentrated, oligopolistic market in which competition is already reduced, it is more likely that the exchange of information will be regarded as anti-competitive.

In respect of the structure of supply and demand, the number of competitors together with the symmetry and stability of their market shares is important. It is also important to consider how many firms in that market take part in the information exchange and what their market shares are, to understand to what extent the practice may impact the market. The existence of any structural links between competitors must also be considered.

The homogeneity of products must also be taken into account, as it is easier to behave in a parallel fashion in oligopolistic markets where the products are homogenous.⁹⁸

Type of Information Exchanged

It is further important to understand the type of information that is exchanged. In this regard factors which are taken into account when determining what effect the exchange of particular

⁹⁷ Horizontal Guidelines at par. 77.

⁹⁸ One of the reasons for this is that in differentiated product markets, access to detailed sensitive information may not be useful to predict future behaviour of competitors, information exchange in respect of such differentiated products is therefore less likely to increase co-ordination between the firms involved in such an exchange (Capobianco at 1268).

types of information can have on a market, is the degree of detail in which it is communicated, the frequency in which it is communicated and the age and level of aggregation of the information.⁹⁹ Another important factor to consider is what the rationale of the exchange is.¹⁰⁰

Therefore the nature of the information requested must be considered. Concerns are raised where the information relates to issues of price, inventory, supply, output, costs, sales and strategic planning.¹⁰¹ Other types of less commercially sensitive information sharing may be regarded as less problematic.¹⁰²

The exchange of aggregated statistical data, market research and general industry studies is unlikely to be considered dangerous to competition, since it is improbable that the exchange of such information will result in the reduction of firms' competitive independence in the market.

As a general rule, competitively sensitive information includes information relating to the following -

- previous, current or future negotiations and/or sales and purchase contracts with individual customers or suppliers, or marketing, negotiation or contracting strategies in general;
- previous current or future selling and purchase prices or other terms of trade (including discounts, margins, rebates, commissions, and credit terms) with customers or suppliers;

⁹⁹ Supra at 1262.

¹⁰⁰ Supra.

¹⁰¹ In this regard refer to the Petroleum referral.

¹⁰² However as evidenced by the Banana cases discussed above in various industries different factors play an important role in pre-pricing decisions. Factors such as the weather conditions, climatic events and congestions at ports may seem innocent but in particular markets discussion around these issues may have an influence on the price of specific product and the behaviour of the firms in a particular market. This is due to the fact that such discussions remove uncertainty in the market and the firms involved can gauge their competitors understanding of demand and supply factors which impact the price of the product(s) sold in that market.

- cost of production and profit margins;
- details of markets, territories, customers and suppliers;
- previous, current or future stock levels; and
- previous, current or future investment, capacity, volumes, production, or sales data (whether domestic or export).¹⁰³

Insofar as sensitive information exchanged regarding prices or pricing policies (discounts, costs, terms of trade and rates, changes of dates etc.) is concerned, discussions about current and future prices are usually characterised as anti-competitive price-fixing arrangements. The mere fact of providing a competitor with pricing behaviour is likely to be sufficient for a finding of an agreement on prices.¹⁰⁴

Providing competitors with historic information as opposed to present and future information is generally regarded as less problematic from a competition law perspective. The more up-to-date the information provided, the more dangerous it is to competition.¹⁰⁵

Aggregate information can be considered more favourable than particularised information relating to an identifiable undertaking. Sharing of individual competitor data as opposed to aggregated or masked data is favourable. The direct exchange of individual information between competitors is accordingly more likely to be problematic.¹⁰⁶

Exchanges of information generally available from other sources or legitimately in the public domain are considered less harmful to competition.¹⁰⁷

¹⁰³ See in this regard the list of information set out in the conditions imposed in the IDC case.

¹⁰⁴ OECD 2010 Report at 377.

¹⁰⁵ OECD 2010 Report at 296.

¹⁰⁶ Horizontal Guideline at par. 89.

¹⁰⁷ OECD 2010 Report at 296.

Manner in which Information is Exchanged

The manner in which the information is exchanged is also relevant. As discussed above, increasing attention is being paid in the UK regarding the potential harm of vertical exchange of information and in the US on so called “invitations to collude”, which take the form of public disclosures aimed at affecting market dynamics. That said, it remains generally accepted that genuinely public disclosure of information should generally be viewed as legal.¹⁰⁸

Public announcements with the following characteristics may be regarded as suspicious and may be public disclosures aimed at altering competitive outcomes:

- public announcements which contain not only information which must, as a matter of commercial policy, be conveyed to customers, but also information which is not intended for that audience, for example including references to specific competitors;
- if a firm discloses more information than is strictly necessary for the purpose of the announcement;
- it makes the behaviour announced contingent on what other market players or the industry at large will do; and
- include threats (e.g. a price war) in case other market players do not accept the invitation to collude.¹⁰⁹

Also, there is more likely to be an appreciable effect on competition where the information exchanged is limited to specific undertakings to the exclusion of their competitors and customers.

¹⁰⁸ See Horizontal Guidelines at par. 92. See also the Capobianco at 1263 and the European Court of Justice’s decision in the Wood Pulp Case ([1993] ECR 1307), where the court stated that if prices are announced in public “*they constitute in themselves market behaviour which does not lessen each undertaking’s uncertainty as to the future attitude of its competitors. At the time when each undertaking engages in such behaviour it cannot be sure of the future conduct of others.*” (see par 64)

¹⁰⁹ OECD 2012 Report at 42.

11. CONCLUSION

Whether information exchanged between competitors will result in a contravention of competition law, will always be something which must be assessed on a case-by-case basis. The nature of the particular information exchanged, how and between whom it is exchanged as well as the specific market dynamics of the industry in which the exchange takes place, must always be analysed to assess to what extent the increased transparency which results from the exchange will result in pro-competitive benefits or anti-competitive harm.

We anticipate that there will be many developments in this field of competition law in coming years, as competition authorities internationally continue to investigate and debate the pro- and anti-competitive effects of transparency on competition and firms look for more subtle ways to reduce the uncertainties created by competitive rivalry.¹¹⁰

Although the law in South Africa in respect of information exchange still has to develop, the jurisprudence and guidelines from other jurisdictions and reports such as the OECD 2010 and 2012 Reports offer useful and practical guidance we can look to, to better understand this complex area of competition law. By keeping in mind the practical guidelines discussed in this paper, practitioners can navigate their clients through the murky waters of bananas and public announcements.

¹¹⁰ Capobianco at 1276.