Recent Developments in Exchanges of Information:
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Dr. Matthew Bennett,
Vice President, CRA London
Overview

A brief summary of pros and cons of exchanges of information and where competition law draws the line.

Interesting recent developments and questions:
• Public announcements
• Vertical communications (A2B2C cases)
• Communications where customers are also competitors
1. Quick recap
Overview of economics

Generally, more information improves the functioning of markets

• Asymmetric information often at the route of market failures.
• Better information on how the market will evolve generally allows firms to allocate their goods more efficiently.

Except… when it facilitates coordination between competitors.

• Pricing information may facilitate a focal pricing point.
• Quantity information may facilitate ability to identify deviations.

NOTE that reductions in uncertainty absent a coordination concern cannot be presumed to be harmful.

• Can be beneficial as often as harmful – OFT Motor Insurance (2012).
• Conspicuous absence of such theory in Horizontal guidelines.
Legal certainty and the Horizontal Guidelines

What does information pertain to?

“Future intentions”

Current/Past

How is data announced?

In public

In private

Other

Effects infringement

Object infringement

These exchanges “run the risk of being investigated and, ultimately, fined as cartels.” p68

“Public announcements of future individualised prices or quantities would not be considered as intentions” p74 FN 4

Question of signalling

Question of commitment?

EC Liner Shipping case
2. Public Announcements
Public Announcements

Concern that public announcements become a way of ‘signalling’ private strategic competitive intentions.

- ATP case
- EC Liner case (see next slide)
- Dutch mobile case (2014)

Be very careful about making public announcements that are:

- on a key strategic competitive variable.
- can be, and are, changed without implementation.
- have ‘conditional’ statements within them.
Public Announcements: EC Liner Shipping

Ongoing investigation
- Centres on individual firms’ regular public announcements of pricing intentions through releases on their websites and specialist trade press.
- Announcements are made several times a year, several weeks in advance of implementation and detail amount of increase and implementation date,

Concerns/Efficiency?
- Signalling – announcements may let firms communicate a focal point.
- BUT.. efficiency rationale – let customers know when prices are increasing so they can plan their shipments more efficiently.

Questions relevant to ‘future intention’:
- Were liners committed to implementing their prices on announcement or could they reverse their announcements with little cost?
- What will standard of proof be? Can EC simply presume that there was price signalling or will the EC have to show a pattern of signalling through the data?
2. Manufacturer Retailer Communications
Two possible cases of hub and spoke

Retailer to Supplier to Retailer

Supplier

Retailer A

Retailer B

Supplier to Retailer to Supplier

Supplier A

Supplier B

Retailer
Retailer to Supplier to Retailer
Theory of harm

A tells the supplier what retail price it will be charging.

Supplier then passes on this information to retailer B
B then tells supplier its expected prices, and supplier passes this back to A.

Flow of information may allow coordinated outcomes between retailers.
A2B2C Efficiencies?

Note that discussions between retailers and suppliers on **wholesale prices** are common:

- Retailers may well want to play suppliers off of each other to get the lowest wholesale price.
- This will involve the retailer telling the supplier about its rival’s price and will generally be pro-competitive.

**Notable that there are no cases within such a framework.**

Conversations between suppliers to a retailer about **retail prices** may be less common:

- However may still exist – for example manufacturers may have better information about the optimal retail price level (RRPs).
- However harder to find a good rationale to pass that information along to a rival retailer – this is where A2B2C cases have concentrated (Toys, Football Kits and Dairy).
### The UK test: Three limb test

<table>
<thead>
<tr>
<th><strong>Limb 1:</strong> A to B</th>
<th><strong>Limb 2:</strong> B to C</th>
<th><strong>Limb 3:</strong> Use by C</th>
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<td>A discloses future pricing information to B in circumstances such that A can be assumed to intend, or does intend, that B will pass onto C.</td>
<td>B passes info to C in circumstances such that C may be taken to know context in which it was passed on, and/or information is passed on with A’s understanding.</td>
<td>C uses the information in determining its own future pricing intentions.</td>
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What happens when customers are competitors? Some initial thoughts…

Situation One:

More difficult to argue that Retailer B was doing it to negotiate the price of its upstream arm (B) down (i.e. less efficiency rationale).

But can we apply same A2B2C test?
• Was A providing it to C knowing that it would go to upstream arm?
• Much more difficult to presume that A was passing it onto B knowing that it would be passed on to upstream arm as there is a clear objective justification for supplier A to provide its price.

Supplier A could relatively easily guard against this:
• Simply state that price is confidential and cannot be passed to upstream supplier arm.
What happens when customers are competitors? Some initial thoughts…

Situation Two:

Same justification for retailer A to pass onto supplier B (i.e. optimal sales price)... but difficult to provide an efficiency justification for B to pass this onto downstream B.

More likely to be problematic in such a situation – will be harder for A to argue that it has a clear objective justification to provide information.

Thus A will need to go further to distance itself from any discussions internally to B.

• A should request confidentiality to ensure that its price is not passed onto retailer B.
• Similarly it must refuse information from supplier B about retailer B’s pricing.