

MAYER • BROWN

# Competition Law Compliance

## Teleconference

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9 November 2011

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# General principles

Adam Smith: *Wealth of Nations* (18th century):

*People of the same trade seldom meet together, even for merriment and diversion, but the conversation ends in a conspiracy against the public, or in some contrivance to raise prices*

- General principle: independence, uncertainty as characteristics of a competitive market
- Information exchange reduces uncertainty
- Prohibition on anti-competitive arrangements applies – Article 101 TFEU
- Article 101 applies in all 27 Member States – no contradictory national rules allowed
- Inter-relationship cartels/information exchange



# Basic rules

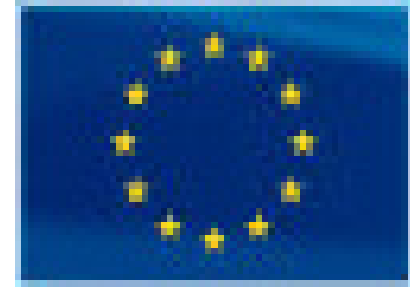
Viewed with suspicion by competition authorities:  
Hard to defend inferences drawn from evidence of information exchange



- **Two basic rules:**

- Competitors are free to adapt their conduct intelligently to the existing and anticipated conduct of their competitors
- Competitors may not directly or indirectly disclose to competitors or exchange with competitors **competitively sensitive information** as this creates conditions of competition that do not correspond to normal competition – it reduces incentives to compete and leads to aligned conduct in the market

# European Commission guidelines



- Horizontal guidelines, published 14.1.11
- Chapter on information exchange
- Acknowledges some exchanges innocuous, some not automatically illegal if handled correctly
- Information exchange as a concerted practice
  - Replacing risks of competition with practical co-operation
  - *T-Mobile* case: a single meeting
  - Single disclosure also a risk

**Exchanges of non-competitively sensitive information, or aggregated information, may be pro-competitive – standards, non-competitive issues, benchmarking**

# Assessment

- **Two main considerations**
  - Characteristics of market in which participants operate
  - Characteristics of information exchange

# Market characteristics

- **Transparent** markets – or markets that become transparent as a result of the exchange
- **Concentrated** markets, where those businesses that exchange information form a significant part of the market (*Tractors* case)
- Markets involving **homogeneous products**
- Markets in which **demand and supply are stable**
- Markets with **players whose cost structures are symmetrical**

# Characteristics of information exchange

## 2.1. What is an information exchange?

- Information exchanges (IEs) are a common feature of competitive markets
- IEs between different players in a market can occur:
  - In different contexts (business/social)
  - In different forms
    - written/oral
    - unilateral/bilateral
    - direct/indirect (e.g. trade associations, hub and spoke)
  - In different frequency (occasional/systematic)
  - With different content (economic, social, business, forward looking)
  - With different purpose (intentional/unintentional)

# Characteristics of information exchange

## 2.2. What is an information exchange? (cont'd)

- Three main categories can be distinguished:
  - IEs ancillary to a cartel
  - IEs ancillary to a vertical/horizontal agreement
  - Autonomous IEs (very rare)
- Not all IEs are unlawful: Under competition law, IEs may generate efficiency gains
  - E.g. they can eliminate asymmetries of information and render markets more efficient; save inventory costs; deal with unstable demand to the benefit of consumers. Suppliers and retailers can exchange information for legitimate reasons (e.g. to improve their negotiating position, gather market intelligence, be more competitive)



# Characteristics of information exchange

## 2.3. Why is it so important to assess an IE?

- IE entails risks if they enable companies to be aware of their competitors' market strategies
- No clear-cut definition of IE in competition law exists
  - Difficult to differentiate the conduct of information exchange to that of a cartel
  - All cartel cases dealt with by the EU Commission involved IEs
- Engaging in illegal IE may bring about significant fines for the entity involved, in some countries criminal sanctions for the individual involved (if IE is ancillary to a cartel) and important individual and corporate reputational damage

# Characteristics of information exchange

## 2.4. Under the horizontal guidelines

- Commercially sensitive means information that would not normally be shared with competitors. This includes, but is not limited to:
  - pricing & discount information
  - terms & conditions
  - costs & margins data
  - other price setting factors
  - business/investment plans
  - suppliers or customers
  - production capacities
  - production/sales volumes
  - import volumes
  - market shares
  - commercial strategy
- Unilateral announcements that are also genuinely public (e.g. through a newspaper) not caught, unless such announcement is also followed by public announcements by other competitors or common understanding between competitors about the terms of coordination

### 3. An industry example - insurance

- ***WhatIf***

- Exchange of very detailed pricing information through a market research tool – ability to access competitors' prices
- Case settled:
  - Information to be historic or current, but aggregated and anonymised

- **Insurance block exemption**

- Allows exchanges of otherwise sensitive information that is necessary for assessing risk and likelihood of risk – pro-competitive because it allows all insurers to compete on a level playing field
- Conditions include:
  - No exchange of price information
  - Information to be anonymised
  - Access to all insurers on reasonable terms

## 4. Risk scenarios

### 4.1. Some case examples - EU

- Woodpulp (1984)
  - quarterly announcements of future prices (by the firms themselves through the trade press or by being passed on to agents who were also acting for other producers at the same time) was found to be an indirect exchange of information on future market conduct
- Fatty Acids (1986)
  - exchange of (not sufficiently) historic information was held to be illegal
- UK Tractors' case (1992)
  - exchange of detailed price information referring to the past through a Trade Association was held to be illegal

## 4.2. Some case examples - NCAs

- France: Fuel Distribution (2003)
  - French Competition Council fined three companies for illegal IE. Infringement was that several times by week, one of the service stations on motorways would inform the others on prices charged by each service station for different types of fuel (note that this information was public)
- France: Paris Luxury Hotels (2005)
  - French Competition Council fined six Paris luxury hotels for exchanging on a monthly basis information on (i) past performance; (ii) geographic origin of clients; (iii) business strategy. Exchanges through informal meetings or email correspondence
- Germany: Consumer goods manufacturers (2011)
  - fines on three manufacturers of consumer goods for exchanging competitively sensitive information in the food sector - in particular information on the status and progress of negotiations with major retailers and, in some cases, on intended price increases for retailers

## 4.3. Current cases

### 4.3.1 Social context meetings

- Employee of company A gets invitation to informal dinner with competitors B, C, D and E
  - he attends, out of curiosity to meet socially his competitors (they are in a small city and often come across each other in client premises) and to also hand certain administrative documents to company B
  - during the meeting, participants discuss their outrage about the terms and conditions imposed by one of their biggest customers and one of them suggests that a consistent response be sent to that customer by all suppliers telling that they do not intend to comply
  - no evidence of concertation post this meeting existed. However, individual employee became central person of interest in a dawn raid undertaken by a competent authority who named him personally

## 4.3 Current cases

### 4.3.2. Exchanging misleading information

- Competitors A, B and C participate in live procurement process
  - customer, organising the procurement, expressly forbids all contacts between participants during the procurement process
  - employee of company A stays in touch with employee in company B via email (blackberry) and reveals in each round the intention of his company in the proposed procurement. His intention is to mislead his contact in company B by giving false information. He does this to win the project for his company
  - however, this conduct qualifies for bid rigging and is established irrespectively of the intention of the participants or even the outcome of the process. Such conduct bares criminal sanctions in several countries

## 4.3 Current cases

### 4.3.3. E-networking

- E-networks
  - Social, professional, leisure, thematic e-networks, blogs, content sharing sites are founded by hundreds a day
  - E-Networking and virtual communities are features of our time
- E-networks facilitate greatly
  - Connection with hundreds or thousands of contacts within a short period of time
  - Exchange of views between wide group of individuals
  - Information dissemination
  - Faster contact
  - Communication (even for passive/silent users of e-networks)



## 4.3 Current cases

### 4.3.3. E-networking (cont'd)

- E-networks entail serious risks for their users
  - It is difficult to control the identity of all the members of the network
  - Spontaneous updates and seemingly benign comments on e-networks may reveal more than one desires
  - E-networks entail written communication, which creates evidence
  - Passive participation to a business network which is used by the other members for anticompetitive conduct is enough to put you and your company in trouble

## 4.4 Trade associations

- **Essential safeguards against information exchange**
  - Written constitution setting out purpose of trade association
  - Agenda circulated in advance for each meeting
  - Minutes recording each meeting
  - Leave the meeting if any anti-competitive matters are discussed or practices contemplated, inform lawyers over the telephone or in person to agree how to record this and any further action
  - Take legal advice on proposed initiatives

## 4.5 ABC or “hub and spoke” cartels

- **Indirect information exchange**

- Supplier, customer or other third party acts as conduit for exchange of information among competitors
- *Hasbro case*
- Creates risks – inferences drawn from existence in a firm’s files of competitor information – hard to prove a negative
  - Customers – generally disclose competitor information to get a better deal – pro-competitive (but beware breach of confidentiality)
  - Suppliers, third parties – greater risk
- Key strategy
  - identify whether information on a competitor that is provided by any third party is sensitive
  - restrict its circulation until it has been checked for risk
  - then once it has been checked, either
    - hand it back if it creates significant risks and make a note of this or
    - keep it, but immediately mark it with information on how it was received, so that it can be explained several months or years down the line.

# Lessons learned

## 5.1. Importance to a Corporation

- An anticompetitive IE:
  - Does not have to be intentional
  - Does not have to deal with secret information
  - Can be established even if it uses a third party as medium
  - Can be established even if it happened only once
- Corporations should:
  - Focus compliance awareness on those individuals who are ‘high content, high contact’
  - Sensitise employees to the risks of e-networking
  - Watch for hub-and-spoke information exchanges...they may be the indicator of a deeper issue

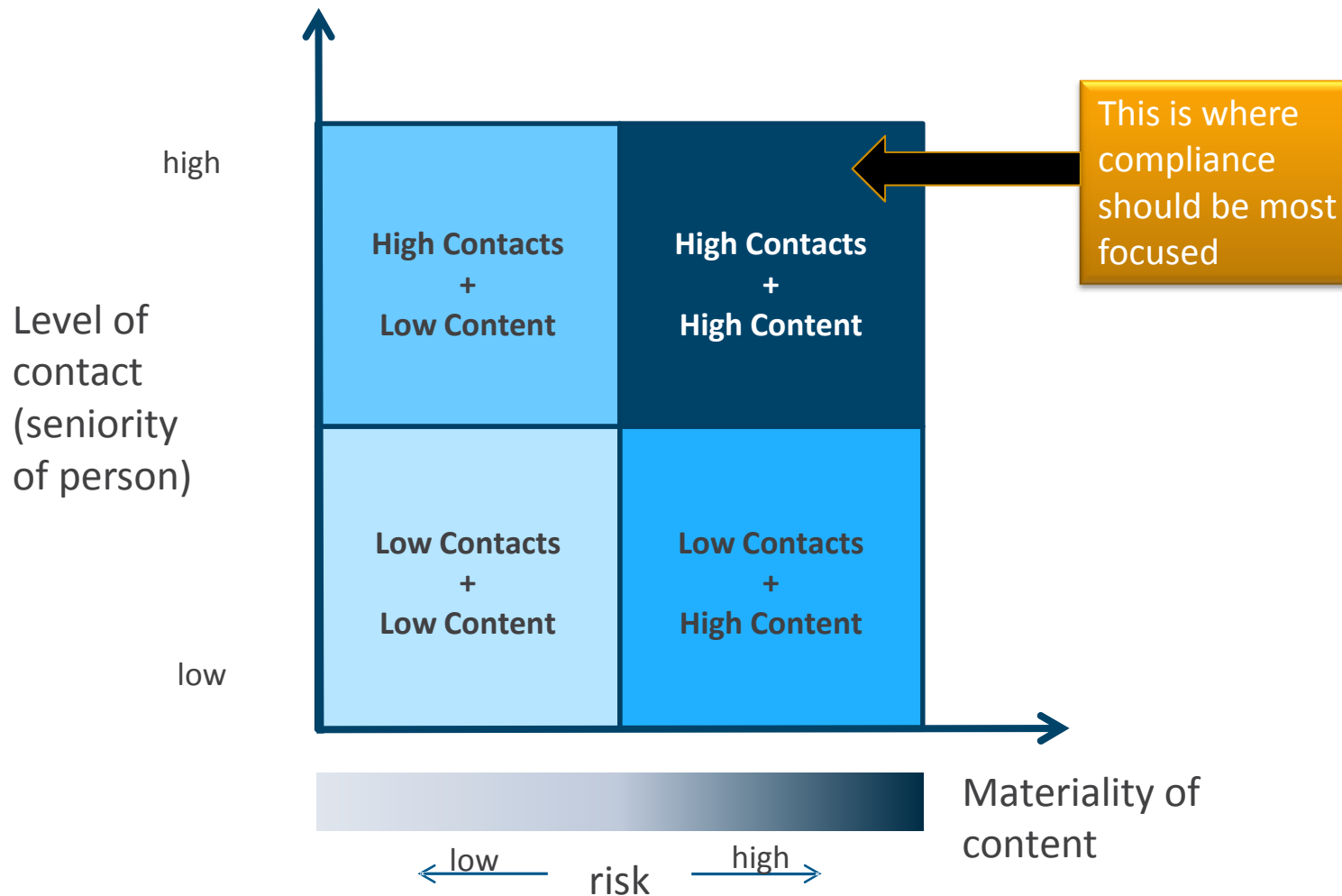
# Lessons learned

## 5.2. General guidelines

- An IE is most likely anticompetitive in markets that are
  - Transparent
  - Concentrated (oligopoly)
  - Symmetric
  - Stable
- An IE is most likely anticompetitive if it involves:
  - Strategic information
  - Participants with material market shares
  - Individualised information
  - Recent data
  - Frequent IE
  - Non public information

# Lessons learned

## 5.3. Assessment under the horizontal guidelines-matrix



Thank you