

The Risks of Sharing Data: *Competition Law Considerations*



A company that obtains information from a number of competitors (for example, to create industry statistics or to provide price comparisons) should be careful not to facilitate the flow of confidential information between those competitors.

Two recent cases highlight the potential competition law issues. We will then look at some practical considerations to keep in mind.

AC Treuhand

In 2009 the European Commission fined 24 companies a total of over €173 million for their involvement in two illegal cartels in relation to plastic additives used as heat stabilisers. Since it was merely a consultant, AC Treuhand was not a participant in the heat stabilisers market. However, it was fined as a facilitator to the cartels.

AC Treuhand unsuccessfully appealed the European Commission's decision to the General Court and then to the CJEU. AC Treuhand argued that because it was an administrative consultant, it was not active on the relevant markets and could therefore not be defined as being a part of the illegal agreements. The CJEU rejected this argument and pointed to the fact that AC Treuhand had played "an essential role" in the infringements by organising and attending meetings, collecting and supplying sales data, and offering to act as moderator in the event of tension between producers.

This case is a useful reminder for companies that obtain and process information from a number of competitors that there is a risk that they may act as a conduit for such information. Exchanges of information between firms may be prohibited where the flow of confidential information reduces the strategic uncertainty of competitors, diminishing their incentives to compete one against the other.

WhatIf? Private Motor

In 2011 the OFT investigated motor vehicle insurance providers and two IT providers which were involved in anti-competitive information exchange. A number of insurers contributed detailed pricing and risk information to a database provider enabling insurance brokers to access prices for policies that they sell to customers. Being a purely vertical information flow (from supplier to customer) this aspect of the information exchange did not raise competition concerns. However, the pricing information was also passed to a second provider, Experian, which incorporated it into a market data analysis product "WhatIf? Private Motor". Most insurers in the market subscribed to WhatIf?, allowing them to access their competitors' future pricing information for almost any risk profile in the market. It was also possible to manipulate the database to allow insurers to extract competitors' exact pricing models for each risk factor.¹

¹ OFT Case Reference: CE/9388/10 What exchanges of information are prohibited?



What exchanges of information are prohibited?

UK and EU law prohibits any agreement or concerted practice that prevents, restricts or distorts competition. Exchanges of information can, in certain circumstances, fall foul of these rules.

Information exchange between firms is an everyday commercial reality and is a recognised feature of a competitive market. It is the sharing of competitively sensitive information, particularly in relation to future activities, that can raise competition law issues.

There is no one size fits all rule to decide whether an information exchange infringes competition law so a case-by-case assessment needs to be carried out. To be caught, the information exchange must have as its object or effect the prevention, restriction or distortion of competition.

Guidelines² published by the European Commission on horizontal cooperation agreements state that information exchanges between competitors of individualised data regarding intended future prices or quantities (including intended future sales, market shares, territories or customer lists) will be likely to comprise a restriction of competition by object.

For an information exchange to have restrictive effects on competition it must be likely to have an appreciable adverse effect on one or more aspects of competition, such as price, output, product quality, product variety or innovation. Whether or not an exchange of information will have restrictive effects will depend on both the economic conditions on the relevant market(s) and the characteristics of the information exchanged.

What kind of information cannot be exchanged?

The key test for assessing whether the exchange of information has a collusive object/effect is whether or not the flow of information reduces the strategic uncertainty of competitors, diminishing their incentives to compete one against the other. According to the Guidelines, information is strategic if related not only to prices (for example, actual prices, discounts, increases, reductions or rebates), customer lists, production costs, quantities, turnovers, sales, capacities, qualities, marketing plans, but also to risks, investments, technologies and R&D programmes and their results.

Certain factors can help determine whether exchanged information is likely to raise competition law concerns. These include:

Is the data strategic? The exchange of information that reduces strategic uncertainty in the market is likely to be considered problematic from a competition law

perspective. A wide range of data may be deemed to be strategic, depending on the particular circumstances and the characteristics of the market, for example, data concerning actual prices, discounts, price increases and reductions, rebates, customer lists, production costs and quantities, turnovers, sales, capacities, qualities, marketing plans, risks, investments, technologies, and R&D programmes and their results. The strategic usefulness of data also depends on its aggregation and age, as well as the market context and frequency of the exchange.

Market coverage. Only information exchanges covering a “sufficiently large part of the relevant market” are capable of having restrictive effects. There is no defined percentage that will constitute a sufficiently large part. This will be assessed on a case-by-case basis, taking account of the characteristics of the information and the market in which the exchange takes place.

Level of aggregation. What does the output look like? Is reverse engineering possible? Exchanges of genuinely aggregated data, where the identification of individualised company data is sufficiently difficult, are unlikely to have restrictive effects. Information is individualised if it enables identifying a specific competitor or a specific transaction.

Age of data. The exchange of genuinely historic data is unlikely to be problematic, as it is not indicative of a competitor’s future conduct, and cannot serve for a prompt and credible retaliation. The threshold when data becomes historic also depends on the data’s nature, aggregation, frequency of the exchange, and the characteristics of the relevant market (for example, its stability and transparency).

Frequency of exchange. Frequent exchanges of information are more likely to have restrictive effects than infrequent exchanges. The frequency at which data needs to be exchanged to facilitate a collusive outcome also depends on the nature, age and aggregation of data.

Availability of information. Exchanges of ‘genuinely public’ information are unlikely to have restrictive effects. However, the concept of genuinely public information is narrower than that of information in the public domain. Genuinely public information is described as information that is generally equally accessible (in terms of costs of access) to all competitors and customers. Therefore, for information to be genuinely public, obtaining it should not be more costly for customers and companies unaffiliated to the exchange system than for the companies exchanging the information.

² Commission Guidelines on horizontal cooperation agreements, OJ 2011 C11/1, as corrected by OJ 2011 C33/20



If you would like to discuss the issues covered in this briefing note, please contact the authors below or any other member of the competition team.



John Schmidt
Partner
T +44 (0)20 7429 4967
M +44(0)7884 004396
E john.schmidt@shepwedd.co.uk



Zeno Frediani
Solicitor
T +44(0)131 473 5418
M +44(0)7841 951070
E zeno.frediani@shepwedd.co.uk