A NOTE ON INFORMATION SHARING AMONG COMPETING FIRMS

This article briefly highlights the competition issues that arise when rival firms share information among themselves. It also presents some useful tips national competition authorities in the CARICOM region should bear in mind to help detect the likelihood of information sharing among firms and consequently reduce the possibility of collusion in their respective jurisdictions.

To begin with there are two important things that must be mentioned. Firstly, the concept of a perfectly competitive market is built on the idea of all market participants (e.g. buyers and sellers) having complete access to information. On this premise, information exchanges are considered essential for competitors to actively participate in a competitive market place. Increased transparency in the market also leads to benefits for consumers by reducing search costs and helping consumers to choose products more effectively[1]. Secondly, although fundamental for competitive markets, information exchanges can have either pro-competitive or anti-competitive consequences, depending on specific circumstances.

Pro-competitive outcomes occur when the exchange of information among competing suppliers enhances economic efficiency and consumer welfare in a product market. Information sharing that leads to more intense competition among rival firms, the diffusion of technological knowledge, innovation, and the promotion of product standardisation or benchmarking in a product market, are generally perceived as pro-competitive. As a result of their overall welfare increasing attributes pro-competitive information sharing are not investigated by competition agencies.

In contrast, anti-competitive market outcomes arise when information sharing leads to collusion among rival firms. Collusion involves competing companies working together to limit competition in a product market for their own benefit. Collusion may take several forms including price fixing, the artificial dividing up of markets or restricting to supply sources, and bid-rigging. If essential information is exclusively shared by only a few competitors, these companies could use that information to foreclose other rival firms (or potential entrants) in the market that are not participating in the information sharing system. This lessening of competition can ultimately lead to harm to consumers in the form of high prices. In this regard, competition authorities across the globe have become increasingly concerned about anti-competitive information sharing that leads to collusive behaviour.

Structure of the Market and the Nature of the Product

Competition authorities rely on a number of factors when deciding whether communications among competitors may constitute a restriction of competition. One factor considered is usually the structure of the market and the nature of the product or service in question. In general, the fewer the firms competing in the market, the easier it is to collude. If a market only has a few firms on the supply-side, the ability to coordinate will be easier. Conversely, in markets with many suppliers, coordination is much more difficult as firms will have greater incentives to deviate from any collusive understanding in order to try and gain market shares over their competitors. Emphasis on the structure of the market has led many competition authorities to

1 See OECD Policy Roundtables (2010). “Information Exchanges between Competitors under Competition Law”

carefully review information exchanges in markets with only a few suppliers. In the UK Agricultural Tractor Registration Exchange case[2], for example, the European Commission prohibited the exchange of information in a market where four suppliers (Ford, Case, Massey-Ferguson and John Deere) had a combined market share of almost 80 percent.

Price collusion is also much easier to achieve if the agreements concern homogenous products, i.e. if the products are the same in terms of attributes and quality. In differentiated product markets, access to detailed sensitive information about competitors may not be useful to predict future behaviour of competitors and therefore may not lead to an increase of coordination among them.

Characteristics of the Information Exchanged

A major challenge that competition agencies face is determining what types of information exchanges are pro-competitive and anti-competitive. In order to make this distinction, it is important that competition authorities fully understand the various types of information that competitors may sometimes share.

The types of information firms share with each other may include, among others, sales data, prices charged to customers for goods or services rendered, bidding or tender details, discounts offered, details about customers, production costs, new products, research and development and other general business strategies. Consequently, for competition agencies the specificity of the information communicated and the time period to which that information relates become important. Essentially, the more detailed the information shared the more likely it can be used to facilitate anti-competitive business conduct. As with regards to time, in order for collusion to effectively take place, information exchanged among competitors would have to relate to current and future information so that coordination can be maximised.

An example of how the two concepts – specificity and the period of time to which the information pertains – are used to determine anti-competitive conduct was the 2010 case involving Royal Bank of Scotland (RBS) in the United Kingdom. In that case Royal RBS agreed to pay a fine of £28.5 million after admitting to competition law breaches[3]. RBS disclosed generic and confidential future pricing information to Barclays Bank, which Barclays took into account in determining its pricing. For this case the substantive issues are: (1) the information shared which was confidential (and therefore specific), and (2) the information shared pertained to the future activities of the bank.

In general it is difficult to develop an exhaustive list of the types of information that should not be legitimately shared among suppliers. Regional competition authorities may therefore wish to consider two mechanisms in their monitoring activities. Authorities can develop what could be considered as a "positive list" or "negative list" approach to information sharing among firms. A positive list approach would describe the types of information exchanges that a competition authority deems likely to be anti-competitive, while under the negative list approach an authority would describe information sharing that it is less likely to pursue.

[2] See Decision 92/157/EEC of 17 February 1992 relating to a proceeding under Article 85 of the EEC Treaty (IV/31.370 and 31.446 – UK Agricultural Tractor Registration Exchange, OJ 1992 L68, p.19)

3 The fine was reduced from £33.6 million to reflect RBS's admission and agreement to cooperate. See http://www.oft.gov.uk/news-and-updates/press/2010/34-10#.U0fm-VWrpDw

An example of establishing a positive list approach to the issue of information sharing could be to prohibit any of the following:

(a) Information exchanges among competitors of data regarding future prices and/or quantities (such as future sales, market shares, territories or customer lists);

(b) Information sharing on current conduct that reveals intentions on future market behaviour (outside pricing and quantity information) or cases where the combination of different types of data enables the direct deduction of intended future prices and quantities to have the object of restricting competition; and

(c) Any exchange of information that may not have the intention of restricting competition but may have that effect.

On the contrary, a negative list approach, such as that adopted by the US Fair Trade Commission (FTC)[4], could contain the following information exchanges that a competition agency will not challenge firms on:

(a) The exchange of information that is managed by a third party;

(b) The information is based on data that is more than three (3) months old;

(c) There are at least five (5) contributors of data for each disseminated statistic;

(d) No individual participant's data represents more than 25% of any particular statistic; and

(e) Information is sufficiently aggregated such that participants are unable to identify the data of other participants.

Ways Firms Share Information

Equally important to the various types of communications among firms, the market structure and the nature of the products involved, is recognising the different ways companies sometimes exchange information. There are several possible methods of doing so. Some firms may share information:

(a) Directly with each other firms;

(b) Use trade associations as a means to share business details;

(c) Publish information on their websites, or

(d) By way of government meetings.

Competition authorities must consequently adopt practical approaches for monitoring information sharing via these channels. For example, periodically monitoring the websites of

[4] In 1996 the FTC issued "Health Care Guidelines," which carved out safety zones for certain exchanges of information between competitors in order to protect them from antitrust claims.

firms may be a first step to take or the attendance at meetings of trade associations to explain what anti-competitive information sharing is. Advocacy is also another strategy when addressing trade associations and government departments.

Way Forward for the CARICOM Competition Commission

There have been documented cases of active collusion among firms in CARICOM. This collusive behaviour has so far been found within national jurisdictions. For instance, in 2011 the Barbados Fair Trading Commission investigated and found that shipping agents in Barbados were cooperating to set Local Administration Charges (LAC) in 2004[5]. In 2003, in Trinidad and Tobago price fixing by the Baker's Association was openly announced in the newspapers. Due to the fact that there is no law prohibiting collusion in Trinidad and Tobago, and this has been the business practice of trade associations for some time, there was no sense of wrongdoing among the firms involved[6].

The CCC views the issue of information sharing among rival firms to be important in order to effectively prohibit collusive behaviour in CARICOM. As such, in 2012 the CCC held a workshop at its office in Paramaribo with Surinamese businesses to highlight the issue of information sharing among competitors. At the workshop several cases that were concluded in the USA and Europe were presented to the participants to demonstrate the practical enforcement of competition rules to information sharing among rival firms. Also in 2013, at a competition seminar in St. Lucia, staff from the CCC was able to discuss with representatives of trade associations the types of information that should and shouldn't be shared in their meetings.

Going forward the CCC intends to continue to engage trade associations and government departments with the aim of helping them to understand the potential dangers that can occur when rival firms share information. In-depth research on how meetings with Government departments and trade associations are possibly used to facilitate information exchanges will also be conducted and the results used to feed into our advocacy and educational seminars.

For any more information about the work of the CCC please feel free to email admin@ccc.sr or contact us via our website at www.caricomcompetitioncommission.com.

[5] The Commission agreed that the conduct of the agents had the potential to amount to a breach of the Fair Competition Act CAP 326C. For more details see http://www.ftc.gov.bb/index.php?option=com_content&task=view&id=226&Itemid=28

[6] See Dr. Taimoon Stewart (2004). "The Role of Competition Policy in Regional Integration: The Case of the Caribbean Community." https://sta.uwi.edu/salises/workshop/papers/tstewart.pdf