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Atypical Cartels – Future Enforcement and Recent Trends

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Why the focus on atypical cartels today?

- Enforcement authorities have learnt lessons from recent cases in “new areas”
  - Automotive sector investigations
  - LIBOR, TIBOR rate setting
  - E-Books, Dairy Products and mixed/horizontal vertical cases
- The authorities are moving enforcement resources to “atypical cartels”
- Enforcement authorities are pooling experience and comparing cases through cooperation & ICN

What do we mean by atypical cartels?

- Information exchange cases
- Price signaling cases
- Indirect price fixing / “Benchmark cases”
- Joint bidding / consortia vs. competition
- Non-secret cartels
- “Hub and Spoke” cases (mixed vertical/horizontal)
- Ongoing effects of “old and cold” conduct

Atypical cartels require different analysis?

- In essence, the law is the same
- But not obvious to identify for parties or enforcers
- Why pursue if even effect is uncertain
- Evidentiary issues are different and difficult
- Alleging a cartel is serious and authorities must carefully consider implications of starting a case

Information sharing

- When is information sharing cartel conduct?
  - The difference between *per se/by object* and *rule of reason/by effect*
  - "Concerted practices" short of "agreements"
    - direct or indirect contacts with object to influence conduct OR disclose
    - practical cooperation knowingly substituted for the risks of competition
  - New limits of the law in Europe: *Bananas* – No future prices
  - But Horizontal Guidelines appear to draw the line at intended future pricing and quantities? (H.GL. para. 74)
- No need for bilateral exchange / *ANIC* presumption
  - Influencing market conduct of at least one participant (*Deere*)
- Not only prices, also other strategic information
  - What may affect conduct? (E.g., information on a company exiting a market segment, allows another company to raise prices?)

Price signaling

- This is sub-set of information exchanges
- When is it a concern?
  - Analyst calls
  - Press releases
  - CEO statements at conferences
- Not only using analyst calls to influence the market
  - U-Haul case in the US; Nothing similar in Europe
- When is it truly unilateral conduct?
  - *Woodpulp* – intelligently adapting to competitors' conduct
- Passive reception of information may be a risk
  - When is information presumed to influence conduct (*ANIC*)

Benchmark cases

- Benchmark cases are a fairly recent phenomenon
- Different variants and not always an antitrust issue
  - Some cases are about market stabilisation (price fixing by sellers)
  - Some are really about market manipulation (e.g., credit worthiness)
- The key antitrust issues are not all resolved
  - Buyers using a common benchmark as a means raise prices together in response to increased material prices (surcharge cases)
  - Sellers setting a common distance charge (market allocation)
  - Benchmarks to reduce competition among suppliers (commodities or banks on interest rates?)
- Is an industry-wide pass-through system a cartel?
  - LME, Platts Oil or LIBOR indexed pricing

Joint bidding and Non-Secret Cartels

- A recent spate of cases (Canada; Australia; US)
- Joint bidding instead of separate bidding
  - Shadow bidders where multiple contracts will be awarded
  - Where one bidder is constrained by prior price commitments (CAN)
  - Consortium instead of separate bids
  - Allocated consortia (e.g, US private equity auction bidding)
- New area and law and enforcement is unclear; But priority..
- Does customer knowledge cure the cartel concern?
  - In theory, cartels are secret agreements (Leniency Notice)
  - Joint bidding with customer knowledge generally cures
  - Customer agreement cannot cure price fixing as such
  - But recent cases where customers shown to have known… but will they say so if enforcement or damages actions start?

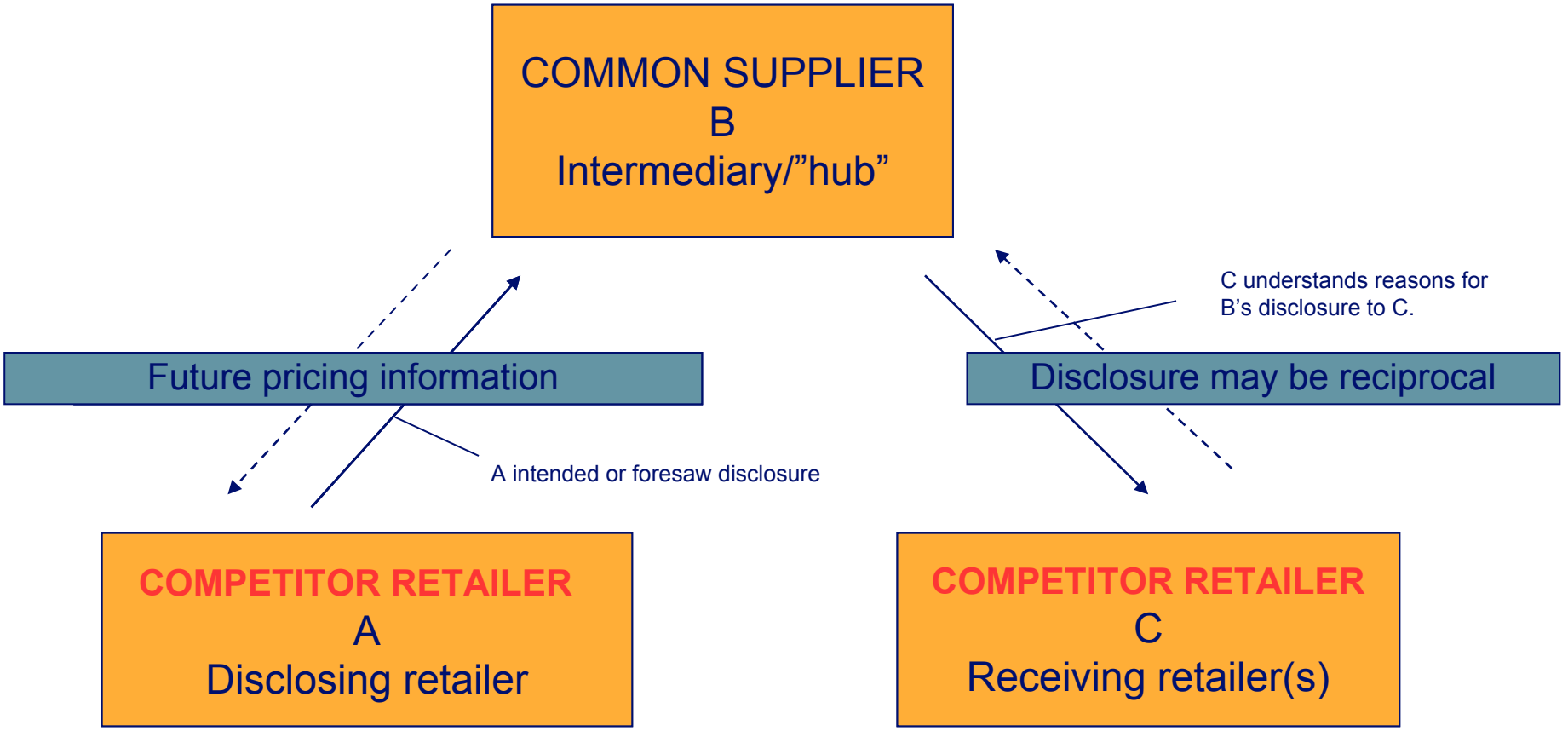
What is a "hub and spoke" cartel?

- In essence: horizontal price fixing, via a vertical link
- With thanks to the OFT:

1. The transmission of future pricing information from one retailer (A) to another retailer (C) via an intermediary (B) – the horizontal element is key to this type of infringement
2. An intention on the part of the disclosing retailer (A) that the information will be passed on to a competitor (i.e. C) – it is this intent that distinguishes potentially legitimate from illegitimate disclosures
3. An understanding on the part of the receiving retailer (C) of the circumstances in which the information was disclosed

NB: Unilateral disclosure sufficient – no need for reciprocity. Infringements stronger where that occurs

The test for establishing Hub and Spoke (2)



Future pricing information is passed from A-B-C. Evidence of the exchange may be more cogent where there is a reciprocal disclosure of future pricing information from C-B-A.

“Hub and Spoke”: The Frontier

- Authorities in US and UK have pursued
  - E-Books case (Apple and publishers; DOJ civil suit)
  - Dairy products (Supermarkets; OFT in UK)
- No cases at EU level
  - No intent test in law
  - Many legitimate reasons for disclosing prices to suppliers (brand management), and by suppliers to customers (price bluffing)
- How far can “hub and spoke” be pushed?
  - Seen from spokes (yes? *Dairy*) or from hub (no? *Apple*)
  - Are there pro-competitive explanations (a new entry story? *Apple*)
  - Bluffing on prices is part of business (evidentiary burden should be heavy to avoid dampening competition)

Ongoing Effects: "Old and Cold" Conduct

- Also an area of enforcement interest
- Recently, several cases where 5+ years between collusion and actual sales taking place
- Why enforce if conduct has stopped?
  - Scarce enforcement resources
  - Once customers know, they renegotiate prices (no consumer harm)
- So far, largely dealt with as a fine calculation issue
  - A parallel to domestic effects of foreign conduct (indirect sales)

What are the lessons?

- Atypical cartel matters warrant special analysis
  - The conduct and evidence less clear than “smoke-filled room” cases
  - The entire picture may not be clear to each participant in the conduct (e.g., information sharing and “hub and spoke”)
  - Customers may know about the conduct
- Both companies and enforcers must look at such cases with special attention

The special considerations for companies

- These cases come to the lawyer as a “problem”
  - It is up to the lawyer to define the problem
  - But above all find a solution
- The solution can be to decide: No real risk of enforcement
  - No violation of law as pro-competitive?
  - Not “per se” -- Efficiency defenses (information exchanges)
  - Other defenses? (new entry?)
- The more marginal, the more statute of limitations is a factor
- Above all, such cases have less clear fact patterns than the classic “smoke filled room” cartel cases
- Not all violations of law must be reported

Leniency is not the solution to all problems

- Immunity and leniency comes at a cost
  - A long and expensive process becomes very likely
  - Scope of reported case may be different from ex officio case?
  - Likelihood of customers asserting damages claims increases
  - Consequences for employees (criminal investigation even if nothing?)
  - Admitting to conduct being illegal creates a serious image problem for management and board of directors
  - Shareholder value affected
- In essence, leniency is only attractive where net benefits
  - Upsides must be clear and permanent
  - Avoiding fines is not enough if damages claims are a certainty
- Leniency is only attractive if ensures a predictable outcome

In a marginal case, is leniency the solution?

- The key questions that give the answer:
  - Do you have access to all the facts required to define an offence
    - Can you see all the facts (hub and spoke), or are they hidden to some?
  - Is the legal qualification clear?
    - Is the violation clear?
    - Is it a *per se/by object* offense
    - Does leniency limit your ability to argue efficiencies and other defences
  - Must you admit to an offence that you cannot be sure is an offence?
    - Or just the facts (perhaps the elements of the offence, which if not complemented by other elements are insufficient?)
    - Leniency systems are not the same around the world
  - Are you better off fighting?
    - The answer may depend on the jurisdiction?

How should enforcers approach atypical cases

- First, they should incentivize leniency
  - Encourage applications
  - Accept that in marginal cases, some will opt for 2nd in, not immunity
  - Allow incomplete stories to be told, and don't require applicants to "fill in" the story where the facts are unknown
  - If no case, keep it confidential, forever; But reserve the "slot"
- Second, enforcers should not incentivize embellishments
  - Dangerous where there is an incentive to cement a leniency story
- Last, when in doubt, enforcers should not pursue as a cartel
  - If a plausible defense, enforcers should deal with the defence and not take the short cut of calling something a *per se* offense or "cartel"

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