Managing the Competition Risks of Communication between Competitors

It is a truism that, in order to avoid breaching competition law, competitors should not communicate with one another. In reality, it is almost inevitable that some degree of communication between competitors will take place. Often competitors will come across one another at events such as conferences or trade association meetings. They may have entirely legitimate reasons to discuss matters of common interest. While some subjects should certainly be avoided, discussion of other topics may not be deemed to have an adverse effect on competition, and may even be considered to be pro-competitive. The challenge is to manage such communications in a way that will ensure compliance with the rules and to know where to draw the line between legitimate discussions and those which may be deemed to be anti-competitive, and therefore risk landing the individuals and companies concerned in trouble with the competition authorities or before the courts.

From a competition law perspective, communications between competitors can be placed along a spectrum with, at one end, communications that will virtually always be problematic, and, at the other end, communications that may generally be considered not to be anti-competitive. An agreement between competing producers to fix prices or allocate markets between one another, for instance, would almost certainly be considered to breach competition law and would fall at the former end of the spectrum. On the other hand, a general discussion of proposed legislation or health and safety standards affecting the industry would be unlikely to be considered to be problematic and would ordinarily fall at the other end of the spectrum. Between these two extremes lie a broad range of activities that are less easy to place along the spectrum. In such cases the communications in question have to be analysed in their broader context in order to determine whether there is any scope for a competition authority or a court to consider that competition could be adversely affected as a result. Examples of topics that fall within the ‘grey area’ of communications that may or may not be problematic under competition law, depending on the circumstances, include the provision of past sales figures to a trade association, standard setting, and indirect exchange of information through a credit reference agency. Fortunately, the courts have supplied some guidance on how to determine whether activities within this grey area are compliant with competition law.
Guidance from the Courts

The recent judgment of the European Court of Justice in Asnef-Equifax v. Ausbanc\(^1\) provided a helpful clarification of the case law. Although the judgment concerned the circumstances in which banks could exchange information regarding the solvency and creditworthiness of their clients, broader principles of general application can be extracted from it.

The Court’s judgment was given in the context of a long-running dispute before the Spanish courts between Asnef-Equifax, a credit reference agency, and Ausbanc, which represented consumers of the banks’ services. Asnef-Equifax had notified the Spanish competition authorities of its activities as a credit reference agency in 1998. Those activities involved the indirect exchange between banks and other financial institutions of information regarding the credit-worthiness of their customers. Ausbanc claimed that such exchange was unlawful for a number of reasons, including breach of privacy and breach of EC and Spanish competition law. The litigation had been through several levels of the appeal process by the time the Spanish Supreme Court asked the European Court for a definitive ruling on the compliance of the credit reference arrangements with EC competition law.

The ECJ’s Ruling

The Court held that exchange of information of the type in issue before it was in principle compatible with competition law, provided that: (i) the markets concerned are not highly concentrated, (ii) the system does not disclose the identity of individual lenders to be identified; and (iii) the system does not exclude certain financial institutions by allowing access on a discriminatory basis. Each of these conditions is briefly examined below.

- The relevant markets should not be highly concentrated

Ausbanc claimed that the credit referencing system organised by Asnef-Equifax involved the exchange of business secrets between competitors. This, Ausbanc argued, reduced the risk inherent in any business decision and was likely to lead to a uniform reaction by credit institutions to potential borrowers. As a consequence, Ausbanc argued, the system was necessarily restrictive of competition between the banks and other financial institutions involved in its operation. This line of argument was rejected by the Court. It found that exchange of information on borrowers made it easier for lenders to predict the chances of being repaid repayment, which was likely to reduce the rate of borrower default and therefore of improving the functioning of the market for credit. As a result, lending institutions could make more effective decisions, and the risks for new competitors of entering the market were reduced. Nor was it only the financial institutions that stood to gain; customers were also likely to gain access to cheaper rates, made possible by the generally reduced risk of default.

\(^1\) Asnef-Equifax, Servicios de Informacion sobre Solvencia y Credito, SL v. Asociacion de Usarios de Servicios Bancarios (Ausbanc), Case C-238/05, judgment of 23 November 2006.

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The Court did, however, make it clear that in highly concentrated markets, where only a few large players were present, there was a risk that the exchange of certain information might allow competitors to become aware of confidential market information and commercial strategy of their rivals, thereby increasing the chances of collusion between such competitors. Where, as on the facts before the Court, a market is relatively fragmented and is made up large number of competing undertakings, the risks of coordination as a result of the exchange of information are reduced.

- **The system should not enable individual lenders to be identified**

The Court held that it was important that individual lenders should not be identifiable through the system, in order to avoid the risk of facilitating coordination of competitive behaviour by revealing the market position or commercial strategy of individual firms.

- **All financial institutions should be able to gain access to the system on a non-discriminatory basis**

In order to reduce the risk of the system being used in an anti-competitive manner and, in particular, to avoid putting potential new entrants at a competitive disadvantage, the Court held that all existing or potential participants in the market should be able to gain access to the system on a non-discriminatory basis.

**Managing Compliance**

It is apparent from the Court’s judgment that, save in straightforward cases, an analysis of the relevant market must be undertaken in order to determine whether in any given circumstances communication between competitors is likely to be problematic from a competition law perspective. The key question underlying that analysis is whether the communication is capable of reducing uncertainty as to one or more competitors’ future competitive behaviour: the mere receipt of information capable of doing so is likely to be problematic, even in the absence of any agreement or further action. In the *Asnef-Equifax* case the Court was only able to satisfy itself that there was no scope for such uncertainty to be reduced after a detailed examination of all the features of the market.

The risks associated with getting the decision wrong are considerable. In most countries the companies involved are at risk of significant fines. The acts of a single employee are sufficient to give rise to liability on the part of the whole company. In an increasing number of jurisdictions the individuals involved may also, in certain circumstances, face personal liability including, in the UK, imprisonment and disqualification as a director. At the same time, competition authorities are generally less willing to give guidance on the compatibility of specific arrangements with competition law than previously and the onus is now on companies to “self-assess”.

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In order to manage these risks, businesses are increasingly putting in place compliance programmes designed to make their employees aware of what they may do without breaching competition law, what to do if they become aware of a suspected breach of the rules, and what to do if they are uncertain how to proceed in a given set of circumstances. Of course, such compliance programmes cannot resolve all competition law issues. A more realistic target is to make employees aware of the behaviour that is definitely prohibited under competition law and behaviour at the other end of the spectrum that is normally unproblematic under competition law, and to sensitize such employees to competition law issues so that they may seek assistance from management and legal advisors if they encounter an issue falling within the ‘grey area’ described above or in other cases of uncertainty.

A compliance programme should be aimed not only at ensuring compliance with competition law, but also at enabling the business to demonstrate that it has complied with competition law. The evidence regarding anticompetitive behaviour is often hard to come by, and competition authorities and the courts will often fill in any gaps in the evidence by drawing inferences from the facts that are available. If, for instance, an employee receives an unsolicited email from competitor seeking to fix prices, and that email subsequently comes to the attention of a competition authority, the authority may seek to infer an agreement to fix prices from the email. It is therefore essential that employees are able to identify a situation as problematic and know how to react when placed in such a position. The compliance programme should instil in employees the reaction that they should repudiate any attempts to enter into anticompetitive arrangements in a manner that is verifiable after the event, and consult their management or legal advisors when confronted with such a situation.

Similarly, if an employee attends a meeting of a trade association at which members are asked to provide sales data for use in a report by the association, it should be clear from the compliance programme that the provision of such information falls within the grey area of matters that may or may not be problematic, depending on the circumstances. A market analysis of the type undertaken in the Asnef-Equifax case will need to be carried out in order to assess the competition risks associated with the use of the information in this way. This will require further information on the age of the information which is being sought (if the information is more than a year old and does not have any current competitive value its use is unlikely to give rise to problems under competition law) and the manner in which the information is to be used (if the information is to be aggregated in such a way that individual competitors will not be identifiable this will reduce its scope to have an adverse effect on competition). Again, this is an area in which employees should be encouraged to seek help from management or legal advisors, to ensure consistency of approach throughout the company and to minimise the competition risks.

**Conclusion**

Communications between competitors can give rise to serious competition risks. However, such risks can be managed by putting in place a compliance programme. Such a programme should make employees aware of topics to avoid and topics that

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are safe to discuss. In addition, employees need to be aware of when an issue falls within a grey area of potentially problematic issues, so that they may seek advice where required. This is likely to reduce the risk of problems arising further down the line. In competition law prevention is better than cure.

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