



Clarifying Competition Law:

Information Exchanges - What you can and cannot exchange with your competitors

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Speakers



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Robert Bell is head of the EU & UK competition team at Bryan Cave with over 20 years of experience advising on complex competition and regulatory matters involving some of the leading cases before The Competition and Markets Authority, the European Commission and UK and European Courts.

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Phil Bartz is co-leader of the firm's Antitrust, Franchise and Consumer Law Group and focuses on antitrust litigation, including the defense of antitrust class actions, complex commercial litigation, defense of federal and state investigations, and antitrust advice.

During the course of his career, he has counseled Fortune 500 clients regarding antitrust matters related to merger and acquisitions, distribution channel issues and antitrust compliance. Mr. Bartz has also represented clients in matters involving the federal antitrust enforcement agencies.

Prior to joining the firm, Mr. Bartz held senior level positions in the Civil Division of the U.S. Department of Justice, including serving as the Deputy Assistant Attorney General for the Federal Programs Branch of the Division, which litigates on behalf of approximately 100 federal agencies.

Agenda

1. USA and EU Basic Principles
2. Information exchange in the USA
3. Information exchange in the EU
4. Strategies to ensure compliance



US - Antitrust Law

- Section 1 of the Sherman Act, 15 U.S.C. § 1
 - Prohibits contracts, combinations and conspiracies in restraint of trade.
 - The Supreme Court has interpreted the Sherman Act to only prohibit “unreasonable” restraints of trade.
 - Certain agreements are *per se* illegal without any further analysis. It is generally *per se* illegal when competitors engage in price fixing, division of markets, bid rigging or group boycotts.

US - Antitrust Law Penalties

- Criminal Penalties
 - Up to 10 years in prison for individuals
 - Criminal fines of up to \$100 Million for corporations or twice the loss/gain from the violation (whichever is greater)
 - Criminal fines of up to \$1 Million for individuals or twice the loss/gain from the violation (whichever is greater)
- Civil Penalties
 - Treble damages available to a successful plaintiff
 - Payment of the plaintiff's attorneys' fees and costs (on top of your own attorneys' fees)
 - Joint and several liability



The Basics – EU competition law

- Article 101(1) TFEU prohibits agreements whose object or effect is the prevention, distortion or restriction of competition and which appreciably affects competition and trade between Member States
- Agreements/concerted practices
- Restrictions by object or effect
- Must appreciably affect competition and trade between member states

The Basics – Cont

- Article 101(3) individual exemption
- If an information exchange contributes to improving products and distribution or promotes technical and economic progress while sharing benefits with consumers can be granted an individual exemption
- Examples of pro-competitive information exchange
- Various Block Exemption Regulations: R&D, technology transfer agreement, specialisation
- Horizontal Co-operation Agreement Guidelines

The Basics – Cont

Domestic Competition Law

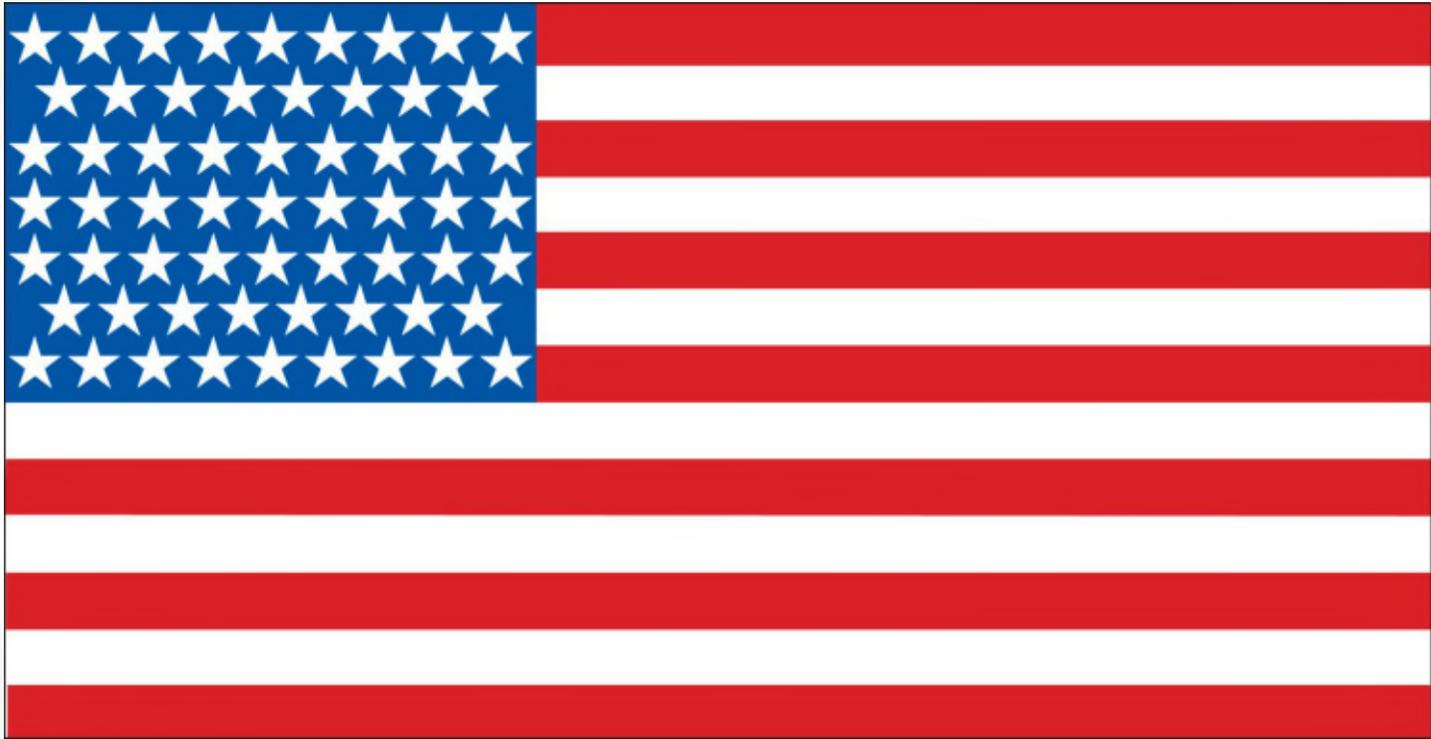
- Member States have their own competition laws modelled on the EU laws
- This law applies where the competitive effect of the arrangement is purely domestic

Relevant Authorities

- The EU Commission is primarily responsible for enforcing EU competition law
- Member States competition authorities enforce domestic competition law but also enforce EU competition law in association with the EU Commission.

EU - Dangers of non-compliance

- Agreements found invalid
- Regulatory fines
- Private and collective damages actions
- Possible criminal sanctions
- Bad publicity



US – Information Exchange

- Information exchanges present tricky antitrust issues under the law.
- If a market is truly competitive - not oligopolistic – then information exchanges are unlikely to have anticompetitive effects. Issues arise when markets are oligopolistic.
- United States v. Container Corp. of America 393 U.S. 333 (1969)
 - “Price information exchange in some markets may have no effect on a truly competitive price. But the corrugated container industry is dominated by relatively few sellers. The product is fungible and the competition for sales is price. The demand is inelastic, as buyers place orders only for immediate, short-run needs. The exchange of price data tends toward price uniformity.”

US – Information Exchange

- But Container Corp. is not the end of the information exchange analysis.
- Exchanging competitively sensitive information raises ancillary antitrust risks because such information can be used for anticompetitive purposes, *e.g.*, price-fixing, market or customer allocations, group boycotts and bid-rigging.
- In other words, the exchange of price and other competitively sensitive information can be viewed as a “facilitating practice” to *per se* antitrust violations.

US – Information Exchange

- Over the past five years, US antitrust authorities increasingly have looked at information exchanges as a facilitating practice.
- Section 5 of the FTC Act makes unlawful “[u]nfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce”.
 - The FTC has taken the position that in past cases that the exchange of competitively sensitive material can violate Section 5 of the FTC Act.
 - The FTC has taken this position even if there is no evidence of an effect on prices.

US – Information Sharing

- Recent FTC Enforcement Actions

- In the Matter of Bosley, Inc., FTC No. C-4404, Administrative Complaint (2012)

- “Bosley’s and Hair Club’s CEOs directly exchanged detailed information about future product offerings, surgical hair transplantation price floors, discounting, forward looking expansion and contraction plans, and operations and performance.”
- “The exchanges of information, alleged herein, had the effect of reducing Bosley’s and Hair Club’s uncertainty about a competitor’s product offerings, current discounting, geographic expansion and contraction, marketing plans, and operating strategies. The reduction of uncertainty facilitated coordination and endangered competition.”

- In the Matter of U-Haul International, Inc., FTC No. C-4294 (2010)

- FTC alleged that U-Haul’s CEO made public statements about U-Haul’s planned business activities – pricing, discounts, etc. – and then encouraged regional managers to engage in direct communications with competitors about pricing.
- Instead of alleging an actual agreement on pricing, the FTC alleged that U-Haul violated Section 5 because “U-Haul acted with the specific intent to facilitate collusion and to achieve market power.”

- In the Matter of McWane, Inc., FTC No. 9351 (2014)

- FTC alleged price fixing and information exchanges among ductile iron pipe manufacturers (used in municipal water systems) violated Section 5 of the FTC Act.
- An Administrative Law Judge issued a lengthy opinion in which he found that the exchange of past sales data (through a trade association) did not have an effect on pricing and, therefore, did not violate Section 5.
- The Commission – sitting with 4 members at the time – split 2-2 on whether the information exchange constituted a violation, and dismissed the claim.

US – Information Sharing

- These cases demonstrate that even in the absence of an anticompetitive effect from an information exchange, the enforcement agencies may be hostile to exchanges of competitively sensitive data.
- Notwithstanding the foregoing, all information exchanges are not unlawful; indeed they can be pro-competitive.
- Critical that information sharing be done the right way, and in appropriate contexts.

US Information Sharing - Benchmarking

- Benchmarking requires the collection, assembly, and analysis of data from competitors and allows all competitors to see where they stand in relation to their peers. Generally speaking, benchmarking is a pro-competitive activity.
- This type of information you need to do benchmarking is by necessity, competitively sensitive.
- FTC/DOJ Statement on Information Sharing (released in the context of healthcare markets, but recognized as applicable to other markets) creates a safety zone for competitors sharing information.
 - Antitrust Safety Zone
 - The survey is managed by a third-party;
 - The information provided by survey participants is based on data more than 3 months old;
 - There are at least five providers reporting data upon which each disseminated statistic is based;
 - No individual provider's data represents more than 25 percent on a weighted basis of that statistic; and
 - Any information disseminated is sufficiently aggregated such that it would not allow recipients to identify the prices charged or compensation paid by any particular provider.

US Information Sharing - Benchmarking

- Cases have ruled that departure from the guideline must be based on legitimate business justifications
 - Cason-Merenda v. Detroit Medical Center, 862 F. Supp. 2d 603 (E.D. Mich. 2012) (denying summary judgment where defendants “were long on generalities but short on specifics” for departing from the safety zone criteria).
- Reasons for departing from the Safety Zone should be well documented before-hand
 - Understand the business reasons for the exchange of information
 - Understand how the information will be used by participants
 - Understand why satisfying the safety zone criteria would not achieve the same objectives

US Information Sharing - Lobbying

- Lobbying is generally protected by the First Amendment even if done collectively by competitors

- *Noerr-Pennington* Doctrine

***Easter R.R. Presidents Conf. v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961)**

- Railroad companies working together – even through unethical and deceitful conduct – to lobby the legislature in favor of legislation that would dramatically affect truckers in competition with the railroads is protected by the First Amendment.

***United Mine Workers of Am. v. Pennington*, 381 U.S. 657 (1965)**

- Coal companies and a union petitioned Tennessee Valley Authority officials to stop purchasing coal on the spot market, which would likely have helped drive smaller competitors out of business.
- Supreme Court made it clear that *Noerr* extends beyond just legislation. The Supreme Court ruled that “[j]oint efforts to influence public officials do not violate the antitrust laws even though intended to eliminate competition.”

BUT SEE *Cal. Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508 (1972)

- Defendants agreed to file baseless challenges before federal and state agencies to prevent competing trucking companies from acquiring operating rights or from transferring or registering those rights.
- *Noerr-Pennington* does not apply to SHAM litigation in which the “power, strategy, and resources of the [defendant] were used to harass and deter [plaintiffs] in their use of administrative and judicial proceedings so as to deny them ‘free and unlimited access’ to those tribunals.”
- Requires a showing that the defendant did not intend to achieve the desired outcome, but instead only sought to obstruct, delay, or impose costs on its competitor.

US Information Exchange: Standard Setting

Benefits: lower costs and improve quality through standardization.

Risks: misuse of Standard-Setting Organizations (SSOs) to exclude competitors or reduce competition.

If no price fixing or output restrictions, “rule of reason” review is likely of standard-setting practices

Exchange of Information in SSO Context

- The exchange of non-price information and non-customer information at SSOs generally poses little antitrust risk.
- It is generally permissible for companies to exchange technical information when developing technical standards.
- The Department of Justice has found it permissible for SSO participants to exchange limited amounts of **price information** in some circumstances.



EU Information Exchange

Types of information exchange, between:

- Competitors
- Common agency (trade associations, hub and spoke)
- Non-competitors

Information exchange between competitors

Direct or indirect exchange of sensitive commercial information between competitors usually infringes competition law.

Sensitive commercial information:

- Depends on context (age/frequency)
- Aggregated/individual
- Usually includes current and future price information, output figures, customers, cost information
- Usually not public (there are exceptions this rule)
- Market context

Competitive harm

- Collusive outcome (co-ordination, policing cartel arrangements)
- Anti-competitive foreclosure
- Importance of restriction by object or effect

Information exchange between competitors

Example 1

- Meetings between competitors/informal contact e.g. drinks reception
- RBS/Barclays (2011), UK case concerning unilateral disclosure by RBS to Barclays of future pricing information through social events and phone calls
- RBS fined £28m after being whistleblown by Barclays

Example 2

- What is public information?
- Four petrol companies own all petrol stations in a EU Member State. They exchange current petrol price displayed on forecourts over the telephone
- Pricing data exchanged over the phone not genuinely public
- The competitors would need to make substantial time and transport costs to get the same information
- EU Commission Horizontal Guidelines/ c/f French Motor Fuels case

Information exchange by common agency

Exchange through Trade Associations

- Members share individual data on prices, markets or customers
- A serious infringement of competition law
- You can exchange anonymised data in non-oligopolistic markets
- C/f UK Agricultural Tractor Registration Exchange, on appeal (Case C-8/95P)

New Holland Ford (1998) ECR I-3175

- Market context important

Hub and spoke

- Anti-competitive exchange of sensitive information between competitors can take place through the use of common customers or suppliers as a conduit
- Lobbying – no specific exclusion for sharing of information to lobby government

Information exchange through common agency

- Acceptable for supplier to share with an individual retailer the price of goods it will have to pay and the terms and conditions of the sale
- However, future pricing or output intentions which could be communicated through retailers to other competing suppliers constitutes an infringement
- UK Dairy Cartel (2011)
- Argos Ltd and Another v Office of Fair Trading JJB Sports plc v Office of Fair Trading [2006] EWCA Civ 1318

Information exchange by non-competitors

Information exchange

- Between companies that do not compete generally acceptable
- Co-operation can extend to setting up joint selling arrangements/joint advertising
- Be careful about exchange of sensitive data as it could infringe in a hub and spoke context

Information exchange by non-competitors

Outside Article 101(1) or exemptible under Article 101(3):

- Agreements between non-competitors
- Exchange of truly anonymised data
- Exchange of genuine public information
- Joint market research/industry statistics
- Benchmarking performance with competitors and the exchange of aggregated data on prices, costs etc., exemptible in a fragmented market.
- Standard setting by competitors as long as available to all on the same conditions
- Past performance and truly historical information between competitors (but not if the historical information can reveal pricing mechanisms and future intentions)



USA / EU – How best to avoid implications?

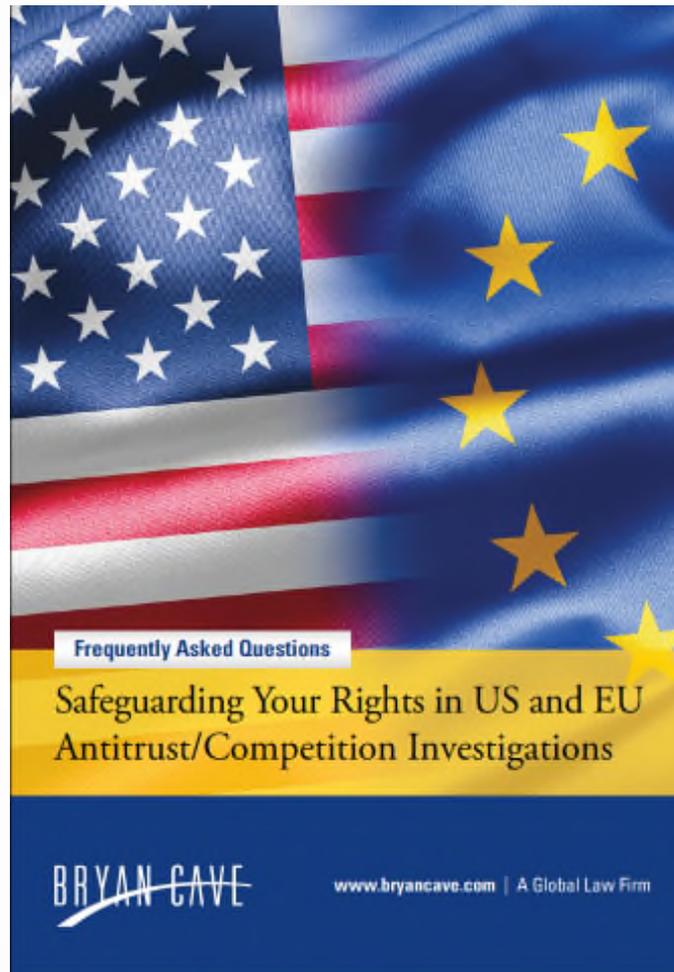
1. Avoid any discussion of FUTURE conduct
2. Playing the innocent receiver of confidential information is not a defence – actively distance yourself from any receipt, put parties on notice and destroy received confidential information
3. Anonymise and aggregate information where possible, information submitted to trade associations and research bodies can be especially problematic
4. Beware hub and spoke arrangements: Be careful what information you exchange with your customers and suppliers
5. Whistleblow. If involved in suspected activity, come forward first for the chance of full leniency from regulatory fines

Specific responses

Danger if retailer starts to disclose future pricing intentions, advertising or potential plans of their competitors, or the retailer's own future resale pricing intentions

- **How do you react?**
 - stop conversation
 - put on notice not acceptable
 - seek advice from compliance/legal
- **What to do if sensitive information is shared by mistake**
 - upon receipt: write and confirm that you are returning or destroying information and that no use has been made of it
 - if sent: confirm sent by mistake, ask for it to be destroyed and returned and confirmation no use has been made of it

FAQ Booklet



eu-competitionlaw.com

The screenshot shows the homepage of eu-competitionlaw.com. At the top left is the 'BRYAN CAVE' logo. A search bar with 'Google Custom Search' and a 'Search' button is at the top right. Below the logo is the text 'EU & COMPETITION LAW' with social media icons for Twitter and YouTube. A large banner image shows various European Union flags in front of a modern building. Below the banner are navigation icons for Home, Archives, and Authors. A 'CATEGORIES' sidebar lists: ABUSE OF DOMINANCE, ANTI-COMPETITIVE AGREEMENTS, CARTELS, EU & REGULATORY, GENERAL, LITIGATION, MERGERS, and PROCUREMENT. A 'POPULAR POSTS' section lists several articles. The main content area features a 'Mergers' article with a UK flag icon, titled 'A COACH AND HORSES BEING DRIVEN THROUGH COMPETITION LAW? - THE EUROTUNNEL/SEAFRANCE SAGA CONTINUES'. The article text states: 'On 19th May 2015, the CMA announced that it intends to seek permission to appeal the Court of Appeal judgment in the Eurotunnel/SeaFrance case to the Supreme Court after the Court of Appeal ruled against the CMA on the 15 May 2015. It is the latest development in a case going back to June 2013 and acts as an important clarification on when buying a liquidated company triggers merger control as the acquisition is considered an acquisition of an enterprise - Read More-'. Below the article are social sharing links for Email, LinkedIn, Facebook, Twitter, and Google+. A 'Written by Roman Madaj on Friday, May 22, 2015' note is present. To the right of the article is a '2014 INNOVATIVE LAW FIRM OF THE YEAR' award badge and a 'CONTACT US' section with 'ROBERT BELL - EDITOR' and a 'SUBSCRIBE' section with RSS and email icons. At the bottom right of the main content area are 'EU TEAM' and 'BIC NETWORK' sections. A second article snippet is visible at the bottom, titled 'Anti-competitive Agreements' and 'EU COMMISSION TO CREATE A GENERAL RIGHT FOR RESELLERS TO SELL OVER ON LINE PLATFORMS?'.

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