Information exchange through competitor contact

Cormac O'Daly

BSC / IEJE, Liège

VBO-FEB, 22 June 2011

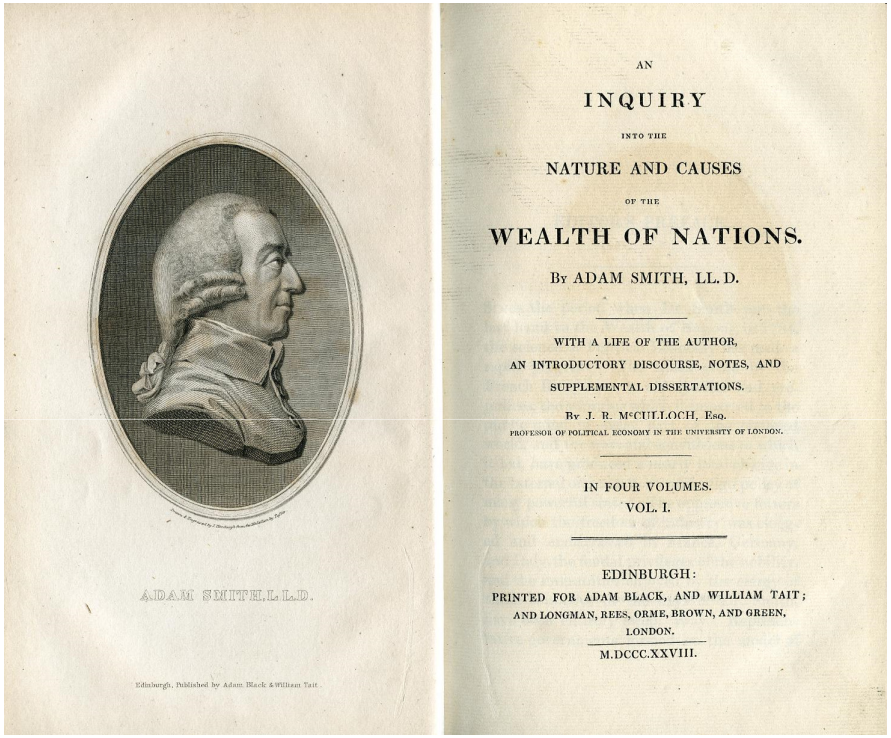
WILMERHALE®

WILMER CUTLER PICKERING HALE AND DORR LLP ®

Overview

- Information exchange ancillary to legitimate, pro-competitive cooperation with competitor
- Risk of “spillover” and infringement of Article 101 EC and national equivalents
- Best practices to avoid this
- *Mergers*
- *Joint ventures*
- *Other cooperation including benchmarking*

Underlying risk



- Adam Smith (1776): "*People of the same trade seldom meet together, even for merriment and diversion, but the conversation ends in a conspiracy against the public, or in some contrivance to raise prices*."

1. Mergers

- Assuming merger needs competition clearance - obligatory notification in EU and Belgium *etc.*
- No exemption from the normal competition law rules
  - Risk of “gun jumping” / premature exercise of control
  - Unlawful information exchange particularly problematic if merger does not proceed
- Penalties
  - EU – to date for failing to notify in time – *Electrabel / CNR* € 20 million (4 years late)
  - *Ineos / Kerling* investigation but no infringement found
  - Germany – *Mars / Nutro Products* € 4.5 million
  - US more frequent – e.g. *Qualcomm* US $ 1.8 million

"Business as usual"

- Core principle while waiting for merger clearance is "Business as usual"
- Continue to behave independently and to compete as before
- Information that should not normally be shared with a competitor should not be shared
- Yet – need for due diligence and transition planning but subject to safeguards

Due diligence

- Seller has incentive not to disclose too much – not reveal key contracts, trade secrets *etc.*
- Confidentiality agreement
- Limit access to “strategic” information
  - Only when access is necessary
  - Only to those who need to know
  - Do not taint those who are involved in day-to-day business – due diligence team should be people who are less involved or even a third party
- Where possible, disclosure in stages

Transition / integration planning

- Planning exclusively in a “clean team”
- Essential as not all deals go through
  - Negotiations break down
  - Mergers get prohibited (or other consent not obtained)
  - Should not compromise / taint business people
- Use of third parties to analyse / sanitise strategic information?
  - More costly and less effective?
  - But safer and necessary for very confidential data
- Agree what happens if transaction does not close – return of documents *etc.*

Organising the clean team

- Who?
  - Avoid information exchange between those who deal daily with customers, suppliers *etc.*
  - Either different people or people temporarily removed from daily activities with a “cooling off” period in case transaction does not proceed – can be difficult
- Confidentiality agreements
  - Recognise that will receive strategic data
  - Will limit use of strategic information to integration planning
- Competition law training for members of clean team

What can clean team discuss?

- Unless absolutely necessary no exchange of most strategic information such as future prices or current sales opportunities
  - And if necessary, extremely limited disclosure (third party)
- Can make comprehensive integration plans
- Cannot implement these plans
  - E.g. can interview for positions but conditional on closing
- Can jointly market “the deal” but not jointly market competing products
- Structural / technical issues at outset. *May* be able to discuss more later. Case-specific analysis required.

Precautions

- Lawyer present at meetings?
- Detailed agenda and official minutes
- Avoid leakage back into the business
  - Limit document creation and care with language
  - Clearly mark documents exchanged between members of clean team and store in (physical and virtual) location that is not accessible to business
  - Remove confidential data from draft Form CO *etc.* when circulating to business
- Even after merger clearance, some risk before closing

2. Joint ventures with competitor

- JVs are normally specific to a particular project and often time limited – e.g. *Sony / BMG*, *Areva / Urenco*
- Scope of information exchanged should reflect this
  - Limit exchange to that which is necessary to fulfil JV's purpose
  - Avoid exchanging information on parents' activities especially if they also compete on the same market
  - Likewise, avoid strategic information on the JV flowing to parents – limit to information that is necessary for parents, as investors, to monitor JV's performance
- Otherwise risk infringing Article 101 EC by object

Best practices

- Adequate walling off of people with access to strategic information about the JV or the parents
- Suitable IT firewalls to support this
- Confidentiality agreements
- Cooling off periods
- Can all be complex and raise delicate issues in practice …

Interlocking directors / minority shareholdings

- Similar issues can arise if directors of one company are on competitor's board or if minority shareholding in a competitor
- OECD / Office of Fair Trading studies: Like all information exchange, it may make it easier to reach and monitor collusive outcomes
- In EU normally examined in context of mergers
- But older cases - e.g. *BT / MCI* and *Phoenix / Global One*

3. Other forms of cooperation

- Looser forms of cooperation
- R&D; Production (including specialisation); joint purchasing; and joint selling agreements
- Still considerable danger of spillover – e.g. *SAS / Maersk Air*
- Implement similar best practices to those discussed:
  - Walling off of those with access to competitor's strategic information
  - Confidentiality agreements
  - Use of intermediaries to sanitise strategic information (e.g. a joint purchasing organisation)

Market shares / safe harbours

- If a Block Exemption exists, some security
  - Market share thresholds
    - R&D: combined share of 25%
    - Specialisation: combined share of 20% on any market
- Otherwise, absence of a market coverage safe harbour in information exchange section of Horizontal Guidelines
    - “Sufficiently large part of any market”? (para. 87)
- Exchange of information necessary to give effect to primary purpose of other cooperation is OK and is assessed in light of overall agreement (HGs paras. 88, 181, 182, 192, 193, 215, 216, 224, 244, 245)

Benchmarking

- Benchmarking against others' best practices can lead to efficiencies (HGs para. 57)
- Possibility of exemption under Article 101(3) EC
- But level of detail must be indispensable
- Individualised detail normally not indispensable; information should be aggregated to avoid identification (HGs para. 101 and 108 / Example 4)
- Note Example 4, companies with 80% market share combined, suggests even aggregation may not always be sufficient in concentrated markets