

INFORMATION EXCHANGE UNDER ARTICLE 101 TFEU

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INFORMATION EXCHANGE UNDER ARTICLE 101 TFEU

STRUCTURE OF PRESENTATION

- ◉ ARTICLE 101 TFEU
- ◉ INFORMATION EXCHANGE AS A WAY OF ENFORCING/POLICING A CARTEL
- ◉ INFORMATION EXCHANGE AS AN INDEPENDENT INFRINGEMENT
- ◉ ONE-WAY PROVISION OF INFORMATION
- ◉ PRICE SIGNALLING
- ◉ FACILITATORS
- ◉ HUB AND SPOKE

INFORMATION EXCHANGE UNDER ARTICLE 101 TFEU

ARTICLE 101 TFEU: AGREEMENT/ CONCERTED PRACTICE

- ◉ IN SOME CASES THE EXCHANGE OF INFORMATION IS HIGHLY STRUCTURED WITH FORMAL RULES, A CENTRAL REPORTING POINT ETC.
- ◉ THE CONTROVERSIAL CASES ARE USUALLY CONCERNED WITH 'INFORMAL' EXCHANGES WHERE CONCERTED PRACTICE ANALYSIS IS LIKELY TO BE REQUIRED
- ◉ THE COJ HAS SAID THAT IT IS NOT CONCERNED WITH WHETHER AN EXCHANGE IS AN AGREEMENT OR A CONCERTED PRACTICE (*ASNEF-EQUIFAX*)

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ARTICLE 101 TFEU: AGREEMENT/ CONCERTED PRACTICE

- ◉ THE STARTING POINT WHEN DISCUSSING INFORMAL INFORMATION EXCHANGES SHOULD BE THE DEFINITION OF A CONCERTED PRACTICE
 - THE KNOWING SUBSTITUTION OF PRACTICAL COOPERATION FOR THE RISKS INHERENT IN COMPETITION (*DYESTUFFS*)
 - WHY WOULD AN UNDERTAKING TELL ITS COMPETITORS, FOR EXAMPLE, ABOUT ITS CURRENT OR FUTURE PRICES, OUTPUT, CAPACITY PLANS, CUSTOMERS?
 - THIS IS OBVIOUSLY DIFFERENT FROM THE AGGREGATION OF HISTORICAL DATA, BENCHMARKING ETC.

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ARTICLE 101 TFEU: AGREEMENT/ CONCERTED PRACTICE

- ◉ CAN THERE BE A FINDING OF A CONCERTED PRACTICE WITHOUT EVIDENCE OF DIRECT COMMUNICATION BETWEEN COMPETITORS?
 - IN THEORY YES: WHERE THERE IS NO PLAUSIBLE EXPLANATION OF PARALLEL BEHAVIOUR BUT FOR A SUBSTITUTION OF COOPERATION ETC.
 - BUT THIS FAILED IN *WOOD PULP* AND IN *CISAC*
 - SEE PRICE SIGNALLING (BELOW)

INFORMATION EXCHANGE UNDER ARTICLE 101 TFEU

ARTICLE 101 TFEU: AGREEMENT/ CONCERTED PRACTICE

- ◉ CAN THERE BE A FINDING OF A CONCERTED PRACTICE WITHOUT EVIDENCE OF ACTUAL EFFECTS?
- ◉ YES, BECAUSE OF THE *HÜLS* PRESUMPTION THAT CONTACT WILL LEAD TO COMMON CONDUCT
- ◉ APPLIED IN *T-MOBILE* AND *DOLE* AND *DEL MONTE*
- ◉ SEE THEREFORE ONE-WAY PROVISION OF INFORMATION (BELOW)

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ARTICLE 101 TFEU: OBJECT/EFFECT

- ◉ CAN THE EXCHANGE OF INFORMATION RESTRICT COMPETITION BY OBJECT?
- ◉ IN PRINCIPLE YES
- ◉ *T-MOBILE* CONFIRMED THAT THIS WAS THE CASE
- ◉ AND THE GENERAL COURT FOUND THAT THERE WAS A RESTRICTION BY OBJECT IN *DOLE* AND *DEL MONTE*
- ◉ SEE AG KOKOTT'S OPINIONS AND THE COURT OF JUSTICE IN THOSE CASES REACHING THE SAME CONCLUSION

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ARTICLE 101 TFEU: OBJECT/EFFECT

- ⊙ HOW LARGE IS THE ‘OBJECT’ BOX?
- ⊙ SEE THE DEBATE AROUND *CARTES BANCAIRES*
- ⊙ PARAGRAPH 51 OF THAT JUDGMENT STATES THAT
 - ‘CERTAIN COLLUSIVE BEHAVIOUR ... MAY BE CONSIDERED SO LIKELY TO HAVE NEGATIVE EFFECTS, IN PARTICULAR ON THE PRICE, QUANTITY OR QUALITY OF THE GOODS AND SERVICES, THAT IT MAY BE CONSIDERED REDUNDANT, FOR THE PURPOSES OF APPLYING ARTICLE [101 TFEU], TO PROVE THAT THEY MAY HAVE ACTUAL EFFECTS ON THE MARKET’

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ARTICLE 101 TFEU: OBJECT/EFFECT

- ◉ THE OBJECT BOX IS JUSTIFIABLE AS LONG AS IT ACCORDS WITH COMMON SENSE: IT CAN ACCOMMODATE ‘OBVIOUS’ RESTRICTIONS OF COMPETITION (A PHRASE USED IN *EUROPEAN NIGHTS SERVICES*)
- ◉ IT BECOMES DIFFICULT TO JUSTIFY IF ‘NON-OBVIOUS’ RESTRICTIONS ARE FORCED INTO IT
- ◉ IN MY OPINION *BANANAS* BELONGS TO THE OBJECT BOX; *ALLIANZ HUNGARIA* AND *GCB* DO NOT

INFORMATION EXCHANGE UNDER ARTICLE 101 TFEU

ARTICLE 101 TFEU: OBJECT/EFFECT

- ◉ IN *BANANAS* IF THERE WAS A JUSTIFICATION FOR THE INFORMATION EXCHANGE THIS SHOULD HAVE BEEN ARGUED UNDER ARTICLE 101(3)
- ◉ IT IS POSSIBLE TO JUSTIFY OBJECT RESTRICTIONS UNDER ARTICLE 101(3)! *MATRA HACHETTE V COMMISSION*; *GSK V COMMISSION*
- ◉ NOTE RECENT DECISIONS IN SINGAPORE BY THE CCS

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INFORMATION EXCHANGE AS A WAY OF ENFORCING/POLICING A CARTEL

- ◉ HERE THE EXCHANGE OF INFORMATION IS, IN A SENSE, ANCILLARY TO THE CARTEL, AND ITS ILLEGALITY IS BASED ON THE UNLAWFULNESS OF THE CARTEL GENERALLY
- ◉ THE REPORTING OF INFORMATION IS A COMMON FEATURE OF MOST CARTELS SINCE IT IS NECESSARY TO POLICE COMPLIANCE WITH THE TERMS OF THE CARTEL AGREEMENT
- ◉ OFTEN A TRADE ASSOCIATION HAS AN IMPORTANT ROLE IN THIS

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INFORMATION EXCHANGE AS AN INDEPENDENT INFRINGEMENT

- ◉ INFORMATION EXCHANGE CAN BE AN INDEPENDENT INFRINGEMENT OF ARTICLE 101
- ◉ OBJECT INFRINGEMENTS SHOULD BE LIMITED TO THE 'OBVIOUS', AS ABOVE
- ◉ EXCHANGING INFORMATION ABOUT FUTURE PRICING INTENTIONS IS CERTAINLY AN OBJECT RESTRICTION
- ◉ EFFECTS INFRINGEMENTS DEPEND ON ALL THE CIRCUMSTANCES - HORIZONTAL GUIDELINES ETC. (HISTORIC, AGGREGATION, PUBLIC/PRIVATE ETC.)

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ONE-WAY PROVISION OF INFORMATION

- ◉ REMEMBER THE *HÜLS* PRESUMPTION
- ◉ NOTE THE CASE-LAW ON PUBLIC DISTANCING FROM THE CARTEL: A FIRM THAT IS PRESENT AT A MEETING WHERE THE ‘WRONG’ KIND OF INFORMATION IS BEING IMPARTED SHOULD DISTANCE ITSELF FROM WHAT HAPPENED
- ◉ *SOLVAY V COMMISSION* - NO DEFENCE THAT NO EFFECTS; NO PUBLIC DISTANCING
- ◉ IN THE UK SEE *RBS/BARCLAYS* - PROFESSIONAL LOANS

INFORMATION EXCHANGE UNDER ARTICLE 101 TFEU

PRICE SIGNALLING

- ◉ DEFINITION OF CONCERTED PRACTICE
- ◉ WHAT 'PLAUSIBLE EXPLANATION' IS THERE FOR THE SIGNALS?
- ◉ DUTCH COMPETITION AUTHORITY: *MOBILE TELEPHONY*, JANUARY 2014
- ◉ EUROPEAN COMMISSION: *CONTAINER SHIPPING*
- ◉ ARTICLE 9 COMMITMENTS BEING MARKET TESTED: WHICH WOULD MEAN NO FINDING OF INFRINGEMENT

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FACILITATORS

- ⊙ IS IT POSSIBLE TO INFRINGE ARTICLE 101 BY FACILITATING AN INFRINGEMENT BY SOMEONE ELSE?
 - UNDOUBTEDLY YES: *AC TREUHAND V COMMISSION*
- ⊙ THE ISSUE IS CURRENTLY ON APPEAL TO THE GENERAL COURT IN THE CASE OF ICAP, AN APPEAL IN THE *LIBOR* BENCHMARK MANIPULATION CASE
- ⊙ THIS MEANS THAT THERE ARE RISKS IN THE ‘VERTICAL’ EXCHANGE OF INFORMATION

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HUB AND SPOKE

◉ SEE THE JUDGMENT OF THE UK COMPETITION APPEAL TRIBUNAL IN *TESCO V OFT*, 2012

- Retailer A discloses to supplier B its future pricing intentions;
- A may be taken to intend that B will make use of that information to influence market conditions by passing that information to other retailers (of whom C is, or may be, one);
- B does, in fact, pass that information to C;
- C may be taken to know the circumstances in which the information was disclosed by A to B; and
- C does, in fact, use the information in determining its own future pricing intentions’.

THANK YOU FOR YOUR ATTENTION!