A review of lessons from information exchange investigations and the approach of the South African Competition Commission

WORKING PAPER- NOT FOR CITATION

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Abstract

Around three years ago the Commission increased its focus on practices such as information exchange which have the potential to dampen competition and to facilitate coordinated outcomes. Since then, two cases have been referred to the Competition Tribunal and others have either been non-referred, settled or are still under investigation. The Commission has had to deal with where and how information exchange fits into section 4 of the Act, that is, either under section 4(1)(a) which requires a demonstration of effects or under section 4(1)(b) where conduct is characterised as market division, direct or indirect price-fixing or collusive tendering. The EC draws a distinction between restriction of competition by object, and by effects, but with penalties being applicable in both instances. This paper seeks to reflect on the Commission’s approach over the last three years, relative to other jurisdictions (mainly the EC) using cases that have been referred to the Tribunal (flat steel and bitumen), a case in which there has been settlement (cement), a case which was non-referred (dairy feed) and in on-going cases (commercial diesel, wheat milling and animal feed). Settlement criteria have broadly been around aggregation of data in terms of product categories and geography as well as increasing the time lag, depending on the levels of concentration and characteristics of the market.

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1 This paper is written in the personal capacities of the authors and does not necessarily reflect the views of the Competition Commission.
I. INTRODUCTION

The Competition Commission of South Africa (the Commission) has recently been confronted with questions on when and how information exchange between competitors dampens competition and falls foul of section 4 of the Competition Act 89 of 1998 (the Act), either under section 4(1)(a) which requires showing effects or under section 4(1)(b). The choice between the two is about characterisation of the conduct. The Commission has, in recent years, engaged with these issues in a number of cases (including cement, petroleum, wheat and maize milling, poultry and steel amongst other cases) as well as in interactions with industry participants such as trade associations. Some members of the media fraternity have also voiced their views on the Commission’s approach to information exchange.  

It is widely accepted that information exchange can facilitate co-ordination, especially in oligopolistic markets. However, characterisation of how it offends Section 4 of the Act has not been tested yet. Firms on the one hand are more likely to favour characterisation under section 4(1)(a) which, in addition to requiring a demonstration of effects by the authority, allows them an opportunity to claim efficiencies which must then be weighed against effects. Firms are also more likely to resist treatment of information exchange under section 4(1)(b) as it attracts penalties even for first time offences whereas section 4(1)(a) only attracts a penalty if the conduct is a repeat offence by the same firm, of conduct previously found by the Competition Tribunal to be a prohibited practice.

On the other hand, competition authorities may characterise information exchange as direct or indirect price-fixing and/or market division particularly where individualised, recent or forward looking information is shared, and where there are well understood pricing points or geographic, product or customer segmentation. In such situations, information exchange could play an important role in the formation and interpretation of signals thereby facilitating a better understanding of the terms of coordination. Where information exchange forms part of wider collusive arrangements, it is likely to be illegal by virtue of its support of an illegal practice. In South Africa, we consider that such exchange would be in contravention of section 4(1)(b). This appears to be consistent with the EC stance, as we see in case examples, where such information exchange is considered anticompetitive by object.

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3 Section 59 of the Act
This is not to say that competition authorities only see information exchange in this light and not being capable of generating benefits for consumers, firms and the competitive process overall. As our paper will show, the Commission has taken possible pro-competitive benefits into account in dealing with some of the cases it has encountered. It must be noted that section 4(1)(a) applies to cases where the conduct in question cannot be categorised as any of the conduct under section 4(1)(b), but nonetheless has the effect of lessening competition.

The Commission’s experiences with information exchange have typically been in markets characterised by a history of coordination, including through regulation and tight knit business communities that have frequent interactions through industry associations. Two parallels can be drawn from the Commission’s experiences, that is, where information exchange took place alongside explicit agreements or as part of understandings, and where the exchange in itself results in diminished incentives to compete.

Our paper seeks to contribute to this debate by offering our views on how information exchange should be assessed, particularly in light of the context in which it takes place, as well as by reviewing the Commission’s approach to information exchange in recent cases. In doing so, we review the approach in other jurisdictions mainly in Europe and draw parallels with that of the Commission.

II. ECONOMICS OF INFORMATION EXCHANGE AND DEVELOPMENTS IN ASSESSING INFORMATION EXCHANGE CASES

(a) Brief review of literature on information exchange

It is perhaps helpful to start by recalling that the essential incentive for firms to compete is to increase sales at the expense of rivals through keener pricing, better quality and/or service. This means achieving higher profits through larger volumes albeit earning lower per unit margins. Vigorous competition means lower prices, which benefit consumers, and also lower profits for firms than would be the case under coordinated arrangements. Firms in an oligopolistic setting may recognise their shared incentive is to not aggressively compete

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4 The economics of information exchange is discussed in more detail in Das Nair, R. & L. Mncube ‘The role of information exchange in facilitating collusion – insights from selected cases’ 2009 (South African Competition Commission’s Third Annual Competition Conference, 3 – 4 September 2009).
against each other, as profits from cooperation will always be higher than those under conditions of competition.

There are thus generally divergent individual and collective incentives amongst firms. Individually, a firm has a strong incentive to undercut rivals and steal their ‘lunch’. Coordination here means overcoming this individual incentive through explicit collusion (often in the form of formal contracts or agreements between competitors) and/or tacit collusion where there is no formal communication, but outcomes are self-policing.\(^5\) Under tacit collusion, repeated interactions between firms provide scope for coordination, signalling and reputation building since firms can anticipate the likely reactions of their rivals. These reactions could take the form of rivals punishing the cheating firm by undercutting its prices to such an extent that the benefit of cheating is eroded. Collusion is sustained where the cost from punishment exceeds the benefit from cheating and there is speedy detection and retaliation.\(^6\)

Where does information exchange between competitors fit in all this?\(^7\) Several authors have added to the well-established economic literature on the role of information exchange in abetting collusion.\(^8\) We do not repeat their arguments here, but simply state that information exchange can in itself, even absent a formal agreement, alter the incentives to compete and amount to coordination through a common understanding and by artificially removing competitive uncertainty which is the essence of the competitive process.\(^9\) For instance, if through information exchange, rivals understand that there will be speedy identification and response to their competitive actions, then the incentive to compete (e.g., by offering secret discounts) is dampened. This leads to an alignment of competitive strategies.\(^10\)

\(^5\) Gunnar Niels, Helen Jenkins and James Kavanagh *Economics for competition lawyers* (2011) 145.
\(^6\) Ibid at 147.
\(^7\) Information exchange can take various forms including direct exchanges between competitors, indirect exchanges through a third party body such as an industry association or through suppliers or retailers of the firms concerned.
\(^9\) Das Nair & Mncube op cit at 2.
\(^10\) UK Tractor Registration Exchange case (OJ [1992]L68/19)
An illustrative example is the Danish concrete case where four ready mix concrete producers started publishing information about their past prices and previously secret discounts. Prices aligned and increased by twenty per cent within six months compared to average prices prior to information exchange suggesting that improved information about past prices and discounts can facilitate coordination in concentrated markets.\textsuperscript{11}

Another example is the Cimbel case in the cement market \textsuperscript{12} in which firms exchanged information on projected increases in capacity and output. The EC described the information exchanged as strengthening and supplementing the object of the cartel agreement and highlighted that the exchange of future changes in capacity information removed the possibility of obtaining an advantage over competitors.

A commonly cited, albeit older, case regarding information exchange is the UK Tractor Registration Exchange case. This was one of the first cases evaluated by the European Court of Justice that brought information exchange exclusively (and not as a support to or facilitation of a collusion case) as an infringement of (the then) Article 81(1). Eight manufacturers and importers of tractors into the UK exchanged aggregate industry sales information which could be broken down by product, time periods and territory; aggregate sales and market share of each individual which could be broken down by product, time periods and territory; sales information by dealer in the distribution network of each member along with imports and exports. The Commission concluded that such information exchange in the type of oligopolistic market in which the tractor manufacturers competed in was anticompetitive as it eliminated uncertainty and secrecy of behaviour of competitors (das Nair and Mncube, 2009).

The increased level of transparency brought about by the exchange in an already highly concentrated market prevented the residual hidden competition between the participants. The exchange of information also raised barriers to entry for non-members of the exchange system. The Commission found even the aggregated industry information was problematic when it could be used to identify individual competitors’ sales volumes in markets where there were less than 10 tractors sold. The effect of the exchange was that market shares were stabilised. The parties argued that the exchange was necessary to process

\textsuperscript{11} OECD ‘Draft summary of discussion of the roundtable on unilateral disclosure of information with anti-competitive effects (e.g., through press announcements) Working Party No. 3 on Co-operation and Enforcement para 11 at 3.

\textsuperscript{12} O.J. L 303/24 (1972) (Commission).
warranty claims and to track their sales teams’ progress. The Commission felt that this could be achieved by comparing own company data to industry aggregated data, without the need to exchange individual firm data. The Court of First Instance upheld the Commission’s decision in 1994.

Information exchange can also be part of wider coordinated arrangements in which it increases market transparency enabling firms to reach agreements, monitor each other’s competitive actions and punish deviators. In this case, information exchange can be seen to play a key role in the formation and interpretation of signals which results in better understanding of terms of coordination, an increase in the internal stability of collusive outcomes by monitoring deviations, and an increase in the external stability of the collusive outcome by deterring new entrants. This is more likely where there are well understood pricing points or geographic, product or customer segments.

The Methionine case in Europe is a good example. In this case, three producers of methionine – Aventis, Nippon Soda Company and Degussa produced most of the European output and were part of a cartel that ran from 1986 to 1999. The cartel was characterised by meetings which took place three to four times a year and at different levels of management. The cartel members shared information on sales volumes and production capacity. This information was used to establish fixed target prices (based on the cartel’s assessment of the willingness to pay in each market) and minimum prices for methionine in each national market. The cartel members also agreed on specific price increases for the product.

Information exchanges between competitors are not always anticompetitive. They can result in benefits to consumers, competitors and the competitive process. This is recognised in the Act under section 4(1) (a) which requires an assessment of effects which would then be weighed against possible efficiencies. Examples of efficiencies include benchmarking costs against competitors enabling future efficiency improvements, allocation of production to high demand or low cost firms (for instance to avoid waste of quickly perishable products),

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13 Richard Whish op cit at 523 – 524.
14 For instance, in the ATP case in the US in which one-way fares in certain categories increased by twenty dollars due to signalling of future price intentions (OECD Draft op cit para 12 at 4 and para 18 at 5).
15 OECD Executive summary of the roundtable discussion on unilateral disclosure of information with anti-competitive effects (e.g., through press announcements) 14 February 2012 Working Party No. 3 on Co-operation and Enforcement para 4 at 2.
correction of asymmetric information about consumers (in insurance for instance), more informed consumer choices in the case of genuinely ‘public’ information and enhanced R&D where the shared information involves future intentions.\(^\text{18}\)

\(\text{(b) How other jurisdictions characterise and assess information exchange}\)

Jurisprudence on information exchange is not yet developed in South Africa. It is helpful to consider how other jurisdictions such as the EU assess information exchange cases, particularly recently, and how the Commission compares against this.

Under EU law, information exchanges between competitors are seen as leading to a lessening of competition in two ways, that is, by \textit{object}\(^\text{19}\) or by \textit{effect}, both of which attract penalties. Information exchanges that form part of wider collusive arrangements are established as illegal by virtue of the fact that they are mechanisms supporting illegal conduct.\(^\text{20}\) Where competitors share current and future price information, the EU is likely to regard such exchanges as giving rise to an anticompetitive quantity- or price-fixing agreement whose objective is to lessen competition and as such the exchanges are normally prosecuted as cartels.\(^\text{21}\) This is illustrated in the \textit{Zinc Phosphate} case\(^\text{22}\) in Europe in which the EC found that by exchanging aggregated monthly sales volume data, zinc phosphate producers had used the information to allocate markets based on market shares. There was also a price fixing agreement. The information sharing enabled monitoring adherence to the agreements.\(^\text{23}\)

In such circumstances it is not necessary for authorities to prove agreement between firms. The mere provision or receipt of information is likely to be sufficient for a finding of an agreement on prices.\(^\text{24}\) Where a firm receives commercially sensitive information from competitors, it is presumed that the firm has accepted the information and adapted its

\(^{18}\) Richard Whish op cit at 525.

\(^{19}\) See for instance, OFT decision of 20 November 2006 ‘Exchange of information on future fees by certain independent fee-paying schools’.

\(^{20}\) Richard Whish op cit at 524.

\(^{21}\) Ibid; OECD op cit para 7 at 3; and European Commission ‘Guidelines on the applicability of Article 101 of the treaty on the functioning of the European Union to horizontal co-operation agreements’ (14 January 2011) para 59 at 13.

\(^{22}\) 2003/437/EC


\(^{24}\) Richard Whish op cit at 530 – 531.
strategies accordingly unless the firm ‘publicly’ distances itself from the conduct.\textsuperscript{25} This was upheld in the \textit{T-Mobile} Netherlands case in Europe.\textsuperscript{26}

Information sharing could have the effect of lessening competition, but could also result in pro-competitive benefits which then have to be weighed against the anticompetitive effects. These cases are consequently assessed on their own facts.\textsuperscript{27} Under EU law\textsuperscript{28}, a full market assessment is required for such cases, considering the context in which the information exchange takes place, assessing whether uncertainty is reduced or removed such that there is a restriction of competition. A similar approach can be seen in two US cases (\textit{U-Haul International} and \textit{Valassis Communications}) which involved a public disclosure of information with investors and analysts that were coupled with private communications with competitors.\textsuperscript{29}

The effects of information exchange on market outcomes depend on the characteristics of the market in which the exchange takes place as well as the type of information shared.\textsuperscript{30} Market characteristics include concentration levels, transparency, stability, symmetry and complexity. Collusion is more likely and easier in sufficiently transparent, concentrated, stable (demand and supply conditions), symmetric (e.g., cost structures, demand, market shares, product range, capacities) and less complex product (e.g., degree of product homogeneity) markets. This makes information exchange more harmful to competition in tight oligopolies compared to relatively less concentrated markets.\textsuperscript{31}

The nature and characteristics of the information also determines the potential for collusion. Collusive outcomes are more likely if the shared information is strategic (e.g., recent actual prices, discounts, price increases or reductions, customer lists, production costs, quantities, turnovers, sales, capacities etc.) which reduces strategic uncertainty in the market. Collusion is also likely where the data is highly disaggregated, individualised, fairly recent and/or forward-looking, private information and when the exchanges are frequent. Information exchange is further likely to lessen competition if the combined market share of the firms involved covers a significantly large part of the market. This means that the firms involved collectively have market power.

\textsuperscript{25} OECD op cit para 16 at 4 and EC Guidelines para 62 at 14.  
\textsuperscript{26} Case C-8/08  
\textsuperscript{27} OECD op cit para 5 at 2.  
\textsuperscript{28} European Commission Guidelines op cit.  
\textsuperscript{29} OECD Draft op cit para 42 at 8.  
\textsuperscript{30} European Commission Guidelines op cit para 58 at 13.  
\textsuperscript{31} It is easier to reach terms of coordination and monitor fewer firms.
We note here that there are no predetermined, standard thresholds to determine whether data is historic or not. This is determined by the extent to which the data poses or does not pose risks to competition in the sense that it still retains, or does not retain, strategic commercial value. The value of historic data therefore depends on market characteristics, the frequency of price re-negotiations in the market and the nature, aggregation, and frequency of exchange of the data.32

In the previous section we highlighted examples of possible efficiencies that could arise from the exchange of certain information between competitors. The exchange of information between competitors should not go beyond what is necessary to achieve the claimed efficiencies and it should involve information that presents the lowest risk indispensable for achieving the claimed efficiencies. This means the parties have to show that the shared information with its characteristics (disaggregation, age, confidentiality, frequency and market coverage) carries the lowest risk necessary to achieve the said efficiencies.

Efficiency gains arising from the exchange of information must be passed on to consumers to an extent that outweighs the restrictive effects on competition.33 Pass-on is affected by the degree of collective market power of the firms sharing information. Where there is lower market power, pass-on is likely since efficiency gains would be expected to be competed away. EU authorities are more likely to accept efficiency arguments if the information sharing does not eliminate competition in respect of a substantial proportion of the market.

III. REVIEW OF THE COMMISSION’S APPROACH TO INFORMATION EXCHANGE

In our view, in the South African Competition Act, information exchange can be assessed under section 4(1)(a) which requires an evaluation of effects and also provides for efficiency justifications or under section 4(1)(b) where the information exchange is characterised as, or amounts to, either market division, direct or indirect price-fixing. The Commission’s approach appears to have generally followed the key principles set out in the EC guidelines encompassing concentration levels, the level of disaggregation (e.g., by geography, product specification, pack size), whether or not the information is individualised or aggregated, degree of product homogeneity, frequency of the exchanges, age of the information, the

32 European Commission Guidelines op cit para 90 at 20.
33 Ibid para 103 at 22.
public or non-public nature of the information, and the history of coordination in the affected market.

The Commission has generally assessed information exchange cases on their merits given the specific facts of the conduct and affected markets. The Commission has been skeptical of frequent exchanges of fairly recent, highly disaggregated private sales volumes and pricing information in relatively concentrated markets. In particular, the Commission has been concerned where there have been sustained periods of interaction and/or prior history of coordination, including through former regulation.

(a) Recent information exchange cases assessed by the South African Competition Commission

Recent investigations involving information exchange include those in the petroleum, cement, animal feed, poultry, steel, wheat and maize milling and bread baking industries. In most of these investigations, industry bodies (including associations) played an active role as the platform for the information exchange.

(i) Petrochemicals- commercial diesel

The Commission’s investigation into information exchange in the petrochemicals industry arose from concerns that the frequent exchange of company specific sales volumes between competitors that operate in a tight oligopoly resulted in diminished incentives to compete.

Prior to October 2007, sales volume data at company level collected by industry body, the South African Petroleum Industry Association (SAPIA) was distributed to its members monthly, with a lag of two months. The data included sales volumes disaggregated by specific product grade, by province and magisterial district where sales were made and by customer grouping (trade category). This meant that each oil company could see each of its competitors’ recent sales volumes at a high level of disaggregation. The monthly sales volumes shared were disaggregated over 42 product grades, 12 trade categories, nine provinces and 400 magisterial districts by individual company. This information was also submitted in a more aggregated format to the then Department of Minerals (DME), who required some of the data for regulatory and other security of supply purposes. The

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34 Information shared largely within and by a group of firms, excluding non-members of the group and customers.
35 Case no. 2009Jan4223
information was not distributed to non-SAPIA members or to the public. Between October 2007 and January 2009, the data was aggregated over the industry, but still shared by product grade, trade category and magisterial district. Post January 2009, no information has been exchanged although this data has been assimilated and submitted to the DME by the third party provider that collated it.

The Commission’s investigation focused on commercial diesel. The price of diesel is not regulated; however the list price (wholesale list selling price, WLSP) is published by the DME on its website monthly. In the presence of pricing points such as the WLSP, information exchange at the level of disaggregation seen via the SAPIA platform was of particular concern. For unregulated products these pricing bases could act as focal points off which competition would occur through discounting. If secret discounting is discouraged through the exchange of disaggregated information and consequent increased ability to monitor market shares, then competitive outcomes are unlikely.

Particularly in the oil industry, which is oligopolistic in nature, the information exchange in itself could have had the effect of stifling hidden competition by reducing incentives to engage in competitive behaviour. The thinking behind this is that a player has no incentive to secretly discount to gain market share if it knows that this action is immediately visible to its competitors through the information exchange, who, given interdependencies in such markets, are likely to respond by also discounting. This amounts to indirect price fixing. Further if there is no incentive to discount to gain market share, we argue that relative market positions are maintained.

The petrochemicals industry was exempt from competition law until 2000. During this period, coordinated behaviour on prices and market allocation was not in violation of the Competition Act. Given this history of cooperation, the presence of focal pricing points and the nature of the industry, the highly disaggregated, individualised company information exchange and the use of this information in our view could be considered anticompetitive and in contravention of Section 4(1)(b) of the Act.

The data was shared in a more aggregated format with the DME than was shared between the oil companies and not shared with non-SAPIA members. Such exchanges increase the suspicions of the Commission as to the use and intent of the data exchanged. In

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36 The published wholesale list price is used in the formula for the calculation of the regulated price of petrol.
industries of particular strategic significance, such as fuels, government requires the submission of aggregated sales data in order to facilitate the regulation of certain fuel prices as well as for the monitoring of industry trends for such purposes as ensuring the security of supply. It is unlikely that competitors needed to exchange the information submitted to government between themselves for the claimed efficiencies. Competitors certainly did not need to exchange information in greater disaggregation than even what government needs between them to achieve these claimed efficiencies.

Given that a certain level of information is needed for planning and regulatory purposes, a less anticompetitive outcome would be to limit the level of disaggregation of information exchanged to what is sufficient to achieve these efficiencies. It appears that more aggregated information, with longer lags and more infrequent exchanges would be sufficient to produce these efficiencies.

(ii) Petrochemicals- Bitumen

The Commission referred a cartel case in the bitumen market to the Tribunal in 2010 following a leniency application by Sasol Limited and its subsidiary Tosas Pty Ltd in respect of their participation in the development of, and agreement to adopt, a pricing mechanism for the sale of base bitumen and bituminous products.37

After the lapsing of the petroleum industry-wide exemption in 2000, the oil companies entered into an agreement and engaged in conduct that intended to directly or indirectly fix the price of bitumen and bituminous products in contravention of section 4(1)(b)(i) of the Act.

During the exemption period, the petrochemical companies jointly calculated prices for bitumen with reference to an industry-wide retail price list, or the national Wholesale List Selling Price (WLSP). After the exemption lapsed in the latter part of 2000, there was no longer a standard method by which list prices for bitumen could be changed according to the changes in crude oil prices. The oil companies agreed to set the WLSP each month by setting a ‘starting’ price (R/ton) for February 2002 and escalating this by a factor determined through a formula, the Bitumen Price Index (BPI) which later became the Bitumen Price Adjustment Factor (BPAF). The BPI/BPAF was developed as an acceptable formula to track the changes in bitumen prices in line with changes to international crude oil prices and local inflationary

37 Bitumen is predominantly used in tarring roads.
pressures. The date for notifications of changes to customers each month, following a date for internal agreement, was also decided.

The development and implementation of the BPAF was done through industry association, the South African Bitumen Industry Association (SABITA). Board meetings discussed the formula, and regular e-mail communications took place where BPAF percentages and/or Rand per ton escalation figures were circulated to the oil companies. The BPAF then would be added to the present month’s WLSP to arrive at the following month’s WLSP. The exchange was therefore forward-looking and gave an indication of what the market was likely to do in terms of magnitude of list price increases the next month. SABITA was the common platform used to share competitively sensitive information with primary producers relating to pricing of bitumen and associated products.

(iii) Steel

The Commission referred a collusion case against the only two local flat steel producers, ArcelorMittal and Highveld Steel and Vanadium, to the Tribunal in 2011. The conduct related to price fixing and market allocation in contravention of Section 4(1)(b)(i) and (ii) of the Act. The Commission’s investigation was initiated following allegations that the two flat steel producers adjusted their prices for flat steel products around the same time and with similar percentage increases.

The investigation found that the steel producers engaged in concerted practices or had an understanding that Highveld would follow ArcelorMittal’s lead on the pricing mechanism for flat steel, and changes in pricing, including discounts and transport tariffs. The investigation also found that the steel producers divided markets by specific types of goods, maintaining market shares and allocating supply quotas for exports.

The investigation involved an assessment of information exchange via an industry association, South African Iron and Steel Institute (SAISI), which was found to have facilitated the concerted practice. The two firms submitted highly disaggregated monthly information to SAISI on sales volumes by flat steel product type, broken down by relevant HS code,\textsuperscript{38} product description – including product width and coating, relevant specifications, as well as exports and volumes sold locally. This information was collated and returned to the

\textsuperscript{38} Harmonised System code.
members in an aggregated format. But given that there are only two players in the flat steel market, this is tantamount to directly exchanging this commercially sensitive information with each other.

The products in question are relatively homogenous and face inelastic demand. Any price undercutting would be reflected in market share information that is calculated from the SAISI data. This, in our view, results in little incentive to compete. Information exchange of the nature and frequency explained above could therefore be seen to be anticompetitive under these conditions.

(iv) Cement

The South African cement industry operated through a legal cartel up until 1996.\textsuperscript{39} During the legal cartel, cement producers did not market or brand their own products. Pricing was uniform and distribution was centralised and conducted by the Cement Distributors South Africa (Pty) Ltd.\textsuperscript{40}

Following the decision to disband the legal cartel, cement producers were given a two year period to establish their own marketing or branding, but instead reached an agreement to fix market shares. PPC cheated on the agreement and its market share increased resulting in a price war which went on until the late 1990s. This was an undesirable situation for the firms collectively as profits decreased. The firms reached another agreement in the late 1990s for each firm to have a market share equal to that which it had during the legal cartel, agreed on pricing parameters for different types of cement and to not offer special discounts on higher grade cement. They also agreed to scale back marketing and distribution activities including closure of certain offices and depots.\textsuperscript{41}

The cement producers fine-tuned the information exchange framework which existed during the legal cartel to make monitoring and maintenance of the agreed shares effective after the legal cartel was disbanded.\textsuperscript{42} This resulted in a higher level of disaggregation of the information shared which made it unnecessary for the firms to hold meetings.\textsuperscript{43} The firms exchanged monthly sales by province; monthly regional sales by packaging type, product

\textsuperscript{39} Consent Order Agreement between the Competition Commission and Lafarge Industries South Africa (Proprietary) Limited confirmed by the Competition Tribunal on 8 March 2012.
\textsuperscript{40} Ibid para 2 at 6 – 7.
\textsuperscript{41} Ibid para 3.3.1 – 3.3.5 at 8 – 9.
\textsuperscript{42} Ibid para 3.3.5 at 9.
\textsuperscript{43} Despite this, firms had opportunities to interact in different platforms.
composition, product strength, end-use sector, end-use sector by province, end-use sector for cement sales only, end-use sector for extender sales only; and monthly imports of the firms.

This information sharing covered the SACU region and allowed the firms to monitor and maintain the target market shares. Although the information was aggregated across firms, the markets were highly concentrated with three independent producers and one other, NPC, jointly owned by the three producers until 2002.44

The cement case is similar to the Methionine case in Europe45 in that the information sharing formed part of wider collusive arrangements and played a significant part in prolonging the life of the anticompetitive conduct. The Commission viewed the information exchange as amounting to indirect price fixing under section 4(1)(b)(i) and market division under section 4(1)(b)(ii) of the Act. Lafarge Industries South Africa (Proprietary) Limited settled the case against it under these sections of the Act.46

(v) Wheat milling

In 2010 the Commission learnt that sensitive commercial information was being exchanged by competitors in the bread and wheat milling markets. This followed the Commission’s investigation into the wheat and white maize milling cartels, which was referred to the Competition Tribunal in March 2010. In particular, the Commission found that members of industry associations such as the National Chamber of Milling (NCM) were exchanging disaggregated sales volumes data on a monthly basis, disaggregated per province, per product type, per pack size and per customer channel.

The wheat flour industry is highly concentrated and has a history of collusion at both the flour milling and bread levels. The Commission’s concern in this regard was that the information exchange could have facilitated on-going collusion, even after the explicit cartel had apparently ceased, and would increase market transparency by reducing strategic uncertainty about competitors. In a highly concentrated market such as this, the concern is that the increased transparency would enable firms to anticipate the conduct of their competitors and thus align themselves to this. A particular concern is that such information exchange may have been used to monitor adherence to a collusive agreement, such as that reached during the explicit cartel.

44 Consent Order Agreement op cit para 3.3.9 at 10.
46 Consent Order Agreement op cit para 5 at 11.
In this matter the Commission had to consider the coordination in light of the former regulatory regime and collusive behaviour in the industry post-regulation. NCM collected data from its members on monthly volumes of sales per product, per province, per pack size, per customer category and exports. In addition to this, NCM collected information from its members relating to annual production, packaging and distribution costs. Members of the NCM would in return receive, for each category of data collected and supplied by the NCM, the firm’s own values and an aggregated industry value in terms of percentage changes of sales totals on a month-to-month basis. The information exchange through the NCM did not include any pricing data and related to past information at most a month old. No information regarding future prices and volumes was exchanged.

The information that was obtained by the member firms from the NCM could be used to observe and track a firm’s own market share against the market as a whole, without necessarily being able to identify the beneficiary of lost market share. It was noted however that in certain limited circumstances where there are only two firms present in a region, this industry aggregated exchange could still allow these firms to monitor their competitor in that region.

The claimed efficiency justifications included the use of the information in making investment decisions (e.g. in purchasing new equipment) and to measure performance against the industry. It was claimed that such efficiencies gained could be passed on to consumers. Such efficiencies would have to be shown to outweigh the anticompetitive effect of the conduct. We are of the view that a possible solution going forward would be for the NCM to distribute less disaggregated data, published less frequently and with a greater time lag.

(vi) Animal feed

Bran and Chop

In April 2010 the Commission received information of potential contraventions of the Act by milling companies in relation to the markets for offal, which are the by-products of the milling process, in two specific geographic locations. The conduct had allegedly taken place in the market for hominy chop, (offal for maize) and wheaten bran (offal for wheat).

To the millers of wheaten flour and maize meal, bran and chop are considered by-products that need to be disposed of rapidly in order to clear the mills for further production of maize meal or wheat flour, which is their core business. The by-products are priced by
making reference to the SAFEX average price of maize. This price can be seen as a focal price which all producers priced off.

Broadly it was alleged that competing milling companies had engaged in the following conduct through direct, albeit *ad hoc*, contact with competitors:

- Exchanging of current prices of bran and chop;
- Discussing movements and expectations in the price of whole yellow maize\(^{47}\) with competitors;
- Discussing information on intentions with respect to future pricing of chop with competitors;
- Coordinating the management of chop surplus with suppliers of chop in order to prevent chop from selling at prices close to bran prices.

The history of collusive conduct by the milling firms identified would be a factor taken into account when assessing the information exchange. Further factors to be considered should be the detail and age of the information exchanged, the frequency of the exchanges of information and the structure and concentration of the market in which the parties operate. The information exchanged, although *ad hoc*, was forward looking, which is potentially problematic as it could influence future pricing decisions. An assessment of how the information exchanged was used would have to be undertaken in such circumstances.

*Dairy Feed*

The Commission received information in April 2009 alleging that parties in the dairy feed industry were involved in collusive conduct. It was alleged that price discussions between dairy feed manufacturers had taken place at meetings of a milk producer / farmer group in the Western Cape.

The purpose of the farmer group was to facilitate the flow of information which would be of interest to dairy farmers. The group would on occasion invite industry experts, suppliers of material and other such parties to discuss relevant information such as new technologies etc. Feed manufacturing companies were also invited to partake in the activities of the producer group.

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\(^{47}\) Which is a substitute for chop.
It was alleged that representative employees of the feed manufacturing companies had discussions regarding prices at these producer group meetings while their competitors were present at these meetings. The Commission’s investigation found that even though this was a grouping of farmers, representatives from the feed manufacturing companies were often invited to give presentations and give information to members regarding their products. On occasion representatives of the feed manufacturing companies would also be invited as co-opted members of the group and would assist the group with matters such as the administration of the group. These co-opted members would also regularly attend the meetings of the group.

The Commission found that at the meetings the farmers generally discussed price movements of raw materials and other inputs into their business and when a feed manufacture was present at these meetings they would ask direct questions of these parties and thus initiate the discussion regarding prices. These discussions regarding price were general discussions regarding expected or planned price increases or decreases.

The investigation showed that while there did not appear to be a formal agreement between the respondents in the matter to specifically fix prices of feed, there was contact between the competing feed manufacturers in relation to discussions of feed price trends. The Commission found that the nature of the information discussed at these meetings by feed manufacturers was such that coordination would be difficult due to the different products produced by the respondent firms. Each of the respondent firms produced different types of animal feeds, most of which are customised to an individual customers’ nutritional needs. Further it was found that in certain circumstances the discussion of prices was of prices already known in the market as result of an earlier price movement announcement by one of the feed manufacturers.

The Commission non-referred this matter, based on the information available to it, however the Commission cautioned parties regarding the nature of information that is shared in such forums with competitors.

(vii) Poultry Feed

In April 2009, the Commission initiated a complaint against the Animal Feed Manufacturers Association (AFMA) and its members involved in the production of poultry feed and other players involved in the poultry feed industry. One of the allegations involved the exchange of
information through AFMA with respect to poultry feed. It is alleged that the members of AFMA had engaged in practices that constituted horizontal restrictive practices in contravention of section 4(1)(b), alternatively 4(1)(a) of the Act, in that they submitted a range of commercially sensitive production and industry related data to the association, which then disseminated and distributed the information to all members.

The information exchanged through AFMA included monthly historical sales information for each of their feed mills disaggregated per type of feed and product; by region and raw material usage (disaggregated by type of input e.g. maize, bran and chop, and aggregated across firms). The poultry feed industry is not highly concentrated, there are a number of players in this market, some of which are not members of AFMA. The information exchanged is only published on an aggregated historic basis and is available to the general public as well through the publication of the AFMA annual report. Nonetheless, there is a commitment from AFMA’s side to further aggregate the information exchanged and increase the time lag.

(b) Lessons from the Commission’s approach to information exchange

Although the Commission has not yet prosecuted any of the information exchange cases at the Tribunal, it has settled, and is in the process of settling cases through commitments regarding future information exchange. These cases include cement and animal feed, with the impending settlement of the wheat flour milling case along similar lines.

In cement, the Commission agreed that information exchange should take place on a lagged quarterly basis, aggregated across products and nationally given the high levels of concentration. In the petroleum information exchange case, it appears that more aggregated information, with longer lags and more infrequent exchanges would be sufficient to achieve fuel regulatory requirements and security of supply commitments. AFMA’s commitment to aggregation, frequency of exchange and age of information exchanged is also along similar lines. Aggregation and longer lags are therefore important in reducing market transparency and scope for punishment thereby reducing the scope for coordination.

In addition to the aggregation and age of information, the Commission appears to take the following into account in its assessment of information exchange. In most cases assessed, there was either some form of regulation or formal cartel that previously existed. In such
cases, the Commission viewed information exchange with suspicion in that the artificial price or sales transparency brought about by the exchange may allow for collusion to continue tacitly after deregulation or apparent cessation of the explicit cartel. The information exchange is particularly of concern when past regulation or rules of cartel engagement resulted in well-known pricing points or regulated prices which companies may continue to use after deregulation as focal points (for instance, in cement, commercial diesel, bitumen, dairy feed and wheat milling).

The Commission in each case had consideration of the nature of the relevant market. The cases which raised most concern were those where markets were highly concentrated and where firms which were part of the information exchange constituted a large proportion of the market. Privately exchanged individualised (company specific) price or volume data was viewed suspiciously in such markets (for instance in petroleum-commercial diesel), although even industry aggregated information was considered problematic in markets where there were only two players (flat steel), or where it was possible to infer the identity of a player in a submarket or region (cement and wheat milling).

The strategic benefit that the information conferred and how it was used was also assessed. In markets where secret discounting was important such as in commercial diesel and cement, the highly disaggregated information, particularly the individualised information, could be seen to stifle incentives to vigourously compete for market share. Information exchanged to determine future prices by means of an agreed pricing formula was also seen as problematic (bitumen).

In other markets (animal feed, dairy feed and poultry), the information exchanged may not have had major strategic value in that it was either publically available (dairy feed and poultry), there was a high level of product heterogeneity (dairy feed), or the exchange was of an ad hoc nature (animal feed). However, in the context of the recent EC T-Mobile decision, even ad hoc meetings could be found to be anticompetitive as it is presumed that the information was used.

The Commission’s approach to information exchange in the cement case is in line with the EC’s approach in classifying information exchange that is part of a wider cartel as restriction of competition by object. The Commission characterised the information exchange between cement producers as contraventions of Section 4(1)(b)(i) and (ii) of the Act, and indeed cement company Lafarge admitted to this. In the milling case, the Commission was
concerned that the information exchange through the NCM could potentially contravene section 4(1)(a) and/or (b) of the Act. However, this exchange, like in cement, formed part of a wider cartel, and under the EC approach would have been seen clearly as a restriction of competition by object. The information exchanged in the bitumen case would also likely be characterised by the EC as restriction of competition by object as it facilitated an agreement to set escalations to prices. The Commission’s approach to information exchange in the petroleum industry appears to be in line with the UK Commission’s approach in the tractors case, where the object of the agreement to exchange the various categories of information was seen as restriction of competition by object.

IV. CONCLUSIONS

The assessment of information exchange should depend on the context within which the exchange occurs. This requires an understanding of the market circumstances, type of information sharing in question, the benefits of the information sharing not just to the firms, but to consumers and the competitive process. It also involves an understanding of the incentives of firms to engage in the exchange in light of the competitive history of the market in question.

Where firms exchange current and forward-looking information such as expected changes to prices and capacity (including utilisation), the rationale for engaging in such conduct is more than likely to be anticompetitive. EC law would regard such conduct as having the objective of lessening competition. This would be the same in situations where the information sharing forms part of wider collusive arrangements or understandings as in the case of cement in South Africa. These types of exchanges are more likely to be characterised under section 4(1)(b) of the Act either as market division or as direct or indirect price-fixing. As shown, this is particularly relevant where there are well understood pricing points, or geographic, product or customer segmentations. In our view, while a Section 4(1)(b) assessment does not require an assessment of market characteristics; such an assessment is potentially useful in understanding the context and the incentives of firms to share information.

The rationale and incentives for sharing information between competitors may not be so clear in other circumstances. In these cases, it might be necessary to undertake a full
market assessment which seeks to establish the effects of the information sharing on the competitive process and possibly on market outcomes. Such exchanges would be assessed under section 4(1)(a) which requires an assessment of anticompetitive effects which would be weighed against any efficiency claims. A full market assessment envisages understanding the characteristics of the market (in terms of concentration, degree of complexity and duration of interaction between firms), type of information shared (whether commercially sensitive, public or non-public, level of disaggregation - including whether individualised, by product segment, customer segment, geography, and age of data), frequency of exchanges, and market coverage. These factors cannot be looked at individually, but together and in context.

Efficiencies claims are more acceptable where there is a direct link to the information shared, and in particular the nature of the information shared. In other words, the information shared has to be indispensable to the achievement of the claimed efficiencies. These gains should be passed on to consumers rather than just benefiting the firms involved. In the EU, authorities are more likely to be sceptical of efficiency claims where the information sharing covers a large portion of the market.

The Commission’s experiences with information exchange have mostly been in markets characterised by history of co-ordination including through regulation and tight knit business communities whose interactions span a sustained period of time. Such exchanges may have played a role in better understanding the terms of co-ordination, and facilitated ongoing co-ordination. By the EC approach, these exchanges would be seen as lessening competition by object.

In other cases the Commission demonstrates some flexibility regarding future information exchange conduct particularly where potential for efficiencies exists, noting indispensability and pass-on. This is not to say there is an opportunity for firms to try and argue efficiencies when it is clear that the object of the conduct is to lessen competition (that is, claiming efficiencies under section 4(1)(b)), but rather demonstrates a willingness on the part of the Commission to consider remedies that benefit the competitive process. In these instances, the Commission has mainly considered remedies that take into account market concentration and complexity (homogeneity or heterogeneity), level of aggregation (product, geography, and customer segments), age of information, and the time lag in terms of dissemination. In other words, the Commission appears to seek to balance the downside risk
to competition against the upside benefit to the competitive process, consumers and the firms involved.

V. REFERENCES

Das Nair, R. & L. Mncube ‘The role of information exchange in facilitating collusion – insights from selected cases’ 2009 (South African Competition Commission’s Third Annual Competition Conference, 3 – 4 September 2009).


Kühn, K., ‘Fighting collusion by regulating communication between firms’ 2001 Economic Policy


OECD ‘Executive summary of the roundtable discussion on unilateral disclosure of information with anticompetitive effects (e.g., through press announcements) 14 February 2012 Working Party No. 3 on Co-operation and Enforcement
