Horizontal co-operation

The European Commission's draft guidelines are a helpful development

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Adam Smith famously said that "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". So it is unsurprising that both competition authorities and legal advisers to companies that conclude co-operative agreements with competitors (such as research and development, production, purchasing, commercialisation, standardisation and exchange of information) usually treat these issues with care, given that such conduct can lead to price-fixing, market sharing or limiting output.

Nevertheless, however laudable such caution may be for compliance-minded companies, it is easy to forget that there is a wide range of co-operation mechanisms between competitors that are unlikely to be of concern from a competition perspective. Indeed, many may give rise to valuable efficiencies – and even be procompetitive.

Currently, guidance on co-operation between competitors at EU level can be found in two block exemption regulations (on research and development agreements and on specialisation agreements, respectively), as well as in the accompanying horizontal guidelines. Following a number of European Commission cases and judgments by the Community courts in this area, and faced with the fact that the block exemptions are due to expire shortly, last month the Commission published two updated block exemption regulations and draft horizontal co-operation guidelines (the Draft Guidelines). Following a consultation period that has recently closed, the Commission hopes to adopt final versions of the block exemption regulations and the Draft Guidelines by the end of 2010.

This article is the first in a two-part series analysing the Draft Guidelines. This article will focus on the new chapter in the Guidelines on information exchange issues, and the second article later this year will focus on the expanded treatment of standardisation issues.

Previous approach to information exchange cases

For a long time, the Commission's decision (upheld on appeal by the General Court) in the *UK Agricultural Tractor Exchange* case was the leading authority on the Commission's practice in information exchange cases. However, more recently, both the Commission and national competition authorities (such as the UK's Office of Fair Trading and the French competition authority) have made decisions in "pure" information exchange cases. These are cases where it was the information exchange on its own that was found to be problematic – ie not simply where the information exchange supported other anticompetitive behaviour such as price-fixing and market sharing. In addition, the jurisprudence on information exchange coming from the Community courts has become tougher. Last year, the European Court of Justice confirmed in the *T-Mobile Netherlands* case that an information exchange at a single meeting between competitors can be problematic (although it is important to note that this was not a "pure" information exchange case, as the meeting also involved discussions about commission payments to dealers).

However, despite the increasing importance of information exchange issues, there was no general Commission guidance on the principles according to which information exchange cases should be assessed. The horizontal guidelines published in 2000 do not deal with information exchange cases at all.

In a Q&A document accompanying the Draft Guidelines, the Commission admits that there was "strong demand from stakeholders and national competition authorities for extensive guidance on the assessment of information exchange".

Draft Guidelines' approach to information exchange

General principles

In terms of general principles, the Draft Guidelines confirm the two-step approach that must be taken to assess any horizontal co-operation agreements (including information exchange agreements): "The first step, under article 101(1), is to assess whether an agreement between undertakings, which is capable of affecting trade between member states, has an anticompetitive object or actual or potential restrictive effects on competition. The second step, under article 101(3), […] is to determine the procompetitive benefits produced by that agreement and to assess whether these procompetitive effects outweigh the restrictive effects on competition".

The key question that will determine whether or not an information exchange is problematic from a competition perspective is set out in paragraph 58 of the Draft Guidelines. Essentially, where the information exchange enables companies to be aware of the market strategies of their competitors, the information exchange may lead to restrictive effects on competition. However, as noted below, the Commission also clearly recognises that information exchange can be procompetitive as it gives rise to efficiencies.

Main competition concerns

On the assumption that an agreement, concerted practice or decision of an association of undertakings has been established (otherwise article 101 will not apply), the Commission notes that there are fundamentally two possible types of harm that can result from information exchange. First, there is a risk that companies will align their competitive behaviour in a market as a result of exchanging competitively sensitive information. Second, if a significant number of companies exchange highly strategic information that gives those companies a competitive advantage when compared to other market players, the information exchange may give rise to anticompetitive foreclosure concerns.

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Information exchange – restriction of competition by object or effect?

One of the most important sections in the Draft Guidelines dealing with information exchange is the part that explains whether a particular information exchange is likely to be analysed as a restriction of competition by "object" or "effect". This categorisation has a profound impact and is therefore very important in practice. As object restrictions are considered more serious than effect restrictions, it is more likely that competition authorities will dedicate resources to investigating the former. This is also because such restrictions are easier to prove, as no effects in the market need to be demonstrated. However, until relatively recently, there was a vigorous debate among practitioners and commentators as to the circumstances in which competition authorities could classify "pure" information exchange cases as object restrictions. It was uncontroversial that information exchanges that formed part of wider anticompetitive practices (such as price-fixing or market sharing) constituted restrictions by object – however, it was far from clear whether "pure" information exchanges were serious enough to be classified like that. Some would argue that competition authorities may be tempted to stretch the definition of object cases to include "pure" information exchanges to reduce the evidentiary burden required in such instances.

Restrictions by object

In the Draft Guidelines, the Commission has now clarified that the exchange of individualised data regarding intended future (and, in certain circumstances, current) future prices or quantities (such as sales, market shares, territories or customer lists) constitutes a restriction of competition by object. On that basis, even "pure" information exchanges of such data will be investigated and fined as cartel conduct.

Restrictions by effect

The Draft Guidelines also say that any information exchanges that do not fall into the restriction by object category will be of concern as a restriction by effect only if the conduct in question has an appreciable adverse impact on one (or several) of the parameters of competition, such as price, output, product quality, product variety or innovation. There are several key factors that need to be taken into account when considering whether an information exchange represents a restriction of competition by effect, and in this regard the Draft Guidelines essentially codify existing practice. For example, the analysis of the information exchange must take into account the extent of the market that it covers. The more of the market that is covered by the information exchange, the less likely it is that companies not involved in the exchange can constrain any anticompetitive behaviour by the companies concerned.

The restrictive effect or otherwise of an information exchange is also determined by the characteristics of the market – for example, the Draft Guidelines refer to the fact that a transparent market facilitates a collusive outcome as the result of an information exchange.

Finally, the Draft Guidelines refer to the characteristics of the information exchange as another factor that determines whether or not that exchange has a restrictive effect. In this regard, the first relevant issue is whether the information exchanged is commercially sensitive. The Draft Guidelines identify price and quantity information (the latter relating to sales, market shares, territories or customer lists) as the most commercially sensitive, followed by information about costs and demand.

The Draft Guidelines also provide further guidance on the distinction between the exchange of public and non-public data (the former being acceptable, whereas the latter may not be). This distinction is important in practice, as companies accused of "pure" information exchange in particular often defend the conduct by arguing that the information was in the public domain. The Draft Guidelines now refer to the concept of "genuinely public information", which is defined as "information that is equally easy (ie costless) to access for everyone". On this basis, the Draft Guidelines appear to have limited the possibility for companies to defend their conduct by claiming it is public information. It will be interesting to see how restrictively the Commission interprets this concept in future cases.

Other important factors in the characteristics of the information exchange are the level of aggregation, the age of the data and the frequency of the information exchange.

Information exchange analysis under article 101(3) TFEU

Helpfully, the Draft Guidelines do acknowledge that there are certain situations in which information exchange can be justified because the conduct gives rise to efficiencies that fulfil the relevant criteria in article 101(3). As with most analyses under article 101(3), the most likely point on which the parties are likely to fail is "indispensability", and the Draft Guidelines suggest that – in order to meet the indispensability criterion – the type, level of aggregation, age, confidentiality and frequency of the information exchange must represent the lowest risk of restricting competition that is indispensable to creating the claimed efficiency. This will clearly require an analysis of the relevant facts on a case-by-case basis.

Examples

A very helpful feature of the Draft Guidelines are the nine practical examples at the end of the information exchange section – these are designed to illustrate the key points of the relevant guidance, and they complement the Draft Guidelines (which, by their very nature, are broad) very well.

Conclusion

Information exchange was an area of EU competition law that, while of considerable importance in practice, was subject to some uncertainty because the main Commission decisions on the topic were not recent and the Community courts had not yet had the opportunity to express their opinion on many important concepts within information exchange. So it is clearly helpful that the Commission has now published detailed guidance on the topic, although in some areas the Draft Guidelines are rather opaque, due to their attempt to explain concepts whose analysis is very fact-specific.

It will be very interesting to see how the Commission will use the Draft Guidelines in forthcoming cases, particularly in relation to potentially contentious areas such as "genuinely public information".