I’ll show you mine

By Peter Camesasca and Thomas Weck

The European Commission has for the first time provided guidance regarding a key competition law grey area – information exchange.

The move came at the beginning of the year when the commission published fresh ‘horizontal’ guidelines ([2011] OJ C 1/11) setting out the principles for co-operation between competitors.

Information can be exchanged directly between competitors – or indirectly via, for example, a trade organisation, or a third party, such as suppliers or retailers. Furthermore, the competitor contact may be limited to the information exchange, or the exchange may be part of a broader horizontal agreement (for example, a production or research and development agreement). In the latter case, the information exchange should be assessed in the context of the horizontal co-operation agreement itself.

Collusive outcomes

The competitive outcome decides whether an information exchange is admissible.

Where the information exchange has an anticompetitive outcome, it is a key distinction under the guidelines whether it restricts competition ‘by object’ or ‘by effect’. Information exchanges restricting competition by object ‘are very unlikely’ to be justified in terms of EU competition law.

In its earlier draft in May 2010, the Commission stated that the exchange of individualised data regarding future prices and quantities (including sales, market shares, territories, or customer lists) ‘is particularly likely to lead to a collusive outcome’ and should therefore ‘be considered a restriction by object’. This should also apply ‘to information exchanges on current conduct that reveals intentions on future behaviour.’

However, it was not entirely clear whether the Commission viewed also the exchange of information on ‘current’ prices between competitors as a restriction of competition by object.

In the final version of the guidelines, the Commission softened its original approach by making a couple of key changes. The wording of the guidelines no longer includes the reference to ‘current conduct’. Restrictions by object will now only cover the exchange of ‘information on companies’ individualised intentions concerning future conduct regarding prices or quantities’. The exchange of present and past information thus does not constitute a restriction by object, but is subject to an effects-based analysis.

In addition, the guidelines make it clear even for infringements by object that it is necessary to ‘consider the economic and legal context of an information exchange in determining whether it constitutes a restriction by object’, which falls in line with recent case law.

The Commission maintains that ‘private exchanges between competitors of their individualised intentions regarding future prices or quantities would normally be considered and fined as cartels’ because they ‘generally have the object of fixing prices or quantities’ and they are ‘very unlikely’ to be justified. However, this wording leaves at least some room to demonstrate the pro-competitive effects.

Market characteristics

Regarding infringements by effect, the guidelines describe the characteristics of the information exchange in which a ‘collusive outcome’ is more or less likely. The exchange of strategic information, namely, data that reduces the strategic uncertainty in the market, is particularly likely to restrict competition. Strategic information includes information relating to prices and quantities.

However, the assessment also depends on the market characteristics (such as, the level of market concentration) and on other characteristics of the information exchange. For example:

• the exchange of aggregated data is much less likely to lead to restrictive effects than exchanges of data that allow for the recognition of individualised company level information;

• unlike an exchange of current data, the exchange of historic data is unlikely to lead to a collusive outcome because it typically is not indicative of the competitors’ future conduct;

• frequent exchanges of information that facilitate both a better common understanding of the market and monitoring of deviations increase the risks of a collusive outcome;

• an information exchange covering a sufficiently large part of the relevant market is more likely to have restrictive effects on competition than an exchange relating to only a small part of the market.

The new horizontal guidelines define the criteria for assessing information exchanges between competitors under EU competition law. While this assessment remains complex, the guidelines have the potential to harmonise further the assessment of information exchanges between competitors.

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