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Regulating Info Exchange Under EU Antitrust Rules

Law360, New York (July 09, 2010) -- On May 4, 2010, the European Commission published a package of proposals to overhaul European Union (EU) competition law, which includes revised guidelines on the assessment of such horizontal co-operation agreements under Article 101 of the Treaty on the Functioning of the European Union (TFEU; former Art. 81 EC-Treaty) ("Draft Guidelines").

Dr. Hans-Georg Kamann

In the Draft Guidelines, the commission for the first time sets out general guidance for assessing information exchanges/sharing among competitors. The final guidelines are expected to be issued by the end of this year.

The principles on how to distinguish information sharing beneficial for consumers and competition from practices prohibited under EU competition law have been a focus for discussion since the Court of Justice of the European Union ("ECJ") found in June 2009 T-Mobile Netherlands case (ECJ, decision of June 4, 2009, Case C-8/08) that even a one-time exchange of information on future market conduct among competitors can amount to a prohibited concerted practice under Art. 101 TFEU subject to hefty fines.

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Background

The T-Mobile Netherlands case involved a one time meeting of the five operators of mobile telecommunication services in the Netherlands in June 2001 where the parties discussed, among other things, reducing standard dealer remunerations for postpaid subscriptions, to take effect on or about Sept. 1, 2001. The Dutch competition authority

imposed antitrust fines of initially EUR 88 million on the companies for illegal information sharing.

In a preliminary ruling procedure, the ECJ held that this exchange of confidential information on future business conduct constituted a concerted practice having the object of restricting competition and thereby violated Art. 101 TFEU — even through the competition authorities did not cite any evidence that the information exchange actually had restricted competition and influenced the market in which the companies participated.

Rather, the court held that there is legal presumption that the shared information influenced the companies' conduct on the market unless they are able to prove the contrary with sufficient evidence (which is practically impossible to adduce).

Information exchanges between competitors are also an increasing area of focus for other national competition authorities in the European Union. For instance, the German competition authority (Bundeskartellamt) imposed fines on manufactures of luxury cosmetics products in Germany (EUR 10 million) for exchanging detailed sales data and information on planned marketing strategies and on four manufacturers of branded drugstore products (EUR 18 million fine) for exchanging information on the state of annual talks with retailers.

As a consequence of the T-Mobile Netherlands decision and national enforcement activities, private parties and national competition authorities have urged the commission to provide comprehensive guidance regarding which types of information exchange are in line with competition rules and which practices run the risk of infringing Art. 101 TFEU. The Draft Guidelines provide this guidance.

Types of Information Exchanges

Information exchanges can occur through direct sharing of data between competitors, a common agency (such as trade associations) a third party (e.g. market research agencies) or through publishing (e.g. on a Web site).(54) The information exchanged can include sales information, prices charged and discounts, information on customers, production costs, capacities, and information regarding o marketing and R&D activities. In practice, three situations of communication/information exchanges between competitors can be distinguished:

- Exchanges ancillary to other horizontal agreements (production, standardization, R&D). These are to be assessed in combination with the respective horizontal co-operation agreement (57) and are unlikely to carry an additional antitrust risk if they are strictly limited to information/contacts necessary to implement the respective contract.

- Exchanges ancillary to cartel activity (price fixing/market sharing) as a monitoring device. These are assessed as part of the respective cartel and not under the Draft Guidelines. (58)

- "Pure" information exchanges such as market information systems (main economic function lies in the exchange itself). These are the main subject of the Draft Guidelines (57).

Main Competitive Concerns and Pro-Competitive Effects

The Draft Guidelines highlight possible competition concerns and also pro-competitive benefits of information exchanges:

- information exchanges can create substantial benefits, either by intensifying competition (e.g. by eliminating information asymmetries) or by creating significant efficiency gains e.g. by allowing benchmarking (improvement of internal efficiencies), more efficient production allocation or a better choice for customers.

- The main concern of information sharing is a collusive outcome, i.e. the alignment of competitive behavior of market players, since the information reduces/eliminates the uncertainties on the future competitive conduct of other market players. Furthermore, if essential information is exclusively shared among a number of competitors only, there may be risk of anti-competitive foreclosure if other competitors/potential market entrants not participating in the information system are put at a significant competitive disadvantage.

Agreement or Concerted Practice Needs to be Established

An information exchange can only fall under Art. 101 (1) TFEU if it establishes or is part of an agreement, a concerted practice or decision of an association of undertakings. The Draft Guidelines explain that truly unilateral action involving the dissemination even of competitively sensitive information does not fall within the scope of Article 101 (1) TFEU. (55, 56)

The prerequisites for assuming a "concerted practice," however, are rather easy for competition authorities to prove since this concept has been applied very widely by the ECJ in its jurisprudence. Even in situations where only one company discloses confidential information on future conduct and the competitor “accepts” it, can also amount to a concerted practice (e.g. General Court, Joined Cases T-25/95 and others).

Article 101 (1) TFEU in principle distinguishes two types of agreements and concerted practices: (1) those that have the object of restricting competition (“restrictions by object”) and (2) those that do not aim at restricting competition, but may nevertheless have restrictive effects on competition. The main difference between the two types of practices is that in case of restrictions by object, the competition authority/or a private claimant does not have to show any actual restrictive effects on competition.

Restriction by Object — Exchange on Future Prices and Quantities

In the T-Mobile Netherlands case, the ECJ made a far-reaching statement that an exchange of information between competitors is deemed to have an anti competitive object if the exchange is merely capable of removing uncertainties concerning the intended conduct of the participating undertakings.

Accordingly, the statement of the commission regarding which types of information exchanges constitute a “restriction by object” are of most interest. This has important practical implications for the standard of evidence applied: As mentioned above, if a restriction by object is found, the burden of proof is on the companies participating in the exchange to prove that the exchange does not infringe Art. 101 (1) TFEU. Basically, the commission appears to draw the following distinctions:

- Information exchanges among competitors of individualized data regarding future prices and/or quantities (such as future sales, market shares, territories or customer lists) are a restriction of competition by object under Art. 101 (1) TFEU.

- In addition, the commission currently considers information sharing on current conduct that reveals intentions on future market behavior (outside pricing and quantity information) or cases where the combination of different types of data enables the direct deduction of intended future prices and quantities to have the object of restricting competition. Both concepts are rather vague since the commission does not offer guidance on when current market data reveals future intentions. Furthermore, it may be inappropriate to label cases as a restriction by object where companies combine different types of data to project future developments. This could in fact unduly sanction companies with the most efficient and sophisticated market intelligence systems.

- While not explicitly stating this, the commission appears to assume that all other practices on the exchanges of current or past data, e.g. exchanges of current prices (rather than indented future prices) do not constitute restriction by object, but only come under scrutiny, if they potentially have the effect of restricting competition.

Restrictive Effects on Competition — Assessment on a Case by Case Basis

Outside of discussions on individual future market behavior and strategies or data to deduct future behavior, the evaluation whether a restriction of competition may arise from the information exchange requires a complex assessment on a case by case basis.

The assessment will take into account a number of factors, mainly the proportion of the market covered by the practice, the market structure (e.g. concentration level), and characteristics of the exchanged data (e.g. level of commercial sensitivity, aggregation level and age of data).

1) Market Coverage

Appreciable restrictive effects on competition are only likely if the companies involved cover a sufficiently large part of the relevant market.

The Draft Guidelines do not specify what constitutes a "sufficiently large part of the market," but provide a "soft" safe harbor for information exchanges ancillary to horizontal cooperation agreements by stating that a market share below the thresholds of the relevant block exemption regulations or the "De minimis" notice will usually not be large enough to lead to restrictive effects on competition.

The commission may want to consider to introduce a stricter safe harbor (e.g. 15-20 percent) for information exchanges not otherwise benefitting from one applicable to another section of the Draft Guidelines.

2) Market characteristics

Companies are more likely implicitly to coordinate their market behavior by means of information sharing in markets that are relatively transparent and concentrated. In fact, all major cases on information exchanges involved concentrated oligopolistic markets. The Draft Guidelines discuss several characteristics making restrictive effects more likely, including market transparency, stable demand and supply conditions and symmetric market structures.

3) Characteristics of the Information Exchanged

On the type of information exchanged/modus of the information sharing, the Draft Guidelines list the following main factors:

- Commercially sensitive (individualized) information: The more commercially sensitive the exchanged information is, the more likely are restrictive effects. Sharing of strategic data can reduce the parties´ decision-making independence by decreasing their incentives to compete. (Information related to prices and quantities is considered the most strategic, followed by information about costs and demand.)

- Public vs. Non-public information: Exchanges of genuinely public information are regarded as unlikely to constitute an infringement of Article 101 (1). Genuinely public information, however, is defined only as information that is equally easy (i.e., costless) to access for everyone. Thus, even if the data is available publicly, additional exchanges may restrict competition if the exchanging parties save substantial costs and time compared to others who would have to spend time and money to gather that information.

- Public exchanges vs. non-public exchanges: Information that is exchanged in public, meaning it is accessible to all competitors and buyers, is less likely to be used only by the exchanging parties and raise competition concerns. Conversely, non-public exchanges limited to certain competitors increase the risk of detrimental effects.

- Aggregated vs. Individualized data: Exchanges of aggregated data are less likely to lead to restrictive effects than individualized company level information. The Draft Guidelines do not provide insights or rules of thumb regarding the aggregation level required to exclude competitive concerns. Also based on previous discussions regarding permissible aggregation levels, the Commission should consider to include more explicit guidance in the final Guidelines.

- Current data vs. historical information: The exchange of historic data is unlikely to indicate the future conduct of competitors or provide a common understanding on the market. The Draft Guidelines propose to determine whether data is sufficiently historic by comparing the datas' age with the frequency of contract renewals in the specific industry.

- Frequency of the exchange: If the companies exchange information often, they gain a better common understanding of the market and are able to monitor deviations more precisely. Nevertheless, in markets with long term contracts, a less frequent exchange (even an isolated exchange of information) can enable the competitors to concert their conduct.

Efficiency Defense (exemption under Art. 101 (3) TFEU)

Even if an exchange of information restricts competition under Sec. 101 (1) TFEU it may nevertheless be exempted under Section 101 (3) TFEU if it overall has beneficial effects e.g. by leading to an intensification of competition or by creating significant efficiency gains. According to the Draft Guidelines, exchanging present and past data is more likely to generate efficiency gains, while exchanges on future intentions of market conduct are unlikely to have pro-competitive motives.

The burden of proof that information exchanges can benefit from an exemption under Art. 101 (3) are on the participating undertakings (general rule in Art. 2 of Regulation 1/2003/EC). The Draft Guidelines set out strict standards for an exemption:

- The parties have to show that the data's type, aggregation, age, confidentiality and the frequency of the exchange are of the type that carries the lowest risk possible for achieving the claimed efficiency gains.

- Efficiency gains attained by the restrictions must be passed on to customers to an extent that outweighs the harm to competition caused by the information exchange.

Conclusion

The Draft Guidelines contain valuable insights into the current thinking of the commission on the antitrust assessment of information exchanges under Art. 101 TFEU. They provide helpful guidance, particularly in light of the strict standards set out by the ECJ in T-Mobile Netherlands judgment and corresponding risks of large fines for participating companies — which could lead to a situation of "over-enforcement" and deter information exchanges that benefit competition and consumers.

Therefore, it would be helpful if the commission would in the final guidelines more clearly limit the practices it considers to be restrictions by object and also define "safe harbors" for certain information exchanges that are permissible under European antitrust rules.

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