

EU competition: information exchanges and antitrust compliance

On 14 December 2010, the European Commission (the “**Commission**”) adopted a new suite of rules governing co-operation between actual or potential competitors, consisting of (i) guidelines on the applicability of EU competition law to horizontal co-operation agreements (the “**Guidelines**”) and (ii) two new block exemption regulations covering: (1) R&D agreements; and (2) specialisation and joint production agreements.

The Guidelines and block exemption regulations replace existing rules which had been in place for a decade and cover a large variety of different types of horizontal co-operation agreements. In an effort to break down the myriad rules to manageable proportions and in a user-friendly style, GTM has prepared a series of alerts which will, in turn, examine the implications for the various categories of agreement. This alert focuses on **information exchanges** between competitors.¹

In order to determine whether or not an information exchange breaches EU competition law, it is firstly necessary to establish whether the agreement has as its *object* (i.e. intent) or *effect* the prevention, restriction or distortion of competition.

Restrictions of competition by object

The Guidelines make it very clear that exchanging information on companies’ individualised intentions concerning future prices or “quantities” (e.g. future sales, market shares, territories and sales to particular groups of customers) are considered a restriction of competition “by object” - in other words, an “absolute” and “intentional” offence. Once the Commission has determined that an information exchange constitutes an infringement by object, it is not required to analyse the actual effects of the exchange on the market. The Commission has stated that such information exchanges would normally be considered, and fined, as if they are cartels.

Restrictions of competition by effect

In the case of exchanges of other types of information, it is necessary to analyse in detail the characteristics of: (i) the market affected by the information exchange; and (ii) the exchanged information itself. These main parameters are examined below. Lastly, it is necessary to determine whether there are any pro-competitive benefits of the exchange and whether they outweigh any anti-competitive effects the exchange may have.

¹ We have recently issued an alert on the implications of the Guidelines for specialisation and joint production agreements which is available at <http://www.gtmlaw.com>. Future alerts will examine the implications for other types of horizontal co-operation agreements, including R&D agreements and standardisation agreements.

Market characteristics

A wide range of market characteristics needs to be taken into account, including:

- Transparency: the more transparent the market (in terms of prices, output, demand, costs, etc.), the more likely an information exchange will have restrictive effects. An information exchange will itself increase market transparency;
- Concentration: the existence of only a few competitors in the market will make restrictive effects more likely. Conversely, such effects are less likely in fragmented markets;
- Product characteristics: restrictive effects are more likely in markets for single, homogenous products than in complex markets covering a number of differentiated products;
- Volatility: markets which are stable are more likely to be susceptible to collusion than volatile markets. As a general rule, volatile demand, large swings in market share, frequent entry by new competitors make collusion less likely. Information exchanges are themselves likely to decrease market volatility; and
- Structure: symmetric market structures characterised by competitors which are homogeneous in terms of costs, demand, market share, product range, capacities, etc., are more likely to give rise to restrictive effects than asymmetric, heterogeneous market structures.

Characteristics of the exchanged information

As a starting point, the exchange of information which reduces strategic uncertainty in the market is likely to be considered problematic from a competition law perspective. According to the Guidelines, a wide range of data may, depending on the particular circumstances and the characteristics of the market, be deemed to be strategic: actual prices; discounts; price increases and reductions; rebates; customer lists; production costs and quantities; turnovers; sales; capacities; qualities; marketing plans; risks; investments; technologies; R&D programmes; etc. As a general rule, however, information relating to prices and quantities is considered most sensitive, followed by information on costs and demand.

Factors which determine whether exchanged information is likely to raise competition law concerns include:

- Market coverage: only information exchanges covering a “substantially large part of the market”, are capable of having restrictive effects. The Guidelines do not define what percentage will constitute a substantial part. This question needs to be assessed on a case-by-case basis, taking account of the characteristics of the information and the market in which the exchange takes place;
- Level of aggregation: exchanges of genuinely aggregated data, where the identification of individualised company data is impossible, are unlikely to have restrictive effects. Conversely, the more individualised the data, the more likely it is to be problematic;
- Age of data: the exchange of genuinely historic data is unlikely to be problematic. The Guidelines do not, however, specify the threshold at which data becomes historic. Previous Commission decisions indicate that information older than one year may be considered historic. However, this is no hard and fast rule. The Guidelines confirm that the question of whether data is genuinely historic depends, in particular, on the frequency of price renegotiations and suggest that data can be considered historic if it is several times older than the average length of contracts in the industry;

<u>Frequency of exchange:</u>	frequent exchanges of information are more likely to have restrictive effects than infrequent exchanges. Much will depend on the characteristics of the relevant market (e.g. in volatile markets characterised by short-term contracts, frequent information exchanges are less likely to be problematic than in more static markets with long-term contracts). In highly concentrated markets even one-off exchanges may give rise to accusations of collusion; ² and
<u>Availability of information:</u>	exchanges of genuinely public information are unlikely to have restrictive effects. The Guidelines make it clear that the concept of genuinely public information is narrower than that of information in the public domain. Genuinely public information is described as information which is equally accessible to all competitors and customers, including in terms of collection costs. Information in the public domain will not constitute genuinely public information if the costs involved in collecting the data deter others from doing so. In addition, exchanges making data equally accessible to all interested parties on non-discriminatory terms are less likely to have restrictive effects than closed, exclusive exchanges. ³

Balancing exercise

Once it has been established that a certain exchange of information is problematic due to the characteristics of the information exchanged and the market affected by that exchange, it is necessary to determine whether there are any pro-competitive effects of the exchange which outweigh its anti-competitive effects. To do so, the parties will need to be in a position to illustrate that each of the following *cumulative* conditions is met:

Efficiency gains

The Guidelines recognise that information exchanges may generate efficiency gains. For instance, exchanges may alleviate information asymmetries for competitors and consumers alike - thereby making markets more efficient. Benchmarking of best practices may improve the efficiency of participating companies. Further, sharing of information may result in cost savings, by reducing inventories, enabling quicker delivery of perishable products, etc. As a general rule, exchanging current and past data is more likely to give rise to efficiency gains than exchanging information regarding future intentions.

Indispensability

The restriction of competition resulting from the information exchange must be indispensable to the attainment of the identified efficiency gains. The parties need to be in a position to demonstrate that the exchanged data, its level of aggregation, age, confidentiality and frequency, etc. *“are of the kind that carries the lowest risks indispensable for creating the claimed efficiency gains”*.

Pass-on of benefits to consumers

The parties to the information exchange must allow consumers a fair share of the efficiency gains brought about by the indispensable restrictions (e.g. by way of lower prices, superior product quality, better market information, etc.). In other words, efficiency gains which only benefit the participants of an information exchange are insufficient to justify its existence.

² See Case C-8/08, *T-Mobile Netherlands*. In this context it should also be noted that even unsolicited, unilateral disclosures of information by one company to another may be held to constitute an infringement. See Joined Cases T-25/95 and others, *Cimenteries* [2000] ECR II-491.

³ This does not preclude operators of exchanges offering data contributors a lower access price than non-contributors as long as such discounts reasonably represent the costs involved in contributing data to the information exchange.

No elimination of competition

Lastly, the information exchange must not permit the participants to eliminate competition in respect of a substantial part of the products covered by the exchange.

Conclusion

The Commission has taken the opportunity to include a detailed section on information exchanges in the Guidelines which may be taken as an indication of the importance attached by the Commission to policing this type of activity. In this context, it is also noteworthy that the Commission published separate guidelines in 2008 on the compatibility with EU competition law of information exchanges in the maritime transport sector. Those guidelines, along with the guidance summarised above, provide a set of instructions which is now quite detailed.

That being said, however, there are few hard and fast rules to determine whether an information exchange is competition law compliant. So much is clear:

- exchanges of individualised future prices or quantities constitute a serious breach of EU competition law;
- frequent exchanges of recent, disaggregated, non-public, strategic data covering a substantial part of a concentrated, transparent, stable and symmetric market for a generic product by way of non-public information exchanges are highly likely to infringe EU competition law. Few, however, will consider this to be “breaking news”. It is the kind of activity engaged in by cartels as part of their efforts to fix markets; and
- infrequent exchanges of historic, aggregated, genuinely public, non-strategic data covering an insubstantial part of a fragmented, opaque, volatile and asymmetric market for complex products by way of non-discriminatory information exchanges are highly unlikely to raise concerns. However, companies may well conclude that such exchanges are also pointless.

As the above (polarised) examples demonstrate, the devil is, as usual, in the detail. Participants will need to strike a balance between information exchanges which are useful to them and the restrictions on competition which such exchanges may have. Above all, participants must be ready and able to demonstrate that any anti-competitive effects of the information exchange are outweighed by its pro-competitive effects.

Some commentators have suggested that the section on information exchange in the Guidelines is so hedged with caveats and exceptions as to be borderline worthless. By way of example, it is indicative of the Commission’s mindset that the Guidelines largely equate the concept of “restrictive effects” with that of “a collusive outcome”. Clearly, the Commission is, perhaps understandably, mindful not to fetter its discretion unnecessarily. That said, guidance issued by enforcement authorities is always welcome and this area of activity now has the benefit of more guidance than most. As a result of the Commission’s efforts to outline the boundaries in this area, horizontal competitors should now be in a position to better understand what type of information can be exchanged, and in what circumstances.

FOR MORE INFORMATION:

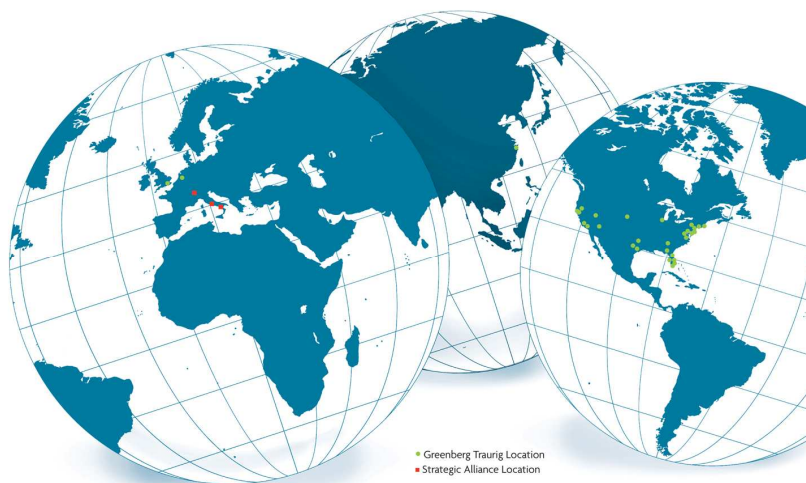
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