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Exchanges of Information and the New Horizontal Guidelines: Barolo or Beaujolais?

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One of the 'novelties' of the Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements, released by the Commission on Dec. 14, 2010 ("**Guidelines**"), is a whole new chapter devoted to exchanges of information. The Commission claims that such new section "*is the first Commission document to give clear and comprehensive guidance on how to assess the compatibility of information exchanges with EU competition law and will therefore play a significant practical role for businesses and their legal advisors*".

This is not completely true. As a matter of fact, the 2008 Guidelines on the application of Article 101 to maritime transport services (which today remain in place as sector-specific guidelines for sea transport) represented the first comprehensive set of guidelines addressing exchanges of information and their assessment under EU antitrust rules on restraints of trade.

Nevertheless, even if lacking true priority status, the 55 paragraphs now embedded in the Guidelines are important as they aim at summarizing the existing principles of law on the subject as applicable to agreements between competitors in general.

Thus, the new piece of soft-law is a welcomed addition and fills a much regrettable gap. One has to remind that in the previous 2001 Horizontal Guidelines, which are now repealed, the Commission had indeed refrained from ruling on exchanges of information, promising that "*Other types of horizontal agreements between competitors, for example on the exchange of information (…), are to be addressed separately*".

After such a long wait and almost a decade of decanting in the Commission's canteen, one would have expected a sophisticated, well-balanced vintage red wine, probably a Barolo if one likes Piedmont and its grapes. At first glance, what is poured into the Guidelines' chapter on information exchanges tastes more like a young Beaujolais, which to the discerning palates of antitrust practitioners says little; or, worse, conveys lack of structure and substance. Said in other 'drinking' terms, the Guidelines look more like a soft-drink rather than soft-law.

Why this is so ? The Commission takes an overly excessively prudent approach. There is no real safe harbor to the application of Article 101 when exchanging information with competitors. Even when addressing the most innocent types of exchanges (ie. public data, as will be explained hereunder) the Guidelines warn that, in some circumstances and markets, Article 101 may kick in.

This de facto nullifies the scope of the guidance the Guidelines are supposed to offer to businesses and counsels. More problematically, this risks inducing NCAs as well as national Courts to take divergent and conflicting approaches.

As to the merits of the Guidelines, the key test for assessing whether the exchange of information has a collusive object/effect for the purposes of Article 101 is whether or not the flow of information "***reduces the strategic uncertainty***" of competitors, consequently diminishing their incentives to compete one against the other.

For the above test to work, the notion of "*strategic*" information becomes crucial. The draft version of the Guidelines circulated before the summer referred instead to "*commercially sensitive information*" rather than to "*strategic information*" and indeed this is not a merely nominalistic change as the "*strategic*" information also encompass information which are not merely commercially driven as prices and quantities.

According to the Guidelines, information is **strategic** if related not only to prices (for example, actual prices, discounts, increases, reductions or rebates), customer lists, production costs, quantities, turnovers, sales, capacities, qualities, marketing plans, but also to risks, investments, technologies and R&D programs and their results. It goes by itself that information related to prices and quantities is however the most strategic, followed by information about costs and demand.

Since not all information exchanges, like good wines, are created equal, the Commission draws a main line between exchanges of information which are '*quasi-per se*' against Article 101 and exchanges which instead warrant a full-fledged analysis under Article 101(1) and/or 101(3):

(a) **exchanges of information which are 'quasi per-se' illegal**: an exchange of information almost invariably runs afoul Article 101 (1), and hardly benefits of an exemption, if the parties thereto exchange strategic data on an **ex ante** basis: "*Information exchanges between competitors of individualised data regarding intended future prices or quantities should therefore be considered a restriction of competition by object*" and, as such, "*would normally be considered and fined as cartels because they generally have the object of fixing prices or quantities*";

(b) **'other' exchanges of information**: in all other instances, the likely effects of an information exchange on competition must be analyzed on a case-by-case basis as the results of the assessment depend on a combination of various case specific factors. The assessment of restrictive effects on competition compares the likely effects of the information exchange with the competitive situation that would prevail in the absence of that specific information exchange (counterfactual). For an information exchange to have restrictive effects on competition, it must be likely to have an appreciable adverse impact on one (or several) of the parameters of competition such as price, output, product quality, product variety or innovation.

Whether or not an exchange of information will have restrictive effects on competition depends on both the economic conditions on the relevant markets and the characteristics of information exchanged, as the case-law has traditionally held. The Guidelines offer interesting new approaches in relation to two of them: age of data and the public nature of the data.

As regards **age of data**, the Guidelines confirm that the exchange of historic data is unlikely to lead to a collusive outcome as it is unlikely to be indicative of the competitors' future conduct or to

provide a common understanding on the market; yet, the Commission states that there is no predetermined threshold when data becomes historic, that is to say, old enough not to pose risks to competition. Data can be considered as historic "***if it is several times older than the average length of contracts in the industry if the latter are indicative of price re-negotiations***". This rule seemingly overturns the well-established principle we all have been given as a comfortable tool for antitrust assessment, pursuant to which the exchange of individual data which was more than **one year old** is deemed historic and as not restrictive of competition. This new approach opens the door for great uncertainty as to the legitimacy of the exchange. Nor this uncertainty is ameliorated by the fact that – at least, and last ! – the final text of the Guidelines softens the language of the initial draft version, crossing out Examples n. 5 (in the original numbering) which once read as follows: "***Situation:*** *Companies are in an industry characterized by short term contracts and where prices are re-negotiated every three months directly exchange price data that is three years old.* ***Analysis:*** *In a context of contract renewal and price re-negotiations taking place every three months, three year old data constitute historic information and their exchange would not be likely to lead to a collusive outcome in the market and thereby give rise to restrictive effects on competition within the meaning of Article 101(1)*".

As regards the **public/non public nature of the data**, it is (was….) a well established pillar of EU case-law (and doctrine) that, save for two isolated decisions of the Commission going back to the 70s, exchanges of public data should not infringe Article 101. The Guidelines, while formally paying deference to such jurisprudence, here too risk overruling it.

First of all, the Commission distinguishes between "***genuinely public information***" and "***information in the public domain***". Information is "***genuinely public***" if equally accessible (in terms of costs of access) to all competitors and customers. For information to be genuinely public, obtaining it should not be more costly for customers and companies unaffiliated to the exchange system than for the companies exchanging the information. Conversely, Information "***in the public domain***" is instead not genuinely public if the costs involved in collecting the data deter other companies and customers from doing so. A possibility to gather the information in the market, for example to collect it from customers, does not necessarily mean that such information constitutes market data readily accessible to competitors.

Having made such a distinction, the Commission then explains that the presumption that the exchange of public data does not infringe Article 101 applies only to the exchange of "*genuinely public information*". The result is a paradox. As the Commission points out in the Guidelines, if the information is truly accessible to everybody on the market (i.e. genuinely public), it makes no sense to share it. The Commission is certainly aware of this paradox, and the Guidelines indeed acknowledge that "*competitors would normally not choose to exchange data that they can collect from the market at equal ease, and hence in practice exchanges of genuinely public data are unlikely*".

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