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Standalone Exchange of Information Between Competitors May be Classified as "By Object" Restriction of EU Competition Law, AG Rantos says in Case C-298/22

Nina Frie (White & Case) · Tuesday, November 21st, 2023

In October 2023, Advocate General Rantos delivered his opinion in the context of a preliminary ruling request from Portuguese courts on whether an exchange of information between competitors can constitute a restriction of competition by "object" in breach of Article 101(1) of the TFEU. In practice, such classification relieves a competition authority from the obligation to investigate what effects such an exchange has on the market, meaning the burden of proof that a competition authority needs to meet to establish an infringement is significantly lower.

In September 2019, the Portuguese Competition Authority (PCA) fined several banks operating on the Portuguese market for having participated in a standalone exchange of information (i.e., there was no allegation of any other infringement), categorising it as a restriction of competition by object.

The exchanged information related to the home loans market, the consumer credit market and the corporate lending market. In particular, the alleged exchange related to (i) current and future commercial conditions, namely charts of credit spreads, the borrowing capacities of customers and risk parameters; and (ii) production volumes of the amount of loans granted in the preceding month in a dis-aggregated format. Both of the information types were not publicly available at the time of the exchange. The banks appealed the decision on the ground that the PCA was wrong to regard the exchange of information as sufficiently harmful for the examination of the effects not to be necessary.

Summary of the AG Opinion

In line with established case law, AG Rantos recalls that "by object" restrictions of competition are practices that reveal a sufficient degree of harm to competition so that there is no need to examine their effects. In assessing this, a competition authority must take into account the content of an agreement's provisions, its objectives and the economic and legal context of which it forms part. The concept of restriction of competition by "object" must be interpreted restrictively (paras 29-30 of the Opinion).

AG Rantos emphasized that the absence of precedents or robust experience does not prevent

competition authorities from classifying a practice as a restriction of competition by "object" but increases the likelihood that a practice which has the same characteristics will also be so classified (para 38). He notes that Article 101(1) of the TFEU is drafted sufficiently widely to cover any new category of practice in breach of EU competition law (para 35).

Analysis of the legal and economic context is different from the effects analysis

The analysis of the legal and economic context requires two steps. As a **first** step, the authority analyses whether, given the content and objectives of the agreement, that agreement falls within a category of agreements which are detrimental to competition, in light of a reliable and robust wealth of experience. As a **second** step, the authority must carry out a "*basic reality check*" in order to verify whether specific circumstances of the legal and economic context of the agreement may cast doubt on the presumed harmful nature of that agreement.

AG Rantos helpfully articulates the difference between the analysis of economic context and the "effects" analysis, which continues to present interpretation challenges. AG clarifies that the main purpose of the legal and economic context analysis is to either confirm or reject an initial finding that conduct has an anticompetitive object (para 44-48), i.e., to confirm whether or not the effects test is needed. The effects analysis entails an additional burden of proof and a more detailed examination of the effects of the agreement on the market in order to establish the existence of a restriction of competition (para 45). The main difference between the two categories of restriction of competition (object or effect) is in the intensity with which they are examined (para 47). In cases where the anti-competitive object is easy to perceive, the analysis of the economic and legal context should be limited to what is strictly necessary to confirm or cast doubt on the harmful nature of a given practice (para 47). If it is "impossible" to establish that the agreement is capable of restricting competition "by object" (despite analysing all the relevant contextual factors), this is an indicator to switch to the effects analysis (para 48).

Exchange of information can constitute a restriction of competition by "object"

The exchange of certain information between competitors can have an anti-competitive object if it is clear and unambiguous (without the need to examine its effects) that the exchange of information will lead to "***a reduction or removal of uncertainty on the market***" with the result that "***those exchanges can directly influence the commercial strategy of competitors by enabling them to adapt their conduct on the market***" (para 63). According to AG Rantos, this was the case with respect to information exchange related to credit spreads because of its sensitivity and competitive value, but probably not in relation to past production volume data.

Notably, AG Rantos concludes that a **standalone exchange of information** between competitors, in the sense that the exchange is not associated with the finding of a cartel, may have an anti-competitive object, provided that the exchange presents a sufficient degree of harm (para 64).

So, what are the characteristics of information and other factors that may lead to a conclusion that an exchange of information restricts competition "by object"? AG Rantos relies on previous opinions of other Advocate Generals, available guidelines as well as existing decisional practice when listing characteristics and factors that may lead to such conclusion. In a nutshell, these can be

summarised as follows:

- Exchange of non-publicly available strategic or commercially sensitive information (para 61) with a limited number of participants (para 85) is more likely to constitute a restriction of competition “by object”.
- The fact that such exchange is sporadic does not in itself rule out the anticompetitive object of a practice (para 86).
- The fact that such information will become public after some time is not relevant. What matters is that the information is confidential at the time of the exchange (para 91).
- The exchange of past (or historic) data is unlikely to lead to a collusive outcome and is less harmful from the point of view of competition law as it is unlikely to be indicative of the competitors’ future conduct or to provide a common understanding of the market (para 103).
- What matters are the objective aims of such exchange as opposed to subjective intentions of whether or not to restrict competition (para 76), meaning that even if parties do not intend to restrict competition, such exchange can still breach competition law.
- Unless otherwise proven, it is presumed that companies take account of the information exchanged with their competitors when determining their conduct on the market (para 88).
- In order to find that a concerted practice has an anticompetitive object, there does not need to be a direct link between that practice and the prices paid by end users, meaning that even if the actors did not act on the information they received, it can still be anti-competitive (para 91).

Practical takeaways

AG Rantos brings welcome clarifications on the difference between the analysis of legal and economic context done as part of a restriction of competition by an “object” test, and the effects analysis done as part of a restriction of competition by “effect” test. It also clarifies that a standalone exchange of information between competitors can infringe Article 101(1) of the TFEU by “object”.

The Opinion does not change much in terms of compliance tips with respect to information exchange. Companies should be aware that the exchange of sensitive information with their competitors, whether in the formal or social context, may result in a breach of EU competition law.

Key elements of compliance advice should include:

- Not to exchange, directly or indirectly, with a competitor commercially sensitive confidential data;
- Not to exchange such data about future conduct with respect to prices or quantities; and
- Generally speaking, information that is historical, anonymised, aggregated and public may be permitted.

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