Kluwer Competition Law Blog

Standalone Information Exchange: EU Court of Justice Delivers Lesson on Anatomy of 'By Object' Violations and some Food for Thought

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At a glance…

Despite fielding a referral question on information exchange and 'by object' violations which could easily have been met with a 'slam dunk' but anodyne judgment, the top EU Court's analysis turns out to be a useful lesson on the anatomy of a 'by object' violation in relation to standalone information exchanges. It also provides food for thought on how this presumption may or may not apply regarding info exchange in less familiar contexts, such as labour markets.

The judgment will be of interest to those that are fresh to the debate on 'by object' infringements as well as those that have been following the decades-old debate.

While there are no surprises in relation to future, price-related information (even though it was sporadic; even though it was only one element of price etc…- see the seven failed arguments at end of this post – paras 82-95) the Court provides a clear explanation of the concepts of 'confidential' and 'strategic' which can push information exchange into the 'by object' box – para 63).

As regards current or past information, the Court is clear that this can still be strategic (where it reveals future market conduct etc.) (paras 64,65).

But in relation to past information (in this case, production volumes from the previous month) the judgment is – on the facts of this case – slightly more sanguine. It accepts that an isolated case of sharing past production volumes might not deserve the 'by object' classification. That said, it is still necessary to assess how harmful the exchange is by also considering or "cross-referencing" other information exchanged, or which is already the public domain. In other words, a 'reality test' is needed which considers more than just the information exchanged (paras 63, 78).

In the end, it is a moot point regarding past information because of the wider information exchange of obviously strategic information (and the underlying intentions – para 79). But the separate consideration of past information is logical and shows that isolated exchanges may be treated more leniently (where, even in the round, they do not allow inferences to be drawn about future market conduct).

It also provides food for thought on information exchange in the HR context. "Labour markets"

are often discussed these days but are yet to be defined with precision. Query whether the underlying assumption for 'by object treatment' (assured harm) is necessarily present.

Finally – although a procession of seven arguments failed to persuade the Court to change its mind – it is interesting to see (again, at a time of increased focus on labour market restrictions and impending pay transparency requirements) the clarification that:

- A regulatory requirement to publish certain sensitive data will not shield a company from liability if the information exchanged goes beyond what needs to be made public and was exchanged before the point in time at which those obligations arose
- While a degree of transparency can be good (para 53), and benchmarking can be pro-competitive, this argument is not available in respect of exchanges of confidential information relating to the future intentions (para 87).

?What kind of information exchange was involved?

- It was a 'standalone' exchange of information (no other coordination/cooperation agreement) between 2002 and 2013.
- Related to the home loans market, the consumer credit market, and the corporate lending market.
- Specifically:
    - **Current and future** commercial 'conditions', i.e., charts of 'credit spreads' (showing the difference between the rate offered to a borrower and the rate at which the bank borrows itself), as well as risk variables to which a credit spread is attached to offset that risk.
    - **Past** production volumes – i.e., individualised figures, showing the amount of the loans granted by banks in the previous month.

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The Court's reminder on the law of 'by object' restrictions

- The concept of 'restriction by object' is to be interpreted strictly (paras 43, 50). It is only appropriate for certain types of coordination between undertakings which reveals a sufficient degree of harm to competition (such that there is no need to assess effects).
- To determine whether a 'by object' classification is appropriate, it is necessary to examine these three elements:

1. The **content** of the agreement, decision or practice. In other words, does it have characteristics which create conditions of competition which do not correspond to the normal conditions of the market in question? (para 45)
2. The **economic and legal context** – while there's no need to examine the effects of the arrangement, it is still necessary to consider the nature of the goods or services concerned, as well as the structure and functioning of the market. This is essentially a cross-check that no particular circumstances surrounding the arrangement should rebut the presumption that it is harmful to competition. (paras 46-48)
3. Its **objectives** – i.e., what did it intend to achieve? What were its "immediate and direct aims" ? (para 56) But there is of course no automatic 'get out' by showing no actual intention to restrict competition, or because it pursued certain legitimate objectives. (para 49)

?Spotlight on when information exchange is by object (confidential + strategic)

- According to the Court, the acid test is whether the exchange of information has characteristics linking it to a form of coordination between undertakings that creates conditions of competition that do not correspond to the normal conditions of the market in question. (para 51)
- It is not necessary that the information exchange would lead market participants to follow the same course of conduct. Normal market function implies that firms not only determine independently the policy which they intend to adopt on the market, but also remain uncertain as to the future conduct of other participants on that market. (para 54)
- According to the Court, it is sufficient for the information exchanged to be, first, confidential and, second, strategic (para 63).
    - 'Confidential information' = information not already known to any firm on the market
    - 'Strategic information' = information that may reveal, once combined with other information already known to the participants in an information exchange, the strategy which some of those participants intend to implement
- Accordingly, any exchange of information relating to future prices, or some of the factors determining those prices, is inherently anticompetitive.
- But the Court reminds us that the concept of strategic information is broader and includes any data not already known to economic operators which, in the context of such an exchange, is likely to reduce the uncertainty of the participants as to the future conduct of the other participants with regard to the actual conditions/structure of market. (para 64)
- Where the information exchanged relates to current or past events (not future), that can be strategic if, given market conditions/realities, another firm can infer with sufficient precision the future conduct of the other participants in that exchange or their reactions to a possible strategic move on the market. (para 65)

What does this mean for the case at hand?

- Credit spreads: the information was confidential and was also strategic because it reveals the rate that the banks offered their customers. And so deserved to be a restriction by object. (para 71)
- Risk variables: similar conclusion reached as information relating to future changes to the risk variable, combined with information on the future intentions of credit institutions with regard to credit spreads, could provide a more accurate view of pricing strategies. (para 72)
- 'Production volumes' (past information): as regards a 'standalone' exchange of past sales volumes, the Court thought it unlikely that, considered in isolation and in the absence of particular circumstances, this information would reveal the future intentions of the credit institutions. But the Court pointed out that it is necessary to also take into account the possibility of cross-referencing the different categories of information exchanged. So, a 'standalone' exchange of production volumes could constitute part of a by object infringement if that information were combined with other types of information exchanged and with other

information already freely available, such that a competitor could infer the future intentions of the other participants. In the end this seems to be a moot point as because the Court pointed out that the wider intention of the participants in the exchange was to change credit spreads in the future. (paras 73-79)

Seven arguments cast aside by the Court (paras 82-95)

1. **Consumer or other laws/regulations required the publication of this information**.

Answer: referring court to decide whether the information exchanged goes beyond regulatory obligations and was exchanged before those obligations required publication

2. **Information exchange was sporadic**: e.g., once or twice a year.

Answer: a single instance of contact may be enough to remove uncertainty in the minds of the parties concerned as to the future conduct of the other undertakings concerned

3. **The exchange was capable of facilitating pro-competitive benchmarking**.

Answer: Could be true for exchanges of information concerning the best management or production methods to be implemented but that cannot be the case for exchanges of confidential information relating, specifically, to the future intentions.

4. **Credit spreads did not reflect the overall price of the credit services offered, but rather only one of its components.**

Answer: not necessary for a concerted practice to cover every parameter; one is enough ?

5. **The information communicated related to changes that were about to enter into force** and several weeks were necessary for a bank to change its own spreads, so firms could not react immediately

Court: the mere fact that information relating to credit spreads is exchanged before that information becomes effective or public is sufficient to establish that that exchange had the capacity to reduce uncertainty in the minds of the participants

6. **No evidence that any of the banks amended its price list** after receiving the information.

Court: Not necessary to prove that an exchange of information has any actual effects on the

market in question, or even that the information was actually taken into account by the participants in the exchange, in order to apply the concept of restriction by object to it.

7. **The factors which underlie each level of risk variable were not disclosed**

Court: for the referring court to determine whether the information contained in such a table was sufficiently intelligible to enable those participants, once they had combined it with the credit spreads and with the sales volumes achieved, to reduce their uncertainty as to the future conduct

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