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Information Exchanges Among Competitors: The Commission Takes a New Look

Andreas Reindl[1]

I. INTRODUCTION

The European Commission's draft guidelines on horizontal agreements (the "Draft Guidelines") feature as one of its main innovations a new chapter on information exchanges among competitors.[2] In it the Commission has put forward an analytical framework that should ensure a conceptually sound and consistent assessment of the broad range of diverse situations in which firms exchange information with their rivals.

The Commission document has already triggered strong reactions. One alarmist comment accused the Commission of seeking to drastically expand its enforcement powers, of creating the risk of jail time for potentially benign conduct, and of threatening to chill activities of third parties such as market research companies and journalists with its unprincipled enforcement zeal against information sharing.

Such comments might be designed to scare firms into hiring more lawyers, but they do not provide an accurate assessment of the Draft Guidelines. I believe that the Commission has proposed overall sound analytical principles for a practice that simply cannot be analyzed with the help of bright-line legal rules. Of course there are aspects in which the Draft Guidelines could and should be improved. But if the Guidelines' principles are followed in actual enforcement practice (an important "if," as I will explain below) the proposed approach should allow firms and their counsel to reasonably accurately assess the risks of information sharing, and should generally lead to case outcomes consistent with the Commission's view of EU competition law as a consumer-welfare prescription. On both counts the Draft Guidelines do a better job than existing case law and are therefore an improvement over the current state of affairs.

II. THE MARKET NEEDS GUIDANCE ON INFORMATION EXCHANGES

Developing guidelines on information exchanges was a timely project. This is an area that raises complex questions for competition law enforcement, but where case law has not provided much coherent guidance. In addition, a wide range of firms and industries is affected by existing uncertainties and will benefit from better analytical standards as information exchanges among competing firms are a common feature in pretty much every industry, even though the practice occurs in very different shapes and forms.

Questions on how to assess the effects of "pure" information exchanges are certainly not new, but have recently become a popular topic for enforcers, policy makers, and in the academic literature. One explanation for the increased interest may be that competition authorities recognize how their persistent enforcement practices against hard-core cartels make it more likely that firms try to find more subtle ways to coordinate their conduct and thus operate in the grey fringe of rules that prohibit rivals from expressly fixing price or output. The Commission's cartel

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[2] Commission Draft Guidelines on the applicability of Article 101 on the Functioning of the European Union to horizontal co-operation agreements (2010), Section 2.

case against banana importers, where the allegedly unlawful conduct consisted of exchanging information about future prices, is a good illustration for grey fringe conduct that may be subject to harsh enforcement action. The greater interest may be explained in part also by renewed attempts to better understand and analyze problems created by oligopolistic markets consistently across different enforcement areas. Aside from coordinated effects merger cases, these issues recently emerged also in the discussion of proper analytical approaches to resale price maintenance agreements.

Assessing the competitive effects of information exchanges depends on analyzing firm conduct in oligopolistic markets—an area in which competition authorities have found it exceedingly difficult to translate general and abstract economic concepts into workable legal standards. The economic logic of collusion is quite clear: Firms in oligopolistic markets may be able to anticipate their rivals' reactions to their own output and price decisions, and through a process of repeated interaction might be able to achieve supra-competitive prices, foregoing individual short-term profit-maximizing strategies in favor of arrangements with rivals that maximize industry profits over time. Successfully coordinating conduct with rivals is not a trivial exercise, though, especially if firms stay outside the no-go, hard-core cartel zone. Markets may be too complex, the incentive to deviate may be too powerful, and the ability to monitor may be too limited to reach or maintain a collusive outcome. Sharing sensitive information with rivals, like other facilitating practices, can play an important role in this situation as it may allow firms to more effectively coordinate their strategies by establishing focal points, or to monitor that a previously reached understanding is observed.

Finding an intellectually acceptable legal analysis, however, which identifies predictably and consistent with generally applicable evidentiary requirements those instances where information exchanges are clearly harmful continues to be a challenge for competition regimes. The Commission found out how demanding it can be to build a legally sound case around alleged collusive outcomes in coordinated effects merger cases such as *Airtours* where its explanation of how competitors would more effectively coordinate their conduct failed to satisfy the Court. Showing harmful effects in information exchange cases should be as demanding, given that the circumstances and competitive concerns are essentially the same.

A legal system faces other challenges as well. Parties may unilaterally disclose information about their intended activities and may be able to use the resulting greater transparency to more effectively coordinate, but have no explicit agreement to share information. In this situation, most competition regimes are forced to artificially press conduct into the legal category of "agreement" to make it subject to competition law enforcement, but exactly how far the concept of "agreement" can be extended to reach seemingly unilateral disclosures of information is unclear.

Coherent standards to sort out these issues have yet to emerge from European case law. Commission decisions, Court judgments, and decisions by national competition authorities have dealt with information exchanges, but the various pieces have not yet come together to form a clear analytical framework.[3] Two of the leading European information exchange cases, *T-Mobile*

[3] EU competition law is not alone in its struggle to formulate rational and predictable rules governing information exchanges. A highly respected commentator recently described leading U.S. case law on data exchanges as philosophically inconsistent, relatively arbitrary, and without support in economic analysis, requiring counsel to reconcile inconsistencies in some rationale way. Thomas E. Kauper, *Oligopoly: Facilitating Practices and Plus Factors*, 2007 FORDHAM COMPETITION L. INST. 751, 757 (Barry E. Hawk ed.) (2008).

Netherlands and *UK Tractors*, illustrate some of the problems.[4] *T-Mobile Netherlands*[5] is the Court's most recent pronouncement on information exchanges, and arguably the most controversial judgment in this area. The Court was asked how Article 101 should be applied in a situation where the five providers of mobile phone service in the Netherlands met on one occasion and exchanged information about their intentions to limit dealer remuneration for post-paid subscriptions. The Court explained that this conduct could quickly be condemned as a restriction of competition under Article 101(1) after establishing only a very limited set of facts and without examining its actual or likely harmful effects.

The outcome in this case is not particularly remarkable—a competition regime should be highly suspicious of situations where competitors in a highly concentrated industry with some history of suspected collusion share information about a key element in their competitive strategies in a non-public setting, and should be willing to condemn such conduct unless the defendants can come up with a plausible efficiency explanation. But many were puzzled by the Court's reasoning that the mobile phone operators' conduct could be quickly condemned as a violation of Article 101(1) because it harmed "*the structure of competition*" and "*competition as such*." The Court appeared to remove the analysis even further from contemporary competition law concepts by concluding that the finding of a restriction of competition under Article 101(1) does not have to be connected with possible harm to consumer welfare.

The Court's approach is awkward and creates additional uncertainty in an area that is already quite complex. It suggests that the analysis of some information exchange situations occurs outside a uniformly and consistently applicable framework focusing on increases in market power and harm to consumer welfare. What standards should be applied instead to analyze information exchanges remains unclear. The Court was satisfied that a "restriction by object" analysis can be applied to a practice that is "capable in an individual case, having regard to the specific legal and economic context, of resulting in the prevention, restriction or distortion of competition within the common market, where competition law is designed to protect the structure of the market and thus competition as such." This language makes it impossible for firms, their counsel, and competition authorities to assess the lawfulness of information sharing in a slightly different factual situation. If any practice that is "capable of ... distorting ... competition as such" falls in the "restriction by object" category, at least in theory nearly every information sharing could be quickly condemned as unlawful unless the parties come up with a strong efficiency defense. And for those information exchange cases for which a fuller analysis of anticompetitive effects is required, one wonders whether the same "competition as such" standard applies (and whether there are "appreciable effects on competition as such") or if the two analytical routes in Article 101(1) represent different concepts of what constitutes a "restriction of competition."[6]

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[4] For a summary of relevant case law with a critical analysis in particular of some decisions by national competition authorities, *see* Stefano Grassani, *Oligopolies and 'Pure' Information Exchanges in the EU: New Crops Are Growing on the Soils Plowed by 'UK Tractors,'* 2007 FORDHAM COMPETITION L. INST. 675, 682–83 (Barry E. Hawk ed.) (2008).

[5] Case C 8/08, T-Mobile Netherlands BV et al. v. NMa, 2009 ECR I-4529.

[6] Another puzzling aspect of the decision is the Court's ruling that the conduct presumably fell under Article 101(1), but the defendant phone companies could reverse the presumption by providing evidence that the information exchange did not influence their market behavior. This sounds that, if the parties can demonstrate that their conduct had no *effect* on competition, they could escape Article 101(1), which would be a surprising step in the analysis as the conduct was considered of having the object of restricting competition.

UK Tractors,[7] which for a long time was the leading European case on "pure" information exchanges, has its own shortcomings. This is the case where the few tractor manufacturers in the UK exchanged over an extended period of time detailed historic sales data, but no (historic or future) price information. The Court upheld the Commission's finding that the information exchange had the effect of restricting competition, in particular given the market structure including entry barriers, the sensitive nature and detailed level of the information exchanged, and the fact that the information exchanged did not benefit customers. *UK Tractors* confirms the importance of market conditions and industry characteristics in analyzing the effects of a non-public information exchange, but uses these factors more like a checklist approach, without requiring too much of a persuasive story about how exchanging historic sale information could facilitate coordination of future conduct. In fact, the Commission decision fails to clearly explain how such coordination would have been possible.

UK Tractors contrasts with the Court's more recent view on evidentiary standards to prove collusive effects in merger cases. In particular, in *Impala* the Court required an explanation of how specific market circumstances will aid parties to more effectively coordinate their conduct and jointly exercise market power, and expressly warned against a mechanical approach in coordinated effects cases with over-reliance on a laundry list approach limited to market characteristics and the type of information concerned.[8] Thus, for mergers the Court has emphasized recently the need to connect various elements to a plausible story of coordination, whereas *UK Tractors* had earlier suggested that this requirement is less demanding when proving harmful effects in information exchange cases.

III. THE DRAFT GUIDELINES ON INFORMATION EXCHANGES: SOME HIGHLIGHTS

A. A Good Analytical Framework

Viewed against this state of affairs, the Draft Guidelines do a reasonably good job in developing useful and useable analytical principles for information exchanges. Here is a synopsis of Guidelines features that justify this assessment.

First, the Draft Guidelines confirm that market power and harm to consumer welfare must be in the center of every analysis of horizontal agreements.[9] Accordingly, horizontal arrangements including information-sharing arrangements must be assessed in light of their tendency to enable competitors to jointly exercise market power, for which the ability to raise price or reduce output industry-wide can be a proxy.[10]

[7] Case C-7/95, John Deere, Ltd. v. Commission, 1998 E.C.R. I-3111, ¶ 76.

[8] Case C-413/06, Bertelsmann and Sony Corporation of America v. Impala, 2008 E.C.R. I-4951, ¶¶ 125–26.

[9] The Guidelines do so by referring to the Commission's Article 81(3) Notice which laid out these concepts, Commission Notice, Guidelines on Application of Article 81(3), 2004 O.J. C 101/97, ¶¶16, 21 (explaining that the prohibition in Article 81(1) focuses on whether an agreement likely has an appreciable adverse impact on price, output, product quality, product variety, and innovation).

[10] As explained elsewhere, both the restriction by object and the restriction by effect analytical approaches under Article 101(1) are effects-based and steer clear of form-based analysis. A determination that a certain restraint can be quickly condemned under Article 101(1) relies primarily on previous experience in case law, empirical evidence, and consistent economic theory to conclude that the restraint almost invariably tends to facilitate the exercise of market power. Where such a determination is not possible, case-specific evidence of harmful effects must be used (an "restriction by effect" type analysis) under Article 101(1) to decide whether an agreement likely facilitates

The Guidelines then confirm that the risk that information exchanges create or increase the ability of competitors to jointly exercise market power is particularly significant only when rivals inform each other (apparently in particular through non-public communication) about future individualized pricing and output decisions. In this situation information exchanges can be presumed to fall under Article 101(1) without further case specific analysis. By limiting the "restriction by object" analysis to these types of information exchanges, the Guidelines resist the possible temptation to rely on *T-Mobile Netherlands* to create a wider category of information exchanges which would be relatively easy to win under the Court's "restriction as such" standard.

For all other information exchange cases, which must be analyzed under a case specific effects analysis, the Guidelines include important statements on the evidentiary requirements, highlighting that finding of harmful effects requires a decision maker to combine findings of market characteristics and the nature of information exchanged[11] with a story about how coordination likely would occur. This includes also a determination how the outcome is different from a situation without the information exchange. Thus, there may be situations where the characteristics of the market and information exchanged point toward an unlawful exchange of information but there is a good explanation why the firms will not be able to coordinate their conduct; conversely, there may be cases where the "structural factors" are not particularly strong, but there is evidence that the parties managed to coordinate their conduct more effectively. It would have been logical at this point to include language from the Court's *Impala* judgment, which explained so well that relevant market characteristics must be connected to a plausible story about collusion before they can support a finding of a risk of coordination. But one can hope that the Commission would follow the same evidentiary standards in an Article 101 case, and the language of the Guidelines certainly does not suggest anything else.

Another significant feature is the Guidelines' recognition and detailed discussion of the potential benefits that may flow from information exchanges. The same view is reflected in the statement that most information exchanges are pro-competitive. This is important as there is the perception in the market that the Commission in general has not been very receptive to submissions by parties about alleged efficiencies of their conduct or agreements. In particular, this section should assist parties in the future to properly frame their arguments if a practice is found to fall under Article 101(1) and therefore efficiency justifications must be analyzed.

The importance of robust efficiency justifications is highlighted by what could be called the "no good-no harm" information exchange cases where the parties cannot point to strong, plausible business reasons to explain their conduct, but at the same time the competition authority cannot come up with a compelling story about how the conduct helps the firms to more effectively coordinate their future conduct even though it finds the information exchange suspect. There have been some cases that fit this description, like the French *Palaces Parisiens*[12] case and *UK Tractors*, in which competition authorities were faced with "suspect" information exchanges that had no apparent benefits and arguably condemned conduct as anticompetitive under a less demanding proof for how the information exchange could facilitate future coordination among

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the exercise of market power. Andreas P. Reindl, *Resale Price Maintenance and Article 81: Developing a More Sensible Analytical Approach*, 2009 FORDHAM COMPETITION L. INST. XXX (Barry E. Hawk ed.) (2010).

[11] The Draft Guidelines include a lengthy discussion of circumstances that facilitate collusion, including market coverage of the practice, market characteristics, and the nature of the information exchange, and how these factors affect the analysis.

[12] Conseil de la concurrence, Décision relative à des pratiques mises *en œuvre sur le marché des palaces parisiens*, no. 5-D-64 (Nov. 25, 2005).

competitors. The Guidelines do not specifically address such a situation, but a statement justifying a quick condemnation under Article 101(1) of sharing information on future pricing and output conduct because "it is less likely that this type of information exchange is done for pro-competitive reasons" could be read as endorsing the same approach. If this interpretation is correct, it would again point to the overriding importance of indentifying a pro-competitive rationale for an information exchange scheme.

B. A Framework that Could and Should be Improved

There are areas where the Draft Guidelines could have done better. Some issues been treated inadequately, and sometimes the Guidelines create uncertainty.

One shortcoming is the Daft Guidelines' anemic treatment of "unilateral information disclosures." This encompasses situations where one firm unilaterally (although perhaps nevertheless systematically) makes its future intentions known to rivals, or when industry participants find mechanisms to exchange sensitive information, for example through public announcements, without explicit agreement to exchange information.

These are challenging situations for enforcers. Unilateral acts of information disclosures by one or more industry participants can be an effective mechanism to coordinate behavior in an oligopoly and lessen rivalry by providing focal points. But in most competition regimes, unilateral acts remain outside the reach of competition laws and there is a need to apply the legal category of "agreement" to such conduct in order to make it subject to competition law enforcement.[13] The best view is that finding of "agreement" in this situation focuses on identifying certain conduct that facilitates coordinated pricing and not on the state of mind of competitors (for example, there has been a "meeting of the minds," or a "conscious commitment to a common scheme") which makes things a little more concrete.[14] But defining the boundary between what is considered unilateral and therefore lawful and what is the result of agreement remains a challenging and, to some extent, arbitrary exercise.

Consider, for example, the facts in the U.S. Federal Trade Commission's recent case against U-Haul, in which the FTC accused U-Haul of implementing a deliberate policy to invite Budget to collude and to implement a price increase for Do-it-Yourself ('DIY") one-way truck rentals. During a U-Haul's analyst call, for example, senior management encouraged Budget to match U-Haul's price increase; U-Haul also had instructed its sales personnel to contact its Budget counterparts with similar messages. The FTC settled with U-Haul, alleging that the conduct amounted to a unilateral invitation to collude. It specifically did not allege that U-Haul and Budget had reached an agreement on increased rental rates and emphasized that the finding of agreement was not required to establish a violation of Section 5 FTC Act.[15]

If similar conduct occurred in Europe, could the Commission consider that such "unilateral" acts resulted in "agreement" and therefore fall under Article 101? Would it have been sufficient if Budget had demonstrably raised rental rates in response to U-Haul's invitations?

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[13] European competition law may use the concept of "concerted practice" to analyze this situation, but this is just another undefined and unclear term that replaces the term " agreement;" in either case, the real difficulty is to define the boundary between unilateral, lawful and coordinated, unlawful conduct.

[14] *See, e.g.,* George A. Hay, *The Meaning of Agreement under the Sherman Act: Thoughts from the 'Facilitating Practices' Experience*, 16 REV. IND. ORG. 113, 127-28 (2000).

[15] *See* In the matter of U-Haul, Inc., Trade Reg. Rep. (CCH) ¶ 16461, 2010 WL 3072262 (Fed. Trade Comm'n June 9, 2010).

A quote in footnote 42 of the Draft Guidelines suggests that it might be enough if the competitor "accepts" unilateral invitations to collude; but in the *U-Haul* facts finding of agreement would obviously be a stretch. But what if Budget internally discussed the invitations and made its own unilateral announcement about its intended price increases, but without directly communicating with U-Haul: Would there be enough to find agreement, or have the parties merely figured out how to communicate through what the law considers unilateral acts to soften competition between them?

By stating simply that it will assess on a case-by-case basis whether a concerted practice can be found or whether information dissemination can be considered a unilateral act, the Commission walks nonchalantly into one of the most difficult enforcement areas in oligopolistic markets without providing any guidance on what principles it would apply to evaluate these situation. A cautious approach may be justified, given the complexities in this area and the lack of relevant case experience. But market participants could have expected at least some words on what indicia the Commission considers most relevant in these cases, or a case hypothetical that could illustrate what questions the Commission would ask and how aggressively it would be willing to stretch the scope of Article 101 to reach potentially harmful conduct.

The arguably biggest concern is how the standards explained in the Draft Guidelines will be applied in actual cases. Several illustrative examples in the information-sharing chapter raise the question how the Guidelines will be applied in practice and suggest that the Guidelines might not impose the expected analytical discipline on enforcers.

Examples of hypotheticals where the analysis does not live up to the standards set forth in the Draft Guidelines include the cases of bus companies that agree with a tourist office to disseminate price information about their tickets through a freely accessible website; customers can buy tickets at the posted prices. It is unclear how, under the standards of the Guidelines, this type of arrangement could be considered a restriction of competition, but the hypothetical suggests such a result. It asserts that such a mechanism could be used to monitor an already existing collusive outcome, but nothing in the facts suggest that such collusion already exists. In fact, collusion among bus operators appears to be difficult to achieve or maintain, at least under the factual assumptions of the hypothetical, given that bus companies typically serve different routes, the ease with which each provider can differentiate its product, and the complexity in pricing rules (which the hypothetical acknowledges).

The hypothetical recognizes that the arrangement would create significant efficiencies and therefore Article 101(3) would be met, but that is "cheating" given the less than satisfactory explanation why such an arrangement could ever restrict competition in the first place.[16]

Beyond the weak facts, the hypothetical raises the broader question of whether the Commission would seriously suggest that most cases where competing service providers make their prices available on third party websites could fall under Article 101(1), at least when the affected market is concentrated.

Example 3 concerning luxury hotels in a country's capital suggest that perhaps some of the hypotheticals might be used to defend less persuasive cases by national competition authorities, although they might not reflect the Guidelines' standards. In the original *Palaces Parisiens* case, which provides the facts for the hypothetical, it was never clearly explained how the

[16] Example 7 on information exchanges among fresh juice producers suffers from the same problem.

top six luxury hotels in Paris could use the sharing of historic information about average prices, revenues, and occupancy rates to coordinate their future competitive strategies more effectively. The Guidelines' hypothetical does not do a much better job. One sentence asserts that this information exchange "leads to coordination;" and the next sentence says that the practices are about monitoring deviations. The facts do not support either theory sufficiently. This can, again, leave a reader worried that the Commission would be willing to quickly find an Article 101(1) violation without carefully developing a facts-based story about collusion.

IV. CONCLUSIONS

Contrary to some of the more dramatic initial reactions to the Draft Guidelines, I believe that firms and counsel can be cautiously optimistic about the approach to information exchanges proposed by the Commission. The analytical framework can, over time, enhance predictability and put meaningful limits on when information exchanges can be found to be anticompetitive, with the caveat that the Commission and national competition authorities will have to accept in practice the limitations and analytical discipline that the Draft Guidelines' approach imposes.

Of course the Draft Guidelines do not provide bright-line tests. Assessing conduct in oligopolistic markets is not amenable to the type of legal rules and clear boundaries firms and counsel may consider most desirable.[17] But in this respect the analysis of information exchanges is no different from other enforcement areas. What matters is that the Draft Guidelines use the same principles and methods to indentify instances of anticompetitive exercise of market power as other enforcement areas such as merger enforcement or single-firm conduct cases.

The uncertainty that every case-specific assessment of harmful effects creates, especially when the assessment involves oligopolistic markets, cannot be papered over by legal rules that seem to provide greater legal certainty but result in bad case outcomes. This uncertainty ought to be recognized by limiting the imposition of fines to (the few) cases where the facts and precedents leave little doubt that the sharing of information was unlawful, and abstain from fining decisions where the finding of an infringement has to rely on a more case specific evaluation of evidence.

[17] The exception are hard-core cartels. In that respect the Draft Guidelines are clear: if there is a hard-core cartel, ancillary information exchanges will be subject to the same assessment and fines.