

Warning: exchange of commercially sensitive information between competitors may result in an infringement of Article 101 TFEU by object

by Anna Kaczor

Unsurprisingly, the exchange of commercially sensitive information between competitors can result in the prevention, restriction or distortion of competition under Article 101 of the Treaty on the Functioning of the European Union (TFEU) – it often makes complex markets transparent, limits incentives to deviate, and increases the ability to monitor. The existence of an anti-competitive object and an anti-competitive effect of an agreement or a concerted practice are alternative conditions for determining the application of Article 101. Usually infringement by object occurs where certain forms of collusion between undertakings can be regarded by their very nature to be detrimental to the proper functioning of normal competition. Importantly, once an anti-competitive object has been established, it is no longer necessary to verify whether the concerted practice also had any effects on the market, which is cost efficient for the competition authorities.

This article considers which circumstances constitute an infringement of Article 101 by object. It also sets out the recent attempts to clarify this sophisticated issue of information exchanges between competitors, and provides a description of the European Commission's success and the European Court of Justice's failure to assist businesses with developing compliance strategies.

TYPES OF INFORMATION

The types of information exchanged between competitors are crucial in assessing the risks of potential fines being imposed on a company and its directors being disqualified for the infringement of competition law.

Under paragraph 81 of the draft guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements, Brussels, SEC(2010) 528/2 (“horizontal guidelines”), the exchange of commercially sensitive data between competitors is more likely to violate Article 101 than exchanges of other types of information. Sharing of strategic data can give rise to restrictive effects on competition if it reduces the parties' decision-making independence by decreasing their incentives to compete. Strategic information can be related to prices, customer lists, production costs, quantities, turnover, sales, capacities, qualities, marketing plans, risks, plans, investments, technologies, research and development programs and results.

In the Commission decision 92/157/EEC on the *UK Tractors* case – useful in classifying the types of information exchanged between competitors – eight manufacturers and importers of agricultural tractors exchanged, over an extended period of time, some historical sales data. This decision was appealed, and the Court of First Instance (CFI), now called the General Court, ruled that the information exchange system regarding historical sales data had an anti-competitive effect. This case is helpful, therefore, in ascertaining what types of information exchanges should not of themselves constitute an infringement by object under Article 101.

Information sharing does not have to be an isolated event – it may also form part of a hard-core cartel or a wider arrangement such as standardisation agreements. The information itself can

be classified as: individualised/aggregated, private/public, future/current/historic, and regarding pricing/quantity/cost/other.

CASE LAW PRIOR TO T-MOBILE

Before *T-Mobile Netherlands BV and others v Raad van bestuur van de Nederlandse Mededingingsautoriteit* C-8/08, ECR I-4529, only arrangements or practices that restrict competition “by their very nature” were considered as object cases. In object cases anticompetitive effects would arise “as a necessary consequence” of the agreement or practice (*Competition Authority v Beef Industry Development Society Ltd, Barry Brothers (Carrigmore) Meats Ltd* C-209/07). The European Court of Justice (ECJ) stated in *Irish Beef* that the parties’ intentions were not relevant to whether the object of the scheme was to restrict competition.

As mentioned before, an exchange of information may form part of a cartel. For example, in the Commission decision of October 15, 2008 in the bananas case COMP/39188 the pre-pricing communications took place before quotation prices were set by competitors (banana suppliers). Then, after setting their quotation prices on Thursday mornings the parties bilaterally exchanged them. The European Commission considered that even if only one party revealed its pricing intentions during exchanges of information, such communication constitutes a concerted practice with an anticompetitive object. The Commission found that such an exchange of quotation prices forms an element of the parties’ cartel arrangements, which have as their object the restriction of competition.

The Commission is not the only competition authority with the power to apply Article 101. Since May 1, 2004 when Council Regulation (EC) No 1/2003 entered into force (Regulation 1/2003 OJ 2003 L1/1) national competition authorities and national courts of EU Member States are required to apply and enforce, inter alia, Article 101. For instance, the Office of Fair Trading (OFT) investigated several cases regarding the disclosure of future pricing intentions. In *Independent Schools* (the OFT decision CA98/05/2006 of November 20, 2006) the OFT held that the exchange of future fees information between independent schools was anticompetitive by “object”. The exchanged information related to future intentions, was confidential, and not publicly available. The information exchange took place on a regular, highly systematic basis for a number of years. Interestingly, the timing of the exchange corresponded with the time when school fees were set. The independent schools infringed the prohibition (“the Chapter I prohibition”) imposed by section 2(1) of the Competition Act 1998 which is an English law equivalent of Article 101. The Chapter I prohibition reflects both the structure and the precise wording of Article 101(1) and (3).

T-MOBILE – A TURNING POINT?

As was mentioned by Christian Ahlborn at his presentation at the British Institute of International and Comparative Law, October 6, 2010, “A Random Walk between Luxembourg and Brussels”, the recent ECJ judgment in *T-Mobile* is highly controversial as it drastically expands the definition of an anti-competitive object. The ECJ was asked how Article 101 should be applied in a situation where the representatives of five operators providing mobile telecommunications services in the Netherlands met on one occasion, and exchanged confidential information about their intentions to reduce standard dealer remunerations for postpaid subscriptions. The court stated that this conduct falls foul of Article 101(1) as a restriction of competition by object, and examined some controversial criteria for establishing whether concerted action has an anti-competitive object. Notably, the ECJ ruled that to determine whether a concerted practice has an anti-competitive object, close regard must be paid to its objectives, and its economic and legal context. In arriving at this and other conclusions the ECJ relied heavily on Advocate General Kokott’s opinion. AG Kokott, after reviewing the case law on the anti-competitive object, noted that the subjective intentions of the parties are indicative. Subsequently, in contrast to *Irish Beef*, the parties’ intention is one factor which can be taken into account. This statement is highly debatable as an expected effect on competition should matter rather than the parties’ intention. In the view of the jurisprudence, conduct in competition law should not be penalized by reference to intention. For instance, it should not matter that the members of a hard-core cartel did not intend to create one.

The ECJ ruled that: “a concerted practice pursues an anti-competitive object for the purposes of Article 101(1) TFEU where (...) it is **capable in an individual case** of resulting in the prevention, restriction or distortion of competition within the common market (...).” The court’s approach creates additional uncertainty in an already complex area as the court’s language makes it impossible to assess the lawfulness of information sharing in a given factual scenario. If any practice that is “capable of (...) distorting (...) competition as such” falls in the “restriction by object” category, hypothetically nearly every information sharing will be regarded as unlawful unless the parties can present a plausible efficiency defence under Article 101(3). This wording would not leave any room for effects cases. Furthermore, the ECJ noted that an exchange of information between competitors which is capable of **removing uncertainties** between market participants as regards the timing, extent and details of modifications to prices must be regarded as pursuing an anti-competitive object. Defining object infringement by reference to uncertainty is, however, often severely criticised by jurisprudence, and regarded as inappropriate as all information exchanges result in the reduction of uncertainty.

T-Mobile potentially opens a Pandora's box – the broad categorisation of exchanges of information described above as an infringement by object may cause havoc. National competition authorities, with limited resources, may cherry pick only the object infringement cases, which are less work intensive and, therefore, cheaper than the effect infringement cases. Furthermore, if almost all information exchanges capable of restricting competition were regarded as an infringement by object, this would considerably lower the standard of proof and result in a vast number of Type I errors. Type I errors occur where firms do not engage in certain activities, even though some may provide benefits, because the firms are not in a position to carry out complex economic analysis for every individual situation. In other words, a case-by-case approach runs the risk of cooling beneficial firm activity, and subsequently is often detrimental to a competitive economy. That would obviously not be the best outcome for consumers and interested parties, and would not result in the effective enforcement of competition law.

UNILATERAL DISCLOSURES

A unilateral disclosure of future prices to competitors may constitute an infringement of Article 101 by object. In the CFI case of July 12, 2001, *Tate & Lyle plc, British Sugar plc and Napier Brown & Co Ltd v Commission*, joined cases T-202/98, T-204/98 and T-207/98 [2001] ECR II-2035, a meeting had taken place between representatives of British Sugar and its competitor Tate & Lyle, at which British Sugar announced the end of the price war on the UK industrial and retail sugar markets. That meeting was followed, up to and including June 13, 1990, by 18 other meetings concerning the price of industrial sugar, at which the representatives of two leading sugar merchants were also present. At those meetings, British Sugar gave information to all the participants concerning its future prices. The CFI observed that “the fact that only one of the participants [...] reveals its intentions is not sufficient to exclude the possibility of an agreement or concerted practice.”

The court referred to *Rhône-Poulenc v Commission* T-1/89 [1991] ECR II-867, in which the applicant had been accused of taking part in meetings at which information was exchanged among competitors including prices which they intended to adopt on the market. The CFI held in *Rhône-Poulenc* that an undertaking, by its participation in a meeting with an anti-competitive purpose, not only pursued the aim of eliminating uncertainty about the future conduct of its competitors but could not fail to take into account, directly or indirectly, the information obtained in those meetings. Subsequently, the Court of First Instance in *Tate & Lyle plc, British Sugar plc and Napier Brown & Co Ltd v Commission*, joined cases T-202/98, T-204/98 and T-207/98 [2001] ECR II-2035, considered that the *Rhône-Poulenc* conclusion also applies where, as in this case, the participation of one or more undertakings in

meetings with an anti-competitive purpose is limited to the mere receipt of information concerning the future conduct of their market competitors.

The OFT recently investigated the sharing of generic as well as specific confidential, future pricing information by the Royal Bank of Scotland to Barclays of which the latter took account in determining its own pricing (OFT press release 34/10 of March 30, 2010). This case involved a unilateral disclosure of future pricing intentions, from one competitor to another. Such disclosures can amount to a concerted practice which has as its “object” the restriction of competition in circumstances where that information is “at the very least” accepted by the recipient (see *Tate & Lyle v Commission*).

INDIRECT EXCHANGE OF INFORMATION BETWEEN COMPETITORS

Information sharing can infringe Article 101 even if there is no direct exchange between competitors. The OFT has investigated several cases involving “hub-and-spoke” arrangements regarding the exchange of commercially sensitive information through third parties, for instance from one retailer to another through their supplier. Following the English Court of Appeal’s judgments in *Argos Ltd/Littlewoods v OFT* [2006] EWCA Civ 1318 and *Umbro Holdings Ltd v OFT and JJB Sports v OFT* [2006] EWCA Civ 1318, it is necessary to prove the knowledge of the parties and the context of the exchange.

On April 25, 2008 the OFT issued a statement of objections alleging that two tobacco manufacturers (Imperial Tobacco and Gallaher) and 10 retailers engaged in unlawful practices in relation to retail prices for tobacco products in the UK. The OFT found that the infringing agreements were, by their very nature, capable of restricting competition and therefore had an anti-competitive object in breach of the Chapter I prohibition. The alleged infringements included indirect exchange of proposed future retail prices between competitors: for example, Sainsbury’s to Tesco via Imperial Tobacco, Imperial Tobacco to Gallaher via Asda and Imperial Tobacco to Gallaher via Shell (OFT press release 82/08 of July 11, 2008). Interestingly the exchange of information between competitors took place via a third party.

There are similar cases in the US. For instance, in the *US Airline Tariff Publishing Company* 1994-2 Trade Case (CCH) 61, 659 (ED Pa 1977), eight of the largest US airlines used a computer reservation system to disseminate actual and intended fare information through travel agents. The system allowed the airlines to view competitors’ actual fares and to post future fare intentions which other airlines could see without having to implement them. Consequently, the information sharing between competitors allowed firms to agree on focal prices, and to monitor any understanding achieved through the disclosure of actual prices. The Department of Justice

obtained a consent decree which barred airlines from continuing to exchange the information.

COMMISSION GUIDELINES

Paragraph 42 of the guidelines on the application of Article 81 of the EC Treaty (now Article 101 TFEU) to maritime transport services (*Official Journal* C245, p 2, 2008/09/26, Notice 2008/C245/02) states that an exchange of information may have in itself the object of restricting competition. They refer to the ECJ judgment in the case of *Commission v Anic Partecipazioni*, Case C-49/92 P, [1999] ECR I-4125, 1999/07/08, paragraphs 121 to 126. The court ruled that, subject to proof to the contrary, there must be a presumption that the undertakings participating in concerting agreements and remaining active on the market take account of the information exchanged with their competitors. The Commission found that Anic had infringed Article 101(1) by participating in an agreement and concerted practice by which the producers supplying polypropylene contacted each other and secretly met regularly over a long period where they, inter alia, exchanged detailed information on their deliveries. The Commission ordered the undertakings to terminate any exchange of information of the kind normally covered by business secrecy and to ensure that any scheme for the exchange of general information excludes any information from which the behaviour of specific producers could be identified. This concerted practice falls under present Article 101(1) even in the absence of anti-competitive effects on the market. The court noted that concerted practices are prohibited, regardless of their effect, when they have an anti-competitive object.

The draft horizontal guidelines set out the Commission's position on the information exchange. Pursuant to Paragraph 68 of the guidelines "information exchanges between competitors of individualised data regarding intended future prices or quantities should ... be considered a restriction of competition by object within the meaning of Article 101(1)". This wording implies that a unilateral public disclosure of future pricing is not treated as an object infringement.


Information regarding "intended future quantities" could include future sales, market shares, territories, or customer lists. The guidelines provide an example of a restriction by object, namely exchange of "intended future prices." In this example, a trade association of coach companies in country X disseminates individualised information on intended future prices to the member coach companies. The information contains: the intended fare, the route to which the fare applies, the possible restrictions to this fare (ie which consumers can buy it), the period during which tickets can be sold for the given fare, and the time during which the ticket can be used for travel.

An infringement by object under Article 101 also occurs in the case of information exchanges on current conduct

that reveal intentions on future behaviour, and in the cases where the combination of different types of data enables the direct deduction of intended future prices or quantities. There may be other types of information exchanges, which would normally be considered as infringements by object, for example private individualised exchanges between competitors on prices and market share. These types of information exchanges run the risk of being fined as cartels. If there is a hard-core cartel, ancillary information exchanges will be subject to the same assessment and fines.

CONCLUSIONS

Case law clearly states that the sharing of disaggregated, confidential information on future intentions between competitors constitutes an infringement of Article 101 by object. This information can be unilaterally disclosed to competitors, disclosed through a third party or simply exchanged between competitors to result in an infringement by object. The exchange of information can take place over a longer period of time or only once to amount to the object infringement. Information sharing can also form a part of a wider arrangement, for example a cartel arrangement. As a warning for wrongdoers, even the mere participation in a meeting with competitors, where sensitive information regarding future prices has been unilaterally disclosed, may result in an infringement of Article 101 by object (see *Rhône-Poulenc* case). The ECJ's finding in *T-Mobile* that a one-off exchange of information at a single meeting falls foul of Article 101(1) as a restriction of competition by object, is also a cause of concern.

Because case law is unclear in delineating infringement by object and by effect, especially after the recent *T-Mobile* derailment by the ECJ, the Commission's horizontal guidelines can be found helpful. They categorise exchange of information on future prices and output as a "restriction by object". Delineating infringements on the basis of whether the disaggregated information on future prices and output is exchanged in private (object infringement) or in public (effect infringement) may further reduce legal uncertainty. In conclusion, some types of information exchanges should of themselves be considered as: infringement by object (ie future disaggregated confidential information on prices/output), infringement by effect (ie disaggregated historical or current information on sales on a highly concentrated oligopolistic market), or as non-infringement (ie historic public aggregated information). There are also grey areas. As the guidelines and case law do not contribute to shrinking them, further clarification is needed. 

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