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Information Exchanges and Competition Law: A Few Comparative Law Thoughts

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I. INTRODUCTION

Information exchanges between competitors have been an object of interest for competition authorities on both sides of the Atlantic for decades now; in the European Union since the 1970s with cases such as the *IFTRA Glass Containers* and later the *UK Tractor* information exchanges, and in the United States as far back as the 1920s with cases such as *Maple Flooring* or *American Column & Lumber*. Information exchanges between competitors have not only given rise to a considerable amount of cases, but also to interpretative notices by the respective competition authorities. The U.S. Federal Trade Commission ("FTC") and the Department of Justice ("DOJ") jointly issued in 2000 the *Antitrust Guidelines for Collaboration Among Competitors*,[2] and the European Commission issued in 2011 the *Guidelines on the Applicability of Article 101 of the Treaty on the Functioning of the European Union to Horizontal Cooperation Agreements*.[3]

In spite of this attention, the matter continues to generate considerable confusion in many instances, which may be due, among other things, to the fact that most information exchanges present mixed features and can rarely be regarded as clear-cut. Information exchanges that increase transparency, for instance, are in some circumstances pro-competitive, because they may enable purchasers to compare offers more easily, or may enable the formation of *ad hoc* offers suitable for individual clients—both of which should be viewed positively. In other circumstances, however, arrangements that enable transparency may also be a device for collusion, enabling monitoring and eventual punishment of deviating offers. A single information exchange that under some circumstances is pro-competitive may look anticompetitive in other circumstances and, what is often the case, the same information exchange under the same circumstances may present both pro-competitive and anticompetitive features.

Grey is most often the color of information exchanges.

II. THE COMPETITIVE ASSESSMENT OF INFORMATION EXCHANGES.

The competitive assessment of information exchanges requires sound business and legal judgment based on precedent, along with a careful consideration of the business purpose of the information exchange. Economics is undoubtedly a key tool in the analysis of many of these agreements. Very often, a proposed information exchange scheme will not look exactly the same as anything on record. Consequently, the assessment of information exchanges is generally a

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[2] *Available at* http://www.ftc.gov/sites/default/files/documents/public_events/joint-venture-hearings-antitrust-guidelines-collaboration-among-competitors/ftcdojguidelines-2.pdf.

[3] OJ 2011/C 11/01, *available at* http://europa.eu/legislation_summaries/competition/firms/l26062_en.htm.

case-by-case exercise, with the difficulty that there are few "hard" rules that provide the "absolute" certainty that jurists so often long for.

Notwithstanding the foregoing, there are of course a few rules of thumb that may be extracted from the interpretative notices of the European Commission, the DOJ and the FTC's joint Guidelines, as well as from the considerable body of case law from the various competition authorities. In summary:

1. Information exchanges are generally not *per se* forbidden and will be considered under the rule of reason under U.S. law,[4] even though sometimes the line between information exchange (for instance on future prices) and price-fixing itself may be very thin. In some instances information exchanges between competitors will be looked at harshly and be condemned under Sec. 1 of the Sherman Act; in particular, where "the sharing of information related to a market in which the collaboration operates or in which the participants are actual or potential competitors may increase the likelihood of collusion on matters such as price, output or other competitively sensitive variables."[5] Ultimately, information exchanges related to prices that are intimately associated with price-fixing may be dealt with as *per se* illegal (conceptually it may be difficult in those instances to delineate one from the other).
2. Under EU competition law, an information exchange "can only be addressed under Article 101 if it establishes or is part of an agreement, a concerted practice, or a decision by an association of undertakings."[6] This approach echoes the principle that the information exchange will be dealt with as part of price-fixing (or as a restriction by object[7]) if its purpose and effect make it difficult to separate the information exchange itself from a price-fixing scheme. The view that this type of information sharing is anticompetitive *per se* or "by object" is confirmed by the more recent Commission Guidance on restrictions of competition "by object" for the purposes of defining which agreements may benefit from the *De Minimis* Notice.[8]
3. Effects of information sharing agreements must be assessed on a case-by-case basis with the test here being one of likelihood. It is more likely that an information exchange will be anticompetitive if conditions are in place for easy coordination; in particular, if:
    a) the market where the arrangement takes place is more transparent than not;
    b) the market is more concentrated than not;
    c) the market is non-complex, more stable, and symmetric (*e.g.*, commodity markets).
    d) the market is oligopolistic; and

[4] *Maple Flooring Mfrs. Association v. US* (1925).
[5] U.S. FTC & DOJ Collaboration Guidelines, *supra* note 2, at point 3.31.
[6] Commission Horizontal Guidelines, *supra* note 3, at point 60.
[7] *See* point 72 of the Guidelines, *Id.*
[8] C (214) 4136 final.

e) the companies are homogeneous in terms of costs, demand, market shares, product range, capacities, etc.

4. Regarding the nature of the data, the following categorizations drawn from the case law, and as codified in the Commission Horizontal Guidelines,[9] are helpful in the assessment of which information exchanges are more likely to fall foul of Article 101:

    a) Sharing of strategic data is more likely to give rise to concerns. Strategic data include prices and price increases, discounts, rebates, customer lists, production costs, quantities, turnovers, sales, capacities, qualities, marketing plans, etc.

    b) Market coverage of the information exchange should be sufficiently narrow, enabling other competitors not participating in the information exchange to constrain any anticompetitive effects of the information exchange. The theory here works very much like with cartels, so that a cartel covering only a small portion of the market could arguably have no effects because that cartel would be easily disciplined by competitors that are not members of the cartel. In Europe at least, however, the risk is that regardless of the effects this is to be treated as a *per se* or by object infringement anyway (without prejudice to the recent ECJ Judgment in *Cartes Bancaires*, commented on below).

    c) Aggregated information, provided the aggregation does not enable the inference of individualized companies' data, is not likely to be anticompetitive.

    d) The age of the data is relevant; exchange of historic information is not problematic. What data is to be considered as being historic is a matter for consideration on a case-by-case basis as it depends on the relevant market at hand.

    e) Exchange of genuinely public information (i.e., information that is equally accessible, in terms of access costs, to all competitors and customers alike) does not pose an issue.

5. Even when information exchanges take place in markets and regard matters likely to be problematic in view of the above, justifications may be available for those exchanges where there are, for instance, important efficiency gains in the form of cost savings. For example, information exchanges on past conduct of consumers in the insurance or financial markets make it possible for companies to provide more individualized and tailored offers, which may be beneficial to consumers in parameters such as prices and other factors. Transaction cost economics may also sometimes justify information exchanges between competitors in markets characterized, for instance, by a great number of transactions and limited resources on the supply side. In all of these instances, of course, the business justification must be legitimate, any restrictions on competition must be proportionate to the ends sought, and consumers must ultimately share in the benefits of the information exchange.

[9] *Supra* note 3.

The above is a summary of principles generally applicable both under EU and U.S. law, which are hopefully useful to assess the legality of information exchanges between competitors. A general issue—at least in Europe—which has to an extent already been delineated, is that competition authorities sometimes tend to consider some kinds of information arrangements as forbidden by object. This possibility of prohibition by object may sometimes be used as a sort of excuse by competition authorities to arrive at rather quick conclusions, which may in turn feed concerns that not enough economic analysis is used when considering some of these arrangements.[10]

In this regard, the need for a careful weighing of the economics of the particular arrangement may also seem to be supported by the recent judgment of the European Court of Justice of September 11, 2014, *Groupement des Cartes Bancaires*,[11] which introduces a compelling case for taking account of the structure of the relevant market, the goods concerned, the goals sought by the horizontal arrangement, etc. When finding that a given conduct is restrictive "by object," competition authorities should go beyond the actual wording of the measure at hand in order to inquire to what extent that wording reveals a sufficient degree of harm that would enable them to characterize such a conduct as being anticompetitive by object. One must remain hopeful that the *Cartes Bancaires* case will be an enzyme for improvement in the review of grey conduct, such as some information exchanges, by competition authorities.

III. THE ROLE OF TRADE ASSOCIATIONS IN INFORMATION EXCHANGES AND THE SUBSIDIARY LIABILITY OF TRADE ASSOCIATION MEMBERS FOR ILLEGAL INFORMATION EXCHANGES FACILITATED BY THE ASSOCIATION

The role of trade associations in information exchanges has been extraordinarily important in recent years, with many trade associations playing a crucial part in collecting information and relaying it back to its members. The problem here arises when trade associations go beyond their role of facilitators of genuinely aggregated information and act as a means to share detailed information in a way that may actually or potentially affect competition. When this happens, information exchanges facilitated by associations are perceived as linked to the existence and functioning of cartels. In Spain, for instance, there have been quite a few cases involving illegal information exchanges facilitated by associations in the last few years (*e.g.*, paper envelopes, pallets, hair care products, movie distribution, and a currently ongoing investigation in the car sector where an illegal arrangement is allegedly said to have taken place).

The above-mentioned activity by trade associations as information exchange facilitators should be considered with caution. For practical purposes, most—if not all—significant companies doing business in Europe are members of one or many trade associations. Any disregard by association members of the collection and management of information by the associations to which they belong may cost those companies money in the form of subsidiary liability, which is foreseen both by EU and Spanish competition laws.

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[10] *See*, for instance, P. Posada de la Concha, & S. Garcia de Frutos, S. *Intercambios de información entre competidores: actuaciones de la CNMC en un caso reciente*, ANUARIO DE LA COMPETENCIA 2014, Fundación ICO, Spain.

[11] Case C-67/13.

Indeed, the Spanish Competition Act foresees, with almost identical drafting to that of Article 23.4 of EC Regulation 1/2003,[12] that when a trade association is required to pay a fine: *(i)* it must first be requested from the association concerned; *(ii)* if the association is not solvent, it is obliged to call for contributions from its members to cover the amount of the fine; *(iii)* if the individual members do not contribute within the time limit set by the Competition Authority, the latter may claim the fine directly from any of the association members who held positions in the governing body of the association at the time the anticompetitive conduct took place; and *(iv)* if all else fails, the Competition Authority may claim the fine from any member of the association who is active in the market where the infringement occurred. However, members of the association need not pay when they show that they have not implemented the infringing decision of the association and either were not aware of its existence or had actively distanced themselves from it before the investigation on the matter started.

It is striking how few publicly available precedents there are on the application of the rules mentioned above relating to subsidiary liability of trade association members for conduct of an association; and how little insight those counted precedents provide, both at the European Union and national levels. Only in recent months has the Spanish NCA issued a decision applying this provision in connection with an anticompetitive conduct case (including information exchanges) by an association in a market related to a particular type of wine grape. There is also a decision related to a poliuretan foam cartel (including participation of a trade association), which only marginally touches on the point. In view of the applicable statute and the limited case law on the topic, our initial conclusions on this matter are as follows:

1. It is not necessary that the association be declared insolvent by a commercial court for the system of subsidiary liability to kick in. It is enough if the association unilaterally declares itself insolvent.
2. The wording of the relevant provisions indicates that the subsidiary liability by association members is a form of joint and several liability, so that in principle the National Competition Authority ("NCA") or the European Commission could choose to claim from a single member the entire amount of the fine (and leave it to that infringer to later make a claim against the other members of the association). But the provision also uses the word "may," indicating that the authorities may also choose to claim the amount of the fine from all or some of the association members and may do so equally or using a weighted system of some kind.
3. In the only precedent that deals with this matter specifically, the NCA seems quite ready to accept the non-participation/distancing defense from the association members. Successful defenses have included the following:
    a. Proof that an individual member ceased to be a member of the relevant association prior to the admitted facts.
    b. If the cessation as a member of the association took place subsequent to the petition by the member to leave the association, the latter is taken as the relevant

[12] Article 23.4 of EC Regulation 1/2003, of 16 December 2002, on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (OJ L1/1, 2003).

date; again, a relevant point when associations take some time to process members' requests, or in those cases where the association makes it necessary to pay any outstanding membership fees prior to removing the requesting member from the association.

   c. Active distancing from the illegal information exchange or conduct and evidence of not having implemented the association's recommendation. This includes, for instance, evidence that the recommended pricing was not implemented, or that it was implemented only prior to the illegal conduct. Evidence of active distancing seems difficult to find in practice.

4. Even if a member of a trade association was a successful leniency applicant, it does not shield that member from subsidiary liability in cases when the association is insolvent. This may present the paradox that a company that is granted immunity ends up paying anyway if the relevant trade association is fined, but the association is insolvent. Policy considerations regarding incentive reductions for leniency aside, the NCA considers that the source of liability is not directly the conduct of the association member/leniency applicant (in connection with which the latter may have been granted immunity), but the conduct of the association (which in turn is insolvent) and the *ex lege* subsidiary liability of association members.

In conclusion, trade associations have been and are likely to be in focus as information exchanges facilitators. Association members should not turn a blind eye on conduct by trade associations; on the contrary, they should actively seek adequate compliance, since individual association members may be deemed liable on a subsidiary basis for information exchanges implemented by the association, even if such members have in practice had little responsibility for such information exchange.