VAN BAEL & BELLIS

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The new Horizontal Guidelines –
Staking out new boundaries on information exchange?

On 1 June 2023, the European Commission ("Commission") adopted the final version of its new horizontals package, comprising revised Block Exemption Regulations on Research and Development Agreements and Specialisation Agreements and revised Guidelines on horizontal cooperation agreements ("Horizontal Guidelines"). The new Block Exemption Regulations and Horizontal Guidelines, will replace the existing equivalent instruments dating from 2010/2011, will be applicable as of 1 July 2023.

In a series of VBB Client Alerts, we examine a number of key aspects of the Commission's new horizontals package. In this Client Alert, we look at the treatment of information exchange between competitors in the new Horizontal Guidelines, where the Commission has substantially expanded its guidance beyond that provided in the 2011 Guidelines. Staking out a position based on the most recent case law of the European Courts, the new Guidelines provide important clarification in areas where the Commission and national enforcers have been pushing the boundaries of Article 101. We focus on three such areas: (i) when the exchange of information could be regarded as a cartel-like infringement (a restriction of competition "by object"), (ii) unilateral announcements and signalling and (iii) "hub-and-spoke" infringements.

In sum, while providing useful indications, the Guidelines leave substantial uncertainty as to when an exchange of current or recent information risks being considered a "by object" restriction by the Commission. At the same time, the Commission includes valuable guidance on measures that can be used to mitigate compliance risk, including the use of "clean team" arrangements in the context of M&A transactions and horizontal cooperation agreements. In relation to signalling, the Guidelines set out a consumer benefit focused test for the public announcement of future price or other future strategic information that may present challenges to companies in informing their shareholders of their plans, e.g., in earning calls and other investor communications. On "hub-and-spoke" infringements, the Guidelines provide welcome clarity, in particular in relation to situations where a customer shares one supplier's pricing information with another as part of its commercial negotiations.

Information exchange as cartel: restriction of competition "by object"

Since the publication of the 2011 Guidelines, the case law of the European Courts and the decisional practice of the Commission have taken an ever more sceptical view towards information exchanges between competitors, in particular through an increasingly extensive interpretation of when such exchanges can be regarded as a "by object" infringement of Article 101 TFEU, i.e., as sufficiently harmful to competition to be prohibited without the need to assess their effects (evidenced in cases such as Smart Card Chips and Car Emissions). The distinction between restrictions of competition "by object" and restrictions "by effect" is particularly significant in the area of information exchange between competitors given the risk of a "by object" exchange being regarded as akin to a cartel and consequently attracting heavy fines.

Based on the case law, the Guidelines cite as examples of "by object" infringements exchanges between competitors of (i) current pricing and future pricing intentions, (ii) current and future production capacities, (iii) current or future commercial strategy, (iv) forecasts of current and future demand, (v) forecasts of future sales and (vi) future product characteristics. The case law's broadly formulated statements leave substantial uncertainty as to when the exchange of current and recent information alone (e.g., current and recent sales volumes, capacity or demand) risks being considered a "by object" restriction. This may be particularly significant in the case of current and recent information exchanged through trade associations or other industry bodies for statistical and market research purposes.

Apparently conscious of this, the Guidelines stress that each case must be assessed in its specific context and that the key consideration is whether the exchange "is capable of removing uncertainty between participants regarding the timing, extent and details of the modifications to be adopted by the undertaking concerned in their conduct on the market". In other words, the Commission appears to suggest that it will not necessarily regard each and every exchange of information falling within the categories identified in the case law as a "by object" restriction, but that this will depend on the specific circumstances of the exchange. Moreover, the Guidelines make it clear that it is when competitors exchange information relating to their future conduct on prices or quantities that they are particular likely to restrict competition by object. However, while this guidance is useful, it clearly only goes some way to mitigate uncertainties as to how to assess the exchange of current and recent data. This suggests that measures such as appropriate aggregation and aging of data will become even more important tools to mitigate competition law risk in the future.

Indeed, elsewhere the Guidelines provide important practical pointers as to how companies can mitigate the risk of competition law infringements arising through the exchange of information, ranging from implementing access and use controls to the steps that a company should take when distancing itself from an inappropriate disclosure by a competitor. Significantly, for the first time, the Commission highlights in the Guidelines the possibility of using "clean teams" to mitigate the risk of exchanging competitively sensitive data between competitors (e.g., in the context of M&A transactions or horizontal cooperation agreements). Regrettably, the guidance given on this issue is not extensive and the apparent requirement that clean team members not be involved in a company's "commercial operations" appears overly broad. While almost any function in a company can be argued to be related to its "commercial operations", it is generally the involvement of personnel whose functions involve competitively strategic decision making (e.g., on pricing or volumes) that in practice can generate concerns and require the use of clean team measures (e.g., quarantining).

Unilateral announcements and signalling

A further important innovation in the new Horizontal Guidelines is the significant attention paid by the Commission to the issue of unilateral announcements and signalling. While the 2011 Guidelines made passing mention to unilateral announcements, the intervening period has seen this area come under sharpened focus from the Commission as well as national competition authorities in cases such as *Container Shipping, Mobile Phone Operators (Netherlands)* and *Private Motor Insurance (Ireland).* This is an area where it is important that the line between legitimate public announcements and illegal invitations to collude be made clear. In this regard, the new Horizontal Guidelines restate and clarify the application of the legal standard rather than signalling an intention to expand it further. To that extent, the clarifications and practical examples provided by the new Guidelines are welcome in promoting legal certainty and in

indicating to companies and their advisors the forms of unilateral public announcements that are most likely to generate concerns. At the same time, they appear to raise significant questions as to the ability of companies to make announcements to their investors regarding future strategy without running afoul of Article 101, which may be difficult to manage in practice.

As a starting point, the Guidelines recognise that information that *"has been put in the public domain for legitimate reasons – and therefore has become readily available [...] to all competitors and customers – is usually not commercially sensitive".* At the same time, the Guidelines make it clear that the disclosure of competitively sensitive information through a public announcement (e.g., on the firm's website, at a public event or in a newspaper) does not exclude the possibility of the announcement forming part of an illegal concerted practice. In this situation, according to the Commission, such public disclosure may "*form part of a communication channel to signal future intentions to behave on the market in a specific way or to provide a focal point for coordination*". Consistent with the stance taken, e.g., in the *Container Shipping* case, the Commission indicates that the key factor in this assessment is whether the public announcement benefits consumers by assisting them in making informed purchasing decisions.

This implies that the disclosure of otherwise competitively sensitive information (such as the public advertising by retailers of their prices) that benefits consumers (by allowing them to easily compare prices and make informed purchasing choices) is unlikely to be regarded as creating an illicit communication channel. By contrast, as the Commission concluded, e.g., in the *Container Shipping* case, the public announcement of future pricing intentions *that does not commit the disclosing party to its customers* is unlikely to create consumer benefits, as the supplier may revise the announced price before it becomes effective and it therefore cannot be relied on by customers to make purchasing decisions. Instead, such non-binding announcements of pricing intentions may be regarded as facilitating collusion by signalling the disclosing party's intended strategy to its peers and allowing them to adapt their intended pricing and signal this accordingly through subsequent "reciprocal" public announcements.

In this context, the Guidelines highlight that public statements by company executives, e.g., in the context of earning calls, shareholder meetings or industry conferences, which reveal the company's intended strategy, but cannot be regarded as having any consumer benefit may similarly be regarded as an invitation to collude. The strict test that the Commission applies may leave companies facing a significant practical conundrum. While there may be well extreme cases where such public statements by company executives can properly be regarded as a communication channel for collusion, the standard applied by the Commission – which focuses exclusively on whether the announcement has a consumer benefit – also risks catching companies' public statements on future strategy that have the otherwise legitimate purpose of informing their investors.

"Hub-and-spoke" infringements

The new Guidelines also shed light on the Commission's approach to the assessment of so-called "hub-and-spoke" infringements, i.e., where one party (e.g., a distributor) acts as a conduit for the indirect exchange of competitively sensitive information between competitors (e.g., competing manufacturers). This is an area where the relevant standards are not particularly well developed in the case law of the European Courts, particularly when compared to some other jurisdictions, such as the UK. Based on the little direct precedent available, the Guidelines bring a degree of clarification on how the Commission will assess when information exchanged between competitors via a third party will amount to an infringement.

The Guidelines indicate that, in the case of an indirect exchange of competitively sensitive information via a third party, an infringement will arise where *"the undertaking that shares the commercially sensitive information expressly or tacitly agrees with the third party that the third party may share the said information with the undertaking's competitors, or where that undertaking intended, via the third party, to disclose commercially sensitive information to its competitors".* According to the Guidelines, this may be the case when the undertaking that discloses the information *"could reasonably have foreseen that the third party would share the information with the undertaking's competitors and it was prepared to accept the risk which that entailed".*

While, in the context of supplier-customer price negotiations, it may well not be unexpected that a

customer disclose one supplier's price to another in order to negotiate better conditions, the Guidelines helpfully clarify that *"competition law does not prevent customers from independently disclosing one supplier's pricing offer to another supplier with a view to obtaining better commercial conditions, such as a lower price"*. However, they qualify this by stating that *"[s]uch instances have to be differentiated from situations where a customer has knowledge of an anti-competitive arrangement between suppliers and the exchanges information in order to implement such arrangements"*. The knowledge of the customer is accordingly key in the assessment.

The Guidelines go on to state that the competitor receiving the information will equally participate in an infringement if it is aware of the anti-competitive objectives pursued by the competitor sharing the information and the third party, *"and intended to contribute to those objectives by its own conduct"*. Presumably, in this context, applying the standard relevant in concerted practice cases, it will be sufficient that the receiving competitor did not distance itself from the receipt of the information from the third party in order to be found liable for an infringement (where it is sufficiently aware of the anti-competitive objectives of its competitor). In addition, relying on the now well-established case-law on facilitators, the Guidelines also clarify that a third party may also be liable for an infringement where it intends to contribute by its own conduct to the common objectives of the participants to the exchange and was aware of the anti-competitive conduct or could reasonably have foreseen such conduct and was prepared to take the risk.

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