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Trade Associations concerned about draft Commission guidelines on the applicability of Article 101 to horizontal co-operation agreements - Competitive assessment of information exchange

The undersigned trade associations have carefully studied the European Commission's draft for new guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal cooperation agreements (SEC(2010) 528/2). We foresee the risk that these new guidelines will create considerable legal uncertainty for many exchange of statistical information systems. This could be a reason for trade associations to discontinue such procedures, whereas the only objective of these exchanges is to obtain a clear picture of the economic climate in the sectors concerned, which should in our view be considered perfectly legitimate. In addition, these statistics often serve the general public as they are relied upon and used as the basis for decision-making by public authorities, e.g. the European Commission and national competition authorities, when assessing markets and market shares in a merger control procedure.

Many trade associations in the European industry provide services to their members and (often) to the general public by collecting data on sales in terms of quantities or turnover in the sector concerned. The collected data, provided by the members of the trade associations, are combined by the trade associations and presented to members as aggregated information on the economic climate.

The trade associations have until now been guided by the EC jurisprudence, especially in the case of exchange of information between tractor and agricultural machinery manufacturers, as reflected in the Commission's Competition Report 1999, pages 156-158. The Commission stated in the report, as a principle for the future, that aggregate market data less than twelve months old may be exchanged if supplied by at least three different companies. As a conclusion from this jurisprudence, the Commission stated in the report that these principles set out clear guidelines for any similar exchanges of information in other economic sectors as highly concentrated as the market for tractors and agricultural machinery.

On the basis of this jurisprudence, European industry has indeed welcomed these principles and adopted them for many years as clear guidelines for presenting statistics on the economic climate to member companies and for exchanging information.

The draft guidelines include a specific Chapter 2 on the general principles for the competitive assessment of information exchange, which may indeed be very helpful as guidelines for trade associations to decide whether their system complies with EC competition law. In par. 85 of this draft, it is stated that exchanges of genuinely aggregated data, i.e. where the recognition of individualised company level information is sufficiently difficult, are less likely to lead to restrictive effects on competition than exchanges of company level data. This is already a major deviation from the clear guideline in the 1999 Competition Report that aggregate market data may be

exchanged if supplied by at least three companies. Thus, it would be extremely useful if the guidelines could specify what is meant by “genuinely aggregated” (i.e. number of companies as in the previous principles).

One of the major problems for trade associations is the text in the draft guidelines in the same par. 85, which explicitly states that the exchange of aggregated data may also lead to a collusive outcome. The example which follows this general statement concerns exchange of information on prices, like practically all examples from par. 98 to par.104. We wish to point out to the Commission that statistics on the economic climate of most trade associations are restricted to the aggregated data on sales, presented in units or in turnover. We do not see any risk of a collusive outcome or any other risk of restricting competition if the collected data are restricted to statistics on sales, if presented in units or in turnover. This would indeed only reveal the economic climate as such in the sector concerned and would not disclose any defecting behaviour from an individual company, as such behaviour would result in a decrease of sales by the other companies. The whole statistical figure would be the same and companies would therefore not detect any individual defecting behaviour.

The Commission should therefore make it absolutely clear in its new guidelines on horizontal agreements that a system for exchanging information constitutes no problem under competition law, if the information is genuinely aggregated and is restricted to data on sales, presented in units or in turnover, thereby giving an honest picture of the economic climate. This would make the guidelines very helpful with respect to statistics, which are a major service of trade associations to their members and the general public.

Furthermore, as many statistics are based on data that are only one month old, the Commission could indicate in par. 86 (age of data) that the data may be less than one year old. In order to achieve legal certainty for historical data, it would be highly appreciated if the Commission could reinstate its former position that historical data (i.e. more than one year old) generally do not present any competition law problems. We consider that the age of such data could be just one month, as we see no risk of a collusive outcome if the exchange is restricted to sales in units or in turnover. In this respect, the Commission’s positive guideline is needed in order to prevent any legal uncertainty.

Another issue is the exchange of information on costs. It may be interesting for companies to share aggregate information on prices of raw materials and components. This may indeed be pro-competitive, as companies may use this information as a benchmark to force their suppliers to offer better prices. Clearly the guidelines on purchasing agreements (as presented in Chapter 5 of the draft guidelines) should be respected, but the information exchange as such would only provide information to individual purchasers on the average purchase price. In this case, we can even imagine that the exchange of company level data could still be acceptable, as it would be considered pro-competitive. The price of raw materials and components is normally just one of many cost factors for the companies involved, so the risk of harmonisation of sales prices downstream does not seem to exist. However in the draft guidelines it is automatically assumed that information relating to costs is commercially sensitive (see par. 81 and par. 101).

As the Commission may be referring to sharing information on total costs at company level, which would certainly be anti-competitive, we need clear guidelines to understand in which respect the sharing of data on costs may be a problem, if this would not regard total costs at company level, but aggregate data or company level data on costs, specified for each individual supplier or as an average figure for the purchased products concerned.

Industry would benefit hugely from clear guidelines concerning these issues. Failing to provide clear guidelines would force many trade associations to reconsider whether their system for exchanging information on the economic climate complies with competition law and whether to continue such a process as it could present problems in the competition law field. It is important to remember that these statistics not only constitute the “raison-d’être” of many trade associations, but also often serve as an invaluable means of information for the general public, media and public authorities, as mentioned above.

The signatories of this statement hope that the Commission will take due account of this position. We remain at the Commission's disposal for a meeting and an exchange of views.

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<i>EURELECTRIC</i>	<i>Union of the Electricity Industry</i>
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