POSITIVE COMPETITION

New chapter on information exchange

An economist's view

129th GCLC Lunch Talk

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This is probably the most difficult chapter to write

You can exchange information on pretty much any dimension related to demand, supply or strategy

- This explains why this was the first chapter about "General Principles on the competitive assessment of information exchange"
- Whether an information exchange is a restriction by object or by effect will always be very case specific
- Very difficult to give very precise guidance, so getting the principles right is paramount

Information exchanges are closely related to concerted practices but this is not only about concerted practices

- One can have agreements about an organized exchange of information
- Otherwise, the disclosure of information itself gives rise to the concerted practice but this can lead to positive or negative material effects on the market

An information exchange can give rise to a concerted practice to cartelize a market

- Cartels are a conspiracy against the public, excluded from the current (para 9) and draft (para 50) guidelines
- One does not need to give any guidance to cartelists other than the certainty that they will be caught
- This social consensus requires that authorities resist to the temptation of extending the definition of cartels just because it makes their enforcement easier

The object box

Current object box

- "Information exchanges between competitors of individualised data regarding intended future prices or quantities" (para. 74)
  - If private most likely a cartel

New object box

- "An information exchange will be considered a restriction by object when the information is commercially sensitive and the exchange is capable of removing uncertainty between participants" (para. 448)
  - **In practice it says that any concerted practice is a restriction by object**
  - Based on a laundry list of general conducts with references to cartels (para. 424)
  - It says "will be considered a restriction by object" not "may be", such that the mention of the legal and economic context is pure cosmetics

Conceptual issues with the new object box

Concerted practices will be considered as a restriction by object even if they lead to the same outcome than agreements that are not restriction by object

- Paragraph 448 supersedes and contradicts all the other object boxes of the guidelines
- Agreements might be more public and committing by nature than concerted practices but this does not seem to be a sufficient reason

This approach does not take the legal and economic context seriously

- "If the information exchange does not exceed what is necessary for the legitimate cooperation between competitors, then even if the exchange has restrictive effects on competition within the meaning of Article 101(1), the agreement is more likely to meet the criteria of Article 101(3) than if the exchange goes beyond what is necessary to enable the cooperation"
- The issue is not whether there is a procompetitive aspect that balances the restrictive effect that was presumed in a restriction by object
- It is about the existence of a plausible positive material effect (and to a lesser extent here the capability of the exchange to lead to material negative effects) which make a conduct not being a restriction by object in the first place (in general or in a particular case)

How can one identify a restriction by object?

1. "[A]scertain whether the agreement in question falls within a category of agreements whose harmful nature is, in the light of experience, commonly accepted and easily identifiable" (para. 42)
   - "experience may be understood to refer to 'what can traditionally be seen to follow from economic analysis, as confirmed by the competition authorities and supported, if necessary, by case-law'"
2. Does "the legal and economic context of the agreement […] call into question its presumed anticompetitive nature" (para. 53)

- "The concept of restriction of competition is, after all, mainly an economic concept" (para 72)
- The standard for the assessment of an alternative procompetitive rationale of the object of a practice is one of "first sight" or "plausibility" (Para. 74 to 82)
- "[A]ny time an agreement appears to have ambivalent effects on the market, an effects analysis is required" (Para. 81)

Reference:

- Opinion of advocate general Bobek delivered on 5 September 2019 Case C-228/18

The new object box cannot be right

How can the assessment of Example 1 (which is logically correct) be consistent with para. 448?

- "this exchange of information would not constitute a restriction of competition by object because the hotels exchange **present data** and not information on intended future prices or quantities."
- How is "present" not related to "arrangements relating to current and future demand" or to "an undertaking's current state", which are meant to be object restrictions?

It is possible to find counter-examples to each of the bullets of para. 424

- Manufacturers of electronic appliances starting to discuss stopping to include chargers and just all coordinate on USB-C
- This is related to "future product characteristics which are relevant for consumers" but this is fairly different from *Car Emissions*
- It is so *not anticompetitive* that the EC even passed a regulation to solve this coordination issue

The object box has been widened to cover cartels

- But then it has become too wide and I am sure I am not the only one who noticed it
- The likely "fix" will be to settle for "may/will generally be" a restrictions by object: this provides no guidance at all
- Why do you want to cover cartels in the first place here?

Taking a step back

When firms agree about future prices (or quantities)

- They could agree to decrease prices or increase quantities but this is more likely they are conspiring to achieve the opposite (unless there is a worldwide pandemic)

When firms discuss future prices (or quantities)

- They are most likely trying to influence each other's strategy in the same direction as above

When firms discuss other future dimensions

- Do we think that this is necessarily for anticompetitive reasons? All the other chapters seem to suggest otherwise
- Agencies might prefer that firms enter into formal agreements but does this justify a different treatment?

When firms discuss past or current states

- By definition this cannot be to influence this past or current state
- Whether this is likely to support coordination requires an effect analysis on the likelihood of coordination
- Whether current states are a signal (anticompetitive) or a commitment (procompetitive) is also very case specific

Where does this bring us?

I am pessimistic that the system will self-correct

- The only way it will self-correct is when someone opens the window and let the ECJ speak
- Otherwise, we are taken in a web of self-quotations, agencies confusing their established practice with established case-law
- But will any of these cases end up in Court when they can be settled?

Guidance at odds with business reality harms compliance

- There is always a temptation for enforcers to look at the rear mirror and make sure their guidelines do not contradict their past or current cases
  - For instance some national agencies had a tendency to run all cases as object cases
- This can lead to preemptively wide prohibition lists that are impossible to comply with in practice
- If the cost of compliance is too high, firms have no other option than taking their risks (and settling if they get caught)
  - If they risk being caught anyways, it is difficult to convince them to make their best efforts to limit distortions
- This very bad equilibrium can only be broken by agencies making the first step and binding their hands
  - The hard truth is that the Art. 102 guidance paper fostered compliance on rebates

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