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I. INTRODUCTION

In December 2010 the Commission adopted the revised Horizontal Guidelines with a new chapter on information exchanges.[2] The draft Guidelines already proposed sound principles for the analysis of information exchanges, as I explained in my earlier comment.[3] I believe that the final text is a further improvement on the draft Guidelines in some important aspects. The Commission deserves credit for being open and receptive to comments and for taking suggestions on board, to a much greater extent than during recent other drafting exercises.

In this contribution I briefly comment on the substantially revised and expanded discussion in the Horizontal Guidelines on how to handle unilateral information disclosures, a complex question of great practical relevance for market participants. I will also provide some thoughts on the conceptual/systemic question, which has been highlighted by the Horizontal Guidelines and the debate surrounding them, whether European competition law continues to compartmentalize analysis in light of applicable Commission instruments and neglects general principles that should uniformly inform all competition analysis.

II. WHEN DO "UNILATERAL" INFORMATION EXCHANGES AMOUNT TO "AGREEMENT?"

In my previous comment I expressed concerns that the draft Guidelines' new section on information exchanges provided no guidance on the distinction between unilateral disclosures of information that fall outside Article 101 and information exchanges that, even though market participants do not have an explicit agreement on sharing information or on price/output, lead to sufficient coordination to meet the "agreement"[4] requirement in Article 101. The laconic—and, given the great practical importance of the topic, insufficient—statement in the draft Guidelines that these situations must be analyzed on a case-by-case basis to determine at what point the disclosure of information is no longer unilateral and therefore can be reached by Article 101 has been replaced by a more focused discussion that identifies certain types of behavior that in the Commission's view constitute "agreement." The new text suggests that the Commission is

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[1] Consultant, Fordham Competition Law Institute. I would like to thank Miguel de la Mano for a stimulating discussion of an earlier draft.

[2] Commission Notice, Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements, O.J. C 11/1 (2011) (hereinafter the "Horizontal Guidelines").

[3] Andreas Reindl, *Information Exchanges Among Competitors: The Commission Takes A New Look*, 9(1)CPI ANTITRUST CHRON., (September 2010).

[4] For purposes of this contribution, no distinction is made between concerted practice and agreement, and both are considered as coordinated conduct that can be reached by Article 101, as opposed to unilateral acts.

prepared to step outside the safety zone of existing case law to go after potentially harmful conduct like industry-wide "cheap talk" and seemingly unilateral information disclosures.

The Horizontal Guidelines first rehearse Court case law on what constitutes a "concerted practice" under Article 101. The Commission might as well have left out this part which is of little practical use for firms and their counsel. Statements of the European Courts that each player must determine "independently the policy which it intends to adopt," and must not create conditions of competition which do not correspond to the "normal competitive conditions of the market in question," are a description of the problem in oligopolistic markets; they do not help to distinguish interdependent, yet unilateral market activities from specific conduct that triggers the type of coordination against which the law can intervene.[5]

The Horizontal Guidelines become more relevant as they describe certain actions and conduct that would normally meet the agreement requirement in Article 101.[6] They first explain that non-public sharing of strategic information among competitors (the Guidelines in this case appear to assume reciprocal disclosures of information) will not be considered unilateral behavior and therefore will be subject to Article 101. This conclusion is not particularly remarkable; the Court in *T-Mobile Netherlands* already held that the exchange of strategic information among competitors even in a single meeting can be reached by Article 101.[7]

Sharing of strategic information through a series of public announcements can also constitute an agreement, according to the Horizontal Guidelines, as it "could prove a strategy for reaching a common understanding about the terms of coordination." This statement is very broad. It must be understood in light of the Court's position in *Woodpulp II*[8] that industry-wide announcements about future prices and quantities are not caught by Article 101 if they are consistent with normal market behavior and made to the benefit of customers—even if these announcements increase market transparency and might facilitate coordination among the suppliers. Presumably, the Guidelines envisage extending Article 101 to situations where public statements contain no relevant information for customers and are made only to inform rivals about future intended strategy.

The Horizontal Guidelines enter largely unchartered territory and become really "interesting" when the Commission discusses how it intends to apply Article 101 to unilateral disclosures of information, i.e., situations where one firm discloses strategic information to competitors, on its own initiative and without reciprocity, and the disclosure could be understood as an invitation to "compete more profitably." This type of conduct might not be so uncommon in the market place, but there has not been a single Court case that has decided specifically in which circumstances such unilateral disclosures lead to sufficient coordination to meet Article 101's "agreement" requirement.

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[5] OECD, *Facilitating Practices in Oligopolies* 146 (2008) (statement by the European Commission that language in European Court cases describes the problem of oligopolistic markets but does not provide a useful test).

[6] As I have explained in my earlier comment in CPI, this approach is more in line with a contemporary understanding of the concept of agreement than attempts to define "agreement" by the reference to the parties' state of mind (like "meeting of minds" or "conscious commitment to a common scheme"). Andreas Reindl, *supra* note 3, at 7.

[7] Case C 8/08, *T-Mobile Netherlands*, 2009 ECR I-4529.

[8] Case C-89 etc., A. Ahlström Oy v. Commission (Woodpulp II), 1993 ECR I-1307.

The Horizontal Guidelines adopt here a strict position and explain that any non-public disclosure of strategic information even by one firm, for example by e-mail or phone call, will lead to a finding of "agreement" among competitors—sender and recipients—unless the recipients of the information issue a statement that they do not wish to receive such data.

To support this position, the Horizontal Guidelines rely on language in Court judgments that agreement will be presumed where the recipient of information accepts the information and/or does not issue a statement that it does not wish to receive such data. The reasoning might seem to be straightforward, but the Court judgments are not exactly on point. These cases are about hard-core cartels in which the entire industry knew about the existence of a cartel and, on occasion, information was picked up by "passive" participants in cartel meetings.[9] The rationale for condemning information disclosures—they increase the risk of coordination as they reduce strategic *uncertainty of the market* for *all competitors*, as the Guidelines explain—suits particularly well fact patterns where an entire industry sits around the table and participants disclose their future strategies.[10] Because of this increased risk, the law can also be more demanding on "passive" participants in an industry-wide exchange and require them to distance themselves from the information disclosures if they want to avoid getting caught in a competition law violation.

This rationale is much less compelling in a situation where one firm individually sends signals to its competitors, as disclosure of strategic information by a single firm is much less likely to be sufficient to allow for the joint exercise of market power. In other words, there appears to be much less support to presume that this type of unilateral disclosure will lead to the type of industry-wide coordination that would meet the agreement requirement in Article 101.[11]

For example, when a firm sends one e-mail to its competitors that it will do its share to obtain firmer prices industry-wide, or one sales person contacts her counterpart at a competitor to tell her about an intended future price increase, one can easily envisage a situation where the recipients of the information do not have the same strategic interests and therefore do not react to the disclosure in a coordinated way; overall uncertainty of the market would not be reduced in this case. Or competitors may take the disclosing firm's announcement as opportunity to price more competitively and increase their market shares, in which case the unilateral disclosure leads to more competition. It is thus doubtful whether, under Article 101, sender and recipient of unilaterally disclosed strategic information are (and should be) in competition law troubles every time the recipient fails to issue a statement distancing itself from the data it received.

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[9] For example, Case C199/92, Hüls, 1999 ECR I-4287; Case T-25/95, Cimenteries, 2000 ECR II-491.

[10] The language quoted in the text appears, for example, in *T-Mobile Netherlands*, a case where all major providers of mobile phone services in the Netherlands met and told each other about certain strategic decisions. Case C 8/08, *T-Mobile Netherlands*, 2009 ECR I-4529.

[11] The discussion assumes that in those factual situations that are relevant here the finding of agreement is related to the likely harmfulness of the conduct. For this reason, industry-wide cheap talk more persuasively supports the finding of agreement than individual information disclosures do, as industry-wide disclosures are the more effective mechanism to achieve harmful coordination. This also means that once it has been determined that conduct amounts to agreement, the conduct is (at least presumably) unlawful. This view is consistent with the Horizontal Guidelines: The Guidelines discuss the finding of agreement/concerted practice exclusively in the context of an exchange of *strategic* information; later they explain that agreements concerning the exchange of strategic information are presumably unlawful (a restriction by object). This suggests that seemingly unilateral conduct that meets the agreement requirement according to the Guidelines invariably would be presumed to be unlawful.

The Commission's position also creates challenging practical problems. For example, when one person in a firm receives an e-mail from a competitor, or a sales person is contacted by a competitor's sales person, what types of statements would be required so the recipient can avoid the risk of having an agreement with its competitor? The recipient of a unilateral information disclosure is not in the same situation as the participant in a meeting who can get up and leave after making a statement for the protocol. Assuming that we should not expect a flood of newspapers ads in which the recipients distance themselves from strategic information they received from a rival, should the recipient of strategic information contact the disclosing firm? If so, the Commission's policy might actually increase contacts among competitors that involve discussions of strategic information.

The Commission's aggressive push to bring unilateral disclosures of strategic information within the reach of Article 101 can be defended on policy grounds: Disclosures of strategic information, unless they are driven by some customer benefits, have little redeeming value and therefore discouraging firms from engaging is such practices creates little risk of deterring beneficial, pro-competitive conduct. Whether the Commission's moves are legally sound and will be upheld by the Courts remains to be seen. One may have to accept that there can be instances of undesirable firm conduct that cannot be reached with the tools of competition law enforcement. Whatever the outcome, the Horizontal Guidelines put firms on notice that the Commission may actively go after conduct involving seemingly "unilateral" disclosures of information.

III. COMPARTMENTALIZED COMPETITION LAW ANALYSIS

There has been no shortage of commentators who criticized the Horizontal Guidelines' chapter on information exchanges for not providing the necessary legal certainty and, in particular, for missing an opportunity to formulate safe harbors. Apart from the question whether this criticism is really sound,[12] it does raise the broader question whether European competition law is still overly focused on discrete Commission instruments—which continue to be adopted at inflationary rates and with perhaps sub-optimal coordination; whether the analysis is too compartmentalized, in other words. In fact, the Horizontal Guidelines themselves raise the same question.

Those who deplore the lack of safe harbors apparently overlook that the Commission's *de minimis* Notice already provides a safe harbor for agreements among competitors and is, therefore, also part of the law on information exchanges.[13] Of course, the safe harbor that the *de minimis* Notice provides might not be as extensive as what market participants envisage. There could and should be a debate whether the market share thresholds in the *de minimis* Notice generally are too low (they are, given that horizontal agreements that raise the greatest concerns are in any event not covered by the Notice); whether the *de minimis* Notice should be updated to be consistent with other Commission instruments (it should); or, most importantly, whether it is desirable to have a *de minimis* Notice in the first place. (Most likely it is not, as the Notice suggests

[12] There are good arguments that this criticism is unjustified. In an area with little enforcement experience and many unsettled analytical questions, developing sound analytical standards is the appropriate first step for a competition regime; it may be possible to formulate clearer thresholds at a later stage, in light of experience and empirical evidence from case enforcement and greater conceptual clarity. *See* Andreas Reindl, *supra* note 3.

[13] Commission Notice on agreements of minor importance which do not appreciably restrict competition under Article 81(1) of the Treaty establishing the European Community, O.J. C 368/13 (2001).

too strongly that identifying a "restriction of competition" or the absence thereof is a market share driven exercise; and because it can, perversely, encourage quick and convenient findings of unlawfulness for agreements between parties only because they exceed a very low market share threshold.) But for the time being the *de minimis* Notice is part of the law on information exchanges and does provide a (small) safe harbor.

The Horizontal Guidelines themselves provide another striking example of both the continued compartmentalization in European competition law and of the insufficient focus on general principles that apply across the entire competition law regime. To see this point, compare the Horizontal Guidelines' standards for the analysis of information exchanges and the rules on RPM in the Vertical Restraints Block Exemption and Guidelines. The competitive concern in both cases is the same; information exchanges as well as RPM raise competition concerns because they can be a mechanism that leads to more effective coordination among competitors and facilitates the joint exercise of market power.

Under the Horizontal Guidelines, only the disclosure of information on intended *future* prices is considered such an effective coordination device that it is a presumably harmful/unlawful strategy; conduct that does not disclose future pricing information requires a fuller analysis of potentially harmful effects because it cannot be presumed that the disclosed information will invariably allow competitors to coordinate and jointly exercise market power. Under these standards, RPM cannot be considered presumably harmful; a supplier implementing an RPM regime does *not* disclose its intentions concerning *future* prices. Because RPM is not a strategy that invariably allows competitors to coordinate and jointly exercise market power, it would not be the type of coordination mechanism that the Horizontal Guidelines are most concerned about.

Obviously, that result is inconsistent with the approach in the Vertical Restraints Block Exemption and Guidelines which consider RPM not only presumably problematic/a restriction by object, but so hard core unlawful that it is blacklisted in the block exemption.[14] Greater consistency between Commission instruments would be desirable, but may be difficult to achieve with the current piecemeal approach to the drafting of new and updating of existing Commission instruments.

IV. CONCLUSIONS

The Horizontal Guidelines make an important contribution to the ongoing discussion on how competition law should deal with information exchanges among competitors and unilateral disclosures of sensitive information. The standards they develop are sound, although the real test will come when the Horizontal Guidelines are applied to cases before national courts and competition authorities. Case experience and empirical evidence should help to develop further insight into some of the difficult and contentious issues in this area.

[14] Commission Regulation on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices, O.J. L 102/1 (2010), Article 4(a); Commission Notice—Guidelines on Vertical Restraints, O.J. C 130/1 (2010), ¶¶223-29.