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UNILATERAL DISCLOSURE OF INFORMATION WITH ANTICOMPETITIVE EFFECTS (E.G. THROUGH PRESS ANNOUNCEMENTS)

-- Germany --

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The attached document is submitted to Working Party No.3 of the Competition Committee FOR DISCUSSION under item III of the agenda at its forthcoming meeting on 14 February 2012.

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1. Introduction

1. Unilateral disclosure of information with anticompetitive effects is a topic which is of interest not only to economic and legal scholars, but also to anti-cartel enforcers. Competition authorities all around the world have found themselves confronted with situations where companies disclose information on business strategies and have had to assess this conduct under their respective competition law regimes.

2. In their assessment of unilateral disclosure, competition authorities face a variety of constellations which can be considered to fall into "grey areas". Companies use a full range of practices from quietly observing but not communicating with competitors to interacting by way of express agreements. In between, companies may also communicate unilaterally on different levels with different target groups. For example, the CEO of a company may mention changes in capacity in a speech at a trade association meeting attended by competitors. Or he might give a press statement on future pricing policy directed at consumers. Acting in a more subtle way, coordinating their conduct by the unilateral disclosure of information may be one of the courses taken by companies in order to avoid the scrutiny of the authorities. Competition authorities have to assess the quality of such communications and determine whether the behavior might be relevant under competition law, e.g. because it is mirrored by competitors or even leads to parallel conduct with the same aim as an agreement.

3. This paper will focus on the unilateral disclosure of information with potential anticompetitive effects, such as press announcements. It will not cover the express exchange of information as already discussed at the last roundtable on "Information Exchange between Competitors under Competition Law"[1] nor will it deal with market information systems.

4. The paper will survey the benefits and risks that unilateral disclosure may have for competition (2.). It will then turn to the legislative framework in which the Bundeskartellamt assesses such conduct (3.) and give an overview of practical experiences (4.) before concluding (5.).

2. Benefits and Risks for competition

5. Before turning to the legal provisions which may apply to unilateral disclosure of information with anticompetitive effects, it is important to remember the economic implications of such conduct.

6. Though competition lawyers might instinctively regard many forms of information disclosure as a threat to competition, it should be kept in mind that a certain level of transparency is necessary or beneficial for a competitive outcome. Consumers take advantage of their access to information to make informed choices and to purchase those products that best satisfy their preferences or needs. As companies adapt to consumers' choices, this will indirectly lead to an efficient allocation of resources.

7. Information disclosure between competitors may help to avoid the over-supply or under-provision of goods to consumers by contributing to an efficient allocation of resources. Furthermore, information sharing can assist in solving problems of information asymmetries on certain markets: for example, shared information about past credit default can improve the functioning of the credit supply

[1] See Germany's contribution to the 2010 October Roundtable, OECD Doc. DAF/COMP/WD(2010)106.

market by providing incentives for consumers to limit their risk exposure.[2] These are only some examples of the beneficial effects of a certain level of transparency.

8. On the other hand, information disclosure leading to more transparency may assist firms in reaching tacit collusion.[3] In the economic literature three main reasons for the harmfulness of disclosure of information have been identified:[4] i) Information sharing can help firms to reach a *focal point* of coordination, ii) it can increase the *internal stability* of coordination and iii) it may also promote the *external stability* of coordination. In practical terms: A focal point for tacit coordination can be achieved by the transfer of information about pricing intentions, as such knowledge can assist firms in reaching a tacit understanding without direct communication.[5] Internal stability of coordination can be increased when information disclosure facilitates the monitoring of firms' actual conduct. Thereby the probability or targeting of punishment for deviation from the collusive outcome is increased. External stability of coordination can be enhanced when information sharing allows for the detection of and coordinated reaction to new market entries. These effects may also materialize due to indirect information disclosure organized through third parties.[6]

9. The effects of unilateral disclosure will always depend on the nature of the information disclosed, the way in which this is done and the competitive situation on the market concerned.[7] *Public* information disclosure, which also reaches consumers, may have a greater potential to be pro-competitive than information disclosed *privately* to competitors. Further, *aggregate* information about the market may suffice to reach more efficient market outcomes, while the disclosure of *individualized* information may have a greater potential to sustain a collusive outcome.[8] Information on *homogeneous* products may be more likely to lead to collusion than on *heterogeneous* products. Details on *production capacities* can suffice in some markets to give competitors a clear message and indication of future behavior. A decisive element for the assessment of unilateral disclosure is therefore whether the diffusion of information may lead to or *facilitate coordination* between competitors in view of the *specific circumstances at hand*.

3. Legal provisions/ legal standard of review

10. Disclosure of information (be it unilateral or in the form of an exchange) may be subject to assessment under the German Act against Restraints of Competition (ARC)[9] or Art. 101 TFEU as it

2 Communication from the Commission "Guidelines on the applicability of Article 101 Treaty on the Functioning of the European Union to horizontal co-operation agreements" (OJ 14.01.2011, C 11/1), para. 57.

3 In this context tacit collusion shall refer to an anticompetitive behavior by companies. The economic notion of collusion refers directly to the market outcome. Collusion, whether reached by an explicit agreement or via implicit coordination, leads to higher prices (lower output) than the competitive, non-collusive market outcome.

4 See for example Bennett and Collins, "The law and economics of information sharing: the good, the bad and the ugly", ECJ 2010, p. 320.

5 Although this has been criticized as "cheap talk" (costless and non-binding communication), even "cheap talk" has been shown to assist in reaching a collusive outcome. See Bennett and Collins, p. 323 f. Charness and Grosskopf, "Cheap talk, information and coordination – experimental evidence", (September 27, 2001). Available at SSRN: http://ssrn.com/abstract=292861, p. 1.

6 See for example Bennett and Collins.

7 Kühn, "Fighting collusion" in Economic Policy, 2001, p. 180 ff.

8 Kühn, ibid.

9 An English version of the ARC is available at http://www.bundeskartellamt.de/wEnglisch/download/pdf/GWB/110120_GWB_7_Novelle_E.pdf.

reduces the strategic uncertainty on the market and could in principle constitute or lead to a concerted practice. The German ARC introduced the extension of the prohibition of cartels to cover concerted practices with the second amendment of the ARC in 1974[10]. The current provision of the prohibition on cartels in Section 1 ARC mirrors the wording of Art. 101 TFEU. It states that "Agreements between undertakings, decisions by associations of undertakings and concerted practices, which have as their object or effect the prevention, restriction or distortion of competition, shall be prohibited."

11. Guidance for the German practice may therefore also be sought in the "Guidelines on the applicability of Article 101 Treaty on the Functioning of the European Union to horizontal co-operation agreements"[11] (hereinafter "Guidelines") and in the case law of the European Court of Justice. Concerted practices in the meaning of Art. 101 TFEU are understood to be "a form of coordination between undertakings which, without having reached the stage where an agreement properly so-called has been concluded, knowingly substitutes practical cooperation between them for the risks of competition".[12]

12. The Guidelines intend to provide an analytical framework for the most common types of horizontal co-operation agreements, including "General principles on the competitive assessment of information exchange"[13]. According to these principles, the unilateral disclosure of information via, for example, mail, e-mail, phone calls, meetings etc. can amount to a concerted practice under certain conditions. In particular the guidelines stipulate clear obligations for competitors receiving competitively sensitive information in any seemingly unilateral way to take a distance or even object. Otherwise the Commission might consider their silence as agreement. [14] On that basis undertakings can be considered as colluding by just mirroring the unilateral disclosure of one undertaking, and even more so if such announcements involve an invitation to collude. However, given that Article 101 (1) TFEU as well as Section 1 ARC only relate to situations with at least *two* players, the guidelines consequently confirm that where a company makes a unilateral announcement that is also *genuinely public*, for example through a newspaper, this *generally will not constitute a concerted practice* within the meaning of Article 101 (1) TFEU[15].

4. Case practice

13. In practice it is very difficult to assess cases relating to the unilateral disclosure of information. Not only does the relevance of the information depend on the nature of the market and the competitive situation on the market as well as the undertakings involved. Also the requirements of proof that such conduct led to some sort of collusion or concerted practice with competitors are particularly difficult to fulfill. Finally it would also have to be analyzed whether the conduct might be exempted under Section 2 of the ARC, Art. 101 (3) TFEU.

14. In the past, whenever the Bundeskartellamt as the competent federal competition authority in Germany has received complaints or hints about illegal anticompetitive behavior by means of unilateral

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10 The second amendment of the ARC entered into force in 1973, BGBl. I 1974, p. 869.

11 Communication from the Commission "Guidelines on the applicability of Article 101 Treaty on the Functioning of the European Union to horizontal co-operation agreements" (Horizontal Guidelines) (OJ 14.01.2011, C 11/1).

12 ECJ 1972, ICI v. Commission, ECR 619, para. 64.

13 Horizontal Guidelines, para. 55.

14 Horizontal Guidelines, para 62. For meetings or situations with clearly anti-competitive object this is commonly accepted, see Kühn, "Fighting collusion", p.1181, with references to European case law.

15 Horizontal Guidelines, para 63.

disclosure of information, it has analyzed the situation on a case by case basis. However, in recent years the indications for anticompetitive conduct were never clear enough to open a formal investigation.

5. Conclusion

15. The discussion within the framework of the OECD on the requirements for assuming that seemingly unilateral conduct has led to a bilateral or multilateral concerted practice (as described by the Guidelines of the European Union and maybe other authorities) will provide a welcome opportunity to further clarify the standards of assessment in such cases.