DANISH COMPETITION AUTHORITY

18th June 2010
4/0105-0300-0099
/JUK

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Ministry of Economic and Business Affairs

Comments on the draft Guidelines on horizontal cooperation agreements

This document reflects the main concerns of the Danish Competition Authority (DCA) in regard to the draft Guidelines on horizontal cooperation agreements as submitted for public consultation by the Commission 4th May 2010.

We acknowledge the efforts the Commission has made in order to review the horizontal BERs and Guidelines. Nevertheless, we wish to point out our concerns with some key points of the draft horizontal Guidelines – mainly in regard to the chapter on information exchange.

1. The distinction between *object* and *effect* in regard to information exchange

According to the Guidelines only information exchanges between competitors of individualised data regarding intended future prices or quantities should as a main rule be considered a restriction of competition by object within the meaning of Article 101(1).

The framework for any kind of guidance should be the case law of the ECJ. However, we find that the Commission's definition of information exchange that restricts competition *by object* does not correspond to what the ECJ considers as information exchange that restricts competition *by object:*

"...An exchange of information between competitors is tainted with an anti-competitive object if the exchange is capable of removing uncertainties concerning the intended conduct of the participating undertakings." (C-8/08, T-mobile)

In our point of view – and according to our case law – exchange of information about actual individual prices between competitors, or exchange of information about e.g. current costs, are in some cases capable of removing uncertainty between competitors and should in these circumstances be regarded as restricting competition *by object*. We therefore find that the Guidelines' scope of information exchange restricting competition *by object* is too narrow.

We encourage the Commission to reflect the wording of the Court to a greater extent in the guidelines. Please find enclosed our proposal for the wording of p. 68 of the draft guidelines.

2. Effects - standard of proof

According to EU-competition law, in order establish an infringement it is sufficient to show that a conduct is likely to have restrictive effects on the market.

According to the Guidelines *"restrictive effects on competition are likely to occur where due to the agreement the parties would be able to profitably raise price or reduce output, innovation, product quality or variety."* This corresponds to what is also communicated in the Commission's Article 81(3) Guidelines.

In some member states, including Denmark, Court tradition is that in cases where a conduct does not have the object of restricting competition, it must, in order to establish an infringement, be proven that a conduct has in fact resulted in restrictive effects on the market. Consequently, certain member states have a task of explaining national Courts that the requirements (to show effect on the market) only imply that the authority need to prove that restrictive effect *are likely to occur* as result of the behaviour.

To give an example: the notion of an agreement in antitrust cases differs from the ordinary notion of an agreement in contractual law. The Commission has very clearly described the special antitrust notion of an agreement by referring to the relevant case law. There is therefore no doubt that this is a special concept in competition law.

Similarly, we advocate that the Commission by referring to case law on restriction of competition by effect, in a similar way also describes (in the Guidelines) how the notion of *effect* is unique in EU competition law.

This would ensure that the standard of proof for *effects* meets the same requirements in all member states. This is particularly important when cases are subject to both administrative procedure and court procedures in member states.

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Appendix 1

Restriction of competition by object

67. Exchanging information on intentions of future conduct regarding prices or quantities is particularly likely to lead to a collusive outcome. Informing each other about such intentions may allow competitors to arrive at a common higher price level without incurring the risk of losing market share or triggering a price war during the period of adjustment to new prices. Moreover, it is less likely that this type of information exchange is done for pro-competitive reasons.

68. Information exchanges between competitors of individualised data regarding intended future prices or quantities should therefore be considered a restriction of competition by object within the meaning of Article 101(1). This also applies to information exchanges on current conduct that may remove uncertainty as regards to intended future behaviour and to cases where the combination of different types of data enables the direct deduction of intended future prices or quantities. This is without prejudice to the fact that there may be other types of information exchanges (mainly private individualised exchanges between competitors on prices and market shares) whose aim is to restrict competition on the market, which would normally be considered as restrictive by object. These types of information exchanges run the risk of being investigated and, ultimately, fined as cartels.