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Comments

on the consultation of the EU Commission on the Draft Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements (Horizontal Guidelines)

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Summary

For the insurance industry the revised Horizontal Guidelines are of considerable importance, particularly since they are to regulate also the areas of information exchange, model terms and security devices. The two last-mentioned forms of cooperation were exempted from the cartel ban until 31 March 2010 by the Block Exemption Regulation for the insurance industry (old insurance BER). In these areas, the EU Commission has refrained from prolonging the insurance BER because it considers it to be more appropriate to provide guidance in the form of Horizontal Guidelines to all sectors.

Even though the German Insurance Association (*Gesamtverband der Deutschen Versicherungswirtschaft e. V.* - GDV) would have welcomed the prolongation of the insurance BER in these areas, the discussion on this issue is not to be reopened. It should be noted, however, that the draft does not allow for the actual circumstances of cooperation in the insurance industry in all respects.

Both in the area of model terms and that of security devices, cooperation involves considerable advantages for consumers. So far, this does not become sufficiently apparent in the draft in all respects. Instead, in some respects, the draft subjects the insurance industry to even stricter criteria than other sectors. This conflicts with the statement of the EU Commission that cooperation in the insurance industry does not differ from that in other sectors.

In particular, the two examples which have been included on model terms and security devices must be criticized in this context. For instance, the question as to whether or not work on model terms entails de facto standardization cannot depend on the readiness of individual insurers to deviate from their own policy conditions to adapt these to the needs of every individual policyholder. This would also be impracticable in mass business. The relevant criterion for this can only be the market penetration of the respective model terms. This is also pointed out elsewhere in the draft Guidelines themselves. Moreover, in its general statements, the EU Commission correctly notes that model terms lead to efficiency gains in the form of better comparability and that such gains are “necessarily” passed on to the consumers. Therefore, it is incomprehensible why in this example an involvement of consumer associations is additionally brought into play for the insurance industry.

In the area of security devices, any standardization within the meaning of the draft Guidelines frequently does not take place at all in the insurance industry. Against this background, it is incomprehensible that concerning security devices even stricter criteria are to apply to the insurance industry than to other sectors. Unlike industry, the insurance industry does not pursue sales interests, which precisely make the area of standardization so sensitive. Ultimately, stricter rules are imposed here for cooperation which is less restrictive of competition! For instance, according to the draft, with regard to security devices, only in the insurance industry it is considered important that as yet no harmonized EU standard exists in the area concerned.

The envisaged Guidelines on information exchange between competitors are generally welcomed. However, so far, the draft is not appropriate and helpful for practice in all respects. For instance, it does not become sufficiently apparent that only the exchange of commercially sensitive company-specific market data may actually violate the cartel ban. Also, the issue concerning the exchange of consumer data has so far only been discussed in the context of an individual exemption according to Article 101 (3) of the TFEU. However, these data are not likely to adversely affect competition anyway.

A. Introduction

For the insurance industry the revised Horizontal Guidelines are of considerable importance, particularly since they are to regulate also the areas of information exchange, model terms and security devices. Regardless of the fact that GDV generally welcomes guidelines, especially on information exchange, so far, the draft is not appropriate and helpful for practice in all respects. In this respect, we refer to our specific comments on model terms under B.I., on security devices under B.II and on information exchange under B.III.

B. Details

I. Model terms

The fact that non-binding model terms are to be regulated together with agreements on technical standards in Section 7 does not allow for the practice of establishing such terms. In fact, model terms are precisely not aimed at standardization. Rather, companies are to be provided with a non-binding model which they may either use or not use. Therefore, the term “model terms” is also more appropriate than the term “standard terms” used in the Guidelines. From the point of view of GDV, it would, on the whole, be preferable to regulate model terms in a separate section of the Horizontal Guidelines. Regardless of that, we have the following comments on the draft:

1. Assessment under Article 101 (1) of the TFEU

First of all, on the assessment of model terms according to Article 101 (1) of the TFEU in the draft Guidelines:

a) GDV shares the opinion of the EU Commission that accessible and non-binding model terms which have no effect on price generally do not have any restrictive effects on competition, cf. para. 296.

   However, there are concerns as far as an exception to this is to apply here and a close examination is therefore to be necessary where the model terms define the scope of the product or service. This is justified by the fact that such terms involve a higher risk of limiting product choice. According to the draft, this could be the case when the wide-spread use of the model terms de facto leads to a limitation of innovation and product variety. As an example, mention is made of model terms in insurance contracts where these limit the choice of key elements of the contract, cf. para. 297.

   First of all, the question arises as to why in this context it is only referred to terms in the insurance industry. Product-related terms are likely to exist in other industrial and economic

sectors as well. Within the scope of the consultation on the insurance BER, the EU Commission itself has always stressed that in this area cooperation in the insurance industry does not differ, for instance, from that in the banking sector[1].

Moreover, although it is correct that product-defining terms may be more likely to restrict competition than other general model terms, the experience gathered with the old insurance BER shows that this is usually not the case, at least in highly competitive markets with many suppliers. In such markets, model terms, even if referring to product design, precisely do not deprive competition of the incentive to compete with other competitors on the basis of product innovation and variety. On the contrary: model terms constitute a legally certain basis on which insurance companies design their company-specific products to stand out against their competitors. In this respect, the model terms of GDV serve as a basis for product comparisons. They ensure the necessary transparency and hence comparability of products.

As an example, we refer to comprehensive motor vehicle insurance in Germany. On the basis of the General Terms and Conditions for Motor Insurance (*Allgemeine Versicherungsbedingungen für die Kraftfahrtversicherung* – AKB), the most different product features and hence offers for the consumer have evolved, which are not included in the model AKB (such as insurance of damage caused by furred game with all kinds of animals, damage caused by marten bites with and without consequential loss, indemnification at replacement value up to 6, 12 or 24 months, repair shop service in the case of own damage claims, protection of navigation devices, protection against parking damage, extended anti-theft protection, etc.).

b) After these preliminary statements, we have the following comments on the individual statements on Article 101 (1) of the TFEU:

Paragraph 254

In our opinion, the term “model terms and conditions of sale or purchase” is not correct. Particularly policy conditions, but also other types of general terms and conditions in the services sector do not focus on rules on sale, but on the type and scope of service provision. Therefore, we advocate using the term “general terms and conditions for the sale of goods or the provision of services ... (hereinafter referred to as “model terms”)“.

[1] Communication of the EU Commission 2010/C 82/02, para. 22.

Paragraph 263

In the third sentence the reference made to the insurance industry should be deleted. In fact, product-defining model terms are a general phenomenon of the services industry. Moreover, it should become apparent that in the case of terms which define the scope of the product the risk of restriction of competition exists only if a de facto standard is actually introduced (as correctly stated in para. 297). Therefore, the third sentence should read as follows:

> *"The risk of limiting choice and innovation is, however, only likely in cases where the ~~standard~~ model terms define the scope of the end-product ~~as, for example in insurance contracts~~ and where their common application results in a de facto standard."*

Paragraph 268

The wording of para. 268 is unclear, the use of the term "recommended prices" is misleading. From our point of view, a restriction of competition by object exists, if at all, only where prices or price elements are themselves elements of the model terms. We therefore propose to change para. 268 as follows:

> *"Any ~~standard terms containing~~ provisions in model terms which ~~influence the prices charged to customers~~ include price elements (i.e., ~~recommended prices~~ indication of prices, price ranges, rebates, etc.) would constitute a restriction of competition by object."*

Paragraph 293

As a prerequisite for the competitive neutrality of model terms, mention is made, inter alia, of "unrestricted participation in the actual establishment of standard terms". As shown by the examples 7 and 8 (cf. paragraphs 321 and 322), this actually concerns participation by the respective competitors (potential users of model terms) and not by third parties. This should be clarified in para. 293.

Paragraph 294

In the German version of the first part of the sentence the term "zwingend" should be replaced by the term "verbindlich", in line with the English version of the draft.

Paragraph 295

As far as according to this rule certain general model terms (which have a likely negative effect on competition relating to prices, rebates, interest, etc.) may come under Art. 101 (1) of the TFEU, concrete examples of use should be given by the EU Commission in this respect.

Paragraph 297

In para. 297 it should become apparent that the structure of the market plays a role in determining whether product-defining terms may cause a restriction of competition. In highly competitive markets with a multitude of suppliers this cannot normally be assumed. Moreover, mention should be made of the fact that cooperation may be necessary in the case of product-defining terms to be actually able to offer certain products. From the point of view of GDV, para. 297 should be revised as follows:

"Firstly, ~~standard~~ model terms for the sale of consumer goods or services where the ~~standard~~ model terms define the scope of the product sold to the consumer, and where therefore the risk of limiting product choice is more important, could give rise to restrictive effects on competition within the meaning of Article 101 (1). This could be the case when the wide-spread use of the ~~standard~~ model terms de facto leads to a limitation of innovation and product variety. For instance, this may arise where ~~standard~~ model terms in insurance contracts limit the customer's practical choice of key elements of the contract, such as the standard risks covered. Even if the use of the ~~standard~~ model terms is not compulsory, they might undermine the incentives of the competitors to compete on product diversification. However, the characteristics of the market play a role here as well. In highly competitive markets with a multitude of suppliers any limitation of innovation and product variety is normally likely to be excluded. Furthermore, there may be cases where cooperation in drafting product-defining model terms is necessary to be actually able to offer certain products."

2. Assessment under Article 101 (3) of the TFEU

a) The draft correctly refers to the fact that model terms may facilitate comparability of products as well as market entry and switching between suppliers and lead to lower transaction costs. However, there are further advantages of work on terms, which the draft so far does not take into account: For instance, model terms make it easier to comply with legal obligations. This is particularly true for complex products such as insurance policies[2]. As the experience gathered with the old insurance BER has shown, it can mostly be assumed that model policy conditions are legally valid because they are drafted by a body of experts contributing the know-how and the wealth of experience of many market participants. This benefits both companies (because of smaller liability and litigation risks) and directly consumers.

   Moreover, model terms, for instance in the insurance industry, ensure a common basic understanding and hence a comparable database for necessary common surveys and studies, which in turn are used by companies as a basis for their own rating.

   Furthermore, GDV holds the view that in a competitive market with a multitude of suppliers it can normally be assumed that the advantages of cooperation at least outweigh any disadvantages. In fact, precisely in a market with many suppliers, model terms ensure trans-

[2] As expressly stated by Regulation (EC) No 358/2003 (old insurance BER), which was applicable until 31 March 2010, recital 14.

parency and hence comparability. At the same time, this makes it easier to switch to another supplier, especially in highly competitive markets.

b) This leads to the following comments on the individual statements on Article 101 (3) of the TFEU:

Paragraph 302

The additional advantages involved in model terms (legal validity, common database) should be included. We therefore propose the following addition at the end of para. 302:

"The use of ~~standard~~ model terms can entail economic benefits such as making it easier for customers to compare the conditions offered and thus facilitate switching between companies. They might also lead to efficiency gains in the form of savings in transaction costs and, in certain sectors (in particular where the contracts are of a complex legal structure), facilitate entry. Further efficiency gains result from the fact that model terms ensure legal validity, especially in the case of complex products. Moreover, in certain sectors, model terms ensure efficiency gains, as far as these are important for a comparable database.

Paragraph 312 and paragraph 313

Contrary to the statements in para. 312, at least in highly competitive markets with a multitude of suppliers, it can be assumed that the advantages of cooperation at least offset any disadvantages. A presumption to this effect should be included in para. 312 or para. 313 (proposal see below).

Moreover, para. 313 should clarify that the efficiency gains "necessarily" passed on to the consumer include, in addition to increased comparability, facilitated switching between providers and promotion of opportunities for market entry for competitors. The same applies as far as model terms are usually more legally valid because they facilitate compliance with legal requirements.

GDV therefore proposes the following modification to para. 313:

"However, certain efficiency gains generated by ~~standard~~ model terms, such as increased comparability of the offers on the market, facilitated switching between providers, facilitated market entry by competitors and legal validity of terms, especially in the case of complex products, are necessarily passed on to the consumers. At least in a market which is, on the whole, characterized by competition, with many suppliers these advantages normally at least outweigh any negative competitive effects. As regards other possible efficiency gains, such as lower transaction costs, it needs to be assessed on a case-by-case basis and in the relevant economic context whether these are likely to be passed on to consumers.

3. Example 9, paragraph 323

So far, the example which has been included on work on terms in the insurance industry is not purposeful:

a) It is not convincing that model terms (unlike in Examples 7 and 8 for the energy sector and the construction industry) are only treated from the angle of Article 101 (3) of the TFEU. This creates the impression that in the case of model terms in the insurance industry a restriction of competition always exists. This is not correct and does not result from the draft Guidelines either. There it is rather stated that product-defining terms in the insurance industry <u>may</u> adversely affect competition if they <u>lead</u> to restricted choice of products for the consumer. If, however, no such de facto standardization exists, there is no restriction of competition either.

b) Also, it must be criticized that with regard to the issue of de facto standardization it is referred to the readiness of individual insurers to adapt their respective terms to the needs of the individual policyholder. Actually, however, the issue of de facto standardization depends on the use of the model terms distributed by the association (as expressly stated by para. 299).

c) There are concerns as far as in the context of the examination of Article 101 (3) of the TFEU mention is made of the involvement of a consumer association. According to this, the fact that a consumer association was involved in the process "could increase the likelihood of efficiencies being passed on to consumers."

   This is inconsistent insofar as the Guidelines themselves (para. 313) correctly state that model terms lead to efficiency gains in the form of better comparability and that these gains are "necessarily" passed on to the consumers. As shown above, the same applies to facilitated switching between suppliers and market entry by new suppliers as well as to the legal validity of terms. Also, it is incomprehensible why exactly (and only) for the insurance industry an involvement of consumer associations is additionally brought into play.

   Against this background, the involvement of the consumer association should be deleted from the example. But at least it should become more apparent that the involvement of a consumer association is not a prerequisite for the pass-on of efficiency gains, but only <u>**further**</u> increases the probability of their pass-on. Also, this cannot be a matter of involvement in the drafting of the terms, but (as explained in the analysis) in the <u>process</u> of introduction of such terms.

d) Example 9 should therefore be worded as follows:

Situation:

A national association for the insurance sector distributes non-binding model policy conditions for house insurance contracts. These conditions give no indication of the limit of cover of the risk, the level of insurance premiums or excesses payable by the insured.

1st case:

A majority of suppliers have developed policy conditions deviating from this with different product scope and deviating product features.

Analysis:

It is improbable that the model policy conditions, even if they contain product-defining terms, have restrictive effects on competition. They do not lead to a limitation of product variety and innovation because a majority of insurance companies use deviating product-defining terms.

2nd case:

The majority of companies use the model policy conditions of the association. Individual companies have developed policy conditions deviating from these.

Analysis:

Even if the majority of suppliers use the model policy conditions of the association, the efficiency gains achieved are at least likely to outweigh any disadvantages due to a limitation in product variety in a competitive market. For instance, the customer may compare the terms offered by insurance companies. These comparisons in turn facilitate switching between insurance companies and thus enhance competition. Other essential competitive parameters, such as especially premiums, but also the respective service quality, remain totally unaffected by cooperation. Also, the model policy conditions reduce transaction costs and facilitate entry into house insurance to competing insurance companies. Moreover, the restrictions do not go beyond what is necessary to achieve the identified efficiencies and competition is not eliminated. Consequently, the criteria of Article 101 (3) of the TFEU are likely to be fulfilled.

For the case that the EU Commission – despite the above arguments – does not want to delete the involvement of the consumer association from the example, the following last sentence should be added to the analysis of the second case:

> "The fact that a consumer association has participated in the drafting of the model policy conditions further increases the likelihood of the efficiencies being passed on to the consumers."

II. Security devices

Large parts of the statements on standardizations do not meet the requirements of cooperation of the insurance industry in the area of security devices.

1. Assessment under Article 101 (1) of the TFEU

The draft Guidelines are based on the standardization of technical or quality-related requirements for products, manufacturing processes, services and methods. In the insurance industry any such standardization frequently does not take place. Rather, only non-binding notes,

guidelines and recommendations are drafted for certain risk situations, for instance, on how protection against fire should be organized in a museum (i.e., for instance, sprinkler system, yes or no). No technical requirements are imposed on the security device (here: sprinkler system) as such. In this respect, it is rather referred to European or national standards, as far as such standards exist. Also, the insurer or the policyholder remains free to agree bilaterally on whether or not such recommendations may be applied to the respective risk situation and become a subject matter of the insurance contract.

Therefore, in these cases, there is no standardization as considered in the draft Guidelines. Also, the questions concerning rights of licensee, which the draft addresses in detail, do not arise because the results of the work of the insurance industry are open to everyone free of charge (or against payment of a small fee). For practice, it would be helpful if an example to this effect could be included in the Guidelines.

We hold the view that the form of cooperation described above does not have any restrictive effects on competition and is therefore not covered by the cartel ban. This should be expressed in a separate example.

In this respect, we would like to submit the following proposal:

Situation:

A national association of the insurance industry prepares a non-binding manual for fire protection in the paper industry. It is intended to provide mainly medium-sized and smaller companies with a manual on how to protect their machines against fire. Companies themselves do not have the necessary know-how on this. The manual recommends, inter alia, to use fire protection systems according to the appropriate EN standard. Moreover, recommendations are made on how combustible material (paper) should be stored. The manual has been discussed with the competent association representing a majority of the industry concerned to hear its opinion before the final wording of the manual. There is no obligation to take the manual into account. Whether or not it is used as a basis for individual insurance contracts has to be agreed bilaterally between the insurer and the individual company of the paper industry. The manual is generally accessible on the website of the association.

Analysis:

In the present case any restriction of competition is unlikely because no relevant standardization takes place.

Moreover, the process of drafting the manual is transparent and the sectors concerned are involved through their umbrella association. The manual is generally accessible. Negative effects on the market for the manufacture of fire protection systems are not to be feared because these systems are not subject to any requirements going beyond existing EN standards.

2. Assessment under Article 101 (3) of the TFEU

With regard to the statements on efficiency gains, mention should be made of the fact that cooperation in the insurance industry (unlike in other areas) forms the basis for the ability to offer benefits at risk-appropriate premiums. Without suitable prevention measures, many risks are frequently difficult to insure or can be insured only very expensively. Moreover, consumers directly benefit from the fact that security devices may avoid damage to their health, but also to their property. Another aspect is the macroeconomic benefit resulting from prevention work. These arguments can so far not be found in the Guidelines.

3. Example 4, paragraph 318

Example 4 refers to an element of the work of the insurance industry, namely standardization of security devices (components and equipment designed for loss prevention and reduction) and their installation. The example is inacceptable in its current form because it goes beyond the other statements in the draft Guidelines with regard to its requirements:

a) The example assumes that within the area of the standardization project no harmonized EU standards exist, but the insurers have brought the specific need for such standards to the attention of the EU standards bodies and are involved with them with a view to putting a EU standard in place. These specifications should be deleted from the example:

   Such specifications are mentioned neither in the general statements nor in one of the other examples. Therefore, the example can be understood as meaning that the aspect of EU standards is to be relevant solely for standardization projects of the insurance industry.

   To avoid misunderstandings: The German insurance industry supports the work of European standards bodies. For this purpose, it is involved in the work of numerous bodies of the European standards organizations CEN und CENLEC, thus contributing considerable know-how to standards bodies. Many harmonized European standards originate from fundamental work performed by the insurance industry (for instance, on fire detection systems EN series 54 or EN standards for gas and water extinguishing systems). This is to be and will be so also in the future.

   However, it is not justified to include requirements to this effect only and especially for the insurance industry in the Guidelines. This is true for the reason alone that on the other hand the EU Commission itself has always stressed that standardizations in the insurance industry are not a particularity and do not differ from cooperation in other areas. Therefore, in the opinion of the EU Commission, the insurance industry should be treated

equally with other sectors, which led to the discontinuation of the old insurance BER.[3] This should apply here as well.

Regardless of that, unlike industry, the insurance industry does not pursue sales interests, which precisely make the area of standardization so sensitive. Therefore, any reference to harmonized EU standards should be deleted from para. 318.

b) Furthermore, especially insurers must be able to react rapidly and reliably to changing risk situations, for instance, in the case of changed criminal strategies in the area of burglary. European standardization processes still take a very long time, so that EU standards are frequently already outdated when the procedures are completed. In these cases it may be necessary to draft new guidelines, even guidelines which go beyond EU standards.

After the discontinuation of the insurance BER, the question as to whether or not this is permissible under cartel law has to be judged solely according to Article 101 of the TFEU. With regard to the question, which has first of all to be considered within this framework, as to whether or not a restriction of competition exists, the aspect of EU standardization is irrelevant. In this respect, we refer to para. 277, which precisely does not make this a prerequisite.

If in a given case a restriction of competition should exist, it is to be considered whether or not an individual exemption may be granted. For an individual exemption, from the angle of efficiency gains and indispensability of the restriction of competition, it will probably above all be important whether or not the additional requirements are actually necessary and provide concrete added value. If this is the case, an individual exemption is likely to come into consideration despite the EU standard, as far as the other prerequisites of Article 101 (3) of the TFEU are met. However, an individual exemption is in no case a priori excluded only because an EU standard already exists. If the EU Commission is not prepared to delete the criteria with regard to EU standardization, this should at least be clarified in a further example.

c) Moreover, para. 318 states that standards have been agreed to “keep insurance premiums low”. This is not correct. Rather, security devices ensure that benefits may be offered at <u>risk-appropriate premiums</u>, see above. This should be referred to in the example.

d) As far as the example refers to the fact that the project has been discussed “with the majority of installers in the affected Member States”, this is impracticable. Any such discussion “with the majority of installers” cannot be ensured in practice. The participation of the other sectors involved may only be pooled through the respective associations represent-

[3] Communication of the EU Commission 2010/C 82/02, para. 26.

ing the sectors concerned. Also, these associations may only be made the offer to contribute their opinion. It is not in the hands of the insurance industry whether or not the other side will then actually be interested in an involvement. Therefore, the example should state that the major associations of the sector concerned are offered to discuss the project in advance.

III. Information exchange

Finally some comments on the statements on information exchange, which are additionally to be included in the Horizontal Guidelines:

1. Assessment under Article 101 (1) of the TFEU

a) GDV shares the opinion that the likely effects of an information exchange on competition must be analysed on a case-by-case basis, as this depends on a multitude of factors (cf. para. 69). In this respect, the characteristics of the information exchanged and the economic conditions in the relevant market are of decisive relevance. Unlike provided for so far in the draft, the examination to this effect should start systematically with the characteristics of the information exchanged (paragraphs 81-87) rather than with market coverage and market structure (paragraphs 71-80). In fact, any information exchange may actually only lead to a restriction of competition if it refers to competition-related facts.

   Consumer/customer data have to be distinguished from such data. While in the case of sensitive company data there may be a restriction of competition in the form of a concerted practice, in the case of consumer/customer data there is no suitability for coordination and hence for a restriction of competition anyway. This should be clarified in para. 81. As an example of this, we refer to claims data about a policyholder (e.g. number, type and frequency of claims) which are exchanged in the case of a change of insurer between the original and the new insurer. Such data represents policyholder- or risk-specific information. Already by its nature, this information cannot be the subject of a concerted practice between insurance companies. It only forms the basis of the subsequent independent risk assessment and decision of the new insurer on whether and on what terms he wants to cover the risk. As already expressly recognized by the EU Commission in the past, any such information exchange obviously does not constitute any restriction of competition between insurers.[4]

b) After these preliminary statements, we have the following comments on the individual statements on Article 101 (1) of the TFEU:

[4] cf. COM (1999) 192 final.; COM, OJ 1992 L 4/26, para. 39 – Lloyd's Underwriters' Association and The Institute of London Underwriters.

Paragraph s 20 und 96

In both paragraphs it is stated referring to ECJ case law that the pro-competitive effects must outweigh the restrictive effects on competition. This in incorrect. Rather, from the judgment *GlaxoSmithKline* quoted it clearly results that the negative effects must simply be outweighed. This is also referred to by the Commission in its guidelines on the application of Art. 81 (3) EC by stating that "…the concept of '*fair share*' implies that the pass-on of benefits must at least compensate consumers for any actual or likely negative impact caused to them by the restriction of competition found under Article 81 (1). In line with the overall objective of Article 81 to prevent anti-competitive agreements, the net effect of the agreement must at least be neutral from the point of view of those consumers directly or likely affected by the agreement" (para. 85). The wording in paragraphs 20 and 96 should be corrected accordingly.

Paragraph 57

The reference made to mortality tables should be deleted. This area is covered by the insurance BER.

Paragraphs 67 and 68

The across-the-board qualification of statements on future conduct regarding prices or quantities as a restriction of competition by object is untenable in its current form. For instance, statements of a general nature in the press on price increases or intended market share increases cannot be considered restrictions of competition by object, especially since these are made to satisfy a justified interest in information on the part of the market counterparty and the public.

Paragraph 71

It should be clarified in the first sentence that this concerns an information exchange which may probably have restrictive effects on competition given the type and scope of the data exchanged.

Paragraphs 73 to 80 et seq.

The statements on conceivable market characteristics and collusive outcomes are not helpful for practice. The statements confine themselves to describing the different market characteristics and referring to the fact that ultimately collusive outcomes are possible due to information exchange in all constellations. It does not become sufficiently apparent that in principle in complex markets collusion due to information exchange is precisely <u>not</u> to be expected. In this respect, we refer to the established case law of the ECJ, according to which in complex markets with heterogeneous products "the dissemination and exchange of information between

competitors may be neutral, or even positive, for the competitive nature of the market"[5]. This principle should be clearly formulated in the Guidelines and on this basis criteria should be developed according to which exceptions to this can be identified in practice.

Paragraph 76

Para. 76 considers an information exchange to be restrictive of competition because based on it agreements might be made which are contrary to cartel law. However, any such information exchange cannot be judged correctly in an isolated manner, but only in the context of a cartel, provided such cartel exists.

Paragraph 81

In the opening sentence it should become apparent that only the exchange of commercially sensitive company-specific market data may actually violate the cartel ban. Moreover, para. 81 should clarify that – by contrast – the exchange of consumer/customer data (e.g. time, number, type and amount of losses in any previous insurance) is neutral from the point of view of competition, see above.

Paragraph 82

According to para. 82, genuinely public information "that is equally easy (i.e., costless) to access for everyone" is neutral from the point of view of competition. In principle, this is welcomed. However, the addition in brackets ("i.e., costless") should be modified because also information which is available at reasonable cost, such as via a daily newspaper or the Internet, is genuinely public information.

Paragraph 85

It should be clearly emphasized that as a matter of principle the exchange of aggregated data does not come under Article 101 (1) of the TFEU. In this respect, we expressly refer to para. 52 of the Guidelines for maritime transport, which are correct in this respect. Anything else may, if at all, only apply in extreme exceptional cases, where due to market structure conclusions may be drawn about the market conduct of individual companies despite the aggregation.

Paragraph 86

Concerning the question as to whether data are considered to be historic data, the exchange of which "is unlikely to" lead to a collusive outcome, para. 86 refers to the average length of contracts as an example. It is questionable whether this actually leads to appropriate results.

[5] cf. ECJ judgment, case C-238/05, "Asnef-Equifax", para. 58.

For instance, the average length of contracts does not provide any information on the possibility of the customer to switch to another supplier and the introduction of new rates in the insurance industry.

Paragraph 92

The meaning of this paragraph does not reveal itself. Here, it should become apparent on what hypothetical cases the statements are based, so that its application in practice becomes possible.

Paragraph 99

To ensure that Example 2 actually deals with an information exchange between competitors, the opening sentence should be modified as follows:

> ***"Situation**: A national tourist office together with ~~the~~ several coach companies in country X agree to disseminate information on current prices of their coach tickets through a …"*

2. Assessment under Article 101 (3) of the TFEU

Within the scope of the examination of Article 101 (3) of the TFEU, the exchange of consumer data has so far been discussed incorrectly, cf. para. 90. However, especially with regard to "consumer behaviour in the case of accidents", which has been mentioned in this context, this concerns information which is neutral from the point of view of competition and which is already by its nature not likely to adversely affect competition. Therefore, its exchange is not a matter of Article 101 (3) of the TFEU, rather, no restriction of competition exists anyway in these cases.

3. Example 5, paragraph 102

Since this example deals with the exchange of historic data, no restriction of competition exists anyway. Therefore, the reference made to Article 101 (3) of the TFEU in the analysis is incorrect.

Since the Guidelines are to provide guidance on interpretation for assessing practice-relevant hypothetical cases, the age of the data should be reduced to 1 year in the example.

Berlin, 25 June 2010