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Brussels, 25 June 2010

SUBJECT: COMMISSION PUBLIC CONSULTATION ON REVISED RULES FOR THE ASSESSMENT OF HORIZONTAL COOPERATION AGREEMENTS UNDER EU COMPETITION LAW

We particularly welcome the opportunity to respond to the European Commission public consultation on the review of the Guidelines on Horizontal Cooperation Agreements.

We appreciate the Commission intention to revise the Guidelines with the double aim to both clarify some controversial aspects of the current legal framework, and update the existing rules to better fit the challenges posed by the actual market and economic conditions.

Particularly welcome is the new section of the Guidelines dealing with exchanges of information.

In our view, clear Commission guidance on information exchanges is much needed to facilitate a homogeneous level of enforcement of the antitrust rules by the national competition authorities across Europe, provided that it is increasingly up to national authorities and national courts to enforce the Treaty rules on cartels and anticompetitive agreements. A detailed, precise and reliable set of rules on exchanges of information would also greatly help undertakings assess to what extent they can actually cooperate with competitors without falling foul of antitrust rules. Fully fledged guidelines on information exchanges would also contribute to the long standing debate on balancing out positive and harmful effects of information exchanges on market competition.

With this short contribution to the Commission public consultation, we would like to express a few remarks on the new section of the Draft Guidelines on information exchanges, in the context of which the Commission is considering to introduce specific reference to exchanges of information restricting competition "by object".

Section 2.2.2 of Draft Guidelines (Paragraphs 67,68 and 69) - Information exchanges, restriction of competition by object

The Draft Guidelines appear to endorse an object-based test for the assessment of the anticompetitive nature of an exchange of information, stating that the sharing of certain types of information, and in particular information on intentions of future conduct regarding prices or quantities, has to be assessed as “restrictive by object”, and thus be prohibited *per se* without any further analysis of the actual effects on market competition.

It is respectfully submitted that this Manichean “black or white” distinction may not be entirely consistent with the case-law in point of the EC Courts.

The application of an object-based test to assess the anticompetitive nature of an information exchange clashes with the long standing case law of the European Court of Justice as set out in the leading case *UK Tractors*¹. Such jurisprudence remains the reference point on exchange of information up to the present day.

The ECJ case law clearly distinguishes between information exchanges which are part of a wider anticompetitive agreement and the ones which stand out as independent unlawful practices. In the latter case, the conclusion that an exchange of information itself amounts to an anticompetitive practice is based upon an assessment which takes into account several specific factors, such as primarily the features of the market, the kind of information exchanged by the competitors, the frequency of the exchanges.

In *UK tractors*, the ECJ held that the Commission had properly considered that the practice to exchange information between tractor manufacturers was contrary to article 81(1) EC “ *because of its likely anticompetitive effect*” on the market, the Commission itself having previously concluded that the said information exchange “*did not have an anti-competitive object*”². In this case, the Commission came to the conclusion that the information exchange was anticompetitive after examining several and specific factors of the case, namely:

- i. the structure of the market (high concentration, high barriers to entry, absence of significant imports from outside the Community);
- ii. the kind of information exchanged (commercially sensitive information provided under very detailed breakdowns);
- iii. the frequency of the exchanges (taking place on monthly, quarterly, weekly and even daily basis).

It was indeed the combination of all these factors taken together which qualified the exchange of information as anticompetitive, and not just the existence of the information exchange *per se*, simply because of its object.

¹ Judgment of the Court of Justice, 28 May 1998, *John Deere Ltd v Commission*, case n. C-7/95, 1998 ECR I-3111. Commission decision *UK Agricultural Tractor registration exchange* of 17 February 1992, case n. IV/31.370 and 31.446, OJ 1992 L 68, p. 19.

² Opinion of the Advocate General Ruiz-Jarabo Colomer, *New Holland Ford Ltd v. Commission*, Case C-8/95 P, 1998 ECR I 3175, at para. 42: “*In the present case, the information exchange agreement did not have an anti-competitive object and, therefore, it was necessary to consider its effects on competition in the United Kingdom agricultural tractor market.*”

Importantly, in *UK Tractors* the exchange of information was formally qualified as concerning past commercial data; however, as the parties shared weekly prices on a weekly basis, this information, as a matter of fact, was regarded by the Commission and the Court as “fresh” information whose exchange allowed each undertaking to know current and future price conducts of its competitors. Thus, the exchange of information in *UK Tractors* actually concerned “*individualised data regarding intended future prices or quantities*”, a practice which the Commission now proposes to consider “*a restriction of competition by object within the meaning of Article 101(1)*”.

The *UK Tractors* case, which is still *good law*, requires therefore the concurrence of several specific factors to be verified in order for an exchange of information to be deemed anticompetitive.

In all other cases concerning exchanges of information, the Commission investigated information exchanges which were instrumental to wider anticompetitive conducts³. And even so, it is telling that in all these cases, certain market characteristics were consistently present, such as homogeneity of products, high concentration of offer, high market transparency. Accordingly, the Commission consistently took these market features into account when assessing the practice, revealing that in no circumstance a purely abstract object-based approach was followed.

The most illustrative case is the recent *Bananas* decision⁴, where the Commission fined a concerted practice primarily based on a very structured and intense exchange of information. In *Bananas*, the parties had long exchanged on a weekly basis – primarily via brief telephone calls – detailed data on prices and views on expected price evolution and import trends. Such a systematic and methodical information exchange, taking place on a tightly oligopolistic market where price transparency was already increased by both price making mechanisms and existing imports regulation, had the result of eliminating any residual uncertainty as to the future commercial conduct of the market players.

Nor should the Commission regard the ECJ judgment in *T-Mobile* as overruling the established principles laid down by the European Courts on information exchanges.

First, the ECJ's judgment in *T-Mobile* was given in the context of a preliminary ruling reference, based on the specific questions raised by the referring judge and in respect to a case which had not been investigated by the Commission, rather by a national authority (the *NMA*).

Second, even in *T-Mobile* the Court (and Advocate General Kokott), in assessing the anticompetitiveness of the concerted practice, did not go as far as to embrace a fully fledged object-based approach, since this would have departed from long established principles laid down by the ECJ in seminal judgments such as *UK Tractors* and *Thyssen Stahl*⁵; rather, both the Court and the Advocate General conceded that in assessing whether an exchange of information restricts competition the market conditions in which the same takes place, amongst which the oligopolistic nature of the market and its level of concentration, shall be taken into account⁶.

³ See for instance Commission decisions *Cartonboard* of 13 July 1994, OJ L 243/1; *British Sugar*, 14 October 1998, case n. 33708; *Vitamins*, 21 November 2001 case n. 37512; *Citric Acid*, 5 December 2001, case n. 36604; *Rubber Chemicals*, 21 December 2005, case n. 38433.

⁴ Commission decision *Bananas* of 15 October 2008, case n. 39188.

⁵ Judgment of the Court of Justice, 2 October 2003, *Thyssen Stahl / Commission*, case 194/99, 2003 ECR I-10821, para. 87.

⁶ In its Opinion concerning the *T-Mobile* case Advocate General Kokott clarifies that “*the object of an agreement (or a practice) must be established not in the abstract but in the circumstances of the individual case, that is, having regard to its specific legal and*

All the above arguments should prompt the Commission to reconsider the adoption of the current wording of Section 2.2.2 of the Draft Guidelines. In particular, we would recommend that the Commission reinstate the distinction, endorsed by the case-law quoted above, between i) an exchange of information instrumental to a wider and more structured agreement or concerted practice, ii) and an exchange of information regarded as an autonomous behaviour. In the latter case, such behaviour could be sanctioned only if it can be demonstrated that market conditions are conducive to collusion (supply highly concentrated, transparent market, homogenous products, etc.). This position would also be consistent with the economic theory that the Commission and the EC Courts have endorsed when dealing with effects of coordination in mergers, i.e. the risk of tacit collusion is indeed material only if certain market features conducive to oligopoly exist⁷.

The risk of an exorbitant extension of the conditions under which an information exchange should be held *per se* anticompetitive, as currently provided in para. 67-68 of the Draft Guidelines, should be measured having in mind that the guidelines will be enforced by national competition authorities and national courts. Indeed, the application of an object-based criterion, completely independent from any kind of analysis of the market features, the likely effects on competition and the potential collusive outcome stemming from the investigated practices, may well result in a proliferation of investigations by national competition agencies and courts of bland forms of information exchanges which neither have anticompetitive potential, nor can facilitate forms of market coordination between the undertakings.

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In conclusion, we fully support the Commission's view that a more detailed guidance on information exchange is appropriate to improve legal certainty in today's complex business environment. Yet, we consider that the pursuit of information exchanges as independent anticompetitive practices under art. 101 TFEU can by no means forgo a concrete analysis of the market context in which the information exchange actually takes place.

It is therefore respectfully submitted that, in line with the ECJ's established case law, the Commission should reinstate the distinction between autonomous exchanges of information, which can result in a restriction only in presence of certain market features indicative of a (possible) market oligopoly, and exchanges of information which are part of wider anticompetitive practices, for which an approach by object would more justified.

We thank the Commission for providing this opportunity to openly discuss such important issues in a continuous dialogue with the business and legal communities.

economic context and the particular conditions of the relevant market' (para. 48); Case C-8/08, *T-Mobile Netherlands and Others*, ECJ judgment of 4 June 2009.

⁷ Commission Decision *Gencor/Lonhro*, 24 April 1996, case M.619; Judgment of the Court of First Instance of 25 March 1999, *Gencor / Commission*, case T-102/96, ECR 1999 II-753.