CASE ASSOCIATES
CASENOTE
Economics of Competition & Regulation September 2010

Information Exchange

Object, effect, and economics in EC competition law

Information exchange (IE) has become an increasing focus of EC competition law. This *Casenote* looks at the economic and practical issues surrounding 'pure' IE not associated with a cartel or agreement in EU competition law i.e. a concerted practice.

The Economics

The economics of IE is frustrating since it rarely gives clear cut guidance. However, there are several propositions which can be distilled:

- IE can have pro- and anti- competitive effects, and even where it has anti-competitive effects it may improve economic efficiency and lower prices.
- For IE to facilitate collusion it must be communicated, create a credible 'focal point', actions need to be monitored, and there must be some method of punishing deviators i.e. oligopoly and IE alone are necessary but by no means sufficient conditions.
- Economics can guide case-by-case assessments, or rule and standard setting by taking into account the direct competitive effects, and the costs of errors and enforcement, and administrability of the law both to regulator and industry. Where error costs are low and administration costs high, rules prohibiting IE (such as infringement by object) make economic sense. Where the likelihood of IE facilitating coordination is low then it should be exempt from competition rules.
- The aim of applying competition rules should be to deter anticompetitive IE without chilling the flow of efficient IE.

The Law

The case law (*Deere*, *Thyssen Stahl*), paraphrased in the maritime services guidelines (para 41), holds that

> *'an exchange of information, in its own right, might constitute an infringement of Article 81* [now 101] *of the Treaty by reason of its effect. This situation arises when the information exchange reduces or removes the degree of uncertainty as to the operation of the market in question with the result that competition between undertakings is restricted*'.

The draft horizontal co-operation agreements (HCA) Guidelines spell out the European Commission's position. The exchange of '*individualised data regarding intended future prices and quantities*' is an 'infringement by object' under Article 101(1). Such IE is deemed to restrict competition.

All other types of IE are treated as 'infringements by effect'. They are to be assessed case-by-case to determine whether they have an appreciable (adverse) effect on at least one parameter of competition - price, quantity, product quality, product variety and/or innovation (para 69). The appreciable effect test is based on a checklist of the types of IE cross-referenced by market factors (see box below).

The draft HCA emphasises that the above checklists are '*non-exhaustive*', and cannot be '*mechanically applied*'. Nonetheless, an IE is likely to constitute an infringement where:

- Markets are highly concentrated, transparent, simple, and stable, and firms symmetrical, and future profits and firm 'longlivity' important ; and
- IE is commercially sensitive, private, current and firm-specific, particularly about future intentions.

Market Factors	Information Type
Wide coverage	Commercially sensitive
Transparent	Private
Concentrated	Individualised
Simple	Current or intended
Stable	Frequent
Firms Symmetrical	
High discount rate	
Firms well established	

Infringements by Object

A rule which outlaws IE on intended future prices and quantities within a 'tight oligopolistic' market is consistent with the above economic framework. It assumes that such IE inevitably facilitates collusive actions. While this may not always be the case - it could provide the opportunity fair price-slashing - the probability that it does facilitate collusion is high.

Moreover, EC law does not place a blanket prohibition on such IE. It allows the parties an 'efficiency defence' (Article 101(3)). This has an economic logic – it assumes that the error costs of finding an infringement are low, but gives an 'escape clause' to the alleged infringers to adduce evidence that there are offsetting efficiency gains. This is a practical (and economically defensible)

compromise between the problems of evidence, error costs, and administrability. Thus the criticism infringement by object under Article 101(1) smacks of economic illiteracy is unwarranted.

There are, however, at least two concerns with the legal approach to 'object'. First, the ECJ (and particularly the AG) in *TMobile* (2009) seems to have thrown the legal position into disarray by suggesting that IE 'capable' of restricting competition rather than *'by its very nature injurious to competition'* (*TMobile*, para 29), is an infringement by object. This would lower the standard of proof considerably and generate an excessive number of Type I errors (false positives). Second, the failure of the HCA Guidelines (except by illustrative example) to offer safe harbours for low risk IE is inconsistent with the economic framework set out above, and sufficient legal certainty which would assist industry to comply with the law. IE on costs, general demand, investment, deliveries, historical and aggregated data, and even public statements about intended future prices which commits the firms to selling at those prices, should be 'safe harbours'.

Infringement by Effect

Turning to 'infringement by effect', the checklist approach has a good economic pedigree (Stigler, 1961; and Judge Posner, *Antitrust Law*, 2001). A stable highly concentrated market of large similarly sized firms producing standardised products/services is more conducive to a concerted practice than one which is not.

But these factors relate to market structure rather than to a settled body of evidence on the competitive effects of specific types of IE. There is a danger that 'tight' oligopolistic markets which satisfy the checklist have the IE factors applied in a mechanical. The risk of this is high given that most type of IE can have pro- and anti-competitive effects.

This concern is reinforced by the low standard of legal proof which does not require evidence of an actual or potential 'effect' on competition. An infringement exists if it is *'at least likely to have an actual or potential anticompetitive effect'*. *'Likely'* is defined as *'expected with a reasonable degree of probability'* (*TMobile*, para 26). Not unsurprisingly the draft HCA Guidelines do not propose extensive empirical evidence of actual harm.

Further, the law has no credible theory of harm and competition. The case law frames the effects assessment in terms of a reduction in 'market uncertainty'. This, rather tortuously, is taken to mean that the IE alters the undertakings' incentives and decision-making so that their actions are not as independent as they would be in *'normal market conditions'*. This literary formulation begs many questions. If this means that any IE which reduces market uncertainty has the deemed effect of restricting competition, then this is inconsistent with the economics. Indeed, the apparent equivalence of collusion with a reduction in market uncertainty is unwarranted, especially since the latter is to be determined by running down a checklist rather than a factual inquiry of the likely actual or potential anticompetitive effects. It is also not consistent with judicial statements where the effects test requires the reduction in market uncertainty has *'the result that competition between undertakings is restricted'*.

The Counterfactual

The draft HCA Guidelines state that an appreciable effect is to be determined by reference to a counterfactual - *'the competitive situation that would prevail in the absence of the'* IE (para 69).

While counterfactual analysis has become popular in modern antitrust it is not without its problems. First, there will be reasonable differences of view as to the counterfactual, or there may be more than one counterfactual. For example, if sellers could have achieved the same outcome without an agreement or IE (e.g. Christies/Sotheby cartel), then the incremental competitive harm attributable to the IE is negligible. The actual and counterfactual are the same.

In a similar way interdependence theories of oligopolistic behaviour (such as the economists' favourite Cournot model) show that non-competitive outcomes can arise simply because the small number of firms recognise their interdependence. It then becomes difficult to identify a counterfactual that is not close to the actual (collusive) outcome with IE (although one may question why the parties engaged in such IE).

Conclusion

The Commission's Draft HAC Guidelines embrace an economic approach to IE. Yet the law remains unsettled in parts, and there are inherent difficulties in determining when many types of IE restrict competition.