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DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
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Working Party No. 3 on Co-operation and Enforcement

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

-- Norway --

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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 2011.

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1. Introduction

1. The contribution from the Norwegian Competition Authority (NCA) presents our considerations related to unilateral information exchange in two recent cases: The first case the NCA decided to close, even though it involved two different instances where price lists where sent to competitors. We will present our considerations leading to this conclusion. The second case of unilateral information exchange led to substantial fines for one of the companies involved and leniency for fines for the other company. It can be mentioned that consideration relating to unilateral information exchange is also relevant to a case the NCA is currently handling.

2. The NCA has not issued any specific guidance with respect to unilateral information exchange. The prohibitions in the Norwegian competition act[1] article 10 and 11 are aligned with Article 101 and 102 TFEU, and Articles 53 and 54 of the EEA Agreement. The assessment of unilateral information exchange under the Norwegian competition act article 10 is based on the Guidelines on the applicability of Article 53 of the EEA Agreement to horizontal cooperation agreements (2002/C 266/01) and in particular the new EU horizontal guidelines.[2]

2. Case #1 involving three undertakings and a trade organization

3. Case #1 started as an ex-officio case. The NCA got permission from Bergen District Court to go on dawn raid to three undertakings and a trade organization. As a result of the dawn raid, the NCA found evidence of two instances of information exchanged between the three undertakings. In the first instance, undertaking A sent information by e-mail to undertaking B and C informing them of a notice of price increase sent to its customers the same day.

4. Undertaking B and C was informed that the price increase would be put in place a month later. A few months later, undertaking B sent information by e-mail to undertaking A containing information about a notice of price increase four days after it had notified its customers, and about a month before the changes were to be put in effect.

5. In this industry, it is customary that all price changes are notified in a letter to the customers a month prior to the change. Normally this is done twice a year. However, extraordinary price changes may occur. These two instances concerned extraordinary price changes.

6. Thus, it was a case involving information on price changes in percentages, sent directly to competitors before the effective date for the customers. The crucial issue to be assessed was whether these two separate instances of information exchange could be considered as restriction of competition by object. As mentioned above, our assessment in this case was based on the new EU horizontal guidelines.

7. The new horizontal guidelines include a chapter concerning information exchange. Of particular relevance to the NCA assessment in the case, paragraph 74 was the most pertinent:

> "Information exchanges between competitors of individualised data regarding intended future prices or quantities should therefore be considered a restriction of competition by object."

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1 The Competition Act of 2004. Act of 5 March 2004 No. 12 on competition between undertakings and control of concentrations

2 Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements [Official Journal C 11 of 14.1.2011].

8. These two instances of information exchange generated three decisive issues that had to be addressed concerning the scope of legal information exchange, before it could be concluded that the exchanges of information were restriction of competition by object:

- Unilateral communication
- Public versus private information
- Future prices versus price intentions for the future

9. **Unilateral communication.** After analyzing the seized documents and electronic evidence, the authority could not find any statements or other evidence that could confirm any further contact regarding the information of price increases that were sent, neither before nor after the e-mails were sent to the competitors. Thus, the information exchanged in these two instances seemed to be instances of unilateral communication.

10. The review of case-law by the Commission and the EU courts concerning the question of unilateral communication shows that it is not a requirement that an information exchange is mutual for it to be considered a concerted practice.

11. According to paragraph 62 in the Horizontal Guidelines, situations where only one undertaking discloses strategic information to its competitors, who accepts to receive this information, can constitute concerted practice. Undertakings receiving the information are presumed to accept the information, unless they explicitly confirm that they do not wish to receive this kind of information.

12. **Public versus private information.** The distinction between public and private information exchange is crucial in this context. In general, it will be no problem from a competition law point of view that competitors share genuinely public information. It follows from the Horizontal Guidelines paragraph 92.

13. When is information genuinely public? Information can be considered genuinely public when all competitors and customers have access to it on equal terms. However, even though it is possible to obtain the information in question from customers, it does not necessarily mean that the information is easily accessible for competitors.

14. In the case assessed by the NCA, the information regarding future price increases was sent directly to customers by mail. In the testimonials taken by the NCA when assessing the case, it was stated that the customers would spread information about the changes in prices within days after receiving the notice in the mail.

15. The NCA was also informed that competitors were removed from the mailing list of customers, even though they sometimes bought supplies from each other, because they first and foremost were considered as competitors. Thus, the competitors did not get the letters of price changes from each other on a regular basis.

16. The last statement supported, in the authority's opinion, that information cannot be considered genuinely public when sent by mail to the customers. In this case, the NCA concluded that the information exchanged in these two instances was not genuinely public.

17. **Future prices versus price intentions for the future.** In paragraph 73 and 74 of the Horizontal Guidelines, the wording is relatively clear: Exchange of *price intentions* is considered as a restriction of

competition by object. However, in footnote 57 of section 74, it is stated that a public announcement of future prices the undertaking are *bound by*, *is not* to be considered as price *intentions*, and hence normally would not be found to restrict competition by object.

18. Thus, in the case it became crucial to assess whether the notice of price changes could be considered as price *intentions*, or if the prices were *binding* for the undertaking sending the notice.

19. In addition, the authority had to consider whether it was of any significance for the assessment that the undertakings receiving the notices from the competitors at the time they got the information had themselves not yet sent any notice on price changes.

20. The information exchanged in the case concerned information about future prices (future price changes reported in percentage), after customers had been noticed by letter, but before the new prices were announced on the undertakings webpage for registered customers.

21. Based on the facts of the case, it was from the authority's point of view not obvious that the information exchanged in the two instances could be viewed as price intentions, and consequently considered as restriction of competition by object. Thus, the authority decided to close the case.

3. Case #2: Two roofing companies participating in tender

22. In 2011, two roofing companies in the Bergen area were subject to administrative fines for infringement of the competition act in connection with a tender. However, one of the companies did under the leniency program not have to pay the fine because it notified the NCA about the illegal cooperation.

23. The two companies participated in a tender to roof the Norwegian Armed Forces' new administration building at Håkonsvern in the summer of 2008. This was a tender organized by Veidekke, the main contractor for the building project, in the summer of 2008. Two companies competed and handed in offers in the tender. Two days before the deadline for submitting bids, Fløysand Tak sent an e-mail to its competitor IcopalTak with an attachment that laid out the unit prices and the total price for the work.

24. IcopalTak did not in any way distance itself or protest about the information they received in the e-mail from Fløysand Tak. To the contrary, the e-mail and pricing statement were printed out and they were later found in IcopalTak’s working folder for the project. Consequently, IcopalTak was aware of the competitor's price assessments when they submitted their bid. The e-mail reduced uncertainty in the tender procedure and facilitated coordination between the two competitors.

25. IcopalTak notified the NCA about illegal coperation in February 2010. On the basis of information from IcopalTak, the NCA conducted a dawn raid in which documents and electronic material were seized. The NCA also took a number of formal statements in the case.

26. The NCA concluded that the unilateral information exchange is this case was a violation of the Competition Act's prohibition against cooperation between undertakings that restricts competition.

27. As a result of the illegal cooperation, Fløysand Tak AS had to pay an administrative fine of NOK 350 000 for infringement of the competition act. IcopalTak AS was fined NOK 1.2 million, but did not have to pay because the company notified the Competition Authority about the situation and cooperated with the Authority during the investigation, and was thus granted full leniency

28. Even though it is beside the issue discussed here, it nevertheless worth mentioning that this was the first time the NCA granted a company full leniency from administrative fines as a result of such notification.

4. Concluding comments

29. The assessment to determine whether the unilateral information exchange is a restriction of competition by object, or if an assessment of effects needs to be performed, is made on a case by case basis.

30. No *agreement* between the parties for unilateral information exchange is required for a case of unilateral information exchange to be considered as a violation of the competition act. Coordination is sufficient.

31. However, the first case presented illustrates that the scope of legal unilateral information exchange is not clear. Even with the new EU horizontal guidelines, there can be considerable uncertainty with regard to when a unilateral information exchange can be considered to be a violation of the competition act, and in particular to make the distinction between *price intentions* and unilateral exchange of information on *binding future price change*, and thus, to determine if the exchange of information is a restriction of competition law by object.