Is Unilateral Disclosure of Information a threat to competition law?

To Conclude a Prohibited Agreement Merely by Lightening a Candle

Lighting a candle in a dark room fights the darkness. On the other hand, once touched by a candle light, objects start casting shadows. The same applies to market transparency – generally it enhances a competitive effectiveness, however, in some cases it may lead to restrictive effects on competition. Thus, the consequences deriving from transparency are twofold. On the positive side it may solve problems of information asymmetries; improve internal efficiency and may contribute to consumers. On the restrictive side it may redeem strategic uncertainty; facilitate collusion and later maintenance of thereof. Regarding such dual effect on competition, we shall provide an overview of information exchange between competitors and focus on one specific tool – the Unilateral Disclosure of Information.

Information exchange between competitors – is an emerging area of competition law, which, it may be assumed, shall maintain its trend to develop. It follows from the core concepts of business – in its birthday suit an entrepreneur shall make considerable efforts to impact the dynamics of market. Given business’ objectives, it is easily predictable, highly sophisticated and more complex means to exchange information shall emerge in the near future. A key goal of the said efforts is to avoid being captured by a judgment in black and white: you have concluded a prohibited agreement.

It seems that one of the main purposes of the competition law is to adapt to new realities and related threats. The same applies when dealing with information exchange between competitors. The Equilibrium – the most appropriate concept, if considering competitive exchange of information and market transparency.

The following serves as a splendid illustration of the need for equilibrium – not only the price related talks but even discussions about weather forecasts may cause competition concerns. It is a conclusion came up with by the General Court of the European Union in the Del Monte and Dole cases. The court established – even talks about weather may be recognised as prohibited practices, if dealing with a highly concentrated market of undifferentiated goods. As the said equilibrium has been broken, entered competitive exchange agreements have been found to be prohibited.

Prohibited Information Exchanges Between Competitors and Unilateral Information Disclosure

Generally, the Information Exchanges Between Competitors is a horizontal co-operation agreement. In order to be captured by the competition law, actions of the competitors should (at least) constitute concerted practices. Broadly speaking, a practical co-operation between the competitors which allowed redeeming normal competitive uncertainty needs to be discovered.

The European Commission indicates three possible scenarios for the information exchange to be prohibited. First case – one competitor discloses its own future intentions to another when the latter accepts it or, at least, does not refuse it. Second case – mere attendance, for example, in the conference, where one competitor discloses strategic information. Third case – participation in a competitors’ meeting where commercially sensitive information is a subject of exchange. It may be concluded – the European Union sets relatively low standards for the information exchange activities to be caught by the competition law restrictions.

The Unilateral Disclosure of Information, from the practical point of view, may be looked at as any kind of communication performed by an entrepreneur to its competitors. For example, a public announcement about how the entrepreneur (announcer) intends to act in the market in the near future. As shown by, such unilateral disclosure does not fall under traditional concept of concerted practices, as the latter calls for direct contact of two competitors. Does this lead to conclude that businessmen may loosen their belts as the Unilateral Information Disclosure shall not trespass the land defended by the competition law?

Traditionally, when the information exchange is genuinely public, for example, announcements in the specialized business news website, it should not be deemed as concerted practices. Even though, the European Commission did not shut the doors completely – it left a narrow way for the possibility of finding the Unilateral Information Disclosure as a concerted practice, illustration of which is as follows: public announcement of one competitor is followed by public announcement of other competitors.

The European Commission’s first-time attempt of assessing the Unilateral Information Disclosure is found in the Woodpulp case. The Commission decided that the system of quarterly announcements covering information about intended prices of the products itself constituted prohibited concerted practices between
the competitors. The Commission established that these actions guaranteed the competitors with a sufficient time to adapt to the new intended prices of the competitors. However, later the Court of Justice of the European Union overturned the Commission’s decision. The court held that the pursued recipients of the investigated communications were the consumers, not the competitors. As decided by the court, the announcements themselves did not lessen each entity’s uncertainty of the future attitude of its competitors. The reversal of the Commission’s decision in the Woodpulp case (at least, for some time) banished the Unilateral Information Disclosure to the status of the theoretical concept of the European Union’s competition law as well as to the periphery of the said branch of law.

The Unilateral Information Disclosure has been under scrutiny in the USA as well. Federal Competition Authority investigated the Valassis case, merits of which are as follow: entity, aware of the fact that its announcements are (or, at the very least, can be) monitored by its major competitor, opened a public communication which, in its substance, invited the competitor to price increasing practices. The Competition Authority decided that these public announcements were intentions to facilitate collusion and lacked any sound business justification. The Valassis case has been settled and the investigated entity agreed to refrain from the same kind of communications in the future.

Rolling back to the European practice, despite its crash in the Woodpulp case, the European Commission’s did not entirely refuse its ambitions to investigate the Unilateral Information Disclosure. As abovementioned, under the Commission’s position, at certain circumstances prohibition of such conduct might be the case.

Recent practice of the Competition Authorities of the European Union witnesses a comeback of such investigations. In the year 2013 the European Commission initiated and carries out on investigations of the shipping companies conduct related to the information exchanges. Moreover, investigations of the similar kind have been initiated in the separate member states of the European Union: the case of the three major Dutch mobile network operators (2014); the UK’s cement market investigation (2014). In Dutch and UK cases, aiming to avoid negative legal consequences, the investigated entities voluntary committed to refrain from similar conduct. This practice once again set the sails for the Unilateral Information Disclosure and just goes to show that such conduct remains the question of considerable importance. The key principle of this question – entities must act independently, when making a market policy related decision.

To sum up the scanty practice, it may be concluded that public announcements may be captured by the concept of prohibited concerted practice, if: i) announcement with strategic information is followed by relevant answer of the competitor; ii) public announcement invites to collide.

In the Lithuanian practice there is least one case when the question of the Unilateral Information Disclosure has been raised. At the very start of the year 2015 several announcements of the competitors with strategic information (related to the intended pricing and sales policies) has been published in the media. These publications attracted the interest of the Competition Council of the Republic of Lithuania. The latter reacted by informing the participants of the market to refrain from the conduct of such kind as for these actions my fall under the concept of the prohibited concerted practices.

Practical tips

Discovered breaches of the competition law may result in significant legal consequences. Nevertheless, due to lack of comprehensible legal practices, business faces difficulties in assessing the Unilateral Information Disclosure related risks. To sum up, there are some measures entitling to reduce possible risks. These measures might be as follow: do not communicate more strategic information than needed in the certain circumstances; do public only those intended future plans which are backed-up by the unrecoverable implementation decisions; do assess the timing of the publication and actual implementation of the decision (the aspect of adaptation of the competitors); do refrain from considerations on how shall / should/ could the competitors behave in the future; do assess whether announcement does not constitute the invitation to collide; do not mention precise names of the competitor.

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