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Information exchange in associations

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Introduction

The Secretariat of the Competition Commission (ComCo) has published formal advice regarding information exchange to cemsuisse, the Swiss association of the cement industry. The advice applies the criteria of competition law regarding information exchange in a highly concentrated market with homogeneous products. The decision sheds some light on the Secretariat's possible priorities when applying the criteria.

Assessment of information exchange

Cemsuisse requested that the Secretariat assess the compliance of its information exchange with Swiss competition law. The information exchange within the association involves all three cement producers in Switzerland.

The Secretariat analysed the following four sets of information that were either internally exchanged or published by the association:

- Statistics on environmental factors – this included information on volumes of raw materials and products, as well as data regarding

type and amounts of energy consumed and emissions.

- Press releases regarding cement deliveries – the association quarterly published information on total cement deliveries on its website. Cemsuisse also published statistics with further information (eg, types of cement, transportation and groups of customers) alongside the press releases.
- Cement delivery statistics – cemsuisse further delivered monthly public import statistics of the Swiss customs authority and quarterly data on cement deliveries within Switzerland to its members. This included data on cement types and packaging, transportation and groups of customers.
- Calculation of membership fees – as membership fees were calculated based on market shares, this allowed each member to see the market shares. The association communicated the fees annually in the second quarter of the following year.

The Secretariat assessed the information exchange based on:

- prior practice;
- economic considerations; and
- the legal framework of the EU horizontal guidelines.⁽¹⁾

The Secretariat concluded that while the specific differences between the provisions regarding horizontal agreements between the European Union and Switzerland must be considered, they were generally interchangeable.

In general, the Secretariat will look at the market structure and the nature of the information exchanged. Collusion between competitors is deemed likely to be more problematic if the products in the relevant market are homogeneous and the markets are stable and highly concentrated. The exchange of confidential and firm-specific information is deemed risky, whereas truly public information is often no concern. Aggregated information that cannot be easily allocated to certain enterprises is less problematic. Further, the exchange of historic information at a lower frequency is considered less problematic compared to very recent information exchanged frequently. Finally, the exchange of information is deemed less problematic if it is made public and is therefore available to competitors and customers alike.

Statistics on environmental factors

Swiss environmental law explicitly provides for the possibility of sector agreements between the cantons and the industry regarding the execution of Swiss federal law. Such a sectorial agreement has been concluded between the cantons in which cement plants are located and cemsuisse in order to reduce nitrogen oxide emissions. Therefore, the Secretariat considered the collection of information within the framework of the sector agreement as a statutory duty and not problematic. Nevertheless, the Secretariat recommended that in the context of the sector agreement, the three competitors should not have access to each other's emissions factors at the granular level of individual work reports. Such a degree of insight into competitors' information was considered unnecessary for the fulfillment of the statutory task. At the same time, the Secretariat considered this problematic because it could reduce competition, as better emission values may reduce costs and therefore be a competitive advantage. As a result, the mutual disclosure of these results could lessen competition on environmentally friendly production and should be avoided.

Press releases regarding cement deliveries

The Secretariat considered the press releases of the association not to be problematic. Not only were they publicly available on the association's website, but they also contained the information in an aggregated format that could not be allocated to a specific firm. The Secretariat considered this quarterly published information to be historic.

Cement delivery statistics

The Secretariat analysed the cement delivery statistics in more detail. In particular, it held that the publication of information in segments by cement type, packaging, transportation and customer group may allow the three competitors to estimate each other's delivered volumes precisely. The Secretariat considered this quarterly published data to be of "a certain actuality", allowing conclusions on competitors' recently sold volumes. In addition, the Secretariat pointed out that the prices paid for these volumes could be easily ascertained from the customers. It concluded that competitors could obtain an idea of both the volumes and prices, and therefore the information exchange of volumes could reduce the production and price competition. However, each supplier was not only able to but did in fact produce all cement types. As a

result, the Secretariat considered the risk of the information exchange to be limited because "the incentive for the production of a certain cement type is not depending on the fact that competitors produce it, but on the demand of the opposite market side". Therefore, a cement producer had a real incentive to compete on prices in order not to lose a deal.

Calculation of membership fees

Finally, the Secretariat considered the calculation mechanism of the membership fees that allowed the entities to estimate their own market share and, to some extent, their competitors' market shares as not problematic. As the final fees were calculated annually and transmitted not before the second quarter of the following year, the Secretariat considered it historic data.

Comment

The Secretariat's advisory services are a useful tool to receive a view on its opinion on specific questions. The Secretariat is typically open to share its advice and recommendations to the parties requesting it. As a result, the requesting parties can often obtain a valuable insight into the understanding of the Secretariat. While the advice is not binding for the ComCo, positive advice substantially increases legal security. While the individual communications between the parties and the Secretariat and business secrets are kept confidential, the Secretariat can publish its final advice in a non-confidential version. These publications offer helpful insight for companies seeking to improve their compliance.

The advice at hand concerns an homogeneous product. In addition, according to the Secretariat, the market is concentrated and transparent with three active players. Based on the practice of the ComCo and the European Commission, information exchange is more likely to dampen competition in such a market environment. The advice to the cement association in this case reveals that the criteria for information exchange are not always applied consistently. For example, the Secretariat considered the quarterly information exchange of the press releases to be historic and not problematic, while the cement delivery statistics (also published quarterly) were considered to be of a certain actuality and therefore allowed the parties potentially problematic insights. In fact, it appears that the difference was the

granularity, not the age of the data. The press releases were likely harmless, not because they were historic, but because they provided only limited aggregated information on a much less granular level.

One essential factor in the Secretariat's assessment was the necessity of the information exchange. Access to competitors' work reports on environmental factors was considered problematic, mainly because it was unnecessary for the fulfillment of duties under environmental laws. As a result, the Secretariat recommended avoiding it. The necessity of information exchange for the achievement of efficiencies is an essential factor and the Secretariat's recommendation appears understandable in the limited framework of mere advice.

One aspect of the advice is the fact that the Secretariat does not limit its analysis to the actual information exchange, but instead makes overly far-reaching assumptions. The information exchange in question did not concern prices, but only volumes. Nevertheless, the Secretariat assumed that the parties may obtain information about their competitors' pricing by directly asking their competitors' customers. As a result, this led the Secretariat to assess an exchange of volume and price information. However, this approach ignored the fact that pricing was not part of the information exchange in question. Also, it assumed a systematic inquiry of competitors' prices through customers – a practice that may by itself raise certain concerns. Such assumptions without any further explanation may discourage efficient information exchange.

Finally, the Secretariat considered this information exchange not to be problematic on the basis of reasons that were not directly linked to the information exchange. It concluded that customers could shop around and cement producers could produce all types of cement. Therefore, producers would always have an incentive to lower their prices in order to make attractive offers.

The advice confirms that the assessment of an information exchange cannot be limited by strictly applying the given criteria, but must involve an overall analysis of all relevant aspects.

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Endnotes

(1) Guidelines on the Applicability of Article 101 of the Treaty on the Functioning of the European Union to Horizontal Cooperation Agreements, OJ C 11, January 14 2011, pages 1 to 72.