EU Antitrust Compliance and Third Parties: How Can You Minimise the Risks?

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Rachel Cuff (Baker & McKenzie)

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Any company or organisation that finds itself as the 'middle man' in contacts between competitors or which has dealings with such a middleman must take care, as a flurry of recent EU cases has demonstrated. Any company that directly facilitates those contacts is in very dangerous waters indeed.

Cartel Facilitation

In *AC Treuhand*, the European Court of Justice (ECJ) confirmed that a company can be fined for supporting and organising a cartel, even if it does not operate on the cartelised market. The ECJ considered the European Commission was right to fine AC Treuhand in 2009 for its "essential role" in facilitating two cartels on the heat stabilisers market. The consultancy firm was paid to organise and host meetings, collect and distribute sales information, monitor implementation of the cartel agreement and help moderate disputes between the parties.

The ECJ noted that there is no legislative requirement for companies sanctioned for cartel behaviour to be active on the affected market, and rejected AC Treuhand's argument that it was not foreseeable that its behaviour would infringe competition law. Given that the company had already been fined in 2003 for involvement in the Organic Peroxides cartel, the ECJ's position was hardly a surprise. But the ECJ

explains that the 'foreseeability' requirement is easily met. Indeed, an outcome may still be 'foreseeable' even if the company may need to take legal advice in order to assess the consequences of a given action. Those conducting a "professional activity" appear to be held to an even higher standard and *"can be expected to take special care in evaluating the risk that such an activity entails*".

The situation in this case was unusual, and the number of companies seeking to imitate AC Treuhand's business model is (hopefully) limited. However, the judgment confirms that there is no safe haven for third parties, whether or not they operate on the cartelised market and whether or not they profit directly from the cartel. The ECJ's chief adviser had suggested annulling the fine on AC Treuhand, and the ECJ's decision to reject this advice makes a clear statement that it sees third parties as within its sights.

Third-Party Arrangements and Counselling Implications

Behaviour involving third parties which is less obviously egregious has also raised competition concerns, and companies must think carefully before employing or acting as a third party. Arrangements that have recently been held to pose competition concerns in certain circumstances include:

- Activities of a sales agent acting within its authority, even when there is no evidence that the principal is aware of the agent's illegal behaviour.
- Use of third-party systems, such as e-commerce platforms or data exchange tools, with risks for both the platform itself (and its owner) and those companies using it.
- "Hub and spoke" conspiracies, where information is passed between competitors via a third-party "hub" (often in relation to contacts between retail competitors and their common suppliers).

Hub and spoke (or "A-B-C") agreements, in particular, are increasingly on the radar of competition authorities, and companies must be on their guard to ensure that smart intelligence-gathering does not drift into collusive information exchange. The company that requests the information disclosed is taken to intend to rely on that information and, depending on the facts, the recipient of the sensitive information may be presumed to know the circumstances in which it was disclosed and to rely on that information.

A few practical tips may save companies legal headaches:

- For companies in discussion with potential intermediaries:
    - Ensure that you understand what the intermediary is doing and that it is legal – e.g., 'mystery shopping' should not go too far.
    - When dealing with suppliers who you know are closely involved in similar negotiations with competitors, only exchange information necessary for negotiations with the supplier, and only during the period of contract negotiations.
    - Take steps to avoid disclosure of information to competitors via the intermediary (e.g. by using a confidentiality agreement).
- For companies "stuck in the middle" between two competitors:
    - If a retailer/distributor complains about the conduct of another retailer/distributor, do not get involved.
    - Make it clear that you consider such conduct improper.
    - Retailers may voluntarily provide you with useful information, and that's fine. But keep it to yourself, make a note of where it came from, maintain confidentiality of information, and don't ask for or expect that behaviour to be repeated.
- For companies that find themselves unwilling recipients of commercially sensitive information from an intermediary:
    - Firmly distance yourself from the potentially collusive behaviour, clearly stating to the intermediary that you disagree with the unlawful steps taken (i.e. "our policy is not to receive competitor confidential information").
    - Do not turn a blind eye – a single disclosure of information has been held to be illegal under EU rules if it removes uncertainties concerning intended conduct.

How commercially sensitive the information exchanged is depends on factors including its age, frequency of exchange and level of public availability. But companies would be well advised to avoid any exchange where there is a risk of that information being passed on.

Conclusion

This area of law is under current development. New and novel queries are being raised about the liability of third parties or the legality of their behaviour. A current case before the ECJ considers whether a company should be held liable for the anticompetitive bid-rigging of an independent contractor, even if that contractor

did not ever coordinate this behaviour directly with a company employee. Is it going too far to extend the responsibility companies have for the behaviour of their employees to commercially-linked third parties?

Another case before the ECJ concerns whether companies connected by an e-commerce system should be treated in the same way as competitors meeting in a hotel room when information is conveyed to them electronically even though unsolicited. Is it going too far to extend the idea of 'public distancing' to the virtual world?

What is clear is that companies can expect rigorous assessment of arrangements involving third parties. Even where there are clear efficiencies and commercial benefits to be obtained from such arrangements, companies and their legal advisors must carefully assess the facts and merits of each situation to ensure those benefits are not outweighed by the competition concerns.

This post originally appeared on the Kluwer Competition Law Blog.