

Exchanges of past information - a grey area?

Anna Miks

Member of the Competition Council
Hungarian Competition Authority

25 years of the GVH

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Budapest

Outline

1. Information exchanges in the enforcement practice
2. Exchange of past information - problems
3. A Hungarian example: the contact lenses case
4. Conclusions

Information-exchanges in the enforcement practice

- 2011 Commission Guidelines on the applicability of Article 101 TFEU to horizontal co-operation agreements
- Essential distinction: “pure” information exchanges / part of another type of agreement
- “Pure” information exchanges agreements:
 - a) restriction by object
 - b) restriction by effect
 - Relevance: need to assess the impact on competition or not
- Enforcement practice: object restrictions cases

Exchange of past information Problems

- 1) Object / effect restriction?
- 2) Leniency available?
- 3) How do you assess the effects? Problems, e.g.:
 - counterfactual;
 - data problems;
 - concerns too many products etc.
- 4) Can infringement be based on potential effects?

The contact lenses case - facts

- Information exchange agreement between four major players of the Hungarian contact lenses and lens care products market at wholesale level
- More than 80% market share
- Kleffmann & Partner (market researcher) operated a market research system through which undertakings indirectly exchanged individualised information on their past sold quantities and turnovers (on a quarterly basis for 7 years)
(Vj/96/2010)

Contact lenses case - problems

- Object or effect restriction?
- Leniency application
- Difficulties in economic analysis
- Liability of market research company (Treuhand)

Result:

- Infringement based on potential restrictive effects
- Fine

Conclusions

- Still grey zone
- More guidance through case-law
- Are CA's willing to deal with these cases? – contended case-law is better than nothing

Thank you for your
attention!