EUJUS

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GS1 in Europe

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Dear Sir, Madam,

Re: GS1inEU insights project (the "Project"): competition law risk assessment.

1. INTRODUCTION AND EXECUTIVE SUMMARY.

1.1 Under GS1 current rules[1], each GS1 Member Organizations (MO) is given the right to administer the GS1 standards system (Core services) in its territory (one GS1 organization for one country) and to provide other value added services (VAS) to local communities (Core and VAS: "services").

1.2 Despite active marketing and sales being lawfully prohibited under GS1 global rules, it is common ground that passive sales are allowed in compliance with competition law principles. That means that MOs, when requested, must supply their services also to customers located outside the territory.

1.3 Therefore, MOs may be regarded as competitor entities mainly active either (under a narrower approach) on the GS1 standards related services market(s) or (under a broader approach) on the industry standards related services market(s).

1.4 As a consequence, it is very likely that the exchange/sharing of sensitive data among MOs might be treated as an exchange of data among competitors under competition law by the Competition Authorities, should they investigate on this.

1.5 Under the Project, GS1inEurope ("GS1") will ask - on a bilateral basis - its 49 MOs to supply it with some of their financial and commercial data (see annex) useful to

[1] I mainly refer to article 5 a) and c) of the GS1 Statutes.

elaborate data/trends/figures/benchmarks to be shared among all the MOs at European level to improve efficiencies.

1.6 In this framework, GS1 as well as its MOs want to be fully compliant with competition rules and asked me for a legal advice.

1.7 For the reasons that follow and under the criteria I mentioned hereinafter, I conclude that the GS1 collecting and sharing of data with its MOs in the framework of the Project is either not relevant for competition law or, when relevant, compliant with competition law.

2. THE FACTUAL FRAMEWORK.

2.1 Despite the current GS1 business model being a federation of MOs with exclusive territorial allocation with the possibility for end-users to select their MO of choice, experience shows that for practical and language reasons the local MO is often the preferred supplier of GS1 services to customers located within the same country.

2.2 However, in some cases a customer may opt for working with/being advised by another MO based in a different Country: this is the case when it requires a particular service that is not provided by local MO or when the customer for whatever reason (including tariffs and fees) prefers to use the services of another MO.

2.3 If MO must not actively market or sell its services outside its Country, it is allowed to offer its services to customers located in a different Country when it has received an unsolicited and good faith request[2] from the user to provide that particular service, including the allocation of GS1's standards and codes (core services).

2.4 GS1 is fully committed to help its MOs in improving their performances, the quality and value of their services so that they can be as much as possible useful to their local communities. To reach this goal, GS1 elaborates patterns of good behaviours focusing mainly on those data gathered from its more efficient MOs that are often regarded as an useful benchmark.

[2] This is the case when the request from an out of territory customer is made without any previous attempt by the MO to provoke such a request.

2.5 In particular, GS1 asked for a legal advice bearing in mind the following points:

(a) GS1 does collect commercial data (see attached excel file for details) for each MO and carry out statistical analyses (see attached ppt as an example analysis) which are then shared with all 49 MOs in contexts such as the GS1 Board meetings, the REC or used for GS1 internal / institutional brochures / presentations;

(b) further use of these data will lead to the elaboration of "customized analyses" for MO consisting of the comparison between the data of the single Organization with those of the average of the 49 Organizations of GS1. Each MO will receive its specific analysis and rating.

2.6 Furthermore, there could be potential antitrust concerns as a future extension of the scope of analysis is envisaged by the :

(c) creation of "partial clusters" of MOs (aggregated on the basis of different attributes: size in terms of associated companies and employees but also external economic values such as size of GDP and population of the Country of reference). These clusters will be used as benchmarks for single MO analyses. Also in this case the data will be an "average cluster / benchmark" data vs. which the data of the single MO will be compared. In each cluster there will always be > 5 MOs;

(d) calculation of the market penetration index for each MO: a list of local companies by business name (segmented by product sector) will be sent to each MO and requested to indicate which companies on the list are members of the reference GS1. In the end GS1 will get the percentage of coverage (by product sector / companies number) that each local GS1 has in its Country for those specific sectors.

2.7 For our assessment, it is worth noting that under all circumstances (i) the planned shared analyses are always based on aggregated data or, (ii) when individually, anonymized with a minimum of 5 players; (iii) the required data are always consolidated on a yearly basis and are collected >6 months after the end of the reference year to be finally returned to MOs >12 months after the end of the analysis year (*e.g.*: the 2019 data, gathered in spring/summer/fall 2020, are covered by the 2021 Project analyses and made available to the 49 MOs in 2021).

3. THE LEGAL FRAMEWORK.

3.1 The purpose of this legal advice is to set out the criteria to be observed to ensure a safe antitrust environment in relation to the Project. Nevertheless, here in after we supply you also with some general remarks that should be useful to understand this as well as future cases you may face.

3.2 The exchange/sharing[3] of strategic (sensitive commercial) data among (potential) competitors is relevant for competition law and in some case it does constitute a *per se* violation. The sharing of DATA on confidential competitors' prices and market strategies are indisputably relevant in that they enable each player to know in advance its competitors commercial policies and behave accordingly. Experience proves that in this case the collusion often replaces the competition among competing companies.

3.3 (*i*) On one hand, the assessment of legality of information sharing is carried out within the context of traditional competition law prohibitions against cartel;[4] (*ii*) on the other hand, competition rules are based on the principle that every player must determine autonomously his commercial policies when supplying good and services on the market. Under the EU Commission's approach data sharing may lead to restrictions of competition in that "*it is liable to enable undertakings to be aware of market strategies of their competitors*".[5]

3.4 This will include an assessment of the specific characteristics of the system concerned, including its purpose, conditions of access to the system and conditions of participation in the system. It will also be necessary to examine the frequency of the exchanges, the type of information shared (*e.g.* whether it is public or

[3] Usually, we refer to exchange of data when competitors exchange mutually and directly data; we refer to sharing of data when competitors supply with their data a third company/trade association who elaborates this information and gives it back to competitors ("*hub and spoke infringement*").

[4] Competition laws of different jurisdictions around the world do not have specific provision dealing with the information sharing among competitors. Governing rules on this topic stem from Competition Authorities' Guidelines as well as precedents and case law.

[5] EU Commission's guidelines on the applicability of Article 101 TFUE to horizontal co-operation agreements § 58 (2011/C 11/01). See also the leading precedent EUCJ C-7/95 *John Deere*, § 88.

confidential, aggregated or detailed, historical or current), and the importance of the information for the fixing of prices, volumes or conditions of service.

3.5 Information sharing among competitors might take place in various contexts and under various forms through agreements or concerted practices. Actually, data can be either directly exchanged between competitors or indirectly shared via a third company which is not active on the relevant market, such as a trade association, an auditor, a fiduciary agency or a consultancy/market intelligence company, or through the competitors' common clients. GS1 falls within this category and might be regarded as a facilitating element in case of a violation and, as such, be fined.

3.6 The potential for anti-competitive effects of information sharing depends on a number of key factors, such as the confidentiality, the age and the nature of data as well as the characteristic of the market.

3.7 As to the nature of data (strategic vs. non-strategic and aggregated vs. individualised) : (i) Strategic information can be related to prices (for example, actual prices, discounts, increases, reductions or rebates), customer lists, production costs, quantities, turnovers, sales, capacities, qualities, marketing plans, risks, investments, technologies and R&D programmes and their results. In line with precedents, information related to prices and quantities is regarded as the most strategic, followed by information about costs and demand.

3.8 (ii) Sharing of genuinely aggregated data, that is to say, where the recognition of individualised company data is impossible, are much less likely to lead to restrictive effects on competition than exchanges of individualised company data. Collection and publication of aggregated market data (such as sales data, data on capacities or data on costs of inputs and components) by a trade organisation or market intelligence firm may benefit suppliers and customers alike by allowing them to get a clearer picture of the economic situation of a sector. Such data collection and publication may allow market participants to make better-informed individual choices in order to adapt efficiently their strategy to the market conditions.

3.9 Unless it takes place in a tight oligopoly, the exchange of aggregated data is very unlikely to give rise to restrictive effects on competition. Conversely, the exchange of individualised data facilitates a common understanding on the market and

punishment strategies by allowing the coordinating companies to single out a deviator or entrant. Nevertheless, the possibility cannot be excluded that even the exchange/sharing of aggregated data may facilitate a collusive outcome in markets with specific characteristics. Namely, members of a very tight and stable oligopoly exchanging aggregated data who detect a market price below a certain level could automatically assume that someone has deviated from the collusive outcome and take retaliatory steps. In other words, in order to keep collusion stable, companies may not always need to know who deviated, it may be enough to learn that 'someone' deviated.

3.10 As to confidentiality: usually, strategic data are not made available to consumers; as such, it cannot be considered public, unless there is strong evidence to back the opposite (*e.g.:* in the car industry, there are several affordable specialized magazine reporting players' prices and market shares split by model).

3.11 As to the age of data: the exchange/sharing of historic data is unlikely to lead to a collusive outcome as it is unlikely to be indicative of the competitors' future conduct or to provide a common understanding on the market. While <6 months old data on competitors' prices, commercial policies and market shares are considered relevant for competition purposes and regarded as a *per se*[6] violation of competition rules, >12 months old of the same data are not relevant for competition law purposes. Between 6 and 12 months old a case by case analyses is needed to judge whether data may be considered as relevant.

3.12 As to the characteristic of the market: according to the established EU Court of Justice case law (whose findings are binding in all the EU Member States), if in an atomised market transparency might lead to the intensification of competition, in a oligopolistic market, on which competition is always presumed to be intrinsically reduced, the sharing of information at short time intervals is likely to impair considerably the degree of competition which still remains among the very few players[7].

[6]A "*per se* restriction" is a "restriction of competition by object"; as a consequence, there is no need to evaluate its effects on the market.

[7]*Ex plurimis*: *John Deere*, §§ 51-52 andT-34/92 *Fiatagri and New Holland Ford* § 91.

3.13 Therefore, as far as the sharing of information among competitors is concerned, the more the market is concentrated, the bigger is the risk of infringement and *vice-versa*. If strategic and recent data sharing might benefit of some magnanimity in atomised markets, on the contrary, in an oligopolistic market it will be considered as illegal without any need to prove any real collusion/parallelism among competitors on the market as a consequence of the exchange/sharing.

3.14 This may also be true when different retailers of the same dominant supplier share sensitive data on their prices and other commercial policies.

3.15 The question whether GS1 is active in a concentrated market may be left open. Actually, following a very cautious approach, in this opinion we consider that GS1 MOs' activities are carried out in an oligopolistic market on which GS1 is the largest player.

4 ASSESSMENT.

4.1 Bearing in mind the foregoing as well as the peculiarities of our case, after examining the annexes you submitted to my attention, there is ground to believe that :

(i) the vast majority of data covered by the Project are not relevant for competition law purposes in that they cannot be considered as strategic data;

(ii) when data may be regarded as relevant for competition law, I am given to understand that they are to be considered as historic data in that they are shared when they are >12 month old and, furthermore,

(iii) only aggregated data are shared with MOs.

This remains correct also for the cluster projects (above 2.6 c)) when disaggregated data will be provided as long as there will always be > 5 MOs involved and no name of any of the MO will be given but just a confidential number to make impossible the individualisation of the MO.

4.2 As a general rule, please note that these a.m. three criteria, when met, are such to rule out any competition law concerns in this as well as other similar projects you may implement.

4.3 Nevertheless, to be even more cautious, I suggest that the person/entity in charge with the individual gathering/handling of MOs' data should always be a person/firm external to GS1 who has no link with any MO and, in any case, undertakes not to disclose these individualized data to any MO.

4.4 With this additional warning I feel that the exercises planned above under 2.5 and 2.6 are fully consistent with competition law provided that criteria laid down under 4.1 are met.

5. CONCLUSION.

In the light of the foregoing, I conclude that the Project may be carried out without incurring any competition law risks.

I remain at your disposal should you need more on the above.

With kind regards,

Avv. Gianluca Belotti.